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CENTRE FOR MEDIA TRANSITION

Digital Platforms: Government consultation on ACCC's regulatory reform recommendations

Consultation Paper, December 2022

Submission to The Treasury

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About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

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Executive Summary

This submission addresses the dispute resolution aspects of Recommendation 2, Digital Platform Specific Consumer Measures. Specifically, we address questions 10, 11 and 12, drawing on our research, report and round table consultation exploring options for an external dispute resolution scheme for digital platforms.

Introduction

Clarifying who is likely to make complaints and what those complaints are about is essential. As part of our research, we developed a four-part typology of complaints, based on distinctions between user-to-platform transactional complaints, user-to-user transactional complaints, user-to-platform social complaints, and user-to-user social complaints (see Table 1 below).

Given the ACCC's (and by implication Treasury's) emphasis on the resolution of user-to-platform transactional complaints, we have adopted this position in this submission However, we believe it is important to note the gap in user-to-platform social complaints and in user-to-user complaints. Attention should be directed to the former in the medium term (if not sooner) and to the latter in the medium to longer term.

We agree with the ACCC's observations that the scheme will need to be able to:

- make binding decisions on digital platforms;
- award compensation and other forms of restitution to aggrieved complainants, where necessary; and
- have an additional monitoring function with responsibility for identifying systemic issues or trends and raising them with industry, relevant regulators and government departments.

Further, the independent scheme should:

- be able to report potential violations of applicable legislation, such as the ACL, and additional rules, including industry codes of practice, to the relevant regulator;
- not be responsible for enforcing digital platform compliance with applicable law, as potential violations of legislation and other rules are best addressed by the statutory regulator(s) empowered to secure industry compliance with them.

Question 10

- In the absence of any further evidence from the ACCC in support of its view that the TIO may not have the requisite capacity, and assuming the TIO supports the addition of this function and is appropriately funded, on balance our preference is for the TIO to assume these responsibilities. If these conditions are not able to be met, we support the establishment of a new Digital Platform Ombuds Scheme.
- We remain of the view that a single clearing house or portal which has principal responsibility for directing consumers to the appropriate regulator or scheme continues to have merit and should be explored further before a No Wrong Door (NWD) policy approach is adopted.
- The clearing house could be funded by and operated independently of industry provided that the criteria for a qualifying scheme as well as performance expectations and reporting obligations are set out in legislation or a legislative instrument or combined statement of expectations and legislative instrument.

- In the absence of a clearing house, any NWD policy should similarly be the subject of a legislative instrument, rather than left to the goodwill of numerous regulators.
- Government will also need to adequately fund a consumer body with capacity to advocate on behalf of digital platform users. This consumer body could be, for example, the Australian Communications Consumer Action Network (ACCAN) with an expanded remit or a new bespoke consumer body with a focus on digital platform users.

Question 11

- Participation of small and micro-enterprises could be facilitated by the external scheme adopting a realistic membership fee structure that reflects the differences between start-ups and similarly sized players and large international companies.
- In addition, IDR requirements imposed on digital platforms could be tailored to the size of the digital platform concerned with bigger organisations shouldering more responsibilities.

Question 12

- We believe government should adopt a new Act, making ACMA responsible for digital platform non-compliance with the ACL and related protections and oversight of the independent scheme, including monitoring and enforcement of scheme participation and compliance with scheme rules.
- We acknowledge that the ACCC's experience in administering the Australian Consumer Law, and the development of its Digital Platform Branch, would position it to take on these new tasks under amendment to the Competition and Consumer Act 2010 (Cth). However, we also note that ACMA has direct experience supervising dispute resolution schemes as well as significant experience enforcing telecommunications-specific consumer-protection rules and industry standards.
- Conferring scheme oversight on ACMA might also have the benefit of allowing it to develop a more holistic view of pertinent communications-related matters at a time when it is soon to be given powers in relation to disinformation on digital platforms and Australian content on streaming services. In the future, more regulation may be required in relation to messaging and related services (as they replace voice calls and texts), and it is sensible to suppose that ACMA's jurisdiction over telecommunications services will need to evolve as a consequence.
- We would hope that in the future, the roles discussed here in relation to digital platform complaints, along with enduring concepts from the Telecommunications Act 1997 (Cth) and Broadcasting Services Act 1992 (Cth), would form the building block for a new Communications Act. We would also hope the new Act would serve as the impetus for a wider review of ACMA's existing powers and the Australian Communications and Media Authority Act 2005 (Cth) – one that would enable ACMA to play a more substantial role in the digital platform environment.

