

# **DIGITAL PLATFORM COMPLAINT HANDLING:** *OPTIONS FOR AN EXTERNAL DISPUTE RESOLUTION SCHEME*

July 2022



## About the Centre for Media Transition

The Centre for Media Transition (CMT) is an applied research unit based at the University of Technology Sydney (UTS). Launched in 2017, the CMT is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law.

CMT works across disciplines to explore and develop responses to the dramatic and ongoing movements wrought by digital disruption to the media industry, the role of journalism in Australian democracy and the world more widely, and the business models that support a diverse and prosperous industry.

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We would like to thank the Australian Communications Consumer Action Network (ACCAN) for a research grant that supported part of this work. The operation of ACCAN is made possible by funding provided by the Commonwealth of Australia under section 593 of the *Telecommunications Act 1997*. This funding is recovered from charges on telecommunications carriers.

We would also like to thank industry, government and consumer stakeholders who provided information and offered feedback on a preliminary version of this report.

**Suggested citation:** 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).

DOI: <https://doi.org/10.26195/7m5k-wp38>

ISBN: 978-0-6455587-0-8



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## Executive Summary

As part of its recommendations in the Final Report of the Digital Platforms Inquiry ('DPI'), the Australian Competition and Consumer Commission ('ACCC') proposed the establishment of an ombudsman scheme to deal with complaints and disputes involving digital platforms providers. The ACCC suggested the Telecommunications Industry Ombudsman ('TIO') be considered, or, if that were not feasible, then a standalone ombudsman be established.

Taking the Coalition Government's in-principle support of the DPI recommendation as a starting point, this research looks at options for establishing an ombudsman scheme.

Narrowing the focus to social media platforms, we explore the types of complaints and how these are handled by the leading social media service in Australia, Facebook. We then look at existing external mechanisms to handle those complaints, and finally at options for an external complaint handling scheme, were government to mandate such an arrangement.

### Types of complaints

We determined that complaints can be about the conduct of social media platforms themselves or about the conduct of third-party users of those platforms, including advertisers, sellers and users who post content. Further, they can be distinguished as *social disputes* based on, for example, harmful content one user posts about 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. This approach resulted in a four-part typology of complaints, based on distinctions between the following categories:

- user-to-platform transactional complaints
- user-to-user transactional complaints
- user-to-platform social complaints
- user-to-user social complaints.

### Our review of current complaint handling bodies

Several existing bodies have some role in relation to the complaints mentioned above, and could potentially handle complaints left unresolved by social media platforms:

- the Telecommunications Industry Ombudsman ('TIO')
- the Office of the eSafety Commissioner ('eSafety')
- the Australian Communications and Media Authority ('ACMA')
- the Digital Industry Group Inc ('DIGI')
- the Australian Competition and Consumer Commission ('ACCC')
- the Office of the Australian Information Commissioner ('OAIC')
- the Australian Small Business and Family Enterprise Ombudsman ('ASBFEO')
- Ad Standards
- the Australian Press Council ('APC').

All have some role to play, and in some cases their functions are expanding. Our review led us to the conclusion implicit in the ACCC's recommendations: that the TIO is the only existing body that merits serious consideration as the platform ombudsman. We reach this conclusion not because of any perceived failings on the part of other bodies; rather, the other bodies all have functions that render them ill-equipped to take on the full range of digital platform complaints, or the addition of these complaints would likely impede their existing work.

## Options

We conclude that an entirely new, comprehensive ombudsman scheme for digital platform complaints is not a viable option, despite the obvious appeal of a one-stop shop for complainants. This is primarily because complaints relating to privacy, some online harms, copyright complaints, perhaps defamation complaints, advertising complaints and news complaints will continue in all likelihood to be dealt with by specialised bodies. This will leave a depleted jurisdiction for a new ombudsman. It is unlikely to be cost effective to set up an entirely new ombudsman when some complaints will be dealt with by specialised bodies that are already known to complainants, and other complaints could be directed to an existing external dispute resolution scheme with an expanded remit. Accordingly, we developed two other options that are worth further consideration.

### **An expanded TIO**

Under this option, the remit of the TIO would be expanded to include user-to-platform transactional complaints. Some procedural aspects would need to be addressed but, as the TIO itself acknowledged in its 2019 submission on the Coalition government's response to the DPI Final Report, some types of 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 such as account access and control, charges and billing, and privacy complaints referred from the OAIC are similar to complaints the TIO already handles.

However, this leaves social disputes – both user-to-platform and user-to-user – without any means of resolution. It also raises a problem about user-to-user transactional complaints. Many transactions are enabled, but not conducted, by digital platforms. While some unresolved user-to-user complaints (which include consumer-to-business disputes) will become user-to-platform complaints, it is likely that some 'buy and sell' transactional disputes will remain unresolved even where the platform provides a reasonable forum for resolution.

### **A clearing house for digital platform complaints**

This option consists of a multi-pronged approach that builds on existing complaints channels with a streamlined access point. This could have the following elements:

1. the existing or enhanced complaint handling roles performed by the OAIC or a new Privacy Ombudsman as well as the eSafety Commissioner, along with any new arrangement for mis- and disinformation resulting from anticipated co-regulatory arrangements and the existing law enforcement functions associated with criminal matters;
2. an expanded role for the TIO in dealing with residual user-to-platform transactional complaints not addressed by the OAIC, eSafety Commissioner and any other bodies that have specific complaint roles;
3. a standards development role for the ACMA or eSafety to encourage improved internal dispute resolution systems across all types of complaints; this could include the development of online dispute resolution for addressing user-to-user complaints, both social and transactional;
4. a clearing house or portal that enables user complaints to be redirected to the appropriate external disputes scheme and that collects data on matters that are the subject of complaints as well as outcomes of those complaints.

We think that it would be worth considering whether the clearing house function could be funded and performed by an industry body. If that were the case, there would need to be sufficient safeguards in place to ensure the scheme operated transparently and independently from digital platforms.

## Introduction

In December 2017, the Treasurer directed the ACCC to inquire into the impact of digital search engines, social media platforms and other digital content services on:

... the state of competition in media and advertising services markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers.<sup>1</sup>

Eighteen months later, after a Preliminary Report, a long list of submissions and extensive consultations, the ACCC issued its Final Report.<sup>2</sup> Its first 21 recommendations focused on issues of competition, media regulation, impacts on journalism, and consumer issues, particularly surrounding privacy. Its last two recommendations addressed complaints:

- Recommendation 22 – *Digital platforms to comply with internal dispute resolution requirements* – suggested the ACMA develop ‘minimum internal dispute resolution standards’ that should set out requirements for the ‘visibility, accessibility, responsiveness, objectivity, confidentiality and collection of information’, as well as processes ‘for continual improvement, accountability, charges and resources’.<sup>3</sup>
- Recommendation 23 – *Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers* – suggested the ACMA and the TIO investigate the feasibility of the TIO taking on this role. Further, if ‘the ACMA and the TIO conclude that it is not feasible for the TIO to undertake this role, a standalone ombudsman should be created to resolve complaints about digital platforms’.<sup>4</sup>

The focus of the ACCC’s inquiry was across three categories of digital platforms: online search engines, social media platforms and other digital content aggregation platforms.<sup>5</sup>

In its response to the DPI Final Report, the Coalition government merged recommendations 22 and 23, proposing that it:

... work with major digital platforms to scope and implement a pilot external dispute resolution mechanism for complaints between consumers, businesses and digital platforms.<sup>6</sup>

The Government proposals appear to place more emphasis than the ACCC recommendations on small business (rather than business in general) and individual consumers.

In early 2022, the ACCC repeated its call for internal dispute resolution mechanisms and an ombudsman scheme, noting that it is ‘considering additional measures to address the deficiencies in digital platforms’ dispute resolution processes’.<sup>7</sup> It also expanded its understanding of the variations in digital platforms to include the following as categories of ‘digital platform services’:

- (a) internet search engine services (including general search services and specialised search services);

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<sup>1</sup> The Hon Scott Morrison, Treasurer, *Inquiry into Digital Platforms* (Ministerial Direction, 4 December 2017).

<sup>2</sup> ACCC, *Digital Platforms Inquiry: Final Report* (Report, June 2019) (*DPI Final Report*). (For both the Preliminary Report and the Final Report, see <<https://www.accc.gov.au/focus-areas/inquiries-finalised/digital-platforms-inquiry-0/final-report-executive-summary>>.)

<sup>3</sup> Ibid 37.

<sup>4</sup> Ibid 37-38.

<sup>5</sup> Ibid 4.

<sup>6</sup> Australian Government: *Regulating in the Digital Age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (Government Response, December 2019) 13 (*Regulating in the Digital Age*). We understand research has been commissioned and the Department of Infrastructure, Transport, Regional Development and Communications has conducted preliminary discussions with stakeholders.

<sup>7</sup> ACCC, *Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services* (Discussion Paper, February 2022) 51, 57 (*DPSI Discussion Paper*).



- (b) social media services;
- (c) online private messaging services (including text messaging, audio messaging and visual messaging);
- (d) digital content aggregation platform services;
- (e) media referral services provided in the course of providing one or more of the services mentioned in paragraphs (a) to (d);
- (f) electronic marketplace services.<sup>8</sup>

The ACCC's findings in the DPI Final Report prompted our research. This research comprised a desk-based review of policy and academic literature, supplemented by interviews with government and industry stakeholders to gain a better understanding of the current environment. We provided a preliminary version of this report to a number of stakeholders. Written comments were provided by some government and industry participants and a virtual roundtable was held with community and consumer representatives.

Although this research launched off the ACCC's work in the DPI, we largely followed the Government's lead in narrowing the scope to individual consumers and small businesses. We also chose to concentrate on social media platforms because they are increasingly the means of interpersonal and intercommunity communication.<sup>9</sup> As described in the DPI Final Report, social media services are:

...online services that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users.<sup>10</sup>

Further, our approach gives close consideration to a possible role for the TIO in the digital platform environment. As we note in section 4.1 below, an innovative and effective means of dispute resolution for telecommunications services was embedded in Australian communications regulation in the 1990s with the establishment of the TIO. If the TIO membership of carriers and carriage service providers – providers of fixed and mobile telephony services – reflected the way people communicated in the 20<sup>th</sup> century, then any comparable external complaints scheme for the 21<sup>st</sup> century would include the providers of popular communications in the 21<sup>st</sup> century: the social media platforms.

In concentrating on social media platforms, however, we do not intend to suggest that the questions explored in this report are not of relevance to other forms of digital platform. Recent research by the Australian Communications Consumer Action Network ('ACCAN') shows the importance of digital platforms to consumers – and particularly, the need for an effective mechanism to handle complaints about digital platforms more broadly. Specifically:

- 74% of Australians think that it needs to be easier for people to make a complaint
- 78% think that it needs to be easier for people to get their issues resolved
- 60% feel like there's not much they can do when something goes wrong online
- 79% think that digital platforms should be responsible for the content on their sites
- 79% believe more needs to be done to protect people's safety and privacy online
- 47% do not trust digital platforms to act in their best interests

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<sup>8</sup> Ibid 21.

<sup>9</sup> A recent survey for the Australian Communication and Media Authority (ACMA) showed that while 'almost everyone has a mobile phone' (99% of survey respondents, being Australians 18 and over who had accessed the internet in the last six months), 78% of respondents had used an app to communicate and 'almost everyone used a social media website or app for personal purposes (96%)'. See ACMA, *Communications and Media in Australia: How We Communicate* (Interactive report, December 2021), slides 6, 7 & 10 ('*How We Communicate*').

<sup>10</sup> *DPI Final Report* (n 2) 241. The definition of 'social media service' in s 13(1) of the *Online Safety Act 2021* (Cth) includes as key elements the enabling of online social interactions between end users and posting material on the service.

- Only 27% believe the government is doing enough to make sure digital platforms do the right thing.<sup>11</sup>

Dissatisfaction with internal complaint handling processes, including the increasing reliance on automation to resolve complaints, is also noted in the international literature, as we explore in section 5.1 below.<sup>12</sup>

Given our resourcing limitations, where examples are needed for discussion of social media complaint handling, this paper will focus on Facebook — by far the most used social media service in Australia. In a recent discussion paper, the ACCC provided the following graph showing the popularity of Facebook compared to other services (one of which – Instagram – is also owned by Meta, the owner of Facebook).<sup>13</sup>

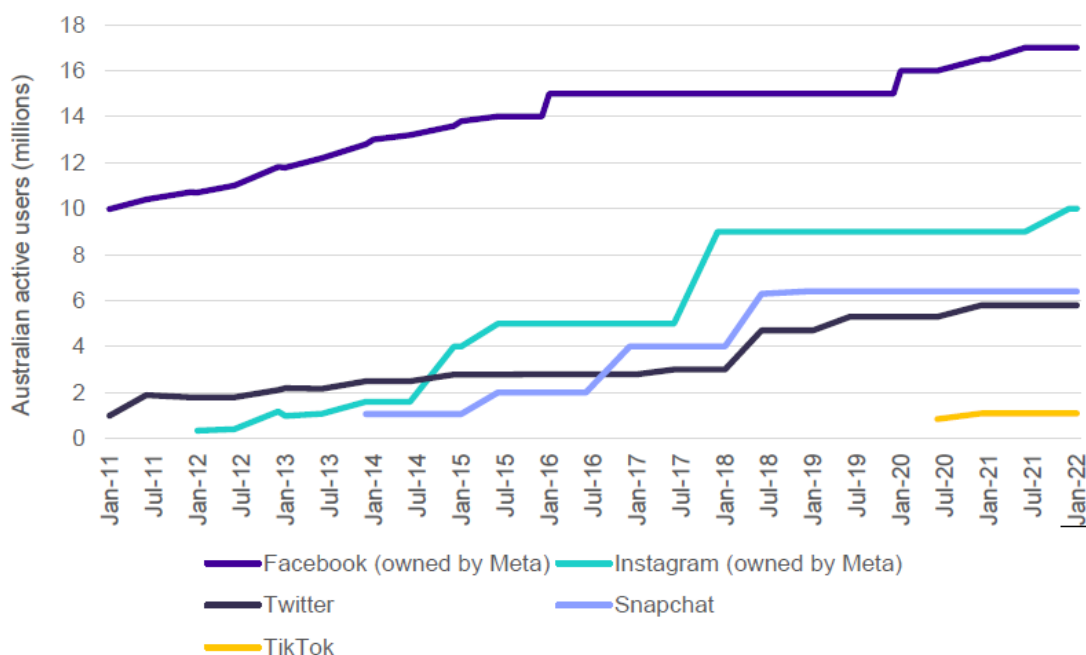


Figure 1: Comparative Australian users of social media services

While this report looks at aspects of internal dispute resolution, its main focus is on *external* dispute resolution mechanisms for individuals and small businesses. It considers the mechanism(s) that might best complement any internal dispute resolution mechanisms adopted by social media platforms. It considers internal dispute resolution mechanisms only

<sup>11</sup> We note that the scope of the ACCAN research was broader than this paper, including, for example, consumer perceptions of government websites and apps. See ACCAN, 'New Research Finds Nearly Three-quarters of Australians Want Better Complaints Handling from Digital Platforms' (Media Release, 29 November 2021) <<https://accan.org.au/media-centre/media-releases/1942-new-research-finds-nearly-three-quarters-of-australians-want-better-complaints-handling-from-digital-platforms>>. As indicated above, ACCAN funded part of the research for this project.

