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CENTRE FOR MEDIA TRANSITION

Digital Platforms Inquiry

Submission to Treasury

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About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.

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Thank you for the opportunity to contribute to this feedback process.

Below we address only those recommendations from the ACCC Final Report that are within our area of expertise. These comments build on our report, *The Impact of Digital Platforms on News and Journalistic Content*, commissioned by the ACCC for its Preliminary Report and on our submission in response to the Preliminary Report.

Recommendation 6: Process to implement harmonised media regulatory framework

We support this recommendation to address the significant problems arising from the fact that digital platforms largely fall outside existing regulatory frameworks. However, we would add the following points to the ACCC's recommendation:

1. In our report for the ACCC and in our submission on the Preliminary Report we made the point that digital platforms should be brought into the regulatory framework and be accorded some form of service provider status. However, this would primarily be designed as a means of preventing certain practices and conduct (in other words, 'harms') rather than as a means of enforcing content obligations. An exception to this could be the requirement to contribute financially if that is considered an appropriate mechanism for applicable digital service providers in addressing the policy problems associated with Australian and children's content.
2. There should be a new service provider category (or more than one, reflecting the different functions of platforms) that can be used across communications regulation. We have consistently said that we think digital platforms, based on their current operations, should be given neither the privileges nor obligations of publishers and broadcasters. The issue of privileges is currently playing out in the national security context: editorial responsibility is still a distinguishing feature of news organisations and they alone should have access to exemptions from liability under national security laws.
3. We have some reservations about the practical implementation of regulatory parity, platform neutrality and the level playing field. While these concepts make sense in the context of correcting some aspects of regulatory imbalance, there will inevitably be some complications in implementing such a scheme. Here, we will touch on three of these. First, there are good reasons why print and online news media should not be subject to the statutory regime applying to broadcasters – and for this reason we have suggested news and current affairs content be pulled from the statutory regime and be rolled into an enhanced industry-based standards scheme along with print and online news media. (We have also suggested there would be an appropriate role for digital platforms here in contributing to the funding of this scheme.) Second, it makes little sense to impose local news quotas on online providers, but we do not support their removal from legacy providers. Third, as we have said elsewhere, the imbalance produced by defamation laws should not be solved by making platforms subject to the same burdens.
4. Having said that, we do agree with the ACCC's proposal for a principles-based approach and if digital platforms take on the role of publishers in addition to their current functions as enhanced distributors, their regulatory status would change. If, for example, a digital platform commissioned original content that was only made available on its platform – a practice we understand one digital platform may adopt in Australia – then it could be

subject to different obligations in the same way that a telecommunications company may have obligations as a carrier and also as a service provider.

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

We support this recommendation.

Recommendation 9: Stable and adequate funding for the public broadcasters

We support this recommendation, though we can foresee definitional questions arising around the key words, stable and adequate. An issue raised (by former Fairfax CEO Greg Hywood) during the recent Senate inquiry into public interest journalism is pertinent: why does the ABC spend taxpayers' funds boosting its presence on social media – and in doing so, place itself in competition with commercial news providers? Taking this as a prompt, we ask, should the ABC receive 'adequate' funding to enable such practices? A further and related issue: the digital age is characterised by a proliferation of platforms and channels. Does the ABC require 'adequate' funding so its content can be found on Snapchat or the social video channel Tic Toc? This point is not a way of denying the ABC stable or even extra funding. But it is worth noting that the demands on a public broadcaster – and the demands from a public broadcaster – are potentially ever-growing.

Recommendation 10: Grants for local journalism

We support this recommendation.

We wish to note the need for transparent criteria for successful outcomes in this area. We are strongly of the view that local journalism requires assistance to innovate and transform, from print to digital, from appointment to on-demand etc. We would not wish to see any grant process being used simply to support business as usual in the absence of an allied transformation. In our experience, innovation is mis-understood by sections of the news media. This may be because it is hard to build a new house when the old one is burning to the ground. That is why we support policies that clearly state and encourage transformative processes. There are models in other countries (notably the UK, New Zealand and the US) of collaborative innovation in this area; we believe such partnerships between news organisations and between news organisations and the community offer potential blueprints for a productive use of public funds.

Recommendation 11: Tax settings to encourage philanthropic support for journalism

We support this recommendation.

We do, however, regret that the ACCC has backed away from its draft proposal to implement tax offsets for producers of public interest journalism and tax rebates for consumers who subscribe or perhaps donate (thereby avoiding the privileging of a subscription model). We are

concerned the current proposal will have limited application in the news media industry. We believe the over-arching goal is to improve and enhance the financial and commercial viability of the news business and stimulate demand for high quality journalism. In short, we want to see a diverse media sector, capable of standing on its own two feet rather than reliant on philanthropy.

Recommendation 12: Improving digital media literacy in the community
Recommendation 13: Digital media literacy in schools

We support these recommendations.

We note these are both considerable undertakings and will require a co-ordinated approach across state and territory jurisdictions, especially when it comes to the question of schools. Teachers and educational bureaucrats tend to be of the view that the curriculum is full and while they may support enhancing digital media literacy, they will be reluctant starters if implementing programs means ditching other programs and parts of the curriculum.

In terms of the broader community, we are of the view that social media platforms, in particular Google and Facebook, have a duty to fund such programs to a greater extent than they now do.

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

We support this recommendation, although we offer the following comments.

