



15 February 2019

Australian Competition and Consumer Commission

By email to: platforminquiry@accc.gov.au

PRELIMINARY REPORT FOR DIGITAL PLATFORMS INQUIRY – BSA COMMENTS

A. Statement of Interest

BSA | The Software Alliance (**BSA**) is the leading advocate for the global software industry before governments and in the international marketplace. BSA members are at the forefront of data-driven innovation, including cutting-edge advancements in data analytics, machine learning, and the Internet of Things.¹ BSA members have made significant investments in Australia and are proud that many Australian organizations and consumers continue to rely on BSA member products and services to support Australia's economy.

BSA and our members thus have a significant interest in the Preliminary Report that the Australian Competition and Consumer Commission (**ACCC**) released on 10 December 2018 for the Digital Platforms Inquiry (**Preliminary Report**)², and its impact on BSA members and the technology sector in general. BSA and our members support the ACCC's efforts to enhance the regulatory framework for digital platforms to increase competition and consumer protection in media and advertising services. However, we are concerned that certain of the preliminary recommendations (**PRs**) have the potential to go much further than this objective and risk having several negative effects on the wider digital economy in Australia. In particular, the recommendations in relation to the choice of browser and search engine (PR 3), copyright take-down standard (PR 7), and privacy and data protection (PRs 8 to 11) require substantial further consideration.

In our experience, working closely with regulators in jurisdictions around the world on best practices in legal and policy frameworks, the most successful regulations are proportionate, principles-based, outcomes-focused, and not unduly prescriptive. In particular, data, privacy, consumer, and intellectual property regulations should balance the rights, needs, and responsibilities of regulators, consumers, technology providers, third party stewards of data, and innovators.

Addressing challenges associated with the impact of digital platforms on competition and consumer protection is not an issue that is unique to Australia. BSA has been involved in discussions with governments, policy-makers, and industry bodies around the world for several years on related issues in a way that balances the associated concerns. BSA therefore appreciates the opportunity to provide

¹ BSA's members include: Adobe, Akamai, Amazon Web Services, Apple, Autodesk, AVEVA, Baseplan Software, Bentley Systems, Box, Cadence, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, Siemens PLM Software, Splunk, Symantec, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

² Made available at: <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>.

our comments on the Preliminary Report. We would also be delighted to further engage with the ACCC to respond to any questions and to explore ways in which BSA and our members can work with the ACCC, other regulators, and industry stakeholders to develop effective and balanced solutions.

B. Recommendations

The Preliminary Report addresses a range of issues associated with the impact of digital platforms on competition in the media and advertising services markets, many of which are likely to require further input and consideration from affected stakeholders. BSA is particularly concerned with the ACCC's PRs in relation to the choice of browser and search engine (PR 3), copyright take-down standard (PR 7), and privacy and data protection (PRs 8 to 11), and we therefore focus on these three issues below.

PR 3 – Choice of browser and search engine

While BSA supports the principle of consumer choice, the recommendation to require suppliers of operating systems and internet browsers to provide consumers with options for browsers and search engines is overly broad and prescriptive. It goes beyond the concern that the recommendation is intended to address, which we understand to be an assumption that default browsers and search engines automatically lead to customer inertia and a substantial lessening of competition in the relevant market.

It is unclear how this broad and prescriptive approach accords with established principles of competition law, both in Australia and around the world. For example, bundling of default products and services should not be prohibited in the absence of a finding of dominance in the relevant market and/or unless there is clear evidence that the activity results in a substantial lessening of competition in the relevant market. There may also be scenarios where the bundling is actually expected by and beneficial to the consumer. Further evidence-based analysis would be required in each specific set of circumstances in order to determine whether the relevant activity indeed meets the relevant competition law thresholds (e.g., for substantial lessening of competition) in the relevant market.

Accordingly, there should not be an automatic *ex ante* restriction on bundling of operating systems with devices, or search engines with browsers. Rather, this issue would more appropriately be the subject of *ex post* competition action using established criteria and processes under competition law. For example, the ACCC has the power to take action under existing provisions of the Competition and Consumer Act³ where there is a misuse of market power by a company with substantial market power. This already allows the ACCC to address specific concerns that may arise in connection with dominant players in the relevant market, without imposing unnecessary and prescriptive requirements on other players in the market.

PR 7 – Take-down standard

While BSA supports the rights and interests of content creators, these rights and interests must be balanced with those of the recipients of take-down notices, such as online services providers. For this reason, BSA continues to advocate the use of safe harbors as an effective way of promoting the right behaviors, by providing responsible intermediaries with clear incentives to remove infringing content in response to appropriate notices from rights holders, while ensuring that bad actors remain subject to appropriate penalties. These safe harbors must be built into any regulatory framework for copyright take-down.

³ *Competition and Consumer Act 2010*, available at: <https://www.legislation.gov.au/Details/C2018C00437>.