<sup>12</sup> Rory Van Loo, 'Federal Rules as Platform Procedure' (2021) 88 *The University of Chicago Law Review* 829-895; Kate Klonick, 'The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression' (2020) 129 *The Yale Law Journal* 2418, 2498; Kristen Vaccaro, Christina Sandvig and Karrie Karahalios, 'At the End of the Day, Facebook Does What It Wants: How Users Experience Contesting Algorithmic Content Moderation' (2020) 4 (CSCW2) *Proceedings of the ACM Human Computer Interaction*.

<sup>13</sup> This chart appears as 'Figure 3.3 Active Australian users of select social media platforms'. The ACCC's source, which it accessed on 24 February 2022, was 'Social Media Statistics', available from <<https://www.socialmedianews.com.au/social-media-statistics/>>. The ACCC provided the following note on the chart: 'Active users are represented as monthly active users in most cases. For Snapchat, users for January 2018, June 2017 and January 2017 are daily active users. This data source first reported user numbers for Instagram in January 2012, Snapchat in November 2013 and TikTok in February 2020.' See *DPSI Discussion Paper* (n 7) 19. The ACMA recently found that although there were high levels of use for both Facebook (76%) and YouTube (74%), Facebook was named as 'used most often' by 47% compared to 20%, and the responses on 'used to actively engage with content' were 58% for Facebook compared to 21% for YouTube (*How We Communicate*, n 9, slide 10).



insofar as it looks at the ways in which users of the most popular social media service in Australia, Facebook, make complaints and how Facebook's internal system might act as a channel leading to an external scheme for unresolved complaints.

This report addresses five key questions:

1. What are the general principles of effective external complaint handling?
2. What sort of complaints are likely to need an effective complaints resolution scheme?
3. How might the internal handling of complaints give rise to an unmet need for external dispute resolution?
4. What are the existing external mechanisms to handle those complaints and their suitability for complaints about social media services?
5. What steps could be taken if an external complaints handling regime is to be introduced?

The report is structured according to these questions. While in the fifth and final chapter we explore options for an external complaint handling scheme (were government to mandate such an arrangement), we do not present an argument for any specific model. Our research is designed to advance the policy discussion around this issue, recognising the need for greater consultation and additional data-gathering.

## 1. Effective Complaint Handling Benchmarks

In this chapter we briefly outline some principles for effective complaint handling, providing some background for the later consideration of a digital platforms ombudsman, as proposed by the ACCC.

The socio-political origin of complaints institutions – public and private – is predicated upon the weakness of the individual citizen or consumer. For example, public ombudsman schemes were introduced across all Australian jurisdictions from the 1970s with the aim of rendering government accountable to the individual. The central premise of the schemes' operations was that access to justice and effective resolution of individual citizen complaints are essential to a healthy democracy.<sup>14</sup>

But how do we know that these institutions are effective?

The Commonwealth Government has six principles for effective complaint handling:

- **Accessibility**  
**Underlying Principle:** The office makes itself readily available to customers by promoting knowledge of its services, being easy to use and having no cost barriers.  
**Purpose:** To promote access to the office on an equitable basis.
- **Independence**  
**Underlying Principle:** The decision-making process and administration of the office are independent from participating organisations.  
**Purpose:** To ensure that the processes and decisions of the office are objective and unbiased, and are seen to be objective and unbiased.
- **Fairness**  
**Underlying Principle:** The procedures and decision-making of the office are fair and seen to be fair.  
**Purpose:** To ensure that the office performs its functions in a manner that is fair and seen to be fair.
- **Accountability**  
**Underlying Principle:** The office publicly accounts for its operations by publishing its final determinations and information about complaints and reporting any systemic problems to its participating organisations, policy agencies and regulators.  
**Purpose:** To ensure public confidence in the office and allow assessment and improvement of its performance and that of participating organisations.
- **Efficiency**  
**Underlying Principle:** The office operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum, and regularly reviewing its performance.  
**Purpose:** To give the community and participating organisations confidence in the office and to ensure the office provides value for its funding.
- **Effectiveness**  
**Underlying Principle:** The office is effective by having an appropriate and comprehensive jurisdiction and periodic independent reviews of its performance.

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<sup>14</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A Guide for Future Action*, Attorney-General's Department (Report, September 2009).  
<<http://www.ag.gov.au/LegalSystem/Pages/Accessstojustice.aspx>>.

**Purpose:** To promote community confidence in the office and ensure that the office fulfils its role.<sup>15</sup>

Other complaint handling mechanisms have adopted similar principles. The Australian and New Zealand Ombudsman Association ('ANZOA'), for example, states, 'The fundamental role of an Ombudsman is independent resolution, redress and prevention of disputes.'<sup>16</sup>

A European Union Directive also sets out minimum criteria that alternative dispute resolution (ADR) entities, such as an ombudsman, must meet.<sup>17</sup> ADR entities must:

- allow consumers to submit complaints online and offline;
- offer consumers information about, and assistance with, the dispute resolution procedures;
- ensure staff in charge have the necessary expertise, and are independent and impartial;
- have processes that are fair, transparent, effective and accountable.

While the precise wording of these complaint handling benchmarks differs, they adopt very similar themes: ADR schemes, whatever their title, should be independent, accessible, transparent, effective and fair.

While governments have developed these benchmarks for effective external, industry-based complaints resolution schemes such as the TIO, there is little scholarly literature on whether these are actually effective. In the United Kingdom, studies provide evidence that UK citizens are much less likely to complain about public services than the private sector and the main reason (52%) for not complaining was that they did not think it would make any difference.<sup>18</sup> In addition, if citizens do complain they are less likely to be satisfied than in private sector environments.<sup>19</sup> Australian scholarly literature has examined the effectiveness of complaints processes;<sup>20</sup> however, to date there is less focus upon the empirical effectiveness of complaint handling in Australia than in the UK.<sup>21</sup>

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<sup>15</sup> Australian Government, *Benchmarks for Industry-Based Customer Dispute Resolution: Principles and Purposes* (Report, February 2015) 7-8.

<sup>16</sup> See 'About Ombudsman' <<https://www.anzoa.com.au/about-ombudsman/>>.

<sup>17</sup> Directive 2013/11/EU of The European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 165.

<sup>18</sup> Citizens Advice, *Learning from Mistakes* (Report, 2016)

<[www.citizensadvice.org.uk/Global/CitizensAdvice/Public%20services%20publications/Learning-from-mistakes.pdf](http://www.citizensadvice.org.uk/Global/CitizensAdvice/Public%20services%20publications/Learning-from-mistakes.pdf)>.

<sup>19</sup> Jane Williams, Chris Gill and Carolyn Hirst, 'Towards Therapeutic Complaints Resolution' in Matthew Groves and Anita Stuhmcke (eds), *Ombudsman in the Modern State* (Hart Publishing, 2022).

<sup>20</sup> For a summary of the management literature on this subject, see: Tania Sourdin, Jamie Carlson, Martin Watts, Christine Armstrong and Tanya Carlyle-Ford, *Return on Investment of Effective Complaints Management: Public Sector Organisations* (Report, 15 June 2020) <[www.socap.org.au/public/98/files/Documents/Research/ROI%20Report-Public%20Organisations%20-%20June%202020.pdf](http://www.socap.org.au/public/98/files/Documents/Research/ROI%20Report-Public%20Organisations%20-%20June%202020.pdf)>.

<sup>21</sup> Lorne D Crerar, *Independent Review of Regulation, Audit, Inspection, and Complaint Handling* (Independent Report, 25 September 2007); Patrick Dunleavy, Simon Bastow, Jane Tinkler, Sofia Goldchluk, and Ed Towers, 'Joining up Citizen Redress in UK Central Government' in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010); National Audit Office, *Public Service Markets: Putting Things Right When They Go Wrong* (Report, 2015) <[www.nao.org.uk/wp-content/uploads/2015/06/Putting-things-right.pdf](http://www.nao.org.uk/wp-content/uploads/2015/06/Putting-things-right.pdf)>: Public Administration Select Committee *More Complaints Please!* (Report, 26 March 2014) <[www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicadm/229/229.pdf](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpublicadm/229/229.pdf)>; UK Government, *Transforming Public Services: Complaints, Redress, and Tribunals* London (Report, 2004); Which?, *Making Complaints Count* (Report, March 2015) <<https://www.staticwhich.co.uk/documents/pdf/make-complaints-count-report---march-2015-397971.pdf>>; Kate Slater and Gayle Higginson, *Understanding Consumer Experiences of Complaint Handling*. (Research Report, 2016) 50 <[https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling\\_DJS%20report%20final\\_June2016%20\(2\)%20\(1\).pdf](https://www.citizensadvice.org.uk/Global/CitizensAdvice/Consumer%20publications/Understanding%20consumer%20experiences%20of%20complaint%20handling_DJS%20report%20final_June2016%20(2)%20(1).pdf)>.

## 2. Types of Complaints

The first questions for an external complaint handling mechanism for social media platforms are: who is making the complaints and what are they about? Some answers to these questions come from submissions to the DPI as well as the ACCC’s Preliminary and Final Reports, and from interviews with representatives from industry, government and consumer bodies conducted in the development of this report.

Explanations by service providers about how disputes are handles also provide insights. As the focus of this research is social media, it is worth considering those aspects of content or conduct about which Australia’s leading social media provider, Facebook, has imposed some kind of restriction or prohibition. Other social media platforms have different policies, and a full survey of these policies is beyond the scope of this report. Nonetheless, as the largest social media provider and perhaps the most diverse in terms of the services it provides, Facebook offers a useful case study to capture a wide range of content- and behaviour-related complaints from users. The topics in the table below comprised Facebook’s Community Standards as at late February 2022.<sup>22</sup>

<b>Violence and Criminal Behaviour</b>	<b>Safety</b>
Violence and incitement Dangerous individuals and organisations Coordinating harm and promoting crime Restricted goods and services Fraud and Deception	Suicide and self-injury Child sexual exploitation, abuse & nudity Adult sexual exploitation Bullying and harassment Human exploitation Privacy violation
<b>Objectionable Content</b>	<b>Integrity and Authenticity</b>
Hate speech Violent and graphic content Adult nudity and sexual activity Sexual solicitation	Account integrity and authentic identify Spam Cybersecurity Inauthentic behaviour False news Manipulated media Memorialisation
<b>Respecting Intellectual Property</b>	<b>Content-related requests and decisions</b>
Intellectual property	User requests Additional protection of minors

**Table 1: Topics covered in Facebook’s ‘Community Standards’**

In addition to these matters, Facebook has a set of ‘Other Policies’<sup>23</sup> that deal with the following matters:

- Advertising Policies for Facebook and Instagram

<sup>22</sup> ‘Facebook Community Standards’ <<https://transparency.fb.com/en-gb/policies/community-standards/>>.

<sup>23</sup> ‘Other Policies’ <<https://transparency.fb.com/policies/other-policies/>>.

- Pages, Groups and Events Policies for Facebook
- Branded Content Policies for Facebook and Instagram
- Commerce Policies for Facebook and Instagram
- Instagram Community Guidelines
- WhatsApp Legal
- Oculus Legal
- Recommendations guidelines for Facebook
- Recommendations guidelines for Instagram.

Having reviewed information on complaints from the various sources mentioned above, including the guidance offered by Facebook’s own scheme for content that it regulates in some way, we consider that complaints 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’ or ‘transactional disputes’.<sup>24</sup>

The distinction between user-to-platform and user-to-user disputes captures an important difference in how complaints are or should be handled. In disputes between users, the platform is involved principally in the sense that it provided the venue for the activity that led to the dispute. Platforms may have information relevant to user-to-user disputes and, increasingly, platforms act, or are being called upon to act, as an intermediary, at least in the first instance, between the disputants. In user-to-platform disputes, the platform itself is a party to the dispute.

We have adopted the distinction between ‘social disputes’ and ‘transactional disputes’ based in part on the work of Ethan Katsh and Orna Rabinovich-Einy which provides a useful way of identifying some key differences that arise in complaint handling on digital platforms. The researchers characterise social disputes as those disputes that occur between users of digital platforms – from individuals in small groups of users, known to each other, to large groups of unknown participants in various platform activities, such as online gaming platforms.<sup>25</sup> ‘Transactional disputes’ are often two-party disputes that involve unmet contractual expectations.<sup>26</sup>

We find this high-level classification system more useful than one based on a distinction between ‘content’ and ‘other’ disputes because disputes may also focus on the conduct of another party (eg, refusing to take some action in relation to a social media post) rather than the content itself. However, we have expanded Katsh and Rabinovich-Einy’s concept of ‘social disputes’ to include complaints that users might have against the actions of platforms themselves, rather than restricting this category to user-to-user disputes. This is because we want to capture the kinds of disputes that are based on the actions of the platforms themselves in regulating content or user behaviour. These disputes could include complaints about exposure to illegal content, misinformation or other harmful material, bots or other inauthentic behaviour, including where the platforms have responsibilities under law or regulation or under their own terms of service. Our category of social disputes differs from user-to-user complaints about content or behaviour such as image-based abuse, harassment or defamation, in that the platforms are the subject of complaint. As such, our understanding of social disputes captures a range of ‘civic complaints’ – those complaints, including those

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<sup>24</sup> Ethan Katsh and Orna Rabinovich-Einy, ‘The challenge of social and anti-social media’ in Ethan Katsh and Orna Rabinovich-Einy (eds), *Digital Justice: Technology and the Internet of Disputes* (2017, Oxford University Press) 109-130, 113.

<sup>25</sup> *Ibid* 114.

<sup>26</sup> *Ibid*. The authors use the terms ‘transaction dispute’ whereas we prefer ‘transactional’.

relating to user-generated content or behaviour, that involve harms to users or the wider community that platforms are increasingly expected to mitigate.

	Social	Transactional
<b>User-to-platform Complaints</b>	<ul style="list-style-type: none"> <li>• Illegal content including terrorism, CSAM, instruction in criminal acts</li> <li>• Pornography and other offensive content</li> <li>• Disinformation and misinformation</li> <li>• Content moderation disputes</li> <li>• Sale of prohibited goods or services</li> <li>• Election advertisements</li> <li>• Proliferation of fake accounts and other inauthentic behaviour</li> </ul>	<ul style="list-style-type: none"> <li>• Unfair digital platform business practices</li> <li>• Complaints about digital platform service, charges etc.</li> <li>• Privacy / other personal violations by digital platform</li> <li>• Failure to protect user eg, account hacking</li> <li>• Complaints about service disruption eg, account suspension</li> <li>• Dispute over terms of service / account suspension etc.</li> <li>• Complaints involving digital platform failure to comply with dispute resolution obligations</li> </ul>
<b>User-to-user Complaints</b>	<ul style="list-style-type: none"> <li>• Abuse, harassment and discrimination and other personal harms with an online dimension</li> <li>• Damage to reputation</li> <li>• Identity theft, impersonation</li> <li>• Disclosure of confidential or protected information</li> <li>• Other privacy breaches by third parties</li> <li>• Advertising content eg, community standards, offensive material</li> <li>• News content eg, accuracy and fairness</li> </ul>	<ul style="list-style-type: none"> <li>• Scams and fraudulent transactions</li> <li>• Misleading advertising and product claims, unfair terms, product defects, other sales disputes</li> <li>• Breach of copyright</li> <li>• Comments in reviews of products and services</li> <li>• Spam and unwelcome notifications or communications</li> </ul>

**Table 2: Types of complaints made about content and conduct on digital platforms**

Source: Centre for Media Transition

In Table 2 above we use these two distinctions to categorise various complaints matters into four types.