Introduction

Thank you for the opportunity to contribute to this consultation. Our submission draws on our research, report and round table consultation exploring options for an external dispute resolution scheme for digital platforms.1 Accordingly, we restrict our comments to the dispute resolution aspects of Recommendation 2, Digital Platform Specific Consumer Measures. Specifically, we address questions 10, 11 and 12.

Before addressing these specific questions, however, we believe it is useful to:

- provide a brief summary of our research report *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme*
- set out the typology of complaints, included in the report, that informed our analysis;
- using the typology, clarify the types of complaints the ACCC believes an independent external ombuds scheme (whether new or modified) would be expected to adjudicate; and
- specify the core functions of an independent external ombuds scheme (whether new or modified) in respect of those complaint types.

In our view, clarifying who is likely to make complaints and what those complaints are about is essential: they go to directly to the scope, functions, form, and necessary powers of any independent external ombuds scheme for digital platforms. They are also crucial to determining which body is best to resolve those complaints (ie, a new body created specifically for that purpose or an existing body with an expanded remit).

Background to our research report

Building on our previous work on digital platforms and on disinformation[2] and using the then government's response[3] to the Digital Platform Inquiry (DPI)[4] as a starting point, our report focused on external dispute resolution (EDR) and the establishment of an ombuds scheme. We narrowed the focus to social media platforms,[5] commencing with the nature or type of possible complaints. We looked at how these were handled by the leading social media service in Australia – Facebook – where different policies apply according to the type of user activity. For example, users posting content in a social media feed were subject to Facebook's 'Community Standards' while buyers and sellers were subject to additional policies, including the 'Purchase Protection Policies' for buyers and the 'Performance and Accountability Policies' for sellers.[6] We then looked at how existing external mechanisms handle those complaints, and finally at options for an external complaint handling scheme, were government to mandate such an arrangement. Three options were explored:

1. A new Digital Platform Ombudsman
2. An expanded Telecommunications Industry Ombudsman (TIO)
3. An industry-led clearing house and social disputes resolution scheme.

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[1] See: Holly Raiche, Derek Wilding, Karen Lee & Anita Stuhmcke, *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme* (UTS Centre for Media Transition, 2022). See also: UTS Centre for Media Transition, *Submission to ACCC Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, April 2022.

[2] See, for example, Wilding et al, *The Impact of Digital Platforms on News and Journalistic Content* (UTS Centre for Media Transition, 2019) and Derek Wilding and Anne Kruger, *Discussion Paper on an Australian Voluntary Code of Practice for Disinformation* (DIGI, December 2020).

[3] Australian Government, *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (December 2019) 13.

[4] ACCC, *Digital Platforms Inquiry: Final Report* (June 2019) 37-38.

[5] This was due to budgetary considerations.

[6] See: https://transparency.fb.com/en-gb/policies/community-standards/; https://www.facebook.com/policies/purchase_protection; https://www.facebook.com/legal/merchant_policies.

Our report did not present an argument for any specific EDR model, as our research was designed to advance the policy discussion around this issue by exploring the workability of different models.

Types of complaints

We determined that complaints involving social media platforms can be distinguished in the following two ways:

- complaints about the conduct of the *social media platforms* themselves or complaints about the conduct of *third-party users* of those platforms, including advertisers, sellers and users who post content;
- *social disputes* based on, for example, harmful content one user has posted against another or complaints against a platform for exposure to illegal content, misinformation or other harmful material; or *transactional disputes* often involving unmet contractual expectations but sometimes involving misuse of user data etc.[7]

This approach resulted in a four-part typology of complaints, based on distinctions between user-to-platform transactional complaints, user-to-user transactional complaints, user-to-platform social complaints, and user-to-user social complaints, as set out in Table 1 below.