It is premature to be considering the introduction of additional regulation in the area of copyright take-down in Australia, given the recent amendments to the Copyright Act⁴ under the Copyright Amendment (Online Infringement) Act 2018.⁵ These amendments, which were made after a public consultation and industry engagement process, are already designed to protect rights holders by expanding the remedies available to them to allow them to apply for a court order directing not only a carriage service provider but also an online search engine to block websites that have the primary purpose or primary effect of infringing copyright. Given that these amendments only came into effect in December 2018 and have yet to be tested, BSA recommends monitoring their effectiveness instead of looking to introduce further, more intrusive adjustments to the copyright regime.

BSA would also question whether the Telecommunications Act⁶ is the right statutory framework within which to address issues of copyright take-down in general. Australia already has comprehensive copyright legislation in the form of the Copyright Act. The Copyright Act would therefore be a much more appropriate medium than the Telecommunications Act for dealing with matters pertaining to copyright.

PRs 8 to 11 – Privacy and data protection – General comments

BSA supports the implementation of considered approaches to privacy and data protection that increase the transparency of personal data collection and use; enable and respect informed choices by providing governance over that collection and use; provide consumers with control over their personal data; provide robust security; and promote the use of data for legitimate business purposes. However, we recommend that there be substantial further consideration of the PRs on privacy and data protection in PRs 8 to 11.

First, we are concerned that the measures go far beyond the terms of reference for the inquiry, which are rightly focused on the impact of digital platforms on the state of competition in the media and advertising services markets. Implementing the privacy and data protection recommendations in PRs 8 to 11 would instead constitute a fundamental change in the regulatory framework applicable to privacy and data protection in Australia, affecting organizations across all industries, and not just digital platforms and related media and advertising services. Fundamental changes to the privacy and data protection framework should be subject to a thorough public consultation process, led by the Office of the Australian Information Commissioner (**OAIC**) and drawing upon comprehensive engagement with all affected stakeholder groups.

A second and related concern is that the conclusions in the Preliminary Report appear to be based disproportionately upon one source of information – namely, the results of consumer surveys. While consumer surveys can be valuable sources of information, appropriate consideration must also be given to overarching privacy principles and global best practices in privacy and data protection, as well as comprehensive engagement with relevant industries. It is for this reason that the BSA developed a report on Global Privacy Best Practices, available at: https://www.bsa.org/~media/Files/Policy/Data/2018_BSA_Global_Privacy_Best_Practices.pdf.

A further concern is that the proposed recommendations appear to depart from Australia's established approach to privacy and data protection regulation. Until now, Australia has largely taken a principles-based, outcomes-focused approach to privacy and data protection, primarily through the Australian Privacy Principles (**APPs**). Introducing a raft of highly-prescriptive measures of the type that the Preliminary Report appears to envisage, and subsequent even more prescriptive requirements via an enforceable Code of Practice, would significantly compromise the enabling effect that the current

⁴ *Copyright Act 1968*, available at: <https://www.legislation.gov.au/Details/C2019C00042>

⁵ Available at: <https://www.legislation.gov.au/Details/C2018A00157>.

⁶ *Telecommunications Act 1997*, available at: <https://www.legislation.gov.au/Details/C2018C00495>.

established, principles-based approach has had on innovation and development of the digital economy in Australia.

We offer further specific comments on PRs 8 to 11 below.

PR 8 – Use and collection of personal information – Specific comments

- (a) **Strengthen notification requirements** – While BSA supports measures to encourage the provision of clear and accessible privacy notices, these notification requirements should not be overly prescriptive and should be based on the core principles of reasonableness and proportionality. This is already reflected in the APPs, which require entities to manage personal information in an open and transparent way, have a clearly-expressed and up-to-date privacy policy, and to notify individuals of relevant matters *as is reasonable in the circumstances*. If, after appropriate inquiry and consultation, the OAIC considers that any additional guidance is required as to what is reasonable in specific circumstances, it should be set out in the APP Guidelines in accordance with existing practice, rather than via the introduction of another layer of prescriptive requirements.
- (b) **Introduce an independent third-party certification scheme** – A principles-based and outcomes-focused regulatory framework, with appropriate and proportionate sanctions for non-compliance, already drives the right behaviors amongst organizations by incentivizing them to understand and comply with the applicable requirements. There is no evidence that adding an additional layer of regulation in the form of mandatory certification would enhance compliance. Conversely, doing so would result in a prescriptive “box-ticking” approach to compliance that would restrict data-driven innovation while imposing additional compliance costs on organizations. Such a scheme would also be out-of-step with international practices. Where certification schemes have been introduced (for example, in countries such as Singapore, which has a Data Protection Trustmark scheme), they have, for the reasons outlined above, typically been limited to voluntary certification, using a “carrot” approach to encourage organizations to use certification as a competitive differentiator, rather than a “stick” approach which mandates certification in all cases. Finally, it is essential that any certification scheme adopt (or, at the very least, be aligned with) international standards (e.g., ISO/IEC standards), since these are already widely-used and accepted around the world as constituting “best practices”. Leveraging international standards promotes consistency for organizations, domestic and foreign alike, and supports cross-border data flows while avoiding unnecessary layers of compliance that arise from national standards.
- (c) **Strengthen consent requirements** – While BSA agrees that data controllers should enable consumers to make informed choices about their personal data, we are concerned that the recommendations in relation to consent as outlined in the Preliminary Report would be unduly onerous and burdensome, and may stifle the development of emerging technologies in Australia. Consent has an important role to play in a regulatory framework for privacy but it is increasingly acknowledged by policy-makers around the world that consent should not always be the *only* grounds for the processing of personal data – other grounds, such as legitimate interests or performance of a contract, are also relevant. Further, due to the constant advancements in technologies such as artificial intelligence, and new and innovative ways in which personal data can be used for various societal and economic benefits, decisions relating to consent need to be based on a variety of factors. Prescribed forms of consent will quickly be rendered obsolete and will hamper innovation and the accrual of such societal and economic benefits. In addition, there is clear evidence that prescriptive consent approaches lead to consumer “consent fatigue”, which actually has a negative effect on the principle of informed consent. Therefore, BSA strongly recommends that the Australian Government maintain a principles-based approach to consent – namely, that consent should be provided at a time and in a manner that is reasonable and relevant to the circumstances. If, after appropriate inquiry and consultation, the OAIC considers that any additional guidance is required in this area, this should be set out in the APP Guidelines in accordance with existing practice.