1. **User-to-platform social complaint:** A complaint that a platform has failed to fulfil its obligations relating to online content or user behaviour. These obligations might arise from law or regulation, such as the *Online Safety Act 2021* (Cth) or the Australian Code of Practice on Disinformation and Misinformation, or from the platform’s terms of service.
2. **User-to-platform transactional complaint:** A complaint about platform service provision. These mainly concern the conduct of the platform in its role as ‘service provider’ (such as suspending an account or misusing personal information) even though they might arise from the conduct of third parties (such as other users who claim an infringement of their rights).
3. **User-to-user social complaint:** A complaint that a user has distributed harmful content or engaged in harmful behaviour. This can include complaints about a range of personal harms – those that, while they might also have a wider community impact, are most likely to be most acutely felt by an individual (such as online abuse or defamation). They include complaints about content or behaviour from third parties of a ‘civic’ nature, such as offensive content in advertisements or unauthorised electoral material.



4. **User-to-user transactional complaint:** complaints about contracts, property rights, business practices – those that, following Katsh and Rabinovich-Einy, concern unmet contractual expectations or, in our own addition to this category, undesirable business practices (such as spam) or an infringement of intangible property rights (such as copyright).

In presenting this four-part classification we are conscious that some topics of complaint could be allocated to another category or more than one category. For example, a complaint about abuse and harassment is most clearly understood as a user-to-user social complaint, but the effect of abuse at large scale in the online environment means that it could also be understood as a failure of a platform to mitigate online harm. In contrast, while complaints about news and advertising content are perhaps most often understood as complaints about the content providers themselves, at times they may be directed against the platforms for distributing this content. A complaint about content moderation or removal may be a user-to-platform transactional complaint in the sense that it involves a dispute over the application of a platform's terms of service to an individual user. At scale, however, such a complaint might turn on a platform's content moderation practices or policies that see it best classified as a social complaint, as we have here. And complaints about the sale of prohibited goods could be classed as user-to-user transactional complaints if the third party's conduct is the focus of attention, but in other circumstances the objection is to the presence of this material on the platform, meaning these complaints bear close similarity to user-to-platform social complaints about illegal content.

Importantly, for any of these issues, a user-to-user dispute may become a user-to-platform dispute where one or more of the users considers the digital platform has failed to fulfil its obligations relating to the resolution of user-to-user disputes (where they exist).<sup>27</sup>

The complaints listed in the table are not intended to be exhaustive. Our purpose is only to achieve a set of categories that will help assess the utility of different external dispute resolution (EDR) options. It should also be noted that in Australia there is already a body of regulation dealing with user-to-user social complaints, particularly in the category of personal harms, but there has been less attention to the user-to-platform social complaints. The findings of the DPI have increased momentum in this area, and to some extent the complaints listed in category 1 (user-to-platform social disputes) anticipate potential complaints arising from recent or forthcoming regulation in this area. In Appendix B we provide a table listing the various complaints matters identified in the course of this research, broadly classifying them according to our proposed social/transactional scheme, and indicating if social media users could make a complaint about these matters under existing laws or regulations, including any industry-based self-regulation. However, not all complaints received by or concerning digital platforms will be covered by law or regulation. Some of these will be matters covered by individual platforms' terms of service, while others will not be covered by either regulation or terms of service.

The table in Appendix B also provides an indication of how a user might complain to Facebook about the matter, citing the breach of one or more of its Community Standards. We should stress that this is not necessarily how Facebook would itself classify these matters; we provide more detail on the classification of matters by Facebook in Chapter 3, where we also consider the differences between the identification of complaints and the flagging or reporting of content, as practised by Facebook and other digital platforms.

For completeness, it should be mentioned that, in the DPI Final Report, the ACCC notes that 'disputes from media companies might relate to the surfacing and ranking of news content'.<sup>28</sup> These matters could also be the subject of a complaint about the conduct of a platform with respect to other businesses; however, we do not consider this issue further in this report,

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<sup>27</sup> We also note that Facebook's action in suspending or terminating an account (ie a more transactional matter) may be in response to a perceived breach of one or more of its Community Standards, such as hate speech (a more 'social' matter). This is partly reflected in the respective column in Appendix B.

<sup>28</sup> ACCC, *Digital Platforms Inquiry: Preliminary Report* (Report, December 2018) 16.

given our emphasis on consumer disputes. We also note that the surfacing and ranking of news content is among a series of issues affecting news media that have been the subject of separate regulatory attention in the DPI and in ongoing work of the ACCC and may be further considered as part of a review of the News Media Bargaining Code by Treasury.<sup>29</sup>

Finally, in Table 2 above and in the four categories we use to group complaints, we use the term 'complaint' in an expansive way designed to capture as many matters as possible that a user might seek to have resolved. However, we exclude matters such as consumer requests for information or support, as well as flagging in the first instance of third party content and conduct that might be in breach of a platform's terms of use or its Community Standards.<sup>30</sup> Exclusion of requests of this nature is appropriate for two reasons.

First, excluding consumer requests for information or support is consistent with codes of practice and other forms of regulation dealing with complaints such as the Telecommunications (Consumer Complaints Handling) Industry Standard 2018 (the 'Complaints Standard') issued by the ACMA. Section 5 of the Complaints Standard defines a complaint as:

... an expression of dissatisfaction made to a carriage service provider by a consumer in relation to its telecommunications products or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected by the consumer.

It does not include an initial call to request information or support or to report a fault or service difficulty unless a consumer advises that they want that call treated as a complaint, and does not include an issue that is the subject of legal action.

Second, many complaints made to social media services about content or conduct that might be in breach of a platform's terms of use or its Community Standards involve 'reporting' or 'flagging' the content from within the user's social media feed (sometimes referred to as their 'timeline' or 'wall'). This is the most straightforward way of making a complaint to Facebook, for example. There is a risk that categorising these matters as 'reports' (as Facebook currently does) rather than 'complaints' will repeat past practice in telecommunications complaint handling where some initial complaints were classified as 'inquiries' or 'contacts', thereby reducing the number of complaints received as well as expectations in relation to the handling of them.<sup>31</sup> However, having regard to the treatment of fault reporting under ACMA's Consumer Complaints Standard, a user's act of flagging content on social media may not need to be treated as a complaint in the first instance. It is important to recognise that some consumers simply want to alert the service to a problem without having any further involvement, and also that the scale of content issues on social media means that, on balance, efficient flagging mechanisms are likely to produce a greater net public benefit. Accordingly, for this analysis we have accepted that it is reasonable for platforms to treat these reports as something other than a complaint, provided that any subsequent contact from the user expressing concern or dissatisfaction triggers the categorisation of the matter as a complaint.

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<sup>29</sup> The terms of reference for the review are available at 'Review of the News Media Bargaining Code – Terms of Reference' <<https://treasury.gov.au/review/news-media-digital-platforms-mandatory-bargaining-code>>.

<sup>30</sup> For clarity, we note that a matter that would fall under our category of 'pornography and other offensive content' in Table 2 above would be something more than just a user requesting that the platform look at content they consider to be offensive; our category is meant to capture a user's articulation of dissatisfaction that the platform carried the content, as well as a request that action be taken. Also note that we also use the term 'dispute' – for example, in the expression 'external dispute resolution' – to stand for complaint. This is not the case (as evident from the context) where we use 'dispute' to refer to an issue between two users with no complaint against the platform.

<sup>31</sup> The ACMA has explained that changes made in 2012 to the Telecommunications Consumer Protections Code better acknowledged the consumer perspective and included a new definition of 'complaint' that required providers to ask the customer, where uncertain, whether they wished to make a complaint: *Reconnecting the Customer Tracking Consumer Outcomes* (Report, April 2014) 39-40. The complaint handling aspects of that code were transferred to the ACMA standard mentioned above in 2018.

### 3. Internal Dispute Resolution: Facebook's Handling of Complaints

In this chapter, we look at internal complaint handling, limiting our discussion to how Facebook would deal with matters that users might wish to complain about. While we recognise that other digital platforms may have different internal complaint handling processes, only Facebook's processes are described as it is the largest of the social media platforms that Australians can access at the time of writing. The summary is intended to provide as detailed a picture as possible of the current complaints handling process for consumers and small businesses. It also enables a better understanding of the interaction between Facebook's internal dispute resolution processes and existing external dispute resolution bodies. We do not evaluate the appropriateness or otherwise of Facebook's internal dispute resolution processes.

Before turning to Facebook, however, it is worth noting that there is extensive consideration in the international literature of one aspect of digital platforms' internal dispute resolution processes: complaints around content moderation, often in response to flagging of content by users.<sup>32</sup> Van Loo, for example, considers a range of methods and processes, including technical methods, used by digital platforms to manage and resolve disputes, over and above their terms of service.<sup>33</sup> In addition, the consumer and marketing literature considers processes for handling of complaints about aspects other than content moderation, privacy and mis- and disinformation, but to a lesser degree.<sup>34</sup> Overall, the literature highlights weaknesses in the internal dispute resolution systems of the digital platforms, and hence the importance and need for external review of complaints.

One point that emerges from the literature is that because of the sheer scale of complaints they handle, social media platforms such as Facebook are increasingly relying on AI-automated processes for resolving disputes. Reliance on AI as a dispute-resolution tool can give rise to the 'black box' problem where decision-making can be opaque. In other words, it can be difficult to determine how or why the software arrived at a particular conclusion. There are implications here for any external review of disputes: while the use of AI by the social media platforms is unlikely to determine the question of which external body should resolve disputes, it could hinder the ability of the external body to undertake systemic investigations (if that function is deemed appropriate for the external body) absent the necessary technical know-how, expertise and resources, and where the inputs to automated decision-making are not known. In Australia, the eSafety Commissioner has said that new powers given to it as part of a suite of 'Basic Online Safety Expectations' ('BOSE') will allow it to 'drive greater algorithmic transparency and accountability by enabling us to require reporting on how algorithms are mitigating or contributing to online harms'. This is said to include 'content moderation algorithms, which seek to detect and take action to address content which may be harmful or problematic'.<sup>35</sup> This will, however, be limited to the applicable functions of the eSafety Commissioner under the *Online Safety Act*.

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<sup>32</sup> See Kate Crawford and Tarleton Gillespie, 'What is a Flag for? Social Media Reporting Tools and the Vocabulary of Complaint' (2016) 18(3) *New Media & Society* 410; Katsh and Rabinovich-Einy (n 25) 119 (discussing Twitter's 'trusted flaggers').

<sup>33</sup> He considers the 'punishment by platform' processes of Amazon, Facebook, AirBnB and Google: Van Loo (n 12) 829 – 895.

<sup>34</sup> Sabine Einwiller and Sarah Steilen, 'Handling Complaints on Social Network Sites: An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies' (2015) 41(2) *Public Relations Review* 195-204; MS Balaji, Subhash Jha and Marla Royne, 'Customer e-complaining behaviours using social media' (2015) 35(11-12) *The Service Industries Journal* 633-654; Ran Huang and Sejin Ha, 'The interplay of management response and individual power in digital service environments from a bystander's perspective' (2018) 31(3) *Journal of Services Management* 373, 389-396.

<sup>35</sup> Office of the eSafety Commissioner, Submission No 53 to Select Committee on Social Media and Online Safety, *Inquiry into Social Media and Online Safety* (January 2022) 45-46.

### 3.1 Facebook policies

Under the Facebook Terms of Service, Facebook users are subject to a range of policies.<sup>36</sup> The most relevant of these for our purposes are the following.

- Community Standards – the global set of policies that outline what is permitted and prohibited on Meta’s platforms, including Facebook. These include policies on violence and criminal behaviour, safety, objectionable content, integrity and authenticity, and intellectual property. Other policies, such as advertising and commerce policies, cross-reference the Community Standards by disallowing content or behaviour that violates those standards.
- Advertising policies applicable to Facebook ads and paid content that appears on Facebook apps, and services like Facebook, Instagram and Messenger.
- Content and partner monetisation policies applicable to monetised content.
- Commerce policies applicable to products and services listed for sale such as those on Marketplace and Shops.
- ‘Community Payments Terms’, which set out terms for payments made by third parties via Facebook.
- ‘Performance and Accountability Policies’ for sellers.
- The data policy, which sets out the terms under which Facebook collects and manages user data.

Users may make a complaint to Facebook if they believe that content or conduct breaches one or more of these policies.

These policies, and complaints made under them, do not always fall neatly into our social and transactional complaint categories. For example, Facebook’s Community Standards, while mostly relevant to social complaints, do include some transactional aspects (such as spam and the sale of prohibited goods). Likewise, complaints under some policies may be a mixture of user-to-platform and user-to-user complaints.

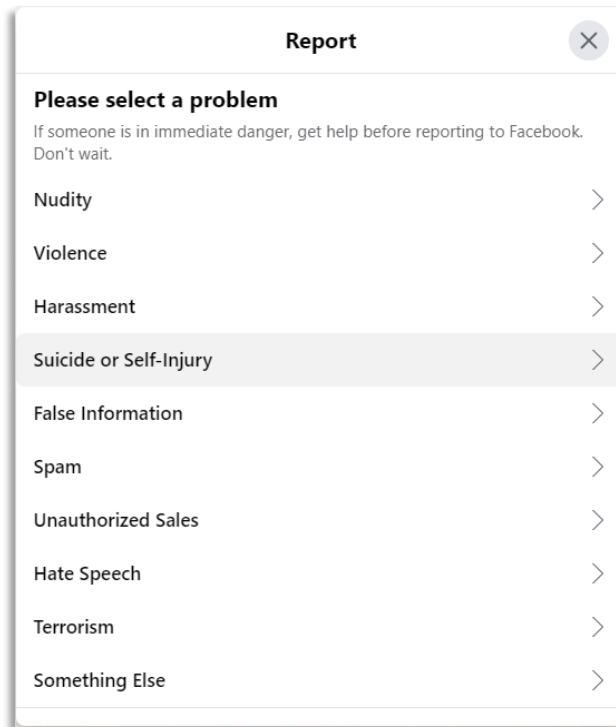
The process for making a complaint to Facebook differs depending on the policy under which the complaint is made, and the relevant area of service (eg, Feed, Groups, or Marketplace). As noted in Chapter 2, many complaints about Community Standards involve ‘reporting’ the content from within the user’s social media feed.

#### 3.1.1 Social complaints

Social complaints are generally made for an alleged breach of the Community Standards. As described above, users can directly report content such as a post, a profile, a page, a group, an ad, a comment, a message, and/or a story on the app or page by clicking the ‘options’ affordance (the three dots) below or near the content and selecting ‘Report’. Users are then asked to select the reason why they believe the content is problematic from a list of reasons set by Facebook. This list includes only a selection of the topics from Facebook’s Community Standards, which changes according to the context. Figure 2 shows the selection available when reporting content in a user’s feed. Clicking ‘Something Else’ brings up additional topics.

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<sup>36</sup> ‘Terms and Policies’ <[https://www.facebook.com/policies\\_center/](https://www.facebook.com/policies_center/)>.



**Figure 2: Menu for reporting a post from within Facebook social media feed**

When one of the topics is selected, the user is given a summary of relevant policies and is asked for further information. For example, when reporting 'harassment', the user is asked whether it concerns themselves or a friend, and is given further information such as, 'We don't allow things like ... Degrading or shaming someone'. Other types of content will show different lists. For example, reporting a 'Page' shows 'Inaccurate Info' (ie, business or page details) as the first option, followed by 'Hate Speech', then 'Nudity or sexual content'. For many matters, if not all, there is no requirement or opportunity for the user to include a textual comment: after responding to the pre-set prompts, the only option is to select 'submit'.

It can be seen from Figure 2 that, at least in certain contexts, both user-to-platform complaints (such as those involving Nudity, Violence and Terrorism) and user-to-user social complaints (such as Harassment) can be made via the on-app reporting function.

