Facebook’s response to the Digital Platforms Inquiry

12 September 2019
Executive summary

Facebook commends the Australian Government for undertaking this consultation as part of its consideration of the role of digital platforms in Australia. We welcome the opportunity to address the practical options for implementation, timing and any impediments or challenges to the recommendations and findings of the Australian Competition and Consumer Commission (ACCC) in its Final Report.

The Digital Platforms Inquiry has considered important issues for Australia’s increasingly data-driven economy and society. The Final Report contains 23 recommendations (including subparts and areas for further investigation, a total 29 areas for action) that touch on a very wide range of topics. Facebook supports 15 of the 29 recommendations and sub-parts, supports in principle five of the recommendations, opposes five and notes four. Of the recommendations we support or support in principle, the devil is in the detail in how these are implemented.

We welcome the opportunity to work on these details with the Australian Government to address some of the big issues facing society in the digital age, and to get them right. In doing so, we can create a new template for the internet that respects the rights of individuals to choose what happens to their data, encourages competition and innovation, and remains open and accessible for everyone.¹

Building a new template that supports the digitisation of Australia requires a review of existing media regulatory frameworks. As outlined in Recommendation 6 by the Final Report, the review should reflect the evolving media landscape and be underpinned by a sound policy rationale based on the functions or impact on the regulated entities. Many of the specific areas for harmonisation that were identified in Recommendation 6 can be implemented immediately through the extension of existing laws, without wholesale review.

However, some aspects of the policy template proposed in the Final Report are based on misunderstandings about competitive dynamics of our industry and a mischaracterisation of aspects of our services. To address this, our submission aims to clarify inaccurate assumptions, share more details about our business, including our work with publishers, and confirm our commitment to privacy laws across the Australian economy that are equivalent to the European

Union’s General Data Protection Regulation (GDPR). These are important decisions to get right as they impact Australian consumers and small business owners that use digital platforms’ services every day.

**New regulatory frameworks for the internet should promote trust, innovation and choice for all Australians**

Facebook agrees that more can be done to support privacy and consumer protection in Australia and globally. We are actively calling for new privacy laws globally and support the extension of GDPR, including to Australia. However, it is critical to ensure that the details of implementation are right. The Final Report’s proposed privacy reform introduces a substandard version of the GDPR that reduces consumer welfare and reduces the significant efficiencies that targeted advertising has introduced for Australian advertisers and small businesses.

The Final Report demonstrates that there is more work to do to identify the most effective regulatory frameworks for the internet that will enable and support innovation while addressing public policy objectives. Facebook supports smart regulation for the internet that both preserves the benefits of technology to Australia and addresses the potential misuse of data and technology. We particularly support smart regulation with respect to privacy (as outlined above), data portability and digital news distribution.

To support data portability, we are working with Google, Microsoft, Twitter and Apple on the Data Transfer Project, to build a common way for people to transfer data into and out of online services. We also recently published a white paper on privacy-protective data portability — and the intersection with competition and privacy — that we hope will help advance the conversation globally.

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4 https://datatransferproject.dev/

We invest to support a stronger Australian news ecosystem but caution against policy reform that is not based on clear evidence

We share the Australian Government’s focus on promoting a stronger Australian news ecosystem. This is why Facebook has invested millions of dollars in tools, partnerships and training of Australian publishers and journalists. Our submission proposes a new policy solution - a Digital News Distributor Code - that we believe will effectively address concerns about potential adverse effects of algorithms and digital distribution services on news in Australia.

We do not agree, however, that a “bargaining code” between Facebook and some of the most influential and powerful media companies in Australia will promote public interest journalism. It is hard to imagine that such influential companies require the assistance of the Australian Government to negotiate commercial terms with Facebook, especially in light of the lack of evidence or findings of unfair trading on our part. The analysis does not reflect our experience and is not supported by evidence of our daily commercial interactions, feedback or engagement with Australian publishers.

The news media industry is undoubtedly undergoing significant change and challenges, which pre-date the invention of Facebook in 2004. As the Finkelstein Report noted in 2012:

“..declining circulation over the past 27 years is part of an underlying long-term trend that began half a century earlier. The turmoil of the late 1980s to early 1990s with several closures of major metropolitan dailies, including all afternoon newspapers, reflects the industry’s adjustment to changed demand for its products. It is interesting to note that most of this adjustment occurred before use of the internet became widespread and consequently could not be due to it. In more recent years, however, the growth of the internet as an important player in the advertising market and a popular medium for access to news sources is undoubtedly intensifying pressure for further industry restructuring.”

However, the Final Report fails to acknowledge the significant power and influence held by Australian media companies. These companies do not require a regulator to protect them by intervening on their behalf in the commercial relationships they have with their competitors for advertising revenue, like Facebook. Media organisations also have substantial audiences and reach:

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News Corp, for example, has publicly stated that they have a monthly audience that matches, if not exceeds, Facebook’s reach in Australia.⁹

**Digital platforms and targeted advertising have delivered value and more choice to Australian consumers and small businesses**

The impact of technology in Australia has overwhelmingly benefited Australian consumers, advertisers and small businesses. Technology has democratised the sharing of ideas and information. As noted in an expert report provided to the ACCC with our initial submission:

> “the growing uptake in recent years of internet-distributed news ... has given rise to movement away from a concentrated oligopoly of news providers in Australia. This is a strongly consumer-led development, with consumers increasingly attracted to the capacity to share, comment on and recirculate news through digital platforms.”¹⁰

Similarly, targeted advertising has contributed to economic and employment growth, especially in small businesses. The use of online services such as Facebook and Instagram by Australian small business owners has allowed them to hire 120,000 more people, generating $16.8 billion, with approximately 34,800 of those new employees and approximately $4 billion in additional economic value in regional Australia.¹¹

Targeted advertising has also reduced the cost of advertising, opening up advertising opportunities for small businesses across the country that were historically unavailable or unaffordable. In Australia, more than 350,000 businesses placing advertisements on Facebook spent less than USD $100 in 2017, and fewer than 150 Australian businesses spent more than USD $1 million placing advertisements on Facebook. A recent cross-country study of the advertising markets in four countries (Australia, the United States, France, and Germany) found that:

> “the shift from print to digital advertising is being driven in large part by the relative (low) price of digital advertising. We calculate, based on several assumptions, that for every $3 that an advertiser spends on digital advertising, they would have to spend $5 on print

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⁹ Facebook’s reach in Australia—16 million monthly active users as of the end of 2018—is matched by News Corp Australia: “Each month, more than 16 million Australians consume news and information across News Corp Australia’s suite of products.”

¹⁰ Digital Platforms and Australian News Media: Report, April 2018 by Professor Terry Flew, Dr. Fiona Suwana and Dr. Lisa Tam, Queensland University of Technology, Page 4, annexure to submission by Facebook Australia Pty Limited to the Digital Platforms Inquiry dated 18 April 2018.

advertising to get the same impact. In the economic sense, digital advertising is more productive than print advertising. The benefits of these lower prices flow directly to advertisers and consumers.”

This means that the economic and social cost of getting regulatory reform wrong for online services is high. Technology is a great equaliser for a country such as Australia that is defined by distance. As Treasurer Josh Frydenberg said recently, “algorithms and data [are] new building blocks to fundamentally change the way we do things across every sector of the economy”;

and we are committed to working on regulatory frameworks that encourage innovation and investment in technology so Australians can reap the productivity benefits.

We support many of the Final Report’s recommendations either entirely or in principle, if properly designed. On the other hand, we are concerned that some recommendations, if enacted as presently framed, have the potential to adversely impact Australia’s economy. For example, the recommendations that make targeted advertising practically unworkable in Australia are out of step with other countries such as Singapore and the European Union. A cross-border study found that Australian businesses using Facebook’s targeted advertising tools are more likely to export than businesses in general. These findings support an emerging pattern in the data showing that digital platforms can facilitate cross-border trade, especially for smaller businesses. The researchers cautioned that “policies involving digital platforms and online social networks should not overlook their potential role in trade facilitation”.

These benefits are at risk because the evidence does not support many of the conclusions reached in the Final Report.

A deeper understanding of the dynamic nature of our industry and services is needed

In fact, the Final Report buries the lede: after an exhaustive review of our business, there is no finding of anti-competitive conduct by Facebook. In response to this 18-month inquiry, we produced over 1,608 documents (over 14,500 pages) and dedicated teams who spent over 10,000 hours to respond to the ACCC’s requests. This does not include the large amount of information that we provided voluntarily in written responses and face-to-face meetings, in order to build an

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understanding of our business and the markets in which we operate. Despite this lengthy inquiry and review of our business, the ACCC makes no finding that Facebook engaged in anti-competitive conduct. The Final Report instead concludes that significant remedies are warranted, even in the absence of any finding of anti-competitive conduct.

While the Final Report explicitly acknowledges that Facebook and Google are different companies, many of the recommendations of the Final Report are underpinned by a conflation of Facebook with Google, a competitor with a very different business structure and suite of products. Designing regulatory solutions that conflate two very different companies will not address the challenges facing the Australian news ecosystem. Rather than having a procompetitive effect, such regulation risks backing powerful global media businesses, to the disadvantage of consumers, advertisers and small business.

Much of the analysis in the Final Report also relies on speculative competition law analysis and conclusions. For example, to support the recommendation that there should be an advance notification protocol for acquisitions, the Final Report concludes that:

“While any of these acquisitions may not have amounted to a substantial lessening of competition, there appears to be a pattern of Facebook acquiring businesses in related markets which may or may not evolve into potential competitors, which has the effect of entrenching its market power”.15 (emphasis added)

These assertions are based on speculative analysis of the potential impact of any acquisitions by Facebook on competition in Australia, and do not account for the highly dynamic nature of the digital economy.

Finally, recommendations with a consumer focus should be consistent with best practices from a privacy perspective and international developments in privacy law globally. Some of the recommendations in the Final Report take a different approach. We note that although the ACCC has learnt on16 the German competition regulator’s (the Federal Cartel Office [FCO]) order relating

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to the collection of data by Facebook. A German court has determined that the order is fundamentally flawed in a stay of proceedings.17

In short, our submission aims to assist the Australian Government by providing advice and proposing constructive policy solutions. We welcome the opportunity to work with the Australian Government on implementing smart regulation – regulation that is effective, proportionate, and is pro-innovation. This is the best approach to preserve the many benefits that technology has and can deliver for Australian consumers, advertisers and small businesses.

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Transparency and independent verification are important
Facebook is not vertically integrated in the ad tech stack

**Recommendation 6: Process to implement harmonised media regulatory framework**

The proposed platform-neutral approach may not achieve the goal of harmonised media regulation
Specific examples identified in the Final Report for regulatory reform can be achieved without sweeping platform neutral laws
Extension of advertising and local content regulations must be undertaken carefully and with a holistic view of the desired public policy outcomes

**Recommendation 7: Designated digital platforms to provide codes of conduct to ACMA governing their relationships with media businesses**

Lack of evidence of imbalance of bargaining power or unreasonable commercial terms between Facebook and publishers

**Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms**

The Final Report’s Key Findings do not accurately reflect Facebook’s strong incentive and commitment to prevent copyright infringement
Adequacy of existing processes and turnaround times
Claimed inconsistencies in takedown decisions
Access to rights management tools
Requirements to issue individual notices
Additional findings

The Final Report overlooks the long history of Australia’s Safe Harbour Scheme
Overview and History of the Safe Harbour Scheme
Effective takedown regulation should be through an expanded Safe Harbour Scheme

**Recommendation 9: Stable and adequate funding for the public broadcasters**

**Recommendation 10: Grants for local journalism**

**Recommendation 11: Tax settings to encourage philanthropic support for journalism**

Facebook’s investment in news-related products
Facebook’s investment in monetisation products for publishers
Facebook’s investment in news partnerships to better support publishers

**Recommendation 12: Improving digital media literacy in the community**

**Recommendation 13: Digital media literacy in schools**
Working with publishers and other experts to identify opportunities to build news literacy
Building tools and products to inform people about what they are seeing online
We invest in education programs focused on digital citizenship and information literacy
Digital Literacy Library
We Think Digital

Recommendation 14: Monitoring efforts of digital platforms to implement credibility signalling

Recommendation 15: Digital Platforms Code to counter disinformation
   Both Facebook and the Australian Government are already working to address concerns of disinformation and mal-information
   There are inaccuracies in the Final Report’s discussion of these complex and important issues
   The case for a regulator-enforced code has not been made

Recommendation 16: Strengthen protections in the Privacy Act
   Recommendation 16(a): Update ‘personal information’ definition
   Recommendation 16(b): Strengthen notification requirements
      Increase in the number and length of notices
      Consumers being overloaded by information
   Recommendation 16(c): Strengthened consent requirements and pro-consumer defaults
      Misunderstanding the existing operation of the Privacy Act
      Diverging from the GDPR and other international privacy frameworks
      Rigid rules on consent are not necessarily favourable for consumers
      Opt in vs opt out ability at more granular level for users
      Processing rules based on contract performance and/or consent will be uncertain and may create the wrong incentives for business
      Transparency for children
   Recommendation 16(d): Enable the erasure of personal information
   Recommendation 16(e): Introduce direct rights of action for individuals
   Recommendation 16(f): Higher penalties for breach of the Privacy Act

Recommendation 17: Broader reform of Australian privacy law

Recommendation 18: OAIC Privacy Code for Digital Platforms

Recommendation 19: Statutory tort for serious invasions of privacy

Recommendation 20: Prohibition against unfair contract terms
Current remedies are adequate

Meaning of an ‘unfair’ contract term is uncertain

It is not always simple to determine whether standard form contracts apply to a small business

Recommendation 21: Prohibition against certain unfair trading practices

An unfair trading practices prohibition would lead to unnecessary and duplicative regulation

The Privacy Act covers many of these issues

The ACL covers each of the other issues

Recommendation 22: Digital platforms to comply with internal dispute resolution requirements

Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers
## Summary of recommendations & Facebook’s response

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<tr>
<th>Recommendation</th>
<th>Facebook's Response</th>
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<tr>
<td>Recommendation 1: Changes to merger law</td>
<td>We <strong>support</strong> this recommendation and would welcome further discussion with the Government about any proposed changes. Section 50(3) makes it clear that the existing merger factors contained in that section are non-exhaustive and, in practice, the ACCC may already consider these additional matters. However, we think that there is likely to be value in making it clear in the Competition and Consumer Act (CCA) that the ACCC will consider these matters, where appropriate, in undertaking any merger assessment. We <strong>note</strong> the Final Report also suggests the ACCC is considering whether to advocate for further legislative changes, including the adoption of some form of rebuttable presumption. Any proposal for such a fundamental change to Australia’s merger laws would require wide consultation, and we welcome the opportunity to engage further with the Government about these issues.</td>
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<td>Recommendation 2: Advance notice of acquisitions</td>
<td>We <strong>do not support</strong> this recommendation. This recommendation is not supported by evidence of any existing gap in, or problem with, Australia's merger laws or processes, that would necessitate such new measures.</td>
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<tr>
<td>Recommendation 3: Changes to search engine and internet browser defaults</td>
<td>We <strong>note</strong> this recommendation and do not have detailed comments to share, as it primarily relates to products that we do not supply. However, we have some concerns with the approach adopted by the ACCC which underpins this recommendation.</td>
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<tr>
<td>Direction for future work: data portability and digital platforms</td>
<td>We <strong>support</strong> the principle of data portability for digital platforms. There are privacy considerations that need to be addressed to ensure that portability mechanisms are safe and easy to use.</td>
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<td>Recommendation 4: Proactive investigation,</td>
<td>We <strong>support in principle</strong> the increase of expertise, capability and understanding within the Australian Government, including regulators</td>
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**Recommendation 5: Inquiry into the supply of ad tech services and advertising agencies**

We broadly support this recommendation. We believe it will assist the ACCC in further developing its knowledge and understanding of the commercial realities and the many developments that have taken place in the online advertising industry.

We note that Facebook is not vertically integrated in the ad tech stack. As the Final Report notes, the issues relating to ad tech services do not apply in the same way to Facebook’s advertising platform. We note that the ACCC has just completed a detailed and in-depth 18-month market inquiry, including in relation to advertising on digital platforms. However, transparency in the online advertising industry is important—consistent with this, we have and continue to provide new and improved tools, and greater transparency, to our advertising customers.

**Recommendation 6: Process to implement harmonised media regulatory framework**

We support in principle a review process for the media regulatory framework and in particular, an approach -- as Recommended by the Final Report -- that reflects the evolving media landscape and is underpinned by a sound policy rationale based on the functions or impact of the regulated entities. We support many of the specific areas for regulatory update identified in the Final Report.

**Recommendation 7: Designated digital platforms to provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA**

We support in principle the recommendation to develop a code of conduct to address concerns about the role that digital platforms play in the distribution of news online (a Digital News Distributor Code). A code should cover all platforms that people use in order to consume news, including social media services, search engines, app stores, and news aggregators. The code might include commitments to publish information about the values and factors that inform the news content that people see, as well as procedures for providing notice about significant changes to algorithms or product features.

However, there is no consistent and clear evidence in the Final Report that there is an imbalance of bargaining power between media publishers...
and Facebook, and therefore no basis for the Australian Government to interfere in the commercial arrangement between large companies such as News Corp, Nine, Seven West Media, etc, and Facebook, all of whom are competitors for advertising revenue.

**Recommendation 8:** Mandatory ACMA take-down code to assist copyright enforcement on digital platforms

Facebook supports in principle initiatives aimed at achieving a streamlined approach to copyright, with appropriate apportionment of obligations as between rights holders and digital platforms, such as the expansion of the safe harbour regime under Division 2AA of Part V of the Copyright Act 1968 (Cth) to online services. However, Facebook does not support Recommendation 8 in its current form, which seeks to establish a mandatory code to govern the notice-and-takedown regime for copyright infringements.

**Recommendation 9:** Stable and adequate funding for the public broadcasters

**Recommendation 10:** Grants for local journalism

**Recommendation 11:** Tax settings to encourage philanthropic support for journalism

Facebook supports the intent of Recommendations 9-11 to ensure a strong news ecosystem in Australia. This is why we invest millions of dollars in Australia's news industry and continue to work with local publishers to co-develop ways to better surface quality news, to support them in reaching new audiences, and to enable them to better monetise content. We have also steadily increased our investment in the creation of new content and support for and training of Australian publishers.

**Recommendation 12:** Improving digital media literacy in the community

**Recommendation 13:** Digital media literacy in schools

We support the ACCC's recommendation to improve digital media literacy in schools and communities across Australia. We are ready to invest in initiatives to assist with these efforts and bring the benefit of our experience of undertaking digital media literacy initiatives in other countries.

**Recommendation 14:** Monitoring efforts of digital platforms to implement credibility signalling

We support in principle the recommendation for deeper engagement between Facebook and the ACMA on the work we are undertaking on reliability, trustworthiness and news source signals. We are concerned that the Final Report has recommended new regulatory powers without any consideration of whether they are needed, nor shared any insight as to the standard against which we will be measured.
| Recommendation 15: Digital Platforms Code to counter disinformation | We support in principle a disinformation code, to the extent that it mirrors the European Union disinformation code of practice. However, we respectfully suggest that the Australian Government should consult more broadly to ensure that it fully understands this complex and important issue, before developing a prescriptive code with potential censorship implications and penalties for non-compliance. We are concerned that the Final Report does not contain an accurate or comprehensive evidence base suggesting that there is a public policy problem necessitating a regulator-enforced code as an effective solution at this stage. More consultation is needed on issues such as misinformation, disinformation and mal-information. |
| Recommendation 16: Strengthen protections in the Privacy Act | We support the elements of recommendations 16 and 17 that suggest updates to Australian privacy law, consistent with international standards. We do not support elements of 16 and 17 that would depart from GDPR, especially those that seem designed to prohibit the delivery of targeted advertising in Australia. We do not support recommendation 18, on the basis that it is not necessary and potentially unhelpful for consumers. We support recommendation 19. |
| Recommendation 17: Broader reform of Australian privacy law | |
| Recommendation 18: OAIC Privacy Code for Digital Platforms | |
| Recommendation 19: Statutory tort for serious invasions of privacy | |
| Recommendation 20: Prohibition against unfair contract terms | We note the Final Report’s recommendation to prohibit unfair contract terms, but consider that the existing remedies available under the Australian Consumer Law (ACL) provide adequate protection against the use of unfair contract terms. It would be disproportionate to impose pecuniary penalties on a business for seeking to rely on a contractual term that it believed, at the time, to be fair in circumstances where the identification of an “unfair” contract term under sections 23 and 24 of the ACL is subject to uncertainty in relation to its interpretation due to |
the appropriately case-specific nature of the assessment that must be undertaken.

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<thead>
<tr>
<th>Recommendation 21: Prohibition against certain unfair trading practices</th>
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<td>We note the Final Report’s recommendation to introduce a prohibition on unfair trading practices, but are concerned that the proposed prohibition is duplicative of existing laws. As outlined earlier in this submission, we support GDPR-equivalent reform of Australia’s privacy law and we believe that the ACCC’s concerns about the increasing use and sharing of data across Australia’s economy and society are best addressed through privacy law. Moreover, existing consumer protection laws already cover the other areas raised by the Final Report to justify introducing the prohibition.</td>
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<th>Recommendation 22: Digital platforms to comply with internal dispute resolution requirements</th>
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<tr>
<td>Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers</td>
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<td>We support these recommendations and welcome the opportunity to work with Australian policy makers and regulators to respond to complaints by consumers and small business owners in Australia.</td>
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Overview of competition law analysis

Despite an 18 month long Inquiry and no clear finding of anti-competitive conduct, the Final Report’s overall conclusion is that Facebook possesses market power and is a threat to competition, privacy and consumer rights in Australia. We disagree.

The Final Report’s analysis does not rest on a sound evidence base. It draws unfounded conclusions based on a selective and incomplete view of the spaces in which we compete, including subscribing to outmoded distinctions between different advertising services. It also departs from established competition law principles in proposing recommendations to address potential future conduct that is entirely speculative and/or hypothetical in nature.

The finding that there is an imbalance in bargaining power—and Facebook has substantial bargaining power in dealings with news media businesses—is not consistent with the commercial environment in which we operate

In our response to the Preliminary Report, we provided the ACCC with detailed information about why there is no separate market for “news referral services” and why, even if we were to assume there is, Facebook does not have substantial power in such market. The Final Report appears to accept this information in part. However, it nevertheless bases a number of recommendations—in particular, Recommendation 7—on the unsupported finding that Facebook has substantial bargaining power with respect to news media businesses, which gives rise to an imbalance of bargaining power that requires regulatory intervention.

These findings are not supported by actual evidence of our interactions with news media businesses or the way that news media businesses distribute their content to consumers. Facebook accounts for only a small proportion of news referral traffic. Publishers control whether and how their content is accessed on Facebook. We provide tools that publishers can use, free of charge, to distribute their content, grow their audiences and cost-free opportunities to monetise their content on- and off-platform. We also provide key metrics to publishers.

The Final Report also contains unsupported assumptions that loss of referrals will result in a substantial reduction in revenue for publishers. The Final Report states that the “direct effect of a

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19 Final Report, page 103.
refusal of referrals from Facebook would be a substantial fall of revenue earned from a newspaper’s platforms, and the indirect mitigating effects are of limited magnitude”. Accordingly, a news publisher is unlikely to refuse referrals from the platform in response to an exercise of Facebook’s bargaining power.

However, it is unclear the basis on which the ACCC has formed the view that publishers would experience a significant decrease in revenue, or that publishers and consumers would not adopt other approaches to mitigate any such reduction (for example, users accessing the website or app directly, or via a search engine).

This finding also does not appear to be consistent with the relatively modest share of referral traffic attributed to Facebook in the Final Report (approximately 12 per cent). It is also not consistent with the feedback provided to us by publishers -- that referral traffic has not generated revenue; this is why we have invested in products that enable publishers to monetise their content. In addition, even if a publisher in fact experiences a loss of traffic, decreased traffic does not necessarily translate into decreased revenue. The Final Report does not offer any basis for its implicit assumption that a publisher can monetise different types of referral with equal success. Rather, the value of referral traffic depends on each publisher’s business model, among other factors.

Please refer to our response to Recommendation 7 for a further discussion on these issues.

**Digital platforms have had pro-competitive effects in the supply of advertising services and have delivered many benefits for both consumers and small businesses**

Digital platforms, including Facebook, have brought significant benefits to advertisers, including to small and medium-sized businesses that are now able to reach audiences previously inaccessible to them. The digitisation of advertising has resulted in lower advertising prices, opening up a long tail of advertising by small businesses across the country. A recent cross-country study of the advertising markets in four countries—Australia, the United States, France, and Germany found that:

“the shift from print to digital advertising is being driven in large part by the relative (low) price of digital advertising. We calculate, based on several assumptions, that for every $3 that an advertiser spends on digital advertising, they would have to spend $5 on print advertising to get the same impact. In the economic sense, digital advertising is more

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20 Final Report, page 103.
21 In Australia, more than 350,000 businesses placing advertisements on Facebook spent less than US$100 in 2017.
productive than print advertising. The benefits of these lower prices flow directly to advertisers and consumers.”

It has also resulted in greater accessibility to audiences, and more effective and targeted advertising services. More effective advertising delivers significant benefits to consumers, who also benefit when they see ads that are more relevant to them, and less content that is not of interest to them.23

Under a traditional competition framework, lower prices and higher quality services are indicators of a well-functioning and competitive process, not of a static market characterised by one or more participants having substantial market power.

Our display advertising services compete directly with other advertising services, including search advertising services provided by Google

The Final Report ignores a number of important industry dynamics and competitive constraints by defining separate markets for the supply of display advertising (in which the ACCC states that we have market power) and search advertising (in which the ACCC states that Google has market power).24

Google and Facebook clearly compete with each other, and with other suppliers of online and offline advertising. This would not be the case if each had substantial market power in separate and distinct markets for search and display advertising, and if a display ad on Facebook was not a close substitute for a search ad on Google.

Over the past decade, digital advertising has evolved significantly, and any perceived distinction between “search” and “display” advertising is no longer competitively meaningful. Advertisers often switch between search and display ads, and the two increasingly serve the same functions. This convergence between display and search advertising - which is, in fact, acknowledged in the Final Report25 - is the result of various industry developments, including the adoption of automated bidding systems by display ad providers (once a distinguishing feature of search ads), the adoption of re-targeting by search ad providers (once a distinguishing feature of display ads),

the increased use of images in search ads, and the development of display ad delivery systems by traditional search ad participants.

The wide availability of data and sophisticated tools for data analysis also allow ad-supported websites, apps and platforms to target and re-target consumers without the need for a Google-type search platform. For example, display ads are no longer just “banner ads” displayed across a screen, but can be targeted by developing a user’s interest profile based on websites visited, mobile apps used, time spent on certain pages or apps, links clicked, and other factors. A platform using this kind of advertising is now as likely, if not more likely, to help advertisers reach the right consumer with the right ad at the right time as search advertising.