- (d) **Enable the erasure of personal information** – A new right to erasure or “right to be forgotten” is not required as APP 11 already requires entities to take such steps as are reasonable to destroy or de-identify personal information where no longer needed.
- (e) **Increase the penalties for breach** – While BSA agrees that regulators should have the tools and resources necessary to ensure effective enforcement, the existing penalties under the Privacy Act are already sufficient to incentivize compliance and drive the right behaviors. Further, pegging the penalties for privacy breaches to the penalties for breaches of the Australian Consumer Law (**ACL**) would be arbitrary (since competition law is an entirely separate body of law from privacy law and based on very different factors). This approach risks having a chilling effect on data-driven innovation in Australia, as organizations are disincentivized from embarking on innovation projects for fear of arbitrary and disproportionate penalties.

PR 9 – OAIC Code of Practice for digital platforms – Specific comments

As outlined above, BSA supports a principles-based, outcomes-focused approach to privacy and data protection regulation. Introducing an enforceable code of practice would be overly prescriptive and would create additional layers and costs of compliance for organizations. While BSA welcomes additional *guidance* from the OAIC on privacy and data protection matters, any guidance should carefully weigh the need for more prescriptiveness against the need to preserve flexibility in business practices. The issues involved in developing any code of practice, including what matters should be addressed in the code, can only be fully canvassed in a comprehensive public consultation involving all relevant stakeholders.

PR 10 – Serious invasions of privacy – Specific comments

The introduction of a statutory cause of action for “serious invasions of privacy” is a concern because this concept is highly-subjective, would create substantial uncertainty, and would result in organizations finding themselves subject to potentially overlapping penalties and legal processes based on the same set of underlying circumstances. The net result of this uncertainty would inevitably be that organizations would be reluctant to embark on developing new and innovative products and services in Australia which rely on large quantities of data (including personal data). Privacy-related causes of action and associated liability are already sufficiently covered under existing privacy legislation and, as outlined above in respect of PR 8, any review of penalties in general would need to be considered as part of a separate and comprehensive public consultation led by the OAIC.

PR 11 – Unfair contract terms – Specific comments

First, privacy should be carved out of a review of unfair contract terms under the ACL – amending the ACL is not the appropriate avenue to address concerns about privacy policies and practices. Instead, any concerns with “unfair terms” in the context of privacy policies should be addressed as part of the consideration of the notification requirements under the Privacy Act. If the notifications are handled appropriately and allow consumers to make informed choices, then it follows that changes to the ACL would not be required. In addition, the proposed amendments to the ACL as set out in the Preliminary Report go far beyond the terms of reference for the inquiry, as they apply to *all* unfair contract terms and not just in relation to digital platforms. There are already sufficient consumer protections in place (for example, unconscionable conduct, misleading or deceptive conduct, and the existing unfair contract terms regime) to address power imbalances, and any changes to the regime would need to be considered as part of a separate and comprehensive consultation on consumer protection.

C. Conclusion and Next Steps

Given the complexity of the Preliminary Report, the comments above are not an exhaustive list of BSA’s concerns and recommendations. These are BSA’s preliminary observations only and there are

other aspects of the Preliminary Report that require further consideration. In particular, BSA remains concerned that there are many aspects of the Preliminary Report which go beyond the scope of the terms of reference and should be subject to separate inquiries and consultation processes led by the appropriate regulators and involving relevant industry stakeholders.

We encourage the ACCC to engage in further dialogue with industry to consider the broader issues at play and the implications of the recommendations made in the Preliminary Report. BSA and our members remain at the disposal of the ACCC to participate in any industry and stakeholder groups, not only to discuss the findings of the Preliminary Report, but also to help develop and deliver other enduring solutions to address the challenges related to the regulation of digital platforms.

If you require any clarification or further information in respect of this submission, please contact the undersigned at darrynl@bsa.org or +65 6292 0680.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Darryn', with a stylized flourish extending from the end.

Darryn Lim
Director, Policy – APAC