	Social	Transactional
User-to-platform Complaints	• Illegal content including terrorism, CSAM, instruction in criminal acts • Pornography and other offensive content • Disinformation and misinformation • Content moderation disputes • Sale of prohibited goods or services • Election advertisements • Proliferation of fake accounts and other inauthentic behaviour	• Unfair digital platform business practices • Complaints about digital platform service, charges etc. • Privacy / other personal violations by digital platform • Failure to protect user eg, account hacking • Complaints about service disruption eg, account suspension • Dispute over terms of service / account suspension etc. • Complaints involving digital platform failure to comply with dispute resolution obligations
User-to-user Complaints	• Abuse, harassment and discrimination and other personal harms with an online dimension • Damage to reputation • Identity theft, impersonation • Disclosure of confidential or protected information • Other privacy breaches by third parties • Advertising content eg, community standards, offensive material • News content eg, accuracy and fairness	• Scams and fraudulent transactions • Misleading advertising and product claims, unfair terms, product defects, other sales disputes • Breach of copyright • Comments in reviews of products and services • Spam and unwelcome notifications or communications

Table 1: Types of complaints made about content and conduct on digital platforms

[7] This categorisation drew on the work of Ethan Katsh and Orna Rabinovich-Einy, 'The Challenge of Social and Anti-Social Media' in Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017) 109-130, 113. Katsh and Rabinovich-Einy limited their category of 'social disputes' to user-to-user disputes; we expanded this category to include complaints that users might have against the platforms themselves.

The complaints listed in the table were not intended to be exhaustive and we were and remain conscious that some topics of complaint (eg, privacy breaches, spam and unwelcome notifications of communications) could be allocated to another category or more than one category. It is also possible that a user-to-user social complaint (eg, one about extremist content) could become a user-to-platform transactional complaint, if, for example, the user's account were suspended or cancelled as a result of the extremist content and the account owner made a complaint. In addition, an initial user-to-user social complaint could become a user-to-platform social dispute where one or more users considers the platform has failed to fulfil its obligations (where they exist) relating to the resolution of user-to-user disputes.

What types of complaints would an independent external ombuds scheme (whether new or modified) be expected to adjudicate?

The Treasury Consultation Paper does not ask about or delineate the scope of complaints the proposed independent external ombuds scheme would be expected to adjudicate. However, the examples of complaints cited on pp. 91-92 of the ACCC's DPSI Interim Report No 5 largely fall into what we called 'transactional disputes' in our July 2022 report. They largely encompass user-to-platform complaints (eg, decisions to suspend services or terminate a user's account; decisions to suspend or terminate the provision of a digital platform service or part of a services), but also include some user-to-user complaints (eg, reporting and removal of scams and fake reviews). The ACCC does not expressly limit the scope of an independent external ombuds scheme to 'user-to-platform transactional disputes'. For example, at p. 101 of DPSI Interim Report No 5, it states 'further consideration should be given to whether all of the types of disputes subject to minimum internal dispute resolution standards would be appropriately handled by an ombuds scheme …' However, the ACCC's discussion of internal dispute resolution standards is clearly focused on resolving user complaints concerning the conduct by the digital platforms themselves, not the conduct of fellow users of digital platforms, as well as conduct that infringes the ACL (as modified).

Given the ACCC's (and by implication Treasury's) emphasis on the resolution of user-to-platform transactional complaints, the remainder of our comments and our answers to questions 10, 11, and 12 below focus on how to give effect to that objective. However, we believe it is important to emphasise the following points.

- If the remit of any independent external ombuds is confined to user-to-platform transactional complaints, there is likely to be no external avenue for users to resolve many types of user-to-platform social complaints that arise on social media platforms: existing regulators and industry schemes do not have jurisdiction over those types of complaints. Examples of such complaints include the failures of social media platforms to discharge their obligations in relation to: disinformation and misinformation (apart from the narrow category of complaints under the Australian Code of Practice on Disinformation and Misinformation that amount to failure to implement systems and processes); news content and breaches of community standards in advertising content (where the complaint is about how the platform itself treats that content); election advertisements (except for the narrow category of actions covered by some electoral laws); censorship; disclosure of confidential or protected information; and damage to reputation (apart from the narrow class of actions against platforms that might succeed, at great expense, via the law of defamation). Adoption of an independent external ombuds dealing with user-to-platform transactional complaints would be a significant step forward, but the gap in user-to-platform social complaints should be acknowledged and attention should be directed in the medium term (if not sooner) to how an independent external ombuds (new or existing) would need to be modified to accommodate disputes of this nature.