The Final Report does not appear to take these developments from the past 10 years into account, instead concluding that the “two varieties of advertising perform somewhat different functions and substitutability between them is limited”. In particular, the Final Report appears to consider that display advertising “is generally more suitable” for brand awareness, and search advertising is relatively valuable for accessing consumers early in their search process with good evidence about purchasing intentions. This does not reflect the commercial reality that advertisers are able to choose among these and other marketing objectives— whether they place ads on Facebook, Google or on a multitude of other online platforms (including media company websites and apps).

The very first question we ask an advertiser when they come to Facebook to place a new ad is, “What’s your marketing objective?” The advertiser then selects among a range of options including developing awareness (e.g. brand awareness, local awareness, reach), increasing consideration (e.g. website clicks, app installs, video views), or generating conversion (e.g. app engagement, catalogue sales, store visits—i.e. a “direct response”). Similarly, Google asks advertisers to choose among several marketing objectives, including build awareness, influence consideration, or drive action. Both Facebook and Google also provide several pricing mechanism options to match these objectives. While conversion ads are traditionally associated with cost-per-click pricing and brand awareness ads are traditionally associated with cost-per-impression pricing, Facebook and Google offer both types of pricing mechanisms.

26 Final Report, page 93.
27 Final Report, page 93.
30 Advertisers that might consider using either a cost-per-click or a cost-per-impression pricing strategy can compare the value of these options by calculating a click-through-rate. See Ratliff, James D., and Daniel L. Rubinfeld, “Online advertising: Defining relevant markets,” Journal of Competition Law and Economics, Vol. 6, No. 3, 2010, pp. 653-686.
Rather than focusing on outmoded distinctions between a wide variety of different advertising services or features, the primary competitive driver among digital advertising channels is return on investment (ROI). Advertisers can—and do—frequently substitute between online and offline distribution channels to maximise their ROI on a particular ad campaign. Advertisers track and measure the success of their advertising campaigns accurately and in real time, and if the ROI is not satisfactory on a particular platform, they will quickly move their spending elsewhere. We compete each day with Google and a range of other online and offline advertising channels to provide advertisers with the greatest ROI. When we fail to do so, advertisers go elsewhere—and there are many alternatives.

In reaching its conclusions, the Final Report does not appear to recognise these commercial realities and the many developments that have taken place in the online advertising industry over the past 10 years. This is one of the reasons why we support the ACCC’s recommendation for a further public inquiry in relation to ad tech services and advertising agencies—to assist the ACCC in further developing its knowledge and understanding of these and other key developments.

The Final Report significantly understates the benefits and wide range of alternatives available to advertisers

As set out in the Final Report, advertising is far less expensive than in the past, and a whole new generation of small and medium-sized local businesses—many of which could never have previously afforded newspaper or TV ads—are now able to reach a national or even global audience affordably through Facebook. Our advertising services have made advertising accessible to more businesses, lowered prices and substantially grown the market.

Pricing for advertising on Facebook is demand based. Prices are determined by an auction mechanism with advertisers, for example, determining how much they are willing to pay for an impression. Advertisers control how much they spend by setting bid caps and campaign budgets, and can also “pace” their spend over the course of the campaign.

Advertisers can—and frequently do—multi-home and shift revenue in real-time across distribution channels in order to maximise their ROI. The widespread availability of advertiser tools such as real-time dashboards and cross-channel attribution technologies allows “advertisers to invest their

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31 For completeness, the Final Report states that, even if there is a combined market for search and display advertising, “it might nevertheless be argued that Facebook has market power” given the “considerable differentiation” between distinct types of online advertising (Final Report, page 94). However, as set out above, the “differentiation” identified by the ACCC does not accurately reflect how advertisers switch between services, channels, platforms and objectives in order to maximise their ROI.


33 See the export report by Professor Catherine Tucker dated 27 November 2018, section 42.
advertising dollars instantaneously into the campaign that is offering the largest ROI.” These tools have lowered advertisers’ switching costs, enabling them to substitute higher-performing ad distribution channels more frequently and immediately.

We do not require any minimum commitment from advertisers. They can start or end their campaigns at any time, paying only for the advertising services already acquired.

Any ability to charge higher prices, lessen the quality of services or reduce the level of innovation is also limited by the many other businesses that also compete for advertising revenue and consumer attention. These platforms include other social media services, as well as news and media websites, Amazon, Google, Twitter, Pinterest, e-commerce websites, subscription TV and numerous apps and offline channels.

Consumers frequently multi-home between these services, freely substituting between the many platforms that compete for their attention. Due to this wide range of choices and the widespread use of mobile devices that allow for easy adoption of and switching between apps, people spread their limited time across more platforms than ever.

All of these platforms seek to provide advertisers with access to an engaged user base, wherever they are. All of these platforms also have access to significant amounts of data and are able to employ sophisticated targeting tools to ensure that advertisers are connected with engaged users.

None of these matters are consistent with the conclusion in the Final Report that advertisers have limited choices or have limited bargaining power.

The Final Report overstates the competitive advantages for Facebook that arise from data

The Final Report contains a number of statements about the amount of data that Facebook has about users and the competitive advantages that this may provide to Facebook in relation to the supply of advertising and other services. However, the Final Report does not contain any detailed analysis in relation to these matters and fails to engage fully with the detailed information and analysis provided to the ACCC by Professor Catherine Tucker during the course of the Inquiry.

As set out in Professor Tucker’s expert reports, this is a complex and developing area of research for academics, regulators and practitioners. There are significant limitations on the ability of any

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34 Ibid.
35 See the Final Report, pages 86-87 and page 99.
36 See the independent expert reports prepared by Professor Catherine Tucker dated 27 November 2018, and Professor Tucker’s reports dated 24 April 2019 in relation to news referrals and network effects.
regulator to make robust conclusions based on assumptions about the extent to which access to more data might involve greater accuracy in making inferences, a greater ability to target advertisements, lower average fixed costs, increased network effects or higher barriers to entry (being some of the matters broadly identified in the Final Report).

Based on the reports prepared by Professor Tucker, we are concerned that the relatively cursory analysis undertaken in the Final Report is likely to materially under-estimate the extent to which large amounts of data are available to others who compete with Facebook, and overestimate the extent to which the data held by us and others is likely to give rise to network effects, raise barriers or otherwise confer an enduring competitive advantage. For a detailed consideration of these matters, we respectfully draw the Government's attention to the reports prepared by Professor Tucker.37

We compete with a very wide range of platforms, apps and other services to attract and retain user attention, not just social media services

The finding in the Final Report fails to take into account the competitive dynamic in our sector:

- the very significant extent to which we compete with a range of other platforms, websites, apps and other services to attract and retain audience attention. For each service offered on Facebook and our family of apps, you can find at least three or four competing services with hundreds of millions, if not billions, of users. There is also a very wide range of differentiated offerings that attract user attention, as well as content and advertisers;
- the ease and frequency with which consumers substitute freely between these numerous alternatives that compete for their attention. Due to multi-homing and the widespread use of mobile and other devices that allow for easy adoption of and switching between apps and websites, people spread their limited time across more platforms and services than ever; and
- the highly dynamic nature of these competing services and the markets in which we operate—the Final Report refers briefly to potential changes in the technology landscape but, based on what appears to be a short term analysis, and without explanation, fails to take these dynamic considerations into account in concluding that “to a large extent, Facebook is insulated from dynamic competition”.

37 Ibid.
38 See Final Report, page 534.
There is significant evidence about the competitive environment, and the multi-sided nature of the markets in which we operate. If we do not innovate or if we fail to engage users, they will go elsewhere, and there are many platforms, websites, apps and other services—not just social media services—that compete for their attention. These include a wide range of news media and other websites and apps, including Snapchat, Twitter, Google, YouTube, Microsoft (Bing), Reddit, Netflix, TikTok, Skype, LinkedIn, Oath, Yahoo, BuzzFeed, Apple iMessage, Twitter, Rakuten, Pinterest, Yelp and Dailymotion, among many others.

This broad and intense competition for audience attention across a range of differentiated products and services is clearly reflected in various letters that Netflix has sent to its shareholders.

Netflix stated on 16 October 2018 that “[w]e compete for entertainment time with linear TV, YouTube, video gaming, web browsing, social media, DVD and PPV, and more. In that competition for screen hours, we lose most of the time, but we win enough to keep growing.”

Similarly, on 17 January 2019, Netflix stated that:

“We earn consumer screen time, both mobile and television, away from a very broad set of competitors. We compete with (and lose to) Fortnite more than HBO... There are thousands of competitors in this highly-fragmented market vying to entertain consumers and low barriers to entry for those with great experiences. Our growth is based on how good our experience is, compared to all the other screen time experiences from which consumers choose.”

The Final Report does not fully take into account these competitive dynamics or the highly dynamic nature of the environment in which we operate, where consumers decide what they will engage with and how they will allocate their limited time and attention.

As a result, the Final Report both defines the markets in which we compete too narrowly, and materially overstates the extent to which we have market power in competing for user and

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39 The Final Report appears to suggest that differentiation between products and services may limit the level of competition between them (see, for example, section 2.3.6 of the Final Report which in reference to social media services identifies a number of differences between Facebook, Instagram, Snapchat and LinkedIn). However, product differentiation is critical in the competition for user attention. As set out above, if we do not innovate and provide a differentiated service to engage users, they can easily go elsewhere.


audience attention. We do not, and cannot, take the attention or loyalty of our users for granted—and, we are far from having an ability to act independently of competitive threats and constraints.

The hypothetical future conduct that the Final Report raises as potentially anti-competitive is speculative and is not based on any evidence

In the absence of finding actual competitive harm, the Final Report identifies a number of hypothetical scenarios in which Facebook might, in the future, have the ability and incentive to leverage its position into related markets. These hypothetical scenarios include the use of technical specifications to benefit our own products or services, favouring our own products or services in rankings, favouring websites that are part of Facebook Audience Network, or favouring advertisers that use our advertising services in the display of organic results or the ordering of News Feed.

Quite apart from the fact that these scenarios are entirely speculative (and are not based on any evidence), they are also inconsistent with the reality of how News Feed works and how Facebook Audience Network operates.

Each time a person visits Facebook, our goal is to show them the content that we think will be most interesting and relevant to them. At any one time, there may be thousands of posts from friends and family in a person’s inventory, arising from the number of people they have chosen to connect with, the number of Groups they have chosen to join and the number of Pages they have chosen to follow. The News Feed ranking process is designed to help order content in a person’s News Feed based on what signals they have given us to help identify what they find most meaningful. If we were to do something to benefit particular advertisers or websites (or our own products to increase short-term revenue) at the expense of user engagement and satisfaction, we would risk driving people away from Facebook, triggering a negative feedback loop that could threaten the company’s viability. Our interests are therefore necessarily aligned with people who use our platform. If we fail to provide a high-quality user experience, people will go elsewhere. Once some people leave, others will follow, and where they go, advertisers will follow. And if we fail to provide value to advertisers, they will shift their budgets to other providers of advertising and related services. That would in turn drive our revenues—nearly all of which come from

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42 Final Report, pages 134-137.
44 To be clear, News Feed ranking does not filter content—except for content that is removed for violating our Community Standards. If a person were to scroll to the end of their News Feed, they would see all posts eligible and available to them. Rather, News Feed ranking is designed to surface first the posts that we think will be most interesting and relevant to her.
advertising—down, which would threaten our ability to continue to provide innovative and high-quality services to our users, who would then leave.

Similar commercial constraints apply in relation to Facebook Audience Network. Through Audience Network, we offer advertisers the option to purchase advertising on participating third-party mobile websites and mobile applications. By matching advertisers to publishers, Audience Network helps advertisers extend their reach, and helps publishers monetise their apps and mobile websites. Both the advertiser and the publisher must make the decision to use Audience Network. Publishers choose which demand sources—i.e. Audience Network, Google Ad Manager, AppNexus—from which to request bids for an ad slot on their app. This may or may not include Audience Network—it is at the publisher’s sole discretion. Unlike News Corp or other stakeholders in the news media industry, Facebook does not sell products or services at any other level of the ad tech stack. More than 98 per cent of Facebook’s revenue comes from selling ads. Facebook’s financial incentives are therefore aligned with both advertisers and Audience Network publishers: everyone earns more revenue when people viewing the ads take the advertiser’s desired outcome (e.g. click, app download, etc.). To maximise the chance of that happening, Facebook has strong financial incentives to make sure the ads each person sees are relevant. Facebook maximises its own profit by optimising outcomes for both advertisers and the publishers that participate in Audience Network.

The hypothetical scenarios identified in the Final Report are therefore just that—hypothetical and speculative.

In support of the suggestion that Facebook could engage in leveraging conduct in the future, the Final Report also refers to:

- documents which originated in proceedings commenced in the UK by Six4Three and were released by the UK House of Commons, stating that these documents “highlight a number of examples where ... [leveraging conduct] is alleged to have occurred in the past” (emphasis added),\textsuperscript{45} and
- proceedings commenced in Australia by Dialogue Consulting Pty Limited “alleging that Facebook has breached the misuse of market power laws” (emphasis added) and certain provisions of the Australian Consumer Law.\textsuperscript{46}

\textsuperscript{45} Final Report, page 133.
\textsuperscript{46} Final Report, page 134.
It is not appropriate to base any findings in the Final Report—or recommendations for regulatory oversight—on mere allegations raised by third parties, or on the mere fact that proceedings have been commenced by a third party either in Australia or in another jurisdiction when they have not been adjudicated or finally determined.
Overview of privacy law analysis

Given the significant economy-wide impacts that the Final Report’s privacy recommendations would have if implemented, we consider that a more detailed and broader consultation process is warranted, including the many organisations that were not consulted during the Digital Platforms Inquiry, before proceeding with any of these proposed reforms.

When considering appropriate updates to Australia’s privacy laws, given the very real implications for small businesses and trade in particular (as noted above) we encourage the Australian Government to have regard to the importance of harmonising privacy regulation across jurisdictions. We are particularly concerned that many of the proposals in the Final Report are out of step with established and widely respected privacy frameworks such as the European Union’s GDPR, without delivering additional protection to Australian consumers.

The benefits of harmonising regulations across jurisdictions are well-recognised.

As the OECD and others have stated, ensuring alignment with global norms enhances Australia’s global competitiveness. This type of regulatory harmonisation reduces unnecessary compliance costs and leads to increases in productivity.

Numerous recent studies have highlighted the importance of the free flow of information to economies. For example, Dr Clarisse Girot writes:

“Sharing data across borders has become the lifeblood of all segments of developed and developing economies, particularly in Asia where markets have embraced years of hyper-growth. In fact, a vast number of traditional industries, big or small, now make routine decisions by relying on data from various locations around the world. Small and medium-sized enterprises have become exporters by joining e-commerce marketplaces, whilst crowdfunding, “digital money”, mobile payments, wireless transfers, and payment gateways revolutionise the way they start up, accept payments, and go global”.


The further that the laws in individual jurisdictions diverge from accepted norms, the higher the compliance costs of meeting all relevant requirements for a particular data exchange, and the greater the threat to the free flow of information. Picking up this theme, Sundaresh Menon, Chief Justice of the Supreme Court of Singapore, has noted that:

“The [privacy] legal landscape is a patchwork of variegated – and at times conflicting – regulations and stipulations. The challenges that this poses have proven to be a significant hindrance to the development of digital trade and cross-border business operations in Asia.”49

In this context, striking out on a different path and applying regulations that do not align with international standards is a dangerous strategy. In particular, such a strategy may present risks to Australia’s future engagement with the global digital economy by making Australia a less desirable jurisdiction in which to do business.50

It would not be wise for Australian privacy laws to diverge from developing international standards in this area. The GDPR has been implemented and adhered to by countless organisations around the world and has some extraterritorial application. Diverging from GDPR standards at this time not only adds complexity, cost and confusion, but it will make it more difficult for international businesses, which rely upon consistent global data processing and other operating procedures, to offer their services to Australian consumers. Similarly, it will make it more difficult for Australian businesses, operating under the constraints of a more rigid Australian data protection regime, to compete with overseas service providers in order to reach a global audience. At the same time, there is no demonstrable benefit to consumers from a more formalistic approach to consent.

In short, countries that align their privacy laws with international frameworks will be better placed to compete in the global digital economy. Perhaps even more importantly, regulatory harmonisation gives Australian consumers comfort that their information will be consistently protected wherever it travels around the world.

Consistent with this, Facebook’s CEO and Chief Privacy Officer have been calling for global regulation, consistent with the international privacy standard of GDPR.51

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49 Foreword, “Regulation of Cross-Border Transfers of Personal Data in Asia”, Asia Business Law Institute, 2018.
The proposal in the Digital Platforms Inquiry would not bring Australia in line with the GDPR because it leaves out important elements: it is GDPR minus, not GDPR plus. The Final Report’s proposal is a substandard version of European privacy laws that would ultimately be a detriment to consumers the Australian economy.

Technology is the great equaliser for Australia - a country defined by distance - and the Final Report’s proposal would increase barriers to trade and limit the benefits to Australians, without any increase in consumer welfare. It is possible to have robust privacy laws, suitable for the digital age, and we believe the GDPR provides that model. We welcome the introduction of GDPR-style laws in Australia.

However, we are unable to support changes that are not designed to promote consistency or compatibility between these legal regimes. A notable example in the Final Report’s recommendations relates to the proposed elevation of prescriptive consent as the primary lawful basis for processing personal information. Although the rationale and support for this proposal draws heavily on the GDPR conditions for consent,\(^52\) the Final Report does not recommend adopting the other core GDPR provisions for data processing based on the “legitimate interests” of the data controller. This will lead to a much more rigid framework for data processing in Australia than applies in the EU and will present significant challenges for businesses that engage in the global digital economy, without any clear benefit to consumers.

**Ensuring consumers have clear and consistent privacy protections**

Consumers deserve a clear and consistent standard of protection for their personal information across all industries. In addition, as the Final Report has recommended in relation to media law reforms, in order to avoid distortions in the market, different businesses performing comparable functions should be regulated in the same way.\(^53\) All of the potential privacy-related concerns that the Final Report has identified in relation to digital platforms also apply to other types of businesses. To provide consistent protection for consumers, and a level playing-field for businesses, these issues should be addressed in a consistent manner through sensible economy-wide regulatory initiatives.

A consistent approach gives individuals more certainty over their privacy rights and businesses more clarity over their compliance obligations. A privacy code directed solely at social media

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53 Final Report, p. 200 and following.
companies, as proposed in the Final Report, would not necessarily deliver any countervailing consumer benefits. Privacy protections should apply to the use of data - rather than a limited subset of particular companies. As is evident from the ACCC’s preliminary findings in its inquiry into loyalty programs, many of these concerns occur across multiple companies and industries. Consumers are entitled to know that they are afforded the same privacy protections across all industries, regardless of who handles it. Ensuring that consumers are appropriately informed and have meaningful control of their data in an increasingly data-driven world is already a challenge, without establishing different standards for different companies.

The guiding principle behind the Australian Government’s privacy reform should be to increase consumer understanding of, and engagement with, their own privacy.

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Recommendation 1: Changes to merger law

We **support** this recommendation and would welcome further discussion with the Government about any proposed changes. Section 50(3) makes it clear that the existing merger factors contained in that section are non-exhaustive and, in practice, the ACCC may already consider these additional matters. However, we think that there is likely to be value in making it clear in the *Competition and Consumer Act* that the ACCC will consider these matters, where appropriate, in undertaking any merger assessment.

We **note** the Final Report also suggests the ACCC is considering whether to advocate for further legislative changes, including the adoption of some form of rebuttable presumption. Any proposal for such a fundamental change to Australia’s merger laws would require wide consultation, and we welcome the opportunity to engage further with the Government about these issues.

**Merger assessment must be based on evidence**

There must be clear evidence that the target company is **in fact** a potential competitor and that its removal would have the likely effect of substantially lessening competition in a market. It is not sufficient to assert that a transaction involves the acquisition of a nascent competitor or to speculate that, without the acquisition, the target would have developed into a substantial competitive constraint (see our response to Recommendation 2 in relation to comments in the Final Report about our acquisition of Instagram).

Given the rapid pace of change and innovation in the technology sector, it is also important that the ACCC has regard to dynamic competition—in particular, the potential development of other competitors, technologies and consumer preferences that can quickly render any business (or, indeed, business model) obsolete. As stated in the Final Report, “*market dynamics [in digital markets] are particularly fast-moving and predicting the future direction is ... challenging*”. It is

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55 The explanatory memorandum to the Trade Practices Legislation Amendment Bill 1992 which introduced section 50(3) also stated that: “*In considering a proposed acquisition, regard is to be had to the factors specified in the list, but of course there may be other factors that would need to be taken into account in any particular case, and the weight to be given to any factor, whether included in the list or otherwise found to be relevant, has to be determined in the context of the facts of the case.*”

56 For example, the ACCC considered in detail the likely removal of a potential effective competitor for the supply of mobile services in its decision to oppose the merger between TPG Telecom Limited/Vodafone Hutchison Australia Pty Ltd (8 May 2019); and the ACCC considered in detail Transurban’s exclusive traffic data (and the use that could be made of this data) in its assessment of Sydney Transport Partners Consortium’s proposed acquisition of a majority interest in WestConnex (11 October 2018).

critically important that acquisitions are not viewed as anti-competitive based on a speculative assessment of potential competitive constraints in the future.

Similarly, there must be clear evidence that the acquisition of particular data or technology would **in fact** exclude rivals, raise barriers to entry or otherwise harm competition. The expert reports that Facebook provided to the ACCC from Professor Catherine Tucker—one of the world’s leading experts on data as a potential source of enduring competitive advantage—highlight that this is an inherently fact-specific inquiry that requires detailed assessment on a case-by-case basis. It is necessary to ask whether the relevant data is:

- **rare or unique**: if the data in question, even “big data”, is widely available, it is unlikely to confer a competitive advantage;
- **imitable**: if a competitor can easily imitate the benefits conferred by a “resource” such as data, then it is unlikely to confer a sustainable competitive advantage;
- **valuable**: recent research highlights that, by itself, data may not be valuable. What is valuable is the ability to make the right inferences based on the data that a firm has access to. This is often a matter of deploying the right algorithms as well as an understanding about what may lead to errors in classification; and/or
- **substitutable**: that is, whether there are examples where firms have possessed a lot of data but not succeeded, or examples of firms that have grown successful despite not having access to the relevant data.  

The competitive impact of data therefore requires detailed consideration, undertaken to an appropriate evidential standard.

**Any further changes to the mergers test, including a rebuttable presumption, requires further consultation**

The Final Report states that, separate to the Digital Platforms Inquiry, the ACCC is considering whether it is appropriate to advocate for further legislative changes, including potentially the adoption of some form of rebuttable presumption (e.g. once it is shown that a merger is likely to result in a significant increase in concentration, triggering a rebuttable presumption that the merger should not proceed absent evidence produced by the applicant to the contrary).

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58 See further Professor Tucker’s expert report dated 27 November 2018, and her two subsequent reports dated 24 April 2019 in relation to news referrals and network effects, which are available on the ACCC’s Digital Platforms Inquiry website.
As this involves a separate ACCC process, we have not sought to address this issue directly in our response to the Government’s current consultation process. In our view, any proposal for such a fundamental change to Australia’s merger laws would require wide consultation and detailed analysis to ensure that it appropriately balances all relevant considerations. Given that any such change would have a material impact on all sectors of the Australian economy, it will be important that the Government adopts a robust separate consultation process and obtains input from a wide range of stakeholders.

Recommendation 2: Advance notice of acquisitions

We do not support this recommendation. This recommendation is not supported by evidence of any existing gap in, or problem with, Australia’s merger laws or processes.

We also share the concerns raised by a number of other parties in their responses to the ACCC’s Preliminary Report. Australia’s merger regime should not be updated based on a focus on two companies (or even a particular industry) for a special or different treatment under Australia’s merger assessment processes. This is not consistent with good policy. It also raises concerns given the lack of evidence of transactions suggesting an adverse impact on competition in Australia that needs to be addressed.

There is a lack of evidence to support advance notification of proposed acquisitions

The Final Report’s supporting discussion for this recommendation is unfounded and, contrary to best practice policy-making principles, the recommendation selectively and arbitrarily targets two companies.

The Final Report asserts that previous offshore acquisitions undertaken by Facebook may raise competition concerns, but these assertions are not accompanied by any detailed analysis that would support a requirement for mandatory merger notifications by Facebook in Australia. The Final Report states that:

- “Facebook has undertaken a considerable number of strategic acquisitions that may have served to entrench its market power” (emphasis added);  

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60 Final Report, page 80.
● “In the past 12 years, Facebook is reported to have spent at least US$23 billion buying 66 companies”,\(^\text{61}\) and
● “While any of these acquisitions may not have amounted to a substantial lessening of competition, there appears to be a pattern of Facebook acquiring businesses in related markets which may or may not evolve into potential competitors, which has the effect of entrenching its market power” (emphasis added).\(^\text{62}\)

These highly equivocal assertions are based on speculative analysis of the potential impact of any acquisitions by Facebook on competition in Australia. The Final Report expressly states that the ACCC has not formed a view on the appropriateness or otherwise of any particular merger.\(^\text{63}\) However, notwithstanding this absence of analysis (and even in spite of the ACCC’s recognition that this recommendation increases the regulatory burden and may have unintended effects on innovation and investment\(^\text{64}\)), the Final Report concludes that it is “critical” that a mandatory notification protocol is implemented, given “the sizeable effects on competition of past acquisitions by... Facebook”.\(^\text{65}\)

Contrary to this assertion about past acquisitions, the only acquisition by Facebook that the Final Report identifies as potentially raising competition law concerns – without presenting any evidence – is our acquisition of Instagram, which took place approximately seven years ago. Even then, the Final Report acknowledges that “at the time of the acquisition, Instagram was more differentiated from Facebook than it is now and it is difficult to determine how Instagram would have developed in the absence of its acquisition by Facebook”.\(^\text{66}\)

It is important that any recommendation to introduce a mandatory merger notification protocol is not based on selective hindsight that Instagram would have grown by itself, organically, absent the acquisition by Facebook, to become a strong independent competitor to Facebook. As stated in our response to the ACCC’s Preliminary Report, this is entirely speculative. At the time of the acquisition:

\(^{61}\) Ibid
\(^{62}\) Final Report, page 81.
\(^{63}\) Final Report, page 80.
\(^{64}\) Final Report, page 110.
\(^{65}\) Final Report, page 110.
\(^{66}\) Final Report, page 80.
• Instagram was not able to grow fast enough to meet the increase in demand. As its former CEO, Kevin Systrom, recognised in an interview, “we had eight people, we were struggling to keep the site up and we were raising money”, and

• there were at least ten other photo sharing apps—some of which were bigger than Instagram—and there were no guarantees that Instagram was going to be a success.

Instagram has been able to succeed, and create significant consumer benefits, through the combination of its strengths with complementary strengths that Facebook was able to bring to its business following the acquisition. Instagram benefitted from all the expertise, knowhow, engineering resources and advertising infrastructure that Facebook could bring. The acquisition of Instagram also enabled Facebook to compete more strongly with Google, and be a stronger price constraint on Google, in the supply of advertising services. At the time of the acquisition, Facebook’s global share of advertising was approximately 4 per cent, and Google had 45 per cent.

Instagram’s post-merger success is therefore proof that the transaction was a success—that it was good for consumers—rather than evidence of under-enforcement or a need for changes to Australia’s merger processes.

