

Submission to the Consultation on the ACCC Digital Platforms Inquiry Preliminary Report December 2018

15 February 2019

By email: platforminquiry@accc.gov.au

Dear Secretariat,

Re: Digital Platforms Inquiry: Preliminary Report

The Consumer Policy Research Centre (CPRC) would like to thank you for the opportunity to respond to the ACCC Digital Platforms Inquiry Preliminary Report (Preliminary Report).

The CPRC is an independent consumer research organisation which undertakes research to inform policy reform and business practice change. Our goal is to achieve a fair outcome for all consumers. We conduct research across a range of consumer markets, with a focus in 2018 on consumer decision-making, housing, consumer data and the online marketplace. We work collaboratively with academia, industry, government and the community sector.

CPRC notes that the ACCC Preliminary Report has found a market and regulatory failure in personal data collection practices in Australia due to:

- information asymmetry between platforms and consumers,
- platforms exerting their bargaining power in terms of consent and privacy collection practices,
- inherent difficulty for consumers in assessing the current and future costs of sharing their data, and
- lack of sufficient deterrents for these poor data collection, usage and disclosure practices.

CPRC's own research supports these findings. Consumer research conducted on behalf of the CPRC found that consumers do not fully understand the level of information being collected about them and that consumers want greater transparency and more control over how companies collect, use and share their data.¹ This issue is relevant beyond digital platforms, as data collection practices extend across multiple business models,² and deserves an economy-wide response.

CPRC commends the analysis and findings of the ACCC's Preliminary Recommendations report. There has been a lack of a cohesive and comprehensive analysis of Australian data collection, sharing and use practices to date. As a result, the implementation of policy

¹ Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC. (p.3-4)

² For example, refer Christl W. (2017) [Corporate Surveillance in Everyday Life](#). (p.13)

reforms to ensure data protection regulation is fit for the digital age has lagged behind international actions.

Regulatory responses to these data governance issues are receiving attention worldwide, most prominently through the General Data Protection Regulation (GDPR) in the European Union and the California Consumer Privacy Act in the United States. The recent ruling by German competition regulator Bundeskartellamt to restrict Facebook's data gathering activities, particularly disallowing the collection of user's data across multiple platforms and sources without voluntary consent, is the latest example of regulatory responses to digital platforms' data gathering, monitoring and sharing activities.³ The ACCC's Preliminary Recommendations are a helpful first step in formulating an Australian, economy-wide perspective on the appropriate treatment of personal data, firstly for digital platforms, and secondly for how such findings might be considered by policymakers in the broader data policy framework.

Lack of an integrated framework for consumer data management and regulation in Australia

Before commenting in detail on the Digital Platforms Inquiry itself, CPRC notes that the Digital Platforms Inquiry is one of three national policy processes underway that relates to the treatment of consumers' data. In addition, the Consumer Data Right, designed to support consumer data portability, and the Data Sharing and Release Bill, that aims provide a framework for the sharing of data managed by government bodies, are both also under consideration.

At present, there does not appear to be co-ordination between the three processes, despite the similarity in subject matter. In addition, the privacy protections recommended by each process results in varying level of consumer protection outcomes. CPRC is concerned that the level of consumer control over their data will be very different in similar contexts. For example, while the ACCC Digital Platforms Inquiry Preliminary Recommendations strengthen Privacy Act requirements, the Data Sharing and Release Bill potentially overwrites key elements of the Privacy Act in the area of consumer consent. This may result in the same consumer data receiving different protections depending on which type of service receives the personal information.

This fractured approach is not only likely to be problematic for companies, it also challenges consumers' ability to comprehend their own data protection and privacy right. For example, consumers face varying consent and notification requirements for different streams of these reforms. These differences place significant limitations on consumers ability to understand what they have a right to be informed about and their level of agency around issues such as deletion.

The benefit of the three processes operating independently is deeply unclear. CPRC considers that the vast and rapid increase in Artificial Intelligence and machine-learning technologies requires policymakers to adequately and thoroughly consider the regulation of data as the fuel that will power those technologies. The design of the consumer data policy

³ Bundeskartellamt. (7 February 2019) Bundeskartellamt prohibits Facebook from combining user data from different sources. Retrieved from https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568

and regulatory framework will have significant effects on value creation and appropriation, inequality and consumer welfare.