### **3.1.2 Transactional complaints**

Among other sources, transactional complaints might arise from the user's social media feed and their participation in 'buy and sell' groups (public or private groups that provide user access to a wider community) or from their activity on Marketplace, an e-commerce platform where Facebook connects sellers and buyers in a local community.<sup>37</sup> All these activities are subject to Facebook's Commerce Policies<sup>38</sup> and Community Standards. Other policies may also apply. Parties to a transaction may be able to report aspects of transactions to Facebook that are thought to have breached Facebook's policies.

<sup>37</sup> Facebook does not accept responsibility for the things sold in a Facebook buy-and-sell group or on Marketplace : 'Commerce Manager' <<https://en-gb.facebook.com/business/tools/commerce-manager>>; 'Buy and Sell Groups' <<https://www.facebook.com/help/319768015124786>>.

<sup>38</sup> 'Terms and Policies – Commerce' <[https://www.facebook.com/policies\\_center/commerce](https://www.facebook.com/policies_center/commerce)>.

In some countries, transactions can be completed on the Facebook platform, and buyers are protected by Facebook's Purchase Protection Policies. In Australia, however, all transactions are completed off-platform and Facebook's Purchase Protection Policies do not apply. Some non-commercial transactional complaints are made via mechanisms other than in-app reporting. For example, account hacking and copyright violations can be reported by filling in forms on the Facebook help pages.

Finally, it is worth noting that both social and transactional complaints can be made about social media advertisements (ie, those that appear in a user's feed, as opposed to classified ads in, for example, Marketplace). Figure 3 below shows the menu for reporting ads from within the feed, with topics that include some of those in Figure 2 above for making social complaints about a breach of Community Standards (eg, Violence or Prohibited Content), while others are transactional, including categories of 'Misleading or Scam' and 'Spam'.

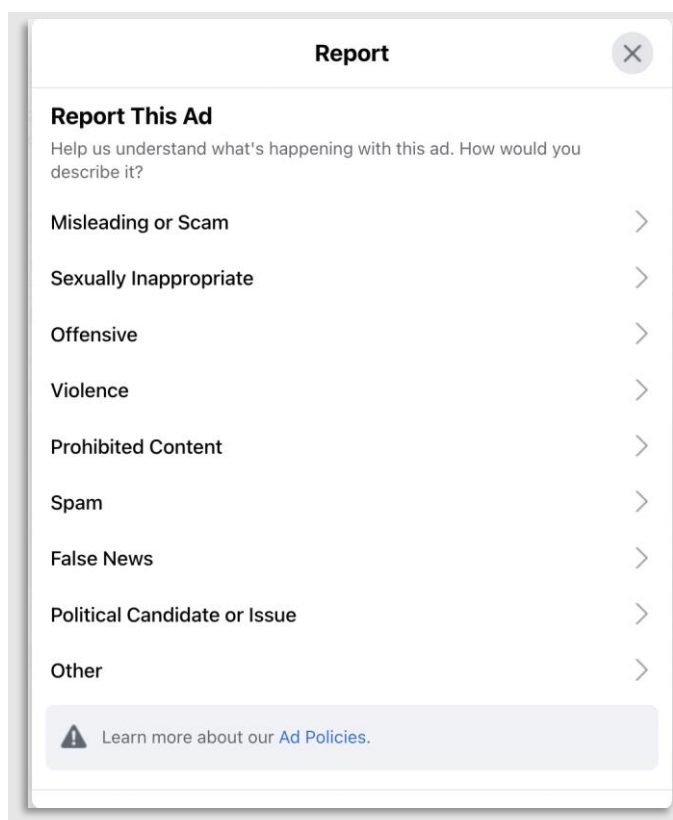


Figure 3: Menu to report an advertisement from within Facebook social media feed

## 3.2 What happens after a complaint is lodged?

### 3.2.1 Social complaints

Making a social complaint by choosing to submit a report triggers an automated reviewing process. On submission, the report is given a subject label. AI detects the subject of the report by scanning the label and takes relevant action, which may also include forwarding the report to a human reviewer. All reported content and complaints undergo a review process undertaken by an AI system or a human before a decision is made. Only a small portion of the flagged content is prioritised for human moderation.<sup>39</sup> According to Facebook,

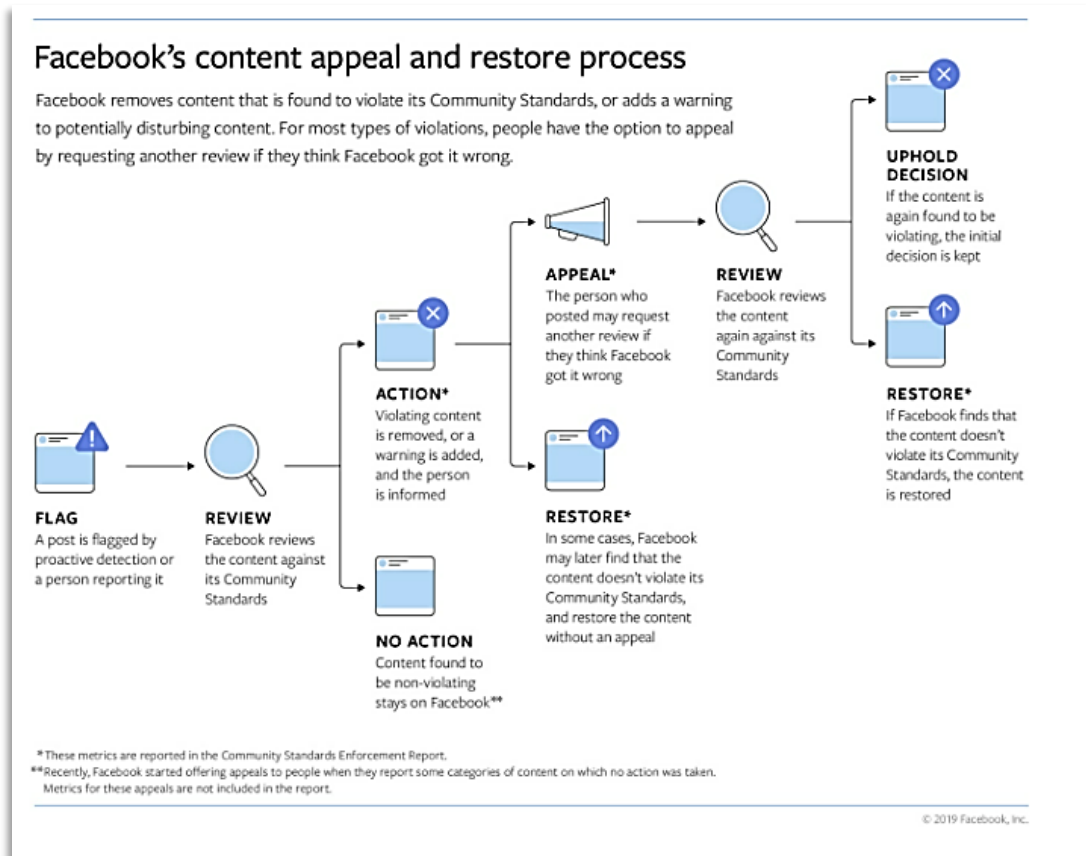
<sup>39</sup> Facebook says that for most violation categories, 90% of the content that is removed is detected and actioned by AI-assisted automated systems: 'How Technology Detects Violations' <<https://transparency.fb.com/en-gb/enforcement/detecting-violations/technology-detects-violations/>>.



this helps human content moderators avoid spending extra time on low-severity issues and/or content that does not explicitly violate its policies. Human intervention is prioritised where either the initial treatment by AI cannot fully determine whether content is potentially in violation of Facebook’s Community Standards or is heavily context-dependent, making it difficult for automated systems to detect violations. Three factors determine whether AI-assisted review systems must forward flagged content to review teams:

- the severity of the harm the content can cause;
- the virality of content;
- the likelihood of violating Facebook’s policies.<sup>40</sup>

Once a decision has been made, users are notified through the ‘Support Inbox’. According to Facebook, the platform may take up to 48 hours to notify the user.<sup>41</sup> Facebook also allows its users to request a second review of the decision made on their initial complaint through the ‘Request Review’ option. However, reviews are not offered on violations with extreme safety concerns, such as ‘Child Exploitation Imagery’. The review and appeal process is represented by Facebook in the flowchart at Figure 4 below.<sup>42</sup>



**Figure 4: Facebook’s published flowchart on its ‘content appeal and restore process’**

<sup>40</sup> ‘How Meta Prioritises Content for Review’ <<https://transparency.fb.com/en-gb/policies/improving/prioritizing-content-review/>>.

<sup>41</sup> An observation of various discussion forums on complaint handling by Facebook reveals that the process can take up to seven days. See: ‘How Long Does it Take Facebook to Review Your Case?’ *Quora* <<https://www.quora.com/How-long-does-it-take-Facebook-to-review-your-case>> and ‘How Long Does it Take to Get a Reply from Facebook When You Submit an “Account Disabled” help form?’ *Reddit*

<[https://www.reddit.com/r/facebook/comments/frhtwu/how\\_long\\_does\\_it\\_take\\_to\\_get\\_a\\_reply\\_from/](https://www.reddit.com/r/facebook/comments/frhtwu/how_long_does_it_take_to_get_a_reply_from/)>.

<sup>42</sup> ‘Appealed Content’ <<https://transparency.fb.com/en-gb/policies/improving/appealed-content-metric/>>.

In October 2020, Facebook announced that people who had exhausted their rights to request a review may be eligible to make an appeal to its new Oversight Board.<sup>43</sup> Appeals can be made directly by Facebook users<sup>44</sup> or can be referred by Facebook.<sup>45</sup> User-generated appeals to the Oversight Board can only be made with an active Facebook account and must be made within 15 days of Facebook's initial decision on the review. Only a small number of appeals are considered by the Oversight Board.<sup>46</sup> The Oversight Board has the power to overturn an initial decision made by Facebook's review team. As at February 2022, the Board had taken 23 decisions on appeals since January 2021. Most of these appeals were about complaints related to hate speech, nudity and sexual activity, violence and incitement, dangerous individuals and organisations, and harassment; none of the appeals was related to transactional disputes.

It should be noted, given their relatively recent adoption, there is only limited critical reflection on the Facebook Oversight Board and similarly structured review bodies in the international literature. For the most part, although it is acknowledged they do provide potential models for external oversight, they are seen as flawed, mainly due to the lack of independence from Facebook and other social media platforms.<sup>47</sup>

### **3.2.2 Transactional complaints**

The exact process for dealing with transactional complaints may depend on the nature of the complaint. For complaints about commercial transactions, such as alleged scams, Facebook requires evidence of communication between the buyer and the seller to support the review process. Facebook may also require the customer's past refund requests and purchase activity to assess a claim for any potential fraudulent behaviour. If the customer is not happy with the decision, an appeal can be made through the 'Appeals claim decision' information box in the Commerce Manager account. Decisions made on appeals are conclusive and cannot be further challenged.

For complaints about copyright, Facebook may ask for further information by email. It may also immediately remove content in response to a copyright infringement claim. Facebook will provide the complainant's contact information to the other party to allow the opportunity for the complaint to be resolved directly between the parties.

### **3.3 Complaint referrals from other bodies**

A range of complaints are referred to Meta, the owner of Facebook, under formal partnerships with organisations such as ACCC's Scamwatch, the Australian Small Business and Family Enterprise Ombudsman, Western Australia's Consumer Protection Agency, IDCARE and Puppy Scams Awareness Australia. Meta has also established referral pathways to comply with regulatory requirements with regulators, government and industry bodies including the OAIC, eSafety and law enforcement agencies. It is not clear whether Meta refers complaints to external bodies in addition to receiving referred complaints.

### **3.4 Transparency mechanisms for complaints made on Facebook**

Meta does not publish 'complaints' statistics (in the way that external complaint handling organisations such as the TIO do) that would give a full picture of the matters that users have complained about, how they have been handled, and the kinds of outcomes achieved. However, since 2013, it has published transparency reports for its Community Standards.

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<sup>43</sup> Brent Harris, 'Oversight Board to Start Hearing Cases', *Facebook News* (Online, 22 October 2020)

<<https://about.fb.com/news/2020/10/oversight-board-to-start-hearing-cases/>>.

<sup>44</sup> 'User Generated Appeal' <[https://about.fb.com/wp-content/uploads/2020/10/OB\\_User-Generated-Appeal\\_FINAL\\_OB.png](https://about.fb.com/wp-content/uploads/2020/10/OB_User-Generated-Appeal_FINAL_OB.png)>.

<sup>45</sup> 'What is the Oversight Board?' <<https://www.facebook.com/help/711867306096893>>.

<sup>46</sup> <https://transparency.fb.com/en-gb/oversight/appealing-to-oversight-board/>

<sup>47</sup> See Amélie Heldt, 'Let's Meet Halfway: Sharing New Responsibilities in a Digital Age' (2019) 9 *Journal of Information Policy* 336-369, 341-343; Van Loo (n 12) 829 – 895, 836-845; Katsh and Rabinovich-Einy (n 24) 109-130.

From May 2021 it has made these reports available on its Transparency Centre. It notes for example:

... the volume of content restrictions based on local law, the number of global internet disruptions that limit access to our products, and reports of intellectual property infringement.<sup>48</sup>

As an example of its reporting on action taken in relation to restricting content based on local laws, the Transparency Centre provides the following summary for the period July to December 2020:

We restricted access in Australia to 12 items in response to valid court orders, to 3 items related to organizing events that violated local social distancing laws during the COVID-19 pandemic, to 1 item for contravening Australia's Interactive Gambling Act 2001, to 1 item related to government reports of defamation, and to 1 item allegedly in breach of the Australian Corporations Act of 2001. We also restricted access to 47 items in response to private reports of defamation and to 3 items in responses to Consumer Policy reports submitted by Liquor and Gaming NSW.<sup>49</sup>

Meta's Transparency Centre also has a section on 'Detecting Violations' which explains how 'review teams help Facebook detect and review potentially violating content and accounts on the Facebook app and Instagram'.<sup>50</sup>

However, nothing in the available material describes Facebook's processes for responding to complaints or notifications from consumers about material, nor does it give any indication of the volume of such individual requests or the main areas of complaint; the focus is its technology that 'proactively detects and removes the vast majority of violating content before anyone reports it'.<sup>51</sup> The Transparency Centre webpage also provides quarterly reports from the Oversight Board.<sup>52</sup>

In May 2018, Meta released its first 'Community Standards Enforcement Report' (CSER). At the same time, Meta appointed the Data Transparency Advisory Group, an expert panel of leading academics to address three issues:

- Is Facebook accurately identifying content, behaviour, and accounts that violate the Community Standards policy, as written?
- Assuming violations are being counted accurately, are the publicly released metrics the most informative way to categorize and measure those violations as well as Facebook's response to them?
- The current metrics are focused on Facebook's efficacy in enforcing its standards, as written. What additional information does the public need in order to be able to understand Facebook's content standards enforcement efforts and evaluate the legitimacy of those policies?<sup>53</sup>

While the Group's Charter limits its deliberations to those three issues, the 2018 CSER contains extensive recommendations on how Meta can improve its measuring, monitoring and reporting in the CSER.

In summary, Meta's website contains a great deal of information on the actions it has taken in detecting and responding to Community Standards and other policy breaches; however, it is far less clear on its responses to consumer complaints.

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<sup>48</sup> Chris Sonderby, 'Our Continuing Commitment to Transparency', *Meta Newsroom* (Online, 19 November 2020) <<https://about.fb.com/news/2020/11/biannual-transparency-report/>>.

<sup>49</sup> See 'Content Restrictions Based on Local Law: Australia' <<https://transparency.fb.com/data/content-restrictions/country/AU/>>.