Success should not be penalised. As Facebook has previously stated, our success has brought great innovation, and “given billions of people around the globe access to new ways of communicating with one another.” In addition, the purpose of antitrust laws “is to protect consumers by ensuring they have access to low-cost, high-quality products and services. And especially in the case of technology, rapid innovation. That is exactly where Facebook puts its attention: building the best products, free for consumers, and funded by advertisers.”

The Final Report concludes that “Instagram had at least the potential to develop into an effective competitor”. This finding is based on counterfactual speculation. However, even if correct, this is a highly equivocal statement that falls far short of a finding that our acquisition of Instagram (or indeed any other previous acquisition) was in fact likely to substantially lessen competition in any market in Australia. It also falls far short of demonstrating that, without Recommendation 2 being

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68 See id. (“It sounded like a really good deal, and if you look in retrospect, I think it was a great deal. Think about all the things we’ve accomplished being part of Facebook. All the things we have plugged into — whether it’s hiring, spam fighting, the ad system. We have thousands of salespeople who are basically selling ads for Instagram and we snapped our fingers to access them.”).
70 Ibid.
71 Final Report, page 80.
implemented, there is a real or credible risk of acquisitions taking place which the ACCC is unable
to consider or in respect of which the ACCC does not have adequate powers to take enforcement
action if required.

Facebook therefore disagrees that it is “critical” to introduce a mandatory merger notification
protocol based on the matters raised in the Final Report. This is particularly the case given the
ACCC’s strong existing powers to assess mergers (see below).

We also consider it important that any recommendation to introduce a mandatory merger
notification protocol is not distorted by unduly focusing on one or more transactions that may
have been successful, and ignoring the acquisitions that have not worked as well.

The ACCC already has strong powers to monitor and take enforcement
action in relation to mergers

The Australian merger control regime is highly effective and flexible. The ACCC can examine and
take enforcement action in relation to any merger or acquisition, regardless of value, and
regardless of the volume of the parties’ turnover in Australia. The ACCC can also undertake a
review even if the transaction is not notified to the ACCC by the merger parties. The ACCC
actively monitors the international media so that it is aware of the transactions taking place, and
also coordinates regularly with other competition agencies globally in relation to acquisitions that
may have an impact in one or more jurisdictions.

The ACCC can also investigate and, if required, take enforcement action either before or after
completion of a transaction.

The ACCC’s ability to investigate is supported by extensive mandatory information gathering
powers under section 155 of the CCA, and the ACCC can seek a range of court orders if an
acquisition has the effect or likely effect of substantially lessening competition in any market in
Australia. These orders include unwinding the transaction, divestment and substantial pecuniary
penalties.

The Final Report does not provide any evidence to suggest that there is a pressing or meaningful
problem with the ACCC not:

- being notified, or becoming aware, of acquisitions that have a material nexus with Australia,
and which could potentially have an adverse impact on competition,
● being able to identify or consider the potential impact of acquisitions by Facebook on markets in Australia; or
● having power or an ability to take enforcement action in relation to any acquisitions that raise potential competition law concerns in Australia.

In these circumstances, it is not clear why Recommendation 2 in the Final Report is required.

We are aware that the ACCC has sought agreement on a mandatory notification protocol from certain other businesses in the past, “particularly when there had been a history of transactions which required scrutiny”. However, for the reasons set out above, this same rationale does not apply in relation to Facebook.

For instance, based on public information, we understand that, in December 2012, the ACCC agreed with Coles a streamlined assessment protocol for single supermarket acquisitions, including in relation to new supermarket developments, for an initial six month trial period. This agreement excluded liquor and hardware acquisitions. In addition, Woolworths did not enter into a similar agreement with the ACCC, and we understand that the agreement with Coles did not have any formal effect after the six month trial period.

It is therefore questionable whether this mandatory notification protocol or its lapsing, or the fact that Woolworths did not enter into such a protocol with the ACCC had any impact on the ACCC’s ability to identify potential acquisitions and take enforcement action if necessary.

Australia’s merger assessment processes should not be designed based on two individual companies

In its submission in response to the ACCC’s Preliminary Report, the Antitrust Law Section of the American Bar Association (ABA) stated that:

“As a general matter ... the Section advises against the adoption of special rules, standards or presumptions for either a specific industry or, certainly, for specific companies, because

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doing so can end up unnecessarily and perversely stifling competition and innovation, particularly in dynamic internet-based industries.”

The Section therefore respectfully recommended that the ACCC “[r]econsider initial recommendations to impose requirements that would apply only to specific industry players (e.g., requiring “large digital platforms” to provide advance notice of the acquisition of any business with activities in Australia).”

We agree with these concerns, particularly in the absence of any compelling evidence that mergers in the digital platforms sector raise issues in Australia that are so material or unique that they cannot be addressed under the existing merger processes that have served merger parties and the ACCC so well over the past 20-30 years.

In the absence of very compelling justifications, the Government should be cautious about adopting different rules for some companies, but not their competitors and other participants in the same industry. As highlighted by the ABA, concerns arising from these distortions are heightened in highly dynamic internet-based industries.

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74 Submission by the American Bar Association Section of Antitrust Law dated 15 February 2019, page 1.
75 Ibid.
Recommendation 3: Changes to search engine and internet browser defaults

We note this recommendation and do not have detailed comments to share, as it primarily relates to products supplied by Google.

However, we have some concerns with the approach adopted in the Final Report which underpins this recommendation. Product changes or bundling arrangements that encourage the use of particular products and features are not necessarily anti-competitive. Determining whether or not a particular change or strategy is likely to be harmful to competition (and, more specifically, whether the particular conduct has the purpose, effect or likely effect of substantially lessening competition) necessarily requires a detailed investigation and consideration of evidence, with a full opportunity for parties to test that evidence and any theories of harm.

There is a significant risk that, without an appropriate process to enable all relevant evidence to be considered and interrogated, any regulatory response that seeks to dictate product design—or which targets a single product or single company—will result in significant harm to consumers. Targeting a single company in this manner distorts the competitive process and discards the level playing field. There is also a significant risk that it will lessen the ability and incentive for companies to innovate and therefore, ultimately, harm the very competitive process that the regulatory intervention is seeking to protect.
Direction for future work: data portability and digital platforms

Facebook supports data portability for digital platforms and we are already working across industry towards this. We are happy to provide updated briefings to the Australian Government as part of its ongoing consideration of this issue for digital platforms. This is an area where Facebook has been proactive even in the absence of legislation, and indeed, is calling for it, whilst also advancing meaningful progress towards privacy protective, pro-innovation data portability.

There are privacy considerations that need to be addressed to ensure that portability mechanisms are safe and easy to use.

Regulation should guarantee the principle of data portability. If you share data with one service, you should be able to move it to another. We want to make sure that the Internet continues to be a space characterised by growth and innovation. Data portability makes it easier for individuals to choose among services, facilitates innovation, empowers individuals to try new services, and enables them to choose the offering that best suits their needs. Data portability can help ensure that barriers to entry remain low for new services.

However, when making data available to third parties, situations like Cambridge Analytica are real risks, where bad actors who appear reputable obtain user data under false pretenses.

We want to work with other stakeholders—companies, governments, academics, and consumer advocates—to figure out what the right framework is for privacy-protective and practical data portability.

Facebook recognises the benefits of data portability

Data portability is the principle that you should be able to take the data you share with one service and move it to another of your choice.

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We want to enable people to have diverse experiences across the web and to help people access data. Data portability does just that by giving people more control over their data. Data portability also facilitates innovation by enabling people to more easily switch between different services to find those that best suit their needs.

Facebook has been working since 2007 to promote data portability

We have had tools that help people move their data to other services for more than a decade.\(^\text{77}\) For example, the Facebook Platform lets developers enable people to log into their services using Facebook.

Facebook's current portability solution is called Download Your Information (DYI),\(^\text{78}\) which was first released in 2010. This tool lets users get a copy of their data so that they can upload it into other services.

We're also envisioning future products that combine the ease of the consumer app platform with the scope of DYI. That is part of the reason why we joined the Data Transfer Project,\(^\text{79}\) along with Google, Twitter, Microsoft, and others back in July 2018.\(^\text{80}\) The goal is to build portability solutions so users can directly transfer data between services in a way that’s really easy to use, safe, and based on common standards.

Getting data portability right

Foremost, we believe that companies should give people control over their information by enabling them to take it out of one service and bring it to another. But even in places with laws already in place—and certainly where they are being considered—we think there are fundamental questions that need to be answered for portability to be implemented successfully—meaning we can build privacy-protective, easy-to-use products for users.

We need to find the right balance, giving people control over data sharing and preventing abuse without hampering people’s experiences or hindering innovation.\(^\text{81}\)

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\(^\text{77}\) The 2007 announcement of Facebook Platform: [https://www.facebook.com/notes/facebook/platform-is-here/2437282130/](https://www.facebook.com/notes/facebook/platform-is-here/2437282130/)

\(^\text{78}\) Facebook, ‘How do I download a copy of my information on Facebook?’, [https://www.facebook.com/help/212802592074644](https://www.facebook.com/help/212802592074644)

\(^\text{79}\) [https://datatransferproject.dev/](https://datatransferproject.dev/)


We recognise that discussions on smart portability regulation are still in the early stages, but as governments around the world—including the US and the UK—begin to focus more on data portability, we are eager to work with them to ensure that any regulation enhances innovation, user control, privacy, and security. To that end, we’ve recently released a white paper that sets out several of the open questions that we’ve encountered in building portability tools and lays out a few possible solutions for discussion.

Based on that white paper, we’re beginning to work with other stakeholders—companies, governments, academics, and consumer advocates—to figure out what the right framework is for privacy-protective and practical data portability. Doing so promises to help people control their information and to support continued innovation online.

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Recommendation 4: Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

We support in-principle the increase of expertise and capability within the Australian Government, including regulators such as the ACCC, and their understanding of our technology, business and our industry. As we continue to work with the Australian Government on the new and smart regulatory frameworks for the internet, deeper knowledge within Government is useful.

We are committed to working constructively with Australian regulators and government officials. As part of our response to this 18-month inquiry, we produced over 1,608 documents (over 14,500 pages) and had dedicated teams working over 10,000 hours to respond to the ACCC’s requests. This does not include the large amount of information that we provided voluntarily as part of written responses and face-to-face meetings in order to assist the ACCC in its understanding of our business and the markets in which we operate. This has been a significant investment on our part, and we are committed to continued engagement with the ACCC and other Australian regulators.

However, we are concerned with the largely unconstrained nature of the public inquiry proposed in Recommendation 4. Public inquiries are an important tool, but they should not be unconstrained. They are extremely intrusive, burdensome and costly, involving the exercise of a highly coercive governmental powers to compel the production of information and documents in circumstances where there is no reason to believe there has been any breach of laws.

We encourage the Government to provide some certainty and guardrails on the scope of any additional inquiries or reviews to be undertaken by the ACCC, especially given their already extensive powers. Additionally, given the increasing digitisation of the economy and society, we would encourage the Government to broaden out the subject matter focus for the new specialist team to digital, data and technology more generally (rather than just digital platforms). Finally, we recommend that the Government give consideration to the existing extensive powers to compel information, undertake market studies and conduct investigations before granting the ACCC new powers.
We support inquiries that have clear objectives and timeframes

The recommendation appears to contemplate a largely open-ended and unconstrained ability for the ACCC to compel—over a period of five years—the provision of any information or documents that the ACCC considers relevant to what again appears to be a very broad public inquiry with broad terms of reference. The ACCC envisages the ability to compel the provision of information and documents in circumstances where there is no suspected breach of any law. The ACCC may simply wish to build on its knowledge or expertise, identify potential inefficiencies, assess the functioning of markets, or obtain information for future policy decisions. 83

This has potential to be an intrusive power for any government agency, which should not be granted except in exceptional circumstances—which are not established in the Final Report.

By contrast, as an example, the Federal Trade Commission’s Bureau of Competition launched a technology task force earlier this year dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted. This dedicated new taskforce operates within the existing powers available to the FTC and has not been given additional powers to compel the provision of information on an ongoing basis.

The creation of a new specialist branch within the ACCC should likewise not provide the ACCC with additional powers (i.e. in addition to its existing strong powers to investigate potential breaches of the CCA and ACL and take court enforcement action where required). 84 It is critical that any market study powers are clearly circumscribed and do not, as apparently contemplated by Recommendation 4, involve largely unconstrained powers to compel the provision of information and documents over a long period of time.

We recommend that, rather than a five-year public inquiry empowered by a Ministerial direction involving a single and widely-focused terms of reference, the Government considers directing the ACCC to undertake specific inquiries or consultation processes which each involve focused terms of reference (based on any areas for review specifically identified by the Government or ACCC)

83 See the quote extracted above from the Final Report, pages 12-13.
84 In particular, it is important that the creation of a new specialist branch does not become a “back door” way of giving regulatory agencies additional, unprecedented and even more intrusive powers, without proper justification, consultation and debate (e.g. with the effective result of lowering the standard of proof for enforcement or regulatory intervention, shifting the burden onto companies to demonstrate that innovative developments (e.g. bundling of services for consumers etc.) are pro-competitive, or enabling regulatory agencies to impose requirements in relation to particular products without any Court finding of anti-competitive or consumer harm).
and clear timeframes. This would address the concerns identified above, and would also provide much greater clarity, both for digital platform operators and the public. This is particularly the case given that the ACCC has only just completed a wide-ranging 18-month market study into digital platforms and, if Recommendation 5 is accepted by Government, will shortly commence a new extensive 18-month inquiry into the supply of ad tech services and the supply of online advertising services by advertising and media agencies.

Based on our experience with responding to requests for information as part of the Digital Platforms Inquiry, we also recommend that the Government introduces an express requirement for the ACCC to consult with parties before issuing a mandatory notice to them in any market study process. This is particularly relevant where different market participants are likely to hold data in widely differing specifications and is likely to result in the ACCC being able to issue more targeted notices (i.e. notices that are more appropriately calibrated to the information actually held in companies’ systems) and reduced compliance burden for businesses. This is particularly important given the apparent trend towards long-running market studies in particular industries.

The focus should be on the broader digitisation trend rather than just a handful of companies

We also recommend that the ACCC widens its focus to digital, data and technology issues more broadly, rather than just (in any specific public consultation process or generally) on digital platforms. Focusing solely on a handful of digital platforms will not provide the ACCC with sufficient knowledge, understanding or perspective in relation to the wide range of issues arising from developments in technology, artificial intelligence and an increasingly data-driven economy.

Adopting this wider focus would enable the ACCC to examine a wide range of issues and practices across the digital economy, and provide the ACCC with greater flexibility to adapt to market-driven changes.

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85 This is similar to the requirements in the National Electricity Law and National Gas Law for the Australian Energy Regulator to consult with the public before issuing a general regulatory information order and provide parties with an opportunity to be heard before issuing a regulatory information notice.
The ACCC already has in its possession extensive powers to compel information and conduct market studies and investigations

The CCA provides the ACCC with extensive powers to compel the provision of information and documents to assist it in any market study undertaken in response to a Ministerial direction. These include the power to compel the production of documents, compel the provision of information in a specified manner and timeframe, and to retain documents. These powers ensure that the ACCC is able to obtain timely access to information and documents that it needs to undertake its role.

If, based on its inquiries, the ACCC has reason to believe that a person can provide information about a potential contravention of the CCA, the ACCC also has existing wide-ranging powers under section 155 to compel the provision of information, the production of documents, and to examine individuals under oath or affirmation. Given the investigative nature of this power, the Courts have consistently applied a low threshold – to the benefit of the ACCC – for determining whether or not the ACCC has reason to believe a person may have information about a potential contravention.

Despite the statements in the Final Report that certain current investigations might not have commenced without the proactive examination made possible by the Digital Platforms Inquiry, this should not—as a general matter—be used as a justification for implementing a long-running and intrusive public inquiry as an additional investigative tool for potential breaches of the CCA. The appropriate process for investigating competition and consumer enforcement matters continues to be section 155 of the CCA with its associated safeguards for all parties.

Given the breadth of the ACCC’s mandatory information gathering powers in any market study—and the demonstrated frequency with which the ACCC exercises these powers in any inquiry process—it is extremely important that these powers are appropriately balanced with procedural safeguards. Any public inquiry should not grant a largely open-ended and unconstrained ability for the ACCC to compel—over a long period of time—the provision of any information or documents

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86 See Competition and Consumer Act 2010 (Cth) s 95ZK.
87 See Competition and Consumer Act 2010 (Cth) s 95ZK.
88 See Competition and Consumer Act 2010 (Cth) s 95ZM.
89 See Daniels Corp International Pty Ltd v ACCC (2002) 213 CLR 543 per Callinan J at [130].
90 See Final Report, pages 13 and 141.
91 See Business and Industry Advisory Committee to the OECD, Market Studies as a Tool to Promote Competition, Contribution to the OECD Global Forum on Competition: The Role of Market Studies as a Tool to Promote Competition, 1-2 December 2016, paras 17 and 20, DAF/COMP/GF/WD(2016)79.
that the ACCC considers “relevant”, based on a broadly-framed Ministerial Direction or terms of reference.

We are not aware of any inquiry (including price monitoring processes under Part VIIA of the CCA) in which the ACCC has unconstrained information gathering powers of the type proposed in Recommendation 4. Generally, industries that are subject to ongoing regulatory reporting requirements also have much greater clarity about the types of information that they are required to provide.

The Final Report’s focus on conducting a further long-running public inquiry with wide compulsive information gathering powers appears to discount the ACCC’s existing investigative tools. It also ignores the clear willingness of Facebook—demonstrated in relation to a wide range of issues over nearly two years—to engage meaningfully with the ACCC on a voluntary basis, and to provide large amounts of information voluntarily. In this regard, there is no indication that the absence of the exercise of mandatory information-gathering powers by the Productivity Commission has hindered or reduced its effectiveness in developing its expertise, undertaking reviews, and making recommendations in relation to the efficiency and functioning of markets, or to enable recommendations in relation to future policy decisions. Other than detection and enforcement of possible breaches of the law (where the ACCC already has strong investigative powers), these matters appear to form the key justifications for the information gathering powers proposed in Recommendation 4.

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92 Each price monitoring inquiry under Part VIIA of the CCA involves clearly specified information reporting requirements. For example, the information that airport operators are required to provide to the ACCC (so the ACCC can monitor prices, costs and profits, and the quality of aeronautical services and car parking at key airports) is clearly specified in the Airports prices monitoring guideline and the Guideline for quality service monitoring at airports. The ACCC’s ongoing monitoring of stevedoring is limited to monitoring prices, costs and profits relating to the supply of services by container terminal operator companies at specified ports, and the information reporting requirements are clearly specified. Australia Post’s reporting requirements are clearly set out in specified Record Keeping Rules. The ACCC’s monitoring role in relation to the petroleum industry is also limited to monitoring prices, costs and profits relating to the supply of unleaded petroleum products in Australia, and the information reporting requirements are clearly specified.

93 The Final Report expressly refers to “information gathered on a periodic basis” from telecommunications companies under Part XIB of the CCA as an example of the ACCC’s ongoing information powers (page 141). However, the telecommunications industry is characterised by very high levels of vertical integration in relation to the supply of a number of essential infrastructure services. Even in this situation, the ACCC’s powers to request records and reports are constrained by specific criteria, and there is far greater clarity about the types of information that telecommunications companies are required to provide. Similarly, the National Electricity Law and National Gas Law set out a specific scope for exercise of, and contain number of constraints on, the Australian Energy Regulator’s mandatory information gathering powers.
Recommendation 5: Inquiry into the supply of ad tech services and advertising agencies

We broadly support this recommendation. We believe this will assist the ACCC in further developing its knowledge and understanding of the commercial realities and other key developments in the online advertising industry.

We note that Facebook is not vertically integrated in the ad tech stack. As the Final Report notes, the issues relating to ad tech services do not apply in the same way to Facebook’s advertising platform. We note that the ACCC has just completed a detailed and in-depth 18-month market inquiry, including in relation to advertising on digital platforms. However, transparency in the online advertising industry is important—consistent with this, we have and continue to provide new and improved tools, and greater transparency, to our advertising customers (see below).

Further consideration of the supply of ad tech services and the supply of online advertising services by advertising and media agencies is likely to assist the Government, advertising customers and the public to understand in greater detail how online advertising works and, we believe, address some of our concerns raised above in Overview of Competition Law Analysis.

Innovative and personalised advertising services, such as those provided by Facebook, deliver significant benefits to businesses and consumers

As set out in the Final Report,94 advertising in Australia has undergone significant change in the past 20 years, and continues to evolve rapidly. Programmatic advertising has changed the way advertising works and has opened up the opportunity for advertisers to engage in a higher level of ad targeting and new ways of targeting that were not previously possible. Instead of targeting broad audience segments with print or TV, advertisers are now able to serve ads in real time, taking into account factors such as individual user interests, browsing history, time, location, and website content, and can also target users at specific points in the purchasing journey.95

This benefits both consumers and businesses. Consumers are far more likely to see ads that are of interest to them and, conversely, see fewer ads that are less likely to be of interest. Businesses can also be more targeted and efficient in their ad spend. They can reach customers locally and

94 Final Report, page 120.
95 Final Report, page 121.
internationally at a lower cost than was previously possible, can communicate one-to-one with consumers, and, importantly, have access to a wide range of tools so they can measure ad performance in real time and switch between advertising channels to achieve the highest return on investment. Advertisers are therefore able to pass on the benefits of lower costs, increased efficiencies and greater accessibility to consumers in a way which has not previously been possible.96

These benefits are particularly significant for small to medium businesses that may not previously have been able to afford advertising through newspapers, commercial television or radio. In Australia, more than 350,000 businesses placing advertisements on Facebook spent less than USD $100 in 2017. Fewer than 150 Australian businesses spent more than USD $1 million placing advertisements on Facebook in 2017. As stated in the Final Report:97

“For small to medium businesses, the self-serve platforms of Google and Facebook are easy to use services that enable them to efficiently acquire their advertising needs. Businesses can easily set up accounts and business pages for advertising on both platforms in a short amount of time. Due to the complete end-to-end service that Google and Facebook offer via their self-serve platforms, businesses do not need to contract with multiple parties. Additionally, no minimum spend is required and businesses can start and stop ad campaigns and spend at any time ... For these reasons, the ACCC considers that digital platforms, and in particular Google and Facebook, provide significant benefits to businesses.”

In reaching its conclusions, the Final Report does not appear to recognise these commercial realities and the many developments that have taken place in the online advertising industry over the past 10 years.98 This is one of the reasons why we support the ACCC’s recommendation for a further public inquiry in relation to ad tech services and advertising agencies—to assist the ACCC in further developing its knowledge and understanding of these and other key developments.

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97 Final Report, page 132.
98 For completeness, the Final Report states that, even if there is a combined market for search and display advertising, “it might nevertheless be argued that Facebook has market power” given the “considerable differentiation” between distinct types of online advertising (Final Report, page 94). However, as set out above, the “differentiation” identified by the ACCC does not accurately reflect how advertisers switch between services, channels, platforms and objectives in order to maximise their ROI.
Transparency and independent verification are important

Transparency and independent verification are important—both to us and to our advertisers. We continue to look for ways to improve the tools and resources available to businesses and advertisers.

The most important metric to our advertisers is the return they see on their ad spend with Facebook. Advertisers measure the effectiveness of their campaign by the results it achieves—whether that is lift in brand recognition, or an increase in website visits, app downloads, or sales. If advertisers do not see the desired results, they will shift their ad spend from Facebook to another online or offline channel. Accordingly, we have a direct interest in ensuring that advertisers have tools and data which enable them to measure and manage campaign performance in real time.

We provide advertisers with a range of aggregated metrics on how users engage with advertisements. These metrics, which are provided to advertisers at no additional cost, involve three broad categories:

- **Ads reporting metrics**: These metrics are based solely upon Facebook’s own data and reflect the level of engagement between a user and the advertisement, including, but not limited to, the number of impressions, clicks and likes an advertisement received.

- **Insights metrics**: These metrics provide aggregated demographic and interest information about the Facebook users who visit the advertiser’s website, use its mobile application, or engage with the advertiser’s campaign. For example, an advertiser can assess the number of users within specific age ranges or the gender ratio of users who clicked on its advertisement. This information helps advertisers provide more relevant content and develop features that are likely to be interesting to their customers.

- **Conversion metrics**: These metrics measure the effectiveness of an ad campaign based on the advertiser’s marketing objective (e.g. online sales or app downloads). Using conversion data provided by the advertiser, Facebook compiles customised conversion metrics. For example, if an advertiser wishes to increase traffic to its website, we will provide metrics identifying the number of users who visited the website after viewing the advertisement.
These metrics are independently verifiable. Our measurement of impressions for ads in News Feed is accredited by the Media Rating Council (MRC),\(^\text{99}\) the same organisation that sets industry measurement standards for television and radio.

We also partner with 40+ companies around the world who provide independent third-party metrics for ads on Facebook. These metrics fall into five broad categories—reach, viewability, attribution, brand lift, and outcome lift. In Australia, we have partnered with Nielsen to provide reach metrics, Integral Ad Science and Moat for viewability, AppsFlyer and Datalicious for attribution, and Quantum and Acxiom for lift. We provide these partners with the data needed to independently calculate and verify these metrics.

Throughout the ACCC’s Inquiry, we provided a substantial amount of information about our advertising services, advertising metrics and the independent verification of ads on Facebook. We therefore welcome the finding in the Final Report that:

“market driven solutions appear to be on the way to solving issues around verification and the measurement of ads... Therefore, the ACCC considers that there is unlikely to be significant value in requiring additional monitoring of ad verification and measurement.”\(^\text{100}\)

In addition to these independently verifiable metrics, we provide advertisers with a range of tools which enable them to understand how their advertising campaigns are performing. These include:

- Facebook Attribution, which enables advertisers to understand the effect of their ads across publishers, channels and devices;
- Split testing and test and learn interfaces, which enable advertisers to analyse their advertising strategies to compare which ones are effective; and
- Facebook Analytics, which enables advertisers to understand how people interact with their event sources (e.g. website, Facebook Page, app and so on).

These tools provide a large amount of information to help advertisers measure the effectiveness of their ads, make decisions for future planning and optimisation, and achieve the best returns from their advertising spend.

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\(^{99}\) The Media Ratings Council is a non-profit industry organisation that reviews and accredits audience measurement services in three key areas: first-party served ad impression reporting, third-party viewability partner integrations and upon launch, our new two-second video buying option.

\(^{100}\) Final Report, page 150.
As set out above, we are committed to providing transparency to our customers—if they can’t measure the success of the ads in real time, they will shift their ad spend elsewhere. We are therefore continuously looking for ways to improve these tools and resources, and have implemented a range of new initiatives in the recent past, including Facebook Attribution in October 2018.

**Facebook is not vertically integrated in the ad tech stack**

This recommendation, if implemented by Government, would enable the ACCC to undertake a new Advertising Inquiry focusing on “the supply of ad tech services and the supply of online advertising services by advertising and media agencies”. The ACCC has noted, in its Final Report, that the issues it has identified relating to ad tech services do not apply to Facebook’s advertising platform in the same way that they apply to other services. In particular:

“While Facebook’s advertising platform facilitates the sale and purchase of programmatic display ads, the entire Facebook advertising service offered to advertisers and websites does not interconnect with other parts of the ad tech supply chain. The Facebook advertising platform is therefore not considered to be an ad tech service.”