1. Experience overseas, mainly in the US, indicates that credibility signalling via such ideas as a 'trust tick' (see the Trust Project) requires widescale buy-in from the news media industry as well as digital platforms. We have nothing against monitoring current and any new efforts of the platforms but are of the view that such credibility signalling needs adoption by all parties. It also requires media consumers to be better educated about what they seeing, why they are seeing it and what it means.
2. We note this and Recommendation 15 effectively replace the idea in the Preliminary Report that a Digital Platforms Code could require platforms to take active steps in promoting content generated under standards schemes. There was value in that proposal, perhaps even more so in conjunction with Recommendation 14. In our submission on the Preliminary Report we suggested some amendments, including the replacement of the fragmented system of multiple rules about aspects such as accuracy with a single set of cross-media, cross-platform standards administered by an industry body with funding from digital platforms. If there is not to be a code of this kind, we think reform of the fragmented environment for news standards should be part of the harmonisation work proposed in Recommendation 6.
3. That said, we support the proposal for credibility signalling and we think ACMA should be the regulator to conduct this work. We suggest this activity be placed within a broader remit of ACMA, with the power to investigate and report on problems related to reliability and trustworthiness (rather than just monitoring voluntary initiatives of platforms). Though not directly a part of media diversity, the reasons for conducting this regulatory work are closely related to the reasons for monitoring and regulating diversity. It would be appropriate to adjust the objects in the Broadcasting Services Act and the statements of ACMA's functions in the

Australian Communications and Media Authority Act to give it a clearer mandate to oversee these issues.

Recommendation 15: Digital Platforms Code to counter disinformation

We support this recommendation in principle but make the following comments.

1. We would appreciate more information about this recommendation. The CMT is the host of First Draft News, an independent global project, fighting mis- and dis-information. The Australian Bureau is headed by Dr Anne Kruger. By facilitating collaboration between news rooms on harder to reach areas such as social media monitoring and verification, First Draft's CrossCheck methodology and associated training helps news organisations to strengthen their output and build public trust. We would imagine its experiences might usefully inform the development of disinformation code.
2. On the specific aspects of the code, as it is to be registered by the ACMA, we assume it would be a co-regulatory code under the Broadcasting Services Act or the Telecommunications Act and we would have the opportunity of contributing as part of public or consumer consultation. At this stage we would just offer the following observations:
3. The test of 'serious public detriment' establishes a high threshold for complaints. In addition, complaints relating to misinformation (as distinct from disinformation or malinformation) would be out of scope. We note the potential for new rules to restrict freedom of expression and agree that both aspects limiting the scope of complaints may be justified, but we think the scheme may be difficult to administer, allowing for considerable discretion on the part of decision-makers (especially given the other proposed exclusions on page 371 of the Final Report). There is a risk that platforms will reject valid complaints in order to manage the workload. In addition, there is a risk that even when the platform is right to reject the complaint as out of scope, uncertainty over the code rules will mean the burden shifts to the regulator as unsatisfied complainants seek reconsideration.
4. The proposal to exclude misinformation is understandable given the overall rationale for the proposal and the objects of Recommendation 14, however we reiterate our point above that the arrangements for news standards schemes need reform.
5. The regulatory obligations under Recommendation 15 appear to be imposed on digital platforms, without any sanctions for content creators. While in practice it may of course be difficult to enforce Australian provisions on overseas entities, it does seem an omission not to include in some way the creators of this content.
6. One of the proposed exclusions on page 371 is 'incorrect or harmful statements made against private individuals (addressed by existing defamation laws)'. Again, we understand why this is proposed but we also note the connection with the regulatory disparity identified by the ACCC and that the problems in application of Australia's defamation laws are specifically cited by news organisations (and addressed by the ACCC in Appendix B). We refer to our research report on Trends in Digital Defamation which documented shifts in who is bringing defamation actions against whom and on what platforms. There is a real concern over the take-up of defamation law over social media and blog posts, pointing to the need for some remedy that

removes these disputes from the court system. We think it is worth considering whether this industry code, along with improvements to the fragmented standards scheme (mentioned above), presents an opportunity to address at least some of the problems in defamation law.

Recommendation 16: Strengthen protections in the Privacy Act
Recommendation 17: Broader reform of Australian privacy law
Recommendation 18: OAIC privacy code for digital platforms
Recommendation 19: Statutory tort for serious invasions of privacy
Recommendation 20: Prohibition against unfair contract terms
Recommendation 21: Prohibition against certain unfair trading practices

The recommendations in chapter 7 seek to bolster Australia's privacy protections. Overall, we emphatically support these recommendations. Privacy in Australia is significantly under-protected, which is causing all manner of harms, including market imbalances. However, there are two caveats.

First, we support Recommendations 16 and 18 only on the condition that the OAIC is granted significantly greater funding. Currently, at a time when privacy has emerged as one of the most pressing challenges facing society, the OAIC is worryingly under-resourced. The effect of these recommendations would be to confer on the OAIC a significantly greater role. To protect the privacy of Australians effectively, the OAIC needs adequate funding both to conduct investigations in a timely manner, but also to conduct own motion investigations, to monitor industry practices and to address systemic issues.

Second, it is our firm view that in this context the law must protect citizens, not just consumers, given that privacy attaches to persons and their role in democracy, as well as to consumers and their role in the market place. As such, we welcome the recommendation of new prohibitions under the consumer law (Recommendations 20 and 21). However, these consumer protections should not be adopted at the expense of the citizen protections contained in Recommendations 16, 17, 18 and 19. These citizen-based recommendations, if properly implemented, will serve to minimise the abuses of data that can directly harm citizens, society and democracy.