



Law Council
OF AUSTRALIA

Digital Platforms Inquiry

The Treasury

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Table of Contents

About the Law Council of Australia	3
Introduction	4
Competition law reform (Recommendations 1, 2 and 5)	4
Data portability related findings (section 2.10.1)	4
Disinformation Code (Recommendation 15)	5
Digital platforms and consumers	5
Strengthening protections in the Privacy Act	5
Recommendation 16(a): Update ‘personal information’ definition.....	6
Recommendation 16(b): Strengthen notification requirements.....	7
Recommendation 16(c): Strengthen consent requirements and pro-consumer defaults.....	7
Recommendation 16(d): Enable the erasure of personal information.....	8
Recommendation 16(e): Introduce direct rights of action for individuals.....	8
Recommendation 16(f): Higher penalties for breach of the Privacy Act.....	8
Recommendation 17: Broader reform of Australian privacy law	8
Recommendation 18: OAIC privacy code for digital platforms.....	8
Changes to the <i>Competition and Consumer Act 2010 (Cth)</i>	9
Scams on digital platforms and other emerging issues	9

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-Elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Introduction

1. The Law Council welcomes the opportunity to provide a submission to the Treasury's stakeholder consultation on the findings and recommendations of the Australian Competition and Consumer Commission's (**ACCC**) *Digital Platforms Inquiry – Final Report (Report)* released on 26 July 2019.
2. The Law Council is grateful for the assistance of the Privacy Law Committee and the Competition and Consumer Committee of the Law Council's Business Law Section, as well as input from the Law Institute of Victoria in preparing this submission.

Competition law reform (Recommendations 1, 2 and 5)

3. The Law Council is generally supportive of the ACCC's recommendations for mandatory disclosure of information relating to competition issues.
4. However, the digital platform sector is fast-moving, and breaches of the law can be difficult to detect. In implementing measures to strengthen competition law as it relates to the current major digital platforms, the Law Council suggests that Treasury could consider structural reform of the major platforms, to address some of the natural barriers to competition that have arisen due to the manner in which technology has developed over the past two decades.
5. The major digital platforms would not have evolved to their current scale and dominance if commencing trade in today's technological landscape and these circumstances inhibit the introduction of new market participants. Given the central role the digital platforms play in our communities, some measure of structural reform may be warranted to encourage the establishment of more conventional market forces, overcoming the distorting effect of a particular period of technological development.

Data portability related findings (section 2.10.1)

6. The Law Council notes that the ACCC has deferred consideration of mandatory data portability provisions on the basis that platforms such as Google and Facebook already provide a mechanism for users to export their data and the rate of utilisation of this functionality is low, indicating that users do not wish to migrate to other platforms that do not have the same reach.
7. The Law Council considers that greater impact on encouraging competition could potentially be achieved by mandating interoperability standards. The Consumer Data Right recently implemented in relation to the financial sector is expected to significantly improve customers' ability to move between product offerings.¹ Although customers have always been able to download bank statements and export 'csv' files, mandatory standardisation of the way financial data can be transferred is expected to significantly increase the ease with which customers can change banks.
8. Similarly, mandatory standardisation of data transfer for social media platforms could increase the speed at which alternative platforms can be developed and gain sufficient reach to be viable alternatives for consumers. To this end, the Law Council supports the ACCC's undertaking at page 116 of the Report to reconsider this issue in the future.

¹ The Treasury, '*Consumer Data Right*' (2019) <<https://treasury.gov.au/consumer-data-right>>.

9. Data Portability is a data protection right. In the European Union (**EU**) it is governed by the General Data Protection Regulation (**GDPR**) and forms part of the fundamental rights of the data subject.² However, the rights under the GDPR are not absolute and if they are to be implemented under the competition and consumer protection frameworks, will require careful review and analysis.
10. It will be key to determine what rights arise as part of a given consumer or customer driven transaction (for example under the Consumer Data Right) and what rights arise as part of the individuals human right *per se*. These rights will need to be complementary and clearly articulated in any pending reforms to the law in this area.

Disinformation Code (Recommendation 15)

11. The Law Council supports the introduction of a Digital Platforms Code to counter disinformation.
12. In relation to implementing such a code, the Law Council recommends:
 - minimisation of the elements of the code that are dependent on the establishment of 'intent'. Such elements could result in code breaches being significantly harder to prove, effectively undermining the code's purpose;
 - additional powers for the regulator to launch its own investigations. Relying on individuals to initiate personal complaints is not an efficient way for the regulator to act on issues as they are identified over time; and
 - the introduction of a more proactive complaints mechanism. The Report provides for a reactive mechanism, however by its nature misinformation and disinformation is designed to deceive so complainants may not always be able to conclusively establish that information is false at the time of initiating the complaint.