However, given the importance of transparency for our advertiser customers, Facebook supports the Final Report’s recommendation.

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102 Final Report, page 151.
Recommendation 6: Process to implement harmonised media regulatory framework

We support in principle a review process for the media regulatory framework and in particular, an approach -- as recommended by the Final Report -- that reflects the evolving media landscape and is underpinned by a sound policy rationale based on the functions or impact of the regulated entities. We support many of the specific areas for regulatory update identified in the Final Report.

We look forward to participating in the Australian Communication and Media Authority’s (ACMA’s) review (subject to the Government accepting the recommendation). Some initial comments are provided below, to assist with the establishment and tasking of the review.

We agree that regulatory frameworks should apply consistently when organisations are performing similar functions and there are many areas for regulatory parity identified in the Final Report that can be advanced without a comprehensive review of media regulations.

That said, a media regulation review that is underpinned by sound policy rationale based on the functions or impact of the regulated businesses may not be the platform-neutral media regulatory framework envisaged by the Final Report. In particular, we caution strongly against conflating functions of digital platforms and media businesses that may, on the face of it, seem similar - but are actually fundamentally different. A lack of clarity in this regard risks overlooking many significant differences between different media platforms. Youtube is not the same as the Sydney Morning Herald; Facebook is not the same as Foxtel.

The starting point for the review should be to define priority policy problems in the media and communications sector and to assess how to address them in a competitively-neutral way: the review’s genesis should not be to determine how to apply existing regulation to digital platforms. Indeed, in some instances, digital platforms may already face greater regulation than traditional media businesses: for example, newspaper publishers’ self-regulatory framework for content compared to existing content-related laws for digital platforms and by way of further example, the legislated rules relating to digital platforms when compared with the industry code for broadcasters.
A harmonised media regulatory framework will need to, as a practical matter, take into account these differences, while clearly identifying which public policy goals are relevant and how best they can be achieved. Attempts to simply apply uniform new rules on a blanket basis to all media platforms will lead to regulatory irregularities. Specific and appropriate regulation (which may in some instances include harmonisation to address perceived regulatory disparities) must recognise that different levels of regulation and different frameworks may be appropriate across technology types and businesses. As the Final Report notes, the ultimate goal “is not to achieve absolute uniformity of regulation across media businesses and digital platforms, particularly where they perform different functions.”

The proposed platform-neutral approach may not achieve the goal of harmonised media regulation

In general, we agree that a review of existing regulatory principles may be warranted (and note that some review processes have in fact already occurred). However, if such a review is to adopt a guiding principle of platform-neutral regulation we suggest that much greater consideration of what constitutes a ‘platform’ and how different platforms are to be compared would be required.

Chapter 4 of the Final Report describes the current media law framework as ‘sector-specific’, and identifies ‘print’, ‘broadcasting’, ‘advertising’ and ‘telecommunications’ as the current sectors. At the same section, the Final Report notes there have traditionally been “three silos of communications regulation in Australia: telecommunications, radiocommunications and broadcasting”. Traditional print and broadcast businesses are described as ‘media businesses’ – in distinction to ‘digital platforms’. Different groupings of businesses, entities and technologies are variously described in Chapter 4 with the terms ‘industries’, ‘sectors’, ‘platforms’, ‘businesses’, ‘broadcasters’, ‘publishers’, ‘aggregation providers’, ‘channels’ and ‘stakeholders’. This terminological variety is more than a stylistic choice, there are fundamental differences in meaning based on the nature of the activity and the reason that particular grouping term is used at a given time.

The Final Report contrasts current existing frameworks with six identified benefits of a harmonised framework, which the ACCC considers will:

103 Final Report, page 199.
104 Final Report, Appendix C.
106 Ibid.
107 Final Report, see e.g. page 167.
• “improve regulatory parity to enable different businesses that perform comparable functions to be regulated in the same way, thereby creating a more level playing field between market participants and increasing competition on the merits
• remove redundant legislation to reduce the overall regulatory cost on media and communications industries and to reduce the associated regulatory burden on relevant Government agencies
• simplify the complex system of regulations currently in place
• enable the determination of issues most important to Australian audiences and ensure that such issues are more consistently and reliably protected under the new regime. The coverage of the law would evenly extend to all the different types of content delivered to Australian consumers across different media formats, including online content. This would improve the ability of the law to safeguard community expectations and standards
• allow the establishment of more flexible, technology-neutral principles that could better respond to technological change and adapt to new innovations in the dynamic and rapidly-changing media and communications industries
• improve the competitiveness of Australian digital content industries in a dynamic and increasingly global media environment.”

Of these benefits, only the first is specifically linked to the platform-neutral approach recommended by the ACCC and there is very limited evidence presented that such an approach is obviously positive.¹⁰⁸

Many business functions which are comparable from one perspective may not be comparable from another. A particular product which provides a consumer function of light entertainment might not provide an advertising function, and so would certainly not be comparable from the perspective of a small business advertiser. Should Netflix be regulated the same as Hoyts because they both perform the function of displaying movies? Should Facebook and Australia Post be regulated the same because they both perform the function of allowing individuals to connect or circulate their opinions? These businesses are not the same in type, scale, reach, technology, business model or user base – but they do perform at least some ‘comparable functions’.

We suggest that existing regulatory frameworks contain inherent differences based on legitimate considerations of technology and public policy. The difficulties of simply throwing all business models and technology under a single framework are highlighted by the discussion of sports rights and anti-siphoning in Part 4.4.2 of the Final Report. Digital platforms may in some respects be seen

as competing with broadcast media for sporting rights. For example, anti-siphoning rules (which were reviewed and amended as recently as 2017) were put in place because the pay TV business model inherently meant that content acquired by pay TV broadcasters would only be made available to consumers subject to payment of a fee. However, the prevailing business model for digital platforms is to make content available for free and to generate revenue from advertising and other means (effectively a similar model to free-to-air broadcasters, mixed with an on-demand element). In this sense, these different platforms operate according to quite different dynamics and it is not necessary to apply the same regulatory rules in order to achieve the desired policy outcome (i.e. in the case of anti-siphoning, to ensure that the public has free access to content deemed to be of national significance).

Determining the precise contours for a more harmonised regime will require greater consideration of the nuance of how best to achieve the desired policy outcome, as well as parsing the precise areas of existing regulatory burden that should be reconsidered. For example, while The Guardian’s submission supports the creation of a platform-neutral framework, this support is underpinned by their perception of a ‘passive approach to self-regulation’ which technology platforms have been permitted. However, as a publisher, The Guardian itself enjoys a self-regulatory scheme. Consequently, it seems The Guardian is not seeking a more harmonised regulatory approach between itself and digital platforms, but instead is calling for greater regulation of digital platforms when compared with publishers.

Specific examples identified in the Final Report for regulatory reform can be achieved without sweeping platform neutral laws

Chapter 4 of the Final Report identifies several scenarios (contained in break-out boxes) which highlight particular legal provisions and ‘case studies’ regarding the Australian legal and regulatory environment for digital platforms. These are useful practical examples for immediate regulatory reform focus. However, far from suggesting a need for a sweeping new platform-neutral regulatory regime, these examples support the extension (or existing application) of current targeted regulatory regimes so that they apply in an equivalent way to digital platforms.

We support, or are already subject to, a wide range of obligations raised by these examples as set out below:

- **Box 4.1: The Australian Consumer Law and application to media businesses and digital platforms**

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110 Final Report, Box 4.1 to Box 4.5.
This box confirms how the law applies equally to both traditional media businesses and digital platforms. It highlights an example of an existing regulatory regime which may be applicable to the conduct of digital platforms as well as businesses and individuals who use digital platforms.

- **Box 4.2: Broadcast requirements for advertising that is ‘political matter’**
  
  Facebook recognises the importance of government’s setting rules for political advertising, and indeed this is an area where our CEO has expressly called for regulation.\(^\text{111}\)

  Facebook has already put some similar voluntary measures in place, and the current Facebook Advertising Policy requires compliance with local laws including those on “disclaimer, disclosure and ad labelling”.\(^\text{112}\) Our Ad Library feature already provides the kind of detailed records and disclosures to which the ACCC refers in this example.

  Some consideration may need to be given to whether this is more appropriately in the remit of Australian electoral laws and the Australian Electoral Commission.

- **Box 4.3: Case study – Election advertising restrictions: Blackout periods**

  Facebook works with government agencies and political parties to respect blackout periods in other jurisdictions, such as, for example, New Zealand, and welcomes the opportunity to comply with any extension of blackout periods to include digital platforms in Australia. This type of requirement is already contemplated by the Facebook Advertising Policy on political advertising. If the current circumstances lead to ‘an imbalance’ in the ability ‘to earn advertising revenue’, then we consider that any extension should logically apply to print publishers and all other advertising channels (for example, outdoor, mail) as well.

- **Box 4.4: Election advertising requirements: Display of election ads**

  Digital platforms are already subject to requirements on electoral communications under the Commonwealth Electoral Act 1918, and have been working constructively with the Australian Electoral Commission to respond to concerns about electoral advertising that does not comply with applicable law and to take action to address this. Any review process should give consideration to whether the appropriate regulator for election advertising

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\(^{112}\) Facebook Advertising Policies, Section 10.a ([https://www.facebook.com/policies/ads/](https://www.facebook.com/policies/ads/)).
requirements should be the same as for general political advertising requirements, so as to achieve the desired regulatory harmony. We welcome the opportunity to work with all regulators authorised to oversee such laws, as appointed by the Australian Government.

- **Box 4.4 Case study – Video content from Christchurch terrorist attack:**
  The horrific attacks in Christchurch violated our policies and we moved swiftly to remove them and collaborated across industry to prevent the resharing of the video of the attacks. Through the Australian Government’s Taskforce to Counter Abhorrent and Violent Material, we have been proposing that the Australian Government include traditional media companies in the discussion to ensure a harmonised approach across digital platforms and traditional media channels. This is especially important given some copies of the attack video that were shared by traditional media fuelled the subsequent resharing of the video at an unprecedented scale. Academic research funded by the Global Industry Forum to Counter Terrorism confirms that mainstream media can inadvertently amplify terrorist propaganda messages.¹¹³

- **Box 4.5: Case study – Alcohol advertising restrictions**
  We agree that it is important to prevent children seeing alcohol ads and, as the Final Report indicates, we have various measures in place designed to achieve this. We welcome the opportunity to continue to work through the existing regulatory schemes to address this important policy issue.

Extension of advertising and local content regulations must be undertaken carefully and with a holistic view of the desired public policy outcomes

The Final Report proposes prioritising review of election advertising restrictions and local content obligations. We support this approach in principle, subject to proper consideration of the practical difficulties in applying some of the details to digital platforms, which will need to be considered as solutions to achieve the policy outcomes are developed.

¹¹³ RUSI, Cardiff University’s Crime and Security Research Institute, and Swansea University’s Digital Economy Research Centre, *Paper No 2: A Study of Outlinks Contained in Tweets Mentioning Rumiyah*  
https://rusi.org/publication/other-publications/study-outlinks-contained-tweets-mentioning-rumiyah

Daesh primarily used links from tweets to smaller platforms that hosted terrorist content from their propaganda magazine *Rumiyah*. Much of the posting was done by bots; however, one third of these tweets related to news reports and coverage of claims in Rumiyah. In this way, mainstream media was inadvertently amplifying the propaganda message.
Many of the current regulatory burdens experienced by media organisations, for example, broadcasters have been built up over time for historical public policy reasons and in an environment of limited consumer choice and limited means for the distribution of information and entertainment. This has now changed and consequently, the underlying policy rationale and frameworks merit reconsideration. For example, access to spectrum was conditioned on local content requirements with the goal of achieving investment in Australian content and promoting Australian voices.

Some of the complexities which should be taken into account are:

- **Advertising:** We agree with the proposition that there should be consistent advertising restrictions, but this is necessarily conditional on technical limitations that apply to different platforms, particularly where there are multiple different publishers on some platforms.

  Our Advertising Policies already provide guidance on what types of ad content are allowed on Facebook, and align with many of the broad objectives of advertising regulation in Australia. For instance, our policies require the advertisement of certain products (such as alcohol, gambling and financial and insurance products and services) to be appropriately age targeted. Additionally, our Advertising Policies do not permit ads which constitute, facilitate, or promote illegal products, services or activities. Where advertisements are targeted at minors, our policies state that they must not promote products, services, or content that are inappropriate, illegal, or unsafe, or that exploit, mislead, or exert undue pressure on the age groups targeted.

  However, the Final Report has also not addressed the inherent contradiction in limiting targeted advertising but requiring consistent advertising restrictions. To implement this in the context of a social media platform would require significantly increased targeted advertising capabilities. If Facebook is to be in a position not to display certain advertisements – e.g. for alcohol or unhealthy food – to a specific subset of its audience, then it must have accurate ad targeting ability for that audience segment.

  Moreover, given the differences in the nature of platforms and current advertising restrictions on other forms of media, we are concerned that a blanket unified set of regulations for all platforms may not be fully workable. For example, time-based restrictions on when certain advertisements may be shown, or requirements as to the
location and placement of that advertising relative to other content, may not be technically feasible to control for a platform that may be accessed by users at any time.

- **Local and Australian content**: consideration of how local content obligations can apply in a harmonised media regulatory framework needs to consider the very significant differences in how content is shared via digital platforms.

Facebook generally does not select the content that is uploaded to its platform, and in limited cases where it does contribute to available content it does not control what content its users see or access. In fact, of the content that Facebook Australia funds, 100 per cent is Australian content.\(^{114}\)

The people who use our services exercise control over content they access on the Facebook platform, presented with a personalised range of content, by choosing which other users to follow and which Facebook Pages to visit. People choose whether to follow other Australian users or Pages, and those people who choose to do so on Facebook are inherently more likely to be exposed to Australian content. Equally, users who choose to follow people or Pages based in other locations are more likely to be exposed to international content. The Facebook platform facilitates the free promotion and distribution of Australian content and is used by numerous Australian content creators for this purpose.

- **Content standards**: we manage content on our services consistent with our Community Standards ([https://facebook.com/communitystandards](https://facebook.com/communitystandards)). We use a combination of user reporting and proactive identification and removal of harmful content, which we provide more details about in our Community Standards Enforcement Report ([https://transparency.facebook.com/community-standards-enforcement](https://transparency.facebook.com/community-standards-enforcement)). That said, the current classification system could be modernised to be more effective in a digital age and further conversations are needed to identify how Australian community standards can be met whilst acknowledging the practical challenges of seeking to apply classification categories to content shared by millions of people.

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The role of digital platforms such as Facebook, which provides a distribution platform for content chosen by others, should not be wholesale compared with traditional media providers, which are responsible for actively choosing the content they distribute and, therefore, are able to exercise greater control over the nature of that content.
Recommendation 7: Designated digital platforms to provide codes of conduct to ACMA governing their relationships with media businesses

We welcome the ACCC’s call for new regulatory frameworks that hold all digital platforms to account in relation to the distribution of digital news. We support in principle the recommendation to develop a code of conduct to address concerns about the role that digital platforms play in the distribution of news online (a Digital News Distributor Code). A code should cover all platforms that people use in order to consume news, including social media services, search engines, app stores, and news aggregators. The code might include commitments to publish information about the values and factors that inform the news content that people see, as well as procedures for providing notice about significant changes to algorithms or product features. The development of any code should be undertaken separately by each digital platform.

However, we disagree with the finding in the Final Report that there is an imbalance of bargaining power between media publishers and Facebook that requires the Australian Government to interfere in the commercial arrangement between large companies such as News Corp, Nine Entertainment Co, Seven West Media, etc, and digital platforms like Facebook, all of whom are competitors for advertising revenue.

We are concerned that the Final Report misdiagnoses the problem that the code of conduct is seeking to address. This mischaracterisation has come about: (1) due to an inaccurate conflation of the services, products and tools that Facebook and Google provide; and (2) factual errors in the Final Report’s consideration of the terms on which Facebook and media publishers currently engage. These inaccuracies have formed the basis for the characterisation of the relationship between Facebook and media publishers as being unfair or imbalanced.

Lack of evidence of imbalance of bargaining power or unreasonable commercial terms between Facebook and publishers

The foundational basis for this Recommendation is not consistent with the commercial environment in which we operate. It ignores the reality that some media businesses are among the most influential and powerful companies in the world.
The news media industry is undoubtedly undergoing significant change and challenges (and this has been the case for the past 15-20 years). However, the findings in the Final Report fail to accurately reflect the significant power and influence held by many media companies in Australia. Companies such as News Corp and Nine Entertainment Co—with their stable of news print, television, radio and digital properties—are among the most powerful companies in Australia, with significant political, commercial and public influence, and have a clear ability to negotiate commercial arrangements to their benefit. Media organisations also have substantial audiences and reach, News Corp, for example, has a monthly audience that matches, if not exceeds, Facebook’s reach in Australia.\footnote{\textsuperscript{115}Facebook’s reach in Australia—16 million monthly active users as of the end of 2018—is matched by News Corp Australia: “Each month, more than 16 million Australians consume news and information across News Corp Australia’s suite of products.” https://newscorp.com/business/news-corp-australia/}

As set out in the report provided to the ACCC by Professor Terry Flew,\footnote{\textsuperscript{116}Professor Terry Flew, Dr Fiona Suwana and Dr Lisa Tam, “Digital Platforms and Australian News Media: Report”, provided to the ACCC with Facebook’s response to the Issues Paper in April 2018.} the Australian news media has historically been amongst the most concentrated in the world. In a 28-country study, Noam\footnote{\textsuperscript{117}Noam, E. M. and the International Media Concentration Collaboration (2016). “Who Owns the World’s Media? Media Concentration and Ownership around the World”. New York: Oxford University Press.} identified the Australian newspaper industry as having the second highest level of ownership concentration after China, and the lowest number of net news voices (i.e. number of news providers with >1 per cent of audience share) of the countries surveyed, excluding China.

Digital platforms, like Facebook, have significantly reduced barriers to entry and to the distribution of news, so that consumers can now access a much wider range of content—from overseas publishers to smaller local publishers and citizen journalists who could not previously have accessed a sustainable audience.

Consequently, we disagree that any code of conduct should be a “bargaining code” that effectively involves government intervention in the commercial relationships—and the negotiation of commercial arrangements—between digital platforms such as Facebook and media companies that compete with us for advertising revenue.

Rather than proposing government intervention to protect news media businesses in their negotiations with digital platforms (without any evidence of market failure), any code of conduct should focus first and foremost on consumers, and seek to address, through commitments to the Australian public, any adverse impacts arising from the use or misuse of digital platforms for the distribution of news. Implementation of a “bargaining code” that contains revenue sharing and
data sharing obligations, as reported in the media and confirmed by ACCC Chair Rod Sims, would unfairly shelter media companies from the competitive process whilst simultaneously the Government is aiming to harmonise media regulation by implementing the other recommendations of the Final Report.

In addition, the factual record does not support the findings in the Final Report that we have substantial bargaining power in our dealings with news media businesses and that there is an “imbalance of bargaining power” that requires regulatory intervention.

There are three key areas that require correction in the Final Report. First, the extent of referral traffic that Facebook provides, particularly when taken in context of overall traffic and monetisation opportunities for Australian publishers is small. Second, the current terms on which Facebook engages with Australian publishers are favourable to publishers. And third, the evidence contained within the Final Report itself that confirms that Facebook is not an essential channel.

The basis for making Recommendation 7 also reflects the worrying trend that appears throughout the Final Report of conflating Facebook with Google.

Taking each of these errors in turn:

- Even by the Final Report’s own calculations, Facebook accounts for only a small proportion of news referral traffic. The Final Report makes several significant errors to support its claim that Facebook is a “an essential gateway for news for many consumers.” To support its assertion, the Final Report mischaracterises the findings of the Digital News Report, published by the University of Canberra, in the following ways:
  - Conflating “social media” solely with Facebook: The Final Report misstates the findings of the Digital News Report. The latter finds that 36% of the number of people who say they use social media for news do so via Facebook but importantly, this is 36% of the 46% who say that they use social media to access news. This means that the Digital News Report finds that only 16% percent of consumers use Facebook for news. Further, the Final Report states that a higher proportion of younger generations use Facebook for news. But when the actual primary data of their primary reference is cited -- the Digital News Report -- it finds that 46% of Gen Z and Y cite Facebook as the social media platform for news, but this is of only 47% of Gen Z and Y who use social media platforms for news, which means only 21% of Gen Z and Y use Facebook for news. Neither 16% nor 21% are significant proportions, particularly considering the many other ways in which Australians access news.
○ **Overlooking the many other digital platforms cited as sources for online news:** the Final Report fails to unpack the *Digital News Report*’s definition of social media which includes YouTube (owned by Google), Twitter, Snapchat and LinkedIn. Indeed, the *Digital News Report* finds that while the use of Facebook to access the news has decreased, the use of “aggregated news services” including Google News, Apple News and Snapchat Discover is on the rise, with Apple News having the most growth.\(^{118}\)

○ **Overlooking the importance of non-social media traffic referrals:** the Final Report makes clear, based on data provided to the ACCC, more consumers access news publisher websites directly (44%) than through Facebook (18%).\(^{119}\) Access via Facebook is also considerably less than Google (32%). Facebook accounts for only 12% of referrals to print/online and online-only news websites and publisher apps, and only 20% of referrals to television news websites. On its face, this data does not suggest any material imbalance in bargaining power.

Our competitors have made claims about how essential Facebook is as a distribution channel, however, the evidence suggests otherwise.

- **Even if Australians access news via Facebook, the current terms on which Facebook negotiates are favourable to publishers:** the evidence presented and relied upon in the Final Report confirms that Facebook is not a major source of referral traffic for media companies in Australia. In any event, the fact that some Australians do access news on Facebook, has not resulted in an inequality of bargaining power or unreasonable commercial terms. On Facebook, publishers choose: (i) how they want to take advantage of free distribution, from which they obtain data about the performance of their content and demographics of their audience; (ii) whether to adopt the customised, revenue-generating tools that we have developed to assist them to monetise their content on our services (from which they obtain data about the performance of their content and demographics of their audience); and, (iii) we are investing in the skills and content innovation to support a strong Australian news ecosystem, including paying publishers to create content for our platform, that can lead to greater successful engagement online with audiences in meaningful ways. This is hardly the behaviour of an essential gateway that is indifferent to the requests of media organisations. Specifically:

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\(^{118}\) Final Report, page 30.

○ **Publishers control whether and how their content is accessed on Facebook.** As set out in our response to the Preliminary Report, publishers control whether and how their content is accessed on Facebook through the choice of publishers and by users. Publishers choose what content to make available on Facebook—if any at all. Publishers also choose what format to use (e.g. a link post, photo or video post, or Instant Articles). We do not require, and have never required, news media creators to give people any amount of free access to content, even when news content is shared through Facebook. For example, if a publisher has chosen to put an article behind a paywall, then anyone clicking on a link to that article would hit the paywall.

Clearly, some publishers have developed their businesses so that they distribute their content (for free) to a greater extent than others via Facebook. The extent to which distribution on Facebook is important depends on the strategic and business model choices for each publisher (which provides further evidence of the non-vital nature of our services).

Moreover, the free distribution available on Facebook can benefit publishers in ways that make them want to be referable by Facebook (e.g. because our platform is a good way for friends to share links to content with each other). As set out in the expert economic report prepared by Professor Catherine Tucker referrals expand the publisher’s audience and refer people that would not have otherwise visited the publisher’s websites or seen the publisher’s content.

● **We have developed products to share revenue with publishers:** these include: (i) Instant Articles that allow publishers to serve their own advertising and publishers retain 100% of the revenue; (ii) Advertising solutions, including Audience Network, that help publishers monetise their content through effective targeting, and ad breaks that allow publishers to earn money from their video content. We note that the claim on Page 220 that Facebook takes 55% of the revenue from ad breaks

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121 We note that Mumbrella recently ceased having a presence on Facebook.
122 Instant Articles is a voluntary format that publishers can opt-in to. The use of Instant Articles does not affect the placement of a media business’s news content in News Feed. The lack of take-up of Instant Articles in Australia is itself illustrative that publishers, not Facebook, decide how they would like to distribute their content.
123 See the expert report prepared by Professor Catherine Tucker dated 24 April 2019.
124 See “Publishers chafe at Apple’s news service conditions”, The Australian, 14 February 2019. See also the ACCC’s Final Report, page 223.
125 See “Publishers chafe at Apple’s news service conditions”, The Australian, 14 February 2019. See also the ACCC’s Final Report, page 223.
leaving publishers only 45% is wrong. Publishers take 55% and Facebook receives 45%. (iii) In addition, we responded to publisher feedback and introduced new products to support publishers in collecting subscriptions through Facebook. Publishers own the relationship with the subscriber, collect the payment, and keep 100% of the subscription revenues. These customised products are beneficial to both publishers and users; they deliver revenue to publishers, which allows them to continue to publish important, timely and accurate news on Facebook. This is in addition to the investment that we are making in the Australian news ecosystem, which are detailed in our response to Recommendations 9-12.

- **Media businesses already receive data through their use of tools on Facebook:** at each stage of their engagement and use of Facebook’s tools, media businesses have the benefit of data about the audience for -- and performance of -- their content. As with all of Facebook’s data products, no personally identifiable information is shared with third parties, including publishers. When using Facebook Pages, publishers receive detailed insights about the performance of their content, the nature of interactions on their content, demographics of the audience on their Page, and referral traffic sources. When using Instant Articles publishers receive information on article reach and engagement, time spent in each article, scroll depth and engagement with rich media assets such as photos and videos. Facebook also provides access to Monetisation Manager, which details revenue performance on the apps, websites or Instant Articles that are being monetised with Audience Network. Using this tool, publishers can analyse by property, platform, country and display format across parameters such as estimated revenue, eCPM, clicks, fill rate and ad requests. For video publishers, Creator Studio provides analytics on performance and earning potential, including:
  - Ad breaks metrics such as estimated earnings, monetisable view RPM (this is the money earned for every 1000 1-minute or longer view of videos with ad breaks), and ad cost per mille (CPM).
  - Performance insights such as 1-minute video views, total minutes viewed, engagement and net followers.
  - Loyalty metrics such as returning viewers and length of viewing time.
  - Audience insights such as age and gender, country, language and interests.
In addition, the subscriptions product that we have built into Instant Articles, connects publishers with their customers directly so that they can receive all relevant data and build a meaningful relationship.

- **Even by the Final Report’s own findings, there is no imbalance of bargaining power:**

  The finding of substantial bargaining power is also not supported by the examples contained in the Final Report. The Final Report cites six examples of an imbalance of bargaining power (page 227), the majority of which do not relate to Facebook. The Final Report acknowledges as much stating: “stakeholder submissions cited more examples in relation to Google, rather than Facebook. This may reflect the fact that Google is a larger source of referral traffic for media businesses than Facebook.” In addition, the Final Report notes that publishers have chosen not to use some of our products such as Instant Articles, noting that this confirms it is not a “must have product”.