<sup>50</sup> 'Detecting Violations' <<https://transparency.fb.com/enforcement/detecting-violations/>>.

<sup>51</sup> *Ibid.*

<sup>52</sup> <https://transparency.fb.com/en-gb/oversight/meta-quarterly-updates-on-the-oversight-board/>

<sup>53</sup> The Justice Collaboratory, *Report of the Facebook Data Transparency Advisory Group* (Report, April 2019) 3.

## 4. Handling of Platform Complaints: External Dispute Resolution

The previous chapter looked at Facebook's internal dispute resolution, including aspects of the internal environment that might be relevant to the referral of unresolved matters to an external body. As we noted at the beginning of Chapter 3, with the exception of the literature on Facebook's Oversight Board, research into external review mechanisms for digital platforms has been limited. Moreover, while the literature on ombud schemes is well developed, adopting an ombud structure for an external regulator of online disputes has not been extensively explored in the literature.<sup>54</sup>

In this chapter, we look at external complaint handling, identifying the existing Australian external mechanisms that could potentially handle one or more of the types of complaints considered in Chapter 2 if those complaints are left unresolved by social media platforms. Beginning with the sector-specific bodies and then moving to the cross-sector bodies, we consider the existing role, and jurisdiction to handle complaints involving social media companies, of the following nine organisations:

- the Telecommunications Industry Ombudsman ('TIO')
- the Office of the eSafety Commissioner ('eSafety')
- the Australian Communications and Media Authority ('ACMA')
- the Digital Industry Group Inc ('DIGI')
- the Australian Competition and Consumer Commission ('ACCC')
- the Office of the Australian Information Commissioner ('OAIC')
- the Australian Small Business and Family Enterprise Ombudsman ('ASBFEO')
- Ad Standards
- the Australian Press Council ('APC') and other news standards organisations.

### 4.1 Telecommunications Industry Ombudsman

The Telecommunications Industry Ombudsman scheme was established in 1993. It was the first national telecommunications industry ombud scheme in the world intended to operate independently of government, the telecommunications industry and consumers. Introduced into the newly deregulated Australian telecommunications industry in December 1993, the TIO aimed to 'provide free, independent, just, informal and speedy resolution of complaints about telecommunications services'.<sup>55</sup>

While the TIO was created to provide a cheap and efficient alternative dispute resolution process for residential and small business consumers of telecommunications services, its membership has grown to keep pace with the transformation of the Australian telecommunications industry from a limited competitive environment to open competition. Under the legislation establishing the TIO, its membership must include fixed and mobile phone services and internet access. Providers of those media are carriers and 'eligible carriage service providers' (providers of a standard telephone service with residential or small business customers, a public mobile telecommunications service or an internet service provider to end users),<sup>56</sup> all of whom must enter into and comply with a Telecommunications

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<sup>54</sup> For an analysis of the role of an ombuds officer based on people's expectations, see Naomi Creutzfeld, 'What do We Expect from an Ombudsman? Narratives of Everyday Engagement with the Informal Justice System in Germany and the UK' (2016) 12(4) *International Journal of Law in Context* 437, 452.

<sup>55</sup> Anita Stuhmcke, 'The Rise of the Australian Telecommunications Industry Ombudsman' 26 (2002) *Telecommunications Policy* 69, 86.

<sup>56</sup> *Telecommunications (Consumer Protection and Service Standards) Act 1999* s 127 ('TCPSS Act')

Industry Ombudsman scheme.<sup>57</sup> The ACMA also has the power to determine that a class of carriage service provider must join the scheme.<sup>58</sup>

The 2020–2021 Annual Report of the TIO states it has 1,511 members and 301,396 contacts and has handled 119,400 complaints. The report spells out the types of complaints the TIO handles. By service type, they include the internet (increasing from 32.6% to 33.4% in the past two years), mobiles (increasing from 30.3% to 32.7% in the past two years) and landlines (down from 13% to 10.9% in the past two years).<sup>59</sup> It also provides an indication of the kinds of issues that generate large numbers of complaints, as well as trends in complaints across the telecommunications sector over the past decade.

The TIO's role as an escalated complaint-handling body is tied to its service provider members. The provider must first be approached by the complainant before the TIO is approached for assistance. The TIO may also undertake systemic investigations of the industry. In 2020–2021 the TIO closed 30 such investigations. The TIO may make binding determinations of up to \$100,000 upon members to pay compensation or to take corrective action. In 2020–2021 the median amount consumers received was \$420 in compensation. Corrective action taken included an explanation or assistance followed by a change to a contract, service or plan.

The TIO is an alternative dispute resolution service – consumers may take their complaints to a court or tribunal at any time instead of the TIO. If the TIO cannot handle complaints because they are outside its jurisdiction, it may inform consumers that a court or tribunal is another possible avenue to pursue their complaint. In either case, the TIO does not provide any assistance or advice to consumers and is not involved in any further proceedings.

Under the *Telecommunications Act 1997* (Cth), digital platforms are neither carriers<sup>60</sup> nor carriage service providers.<sup>61</sup> They do not provide the communications infrastructure that carries the communications – the poles and wires or spectrum. Nor do they provide the service that delivers the communications to the recipient – a telephone service or an internet access service. Some platforms, such as Facebook and its related entities, would be classified as content service providers under the *Telecommunications Act*; that is, they use a carriage service to provide a content service to the public.<sup>62</sup> However, complaints about the content of a content service are outside the TIO's jurisdiction.<sup>63</sup>

When responding to Treasury's consultation on the Digital Platforms Inquiry Report,<sup>64</sup> the TIO noted that, while there are currently no 'formalised complaint escalation pathways' for digital platforms, the TIO 'already receives complaints from digital platform users who expect us to be able to handle such escalations'.<sup>65</sup> It listed the following types of matters it already receives:

- scammers using bots run through fake social media accounts;
- individuals or scammers impersonating the user via social media;
- small businesses disputing charges for advertising;
- small businesses receiving misleading point of sale advice for advertising services;
- individuals or small businesses being locked out of their digital platform account;
- small businesses being incorrectly categorised in search engine results;

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<sup>57</sup> Ibid ss 128, 132. See also *Australian Communications Authority v Viper Communications* [2000] FCA 1664.

<sup>58</sup> To date, no determination has been made under the section: *TCPSS Act* s 131.

<sup>59</sup> Telecommunications Industry Ombudsman, *Annual Report 2020/2021* (Report, 2021) 44.

<sup>60</sup> *Telecommunications Act 1997* (Cth) ss 43, 44, 25 ('*Telecommunications Act*').

<sup>61</sup> Ibid s 87.

<sup>62</sup> Ibid ss 15, 16, 97.

<sup>63</sup> Ibid s 128(6)(b).

<sup>64</sup> Telecommunications Industry Ombudsman, Submission to ACCC, *Submission from the Telecommunications Industry Ombudsman to the Treasury's Consultation on the Final Digital Platforms Inquiry Report* (September 2019) 40 ('*TIO Submission to Treasury on DPI*').

<sup>65</sup> Ibid 3.



- having difficulty in getting negative comments or fake reviews of small businesses removed;
- someone hacking the user's account.

## 4.2 Office of the eSafety Commissioner

The Office of the eSafety Commissioner was established in 2015 by the *Enhancing Online Safety Act 2015* (Cth), with a mandate to enhance online safety for children, as well as exercise responsibilities under the Online Services Rules under Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth).<sup>66</sup>

Since 2015, the functions of the Office have expanded to address additional online safety issues, such that it now covers image-based abuse, cyberbullying of children and adult cyber-abuse, and abhorrent violent material as well as administering the online content scheme.<sup>67</sup> This work includes the administration of complaints schemes for the matters it regulates.

Its 2020-2021 Annual Report provides the following data on some of these functions:

- 10,934 complaints about 23,568 items of potentially prohibited online content;
- 934 complaints about cyberbullying;
- 90% of image-based abuse material removed.<sup>68</sup>

In 2021, the Office's role in handling complaints was expanded to include the administration of a complaints scheme similar to the industry codes and standards scheme under Part 6 of the *Telecommunications Act*. The scheme permits 'sections of the industry' — platforms, other social media services, internet engine services, etc — to develop industry codes, including in relation to complaint handling.<sup>69</sup> However, these codes only concern the internet content scheme in Part 9 of the *Online Safety Act*. The scheme is now focussed on the regulation of material that may be categorised as Class 1 or Class 2 material (with Class 1 being content that is or would be 'Refused Classification'), replacing the scheme under Schedules 5 and 7 of the *Broadcasting Services Act* that more closely applied the classification scheme established in the *Classification (Publications, Films and Computer Games) Act 1995* (Cth). The new codes (currently in development) will replace outdated codes developed by the Internet Industry Association. The Office has indicated that it will expect complaints to be made to service providers under the codes in the first instance, and then to the Office if they are not resolved.<sup>70</sup> Despite this, Part 3 of the *Online Safety Act* — unlike the codes schemes in Part 6 of the *Telecommunications Act* and Part 9 of the *Broadcasting Services Act* — does allow for complaints to be made direct to the eSafety Commissioner on matters arising from the internet content scheme, as well as the other regulatory responsibilities now held by the Office.

The Office has published the following explanation of its complaints role:

It is intended that eSafety will generally act as a 'safety net' if resolution of a complaint is not satisfactory to the complainant.

Further, eSafety may choose to exercise its discretion not to investigate certain online content complaints in the first instance where there is a code in place that can address those complaints.

Where a complaint is unable to be resolved, or where a complainant is dissatisfied with the way their complaint is handled, either:

- the person can lodge a complaint with eSafety, or

<sup>66</sup> *Enhancing Online Safety for Children Act 2015* (Cth) s 15.

<sup>67</sup> *Enhancing Online Safety for Children Amendment Act 2017* (Cth); *Online Safety Act*.

<sup>68</sup> Office of the eSafety Commissioner, *Annual Report 2019-2020* (Report 2020) 207-8.

<sup>69</sup> *Online Safety Act* ss 135, 138(3)(u)-(x).

<sup>70</sup> eSafety Commissioner, *Development of Industry Codes: Position Paper* (Position Paper, September 2021) 6.



- the industry participant may refer the complaint to eSafety (where the codes contain such an option).

Conversely, there may be cases where eSafety proactively elects to use its investigative powers to determine whether an industry participant has breached an industry code. This could include, for example, where eSafety has received a number of online content complaints from the public about the availability of class 1 or class 2 material which may indicate that an industry participant has a systemic issue with code compliance.<sup>71</sup>

The latest changes to online safety represent an expansion of the areas of complaint that the Commissioner's Office can deal with. However, the website for the Office is very clear about the areas of complaints it cannot handle. They include the following:

- Cybercrime
- Defamation
- Online Scams
- Privacy
- Racism and Discrimination
- Spam.<sup>72</sup>

### 4.3 Australian Communications and Media Authority

The Australian Communications and Media Authority was established by the *Australian Communications and Media Authority Act 2005* (Cth) through the merger of the former Australian Broadcasting Authority and the Australian Communications Authority. It is the federal agency with responsibility primarily for regulation of telecommunications, broadcasting and radiocommunications. It has responsibility for some aspects of online content, although some functions have been transferred to the Office of the eSafety Commissioner.<sup>73</sup> Spam and online gambling remain with the ACMA, and it has a monitoring and advisory role – although as yet no formal powers – in relation to misinformation and disinformation. In March 2022, the Coalition government signalled its intention to provide the ACMA with formal powers relating to misinformation and disinformation on digital platforms and to consult on the scope of these powers later in the year.<sup>74</sup> At the time of writing, it is not yet known if the newly elected Labor government will pursue this plan.

Although there are strong similarities in the rule-making and enforcement aspects of telecommunications consumer protection issues (under Part 6 of the *Telecommunications Act*) and broadcasting content issues (under Part 9 of the *Broadcasting Services Act*), there is a difference in relation to the resolution of consumer complaints. As noted in section 4.1 above, external complaint handling in telecommunications is performed by the TIO – recognised in the *Telecommunications Consumer Protection and Service Standards Act 1999* (Cth) ('*TCPSS Act*') – with ACMA conducting investigations into telecommunications safeguards issues that are focussed on promoting compliance with regulatory obligations rather than resolution of individual disputes. In the broadcasting area, ACMA acts as the external complaint-handling body for broadcasting complaints, but its investigations are more like its telecommunications consumer safeguards investigations, seeking to establish compliance with regulatory obligations. It does not seek to resolve disputes as the TIO

<sup>71</sup> Ibid 61-62.

<sup>72</sup> See 'Options If e-safety Can't Investigate' <<https://www.esafety.gov.au/report/illegal-harmful-content/what-we-cant-investigate>>.

<sup>73</sup> The Office of the eSafety Commissioner, although officially located within the ACMA structure, operates as 'functionally separate from the ACMA': ACMA, *Annual Reports 2016/17 of the Australian Communications and Media Authority and the Office of the eSafety Commissioner* (Annual Report, 2017) 3.

<sup>74</sup> See 'New Disinformation Laws' (Media Release, Department of Infrastructure, Transport, Regional Development and Communications, 21 March 2022) <[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0005/3181325/AGLC4-with-Bookmarks-1.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0005/3181325/AGLC4-with-Bookmarks-1.pdf)>.

does.<sup>75</sup> In many broadcasting investigations, the ACMA will have no more contact with complainants until informing them of the outcome.

The ACMA reported that in 2020-21 it completed: 25 investigations into compliance with telecommunications consumer safeguards (including six into compliance with NBN consumer experience safeguards); 15 investigations into compliance with the broadcasting codes of practice; 29 investigations into compliance with the rules set out in the *Broadcasting Services Act*, licence conditions or standards; 184 investigations under the *Interactive Gambling Act 2001* (Cth); and 23 investigations into 'unsolicited communications' (spam and breaches of the Do Not Call Register).<sup>76</sup>

#### 4.4 DIGI

DIGI is an industry association for the digital industry in Australia. DIGI's primary role is to advocate for policies for Australia's growing technology sector.<sup>77</sup> DIGI has developed the *Australian Code of Practice on Disinformation and Misinformation* adopted by Adobe, Apple, Facebook, Google, Microsoft, Redbubble, TikTok and Twitter. Under the code, the signatories commit to provide safeguards against harmful misinformation and disinformation, and provide annual transparency reports about those safeguards.<sup>78</sup> Transparency reports of the signatories were first released in May 2021 and again in May 2022.<sup>79</sup>

DIGI has implemented a complaints scheme under the code, including an online complaint form and a complaints sub-committee comprised of independent members.<sup>80</sup> Complaints accepted under this scheme are narrow in scope; they are limited to complaints about signatories' compliance with the mandatory commitments they make to combat misinformation and disinformation under objective 1 of the code.

Importantly, 'complaints by individuals about specific content or accounts on signatories' products and services' are considered ineligible, meaning that if a user of a social media service has a complaint about, say, content encountered on the service, they could not complain to DIGI under this Code about the service's handling of this matter. As DIGI explains on its website:

DIGI cannot accept complaints about individual items of content on signatories' products or services, and ask that these be directed to the signatory via their reporting mechanisms or otherwise.<sup>81</sup>

By contrast, DIGI provides the following example of what would be considered eligible:

... a failure to implement and publish policies, procedures and appropriate guidelines that will enable users to report the types of behaviours and content that violates their policies under section 5.10 of the Code.<sup>82</sup>

Complaints about signatories' compliance with their commitments to the code's non-mandatory outcomes are not considered individually by the complaints subcommittee.