- User-to-user complaints (social and transactional) are also not addressed expressly in the ACCC's DPSI Interim Report No 5 and Treasury's Consultation paper. However, consideration should be given now to how internal dispute resolution standards could be used to encourage platforms to provide effective means of resolving disputes between users (eg, online dispute resolution) over matters that arise as a result of the use of the platform, apart from the schemes administered by Ad Standards and the Australian Press Council which provide a forum for the resolution of complaints about the content of advertising and news. As we stated in our research report:

  > In our view, there is merit in exploring this option now as these social disputes are likely to increase; there is a strong public policy argument for encouraging social media providers to fund easily accessible and no-cost dispute mechanisms; and there is an additional community benefit in helping to address defamation claims in a forum that helps claimants – and courts – avoid the costs of defamation litigation.[8]

  In the medium- to longer-term, consideration will need to be given to whether users need recourse to one or more external dispute resolution bodies for their complaints concerning other users, and if so, the form of alternative dispute resolution best suited for those complaints.

Core functions of the independent external ombuds scheme (whether new or modified)

If the purpose of an independent external ombuds scheme is to resolve user-to-platform transactional complaints, we agree with the ACCC's observations on p. 100 of its DPSI Interim Report No 5 that the scheme will need to be able to:

- make binding decisions on digital platforms; and
- award compensation and other forms of restitution to aggrieved complainants, where necessary.

We also agree that it is essential the independent scheme should have an additional monitoring function with responsibility for identifying systemic issues or trends and raising them with industry, relevant regulators and government departments. Further, the independent scheme should be able to report potential violations of applicable legislation, such as the ACL, and additional rules, including industry codes of practice, to the relevant regulator. It should not be responsible for enforcing digital platform compliance with applicable law. Potential violations of legislation and other rules are best addressed by the statutory regulator(s) empowered to secure industry compliance with them.

We address the questions of which regulator should have responsibility for enforcing the benchmarks against which an independent scheme will assess user-to-platform transactional complaints and which regulator should have oversight of the independent scheme in our answer to Question 12.

[8] Report, pp. 50-1

Question 10

- **Is a new independent external ombuds scheme to resolve consumer disputes with platforms warranted? Can any or all of the functions proposed for the new body be performed by an existing body and, if so, which one would be most appropriate?**

A New Independent External Ombuds Scheme?

In our research report, we concluded that an entirely new, comprehensive ombudsman scheme for all digital platform complaints – as the ACCC originally suggested in its July 2019 DPI Final Report – was not a viable option, despite the obvious appeal of a one-stop shop for complainants. There were two main reasons for this. First, complaints relating to privacy, online harms covered by the Online Safety Act 2021 (Cth), copyright complaints, perhaps defamation complaints, advertising complaints and news complaints would in all likelihood continue to be dealt with by specialised bodies. This would leave a depleted jurisdiction for a new ombudsman. Second, it is unlikely to be cost effective to set up an entirely new ombudsman when many complaints will already be dealt with by specialised bodies that are already known to complainants, and other complaints could be directed to an existing EDR scheme with an expanded remit.

However, as suggested above, the new independent external ombuds scheme the ACCC put forward in its DPSI Interim Report No 5 is much narrower in scope than the one it recommended in its July 2019 DPI Final Report and the one we evaluated in our July 2022 research report. The remit of the proposed new independent external ombuds scheme now appears to be limited to the resolution of user-to-platform transactional complaints – types of complaints that existing industry ombuds such as the TIO and regulators like the Office of the eSafety Commissioner (eSafety), the Office of the Australian Information Commissioner (OAIC), the Australian Communications and Media Authority (ACMA), and the ACCC do not have jurisdiction to resolve.