For innovation to be sustainable and consistent with community expectations and values, governance and regulation of the overarching data framework is critical. Significant challenges face policymakers and are not limited to:

- How can we ensure consumers are adequately informed about what is happening with data to enable genuine consent and choice?
- Who owns consumer data and under what conditions?
- How is data valued to enable consumers to make informed choices?

These are questions which the world policy community is currently grappling with. For example, in 2018 the European Union implemented the GDPR and the California Consumer Privacy Act was passed. Most recently, the leaders of China, Japan, South Africa and Germany have expressed interest in a global approach to technology sector, including data governance.⁴ Technology firms are also requesting regulation. Satya Nadella, the CEO of Microsoft, stated government regulation of facial recognition will be required to prevent harmful consequences.⁵ At the recent World Economic Forum in Davos he also shared his view that the default had to be that consumers owned their own data, and IBM CEO Ginni Rometty agreed, calling for a new era of data responsibility.⁶

For Australia to benefit from data-driven innovation, we need to ensure that:

- our policies make sense within a global context, and
- Australian consumers are not disadvantaged by the significant bargaining power of companies collecting and amalgamating large amounts of personal information compared to the consumers supplying this data.

CPRC supports greater consideration of the intersection of consumer protection, privacy and competition policy frameworks. The levers to enhancing consumer choice are held within the Privacy Act, which provides some remedy to problems of adverse selection. Australian Consumer Law can enhance bargaining power of consumers entering into contracts by strengthening unfair contract terms penalties. A competition lens can also closely consider market power issues and the exercising of exclusionary or exploitative practices by large data amalgamators.

CPRC considers the best approach in Australia would be to undertake a full and thorough economy-wide review of our data governance framework. The review should include consideration of:

⁴ Bradsher K and Bennhold K. (23 January 2019). World Leaders at Davos Call for Global Rules on Tech. New York Times. Retrieved from <https://www.nytimes.com/2019/01/23/technology/world-economic-forum-data-controls.html>

⁵ Browne R. (24 January 2019) Microsoft CEO says facial recognition technology needs to be regulated. CNBC.COM Retrieved from <https://www.cnbc.com/2019/01/24/davos-microsofts-nadella-says-facial-recognition-needs-regulation.html>

⁶ Parker C. (24 January 2019). Privacy is a human right, we need a GDPR for the world: Microsoft CEO. World Economic Forum. Retrieved from: <https://www.weforum.org/agenda/2019/01/privacy-is-a-human-right-we-need-a-gdpr-for-the-world-microsoft-ceo/> and Rometty G. (21 January 2019). We need a new era of data responsibility. World Economic Forum. Retrieved from: <https://www.weforum.org/agenda/2018/01/new-era-data-responsibility/>

- Overarching principles of data governance – with regards to consumer agency and choice
- Ethical considerations in establishing a trusted data ecosystem
- The roles and responsibilities of different regulators and departments in delivering a national data protection strategy
- Analysis of the resourcing of regulators
- Analysis of the ownership structure of consumer data in Australia
- Consideration of the different ways to assess the value of consumer data to individuals, industry, government and public benefit – with regard to data as a non-rivalrous good and input to production
- Analysis of the intersection of data protection governance and fundamental rights.

Establishing the base protections that consumers and citizens should be afforded enables policymakers to implement the policies and processes governing data sharing within that safer environment.

Initiatives such as the Consumer Data Right and Data Sharing & Release Bill, that rightly aim to give consumers more control over their data (CDR), and also make better use of public sector data to drive improvements for the community (Data Sharing and Release Bill), are more likely to successfully achieve these objectives when an overarching data protection framework is in place.

We encourage policymakers to deeply consider the analysis within the ACCC report. These findings indicate the need to undertake broader reforms to ensure that Australian consumers can continue to benefit from innovation and exercise choice and agency in the digital economy.

Preliminary recommendations

CPRC welcomes and strongly supports the recommendations contained within the Preliminary Report.