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<sup>75</sup> Consumers can also complain direct to ACMA about breaches of rules set out in the Act or made by ACMA itself (eg, breaches of program standards or rules relating to captioning). They can complain to ACMA about matters regulated under the broadcasting codes (such as news content and classification of programs) only where the matter has not been resolved by the broadcaster: *Broadcasting Services Act 1992* (Cth) s 147, 148, 150. ACMA has the power to investigate matters on its own initiative: *Broadcasting Services Act* s 173. See also 'Complaints' <<https://www.acma.gov.au/complaints>> and 'Rules for What You See or Hear on TV or Radio' <<https://www.acma.gov.au/rules-what-you-see-or-hear-tv-or-radio>>.

<sup>76</sup> ACMA, *Annual Report 2020-2021* (Report, 2021) 50-65. In addition, there were 118 radiocommunications investigations and a small number of other investigations.

<sup>77</sup> 'About DIGI' <<https://digi.org.au/about/>>.

<sup>78</sup> 'Disinformation Code - About the Code' <<https://digi.org.au/disinformation-code/>>.

<sup>79</sup> 'Transparency Reports' <<https://digi.org.au/disinformation-code/transparency/>>.

<sup>80</sup> DIGI has also published a set of guidelines for this complaints scheme, *Terms of Reference for Complaints Facility and Complaints Sub-committee: The Australian Code of Practice on Disinformation and Misinformation*, available from the complaints page on the DIGI website: <<https://digi.org.au/disinformation-code/governance/>>.

<sup>81</sup> 'Disinformation Code - Complaints' <<https://digi.org.au/disinformation-code/complaints/>>.

<sup>82</sup> See definitions of 'ineligible complaint' and 'material breach' on pages 2-3 of the Terms of Reference. Section 5.10 of the Code provides as follows: 'Signatories will implement and publish policies and procedures and any appropriate guidelines or information relating to the prohibition and/or management of user behaviours and/or content that may propagate Disinformation and/or Misinformation via their services or products.'

Rather, they feed into DIGI's biannual consideration of potential systemic issues with code compliance.

#### **4.5 The Australian Competition and Consumer Commission and state and territory fair trading and consumer affairs agencies**

The ACCC's broad remit covers both anti-competitive conduct and consumer protection issues. In its competition role it made findings in the DPI Final Report that Google and Facebook have market power in certain markets, and it has since examined the supply of digital advertising technology services and agency services through the Digital Advertising Services Inquiry. Its most recent report on the subject of digital platforms advances its views on the need for enhanced competition laws in dealing with digital platforms, and also notes that it is considering enforcement action against Apple for 'restricting third party access to NFC technology on its mobile devices, and the terms it imposes for use of Apple Pay by third parties' as well as against Google in relation to 'pre-installation and default arrangements between Google and OEMs [original equipment manufacturers]'.<sup>83</sup>

As our current research is focussed on the experience of consumers in using digital platforms, especially social media services, the ACCC's administration of the Australian Consumer Law - which comprises a schedule to the *Competition and Consumer Act 2010* (Cth) - is of more relevance here. This includes prohibitions on misleading and deceptive conduct and unconscionable conduct; various specific provisions relating to practices such as the sale of gift cards and the use of pyramid schemes; and rules concerning consumer guarantees, product safety and recall.

While the ACCC's Scamwatch service provides information and tools to consumers about scams, including those encountered on digital platforms,<sup>84</sup> the ACCC does not handle individual consumer complaints, referring complainants to their state or territory consumer protection agencies, small claims tribunals, and other industry-specific complaints bodies. For those agencies that do provide information on where to make complaints about telephone, mobile or internet services, there is generally a reference to the TIO. See, for example, Consumer Affairs Victoria<sup>85</sup> or the NSW Office of Fair Trading.<sup>86</sup>

The ACCC website provides this explanation of its role:

While we don't resolve individual complaints, we will use the information you provide to help us understand what issues are causing the most harm to Australian business and consumers, and where to focus our compliance and enforcement efforts.<sup>87</sup>

Its 'compliance and enforcement efforts' noted here have included action in relation to online providers – for example, in 2020 it was successful in Federal Court action against HealthEngine Pty Ltd for publishing misleading patient reviews and ratings, including editing online reviews to remove negative comments and embellishing others.<sup>88</sup>

While the ACCC does not resolve individual complaints, the agency has been active in monitoring and reporting on consumer issues involving digital platforms. In its most recent report, it drew attention to: risks to consumers from data breaches, online identity fraud, and more effective targeting of scams; harms, such as those involving fake products or services, perpetrated through apps available from the Apple and Google product stores; as well as

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<sup>83</sup> See ACCC, *DPSI Discussion Paper* (n 7) 60-61.

<sup>84</sup> See 'Scam Watch' (Web Page) <<https://www.scamwatch.gov.au/>>.

<sup>85</sup> 'Who to Go to for' <<https://www.consumer.vic.gov.au/contact-us/who-to-go-to-for-help>>.

<sup>86</sup> 'Make a Complaint' <<https://www.fairtrading.nsw.gov.au/help-centre/online-tools/make-a-complaint>>.

<sup>87</sup> See 'Where to Go for Consumer Help' <<https://www.accc.gov.au/consumers/consumer-protection/where-to-go-for-consumer-help>>.

<sup>88</sup> See 'Health Engine to Pay 2.9 Million for Misleading Reviews and Patient Referrals' (Media Release, 20 August 2020) <<https://www.accc.gov.au/media-release/healthengine-to-pay-29-million-for-misleading-reviews-and-patient-referrals>>. For a brief explanation of three other enforcement matters brought against Google and Meta in relation to the use of consumer data, see: *DPSI Discussion Paper* (n 7) 759.

increased tracking and profiling of users and how platforms can influence consumers through the use of 'dark patterns' or 'choice infrastructure' which it explains as 'designing user interfaces that take advantage of certain psychological or behavioural biases'.<sup>89</sup> It also noted that in 2021 the three types of scams causing most harm to consumers, where initial contact was through social media, were investment scams, romance scams and online shopping scams.<sup>90</sup>

#### 4.6 Office of the Australian Information Commissioner

The OAIC is an independent statutory authority that was established in 2010 by the *Australian Information Commissioner Act 2010* (Cth).<sup>91</sup> It is responsible for promoting and enforcing the privacy and freedom of information rights mandated by the *Privacy Act 1988* (Cth) and the *Freedom of Information Act 1982* (Cth), as well as maintaining oversight of government information policy functions.<sup>92</sup>

The OAIC is led by the Information Commissioner who has the authority to conduct privacy functions conferred by Division 2 Part IV of the *Privacy Act*.<sup>93</sup> There is an Office of Privacy Commissioner that may also conduct privacy functions and may perform functions or exercise powers conferred upon the Information Commissioner if it is authorised to do so.<sup>94</sup> Since 2018, the roles of Privacy Commissioner and Information Commissioner have been performed by the same person.

The *Privacy Act's* 13 Australian Privacy Principles govern both Commonwealth and private sector activities, against which individuals can make complaints. Complaints concerning the handling of personal information by Australian Government agencies, an Australian Capital Territory agency or organisations specified in the *Privacy Act*, such as organisations with a turnover of more than \$3 million, can be made to the OAIC after initially contacting the agency or organisation concerned within 12 months of the incident. The OAIC may investigate complaints and may also initiate its own investigations into an act or practice that is in breach of an individual's privacy or a breach of an Australian Privacy Principle if deemed desirable.<sup>95</sup>

Where an investigation finds a complaint is substantiated, a determination may be made containing declarations which may identify the conduct engaged in, the steps which must be taken to ensure conduct is not repeated, actions the respondent must take to provide redress, compensation the complainant is entitled to, or that it would be inappropriate to take any further action.<sup>96</sup> The OIAC Annual Report for 2019-2020 breaks down privacy complaints totalling more than 3,000 made to the Commissioner's Office to show the number of complaints as against each of the 13 privacy principles.<sup>97</sup>

##### 4.6.1 Referral of telecommunications complaints to the TIO

Under s 35 of the *Privacy Act* the OAIC has the authority to recognise external dispute resolution schemes. This is achieved through written notice, and when deciding to recognise a scheme, the Commissioner will take into account accessibility, independence, fairness, the efficiency of the scheme, and any other matter the Commissioner thinks fit.<sup>98</sup> The OAIC recognised the TIO as an external dispute resolution scheme suitable for handling privacy-related complaints.<sup>99</sup>

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<sup>89</sup> *DPSI Discussion Paper* (n 7) 44-45, 50.

<sup>90</sup> *Ibid* 44-45, 48.

<sup>91</sup> *Australian Information Commissioner Act 2010* (Cth) ('AIC Act').

<sup>92</sup> 'What We Do' <<https://www.oaic.gov.au/about-us/what-we-do>>.

<sup>93</sup> *AIC Act* (n 96) ss 4, 10.

<sup>94</sup> *Ibid* s 12.

<sup>95</sup> *Privacy Act 1988* (Cth) s 40 ('*Privacy Act*').

<sup>96</sup> *Ibid* s 52.

<sup>97</sup> Office of the Australian Information Commissioner, *Annual Report 2019-2020* (Report, 2020) 134.

<sup>98</sup> *Privacy Act* s 52.

<sup>99</sup> 'External Dispute Resolution Schemes' <[https://www.oaic.gov.au/privacy/privacy-complaints/external-dispute-resolution-schemes#:~:text=An%20external,quick%20and%20fair%20dispute%20resolution](https://www.oaic.gov.au/privacy/privacy-complaints/external-dispute-resolution-schemes#:~:text=An%20external,quick%20and%20fair%20dispute%20resolution>)>; 'Recognised External Dispute Resolution (EDR) Schemes Register' <<https://www.oaic.gov.au/privacy/privacy-registers/recognised-edr-schemes-register>>.

Under ss 41(1)(dc)-(dd) of the *Privacy Act*, the Commissioner may decide not to investigate, or not to investigate further, an act or practice about which a complaint has been made if the Commissioner believes that the act or practice is being dealt with by a recognised external dispute resolution scheme or the act of practice would be more effectively or appropriately dealt with by a recognised external dispute resolution scheme.<sup>100</sup>

#### **4.6.2 Reforms arising out of the Digital Platforms Inquiry**

Many of the recommendations made by the DPI addressed aspects of data protection and privacy. As the Final Report discussed, however, the *Privacy Act* and its protections cannot address many of the privacy issues raised by the growing use of digital platforms. The ACCC noted that these issues include: data-combining practices; third party data sharing; the inability to obtain meaningful consumer consent through complex click-wrap agreements; terms and policies which may lead to information asymmetries; and the use of non-personal information.<sup>101</sup> The Report's detailed recommendations highlight the many areas of privacy and data protection that should be addressed, as follows:

- 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.<sup>102</sup>

Amongst its response to the many issues raised by the Final Report, the Coalition Government committed to legislation implementing previously announced social media reforms that address privacy issues<sup>103</sup> and a review of the *Privacy Act*.<sup>104</sup> The Attorney-General's Department released the Terms of Reference for the review of the Act along with an Issues Paper in October 2020, followed by a Discussion Paper in October 2021. The Terms of Reference include consideration of whether individuals should have a direct right of action and whether there should be a statutory tort for serious invasions of privacy.<sup>105</sup>

Three alternative regulatory models are explored in the Discussion Paper of the Privacy Act Review.<sup>106</sup> The first is a requirement in the *Privacy Act* to refer matters to EDR mechanisms where available, with 'APP entities' who do not have a recognised EDR scheme paying a fee to have the OAIC as their default provider. The second is the creation of a Federal Privacy Ombudsman to manage and conciliate complaints, collaborate with EDRs and refer complaints to the OAIC where necessary. This would confine the scope of the OAIC's complaints handling capabilities to Information Commissioner initiated complaints and would enable it to assume a more regulatory role. The third is the establishment of a Deputy Information Commissioner – Enforcement.

To enhance the transparency of the OAIC's existing complaints handling process, the Discussion Paper further recommends the incorporation of information on the outcome of complaints into existing annual reporting requirements.

Another outcome of the Coalition Government's reforms of privacy law (which are still in train) was the release, in October 2021, of an exposure draft of the Privacy Legislation Amendment

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<sup>100</sup> *Privacy Act* s 41(1)(dc)-(dd).

<sup>101</sup> *DPI Final Report* (n 2) 416, 418, 394, 409.

<sup>102</sup> *Ibid* 26.

<sup>103</sup> Monica Biddington, 'Regulation of Australian Online Content and Harm' (Research Paper, Parliamentary Library, Parliament of Australia, July 2019).

<sup>104</sup> We understand research has been commissioned and the Department of Infrastructure, Transport, Regional Development and Communications has conducted preliminary discussions with stakeholders: *Regulating in the Digital Age* (n 6) 13.

<sup>105</sup> See 'Review of the Privacy Act 1988' <<https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>>.

<sup>106</sup> For the discussion of these models, see: Attorney-General's Department, *Privacy Act Review* (Discussion Paper, October 2021) 182-185.



(Enhancing Online Privacy and Other Measures) Bill 2021 (Cth). If introduced and passed, these amendments would require the development of a binding Online Privacy Code (an 'OP Code') for social media companies and large online platforms, with increased penalties and enforcement measures for the OAIC. The exposure draft also proposes a new type of complaint – an 'OP complaint' – that would exist alongside other types of complaints including, for example, a 'credit reporting complaint'. The definition of OP complaint would be inserted into s 6 of the *Privacy Act*, as follows: 'a complaint about an act or practice that, if established, would be an interference with the privacy of an individual because it breached the registered OP code.' Draft new section 26KC(8) outlines the matters that could be in an OP Code; this list includes both 'the internal handling of complaints' and 'the reporting to the Commissioner about complaints' (paragraphs (c) and (d)). New section 33A would authorise the Commissioner to share information acquired in the course of its functions, powers and duties under the Act with 'receiving bodies', including alternative complaints bodies, if it is satisfied that they have satisfactory arrangements in place for protecting the information and documents, regardless of whether a complaint or part of a complaint is being transferred to the body. Acts of remediation to be taken by the respondent in the case of a substantiated complaint could include that the respondent is to prepare and publish, or otherwise communicate, a statement about their conduct. Further, the draft bill has proposed that a determination may also instruct a respondent to engage in a consultation with the Commissioner as part of the specified steps to be taken to ensure the conduct does not reoccur. Under proposed section 52A, respondents will have to prepare a statement disclosing their contact details, a description of their conduct, as well as the specified steps and any other information required within 14 days.

#### 4.7 Australian Small Business and Family Enterprise Ombudsman

The primary roles of the Small Business and Family Enterprise Ombudsman are advocacy for small business concerns and consultations with governments and others on a range of issues impacting small businesses. The office also encourages small businesses to resolve their issues with other businesses (including large digital platforms) and government agencies. Where that fails, it can provide information on how to resolve disputes, recommend participation in an ADR process or refer cases to other agencies, as appropriate.<sup>107</sup> The exception is issues involving franchising. There is a mandatory Franchising Code of Conduct that applies to all businesses involved in a franchising. Under that Code, the Ombudsman appoints a mediator in situations where the parties are unable to resolve their dispute.<sup>108</sup>

The Ombudsman's latest Quarterly Report (April-June 2021) records receipt of 1,712 'contacts', 85 per cent of which were calls for assistance. The main issues raised were industry code disputes (predominantly about franchising), and disputes about payments, contracts and leases.<sup>109</sup> Its submission to a recent parliamentary inquiry noted it had 'assisted more than 30 businesses dealing with fake reviews in recent years'.<sup>110</sup>

#### 4.8 Ad Standards

Ad Standards was established by an industry association representing advertisers, the Australian Association of National Advertisers (AANA), to administer codes of practice and handle complaints about advertising. The principal code is the AANA Code of Ethics, but Ad Standards also administers a number of other AANA codes.<sup>111</sup> It also handles complaints under the Federal Chamber of Automotive Industries' (FCAI) Voluntary Code of Practice for

<sup>107</sup> 'Five Steps to Resolve Your Dispute' <<https://www.asbfeo.gov.au/assistance/five-steps-to-resolve-your-dispute#>>.