In our view, digital platform users must have recourse to some form of EDR for user-to-platform transactional complaints, and adoption of a new independent external ombuds scheme is one possible way to ensure the proposed IDR mechanisms of digital platforms are effective and address the power imbalances between consumers and the digital platforms identified by the ACCC (p.98, DPSI Report No 5). It would avoid some of the complexities, identified in our report, involving modifications to the constitutions and funding arrangements of existing schemes, such as the TIO, needed to accommodate an expansion of their memberships to digital platforms – arguably enabling faster scheme set up and quicker redress for consumers.[9] However, it would involve the creation of a brand new body and for this body to set up the kind of administrative frameworks under which existing schemes operate. It would also require resources to educate consumers about the new scheme to ensure the scheme had some consumer brand recognition – recognition that existing schemes already enjoy. Further, a new ombuds scheme might not be able to fully leverage the deep knowledge and expertise of dispute resolution gained by existing schemes. Existing regulators and schemes would need to be willing to work with the new stand-alone scheme. And given the possibility of user-to-platform transactional complaints becoming user-to-platform social complaints (and vice versa), user-to-user complaints becoming user-to-platform complaints (and vice versa) and complaints falling within the jurisdiction of multiple regulators, new memoranda of understanding and other administrative arrangements between the new scheme and all other potentially relevant regulators and schemes would need to be developed – a point to which we will return below.

[9] A ‘purpose-built’ digital platform scheme might also facilitate nimbleness and flexibility (eg, if the government decided in the future to expand the scheme to include user-to-platform social complaints).

An Expanded TIO?

In our July 2022 report, we also considered whether nine existing bodies and regulators could potentially handle user-to-platform transactional complaints identified by the ACCC and other complaints left unresolved by social media platforms:

- TIO
- the Office of the eSafety Commissioner (eSafety)
- ACMA
- the Digital Industry Group Inc (DIGI)
- ACCC
- OAIC
- the Australian Small Business and Family Enterprise Ombudsman
- Ad Standards
- Australian Press Council and other news standards organisations.

However, our review of them suggested that the TIO is the only existing body that could perform the functions the ACCC is now suggesting should be performed by a new independent external ombuds scheme.

This is not because of any perceived failings on the part of the other bodies; rather, the other bodies all have functions that render them ill-equipped to take on user-to-platform transactional complaints, or the addition of those complaints would be likely to impede their existing work. eSafety is perhaps the best suited of all the other bodies as it already has powers to issue notices and take action in relation to online content. It also has an established record of assisting consumers and in handing consumers over to service providers where an issue is outside its jurisdiction. However, eSafety is a well-focussed and efficient agency that may suffer if it is given responsibility for unrelated 'transactional' disputes that do not fall within its current remit of online harms, and it may not want to assume responsibility for user-to-platform transactional disputes.

Moreover, the TIO itself acknowledged in its 2019 submission on the government's response to the ACCC's DPI Final Report that some types of transactional complaints about digital platforms are a natural fit for an expanded TIO. This is because the TIO currently administers a resolution scheme based on consumer complaints about telecommunications service providers. Hence user-to-platform transactional complaints like account access and control, charges and billing and privacy complaints referred from the OAIC are similar to complaints the TIO already handles.

Assumption of responsibility for user-to-platform complaints by the TIO would have the advantages of reducing some of the brand-generation and recognition costs and potential for consumer confusion likely to arise as a result of the creation of yet another external complaints scheme. This is especially the case given the TIO has reported that consumers already contact it seeking resolution of digital platform complaints.[10] Using the TIO would also avoid the need to replicate existing administrative frameworks and procedures and allow it to bring its 30 years of experience and successful track-record with dispute resolution in the telecommunications sector to the problem of user-to-platform transactional complaints. However, it could give rise to the potential difficulties, referred to above in our discussion of a new independent external ombuds scheme, involving modifications to its constitution and funding arrangements. These problems are not necessarily insurmountable but might lead to delay in implementation of the proposed new function.

[10] Telecommunications Industry Ombudsman, *Submission from the Telecommunications Industry Ombudsman to the Treasury's Consultation on the Final Digital Platforms Inquiry Report* (September 2019) 6.