  The Final Report inaccurately claims that referral traffic from Facebook is essential for “a number of media businesses”. In fact, we have built customised tools and invested in content production with Australian media businesses *precisely because* the consistent feedback from media publishers is that referral traffic alone is not useful. This, for example, is what has driven the development of our subscriptions product -- which reduces the friction to allow media organisations to directly engage with paying customers on Facebook and build a relationship with them directly, with the resultant flow of revenue and data that results from signing on new subscribers.

**Greater algorithmic transparency**

We understand that there is growing public interest in the use of algorithms by industry and governments generally, one element of which is the role they play in distributing online news. It is important to provide algorithmic transparency and address concerns as to whether this is unduly interfering with the public’s interest in receiving news and information online. This is why we have been developing tools to promote greater algorithmic transparency such as the “Why Am I Seeing This Post?” feature.\(^{126}\)

On each post that a person sees in New Feed, they now have the option to select the option “Why am I seeing this post?” to better understand and more easily control what they are seeing from friends, Pages and Groups in their News Feed. “Why am I seeing this post?” can be found in the

drop down menu in the right hand corner of a post and explains how a person’s past interactions impact the ranking of posts in their News Feed. Specifically, you can see:

- Why you’re seeing a certain post in your News Feed — for example, if the post is from a friend you made, a Group you joined, or a Page you followed.
- What information generally has the largest influence over the order of posts, including: (a) how often you interact with posts from people, Pages or Groups; (b) how often you interact with a specific type of post, for example, videos, photos or links; and (c) the popularity of the posts shared by the people, Pages and Groups you follow.
- Shortcuts to controls, such as See First, Unfollow, News Feed Preferences and Privacy Shortcuts, to help you personalise your News Feed.

Digital News Distributor code

To address concerns about the role that digital platforms play in the distribution of news online, we propose that we work together to develop a digital news distributor code of practice that provides transparency and accountability to the Australian public about how people can consume and share news online. To ensure a focus on public interest news and user experience, the code should be between users and digital services that play a role in news.

We propose that the code contains three key components:

- **Principles** to guide digital platforms for news distribution in surfacing news that meet the interests of users.
- **Complaint adjudication** to ensure that digital news distributors are held accountable to the commitments they make to the people who use their services.
- **Transparency** to regularly provide the public with information about industry trends and adherence to these principles across industry.
Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms

Facebook supports in principle initiatives aimed at supporting a streamlined approach to copyright, with appropriate apportionment of obligations as between rights holders and digital platforms, such as the expansion of the safe harbour regime under Division 2AA of Part V of the Copyright Act 1968 (Cth) to online services. However, Facebook does not support Recommendation 8, which seeks to establish a mandatory code to govern the notice-and-takedown regime for copyright infringements, in its current form.\(^\text{127}\)

Unfortunately, in reaching this Recommendation, the Final Report incorrectly concludes, based in principal part on misconceptions of industry practice, that digital platforms lack incentives to timely act on reports of copyright infringement and that this contributes to Australian rights holders facing challenges in enforcing their copyrights on digital platforms. The resulting recommendation that a mandatory code of conduct be implemented, to require platforms to ensure the timely removal of copyright infringement, fails to recognise the already-existing heavy investments that Facebook and other platforms have made in helping rights holders protect their intellectual property. The Final Report mischaracterises or ignores the many measures Facebook has put in place, and the close partnerships it maintains with rights holders, to combat infringement.

In addition, the Recommendation appears to sidestep the appropriate process for addressing the notice-and-takedown regime for digital platforms: the extension of the safe harbour regime under Division 2AA of Part V of the Copyright Act 1968 (Cth) to online services. The long history and engagement on this solution, including in principle support from the Government as recently as 2017, strongly suggest that extension of the safe harbour scheme is the appropriate mechanism for implementing a notice-and-takedown regime for copyright in Australia. There is no proven need for a separate approach to be taken with respect to digital platforms, and further engagement on this point should be accomplished through the fulsome legislative process, rather than a separate mandatory code of conduct as recommended in the Final Report.

\(^{127}\) Final Report at 32 and 274.
The Final Report’s Key Findings do not accurately reflect Facebook’s strong incentive and commitment to prevent copyright infringement

Recommendation 8 is based on a number of purported findings, including in particular: 128

- claimed challenges faced by rights holders in enforcing copyright against digital platforms; and
- related findings that the ambiguity in applicable law results in low incentives to respond promptly to takedown notices.

These findings fail to accurately capture Facebook’s established and continuing commitment to protecting intellectual property. In fact, Facebook’s philosophy, policies and procedures with respect to IP infringement on its services are fully aligned with rights holders: we have no tolerance for it.

As set out in some detail in Facebook’s second submission to the ACCC’s Preliminary Report titled “Facebook and IP Protection - Response to issues raised in the Preliminary Report” dated 17 April 2019 (IP Submission) 129, Facebook takes its obligations under Australian copyright law extremely seriously and has collaborated widely and deeply with rights holders, governments and other stakeholders to develop and continually refine its industry-leading notice-and-takedown and IP protection tools. Accordingly, Facebook has invested heavily in people, tools and technology to effectively assist rights holders to protect their copyrights at scale, leading to prompt removal of infringing content upon report from a rights holder, and sometimes without requiring a report at all.

The Final Report fails to acknowledge these measures, and instead criticises Facebook to the effect that:

- the use of a designated agent in the United States (one channel through which rights holders may submit copyright infringement notices) can lead to significant delays for Australian rights holders; 130
- this can cause harm during live broadcasts such as sporting events; 131 and
- digital platforms should be required to have channels, contacts and processes dedicated to ensuring the timely consideration of Australian content. 132

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128 Ibid at 263.
130 Final Report, page 266 and 267.
131 Ibid at 266.
132 Ibid at 267.
Simply put, these criticisms, and the additional miscellaneous criticisms and misconceptions underlying Recommendation 8, are not accurate and do not fairly depict Facebook’s current measures or its ongoing commitment to protecting IP on its platform. We address several of the Final Report’s mischaracterisations of Facebook’s practices below:

Adequacy of existing processes and turnaround times

In the first instance, Facebook’s IP Operations team, together with the other teams who support Facebook’s IP protection work, currently comprises more than 270 individuals based around the world, in North America, Europe and Asia. Several other Facebook teams have global teams dedicated exclusively or principally to IP protection, including Engineering, Product, Legal and Policy. Contrary to the Final Report’s suggestion, simply because Facebook’s headquarters are in the US, its IP protection measures are not limited to US business hours. Rather, all reports, including those submitted to Facebook’s designated email address, are processed by its global IP Operations team – who provide 24/7 coverage globally every day of the year.

Facebook’s data illustratively shows that during the second half of 2018, Facebook received more than 4,000 copyright reports from Australian content owners, through both its online reporting forms and through manual reports via Rights Manager, removing more than 8,700 pieces of content as a result. The overall median turnaround time for these Australian copyright reports was just over 7 hours; notably, the turnaround time for reports through Rights Manager and of Live content was each approximately 3 minutes. And these figures refer only to content that rights holders chose to report for takedown; they do not reflect any content that rights holders elected to automatically block from within Rights Manager (which is further described below).

The Final Report also highlights the importance of prompt measures to remove infringing content during certain high-profile and time-sensitive broadcast events. Facebook shares this view, and for that reason has put measures in place to address special events in a timely manner. Specifically, Facebook partners with rights holders during sensitive and high-touch events, including live sports coverage and other live broadcasts, to ensure timely removal of infringing content during the day of the event. Facebook has partnered with a variety of Australian rights holders for special event support, including major Australian broadcasters and sports entities. For such events, Facebook’s internal teams provide appropriate support and staffing during the day(s) of the event, and Facebook’s turnaround time for special events reports is on average less than five minutes.
Claimed inconsistencies in takedown decisions

The ACCC acknowledges the complexities that can arise in determining whether copyright infringement has occurred, including questions such as whether copyright subsists in the original work, whether a substantial part of the original work has been reproduced, and whether any relevant exceptions or defences apply (for example fair dealing exceptions). However, at the same time, the Final Report does not appear to reflect the fact that there could be legitimate reasons why a particular report may not proceed to takedown.

As Facebook has previously outlined, it will promptly take action on copyright reports that are prima facie complete and valid. For the period July through December 2018, Facebook’s data shows that the action rate on copyright reports from Australian rights holders was approximately 64 per cent. Where content was not removed, this means that either:

- the IP Operations team determined that the report lacked information needed to support the rights holder’s claim; or
- the IP Operations team determined that a valid claim of copyright infringement was not made out, for instance due to the application of a fair dealing or other exceptions to copyright infringement.

As acknowledged by the ACCC, these are not straightforward considerations.

Access to rights management tools

The ACCC suggests that available tools are not providing assistance to rights holders of different sizes due to the application of selection criteria when granting access and adds in this regard that Facebook’s “Rights Manager is ... limited to eligible rights holders who submit a successful application to use this tool.” In response, it is important to note that Facebook maintains eligibility criteria to ensure that Rights Manager is provided to content owners who have demonstrated a need to protect their video content at scale, and to ensure that the powerful feature capabilities of Rights Manager are not provided to entities that may misuse the tool. Indeed, this approach is for the benefit of Australian rights holders who do have valid copyrights.

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133 Ibid at 260 and 261.
134 This action rate figure constitutes the percentage of copyright reports that resulted in some or all reported content being removed. While a single report can identify a single piece of infringing content or multiple pieces, the action rate noted above covers all reports for which at least one piece of content was removed. The amount of content actioned reflects the total amount of content that was removed based on a copyright report from an Australian rights holder. This can include different types of content, from individual posts, photos, videos or advertisements, to profiles, pages, groups and events.
It is also not correct for the Final Report to assert that Rights Manager is only provided to large-scale rights holders. To the contrary, there are versions of Rights Manager aimed at both content creators with a large body of work requiring management at scale as well as smaller online content creators. Tools are therefore provided to rights holders of different sizes, with Rights Manager for Creators specifically designed for smaller content creators to best suit their needs.

Lastly, the Final Report notes a submission from Free TV that “the process of engaging with Google and Facebook staff to access their rights management tools can take up to four weeks.” While Facebook would certainly look into any specific case of unusual delay if brought to its attention, Facebook’s data shows that the average turnaround time for Rights Manager applications is less than 2.5 days.

Requirements to issue individual notices

The Final Report makes several references to rights holders’ burdens, such as needing to “issue individual notices for each infringing act,” which the Final Report sources from “rights holders’ submissions” to this effect. It is incorrect that Facebook requires rights holders to issue individual takedown notices. As clearly noted in the IP Submission, Facebook’s reporting channels allow for the reporting of multiple infringements in a single report. While best practice may weigh in favour of limiting reports to batches of content both for operational and technological efficiency, rights holders may issue takedown notices for multiple infringements within a single report, as shown in figure 1 below.

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136 Ibid at 265
137 Ibid at 265
138 Ibid at 266, including submissions from Foxtel & Fox Sports. Submissions from Free TV area also referenced at 265
In addition, for larger scale content management, rights holders may report in large batches through Rights Manager, and via Rights Manager’s proactive blocking capability, they may also set automated rules so they can effectively manage their rights at scale without needing a human to review each match. There is no limit to the number of videos on which rights holders may take automated action within Rights Manager.
The data provided to the ACCC also demonstrates that individual notices for each infringing act are not required. For instance, for the period January 1, 2018 to June 30, 2018, Facebook received 1,535 reports of copyright infringement from Australian rights holders, and 5,480 pieces of content reported by Australian rights holders were removed in response to these reports.\textsuperscript{139} As shown in Facebook’s Intellectual Property Transparency Report,\textsuperscript{140} during the same period on a global basis, Facebook removed more than 2 million pieces of content in response to approximately 327,000 copyright reports. These figures show that multiple pieces of content can be identified for removal in an individual report.

Additional findings

- **Groups:** The Final Report notes a submission to the effect that there are “a number of Facebook groups set up to discuss, share and support access to copyright-infringing content.”\textsuperscript{141} This submission alleges that despite the existence of groups dedicated to sharing copyright-infringing content, rights holders are only given a narrow range of reporting options (harassment or bullying, nudity or sexual activity, spam, violence, hate speech, unauthorised sales) that do not include copyright infringement. This is incorrect. The described reporting options concern Facebook’s Community Standards or other policy violation reporting flows, not the IP reporting mechanisms. All content on Facebook can be reported for IP reasons using Facebook’s IP reporting forms or designated email address, including both individual posts, as well as entire Pages and groups if those Pages and groups are dedicated to infringement.

- **Repeat infringers:** The ACCC has raised concerns regarding “the resurfacing of the same or similar content” and concerns that repeat infringers may be kicked-off platforms but then immediately recreate new accounts.\textsuperscript{142} Facebook has several measures in place aimed at detecting new accounts created by previously-disabled users – including those disabled for IP-related reasons – and preventing them from returning to or continuing to misuse

\textsuperscript{139} This data represents our best-faith effort to measure data about Australian copyright reports submitted to Facebook. These numbers represent the total number of copyright reports submitted through Facebook’s online reporting forms for the period 1 January 2018 through 30 June 2018. These numbers exclude reports submitted through other channels (including reports emailed to ip@fb.com or sent by other means such as fax or mail), which comprise a small fraction of total reports in comparison to those submitted through our online forms. We have also excluded duplicate reports and other non-copyright reports that were filed through the copyright reporting forms. To identify claims of copyright infringement by an Australian rights holder, the data reflects reports where the reporting party indicated Australia as the country in which they are asserting rights; if no country was indicated in the reporting form, we also relied on geo-location of the reporting party, where available.

\textsuperscript{140} \url{https://transparency.facebook.com/intellectual-property}

\textsuperscript{141} Final Report, page 265.

\textsuperscript{142} Final Report at 267
the platform. Facebook is continually working on identifying new ways that bad actors try to circumvent our systems, and we update our tactics aimed at recidivism accordingly.

- **Terms of Service**: The Final Report states that while Facebook’s Terms of Service “place clear obligations on users not to infringe copyright, they do not appear to place obligations on Facebook to prevent or remove copyright-infringing content.” Facebook notes that section 1 of Facebook’s Terms of Service, titled “The services we provide,” clearly explains that appropriate action will be taken:

  We employ dedicated teams around the world and develop advanced technical systems to detect misuse of our Products, harmful conduct towards others and situations where we may be able to help support or protect our community. If we learn of content or conduct like this, we will take appropriate action – for example, offering help, removing content, removing or restricting access to certain features, disabling an account or contacting law enforcement.

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In short, the concerns expressed by Facebook to the ACCC in the IP Submission remain: the Final Report’s conclusions do not reflect the information provided by Facebook on this important topic, instead mischaracterizing our practices in this regard and adopting selected assertions made by other stakeholders, including those based on anecdotal commentary or supposition. Were the practices of Facebook and other digital platforms properly taken into account, we believe best practices can be gleaned from these various IP protection measures, which Facebook and other like-minded services have successfully implemented on a voluntary basis in recent years.

**The Final Report overlooks the long history of Australia’s Safe Harbour Scheme**

The Final Report notes potential deficiencies with existing legislative and judicial processes, including challenges of bringing copyright claims in court, such as cost and complexity. But the Final Report notably does not address in any meaningful way the existing regime for intermediary notice-and-takedown in Australia: the Safe Harbour Scheme. Had the Final Report done so, it

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143 Ibid at 265
144 [https://www.facebook.com/legal/terms](https://www.facebook.com/legal/terms)
145 See Final Report at 258 and 263.
146 Ibid at 268 to 270
would have become clear that extending that scheme to an additional class of intermediaries – like Facebook – would provide a well-established, balanced approach that takes into account the needs of rights holders, platforms, and users.

Overview and History of the Safe Harbour Scheme

The Safe Harbour Scheme provides legal protection to certain online intermediaries under Australian copyright law when undertaking certain categories of activities, in return for those intermediaries complying with specified conditions. If the conditions are met, the only remedy available against the intermediary is injunctive relief. The conditions attached to this protection include, where relevant, compliance with a notice-and-takedown process that attempts to balance the needs of not only the intermediary but also copyright owners seeking to achieve efficient removal of copyright-protected works, and users who believe they have been incorrectly identified as infringers.

The Safe Harbor Scheme, when initially enacted, applied only to “carriage service providers” – i.e., telecommunications providers. Since its enactment, there have been repeated investigations into extending the Safe Harbor Scheme to other online intermediaries, such as storage and hosting services like Facebook. Indeed, from its inception, the Safe Harbor Scheme was ripe for expansion to other online intermediaries. The Scheme was as a result of Article 17.11.29 of the Australia-United States Free Trade Agreement of 2004 (AUSFTA), which requires each party to the AUSFTA to provide, amongst other things:

- legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials; and
- limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate or direct, and that take place through systems or networks controlled or operated by them or on their behalf.

Despite AUSFTA’s initial intention, the Safe Harbor Scheme that was enacted followed a significantly narrower approach. However, the Government has actively continued to explore how to extend the Safe Harbor Scheme to other intermediaries – and importantly has reinforced that

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147 Division 2AA of Part V, Copyright Act
148 s116AG, Copyright Act
149 Part 6, Copyright Regulations 2017
150 See US Free Trade Agreement Implementation Act 2004 (Cth) and Copyright Legislation Amendment Act 2004 (Cth)
151 “Carriage service provider” is defined in the Copyright Act by reference to the Telecommunications Act 1997 (Cth). See section 87 of the Telecommunications Act for definition.
this is the appropriate and applicable regime for considering issues such as IP takedowns by platforms.

For example, in its 2009 roadmap for Australian participation in the digital economy, titled *Australia’s Digital Economy: Future Directions*, the Government indicated it would “consider whether the scope of the safe harbour scheme should be expanded to include additional types of online service providers,” noting that such an approach would be “consistent with international obligations under the AUSFTA.”\(^{153}\) Again in 2011, in the Attorney-General’s Consultation Paper titled *Revising the scope of the copyright ‘Safe Harbour Scheme’*, the Government proposed the expansion of the Safe Harbour Scheme to other service providers. In doing so, the Consultation Paper acknowledged that the Australian Safe Harbour Scheme is narrower in operation than the US, and that the change would be consistent with the AUSFTA.\(^{154}\)

In its 2014 *Online Copyright Infringement Discussion Paper*, the Government again posed the question of whether there should be an expansion of the Safe Harbour Scheme to a broader category of “service providers,”\(^{155}\) and in the Productivity Commission’s 2016 *Inquiry Report into Australia’s Intellectual Property Arrangements*, the Productivity Commission recommended (at Recommendation 19.1) that “[t]he Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.”\(^{156}\) Notably, the Government’s response to the Productivity Commission Recommendation in 2017 stated:

*The Government supports in principle this recommendation.*

*The Government recognises the limitations of the safe harbour scheme being restricted to only carriage service providers. The Government is undertaking additional consultation on the safe harbour scheme before considering whether to introduce amendments to the Parliament. This additional consultation will ensure our safe harbour scheme will encourage growth in Australia’s digital economy and ensure a thriving and vibrant creative sector, whilst respecting the interests of copyright holders.*\(^{157}\)


\(^{154}\) Attorney-General’s Department, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*, Consultation Paper, October 2011.


The Safe Harbour Scheme was incrementally extended by the *Copyright Amendment (Service Providers) Act (Cth)* 2018\(^{158}\) to other services in the disability, education, library, archive and cultural sectors. When introducing this legislation, the Government noted that it was making “this incremental expansion of the safe harbour scheme so that it can continue to consult on how best to reform the scheme to apply to other online service providers in the future,” and that:

> The Government will continue to work with stakeholders to find a way to further extend the safe harbour scheme in a way that allows Australian businesses to harness the significant opportunities of the growing digital economy while ensuring respect for the creative efforts and economic rights of creators. The Government is confident that through this staged approach it can find a way to provide a practical and responsive safe harbour framework that operates effectively in the Australian environment.\(^{159}\)

Despite these calls by the Government to expand the Safe Harbour Scheme to other online intermediaries where needed, that the ACCC’s Final Report does not analyse its applicability or proper role in the context of addressing the notice-and-takedown obligations of digital platforms. Instead, the Final Report proposes an undefined and unnecessary code for regulating notice-and-takedown procedures, despite there already being an established process for regulating such procedures regarding online intermediaries.

**Effective takedown regulation should be through an expanded Safe Harbour Scheme**

Facebook respectfully submits that extension of the Safe Harbour Scheme is the appropriate mechanism for implementing a takedown scheme in the context of online intermediary arrangements. Extending the Safe Harbour Scheme to new entities like Facebook would:

- provide rights holders with a clear and uniform way to report infringing content for removal that they are accustomed to across multiple different services;
- incentivise digital platforms to take a uniform approach to cooperating with rights holders governed by Australian law;
- balance the needs of end users, including those who believe that rights holders have incorrectly identified them as infringers;

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159 Senate Hansard, *Copyright Amendment (Service Providers) Bill 2017*, Second Reading Speech - Senator McGrath (6 December 2017 at 72-73)
clarify the legal uncertainty and increased risk undertaken by digital platforms in the absence of safe harbour protection; and

align Australia’s legislative position with its obligations under the AUSFTA and with other significant trading partners in the Asia-Pacific rim.

In sum, Facebook respectfully submits that if takedown regulation is needed, as the Final Report suggests, the existing Safe Harbour regime should be extended to cover relevant digital platform activities, and a separate overlapping regulation – a mandatory code – should not supplant that carefully-structured, balanced system. ¹⁶⁰

¹⁶⁰ To the extent legislative modifications are needed to extend the Safe Harbour scheme to services that store and host content, such as Facebook, we would welcome the opportunity to collaborate with all relevant stakeholders in that process. But any shortcomings of the current Safe Harbour scheme – which could be corrected through the legislative process – do not counsel in favour of an entirely separate approach to the same types of issues addressed in the Safe Harbour Scheme, as proposed by Recommendation 8.
Recommendation 9: Stable and adequate funding for the public broadcasters

Recommendation 10: Grants for local journalism

Recommendation 11: Tax settings to encourage philanthropic support for journalism

Facebook supports the intent of Recommendations 9-11 to ensure a strong news ecosystem in Australia. This is why we invest millions of dollars in Australia’s news industry and continue to work with local publishers to co-develop ways to better surface quality news, to support them in reaching new audiences, and to enable them to better monetise content. We have also steadily increased our investment in the creation of new content and support for and training of Australian publishers.

Contrary to the conclusions reached in the Final Report, Facebook has business incentives to partner with publishers and distributors of news and other content. It has helped a much wider range of publishers and publications to enter markets and to access and grow audiences around the world.

For those people on Facebook who choose to follow publisher Pages and to share news with their friends and family, there is a strong value placed on local journalism. In research conducted by Facebook, more than 50 per cent of people told us they wanted to see more local news and community information on the platform — more than any other type of content we asked about, including science, arts, crime and justice, politics, sports and business. The research showed that people wanted both what might be traditionally understood as local news — breaking news or information about past events such as city council meetings, crime reports and weather updates — as well as community information that could help them make plans, such as bus schedules, road closures and restaurant openings. Our investment in tools such as Today In respond to this feedback.
Facebook’s investment in news-related products

Recognising the important role that news plays in our society and the value of it to those members of the public that wish to see news on Facebook, we have been developing tools to better surface quality and relevant news on our services and we have developed products that enable publishers to better monetise their content on our services.

The Final Report frequently references the atomisation of news on services such as Facebook, with a conclusion that this has harmed both journalism and society.\(^\text{161}\) Much of our investment in news-specific products -- based on feedback from publishers -- has been designed to address this and “unflatten” News Feed (ie. making informative news from trusted sources stand out in News Feed, which is one of Facebook’s News product team’s main missions).\(^\text{162}\) Examples of products developed to better surface quality and locally relevant news includes:

- **Breaking News** tags to help people easily identify timely news or urgent stories. These have delivered a significant boost to publishers’ engagement metrics.\(^\text{163}\) Posts labelled with the Breaking News delivered a 4.9% uplift in clicks to publishers’ sites, a 6.4% boost in Likes and a 14% increase in shares.\(^\text{164}\)
- **Publisher logos on articles** to help people recognise the sources of news distributed on Facebook’s platform; and
- **Today In:**\(^\text{165}\) which aggregates local news and community information in a separate section within the Facebook app. People who live in a city where Today In is currently available can visit this section directly, and they can choose to turn on local updates to start seeing a collection of local news more regularly in their News Feed. In November 2018, we launched Today In into 10 Australian cities, the first expansion outside the US: Ballarat, Bendigo, Canberra, Geelong, Gold Coast, Hobart, Newcastle, Toowoomba, Townsville and Wollongong. We’ve seen that people value Today In for helping them stay informed about what’s happening nearby, finding information that directly impacts their day, and discovering ways to support their local community through events or volunteer opportunities.

\(^{161}\) Final Report, page 295
\(^{165}\) https://www.facebook.com/FacebookANZPol/posts/2187139478279980/?__tn__=R
In addition to products that surface quality news, we have also been working to reduce the distribution of low quality news on our services through third party fact checking and context buttons. As discussed in our response to Recommendation 15, our third party fact checking program was expanded to Australia in April 2019 and in September 2018, we also announced the introduction of the Context Button in Australia, which provides people with more background information about the publishers and articles they see in News Feed so they can better decide what to read, trust, and share.\(^{166}\)

Facebook’s investment in monetisation products for publishers

Facebook offers a variety of products to help publishers monetise their content on and off the platform. We understand that it takes money to produce reliable journalism and we want to support publishers, particularly in their move to subscription-based business models. We have invested in the development of the following monetisation products for Australian publishers:

- **Instant Articles**: Instant Articles is a format for articles on Facebook that allows them to load up to 10 times faster than the mobile web. Within Instant Articles, publishers have the option to sell the ad inventory themselves through their own sales teams and keep 100% of the revenue or use Audience Network, Facebook’s programmatic advertising network. Today, Instant Articles is paying out over $1.5 million per day to publishers globally through Audience Network.

- **Subscriptions**: Last year, we began testing new ways to support publishers’ subscriptions models in Instant Articles. Based on publisher feedback, we built the product so that publishers have full control over the customer relationship, from processing the payment to keeping 100% of the revenue. The initial results are promising. In May 2018, across all publishers in the test, people who saw Instant Articles were 17% more likely to purchase a subscription directly via Facebook compared to people who saw standard mobile web articles.

- **Audience Network**: This is the ad network that Facebook runs across the mobile web and across mobile applications for third parties. Audience Network helps publishers monetise and create engaging ad experiences that are right for their readers. Through a combination

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of access to Facebook advertisers and marketing insights, publishers can drive ad revenue and sustainable value for their business, and drive better results for advertisers.

- **Ad Breaks:** Ad breaks in video has rolled out globally. It includes both mid-roll and pre-roll formats as well as image ads directly below the video – and whenever an Ad Break is shown the publisher or creator earns a share of the resulting revenue.

Facebook’s investment in news partnerships to better support publishers

To ensure we are a strong and responsive partner to Australian publishers, we have been expanding our partnerships team, funding new and innovative content optimised for mobile distribution and increasing investing in training for local journalists.