<sup>108</sup> 'Franchising Disputes' <<https://www.asbfeo.gov.au/franchising-disputes>>.

<sup>109</sup> Australian Small Business and Family Enterprise Ombudsman, *Quarterly Report Q2 April-June 2021* (Report, June 2021) 3.

<sup>110</sup> Australian Small Business and Family Enterprise Ombudsman, *Inquiry into Social Media and Online Safety*, House Select Committee on Social Media and Online Safety (Submission, December 2021) 1.

<sup>111</sup> The other AANA codes are: AANA Food and Beverages Advertising Code (replacing two codes previously formulated by the Australian Food and Grocery Council); AANA Code for Advertising and Marketing Communications to Children; AANA Environmental Claims Code; and the AANA Wagering Advertising and Marketing Communication Code. See: Ad Standards, *Review of Operations 2021*, 3, 10. <<https://adstandards.com.au/news/review-operations>>.



Motor Vehicle Advertising, and it refers complaints to the Alcohol Beverages Advertising Council (ABAC) under the ABAC Responsible Alcohol Marketing Code.<sup>112</sup>

Under the AANA Code of Ethics, consumer complaints can be made about such matters as the portrayal of people in a discriminatory way; using sexual appeal in an exploitative or degrading way; and use of strong and obscene language.<sup>113</sup> These complaints are heard by a panel drawn from the Ad Standards Community Panel, which consists of 21 individuals from 'a broad range of age groups and backgrounds' appointed by Ad Standards.<sup>114</sup> Complaints from industry participants about advertisers' content concerning such matters as misrepresentations likely to cause damage to the business or goodwill of a competitor are dealt with under section 1 of the Code of Ethics. These complaints are heard by the Ad Standards Industry Jury, comprised of three lawyers specialising in advertising law and/or competition and consumer law. Jury members are selected on a 'case-by-case basis' from a register of lawyers'.<sup>115</sup>

In 2020-21, Ad Standards received 4,675 complaints, with the top issues of concern being sex, sexuality and nudity (21.31%) and health and safety (16.5%).<sup>116</sup> Complaints can be made about advertising and marketing material appearing in any medium including on social media as well as traditional media. In its 2021 Review of Operations, Ad Standards observed that while most complaints are about ads seen on free-to-air television:

The number of complaints about advertising on social media is increasing each year and in 2021 made up a little more than 8 per cent of all complaints. Instagram is the most complained about social media platform followed by Facebook. This year the Community Panel also assessed ads which appeared on YouTube, TikTok and Twitch.<sup>117</sup>

Although Ad Standards is one of several organisations that administer codes of practice applying to advertising and marketing,<sup>118</sup> it can be distinguished from others on account of its complaint-handling procedures, including: the operation of a secretariat independent from advertisers; the allocation of decision-making to the independent Community Panel and the Industry Jury; the use of independent reviewers to hear appeals; and the publication of annual complaint statistics and case studies.

## **4.9 Australian Press Council and other news standards organisations**

### **4.9.1 Australian Press Council**

The APC is a voluntary industry-based self-regulatory scheme that sets standards of practice and handles complaints about print and online news. Its 'constituent bodies' (mainly publishers but also publisher associations) pay membership fees that fund the scheme. Publisher members include large media organisations such as News Corp Australia, nine.com.au and Daily Mail Australia, as well as smaller publishers such as Private Media and Schwartz Media.<sup>119</sup> Its Council is comprised of an independent Chair and Vice-Chair,

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<sup>112</sup> Ad Standards, *Review of Operations 2021*, 3, 10 <<https://adstandards.com.au/news/review-operations>>.

<sup>113</sup> AANA Code of Ethics, s.2 <<https://adstandards.com.au/codes-and-cases/Codes>>.

<sup>114</sup> 'Community Panel' <<https://adstandards.com.au/about/community-panel>>.

<sup>115</sup> 'Industry Jury' <<https://adstandards.com.au/about/industry-jury#Who%20is>>.

<sup>116</sup> Ad Standards (n 112) 4.

<sup>117</sup> Ad Standards (n 112) 17.

<sup>118</sup> Other bodies include the Australian Digital Advertising Alliance (ADAA) and the Interactive Advertising Bureau (IAB Australia), which are responsible for the Australian Best Practice Guideline For Online Behavioural Advertising (see <<https://iabaustralia.com.au/guideline/australian-best-practice-guideline-for-online-behavioural-advertising/>>); the Australian Influencer Marketing Council (AiMCO), which issues the Australian Influencer Marketing Code of Practice (see <<https://www.aimco.org.au/best-practice>>); and the Association for Data-driven Marketing and Advertising (ADMA), which says that it will accept and pass on complaints about its members (see <<https://www.adma.com.au/compliance/how-to-lodge-a-complaint>>).

<sup>119</sup> Australian Press Council (APC), *Annual Report 2020-21*, 21 <<https://www.presscouncil.org.au/publications>>.

other public members, representatives of the 'constituent bodies', and independent journalists.<sup>120</sup>

The APC's standards of practice comprise two sets of principles (the Statement of General Principles and the Statement of Privacy Principles) and two 'specific standards' (Coverage of Suicide and Contacting Patients). It also publishes non-binding advisory guidelines (eg: Reporting Elections; Reporting on Persons with Diverse Sexual Orientation, Gender Identity, and Sex Characteristics; and Family and Domestic Violence Reporting).<sup>121</sup>

Members of the public can lodge a complaint with the APC about articles published by its members. The APC secretariat handles complaints in the first instance, including by trying to mediate matters where appropriate, which may result in action such as the publication of a clarification or correction. The APC's executive director/CEO may also issue a Letter of Advice to the publisher and then discontinue the complaint. Matters that are not resolved this way may be decided by an Adjudication Panel. Some matters that have been the subject of an adjudication may be reviewed by a Review Panel.<sup>122</sup> The APC's Adjudication Panels are comprised of five to seven people, and have an equal number of public and industry members, who may be independent journalists but not publisher members.<sup>123</sup> Publishers must publish the adjudications. APC decision-makers may also call for action such as an apology or correction, but cannot require such a response or impose fines.

The latest published complaints statistics show that in 2020-21, the APC received 1,296 new complaints, 797 of which were within scope of the Council's standards of practice. In that year, it handled only six complaints that were published only on social media and three that were published online and on social media.<sup>124</sup> Its policy has evolved over recent years to include complaints about a member publication's social media pages, including comments posted by readers. This position was adopted in an adjudication published in 2015 as well as in a more recent adjudication in 2021, both of which involved material published on Facebook.<sup>125</sup> The APC also explained its approach in its submission to the ACCC in the DPI in April 2018:

The Press Council has, as well, had to grapple with questions such as whether newspapers should be held responsible for the comments posted on their Facebook pages about articles they have published originally. As a rule, the Council does require its member publishers to take full responsibility for their Facebook pages. However, they cannot be held responsible for the way aggregators maintain the capacity for people to search for material no longer on the publisher's Facebook pages or other on-line publications, or that has since been corrected. Attempts have been made to address this concern, and Google and Facebook have at times taken suitable action, but neither the Press Council nor its publisher members have the ability to require such action to be taken.<sup>126</sup>

#### **4.9.2 Other news standards organisations**

In addition to the APC, there is another industry-based self-regulatory scheme, the Independent Media Council (IMC), that applies standards to the print and online publications of West Australian Newspapers (part of Seven West Media) only. It shares some of the

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<sup>120</sup> At 30 June 2021, the representation was as follows: a public member as Chair and a public member as Vice-Chair; seven additional public members; two independent journalists and six constituent members. Ibid 17. For current positions, see: 'Who We Are' <<https://www.presscouncil.org.au/about-us/who-we-are/>>.

<sup>121</sup> 'Advisory Guidelines' <<https://www.presscouncil.org.au/standards/advisory-guidelines/>>.

<sup>122</sup> 'Revision and Review of Decisions' (Fact Sheet). See: <<https://www.presscouncil.org.au/publications/>>.

<sup>123</sup> 'Handling of Complaints' <<https://www.presscouncil.org.au/complaints/handling-of-complaints/>>.

<sup>124</sup> APC (n 119) 12, 15.

<sup>125</sup> Adjudication 1643, 31 March 2015 (Kylie Keel/The Moorabool News) <<https://www.presscouncil.org.au/document/1643-kylie-keel>>; Adjudication 1797, 13 May 2021 (Complainant/Herald Sun) <<https://www.presscouncil.org.au/document/1797-complainant-10>>.

<sup>126</sup> APC, *Digital Platform Inquiry*, ACCC (Submission, April 2018), 7 <<https://www.presscouncil.org.au/policy/statements-and-submissions/>>.

features of the APC, including adopting and publishing its own Code of Conduct,<sup>127</sup> but does not have the same secretariat and independent complaint-handling facility. Instead, complaints are generally directed to a Readers' Editor at the responsible publication, although some are made directly to the IMC. Complaints that are not able to be resolved by a Readers' Editor may be referred to the IMC for adjudication. The IMC itself is comprised of three members (all former judicial or political figures).<sup>128</sup> The IMC reported that in 2020, 'more than 400' complaints were sent direct to Readers' Editors, while the IMC received 31 complaints resulting in 11 published adjudications.<sup>129</sup> Social media complaints do not appear to be covered by this scheme.

Finally, the Media, Entertainment and Arts Alliance, the union for journalists, publishes the Journalist Code of Ethics. An Ethics Committee receives complaints under the Code and, where appropriate, convenes a three-person Ethics Panel. While the Code includes within its scope material published on any platform, it applies only to journalist members of the MEAA – not to publishers or broadcasters – and it results in very few complaints each year. Between 2015 and 2020, an average of 13 complaints per year were made but only five per year of these involved MEAA journalist members and were referred to the Ethics Committee; of these, only three per year led to the convening of an Ethics Panel.<sup>130</sup> It could not be determined if any of these complaints related to material published on social media or other digital platforms.

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<sup>127</sup> See: Independent Media Council (IMC), 'Independent Media Council Code of Conduct for Print And Online Print Media Publishers' <<http://www.independentmediacouncil.com.au/#>>.

<sup>128</sup> 'The Independent Media Council Guidelines' <<http://www.independentmediacouncil.com.au/#>>.

<sup>129</sup> 'IMC Report: January 1, 2021' <<http://www.independentmediacouncil.com.au/#>>.

<sup>130</sup> 'MEAA Journalist Code of Ethics' <<https://www.meaa.org/meaa-media/code-of-ethics/>>.

## 5. Possible Options

In this Chapter we present our analysis, based on the preceding chapters, of viable options for establishing an external complaints scheme for social media platforms in Australia. Before commencing our analysis, we describe in section 5.1 some insights taken from the academic literature and some recent developments in regulation and industry practice, in Australia and overseas, that might assist in developing the options. The recent developments are not necessarily connected, but they are all relevant to aspects considered in section 5.2.

### 5.1 Industry, regulatory and academic developments

#### 5.1.1 Online content

In each of Australia, the EU and the UK, there have been recent developments in the regulation of 'online harms' and other aspects of online content and conduct. None of these involves a requirement to develop an EDR scheme, but they deal with complaint handling in some way.

The Parliament in the UK is currently accepting submissions on an Online Safety Bill which, among other things, is seeking to impose a duty to operate complaints procedures upon all regulated user-to-user services. The procedures must allow for relevant online complaints to be made, provide for appropriate action to be taken by the service provider in response to complaints of a relevant kind, and be accessible and transparent. Platforms that fail to fulfil their obligation of protecting users under the Act may be held accountable by Ofcom, the regulator. Similarly, agreement between the European Parliament and the EU member states on the *Digital Services Act* was reached in April 2022, with the Parliament passing the legislation in July 2022. The Act aims to address various risks and harms faced by European citizens online. It includes minimum criteria such as ease of accessibility and the achievement of swift non-discriminatory, non-arbitrary and fair outcomes within 10 working days, which online platforms' internal complaints mechanisms must satisfy. The Act further mandates the possibility of pursuing out-of-court settlements with an independent certified body and judicial redress in certain circumstances. In explaining the impact of the Act, the European Commission has said:

All platforms, except the smallest, will be required to set up complaint and redress mechanisms and out-of-court dispute settlement mechanisms, cooperate with trusted flaggers, take measures against abusive notices, deal with complaints, vet the credentials of third party suppliers, and provide user-facing transparency of online advertising.<sup>131</sup>

It is expected the Act will apply within 15 months or from 1 January 2024 (whichever is the later).

In Australia, the Online Safety (Basic Online Safety Expectations) Determination 2022 (BOSE Determination)<sup>132</sup> includes 'core expectations' required under the *Online Safety Act* and 'additional expectations' developed following earlier consultation. None of these expectations is binding on 'social media services' and the other online services captured by the determination; however, under the *Online Safety Act*, the eSafety Commissioner can issue notices requiring reporting on matters including those relating to complaint handling. Failure to comply can result in a formal warning and/or a civil penalty.<sup>133</sup>

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<sup>131</sup> 'Questions and Answers: Digital Services Act' < [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348)>. See also: *Amendments Adopted by the European Parliament on 20 January 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC* Amendment 49.

<sup>132</sup> The determination was made by the Minister for Communications, Urban Infrastructure, Cities and the Arts on 20 January 2022 under s 45 of the *Online Safety Act 2021* (Cth).

<sup>133</sup> *Online Safety Act* ss 49-62.

Most significantly for this report, s 13 of the BOSE Determination introduces an expectation that social media services and other online services have in place ‘clear and readily identifiable mechanisms’ that allow users and other Australian residents to ‘report and make complaints about’ the various online harms, including image-based abuse and cyberbullying, regulated under the *Online Safety Act*. There is an equivalent expectation for breaches of the service providers’ own terms of use – and indeed, the Determination includes an expectation that service providers have terms of use as well as ‘policies and procedures for dealing with reports and complaints’ about the online harms or their terms of use.<sup>134</sup> It includes an expectation that providers will make information on terms of use and tools and resources published by the eSafety Commissioner readily accessible.<sup>135</sup> Finally, it includes a similar expectation of making available information on how to make a complaint to the eSafety Commissioner – thereby including an element relating to escalated, external complaint handling. However, this last expectation only applies in relation to the matters covered by the *Online Safety Act*.<sup>136</sup>

Neither the Determination nor its Explanatory Memorandum indicates what would constitute a ‘clear and readily identifiable mechanism’ for making a complaint. However, the Explanatory Memorandum does give examples of what the service provider’s terms of use should cover:

Service providers should use their terms, policies and procedures to address harmful material that is not necessarily unlawful or explicitly referenced in the Act, for example:

- Hate against a person or group of people on the basis of race, ethnicity, disability, religious affiliation, caste, sexual orientation, sex, gender identity, serious disease, disability, asylum seeker/refugee status, or age;
- Promotion of suicide and self-harm content, such as pro-anorexia content, that does not meet the threshold of class 1 or class 2 material;
- High volume, cross-platform attacks that have a cumulative effect that is damaging but does not meet the threshold of adult cyber-abuse when reported as singular comments or posts; and
- Promotion of dangerous viral activities that have the potential to result in real injury or death.<sup>137</sup>

### **5.1.2 Proposals for an ‘internet ombudsman’**

Some overseas jurisdictions, including the UK, EU and France, have considered adopting an internet ombudsman to address the problem of illegal and other harmful online material.<sup>138</sup> In 2017, the UK adopted a different regulatory solution, proposing a new UK Council for Internet Safety (UKCIS),<sup>139</sup> but in 2020, the Parliamentary Assembly of the Council of Europe issued a draft resolution calling on member states to consider establishing:

... an internet ombudsman institution, either as a separate body or by expanding the remit of an existing body such as a data protection agency, a media regulator or a conventional ombudsman institution responsible for the protection of human rights.