In attempting to implement remedies to many of the issues raised in this report, CPRC supports the first goal of policymakers being to increase transparency. There are three key reasons for focusing on transparency at this point in the reform process:

1. Increasing consumer comprehension and agency

An increase in transparency in the data collection and sharing practices of digital platforms can assist consumer comprehension and choice. This should not be misinterpreted as 'more information' meaning 'better information'. Lengthy, complex and vague privacy policies have been extensively highlighted as ineffective disclosure tools.⁷ We comment further on this below.

Without adequate information consumers cannot locate products that suit their preferences. This decreases competition between providers in delivering higher quality privacy products and services.

⁷ Kemp K. (2017). Big Data, Financial Inclusion and Privacy for the Poor. Dvara Research. Retrieved from: <https://www.dvara.com/blog/2017/08/22/big-data-financial-inclusion-and-privacy-for-the-poor/>

Ongoing and significant regulatory intervention in other markets such as energy has uncovered significant increases in marketing costs,⁸ one of the direct impacts highlighted in economic theory through Akerlof's market for lemons. CPRC's own research highlights the importance of regulators paying close attention to service quality as well as price in disclosure remedies.⁹

2. Shining a light on data collection and sharing practices to enable more effective regulatory remedies

Regulators and the broader policy community are only just now building a stronger understanding of the data ecosystem enabled by data tracking and collection technologies. In an environment that is rapidly changing, it is critical to strike a balance between enabling innovation that benefits consumers and ensuring there are baseline protections against significant harm.

Regulators and policymakers require access to a more transparent view of data amalgamation and sharing practices in order to develop appropriate remedies and protections. CPRC acknowledges industry's concerns around the public disclosure of commercially sensitive information. However, as a first step, greater disclosure to regulators of data movement, sharing and partnership arrangements is important to establish an accurate understanding of the market. This is particularly important where the resource (consumer data) acting as an input to production is inextricably linked to the personal information of consumers and citizens.

3. Transparency can work to build trust

A lack of transparency across a range of consumer markets has led to significant regulatory intervention in recent times and within the energy and financial sectors in particular. Opaqueness and a lack of capacity of consumers to compare price and quality of service offerings has been raised in energy reform, superannuation, mortgages, insurance and telecommunications markets.

Information (or data) markets are at a unique stage of development where thoughtful governance implemented now will avoid negative consequences in the future. For example, regulatory design should reflect lessons learned from previous market interventions. Consumer dissatisfaction and extraction of economic rent by industry directly due to lack of transparency, consumer confusion and lack of agency are key issues.

Preliminary recommendation 8 – use and collection of personal information

- Strengthen notification requirements

Consumers are regularly unable to make informed choices about how their data is collected, used and shared due to a lack of transparency and control. Consumer research conducted by Roy Morgan Research in February – March 2018 on behalf of CPRC found that Australians do value their privacy, but don't feel they have a lot of control over what's

⁸ For example, see Figure 10.3 NEM-wide CARC, \$ per residential customer, real values in 2016-17 dollars, excluding GST in ACCC. (June 2018). Retail Electricity Pricing Inquiry – Final Report. (p.222)

⁹ Martin Hobbs B. (2018) 'But are they any good?' The value of service quality information in complex markets. CPRC.

happening with their data.¹⁰ The ACCC Preliminary Recommendations respond to these concerns by increasing the control consumers have over their own data.

CPRC agrees that strengthening notification requirements when consumers' personal information is collected, either directly or by a third party, is required. Notifications, in the form of privacy policies or terms and conditions, are inadequate at present. Qualitative consumer research conducted on behalf of CPRC found that consumers did not view terms and conditions as effective communication tools with consumers.¹¹

CPRC supports further behavioural research and consumer testing to identify an effective notification scheme, both in terms of the information included and the wording, timing and presentation of the disclosure notice. We would be happy to share our insights on adequate information disclosure produced from reviews into similar such notifications in the energy and telecommunications sectors. We support the ACCC's view that the Article 13 of the GDPR provides a useful template for the list of information to be provided. This list of information also aligns with the findings of consumer research conducted on behalf of CPRC. The research found that willingness to share information is heavily dependent on the organisation collecting the information, the data being collected, and the purpose of collection.¹²

CPRC strongly supports consumer testing of these notifications. Terminology in privacy policies are often vague, confusing and have different meanings between individual policies. For example, terms such as 'trusted partners' or 'third parties' may not be defined or may be understood differently by individual organisations.¹³ An area for further examination in the development of notification requirements, may be some shared definitional requirements so that privacy policies can be more easily understood by consumers. Conducting consumer research will be essential to ensure notifications are sufficiently transparent and comprehensible for the typical consumer.