Facebook has been steadily expanding the media partnerships team, which is the main conduit for programs, product updates and feedback between the platform and media businesses. Since November, 2017, the team in Sydney has expanded from one to five people, while the wider Asia-Pacific team -- which assists Australian publishers with technical, product and sales support -- has trebled in size. This has directly benefited Australian media businesses and news consumers as it allows for more support of Australia-focused product development as well as monetisation programs such as our reader-revenue accelerator, outlined further below.

We also recently announced a new investment in news video deals signed in recent months with a range of broadcasters and publishers including Seven West Media, News Corp, Nine Entertainment Co., the Ten Network, SBS, and Junkee Media.

The partnerships include funding to support the creation of exclusive news content for Facebook as well as the publication of non-exclusive video clips of linear television output with the goal of bringing relevant and timely news video to the Facebook audience. Our publisher partners have full editorial control and collaborate with Facebook to understand which stories, topics and formats are resonating with audiences. We pay our publisher partners a minimum guarantee against advertising revenue share. They are also free to publish the video clips on other platforms, including YouTube and their own websites and of course the publishers retain 100 per cent of the revenue from those channels.
This builds on our investment announced earlier in the year in a partnership with both the Walkley Foundation and the Alliance for Journalist Freedom. Through the Walkley Foundation, we will deliver a reader-revenue accelerator -- a two-part program, kicking off in September 2019, designed to support publishers as they pursue more direct reader revenue (subscriptions, memberships and donations). The accelerator is launching in Australia after partner feedback that reader revenue is an increasingly important source of revenue as digital advertising yields and sell-through rates continue to decline.

Rural and regional publishers will take part in the program which will be administered by the Walkley Foundation in two stages:

- **Stage 1:** 12-week curriculum of coaching and sharing of best practices from global leaders in reader revenue strategies and tactics, with three face-to-face meetings at our Sydney offices. We cover all accommodation and travel costs.
- **Stage 2:** A project phase in which we fund publishers to run a project or prototype to boost paid subscriptions or memberships.

Recommendation 12: Improving digital media literacy in the community

Recommendation 13: Digital media literacy in schools

We support the recommendations in the Final Report to improve digital media literacy in schools and communities around Australia. We are happy to assist and work with educators, community groups and other key stakeholders.

Digital literacy is a shared responsibility for publishers, platforms, educational institutions, civil society and the government as we collectively seek to help young people and communities think critically and share thoughtfully online.

To effectively and efficiently deliver a multi-institutional digital literacy strategy, we recommend that the guardianship of this recommendation should reside with the regulator that maintains the code of conduct. They will have a greater level of expertise about the organisations that should be involved and the solutions required to deliver impact across the country.

Facebook has been investing in digital skills and literacy training for more than a decade, starting with safety and well-being programs and evolving to digital citizenship, media literacy and critical online thinking.

We adopt a three-part approach to building digital literacy and informed communities:

1. **Working with publishers and other experts** to identify ways to help people be more discerning consumers of digital information;
2. **Building tools and products** to inform people about what they are seeing online;
3. **Investing in education programs** and co-developing resources to equip educators with teaching plans focused on digital citizenship and information literacy.

Working with publishers and other experts to identify opportunities to build news literacy

To leverage the insights and expertise of publishers, academics and other experts, we host an APAC News Literacy Summit. Last year, we partnered with the University of Technology Sydney to bring Facebook’s Asia-Pacific News Working Group to Australia. The 2018 Summit was attended by
40 experts from Asia Pacific’s newsrooms, including all major Australia publishers as well as education institutions and third-party fact checking organisations to discuss and identify initiatives that will help people be more discerning consumers, creators and sharers of media.

The discussions focused on third-party fact checking, community partnerships to encourage consumer literacy, ensuring editorial independence and the online safety of journalists. The cross-industry group identified the challenges of building the skills and capacity of the region’s emerging and established newsrooms and the need to support trusted news sources in the region.

The Summit also heard from our inaugural APAC News Literacy Grant recipients, including:

- The University of Melbourne’s *The Future Newsroom Report* by University of Melbourne, which identified key challenges to the news industry and discussed changes in professional journalism and new business models.
- The Splice Newsroom, which shared how it has built a sustainable media business that captures Asia Pacific’s best practices in newsrooms, case studies, talent profiles, training and media entrepreneurship in the evolution of media.
- Taiwan Media Watch, a dedicated non-profit media monitoring organization that has developed a ranking system - based on two years of research - that evaluates stories on informativeness and accuracy.
- The University of Technology Sydney’s School of Communication research into “Falling in love again – what will it take for audiences to trust newsmakers again?” which examined how do Australians use news media and how they trust and relate to news media, as well as how this could be strengthened.

The Asia-Pacific News Literacy Working Group continues to work to ensure we are able to support news literacy in Australia, and remain focused on building news literacy programs that ensure people gain the necessary skills and knowledge to consume, create and share media responsibly.

Building tools and products to inform people about what they are seeing online

We want to empower people to identify misleading news content when they encounter it — on any platform. To help people make informed decisions about what to read, trust and share, we’re investing in news literacy and building products that give people more information directly in News Feed.

For example, last year, we launched the Context Button — a feature which gives people more information about the publishers and articles they see, such as the publisher’s Wikipedia entry.
Another feature, called Related Articles, displays articles from third-party fact-checkers — including from our Australian fact-checkers, Australian Associated Press and Agence France-Presse — immediately below a story on the same topic. If a fact-checker has rated a story as false, we let people who try to share the story know that there is more reporting on the subject. We will also notify people who previously shared the story on Facebook.

We have also created an educational tool to give people tips to identify false news and co-founded and funded the News Integrity Initiative at the CUNY Graduate School of Journalism, which brings together a diverse new network of partners to research news literacy.

We invest in education programs focused on digital citizenship and information literacy.

Over the past two years, Facebook has launched the Digital Literacy Library and We Think Digital — focused on empowering students, educators and communities with online resources, tutorials and lesson plans to help build digital capacity.

Digital Literacy Library

Last year, Facebook launched the Digital Literacy Library, an educational program designed to improve the digital literacy of young people, which we plan to expand through our collaboration with related organization, CDL (Center for Digital Literacy).

The Digital Literacy Library is an online educational content archive designed to encourage young people to consume useful content and cultivate proper communication skills in a digital environment. The primary objective of opening this library is to support young people to thoughtfully deep dive into the landscape of digital media, to share online/digital content more cautiously, and to assist other educational activities to guide them to build relationships and communicate with others online.

Developed based on 10 years of Harvard University academic research in partnership with the Youth and Media team at Berkman Klein Center for Internet & Society at Harvard University, the Digital Literacy Library incorporates voices of young people from diverse socioeconomic backgrounds, ethnicity, geographies and educational levels. It addresses 18 different thematic areas that comprehensively cover important subjects including content sharing, information literacy, communication with others, security and other important topics. The Digital Literacy Library provides high-quality educational content that helps young Australians think about themselves as
digital citizens and their experience online, in the form of various discussion and assignment-based teaching.

The Digital Literacy Library has proven to be a useful archive leveraged by youth to build the skills they need to enjoy digital technology and appropriately interact with others in a digital environment.

We Think Digital
This year, we launched We Think Digital, an online education portal with interactive tutorials aimed at helping people think critically and share thoughtfully online. We designed the program in partnership with experts from across the Asia-Pacific region, and aim to train 1 million people across 8 countries in the Asia-Pacific (including Australia) by 2020, with our resources available in 6 different languages.

*We Think Digital* has been designed for new and existing internet users of all ages in schools and communities around the world to build the skills they need to safely enjoy digital technology, including critical thinking and empathy.

We’ve developed a series of online tutorials in collaboration with journalist Saffron Howden and with support from TJ Agultz from AHA Behavioral Design; Associate Professor Michael Dezuanni from the Queensland University of Technology; Professor Katherine Chen from National Chengchi University; Chairman Wayne Chau of the Agent of Change Foundation; Executive Director Hamish Curry of the Asia Education Foundation; and Dr Damien Spry, Lecturer of Media & Communications at the University of South Australia and Visiting Fellow at Queensland University of Technology’s Digital Media Research Centre. These academics and representatives from NGOs and civil society organizations across the region all came together to address the question: what does it mean to be a Digital Citizen?

The topics we cover in We Think Digital include privacy, safety, security, digital discourse and knowing your digital footprint. The four modules are:

- **What Is the Internet?** An explanation of the internet and social media, how they work, and the importance of digital citizenship.
- **Your Digital Footprint:** All you need to know about safety and security online and managing your digital footprint.
- **Be a Critical Thinker:** Helping you to discern different types of information and develop critical thinking and empathy when communicating online.
- **You as a Digital Citizen:** Insights into digital discourse and the differences between interacting online versus offline, your rights and responsibilities, as well as internet concepts like netiquette, being a creator, copyright and plagiarism.

We have launched this program in Singapore, and are currently rolling it out across a number of countries in the Asia-Pacific. We are also forming a regional Steering Committee, whose role will be to advise Facebook on how to ensure *We Think Digital* can bring the most value to the community.

We are only at the beginning of our work to promote digital literacy in Australia, and we look forward to working with Government, publishers, academics and educational institutions across the region to build a more informed community, leveraging our existing work and extending them as needed to further support the implementation of this recommendation.
Recommendation 14: Monitoring efforts of digital platforms to implement credibility signalling

We **support in principle** the recommendation for deeper engagement between Facebook and the ACMA on the work we are undertaking on reliability, trustworthiness and news source signals. We are concerned that the Final Report has recommended new regulatory powers with neither consideration of whether they are needed and does not share any insight as to the standard against which we will be measured. These are important considerations which raise key questions for society—for example, how will the ACMA assess, using internal data from Facebook, whether our efforts “to enable users to identify the reliability, trustworthiness and source of news content featured on their services” are successful. Doesn’t it require the government to define what reliable and trustworthy news is?

The initiatives that we are undertaking to address concerns around reliability, trustworthiness and news source signals (first discussed under Recommendations 12 and 13) include:

- **Fact-checking**: in Australia and in other countries around the world, we are working with third-party fact-checkers certified through a non-partisan International Fact-Checking Network to review news stories, check their facts, and rate their accuracy. When a fact-checker rates a story as false, we show it lower in News Feed, significantly reducing its distribution. We’re also showing Related Articles from fact-checkers globally where there’s an available reference article from a fact-checker in that country’s language.

- **Context button**: to further help people evaluate the credibility of an article, we provide a button on each piece of linked news content that displays more context about the article’s source, such as the publisher’s Wikipedia entry and where the article is being shared. We recently expanded this tool to indicate if a Page has a history of sharing misinformation, as well as “Trust Indicators,” which are publisher-provided links to a publication’s fact-checking principles, code of ethics, corrections policy, ownership/funding, and editorial team.

- **Updates to Page Quality Tab**: To better inform Page managers about our policies around repeatedly sharing misinformation, we’ve added information about a Page’s misinformation violations to the Page Quality tab. If a Page has repeatedly published misinformation, we apply a demotion to all of that Page’s content on Facebook, and revoke that Page’s ability to advertise or use monetisation products. The Page Quality Tab tells Page admins whether they have repeatedly shared misinformation, or if they are at risk of reaching “repeat offender” status.
• **Breaking News** tags to help people easily identify timely news or urgent stories, which has delivered a significant boost to publishers’ engagement metrics.\(^\text{168}\) Posts labelled with the Breaking News delivered a 4.9% uplift in clicks to publishers’ sites, a 6.4% boost in Likes and a 14% increase in shares.\(^\text{169}\)

• **Publisher logos on articles** to help people recognise the sources of news distributed on Facebook’s platform.

We would caution that, in implementing credibility signaling and continuing to invest in measures to increase trust in news content, platforms should not become the arbiter of truth. Media, academics and government officials have all at times expressed to us the concern that private companies could be given so much power. We have been quick to reassure people that we do not take on that role. We also want to avoid the risk of government prescribing what news is high-quality or not. Government should not be a censor of journalism.

We have briefed the ACCC and other policy makers, including the ACMA, voluntarily about many of our efforts to unflatten News Feed and address their concerns around the atomisation of news. We have not been asked to brief them about our fact-checking initiative, even after it was launched in Australia earlier this year. We are very happy to work with the ACMA to better understand their interests, if they have any concerns and to identify how we can work together to address them.

However, in the absence of details about when and how we have not been forthcoming in sharing information about the reliability, trustworthiness and source of news content on our services, it seems premature to rush to enact new regulatory powers and recommend regulatory intervention.


Recommendation 15: Digital Platforms Code to counter disinformation

We support in principle a disinformation code to the extent that it mirrors the European Union disinformation code of practice. However, we respectfully suggest that the Australian Government should consult more widely to ensure that it fully understands this complex and important issue, before developing a prescriptive code with potential censorship implications and penalties for non-compliance. We are concerned that the Final Report does not contain an accurate or comprehensive evidence base which would suggest that there is a public policy problem necessitating a regulator-enforced code as an effective solution at this stage. More consultation is needed on issues such as misinformation, disinformation and mal-information.

The key reasons for our concern are:

- the Final Report does not accurately describe the issue nor the measures which have already been taken to address them by both Australian government agencies and industry to address disinformation;
- the ACCC did not consult on this issue and the topic was not the subject of the last 18 months’ worth of their investigation of our business, nor our briefings, nor a subject of discussions in any of the industry forums; and
- the case has not been made for regulatory intervention of the nature proposed.

The implications of a private company such as Facebook or government officials at the ACMA censoring the opinions of elected officials and the Australian public are significant. Consequently, we strongly urge the Australian Government - if it believes that this issue merits further consideration for possible regulatory action - to consult widely on this issue with industry, civil society and experts, and to undertake a review of existing government action and oversight on this issue before moving to consider regulatory solutions such as those proposed in the Final Report.

One example of the complexity surrounding this issue is evident from the recent media commentary that suggests that Facebook should have removed posts that were shared in the lead up to the election that suggested that the Australian Labor Party may introduce an inheritance tax if elected, but that we chose not to do so.\(^{170}\)

The ACCC has not sought any information from Facebook about inheritance tax-related discussions on our platform during the election, nor our approach to substantial investments to combat misinformation. Where the inheritance tax discussion related to content that had been fact checked as false\textsuperscript{17} by our third-party fact checkers, thousands of posts were subsequently demoted. However, most of the discussions about inheritance taxes on our platform during the election came from ordinary Australians expressing their opinions or from elected politicians or political parties. Facebook does not agree that it is appropriate for us to be the arbiter of truth of content shared on our services by ordinary Australians and elected officials.

This media commentary also incorrectly suggest that Facebook does not take action against misinformation on our platform. We are committed to fighting the spread of misinformation and we have adopted an approach that aims to address misinformation, while encouraging free expression (outlined in more detail below).

Furthermore, we also do not believe that the Final Report has made the case for a disinformation code enforced by the ACMA, for the following reasons.

Both Facebook and the Australian Government are already working to address concerns of disinformation and mal-information

Both Facebook and various agencies within the Australian Government are already working to address concerns of disinformation and mal-information.

At Facebook, our overall strategy for fighting misinformation can be described in three pillars:

- **Remove** content that violates our Community Standards,
- **Reduce** the distribution of misleading content, and
- **Inform** people when they do come across misleading content.

Specifically this means we take the following action:

- **Remove**: Our Community Standards, which are public and developed in consultation with experts around the world, outline what is prohibited on Facebook and Instagram. For example, hate speech, fraud, terrorism, and bullying are all prohibited. Importantly, these rules also prohibit impersonation and fake accounts, which are key vectors for

\textsuperscript{17} AFP Australia, "No, Australia’s Labor Party, the Greens and the ACTU did not sign an agreement to introduce a ‘death tax’", 30 April 2019, [https://factcheck.afp.com/no-australias-labor-party-greens-and-actu-did-not-sign-agreement-introduce-death-tax](https://factcheck.afp.com/no-australias-labor-party-greens-and-actu-did-not-sign-agreement-introduce-death-tax)
misinformation. We now disable more than a million fake accounts per day at the point of creation. By using technology like artificial intelligence, we can proactively detect more bad actors and take action more quickly. We use artificial intelligence to identify over 99.8 percent of the fake accounts we remove before they’re ever reported. Our Community Standards Enforcement Report, our voluntary quarterly reporting to enhance transparency, indicates Facebook blocked 2.2 billion accounts in the last quarter (January to March 2019).¹⁷²

We are constantly engaged with Australian policy makers, civil society groups, academics and others to understand new trends and issues in relation to misinformation. One example of this is our update in April 2017¹⁷³ to remove inauthentic accounts more easily by identifying patterns of activity, without assessing the content itself. For example, our systems may detect repeated posting of the same content, or an increase in messages sent.

Consistent with this, we have removed many accounts and Pages, including in Australia for coordinated inauthentic behaviour.¹⁷⁴

- **Reduce**: For content that does not violate our Community Standards, but is otherwise problematic, we reduce its distribution, including by demoting it in News Feed and Search. This significantly reduces the number of people who see this problematic content. This “reduce” approach is used for content like clickbait, engagement bait, sensationalism, and other low-quality content. These are tactics that often coincide with misinformation.

As noted above, we also work with independent third-party fact-checkers who review and rate the accuracy of stories. These partners have been certified through a non-partisan International Fact-Checking Network. Once a story is rated as false, we show it lower in News Feed. In our past experience, once a story is rated as false, we have been able to reduce its future views by 80 per cent. Pages and domains that repeatedly share false news will also see their distribution reduced and their ability to monetise and advertise removed. This helps curb the spread of financially-motivated false news.

In Australia, we launched fact-checking with AFP in April 2019 and in June 2019, with the Australian Associated Press.

Multiple research studies suggest that our efforts to combat misinformation are working, and that misinformation on Facebook has been dramatically reduced since the 2016 US election.175

In the lead up to the 2019 Australian federal election, we worked closely with the Australian Electoral Commission, the Department of Home Affairs (and in particular the Centre for Countering Foreign Interference) and the Department of Communications and the Arts on issues and concerns around disinformation and mal-information. Moreover, in the context of the 2019 election, these measures will be the subject of review and consideration by the Joint Standing Committee on Electoral Matters.

The Final Report does not acknowledge the existing work that is being undertaken by both industry and government on these issues. Before moving forward to develop regulatory solutions and empowering a new regulator to oversee them, we respectfully suggest that consideration is given to both the extent of the problem and existing work by both government and industry to address it.

There are inaccuracies in the Final Report’s discussion of these complex and important issues

The Final Report cites our announcement in March 2019 that we were banning white nationalism and white supremacy content from our services as evidence that we are taking action on disinformation and mal-information.176 This is not correct.

Our announcement177 Standing Against Hate made clear that this was an update to our Community Standards building out on our prohibition against hate speech on our services and the prohibition on dangerous organisations and hate figures using our services. Relevantly, our announcement said:

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176 Final Report, page 372 and footnote 1328
“Today we’re announcing a ban on praise, support and representation of white nationalism and white separatism on Facebook and Instagram, which we’ll start enforcing next week. It’s clear that these concepts are deeply linked to organized hate groups and have no place on our services.

Our policies have long prohibited hateful treatment of people based on characteristics such as race, ethnicity or religion — and that has always included white supremacy. We didn’t originally apply the same rationale to expressions of white nationalism and white separatism because we were thinking about broader concepts of nationalism and separatism — things like American pride and Basque separatism, which are an important part of people’s identity.

But over the past three months our conversations with members of civil society and academics who are experts in race relations around the world have confirmed that white nationalism and white separatism cannot be meaningfully separated from white supremacy and organized hate groups. Our own review of hate figures and organizations — as defined by our Dangerous Individuals & Organizations policy — further revealed the overlap between white nationalism and white separatism and white supremacy. Going forward, while people will still be able to demonstrate pride in their ethnic heritage, we will not tolerate praise or support for white nationalism and white separatism.”

This announcement is unrelated to the important and complex issue of disinformation, misinformation and malinformation. Consequently, the Final Report’s claim that the proposed ‘disinformation code’ would “improve transparency and make [Facebook’s actions to remove white nationalist and white supremacy content] enforceable, helping consumers by publicising, and enforcing, a minimum standard that digital platforms must maintain” is not accurate.

Moreover, the Final Report’s suggestion that the proposed ‘disinformation code’ should cover:

- “doctored and dubbed video footage misrepresenting a political figure’s position on issues
- incorrect information about time and location for voting in elections, and
- information incorrectly alleging that a public individual is involved with illegal activity”

178 Final Report, page 372
179 Final Report, page 370
does not fully take account of Facebook’s existing policies, nor the public interest, nor existing laws.

With respect to Facebook’s policies, as noted above, our policies already prohibit the sharing of incorrect information about the time and location for voting in elections and we welcome new laws that confirm that this is the standard that the Australian government expects for all platforms.180 However, we respectfully suggest that this should be within the remit of the Australian Electoral Commission.

In relation to a code requiring us to remove “doctored and dubbed video footage”, it would be useful to understand why only video footage is mentioned, particularly in light of the ACCC Chair’s claims in August 2019 that Facebook should have removed text based content on inheritance taxes. Moreover, it would be helpful to understand if the code would require us to remove videos such as this one on the Country Liberal Party’s Facebook Page: https://www.facebook.com/countryliberals/videos/482809209126050/

And, with respect to an obligation to remove information that alleges that “a public individual is involved with illegal activity”, we note that this is often a matter of public interest, and where it is not and may be damaging, existing laws such as privacy law or defamation law -- both of which Facebook complies with when provided with valid legal process, by locally restricting access to the content when found to violate either of these laws -- already address this concern.

The case for a regulator-enforced code has not been made

The Final Report notes the EU Code of Practice on Disinformation, which is a self-regulatory code, but nonetheless recommends a co-regulatory model of a code overseen and enforced by the ACMA.

The EU has adopted a self-regulatory approach through its voluntary code of practice on disinformation directive. The code, which has been signed by Facebook, Mozilla, Twitter, Google, and Microsoft, is a great initial step towards addressing disinformation through a co-regulatory model. Our experience in co-drafting the language of the code and working closely with EU

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180 We note that to the extent we took action on this type of context during the 2019 Australian election campaign, we did so consistent with our own policies -- in some cases beyond what is required by Australian law. This is one of the reasons that our CEO is calling for governments to set rules that internet companies such as Facebook can comply with: Mark Zuckerberg, ‘The internet needs new rules. Let’s start in these four areas’, Washington Post, 30 March 2019, https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/966f0504-521a-11e9-33f2-78b7525a8d5f_story.html.
policymakers on its implementation reflects a number of learnings that we think can benefit other policymakers considering similar processes:

- **Enabling the process:** The most beneficial part of the Code is that it has developed a process for continuous dialogue across online platforms and with policymakers. Together, we defined and set the objectives. When there were differences in approaches, the EU had a venue to act as a mediator among the parties involved across industry and government. It also created a process for providing constructive feedback and built trust across all those involved.

- **Some concerns:** On the other hand, there were a number of shortcomings that limited the Code’s success, such as defining metrics that do not help solve the problem at hand, requiring frequent reporting that does not enable companies sufficient time to make meaningful progress, and over-focusing on one part of a multi-pronged challenge.

As governments, including Australia, look to implement their own policies that reflect the unique differences of their society, we encourage the government to consider aligning to and building off of existing best practices. Fragmentation will only create further room for bad actors to exploit. We would therefore welcome a conversation about a code that is well-aligned with the industry approach that has been implemented into the EU.

The principles to which we agreed and to which we adhere are:

- **Improve transparency:** regarding the origin of information and the way it is produced, sponsored, disseminated and targeted in order to enable citizens to assess the content they access online and to reveal possible attempts to manipulate opinion.

- **Support quality journalism:** based on critical thinking, through support to high quality journalism, media literacy, and the rebalancing of the relation between information creators and distributors.

- **Trust indicators:** an indication of the trustworthiness of a piece of information provided, with the help of trusted flaggers, and by improving traceability of information and authentication of influential information providers.

- **Effective long-term solutions:** require awareness-raising, more media literacy, more cooperation of public authorities, online platforms, advertisers, trusted flaggers, journalists and media groups.

Facebook welcomes the opportunity to work further with the ACMA to address concerns about harmful content on our services and other related issues to minimise the misuse of online services
to enable the many benefits that online platforms such as Facebook can deliver to Australian consumers. However, the Final Report contains no discussion of why an ACMA enforced code, as opposed to a model aligned with the EU self-regulatory code, is necessary.

Given the complexity of this issue and the gaps in the existing analysis of current work to address it, we respectfully suggest that the Australian Government allow further consultation to be undertaken.
Recommendation 16: Strengthen protections in the Privacy Act

Given the significant economy-wide impacts that the ACCC’s privacy recommendations would have if implemented, we consider that a more detailed and broader consultation process is warranted before proceeding with any of these proposed reforms. This process should include the many organisations that were not consulted during the Digital Platforms Inquiry. That said, we support the elements of recommendation 16 and 17 that update Australian privacy law, consistent with international standards. We do not support elements of 16 and 17 that would depart from GDPR, especially those that seem designed prohibit the delivery of targeted advertising in Australia. We do not support recommendation 18, on the basis that it is not necessary and potentially unhelpful for consumers. We support recommendation 19.

Recommendation 16(a): Update ‘personal information’ definition

If the definition of “personal information” is aligned with the GDPR, we support the implementation of Recommendation 16(a).

The definition of “personal information” is an important foundational concept for the Privacy Act and sets the scope of protection afforded by the Act.

We agree that clarity on the scope of the definition of “personal information” is essential, and also with the Final Report’s comments on alignment with overseas standards. However, the precise nature of the Final Report’s proposal for reviewing this definition is unclear and it is important that any changes do not inadvertently lead to a departure from international standards.

We support aligning the definition of “personal information” under Australian law with the definition of “personal data” under the GDPR as this will help to align the scope of protection offered by privacy laws across Australia and the EU. This will be of benefit to consumers, who will have comfort knowing the same information is protected in different jurisdictions, as well as to businesses operating in international markets, who will be more able to standardise compliance procedures across the jurisdictions where they operate.

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However, if the aim is to achieve international alignment, then care must be taken when implementing this Recommendation to avoid achieving the opposite result by pursuing a definition that may be wider than that used in the GDPR. In particular, the way that Recommendation 16(a) has been expressed leaves some doubt as to whether the ACCC intends for IP addresses, device identifiers and location data to be automatically treated as personal information. This would be at odds with the GDPR, which makes clear in Recital 30 that such data should be treated as personal data only where it is used, or combined with other data, to identify an individual:

“Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them.”

All critical subtleties of the GDPR concept of “personal data” must be retained if it is to be translated into the Privacy Act. To ensure proper alignment and consistency, the aim should be to stick as closely as possible to the GDPR wording. Although not immediately apparent from Recommendation 16(a) itself, this appears to be a view shared by the ACCC, which suggested that “[t]his update could be made by amending the definition of ‘personal information’ to reflect the wording used in the GDPR, which would be in greater alignment with international standards”.

That is the approach we support.

On a related note, and as subsequently picked up as part of Recommendation 17 of the Final report, we do not believe that anonymised, pseudonymous and aggregated data should constitute personal information under the Privacy Act. Non-binding guidance of the OAIC currently clearly excludes “de-identified” information from the scope of “personal information” so that it is not subject to the Privacy Act. However the “fundamental premise underpinning this guidance is that re-identification risk must be assessed contextually”. This leaves significant scope for uncertainty as to whether or not a particular process of de-identification has eliminated re-identification risks so that the Privacy Act no longer applies. Further confusion could arise from the different terminology used to describe de-identification processes (such as the use of “confidentialisation” by the Australian Bureau of Statistics).