Existing regulators and schemes would need to be willing to continue to work with an expanded TIO, requiring changes to their memoranda of understanding and other administrative arrangements to facilitate the smooth operation of the scheme. In addition, the TIO would need to agree to take on this additional function and be adequately funded by government (at least in the short term) to acquire the necessary capabilities and capacities to perform this role.

We note the ACCC has previously stated, 'it is likely to be efficient for an existing ombudsman [such as the TIO] to resolve complaints about digital platforms, rather than creating a new ombudsman or organisation',[11] but it is now suggesting a new independent external ombuds scheme is necessary because 'an existing body may not have the capability and capacity to undertake that role'.[12] While we agree that either a new independent external ombuds scheme or an expanded TIO needs to have capability and capacity to assume responsibility for user-to-platform transactional complaints, the ACCC does not make it clear why the TIO may not have the requisite capability. The number of user-to-platform complaints involving digital platforms is likely to be very high, but provided the TIO were adequately funded to resolve them and amendments to the Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) and its constitution were made, without further information we do not immediately see why the TIO could not perform this additional function should it wish to, and the other regulators and schemes with which it currently works agree.

Accordingly, in the absence of any further evidence from the ACCC in support of its view that the TIO may not have the requisite capacity; and assuming the TIO supports the addition of this function and is appropriately funded, and required modifications to its constitution do not lead to excessive delay, on balance our preference is for the TIO to assume these responsibilities. If these conditions are not able to be met, we support the establishment of a new Digital Platform Ombuds Scheme.

Need for Seamless Consumer Complaint-handling Experience

Regardless of which body assumes responsibilities for user-to-platform transactional complaints (ie, a new independent external ombuds scheme or an expanded TIO), careful attention must be paid to ensuring that consumers and small businesses can easily find and/or be directed to the body or scheme best placed to resolve their particular disputes with digital platforms. Consumers already experience significant confusion about where to direct complaints involving digital platforms and any change to the regulatory landscape needs to ensure that inconvenience and frustration are minimised. To this end, in our July 2022 research report, we suggested a clearing house or portal that enables user complaints to be redirected to the appropriate external disputes scheme could be developed. We note that in its DPSI Interim Report No 5 the ACCC has also stated that a 'no wrong door' (NWD) policy – whereby consumers with digital platform complaints could approach any relevant industry regulator or scheme and be directed to the appropriate dispute resolution body for their complaints – could work as a substitute for a clearing house or 'one-stop-shop' for consumers.

We understand an NWD policy already operates in practice (at least informally) between the ACCC, ACMA, eSafety, OAIC, and the TIO. If a new independent external ombuds scheme were created, it would need at an absolute minimum to adopt a NWD policy and existing bodies and schemes would have to adapt their referral practices accordingly. Adaptation of their referral practices would also be required if the TIO's remit were expanded. However, given the number of user-to-platform transactional complaints, either a new ombuds scheme or an expanded TIO will be expected to address, we believe all relevant regulators would need to formally adopt new administrative arrangements and procedures governing their working relationships if an NWD policy is to work effectively.

[11] DPI Final Report, above n 4, 510.
[12] ACCC, DPSI Interim Report No 5 (September 2022) 103.

The arrangements and procedures would need to spell out the dispute resolution functions of each body, address the types of complaints each of them will adjudicate, the processes they will use to resolve them, and the steps complainants need to follow for their disputes to be heard. They would need to be developed in consultation with consumer bodies and members of industry and clearly communicated to potential complainants via the websites of each relevant regulator or scheme and relevant user-facing communications channels of the digital platforms themselves. In addition to regulators and schemes committing to engage in ongoing assessment and review of these arrangements and reporting publicly on an annual basis about their operation, government would need to ensure all relevant regulators and schemes are adequately supported and resourced so they could respond promptly to complainants' requests for assistance and redirect complaints wrongly directed to them to the appropriate regulator or scheme.