We note that the ACCC has requested feedback on the applicability of specific exemptions to the notification requirement. CPRC considers that the individual, as the owner of their personal data, has a right be informed of the collection, use and sharing of that data, even when it is collected for non-commercial purposes. In addition, we note that there have been instances of non-commercial websites on-selling or sharing personal browsing data.¹⁴ The

¹⁰ Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC.

¹¹ *ibid.* (p.32)

¹² Solomon L. (5 April 2018). Submission to ACCC Digital Platforms Inquiry – Issues Paper. CPRC. (p.8) Retrieved from <https://www.accc.gov.au/system/files/Consumer%20Policy%20Research%20Centre%20%28April%202018%29.pdf>

¹³ For example, Moretti M and Naughton M. (5 September 2014) Why Privacy Policies are so Inscrutable. The Atlantic. Retrieved from <https://www.theatlantic.com/technology/archive/2014/09/why-privacy-policies-are-so-inscrutable/379615/>

¹⁴ For example, refer Elvery S and Bogle A.(23 November 2018) How my sexual health searches ended up in the hands of the world's biggest tech companies. ABC News. Retrieved from <https://www.abc.net.au/news/2018-11-23/health-data-shared-with-tech-companies/10521456> , and Bagshaw E. (24 January 2019). Afterpay accessing electoral roll data under laws designed to target terrorism, money laundering. The Sydney Morning Herald. Retrieved from <https://www.smh.com.au/politics/federal/afterpay-accessing-electoral-roll-data-under-laws-designed-to-target-terrorism-money-laundering-20190122-p50sw4.html>

collection of information for non-commercial purposes does not equate to the correct handling of personal data.

CPRC research finds that the goal of all information remedies should be to increase consumer comprehension and enable consumers to identify and choose products that suit their preferences.¹⁵ Therefore CPRC would strongly recommend behavioural and consumer testing of proposed notification requirements to support these goals.

- Introduce an independent third-party certification scheme

CPRC supports the introduction of a third-party notification certification scheme. There is a high level of uncertainty around business practices within the data ecosystem. A third-party certification system will provide consumers with some level of transparency over the treatment of their data.

CPRC notes that the ACCC has asked for feedback on an objective threshold over which APP entities should be required to obtain third-party certification. The appropriate objective threshold will in part be dependent on the design of the third-party notification scheme. In theory, any organisation collecting, handling or sharing personal data, should be subject to this scheme, but requirements could be relaxed by identification of amount or sensitivity of data handled or by the business model employed. For example, any firm that's primary purpose is to collect, store, share or sell personal data could be covered by this scheme. Other organisations, of which data collection, sharing, and use is a part but not the primary aim of their business model, may be captured, as suggested by the ACCC, through the volume of personal information held.

- Strengthen consent requirements

CPRC strongly supports the ACCC's recommendations on strengthening consent requirements, including the need for it to be provided expressly and that service settings that enable data collection will be pre-selected to off. These changes are in line with CPRC's recommendation for economy-wide requirements for consent to be provided expressly, specific to purpose, easy to understand, easily accessible, able to be withdrawn, and freely given. Consumer research conducted on behalf of CPRC found that 73 percent of Australians expected the Government to require companies to provide consumers with options to opt out of certain uses and sharing of their data.¹⁶ Furthermore, CPRC notes the strong consistency between ACCC and CPRC consumer research findings that:

- Consumers want options to opt out of certain kinds of information that is being collected about them, how it can be used & shared with others (95% CPRC, 90% ACCC)
- Consumers in particular did not want location data shared with third parties (71% CPRC, 86% ACCC)
- Consumers only wanted providers to collect the data required to deliver the service (91% CPRC, 85% ACCC)¹⁷

¹⁵ Solomon L and Martin-Hobbs B. (2017). Five preconditions of effective consumer engagement – a conceptual framework. CPRC.