Digital platforms and consumers

13. The Law Council notes that the Report, if implemented, would have economy-wide consequences and require substantial changes to the *Privacy Act 1988* (Cth) (**Privacy Act**).
14. While the ACCC's recommendations call for clearer and more granular control for users where consent is required for certain uses of personal information, the Law Council notes that when faced with the option to either consent to certain activity or be excluded from participation in social connections through the digital platforms, it is often unreasonable to require individuals to carry responsibility for this exchange.
15. Many digital platforms have achieved an extraordinary level of integration into the daily lives of Australian citizens. With this success should come a corresponding responsibility to operate the platforms in a way that protects people's privacy unless an individual has actively expressed a wish to surrender such rights.

Strengthening protections in the Privacy Act

² General Data Protection Regulation, Article 25.

16. The Law Council welcomes the Report, specifically the recommendations made in respect of strengthening and streamlining Australia's privacy regime and regulatory frameworks dealing with media, communications and advertising.

17. The Law Council explicitly recommends that:

- (a) privacy related recommendations, (recommendations 16 to 21) and recommendations dealing with portability be the subject of a reference to the Australian Law Reform Commission (**ALRC**); and
- (b) the approach to reform should:
 - (i) reinforce the need for technological neutrality;
 - (ii) support harmonisation of various industry specific or state-based regimes;
 - (iii) where possible align, and clarify how the regime in Australia aligns, with the GDPR; and
 - (iv) align with the fact that privacy is a human right that operates in addition to consumer rights and complements these. It is not supplanted by the addition of consumer rights as proposed.

18. Comments in relation to the specific recommendations of the Report are summarised below.

Recommendation 16(a): Update 'personal information' definition

19. Recommendation 16(a) proposes substantial legal change which would require careful review of existing case law and entail a review the inquiry undertaken by the ALRC in the August 2008 Report *Your Information: Australian Privacy Law and Practice (Your Information Report)*.³ The current test of what is 'personal information' under section 6 of the Privacy Act is highly contextual as it requires an examination as to whether the information in question is 'about' a relevant individual.⁴ The Report suggests that Internet Protocol addresses (**IP addresses**) and similar data is per se personal information without the requisite connection to the individual.

20. The Report appears to suggest that IP addresses and similar unique identifiers should be treated as personal information per se, even if those unique identifiers are not, in fact, associated with other personal information or are not reasonably capable of identifying an individual. That position is not consistent with GDPR. Under Recital 30 of the GDPR, it is acknowledged that certain unique identifiers may be associated with natural persons and may be used to create profiles. The GDPR acknowledges that whether or not a unique identifier constitutes personal data will depend on the context in which it is held.

21. In addition to being an important change in the law, the proposition requires further testing from a practical perspective in light of related recommendations in respect of notice and consent noted below. For example, it is not clear what amounts to effective

³ Australian Law Reform Commission 'For Your Information: Australian Privacy Law and Practice' (ALRC Report 108) <<https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/>>.

⁴ *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4, [3] (Dowsett J), [60], [80] (Kenny and Edelman JJ).

notice of a valid consent, when the only contact details available are IP addresses or limited geolocation information.

Recommendation 16(b): Strengthen notification requirements

22. The Law Council suggests that this recommendation be considered in light of the developments in the EU such as the GDPR, the Privacy and Electronic Communications Directive 2002, and the proposal for an ePrivacy Regulation.
23. Many matters of detail and context would require careful consideration, for example, whether/how this would be achieved when collection is indirect (i.e. from a third party), how a requirement for an overview of the data practices of an entity can be achieved while meeting a requirement that the notification be concise (particularly if the entity carries on a number of different businesses), how requirements that may be relatively easily satisfied in certain types of online environment can be satisfied in other contexts, for example collection via telephone.

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

24. In addition to the above comments, the Law Council notes that many of the changes to data practice will require a careful review of the numerous legacy systems and may prompt consideration of a need for sunset provisions or safe harbour regimes to support an orderly review and implementation as needed.
25. The Law Council notes that the reference to consent is not always consistent and distinction between consent (express or implied) and notice and transparency are not expressly articulated. This will need to be addressed.
26. Under the current regime (principally under Australian Privacy Principle 6 (**APP 6**)), many uses are permitted as a secondary purpose – provided the requirements of APP 6 and section 16 A of the Privacy Act are addressed. The move to reliance on consent would be a substantial change for many organisations that currently rely on secondary purpose as a lawful means supporting the use and disclosure of personal information. Making consent the primary means for processing personal information, potentially does not take into account that under the GDPR consent is one of many lawful bases of processing personal data and work in conjunction with other grounds provided for under Article 6 of the GDPR, such as purposes related to the 'legitimate interests pursued by the controller' or 'compliance with a legal obligation to which the controller is subject'.
27. In short, the Law Council considers that a move to a strengthened consent regime may only be appropriate if it was accompanied by a legitimate interests regime similar to that incorporated within the GDPR. At present, the ACCC's proposals appear not to countenance that this would be the case.
28. Care should be exercised in any pending review to ensure that concepts that are borrowed from other jurisdictions are considered thoroughly in the context of the applicable frameworks and relevant definitions and legal concepts. The detail of the pending review is not to be underestimated and would involve traversing matters previously considered by the ALRC as part of the Your Information Report. In the Law Council's view, it would be appropriate to have these matters tested by the ALRC.
29. One matter that may have not been sufficiently considered in the Report is that collection of personal information frequently occurs simply because a person enters a publicly accessible area such as a shopping centre, a police station, or an airport –

any public area with security cameras and wi-fi networks. Applying formal ‘sign here’ consent models to these casual interactions would not be practical or accord with community standards and expectations, particularly as those who would refuse consent must as a practical matter choose to not visit those facilities.