As our discussion highlights, ensuring a NWD policy works in practice will be a complex exercise – one that has the potential to break-down in the absence of good will and, if poorly implemented, will lead to further consumer anger and frustration. For that reason, we remain of the view that a single clearing house or portal which has principal responsibility for directing consumers to the appropriate regulator or scheme continues to have merit and should be explored further before an NWD policy-approach is adopted. A clearing house would not obviate the need for regulators and schemes to work together, but it would allow for communication between users and regulators and schemes to be streamlined and be a central point of contact for regulators and schemes. This entity could be funded by and operated independently of industry provided that the criteria for a qualifying scheme as well as performance expectations and reporting obligations are set out in legislation or some other legislative instrument or combined statement of expectations and legislative instrument. In the absence of a clearing house, any NWD policy should similarly be the subject of a legislative instrument, rather than left to the goodwill of numerous regulators.

Additional funding for ACCAN or creation of a new consumer body with express digital platforms remit

If the government adopts either approach (eg, establishment of new independent external ombuds scheme or an expanded TIO), it will also need to adequately fund a consumer body with capacity to advocate on behalf of digital platform users. This consumer body could be, for example, the Australian Communications Consumer Action Network (ACCAN) with an expanded remit or a new bespoke consumer body with a focus on digital platform users. ACCAN's current remit and funding are limited to issues relating to the provision of telecommunications and Internet services, and it has made limited contribution to digital platform debates.[13] The initial focus of an expanded ACCAN or new bespoke consumer body would be on digital platform behaviours likely to give rise to user-to-platform transactional complaints as well as some types of user-to-platform social complaints. A provision comparable to s 593 of the Telecommunications Act 1997 (Cth), which confers a power for the Department of Communications to fund consumer organisations, would need to be inserted into the legislation giving effect to the government's external dispute resolution decision.

[13] On the importance of consumer involvement and further discussion on the potential expansion of ACCAN's remit, see Lee, K. & Wilding, D. 2019, *Responsive Engagement: Involving Consumers and Citizens in Communications Industry Rule-making*, Australian Communications Consumer Action Network, Sydney 93-98.

Question 11

- **The ACCC recommends these requirements to apply to all digital platforms, do you support this? If not, which requirements should apply to all platforms, and which should be targeted to certain entities?**

The ACCC suggested in its DPSI Interim Report No 5 that the external independent ombuds scheme should 'apply to all digital platforms providing relevant services' (p. 101). We understand 'relevant services' include the following for the ACCC: search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services (p.73).

In our view, all digital platforms providing these services should be required to participate in an external independent ombuds scheme. Comparable industry schemes mandate participation from all industry participants regardless of their size: for example, the TIO scheme stipulates that all telecommunications service providers to participate; and the Australian Financial Complaints Authority (AFCA) requires all specified providers of financial services to be scheme members. We would not want to see a situation where some users of relevant services have access to external adjudication, but others are denied recourse, especially as it is unlikely that access to an ombuds scheme would be a reason for users to select particular digital platform providers.

We recognise that smaller players may find participation in an external independent ombuds scheme more onerous than very large digital platform providers like Google and Meta. However, participation of small and micro-enterprises could be facilitated by the external scheme adopting a realistic membership fee structure that reflects the differences between start-ups and similarly sized players and large international companies. The Australian Press Council, for example, charges small news outlets radically reduced membership fees compared to large media conglomerates. In addition, IDR requirements could be tailored to the size of the digital platform with bigger organisations shouldering more responsibilities. The Digital Services Act adopted by the EU, for example, exempts small and micro-enterprises from IDR requirements,[14] while mandating that very large online platforms comply with all IDR requirements.

Question 12

- **If the above processes are introduced, is the Australian Consumer Law the appropriate legislation to be used and what should the penalty for non-compliance be?**

Our final observations relate to the question of which regulator should have responsibility for digital platform non-compliance with ACL and related protections (as amended) and oversight of the independent scheme, including monitoring and enforcement of scheme participation and compliance with scheme rules.

As an initial comment, we note that the ACL in its current form is enforced by the ACCC and state and territory consumer protection agencies. Moreover, the ACCC has acquired significant knowledge of digital platforms and their services through multiple inquiries into the sector. It also already has a dedicated Digital Transformation division. These factors arguably make the ACCC the most appropriate body to undertake the tasks of digital platform non-compliance with a revised ACL and oversight of the independent scheme, and the Competition and Consumer Act 2010 (Cth) the most appropriate legislation to implement these changes.