¹⁶ Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC. (p. 6)

¹⁷ ACCC data sourced from: ACCC. (2018). Digital Platforms Inquiry Preliminary Report. CPRC data sourced from Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC.

The context within which an opt-in consent is required should be carefully considered. An opt-in consent is only an effective protection if the consumer is given a real choice. For example, if broad consent for the collection sharing and use of a user's data is required for access to a platform or service, a user is under pressure to agree out of necessity or risk losing access to tools that are not substitutable. This is an important issue for Australians. Consumer research conducted on behalf of CPRC found that 95 percent of Australians want the ability to opt out of certain types of data collection and 92 percent want greater transparency about how this might impact eligibility for goods and services. A requirement for opt-in consent to data collection should be carefully designed to ensure that conditions of use for consumers are not effectively dependent on their consent to data collection beyond that necessary for the delivery of the service.

We also note recent consideration by behavioural economists to the ethical considerations of the use of nudges (default options is one of the most commonly recognise and used nudges). Cass Sunstein one of the leaders of the field recently released a proposed 'Bill of Rights of nudging'.¹⁸ Importantly, this Bill included the concept that: *Nudges should not take something away from someone without their consent*. In application to data collection sharing and use practices, we interpret consent to mean that which is voluntary, freely given, active, able to be withdrawn, and specific to purpose. Thus, where these fundamental components of consent are not present and vast amounts of data about an individual is collected and used by companies, such a practice would be deemed unethical if applying this behavioural lens.

In addition to this, CPRC notes that over half of Australian consumers found it inappropriate for companies to use passively collected data from websites to target them with advertising. While this practice is often put forward as a positive contribution by industry, only 27 percent of Australian consumers surveyed found this practice acceptable.¹⁹ In this sense, default settings for data collection being set to 'off' brings regulation in line with the majority of community expectations.

- Enable the erasure of personal information

CPRC strongly supports the ACCC's recommendation to enable consumers to require the erasure of their personal information. When consent to sharing personal information is provided at a point in time, it is unclear to the consumer what the data could be used for in the future. Data use is highly dependent on technological advancements and thus the value of that data changes through time on this basis.

While a consumer may have 'consented' today, at that point in time, an individual would not necessarily have had the capacity to assess the value of that data in future. Consequently, it is essential to provide consumers the option to withdraw consent to access to their data and for companies to delete that data upon withdrawal. This is also critical to the trust in the system. For example, if companies enter data sharing arrangements with third party entities which consumers do not trust or aren't comfortable with, there is no way at present to withdraw access and require deletion of that data.

¹⁸ Easton S. (19 July 2018). Cass Sunstein's Bill of Rights for Nudging. The Mandarin. Retrieved from: <https://www.themandarin.com.au/96009-cass-sunsteins-bill-of-rights-for-nudging/>

¹⁹ Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC. (p.34)

The provision of a deletion requirement would provide more pressure for companies to collect, use and share data in line with community expectations.

CPRC notes that, under the GDPR, data generated by a child is given special protections. Data provided when an individual was a child can be deleted at any time.²⁰ This type of special protection should also be considered in the Australian context.

Furthermore, CPRC does not accept that deidentified data storage is an acceptable alternative to deletion. In an era where many different datasets are being collected, shared and combined, the risks of reidentification are too significant for this to be relied upon as a remedy.

- Increase penalties for a breach of the Privacy Act

CPRC would support increasing the penalties for a breach of the Privacy Act. Introducing higher penalties would reflect the increasing value of personal data, and growing harms associated with the unauthorised use, collection or sharing of personal information. Assigning higher penalties for a breach would increase pressure for data collection, use and sharing practices to occur in line with the Privacy Act requirements and community expectations.

- Introduce direct right of action for individuals

CPRC supports the ACCC's view that introducing a direct right of action for individuals would allow consumers greater control over their own personal information. As noted by the ACCC, the introduction of this right would also bring Australia into line with international practice, including the GDPR.