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183 OAIC, De-identification and the Privacy Act, March 2018, p. 3.
184 Ibid p. 4.
In order to encourage data-led innovations, it is important for businesses to be able to clearly understand when privacy laws will and will not apply, without compromising the interests of individuals to whom the data relates.
Recommendation 16(b): Strengthen notification requirements

We support the objective of ensuring that privacy notices are clear and provide meaningful information to consumers but raise concerns in relation to certain specific aspects of Recommendation 16(b).

We have three main concerns in relation to Recommendation 16(b):

1. the proposal will lead to a significant increase in the number and length of notices that businesses must present to consumers, which may lead to notice fatigue and reduce the overall effectiveness of the notices that are provided;
2. setting highly prescriptive notice requirements may result in consumers being overloaded with information and therefore “tuning out” so that the effectiveness of the notices that are provided are again reduced; and
3. rigid rules about how notices must be presented will deter innovation from businesses that are experimenting with new and more effective ways to communicate with consumers throughout the lifecycle of their relationship.

The Final Report’s simplistic recommendation to strengthen notices to users does not take into account industry best practice, such as those adopted by Facebook in providing regular contextual privacy notices, reminders, and check-up prompts throughout the consumer’s experience on the Facebook platform. We are concerned that the Final Report’s recommendations may in fact exacerbate consumer disengagement with privacy information, potentially undermining the privacy protections it seeks to achieve.

In particular, the prescriptive requirements proposed under Recommendation 16(b) may not easily adapt to developments in the fast-paced digital environment. This could have negative up-stream and down-stream impacts on all parts of the Australian economy. In our view, good policy should be future-proofed and outcome-focused. A better approach would be to focus on the development of the principle-based approach currently reflected in Australian and other international privacy frameworks (e.g. through specific best-practice guidance from regulators such as the OAIC following detailed and meaningful industry engagement and consultation, on topics such as improving the transparency and effectiveness of privacy notices) rather than to introduce more rigid requirements that may quickly become outdated.
Increase in the number and length of notices

The recommendation that all collection of personal information must be accompanied by a notice, irrespective of how it occurs, could result in a steady flow of notices that are ignored by the user when the business has a dynamic and ongoing relationship with that consumer (a common feature of modern consumer products). An even-greater notice fatigue will occur due to the similar collection requirement each time a third party shares information, which would result in a multiplicity of notices -- even though no new information has been collected from the consumer. Excessive notices do not encourage consumers to be better-informed about privacy: it has the direct opposite effect of disengagement.

The Final Report states in Recommendation 16(b) that a new collection notice should not be required if the consumer already has the information in question. However, this also raises some questions. For example, will it be sufficient for the consumer to be presented with a collection notice at the beginning of their relationship with a service provider and then receive no further notices or reminders even though there may be ongoing information sharing throughout the relationship? This would not necessarily appear to be desirable and may deter best practices innovations such as those adopted by Facebook in providing regular contextual privacy notices, reminders, and check-up prompts throughout the consumer’s experience on the Facebook platform. Practical design solutions to address these questions and issues could be considered further in design workshops with industry and consumers – with a view to providing clearer guidance to organisations about how they can meet the standards of transparency required under existing principles-based laws.

There is no evidence that longer, and more complex privacy notices, will address the underlying information asymmetry as identified by the ACCC at the heart of the privacy paradox. It is in our business interests to encourage consumers to understand and engage with their own privacy; as the Final Report states: “Trust is at the core of the relationship between the business and the consumer and remains critical in the digital economy.”

Consumers being overloaded by information

The Final Report suggests in Recommendation 16(b) that there should be more prescriptive requirements for what is contained in a collection notice, which could in turn lead to more detailed and lengthy notices. We do not agree that more information necessarily leads to a more

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185 Final Report, page 442.
effective notice. The Final Report notes that a number of stakeholders have raised concerns that consumers are less likely to read longer privacy policies.\(^{186}\)

The Final Report makes recommendations that are contrary to the ACCC’s own research, which found that most people do not currently read privacy policies and terms of service.\(^{187}\) Adding to the length of these documents will not lead to an increase in readership or transparency. The Final Report acknowledges this risk by noting that “notification requirements should be carefully designed to minimise the information burden on consumers and to avoid causing consumers to experience information overload”.\(^{188}\)

We agree that this is the crux of successful privacy policy, and we try to achieve this balance every single day. We are constantly innovating to try and get this right and, in our opinion, privacy frameworks should set the expectations of government and industry to protect the privacy of users but also allow industry the flexibility to innovate to meet those expectations. The focus of privacy laws should be on incentivising effective communication, rather than prescribing rules about exactly when notices must be presented, in what format, and how often.

**Recommendation 16(c): Strengthened consent requirements and pro-consumer defaults**

We support smart regulation of privacy consent, but we do not support this component of Recommendation 16. We do not accept the ACCC’s assessment of the current laws as inadequate. We also have concerns about the ACCC’s proposed new consent rules, which are not aligned with international practices.

We have four main concerns in relation to Recommendation 16(c):

1. It appears to be based on a **misunderstanding of Australia’s privacy law**. The radical expansion in the role of privacy consents proposed in the Final Report appears to be based on a misunderstanding of the Privacy Act as it exists today – to the extent there is any confusion as to how the Act is to be applied, a more prudent approach would be to clarify the existing framework rather than to propose radical changes;

\(186\) This concern was raised by various stakeholders at the ACCC Privacy Roundtable and is noted by the ACCC in the Final Report. See: ACCC privacy roundtable summary cited in Final Report, page 463.


\(188\) Final Report, page 463.
2. **It is out of step with the GDPR.** The Final Report’s proposals significantly depart from international practices by omitting important legal bases for processing data that apply under the GDPR and most other modern privacy frameworks. These legal bases are necessary in order for such a framework to operate coherently. If implemented, the Final Report’s proposals would result in a much less practical regime in Australia compared to the EU (and many other countries), and would have a negative impact on both businesses and consumers;

3. **It undermines consumer welfare.** Consent mechanisms should be designed in a way that is most likely to be meaningful for consumers. Applying rigid rules around unbundling of consents will not necessarily be in the best interests of consumers as it will lead to an increased risk of consent fatigue; and

4. **It is uncertain.** Information processing rules based on what is necessary for the performance of a contract may not be sufficiently certain and may create the wrong incentives for businesses that use personal information.

### Misunderstanding the existing operation of the Privacy Act

The core rationale in the Final Report for expanding the circumstances in which explicit privacy consents should be required is based on what we consider to be a misunderstanding of the current law.

The proposition in the Final Report that an entity can simply create a primary purpose via open-ended description in a privacy policy or other similar document is inconsistent with the most recent case law. In *Shahin Enterprises Pty Ltd v BP Australia Pty Ltd* [2019] SASC 12 (Shahin), the South Australian Supreme Court considered the primary purpose concept as used in the Privacy Act. Contrary to the ACCC’s views, the Supreme Court stated that “[a]lthough not limited to a single purpose, nevertheless the purpose for which information was collected will necessarily be finite, will typically be a single purpose and will usually be of very limited number if more than one”.

The Final Report does not engage with or even cite Shahin or any other case law in this area. As such, the basis for the Final Report’s interpretation of the primary purpose concept as it currently applies under the Privacy Act is unclear. In light of this, the deficiency in the current law that provides the basis for the radical shifts proposed in the Final Report under Recommendation 16(c) appear to be misconceived. It is plainly bad policy to propose significant amendments to existing laws in order to address deficiencies that do not exist. To the extent that there are any doubts as to how the “primary purpose” concept should be applied in practice, these could be clarified through other means (such as further guidance from the OAIC, further

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189 *Shahin* at [186].
consideration by the courts, or by legislative clarifications) without fundamentally altering the existing structure of the Privacy Act or imposing radical new consent requirements.

Diverging from the GDPR and other international privacy frameworks

The Final Report cherry-picks from the GDPR to create an inconsistent and more inefficient privacy framework than the GDPR, through consent overkill. In particular, while the Final Report recommends the adoption of consent requirements based on the GDPR, it also, without significant discussion or explanation, explicitly dismisses a “legitimate interests” basis for collecting, using or disclosing personal information, which is one of the six legal bases for processing personal data that are recognised under the GDPR (performance of contractual obligations and consent being two of the others). Without the inclusion of legitimate interests, the consent requirements of GDPR become unworkable; in our view you cannot have one basis and not the other.

The legitimate interests basis for data processing is a key component of the GDPR and provides a foundation for many legitimate ancillary processing activities that serve the interests of consumers and businesses alike. For example, the GDPR expressly acknowledges that legitimate interests may provide a basis for processing personal data for the purposes of fraud prevention and ensuring network security:

“*The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned.*”

*The processing of personal data to the extent strictly necessary and proportionate for the purposes of ensuring network and information security ... constitutes a legitimate interest of the data controller concerned.*

Without the legitimate interests basis to support this type of activity, businesses will have to increase their reliance on consumer consents. As outlined above, this will lead to consent fatigue and disengagement by consumers. This is noted in the Final Report as a risk but is not effectively addressed.

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191 See GDPR, Recital 47.
192 See GDPR, Recital 49.
193 Final Report, page 469.
The Final Report’s recommendations here are out of step with the European Commission Working Party on the GDPR, who stated the following in its Opinion on consent:\textsuperscript{194}

“There is a need to emphasise that consent is not always the primary or the most desirable means of legitimising the processing of personal data.

Consent is sometimes a weak basis for justifying the processing of personal data and it loses its value when it is stretched or curtailed to make it fit to situations that it was never intended to be used in. The use of consent “in the right context” is crucial.”

The Final Report is also out of step with the UK’s Information Commissioner’s Office (ICO)’s extensive guidance on the legitimate interests basis for processing personal data. In this guidance, the ICO states that the legitimate interests basis may be the most appropriate basis for data processing when:

- the processing is not required by law but is of a clear benefit to you or others;
- there’s a limited privacy impact on the individual;
- the individual should reasonably expect you to use their data in that way; and
- you cannot, or do not want to, give the individual full upfront control (ie consent) or bother them with disruptive consent requests when they are unlikely to object to the processing.\textsuperscript{195}

Guidance produced by the European Commission Working Party, the ICO and other European data protection authorities is replete with practical examples of the legitimate interests basis in action.

For example, the ICO guidance sets out how the appropriate application of the legitimate interests basis is to be established via the following three-part test, including: establishing what the legitimate purpose is, demonstrating that the processing is necessary for that purpose, and demonstrating that the legitimate interest is not overridden by the individual’s interests, rights or freedoms.\textsuperscript{196} As conceived by the ICO, the practical effect of this test is as follows:

“This means it is not sufficient for you to simply decide that it’s in your legitimate interests and start processing the data. You must be able to satisfy all three parts of the test prior to commencing your processing.."

\textsuperscript{194} Opinion 15/2011 on the definition of consent (WP 187), p 10.
\textsuperscript{196} Ibid.
If you are unable to demonstrate that the processing actually helps meet the legitimate interest, then you are not able to apply this basis. Likewise if the processing is not a reasonable way to achieve your stated purpose then legitimate interests does not apply. If there is another reasonable and less invasive way to meet the interest and achieve your purpose without the processing, then it would be unlawful (unless another lawful basis applies).”

The “legitimate interest” provision is grounded in accountability, and in the view of some commentators “may be the most accountable ground for processing in many contexts, as it requires an assessment and balancing of the risks and benefits of processing for organisations, individuals, and society”. Considerable harm may be caused to businesses and consumers alike by adopting a more regulated and prescribed regime for processing personal information that over-emphasises contractual performance and express consents, while not recognising processing based on other legitimate interests. It could also give rise to inconsistency with the Spam Act 2003 (Cth) (which expressly allows consent to be inferred from conduct or relationships) and state-based privacy regulation. The Final Report does not seem to consider the other side of the ledger – it simply states there is some concern around the breadth and flexibility of the “legitimate interests” concept and ends its analysis there. The brevity of the Final Report’s analysis in this respect shows that more work is required to understand the implications of the proposed cherry-picking from the GDPR.

In addition to being out of step with recognised global privacy benchmarks, the Final Report’s recommendations fail to heed recently published findings from research carried out jointly by the Productivity Commissions of Australia and New Zealand, which warn against the risk of imposing overly consent-focussed privacy regulations:

“Privacy regulation can be both an enabler of and a barrier to digital transactions … overly blunt or restrictive privacy regulation can limit innovation, raise costs, prevent beneficial transactions from occurring, or allow unscrupulous actors to cover their tracks…

Depending on the circumstance, privacy rules can be either positive or negative for consumers. On the plus side, tight privacy rules can limit the ability of retailers to determine how much an individual is willing to pay for a good or service, thereby protecting the consumer from adverse price discrimination. On the other hand, restrictive privacy rules limit the ability of digital providers to provide personalised services and advice that best meets a consumer’s preferences. These varying and context-specific impacts of privacy rules make it difficult to set optimal privacy regulation, as do differing individual

197 Ibid.
198 Centre for Information Policy Leadership, Hunton & Williams LLP, “Recommendations for Implementing Transparency, Consent and Legitimate Interest under the GDPR”, 19 May 2017, p. 2.
preferences for privacy. People typically claim they want more privacy than they actually seek in practice. This has prompted some scholars to talk of a ‘privacy paradox’ (Norberg, Horne and Horne 2007).”

In the same vein, academic research has increasingly identified significant issues with a pure consent-based approach to privacy regulation. For example, Professor Daniel Solove, writing in the Harvard Law Review, has noted that “[r]equiring companies to obtain affirmative consent for many new uses of data might also be unnecessarily costly and impede socially beneficial uses”. According to Professor Solove, the result of costly or cumbersome consent processes “might be to restrict uses of data in a formalistic manner that fails to distinguish beneficial from harmful uses. Some might say that less data collection, use, and disclosure is always a victory, but should privacy win out when the benefits of data uses outweigh the privacy costs? Or when individuals would desire a use but are not asked because asking would be too costly?”

A solely consent-focused model also does not work well for increasingly dynamic nature of information sharing between consumers and advanced data-based technologies, as noted by Charlotte Tschider in the Denver Law Review:

“A traditional model of prior notice followed by consent is not compatible with real-time improvements precipitated by the “always-on” nature of pervasively connected devices, often resulting in user fatigue. Manufacturers and consumers might be caught in a continuous loop of notice followed by consent, followed by a material system change and new notice followed by new consent, ad infinitum: high-change frequency would likely result in continuous notice deployment and subsequent consent demands on product users.”

These concerns have been echoed by other commentators, such as Omer Tene and Christopher Wolf of The Future of Privacy Forum:

“As new technologies emerge, the opportunities for consent expand geometrically and eventually become meaningless, as consumers tick boxes reflexively in order to proceed with the use of the technology. Moreover, as the “Internet of Things” advances, and as the

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201 Ibid.

prevalence of screens on which choices may be indicated diminishes, just-in-time explicit consent may not be possible at all.”

In addition, despite referring to “the benefits of broader international convergence” in privacy and data protection regulation, by proposing a regime that would be much more heavily reliant upon consumer-consents the Final Report is encouraging Australia to move in a different direction to international trends and some of our major trading partners in the region. The privacy regulator in Singapore, the Personal Data Protection Commission (PDPC), after extensive consultation on the issue, recently proposed the adoption of legitimate interests as an additional basis for collecting, using or disclosing of personal data. Currently, under Singapore’s Personal Data Protection Act (PDPA), organisations must (with certain limited exceptions) obtain consent to process personal data. However, following public consultations in 2017, the PDPC recognised that “there are circumstances where organisations need to collect, use or disclose personal data without consent for a legitimate purpose, but the collection, use or disclosure is not authorised under the PDPA or other written laws”. In light of this, the PDPC stated that it “intends to provide for ‘Legitimate Interests’ as a basis to collect, use or disclose personal data regardless of consent”.

Rigid rules on consent are not necessarily favourable for consumers

There are two other features of the consent recommendations that may diminish from consumer welfare: the proposals around ‘opt-in’ settings and the unbundling of consent.

While we support the objective of clarifying the pre-conditions for an effective privacy consent, these need to be carefully considered in light of the Final Report’s other recommendations, which would greatly expand the range of consents that businesses may be obliged to seek from consumers.

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206 See Personal Data Protection Act (No. 26 of 2012), sections 13 and 17.
The Final Report itself acknowledges that “consents are becoming an increasingly complex and burdensome task for consumers in the digital economy,” but fails to offer any practical guidance or solutions to address this, and seemingly contradictorily proposes that even more complex consents be used.

Examples from South Korea (where the regime is still less rigid than the approach proposed in the Final Report) illustrated by instances where consumers need to tick double digit boxes before signing up to services such as a home delivery service. This has understandably had the effect that the Korean population is generally taking less notice of consent every time they tick a box, which is the opposite of the desired outcome.

The Korean model has attracted significant criticism for its prescriptive requirements and inflexibility. For example, Saerom Lee found that:

“The consent process in Korea has become formalized and non-substantial despite the strong consent requirements. Studies have empirically shown that data subjects don’t fully read consent forms although they acknowledge the importance of personal information protection. According to the survey conducted by the Personal Information Protection Commission in 2015, 88.5% of the subjects think personal information protection is important, yet 72.8% of the subjects responded that they don’t generally or at all read consent forms.”

Other commentators on the Korean model have also criticised requirements that lead to an overly formalised process for collecting consents, which does not serve the interests of consumers. For example, Youngjoon Kwon writes:

“Obtaining explicit, individual prior consent for each purpose of personal information processing requires additional steps in the consent process. Such complicated process only causes inconvenience to data subjects rather than practically enforcing personal information protection.”

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210 Saerom Lee, “A Study on the Personal Information Protection and Consent System” page 383
211 Youngjoon Kwon, Professor at Seoul National University School of Law, “Thoughts on the Self-Determination Right to Personal Information and the Consent Regime” page 707
Opt in vs opt out ability at more granular level for users

In addition to this, forcing businesses to adopt an opt-in approach where consents are required (i.e. by prohibiting use of default opt-in choices, as the Final Report proposes) will not necessarily be favourable for consumers. For example, such an approach may disrupt data processing activities that have broader system benefits (e.g. data processing for fraud detection and network security, as flagged above). This has been noted by a number of commentators on the topic:

“When policymakers enact strict laws and regulations on privacy, especially opt-in rules, the relatively small share of privacy-sensitive individuals gain at the expense of the rest of society by making it more difficult for organizations to collect and use data efficiently.

*In short, opt-in laws are less efficient and costlier than opt-out ones. Given the abundance of research on this topic, when lawmakers and regulators create privacy laws and regulations, they should favor opt-out rules because they benefit consumers, businesses, and the overall economy while protecting consumer choice.*”[^212]

Furthermore, this approach may actually impose higher costs, fewer opportunities for economic growth, reduced innovation and an increased burden for consumers in effort and time. For example, Professors Fred H Cate and Michael E Staten have argued that ‘“Opt-in’ provides no greater privacy protection than ‘opt-out’, but imposes significantly higher costs with dramatically different legal and economic implications”.[^213] Similarly, Nicklas Lundblad and Betsy Masiello suggest that the debate on “opt-in” versus “opt-out” creates a false choice for end users, and a “rhetorical straw-man” that cannot be practically implemented without suboptimal unintended side effects.[^214]

A practical example of the way that opt-outs can be used effectively (even for highly sensitive information), can be seen in the Australian Government’s own approach to the roll out of the My Health Record regime, which relates to highly sensitive health data. As the Australian Digital Health Agency website explains “between 16 July 2018 and 31 January 2019, Australians had the opportunity to decide if they wanted a My Health Record and to opt out if they didn’t want one.”[^215] Rather than present the rollout as an opt-in scheme, the Government offered individuals increased privacy controls via an opt-out model. This allowed those individuals who harboured concerns to exclude themselves while still providing the greatest benefit (and least effort/cost approach) to


those who were either in favour of or neutral towards the regime. We see this as a clear and practical example – and one that has been recently endorsed by the Government – as to the benefits of adopting an opt-out model for managing consumer participation while still offering a meaningful level of privacy control.

The Final Report mischaracterises Facebook’s approach to opt in and opt out. As part of its misdiagnosis of the issue and solution, the Final Report suggests that Facebook’s standard practice is to bundle all user consents together in one ‘take-it-or-leave-it’ proposition. For example, the Final Report states that “[m]any digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents”. 216 The Final Report also states that “[i]n the ACCC’s review of the sign-up processes of Google’s Gmail, Facebook, Twitter and Apple’s Apple ID (ACCC review of sign-up processes), it found that Facebook, Google, and Twitter’s sign-up processes used a clickwrap agreement where a consumer is deemed to have accepted the digital platform’s terms of use and privacy policies by proceeding with the sign-up process”. 217

However, this analysis does not recognise the specific and granular controls offered to users of digital platforms or other digital businesses after sign-up, over the life of the consumer’s interactions with the organisation. Facebook, for example, offers to users the ability to withdraw their consent to sharing at any time by updating their privacy settings on Facebook, removing information they have previously posted, or simply by deactivating or deleting their Facebook account. Facebook offers a free and simple mechanism by which users can download all of their photos and information prior to deletion of their account, 218 which is intended to ensure that Facebook users do not feel trapped on Facebook – they are free to leave with all of their information any time they choose. The issue of bundled consents should therefore be viewed holistically across the many interactions that an individual consumer may have with many different organisations, both online and offline, every day.

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Processing rules based on contract performance and/or consent will be uncertain and may create the wrong incentives for business

The Final Report proposes that any processing of personal data for the purposes of performing a contract with the relevant individual should be permitted.

However, the Final Report provides scarce further detail about how that standard should be applied in practice. When is a particular use of personal information to be considered necessary for the purposes of performing a contractual obligation? Is it only when the obligation itself explicitly requires the use of the information in question? Or is it only when the obligation can only be effectively discharged through the use of that information? What about when it would be possible to discharge the obligation in other ways, but it could be done more efficiently or effectively by using the information? Or what if the information is merely being used to support functions that are required to ensure that the relevant business has the capacity to discharge its contractual obligations?

Clearly there is significant scope for uncertainty. While that could be resolved over time through regulatory guidance and case law, as is occurring in the EU under the GDPR, the introduction in Australia of new principles along these lines will not provide Australian consumers with any more certainty than the current regime and will not help to advance the Final Report’s core objectives.

Transparency for children

The protection of children’s personal data is an important issue, and we fully support measures to keep children safe online. We aim to provide a service that is safe and privacy-protective for all users and we are committed to finding practical ways to enhance transparency and privacy controls for young people.

We agree with the Final Report about the importance of internet access in supporting children’s development, including as an educational resource, for communicating with friends and family, and for engaging with valuable tools and services. The use of communications technologies and online services form part of the everyday lives of children and teenagers, particularly between the ages of 13 to 18. This is why it is so critical for organisations to ensure they communicate clearly about their services to children.

We believe that further multi-stakeholder discussion is needed with regards to finding a balance between providing a broad range of services and information to children and ensuring compliance from legal and regulatory perspectives. We would welcome the opportunity to continue exploring
this issue with the ACCC, the OAIC, the eSafety Commissioner and experts in UX/UI design for children. We note that the eSafety Commissioner has recently released Safety By Design principles, which Facebook has publicly supported\textsuperscript{219}, provide a framework for consideration of these issues. To bring these principles to life, Facebook recently hosted a ‘Safety By Design’ event with young people to hear their insights on privacy and safety controls.\textsuperscript{220}

We consider a practical approach would be to address the concerns raised in this aspect of the Final Report through the consultation process recommended by the ACCC for reviewing the broader reforms suggested in Recommendation 17. We are committed to sharing information on global best practices as part of any consultation in order to help achieve the Final Report’s goals of ensuring meaningful and transparent engagement with users at all levels.

\textsuperscript{219} Facebook, ‘Safety by Design Youth Jam’, https://www.facebook.com/FacebookAU/videos/910843179301219/?__xts__[0]=68.ARBfmtboDFloNarcPMmh2uGRmFXp-oDZ_8v8ZLJWHGWDNQgr_lqhRBBvGfQIPZ86ie6dZ6OipUgzStTDplkIkIEnVcWLIug9AOLSSvEdWBIY4R_KjtKsjCyzoBQqEVbXovkutsugh_HfmiUVVmDxrmLAOeL6XE6IUzL8gAPFoeE4MhjgihuKPlZtfjJQNYMSwGMqjw3oSi42iPVyvehaWnJuE89mGuE25DUDOTN8y-1wQKMqLbzMGrPXPmVcb9mrh+h8H2lNQhOScFkmGa7B-6EQ8JZ2QHYPZz2R6MwJznYggiiK6VxFGJueH8ijVYyFL2vYgHnmIUIKpvvMGWx_H9iCzZG8__tn__.R

Recommendation 16(d): Enable the erasure of personal information

We support the implementation of Recommendation 16(d), provided that it is done in a way that is consistent with international standards.

Facebook users are able to remove information they have previously posted and may permanently delete their Facebook account and profile data at any time. Facebook is a free service and users are not locked into the platform in any way, so they are free to leave any time they choose.

Facebook has no objection to consumers having a formal right to seek erasure of their information, provided that this right is implemented in a manner that is practical and consistent with international standards in this area. In particular, we consider that:

- There should be an exception for circumstances where it is impractical for technical reasons to completely delete existing data, such as data held in backups and data which has been de-identified, anonymised or irrecoverably blended with other data.
- As is the case with the “right to be forgotten” that applies under Article 17 of the GDPR, there should be exceptions for circumstances where retention of the information is required for the purposes of the public interest, meeting a legal obligation, or for establishing or defending a legal claim.\(^{221}\)
- There should be a period of broader consultation with all potentially affected businesses prior to the introduction of such a wide-ranging new legal right for consumers. Based on our experience with GDPR implementation, there may be significant work and costs involved for many businesses in developing compliance systems and programs to accommodate this new right.

Recommendation 16(e): Introduce direct rights of action for individuals

We note Recommendation 16(e) and point out that this recommendation creates the potential for overlap with the proposed statutory tort for serious invasions of privacy in Recommendation 19. We support the introduction of a statutory tort as set out in Recommendation 19. This overlap

\(^{221}\) GDPR, parts 17(1)(a)–(b), 17(2).
is acknowledged by the Final Report, but then brushed aside on the basis that there are points of distinction between the two proposed causes of action.\textsuperscript{222}

In our view, the creation of two new overlapping causes of action risks clogging up the courts with expensive and protracted litigation, which would detract from the efficiency of the administration of justice. As explained further below, our suggestion is to implement Recommendation 19 and to hold off on the changes proposed as part of Recommendation 16(e).

**Recommendation 16(f): Higher penalties for breach of the Privacy Act**

We **support** the implementation of Recommendation 16(f) in its entirety.

While already having a strong commercial incentive to protect the privacy of its users, we recognise the importance of a robust penalties regime to deter interferences with privacy and therefore supports Recommendation 16(f) if applied on a proportionate basis. We also note that the Australian Government has already committed to implementation of this Recommendation.\textsuperscript{223}

\textsuperscript{222} Final Report, page 496.