[14] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), art 19(1).

However, we believe government should instead adopt a new Act, making ACMA responsible for these two tasks and conferring the necessary powers on it. There are two reasons for this. First, unlike the ACCC, ACMA has direct experience supervising dispute resolution schemes. ACMA, including its predecessor the Australian Communications Authority, has nearly three decades of experience with managing such issues in relation to the TIO – experience that could be brought to the digital platform environment. Second, conferring scheme oversight on ACMA would have the important benefit of allowing it to develop a more holistic view of pertinent communications-related matters (other than matters covered by eSafety). The government (as well as the former Coalition government) has recently signalled that the ACMA is to be given powers in relation to dis- and misinformation on digital platforms.[15] ACMA already has some powers under Schedule 8 of the Broadcasting Services Act 1992 (Cth) over online content providers including streaming services, and the government recently announced that in the third quarter of 2023 it will 'introduce requirements for Australian screen content on streaming platforms' to take effect from 1 July 2024.[16] Finally, more regulation of digital platforms (eg, regulation of their messaging and related services as they replace voice calls and texts) may be required in the future, and it is sensible to suggest that ACMA's jurisdiction over telecommunications and broadcasting services needs to evolve as a consequence.

ACMA does not have any direct experience of enforcing the ACL, but it has significant experience enforcing telecommunications-specific consumer-protection rules and industry standards like the Telecommunications (Consumer Complaints Handling) Industry Standard 2018 (Cth) – provisions that have parallels with current and proposed ACL obligations. Conferral of responsibilities on a body other than the ACCC to administer ACL provisions in relation to sector-specific products and services is also not without precedent. For example, the Australian Securities and Investments Commission, administers, in collaboration with the ACCC and others,[17] some ACL provisions (eg, unfair contract terms, unconscionable conduct) in relation to financial products and services.[18] Moreover, while ACMA does not have the ACCC's reputation for responsiveness, with the appropriate powers, adequate resourcing, and, where appropriate, guidance from the ACCC, in our view, ACMA would have the capacity to successfully undertake the ACL enforcement role, currently performed by the ACCC, in relation to the relevant services of the digital platforms subject to the independent scheme.

To conclude, if a new Act giving ACMA responsibility for digital platform ACL compliance and oversight of the independent scheme were adopted, we would hope that in the future it (along with enduring concepts from the Telecommunications Act 1997 (Cth) and Broadcasting Services Act 1992 (Cth)) would form the building block for a new Communications Act. We would also hope the new Act would serve as the impetus for a wider review of ACMA's existing powers and the Australian Communications and Media Authority Act 2005 (Cth) – one that would enable ACMA to play a more substantial role in the digital platform environment.[19]

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[15] See 'New ACMA Powers to Combat Harmful Online Misinformation and Disinformation', Media Release by Hon Michelle Rowland, 20 January 2023, https://minister.infrastructure.gov.au/rowland/media-release/new-acma-powers-combat-harmful-online-misinformation-and-disinformation.

[16] Australian Government, *Revive: Australia's Cultural Policy for the Next Five Years*, February 2023, 89. https://www.arts.gov.au/publications/national-cultural-policy-revive-place-every-story-story-every-place. While the design of this scheme has not yet been announced, the previous government's proposed Streaming Services and Reporting Scheme would have required Subscription Video On Demand (SVOD) providers, which have some of the same attributes as digital platforms, to report annually to ACMA on their investment in Australian content. Investment obligations, to be enforced by ACMA, would apply in cases where an SVOD service did not report or did not meet a target investment amount. Australian Government, Streaming Services Reporting and Investment Scheme Discussion Paper (February 2022).

[17] See, eg, Access Canberra et al, *Compliance and Enforcement: How Regulators Enforce the Australian Consumer Law* (2017) 11.

[18] Australian Securities and Investments Commission Act 2001 (Cth) pt 2, div 2.

[19] On the potential scope of such a review, see Karen Lee and Derek Wilding, 'The Case for Reviewing Broadcasting Co-regulation' 182 (1) *Media International Australia* (2021) 67, 76-78.