- Expand resourcing for the OAIC to support further enforcement activities

CPRC supports the expansion of resourcing for the OAIC to support further enforcement activities. The increasing amounts of data being shared combined with the recommended strengthening of Privacy Act requirements for the collection, use and sharing of data suggests that OAIC enforcement activities will increase. The provision of increased resources will ensure that the OAIC has sufficient ability to enforce the newly strengthened obligations on organisations collecting, using and sharing consumers' data.

CPRC also encourages the ACCC and OAIC to use such resourcing to better consider how the OAIC plans to work with consumer organisations in an ongoing manner and improve current consultation processes.

Preliminary Recommendation 9 – OAIC Code of Practice for digital platforms

The CPRC would strongly support the development of an OAIC enforceable Code of Practice for digital platforms. The proposed obligations relating to information requirements, consent processes and consumer controls are relevant and appropriate. It is essential to commission consumer research as an evidence base to frame these obligations. This will ensure the Code of Practice achieves its goals of increasing transparency and control over the collection, use and disclosure of consumers' personal information.

²⁰ European Commission. Can I ask a company to delete my personal data? Retrieved from https://ec.europa.eu/info/law/law-topic/data-protection/reform/rights-citizens/my-rights/can-i-ask-company-delete-my-personal-data_en

Preliminary Recommendations 10 – serious invasions of privacy and 11 – unfair contract terms

CPRC strongly supports both these recommendations and considers that the inclusion of civil pecuniary penalties will be a more effective deterrent for mishandling consumers' data. One of the main recommendations of the CPRC report, *Consumer data and the digital economy*, was to find better ways to identify and penalise companies that breach anti-discrimination, consumer protection, competition and privacy laws.²¹

Proposed areas for further development

Proposed area for further development 7 - Deletion of user data

The CPRC strongly supports an explicit obligation to delete all user data associated with an Australian consumer when a service is directed by an individual to do so. This requirement is in line with the GDPR's 'right to be forgotten'.

CPRC recommends that the right to deletion be an automatic requirement when:

- it is no longer required for the purposes for which the data was collected and/or processed and
- there is no legal requirement to store the data.

In the absence of consumer request, this would naturally occur when a consumer ceases to use the service.

Proposed area for further development 8 – Opt-in targeted advertising

The CPRC supports the requirement for an express opt-in consent from consumers before entities can collect, use, or disclose personal information of Australians for targeted advertising purposes. Consumer research conducted on behalf of the CPRC found that around half of Australians believed that it was unacceptable for companies to monitor their online behaviour to show relevant advertising.²² This suggests that a large proportion of Australians would value the ability to opt-in to these services as opposed to them being the default.

The ACCC notes that this requirement would apply economy-wide, including entities not covered by the Privacy Act. CPRC strongly supports this wider application of the obligation and notes that the exclusion of SME's from coverage by the Privacy Act is an ongoing detriment to the effective protection of consumers' personal data. Some organisations, due to having an annual turnover of less than \$3 million, will have access to consumers' personal data and will not be subject to any of the strengthened Privacy Act requirements. The SME exclusion, while appropriate at the time the Privacy Act was drafted, represents a potential loophole for entities seeking to collect, use and share data in a non-transparent manner. CPRC encourages the ACCC to consider this issue in its final recommendations.

²¹ Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC. (p. 47)

²² Nguyen P and Solomon L.(2018) [Consumer data and the digital economy](#). CPRC.(p.35)

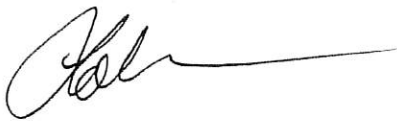
Proposed area for further development 9 – Prohibition against unfair practices

CPRC would strongly support the inclusion of a general prohibition against the use of unfair practices in the Australian Consumer Law. This would provide consumers with significantly enhanced bargaining powers when entering into contracts with service providers and act as another lever to encourage digital platforms to act in line with community expectations.

We would welcome any opportunities for further discussions during the consultation process.

If you have any questions or would like further information regarding this submission, please don't hesitate to contact Senior Research & Policy Officer, Brigid Richmond on 03 9639 7600 or brigid.richmond@cprc.org.au.

Yours sincerely,



Lauren Solomon

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