 Recommendation 17: Broader reform of Australian privacy law

We support sensible regulatory reform and is willing to proactively contribute to the privacy law reform process.

While we support the Government undertaking a broader review of Australia’s privacy laws, given that any changes in such laws will affect all privacy stakeholders (and not just digital platform operators), it is necessary for there to be a robust and fulsome process of consultation. The Digital Platforms Inquiry has been relatively narrow and has not considered the views of all interested parties.

We recommend that the review should be undertaken by the Attorney-General’s Department, as the policy department with the best capabilities to engage with the policy questions raised in the final report. We look forward to working closely with the Attorney-General’s Department (subject to the Government accepting this recommendation) as part of the review.
Recommendation 18: OAIC Privacy Code for Digital Platforms

We do not support the introduction of an OAIC Privacy Code for Digital Platforms.

Consistent with the ACCC’s own comments and recommendations in the Final Report, we support clear privacy laws that apply consistently across all industry sectors. The Final Report states that:

“The ACCC considers it important for the Australian privacy regime to require a clear and consistent standard of data protection across different industries in the data-driven digital economy to consistently protect consumers and to achieve the economy-wide potential benefits of data”.

This is consistent with principles that the ACCC has outlined in other aspects of the Digital Platforms Inquiry. Notably, in relation to media law reforms, the Final Report explicitly calls for a “level playing field” by applying a consistent level of regulation for all market participants who perform comparable functions. The same should apply for privacy laws. Unless supported by compelling reasons, a differential approach to regulation in any area may lead to a range of problems, including:

- for consumers, confusion and uncertainty as to the standard of protection they are afforded across different industry sectors, even when industry participants are performing similar functions, which may erode overall consumer confidence. From a data perspective, the Final Report notes this may result to underutilisation of data and the erosion of associated public benefits; and
- for businesses, an uneven regulatory burden across industries that perform similar functions, which may in turn distort competition by imposing different compliance costs on potential competitors.

With this in mind, it appears contradictory for the Final Report to recommend a dedicated DP Privacy Code that would apply only to digital platform operators without identifying any clear justification for why it may be required.

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In our view, consumers would likely expect their personal information to be protected in the same way across all online services. That is, they would expect the same protections to apply regardless of whether they are logging on to their Facebook account, their frequent flyer account, their Australian Financial Review subscription, or the website of an Australian online start-up. The proposed approach set out in the Final Report is not consistent with this consumer expectation.

In fact, the Final Report does not just seek to distinguish between digital platform operators and others. It also seeks to distinguish between digital platform operators themselves, by recommending that any DP Privacy Code should only apply to digital platforms that meet an undefined “objective threshold”. Again, there is no explanation for why this might be. One can only speculate as to what level of confusion consumers will experience upon finding out that their information is regulated differently simply depending on what search engine, social media channel or content aggregation service they use.

The key privacy-related concerns that the ACCC has identified in its Final Report are not specific to digital platforms, but apply consistently across all industry sectors. Indeed, statistics produced by the OAIC suggest that complaints and privacy issues arise more commonly in other industries. For example, in FY2017-18, the OAIC received 2,947 privacy complaints. The most complained-about industry sectors were finance (roughly 14 per cent of all complaints) and health services (roughly 11 per cent of all complaints). Online services was only the sixth most complained about industry sector. The top six sectors remained consistent from FY2016-2017.227

In light of these facts, it is difficult to see why a privacy code that specifically targets digital platforms is necessary. As the Final Report notes, many other businesses currently follow the same privacy practices that the ACCC criticises in the context of digital platforms. Imposing rules to address these practices for one industry while ignoring their use by others would not only be inconsistent, it could also lead to competitive asymmetries. For example, imposing different rules for digital platforms in relation to consents and opt-outs for targeted marketing would put them at a competitive disadvantage to the myriad of other companies across all industries that use consumer information for targeted advertising.228 Placing additional restrictions on this type of activity for digital platforms only will inevitably lead to competitive distortions. Digital platforms should not be penalised or treated differently simply because they are more successful at employing these common strategies. By the same token, other companies, such as traditional

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228 The ACCC notes for example, that like digital platforms many other online businesses typically seek to gather information about their users for the purposes of targeting advertising and other aspects of their services. See Final Report, page 452.
media companies, that are now using large quantities of personal information for targeted advertising, personalised content-delivery and direct-marketing purposes should not be immune from regulation.\footnote{As one example, News Corp Australia recently announced a raft of new commercial initiatives aimed at leveraging data partnerships, its expansive content creation network and its proprietary data technology to create and deliver shareable content for brands. Chief Operating Officer, Publishing, Damian Eales has boasted that “\textit{[o]ur future digital network is unrivalled in terms of the richness of our targeting capability and the leadership position we have across the content verticals that matter to advertisers}”. Similarly, Julian Delany, managing director of News Corp Australia’s News Digital Networks Australia, has stated that “\textit{[T]he rich, immersive product infrastructure paired with a targeted, on-network distribution strategy yields 25\% greater engagement scores than the industry average}”. See, News Corp Australia, ‘News Corp Unveils new suite of commercial initiatives at this year’s Come Together – News Futures 2018’ on News Corp Australia (2 May 2018) at \url{https://www.newscorpaustralia.com/news-corp-unveils-new-suite-of-commercial-initiatives-at-this-years-come-together-news-futures-2018/}.}

In addition to creating competitive asymmetries, the introduction of a DP Privacy Code could lead to increased confusion amongst consumers as to their privacy rights if other organisations are not subject to equivalent rules.
Recommendation 19: Statutory tort for serious invasions of privacy

We support the implementation of Recommendation 19.

As noted in the Final Report, the need for a new economy-wide statutory cause of action for serious invasions of privacy has been the subject of extensive previous review. Most notable amongst these is the Australian Law Reform Commission’s Serious Invasions of Privacy in the Digital Era Final Report in 2014, which recommended the introduction of a new statutory cause of action in the form of a tort of serious invasions of privacy.230

While we have no objections to the implementation of a new statutory tort as proposed in Recommendation 19 and other previous reviews, we are concerned about the potential for overlap and duplication if both Recommendations 16(e) and 19 are implemented. This may well in turn lead to more complex, lengthy and costly litigation, which would not be in the interests of either consumers or businesses that use personal information. The objective should be to establish a clear and practical system of privacy laws that is well understood by all those involved, rather than an overly complex regime that could give rise to a complex matrix of potential legal claims which may lead to a “lawyers picnic” as parties struggle to resolve how the law is to be applied in practice.

As stated in our response to Recommendation 16(e), the risk of overlap is acknowledged by the Final Report, but then brushed aside on the basis that there are points of distinction between the two proposed causes of action.231 We do not consider the introduction of two significant new laws, in circumstances where there is a real risk of overlap and duplication, to be sound public policy. A better approach would be to implement Recommendation 19, in order to address potential gaps in coverage of the existing protection afforded to consumers by the Privacy Act, and then re-assess whether there is still a need for Recommendation 16(e) at a later point in time.

To the extent that the Government does consider it necessary to implement both Recommendation 16(e) and 19, then explicit steps must be taken to eliminate the risk of overlap. The tortious action proposed under Recommendation 19 should only be available where there is no direct right of action under the Privacy Act as proposed under Recommendation 16(e). Even this measure may not be effective in mitigating the risk of overlap, as in practice litigants would

231 Final Report, page 496.
likely plead both the statutory tort and breach of the Privacy Act. Therefore, a cleaner and more practical solution would simply be not to implement Recommendation 16(e) and only adopt Recommendation 19.
Recommendation 20: Prohibition against unfair contract terms

We note the Final Report’s recommendation to prohibit unfair contract terms, but consider that the existing remedies available under the ACL provide adequate protection against the use of unfair contract terms. It would be disproportionate to impose pecuniary penalties on a business for seeking to rely on a contractual term that it believed, at the time, to be fair in circumstances where the identification of an “unfair” contract term under sections 23 and 24 of the ACL is subject to uncertainty in relation to its interpretation due to the appropriately case-specific nature of the assessment that must be undertaken.

Our view accords with the findings in the Australian Consumer Law Review by the Consumer Affairs Australia and New Zealand (CAANZ), the Final Report of which was provided to consumer affairs ministers, through the Legislative and Governance Forum on Consumer Affairs, in March 2017. In its Final Report, CAANZ found that:

“... a broad prohibition of terms previously declared unfair would undermine the nature and intent of the provisions. Importantly, the provisions establish when a term is unfair in the context of the contract and parties on a case-by-case basis, acknowledging that what may be unfair in one context is not necessarily unfair in another.

Some stakeholders suggested a narrower prohibition to prevent a business using unfair terms for a similar class of consumers. However, regulators are already able to seek court declarations covering a class of affected consumers not party to the proceedings (non-party consumers) who have suffered, or are likely to suffer, loss or damage in relation to a declared unfair term.

Further, a trader who seeks to enforce or rely on an unfair contract term when it has been declared unfair by a court would be misrepresenting the true position to the consumer. This could breach the ACL prohibition of false or misleading representations, meaning the associated remedies, including monetary penalties, would apply.

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232 Final Report, p 55.
The review found that strengthening the ability for regulators to investigate issues and bring enforcement actions would constitute a more proportionate and effective response to concerns about systemic unfair contract terms.”

Current remedies are adequate

At present, the ACCC may apply to the court for a declaration that a term in a standard form contract is an unfair term. In addition, for proceedings in the Federal Court, the ACCC may seek:\(^{233}\)

- an injunction;
- a compensation claim on behalf of a person suffering loss; and
- an order to redress loss or damage to a non-party consumer.

In addition, a private litigant may bring an action seeking a declaration, an injunction and/or damages or a compensation order for any loss suffered as a result of the unfair term.\(^{234}\) These remedies are appropriate where the provisions establish a general norm of conduct, as opposed to prohibiting specific actions.

If a declaration is made by the Federal Court, the unfair term will be rendered void and unenforceable.

The ACCC does not consider that these remedies are sufficient to deter companies from including unfair contract terms in standard form contracts, particularly where there is a zero monetary price for the service provided as is the case for digital platforms. However, the way a company interacts with its consumer and small business customers (including, for example, how it rolls out variations to its terms and conditions or how it changes the way its services are supplied) will likely need to change if a relevant term of its contract with its consumers and/or small business customers is found by a court to be void and unenforceable. This is a significant consequence for any company (digital platform or otherwise) and acts as an effective deterrent to including unfair contract terms in standard form contracts.

These current remedies also address the harm that consumers and small businesses may suffer as a result of an unfair contract term, as a term that is declared void cannot be relied on or enforced against the consumer or small business, and any loss a consumer or small business suffers as a result of the term may be the subject of a compensation order.

\(^{233}\) ACL, sections 232, 237 and 239.
\(^{234}\) See also section 236.
In addition, where an unfair contract term is also a false or misleading representation, or where relying on the term amounts to unconscionable conduct, or contravenes a code of conduct, the ACCC is able to pursue pecuniary penalties under those provisions. Therefore, in circumstances where an unfair contract term is particularly egregious or continues to be enforced after a declaration is made (such as to potentially amount to a false or misleading representation), it is likely to be subject to enforcement action under those provisions and attract pecuniary penalties.

We consider that these remedies provide an effective framework to deter companies from purposively making terms of its standard form contracts unfair, and we do not consider there is any evidence that section 23, in conjunction with these remedies, is not working.

**Meaning of an ‘unfair’ contract term is uncertain**

Unfairness is determined on a case-by-case basis, according to the three-limbed test set out in section 24 of the ACL, and by reference to the contract as a whole and the context in which the contract operates. The task of assessing whether a particular contract term, in its context, is fair is not simple and is likely to attract divergent views, particularly when determining whether the term is reasonably necessary to protect the legitimate business interests of the offeror.

The flexible nature of the test for unfairness allows the regime to be used in a broad range of circumstances. However, its flexibility also gives rise to a degree of uncertainty for businesses as to whether a term may be declared unfair in particular circumstances. It is rational for a business to aim to minimise risk in their dealings, and contract terms are drafted in a way so as to reduce exposure to risk. The party offering the term may legitimately believe that the term is fair and balanced, and necessary to protect their interests. However, a court may determine that those interests could be protected by a more balanced term. In our view, it is a difficult task for a company to forecast this outcome.

In these situations, we consider that it would be a disproportionate outcome to impose pecuniary penalties on a business for seeking to rely on a term that it believed to be fair at the time it was developed or relied upon but which a court later ruled was not. This is particularly the case where

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235 An example of this is when, in 2016, Europcar was penalised $100,000 due to various terms in their standard rental agreements being unfair and conduct surrounding the enforcement of those terms amounting to false or misleading representations. The terms held customers were liable for vehicle loss or damage regardless of whether the customer was at fault. The Federal Court also found that the term was unfair and also that representations made by Europcar suggesting that the customer’s liability for loss or damage was actually capped were false and misleading. In other cases, penalties have arisen as a result of an unfair contract term also contravening a Code of Conduct.

236 In 2019, Motolo Group Pty Ltd was ordered by the Federal Court to pay a pecuniary penalty of $240,000 for contraventions of the Horticulture Code of Conduct. The contract terms in question were also declared unfair, and void and unenforceable.
the current remedies available to the ACCC and private litigants are adequate and penalties are available for conduct that is more egregious, such as false or misleading representations, unconscionable conduct or misuses of market power.

It is not always simple to determine whether standard form contracts apply to a small business

The scope of this uncertainty is expanded in relation to small business contracts. Since 2016, section 23 of the ACL has applied to standard form contracts entered into by a small business. The definition of a small business contract in the ACL is a contract where at the time it was entered into:

- at least one party to the contract is a business that employs fewer than 20 persons; and
- either the upfront price payable under the contract does not exceed $300,000 or the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

It must be recognised, however, that it is not always a simple task for a company to determine whether counterparties to a standard form contract are a small business at the time of entering into the contract. This is because it is not standard practice when signing up to a standard form contract for a business to state how many people it employs (including, how many are casual and permanent).

There may, therefore, be cases where a company’s standard form contract is entered into by a small business, but the company had not intended that the contract apply to small businesses and had not expected that this would be the case.

We consider that it would be disproportionate to impose pecuniary penalties on business for seeking to rely on a term where it had not been able to determine, and had not considered, that the counterparty was a small business. As above, this is particularly the case where the current remedies available to the ACCC and private litigants are adequate.
Recommendation 21: Prohibition against certain unfair trading practices

We note the Final Report’s recommendation to introduce a prohibition on unfair trading practices, but are concerned that the proposed prohibition is duplicative of existing laws. As outlined earlier in this submission, we support GDPR-equivalent reform of Australia’s privacy law and we believe that the ACCC’s concerns about the increasing use and sharing of data across Australia’s economy are best addressed through privacy law. Moreover, existing consumer protection laws already cover the other areas raised by the Final Report as warranting the introduction of the prohibition.

We think that the Australian Consumer Law Review by the Consumer Affairs Australia and New Zealand (CAANZ)—which was a wide-reaching review into the effectiveness of Australia’s consumer law across all industries—provided a more appropriate forum to consider whether the CCA should be amended to include a general prohibition on unfair trading practices, which would apply generally across different industries. In its Final Report, CAANZ found that:

“.. it is unclear the extent to which [unfair trading] practices are already captured by existing protections contained in the ACL, including misleading or deceptive conduct, unconscionable conduct, unfair contract terms, pyramid selling and unsolicited selling. As such, the value of an additional general unfair trading prohibition is uncertain at this point in time.”

Following the report by CAANZ, we understand that the Legislative and Governance Forum on Consumer Affairs (CAF) is undertaking further research into unfair practices, and will report its findings to Government. Introducing a general prohibition on unfair practices before this research is completed, and before interested parties have an opportunity to comment, would not only be premature, but would risk introducing unnecessary, duplicative and inefficient regulation.

Unfair trading regime is not justified and could result in significant uncertainty for business

The Final Report provides a relatively cursory analysis of why a prohibition on unfair trading practices is needed and what this would look like.

We suggest that, to the extent that Government is minded to consider the recommendation, the recommendation should be afforded proper scrutiny, involving far wider input from participants.

across the business sector. This will be critical given that, if introduced, it would involve a fundamental shift in the legal framework and obligations right across the economy. Moreover, it would result in increased legal uncertainty for businesses operating in Australia. This would be detrimental to businesses and consumers, given that legal certainty is well-recognised as being essential to fostering technological innovation in Australia.\footnote{This is well understood and has been recognised by the Productivity Commission. See Productivity Commission Inquiry Report no.78, Intellectual Property Arrangements (23 September 2016) at p 29, available at \texttt{http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf}.

As noted in Recommendation 20, the term “unfair” is highly uncertain and subject to contextual considerations. A general prohibition on “unfair” trading practices would mean that businesses operating in Australia would find it very difficult to assess the legal risk of proposed conduct, which would lend itself to a more conservative and less innovative approach to doing business in Australia. This would result in less innovative services, and less investment in new technology, for Australians.

Complex and legally uncertain general prohibitions are, therefore, not in the interests of businesses nor Australian users, particularly in circumstances where the ACL, as currently drafted, and the privacy law framework in Australia are better able to address the conduct concerns raised by the ACCC.

If, despite these considerations, the Government is minded to introduce a new prohibition on unfair trading practices, then its scope would need to be very carefully considered and clarified to mitigate against the uncertainty that a general unfairness prohibition creates for businesses, to avoid unnecessary duplication, and to ensure that commercial practices that are legitimate and beneficial to the parties to a contract are not prohibited. To this end, we note that overseas regimes, where they exist separately from the types of prohibitions on unilateral conduct listed above, are carefully crafted so as not to capture practices that are legitimate or beneficial or where the harm suffered by a consumer is not significant economic harm.\footnote{We also note that the prohibitions overseas have been introduced in very different contexts and their introduction are not comparable to Australia where we already have a range of broad and specific prohibitions against harmful commercial practices in the ACL.} For example, the US prohibition applies to unfair “acts or practices in or affecting commerce” where the injury to the consumer is substantial, has no offsetting benefits and cannot be reasonably avoided.

We believe that it is very important that a “real world” practical approach is taken to further consideration of this proposal so as not to inadvertently capture legitimate and beneficial practices, and to not deter innovation to the benefit of Australians. For example, some of the matters that the ACCC has raised as necessitating a general prohibition, such as “all or nothing
clickwrap consents”, are not only already covered by the ACL and privacy laws, but are a legitimate way of doing business when dealing with millions of customers, and can be beneficial to customers as they are a convenient and quick means to obtain consent. Ease of use is highly valued by customers.

An unfair trading practices prohibition would lead to unnecessary and duplicative regulation

The ACL contains broad and flexible prohibitions designed to capture a wide range of unilateral conduct in commercial dealings. It also contains specific protections directed at particular forms of unfair commercial practices. The ACL and CCA already protect against:

- misleading or deceptive conduct where the conduct of a business is likely to lead another person into error;
- unconscionable conduct where a business engages in harsh or oppressive behaviour in its dealings with other businesses or its customers;
- unfair contract terms where a business seeks to enforce an unfair contract term in a standard form contract with consumers or small businesses;
- false or misleading representations where a business makes incorrect or misleading claims about products or services it offers; and
- businesses with a substantial degree of market power engaging in conduct with the purpose or likely effect of substantially lessening competition.

The Final Report does not present any evidence that a prohibition on unfair trading practices would capture damaging commercial practices that are not already caught by the current protections in the ACL and CCA.

The ACCC’s call for a general prohibition on unfair trading practices is neither new nor specific to digital platforms. However, in its Final Report, the ACCC states that, as part of its inquiry into digital platforms, it has identified the following kinds of conduct employed by digital platforms as detrimental to consumers and which are not expressly prohibited by the ACL:

(a) businesses collecting, using and/or disclosing consumer data without express informed consent;

(b) businesses failing to comply with reasonable data security standards, including failing to put in place appropriate security measures to protect consumer data;
(c) businesses unilaterally changing the terms on which goods or services are provided to consumers without reasonable notice, and without the ability for the consumer to consider the new terms, including in relation to subscription products and contracts that automatically renew;

(d) businesses inducing consumer consent or agreement to data collection, use and/or disclosure by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information that would enable consumers to properly consider the contract terms; and

(e) business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.

However, Australia’s privacy and consumer laws do already provide protections for these commercial practices.

The Privacy Act covers many of these issues

Data security and informed consent (as raised in points (a), (b) and (d) above) are already addressed by Australia’s privacy laws—in particular, APPs 3, 5 and 11 which relate to the collection of personal information, and the security of personal information. Informed consent is also specifically addressed in the APP Guidelines published by the Office of the Australian Information Commissioner (OAIC), which provide that consent must be adequately informed, voluntarily given, current, specific and given in circumstances where the individual has the capacity to understand their consent. And, to the extent that there may be considered to be a gap in the privacy laws, the Final Report separately recommends changes to the Privacy Act along with further privacy law reviews.

Australia’s privacy law framework is the appropriate context in which to address issues of data security and consent, rather than through a general and vague unfair trading practices offence. It is entirely unclear how a general prohibition on unfair trading practices fits with the current privacy law framework and the privacy protection changes that have been proposed in the Final Report.

Privacy regulation needs to be designed to ensure that users are able to benefit from innovation and new technologies. Restricting companies’ use and collection of data for valid purposes through uncertain legal concepts may unintentionally impair digital commerce and reduce
investment. Privacy and data protection is, therefore, better managed in a designed-for-purpose privacy law framework, in which privacy regulations focus on preventing measurable consumer harms while affording room for innovation. Privacy regimes should be outcome-oriented and permit flexibility in compliance in order to promote innovation, competition, and keep up with emerging technologies.

It is also beneficial for privacy regulation in Australia to be aligned with well-accepted and comparable overseas regimes (i.e. the GDPR) which have been developed after many years of consideration and consultation. Consistency in privacy regimes across comparable jurisdictions provides businesses operating in Australia with legal certainty, which is a touchstone of risk assessment and fosters legally compliant innovation.

If the amended scope of privacy requirements in Australia is not outcome-oriented to permit flexibility in compliance and/or is not aligned with the GDPR – including because of a new general prohibition on unfair trading practices is introduced (the interpretation of which is far from certain) – this would lead to significant uncertainty for multinational businesses operating in Australia. We believe that countries should seek to pursue greater compatibility among their regulations to remove uncertainties, inefficiencies and market barriers which can slow innovation.

The introduction of a further and general ACL prohibition is, therefore, not only unnecessary, but would be an inappropriate means by which to address these issues. We believe that it is appropriate to address privacy and data protection through Australia’s well considered privacy law framework and we welcome the further review of the privacy laws to bring them into line with the GDPR (see Recommendation 17).

The ACL covers each of the other issues

The points raised in (c) to (e) above are already addressed by sections 19 and 23 of the ACL which protect consumers and small businesses against unconscionable conduct and unfair contract terms. To the extent that these types of terms are determined to be unfair, they can be declared void and unenforceable. In relation to the specific points raised in (c) to (e):

- what the Final Report terms “all or nothing click wrap consents” with users are terms in standard form contracts, and are covered by section 23 of the ACL;
- unilateral variation clauses in standard form contracts with consumers are specifically referred to in the ACL as an example of the types of terms that may be unfair; and
• terms that enable one party (but not another) to avoid or limit their obligations under the contract are also specifically referred to in the ACL as an example of the types of terms that may be unfair.

For many businesses that serve a large customer base, it is simply not possible to provide personalised terms for each user. Standard form contracts are therefore a necessary business practice. To the extent that terms in these types of contracts are considered to be unfair, the ACCC or a private litigant can apply to court for a declaration that the term is void and unenforceable.

In addition, to the extent that the terms raised in (c) to (e) are likely to lead a person into error, the prohibitions on misleading or deceptive conduct, or false or misleading representations, may apply. Further, to the extent that the conduct is particularly egregious, the conduct may be caught by the prohibition against unconscionable conduct.

The Final Report states that some overseas jurisdictions adopt a combination of general and specific protections in relation to unfair trading practices, and that this provides a precedent for introducing a general prohibition on unfair trading practices in Australia. For example, the ACCC refers to the EU’s Unfair Commercial Practices Directive 2005 (EU Directive), which contains a prohibition on ‘unfair commercial practices’, which is defined as practices that: are contrary to the requirements of professional diligence; and materially distort or are likely to materially distort the economic behaviour with regard to the product of the average consumer. The EU Directive also sets out a list of practices which will be deemed to be unfair.

However, we believe these practices are likely already covered by an existing provision of the ACL and there is no need to introduce a new general prohibition:

• the black-listed misleading commercial practices in the EU Directive would likely be covered by the misleading or deceptive conduct provision under the ACL (section 18) and/or the specific provisions relating to false or misleading representations (section 29);

• the black-listed aggressive commercial practices in the EU Directive would likely be covered by existing provisions such as: unconscionable conduct under the ACL (sections 20-22A); unsolicited consumer agreements (Part 3-2, Division 2); harassment and coercion (section 50); and offering rebates, gifts, prizes (section 32).

We consider that the inclusion of a new and broad unfair trading prohibition is unnecessary, would introduce significant uncertainty, and would result in duplication and inefficient regulation. Unless
there is specific consumer harm that can be identified as not being addressed under the existing laws, then we consider that there is no reason to amend the law.
Recommendation 22: Digital platforms to comply with internal dispute resolution requirements

Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers

We support these recommendations and welcome the opportunity to work with Australian policy makers and regulators to respond to complaints by consumers and small business owners in Australia.

While Facebook strives to address complaints from consumers and advertisers, we understand that our efforts will never be perfect. We are happy to work with regulators to help create a process that will be unbiased, commercially reasonable, and that will prove useful to consumers and small business owners.

We consider that an ombudsman scheme is an appropriate forum to deal with the types of complaints identified in the Final Report – namely, advertiser scam content, and complaints by small businesses about advertising and suspended business accounts. Facebook works hard to provide clear and easy-to-use complaint and dispute resolution processes, and is supportive of consumers and small businesses having recourse to an ombudsman process if these types of complaints cannot be resolved through existing processes within a reasonable and specified timeframe. However, it should not be the intention of any ombudsman scheme to provide further binding legal avenues for large media companies.

An ombudsman scheme is an inappropriate forum for dealing with all types of user complaints which are varied, numerous and for which our Community Standards and other applicable policies (such as our Advertising Policies) apply. We have also announced the introduction of an external Oversight Board[^240] to review certain content decisions.

We note that consideration will need to be given to how these recommendations are implemented, given that there are other regulators and regulatory bodies with whom we already work with to respond to consumer and small business owner complaints. For example, Facebook works with the ACCC’s own Scamwatch to resolve complaints from the Australian public about scams they may encounter on our services, and the Australian Small Business and Family Enterprise Ombudsman to respond to small business complaints.

We are happy to deepen our engagement with all members of the Small Business and Franchising Consultative Committee and/or work with the ACMA or a designated ombudsmen to ensure that we are responding to and addressing the complaints of the Australian public and small business owners.

We look forward to continuing the conversation about how any complaint handling scheme can be set up in a practical and scalable manner (bearing in mind the differing size, complexity and nature of various platforms), to provide meaningful solutions for Australian consumers and small business owners.