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

30. Again, the Law Council notes that many of the changes to data practice will require a careful review of the numerous legacy systems and may prompt consideration of a need for sunset provisions or safe harbour regimes to support an orderly review and implementation as needed.
31. In the Law Council’s view, it would be useful to explore the exemption of information collected in prescribed circumstances. For example, it is not practicable to erase one person from CCTV footage.

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

32. This a substantial legal change requiring careful review of existing case laws and will entail a review of the Your Information Report. Such rights would need to be considered in the context of the newly created Consumer Data Right and properly review the interaction of the various regulatory regimes currently administered by Office of the Australian Information Commissioner (**OAIC**) and the ACCC.

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

33. In the Law Council’s view, the penalties, if increased to mirror the increased penalties for breaches of the *Australian Consumer Law*,⁵ should be drafted with far greater clarity than has been included in recent legislation about the factors that a Court should take into account in assessing what penalty to levy. This is particularly the case given that:
 - use of data is usually systematised and automated (so that an inadvertently incorrect setting can lead to contravening conduct happening hundreds or thousands of times per day); and
 - the regulated community will include small businesses (such as individual medical practices) as well as multinational corporations.
34. In addition, the Law Council considers that a review could also give consideration to the introduction of an administrative infringement notice regime, similar to that already available to the ACMA and ACCC.

Recommendation 17: Broader reform of Australian privacy law

35. The Law Council welcomes this recommendation given the significance of the proposed changes, and reiterates the need for a comprehensive review by the ALRC as noted above.

Recommendation 18: OAIC privacy code for digital platforms

36. The Law Council supports this recommendation. As a minimum, any code will require a clear definition of ‘personal information’ (as noted above) and a clear definition of a ‘platform’ or ‘platforms’ that will be regulated under the proposed Code. This is

⁵ *Competition and Consumer Act 2010* (Cth) sch 2.

particularly important in industries such as health and financial services which currently exchange a large volume of information (including personal information) and do so via various digital platforms, many in real time.

Changes to the *Competition and Consumer Act 2010* (Cth)

37. The Report also recommends several changes to the *Competition and Consumer Act 2010* (Cth) (**CCA**) that if enacted, would impact on how information on consumers is handled. For example, unfair contract terms would be prohibited (not just voidable). This would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract, including contracts dealing with personal information or, in some cases, policies that may be incorporated expressly or impliedly into contracts regulated under the CCA. Unfair trading and practices are also to be prohibited.
38. Such issues are, in-part, addressed by existing laws. In the Law Council's submission to the ACCC, the Competition and Consumer Committee recommended that unfair contract terms remain voidable rather than prohibited. Instead, the Competition and Consumer Committee recommended that appropriate provisions be introduced to the unfair contract terms regime in the ACL to allow the operation of the regime to have:
- (a) balanced operation given its application depends on particular circumstances;
 - (b) checks and balances in enforcement given (a); and
 - (c) restraint so that this does not become a form of de-facto regulation as to the prohibition of particular words and expressions that is not context dependent.⁶
39. In the Law Council's view, these issues reiterate the need for a comprehensive thorough review by the ALRC as noted above. Currently, privacy policies support the requirements for transparency and specifically the requirements of APP 1.3 to 'clearly expressed and up to date policy (the APP privacy policy) about the management of personal information by the entity' which in turn addresses the requirements of APP1.4. They are not contracts.
40. This is similar with notices, typically issued to address the requirements under APP5 'to notify the individual of such matters referred to in subclause 5.2 as are reasonable in the circumstances; or to otherwise ensure that the individual is aware of any such matters'.

Scams on digital platforms and other emerging issues

41. The Law Council supports the ACCC's recommendation to strengthen and mandate greater responsiveness from the digital platforms when dealing with complaints.
42. In implementing this reform, the Law Council recommends consideration be given to the new forms of harm made possible by the internet's anonymity and the breadth of exposure of potentially defamatory and malicious digital content. In particular, businesses should have a right to protect their employees from disclosure of personal details on reviews of the business.

⁶ See, Law Council of Australia, Submission to the Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Preliminary Report* (15 February 2019) 53-68 <<https://www.lawcouncil.asn.au/docs/296a3889-944e-e911-93fc-005056be13b5/3581%20-%20ACCC%20Digital%20Platforms%20Inquiry%20Preliminary%20Report%20Submission.pdf>>.