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<sup>134</sup> Online Safety (Basic Online Safety Expectations) Determination 2022 ss 14-15.

<sup>135</sup> Ibid s 17.

<sup>136</sup> Ibid.

<sup>137</sup> Explanatory Statement, Online Safety (Basic Online Safety Expectations) Determination 2022 (Cth) 18.

<sup>138</sup> See Owen Bowcott and Samuel Gibbs, ‘UK Considers Internet Ombudsman to Deal with Abuse Complaints’ *The Guardian* (22 August 2017) ; Efrat Daskal, Robert Wentrup and Dan Shefet, ‘Taming the Internet Trolls with an Internet Ombudsperson: Ethical Social Media Regulation’ (2019) 12(2) *Policy & Internet* 207. The Bowcott and Gibbs article is cited by Daskal, Wentrup and Shefet, who also note a more limited proposal developed in France: <<https://www.senat.fr/leg/pp16-151.html>>.

<sup>139</sup> Department of Digital, Culture, Media and Sport, *Internet Safety Strategy Green Paper* (Green Paper, 11 October 2017) <<https://www.gov.uk/government/consultations/internet-safety-strategy-green-paper>; <https://www.gov.uk/government/news/new-council-for-internet-safety-in-the-uk>>; ‘UK Council for Internet Safety – About Us’ <<https://www.gov.uk/government/organisations/uk-council-for-internet-safety/about>>.



Paragraph 7 of the draft resolution also called on member states to:

- ... identify the mechanisms, procedures and measures for guaranteeing:
  - 7.1 the political independence of the internet ombudsman institution;
  - 7.2 constructive interaction between the institution and the legislature, executive and judiciary, as well as the national data protection authority;
  - 7.3 the economic independence of the institution, by examining various funding arrangements and, in this context, through discussion with representatives of the major social media platforms on the issue of the financial support which these operators could provide to ensure the sustainability of the ombudsman institution;
  - 7.4 the transparency of the ombudsman's opinions and of the decisions taken by intermediaries on the basis thereof;
  - 7.5 the specific legal, technical or other skills required for the effective operation of the ombudsman institution and its administration;
  - 7.6 forms of co-operation between the institution and pre-screening agencies, which could help with the swift detection of manifestly illicit content.<sup>140</sup>

Daskal, Wentrup and Shefet have taken the idea of a national ombudsman one step farther, making the case for a transnational, cross-border Internet Ombudsman (IO) informed by the Universal Declaration of Human Rights, that would focus on: privacy-related matters; the truthfulness and accuracy of published information; and safety within social media environments. The IO would be expected to respond to complaints, respond to government requests for information, and advise platforms, and would make use of blockchain technology to address the scale of possible complaints. It would be governed through an international committee such as the Internet Governance Forum or UNESCO.<sup>141</sup>

### **5.1.3 Use of online dispute resolution**

Overseas jurisdictions have started to make use of 'online dispute resolution' (ODR) platforms to resolve 'low value' consumer disputes involving online commercial transactions that are too small to merit resolution by the courts. ODR platforms and processes vary but have been classified by the United Nations Commission on International Trade Law (UNCITRAL) into three categories (or stages).<sup>142</sup> In the first stage, negotiation between the parties is enabled via technology – consumers and suppliers negotiate directly with each other via the ODR platform. If unsuccessful, the parties proceed to the second stage, during which a neutral third party is appointed to mediate the dispute. If the dispute cannot be resolved through the third party process, the parties may move to the third stage — arbitration or another mechanism to determine the dispute.<sup>143</sup>

In their comparative research on schemes developed in Brazil and Europe, Schmidt-Kessen, Nogueira and Cantero Gamito have noted that Brazil funds an ODR platform to resolve online and offline transactional complaints, including complaints about telephony, the internet, TV operators, banks, financial and credit card administration. The ODR platform uses 'technology-enabled negotiation' and if a complaint remains unresolved at the conclusion of the process, consumers may seek redress in the courts or other public bodies. In Europe, the European ODR platform, mandated by a regulation of the European Parliament,<sup>144</sup> has to date attracted complaints focusing on clothing, footwear, airline tickets, and ICT goods. The platform facilitates resolution of low-level complaints from e-commerce transactional

<sup>140</sup> Parliamentary Assembly of the Council of Europe, 'Towards an Internet Ombudsman Institution' (Online, 15 September 2020) <<https://pace.coe.int/en/files/28728/html>>.

<sup>141</sup> Daskal, Wentrup and Shefet (n 138) 207-226.

<sup>142</sup> Marie José Schmidt-Kessen, Rafaela Nogueira and Marta Cantero Gamito, 'Success or Failure? – Effectiveness of Consumer ODR Platforms in Brazil and in the EU' (2020) 43 *Journal of Consumer Policy* 659, 660-661.

<sup>143</sup> *Ibid.* See also UNCITRAL, *Technical Notes on Online Dispute Resolution* UN Doc A/RES/71/138 (2017).

<sup>144</sup> *Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)* [2013] OJ L 165.



disputes. Its main function is to act as a referral service to Alternative Dispute Resolution (ADR) third party providers, who will resolve the dispute between the trader and the consumer on the ODR platform.<sup>145</sup> Consumers submit complaints via the platform, which forwards them to relevant suppliers. The platform also notifies suppliers about suitable ADR entities for the type of dispute. Consumers and suppliers must agree on one of the platform's suggested ADR entities. The enforceability of decisions of ADR entities varies; they are not binding in all circumstances.

The shift to ODR is not without challenges, as identified by Crawford and Gillespie.<sup>146</sup> These challenges include the lack of transparency around the way algorithms work and the biases embedded within them. Katsh and Rabinovich-Einy also draw attention to the possible inaccuracies of the algorithms, the possibility of errors in the data that underpins their operation, and inadvertent harms that can occur, including discrimination and bias.<sup>147</sup> They argue that online dispute resolution systems must take into account a range of factors, such as the scope of problems to be addressed, the degree of human involvement, whether systems are fully or partially automated, the manner in which disputes are resolved, and the degree of transparency in decisions.<sup>148</sup> The authors conclude that if systems do not have these attributes in their design, they may be considered unfair and untrustworthy by consumers and users. The authors consider the involvement of a public authority or neutral third party as essential for the success of ODR systems.<sup>149</sup> Nevertheless, Schmidt-Kessen, Nogueira and Cantero Gamito<sup>150</sup> conclude that, subject to certain qualifications, the Brazilian ODR model provides access to redress for low-value transactional consumer complaints, thereby easing the burden on courts.<sup>151</sup>

#### **5.1.4 Dispute resolution for social complaints: developments in defamation law**

While social disputes on social media services can cover an enormous range of issues from hate speech to the promotion of terrorism, damage to reputation has emerged as a flash point that national governments are attempting to address. In Australia, the eSafety Commissioner has said that between 23 January 2022 and 10 March 2022 it handled more than 480 complaints 'from Australian adults experiencing abuse and harassment online through the Adult Cyber Abuse Scheme', and that of these about one-third related to 'potentially defamatory material'.<sup>152</sup> Interestingly, while initiatives to address the problem are designed to build on existing defamation law – an aspect of tort law in all three jurisdictions noted below – there is the potential for them to operate separately from other regulatory initiatives to address online harms. The three initiatives described below all include an attempt to impose complaint handling procedures on digital platforms, although the point of escalated external dispute resolution is the traditional court system.

##### *United Kingdom*

The United Kingdom offers a 'safe harbour' defamation defence for website operators that host user-generated content.<sup>153</sup> It provides a scheme through which complainants can issue a notice of complaint to website operators regarding allegedly defamatory content. The incentive to comply comes from the risk of losing the defence and incurring liability if

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<sup>145</sup> Schmidt-Kessen, Nogueira and Cantero Gamito (n 142) 664-675.

<sup>146</sup> Mike Annany and Kate Crawford, 'Seeing without Knowing: Limitations of the Transparency Idea and Its Application to Algorithmic Accountability' (2018) 20(3) *New Media & Society* 973-989, 983.

<sup>147</sup> Katsh and Rabinovich-Einy (n 25) 109-130, 50.

<sup>148</sup> *Ibid* 109-130, 54.

<sup>149</sup> *Ibid*.

<sup>150</sup> Schmidt-Kessen, Nogueira and Cantero Gamito (n 142) 659-686.

<sup>151</sup> *Ibid* 659-686, 678.

<sup>152</sup> Office of the eSafety Commissioner, 'Additional Question on Notice', House Select Committee on Social Media and Online Safety, 10 March 2022.

<sup>153</sup> *Defamation Act 2013* (UK) s 5 ('*UK Defamation Act*').

the complaints procedures prescribed by section 5 of the *Defamation Act 2013* (UK) are not followed.<sup>154</sup>

The system is designed to address situations where it is not possible for the claimant to identify the person who posted the statement. In that situation, the claimant can give the website operator (the 'intermediary') a notice of complaint in relation to the statement. To maintain its defence, the website operator must respond (in accordance with any provisions set out in the regulations) and liaise with the poster to attempt to remove the material.<sup>155</sup> If the poster fails to respond within five days or if the poster consents to the removal of the content, the operator must remove the material and inform the complainant in writing within 48 hours.<sup>156</sup> If the poster responds but does not consent to the material being removed, the intermediary may be able to relay the poster's contact details to the complainant if the poster consents. If consent is not obtained, the only alternative provided to the complainant is to receive a court order to retrieve the contact details of the poster.<sup>157</sup> A poster is not prevented from reposting the same or substantially similar content twice, although content can be automatically removed if it is the same or substantially similar to content which has attracted more than two notices of complaint.<sup>158</sup>

Laidlaw and Young have criticised the dependence of this complaints mechanism on the actions of third parties, which in some circumstances could leave a claimant without a remedy.<sup>159</sup> The strict time limits have also been criticised: while the courts can use their discretion to offer more flexibility in relation to time limits where it is in the interests of justice to do so, the time limits and obligations have led to this scheme being regarded as 'complex' and 'administratively onerous'.<sup>160</sup> Others have raised: the issue of online anonymity which has exacerbated the complexity of the section 5 procedures;<sup>161</sup> the potential for content that is not necessarily libellous to be arbitrarily removed; and the difficulty in determining who would be the website operator in the case of social media platforms.<sup>162</sup> As of February 2021, there had reportedly been no cases decided in relation to this defence and there remains a lack of judicial interpretation relating to its operation.<sup>163</sup>

### Canada

The Law Reform Commission of Ontario recently recommended a similar obligation on intermediaries to implement a notice-and-takedown regime for complaints relating to potentially defamatory material.<sup>164</sup> Under the Commission's proposed Defamation Act, to access the scheme complainants must serve a notice of complaint on the publisher where it is reasonably possible. The notice may also be sent to the intermediary hosting the content. This would impose a statutory duty on intermediaries to make all reasonable efforts to forward the complaint to the publisher and does not require an assessment of merits. Complementary to this requirement is a takedown obligation: intermediaries must expeditiously take down the

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<sup>154</sup> Search engines, services that only transmit information or grant access to communications networks will fall outside the ambit of this defence. See: Ministry of Justice, *Complaints About Defamatory Material Posted on Websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations* (Guidance Note, 2014) 2 ('Guidance on s 5').

<sup>155</sup> The operator can lose the defence if the notice of complaint does not contain all the required information and the operator fails to notify the complainant within 48 hours that the notice of complaint was not compliant with the regulation: *UK Defamation Act* (n 139) ss 5(3)(a) to (c) - 5(4); *Defamation (Operation of Websites) Regulations 2013* (UK) SI 2013/3028, r 4(1) and 4(2).

<sup>156</sup> Search engines, services that only transmit information or grant access to communications networks will fall outside the ambit of this defence: *Guidance on s 5* (n 154) 6.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> Emily B Laidlaw and Hilary Young, 'Internet Intermediary Liability in Defamation' (2018) 56 *Osgoode Hall Law Journal* 153.

<sup>160</sup> Andrew Murray, *Information and Technology Law: The Law and Society* (Oxford University Press, 2016) 210.

<sup>161</sup> Ashley Hurst, 'Defamation Act 2013: Section 5, It's Decision Time for Website Operators', *The International Forum for Responsible Media Blog* (Online, 6 January 2014) <<https://inform.org/2014/01/06/defamation-act-2013-section-5-its-decision-time-for-website-operators-ashley-hurst/>>.

<sup>162</sup> Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 *Modern Law Review* 87.

<sup>163</sup> Council of the Attorney General, *Review of the Model Defamation Provisions – Stage 2* (Discussion Paper, 31 March 2021) 19.

<sup>164</sup> Law Commission of Ontario, *Defamation in the Digital Age: Final Report* (Report, March 2020) 71.

allegedly defamatory material if no written response is received from the publisher within two days or it is impossible to forward the complaint to the publisher.<sup>165</sup> Complainants may be entitled to statutory damages if platforms fail to remain compliant.<sup>166</sup>

This proposal is distinguishable from the UK scheme, including the aspect criticised by Laidlaw and Young where a takedown remedy is not provided if the publisher is identifiable as complainants must pursue their actions through the courts.<sup>167</sup> The proposed Act further aims to encourage corporate responsibility by mandating the consideration of factors such as the platform's terms of service and dispute resolution mechanisms when judges assess damages.<sup>168</sup> These proposed obligations would be enforceable by Ontario courts against all intermediaries that offer third party content to Ontario users, and out-of-province platforms that display a 'real and substantial connection' to Ontario and the platform's activities.<sup>169</sup>

### *Australia*

The Social Media (Anti-Trolling) Bill 2022 (Cth) introduced into Federal Parliament in February 2022 adapts the UK model, creating incentives for social media services to establish a complaints function for defamation-related complaints, without requiring them to do so. As in the UK, the motivation for a social media service to establish the kind of complaints scheme anticipated by the Bill arises out of the imposition of liability as a publisher of third party content that could be defamatory. The Bill appears to clarify this aspect of the position at common law, making social media services liable alongside the author of the material, but it goes further in establishing that a defence of innocent dissemination is not available to the social media service. Instead, there is a new defence that can be used by the social media service where it has established and followed a complaints scheme that, in effect, puts the complainant in direct contact with the author of material that might have been made anonymously or pseudonymously. The proposed scheme thereby gives the complainant the opportunity to resolve the matter informally or to sue the poster for defamation.<sup>170</sup>

The Australian Bill, along with an exposure draft released in substantially the same form at the end of 2021, has been subject to similar criticisms as the UK scheme in terms of the impact on anonymous commenting and the reliance on consent from posters, among other concerns.<sup>171</sup> Following the change of government in Australia in May 2022, the future of the Bill is unclear.

## **5.2 Options**

In this research report we are responding both to the suggestion put by the ACCC that there should be an independent ombud scheme available to Australian users of digital platforms, and to the Coalition Government's in-principle support for this proposal, clarified to apply to individual consumers and small businesses. The ACCC made clear in its recommendation that while the ACMA and the ombudsman should work closely together, the ACMA itself would not assume the complaints handling role. Specifically, the ACCC said, 'The ACMA and the relevant ombudsman will determine the nature of complaints and disputes that would be subject to the scheme'. The ACCC explicitly proposed in Recommendation 23 that the TIO be considered to take on the platform ombudsman role, and that,

If the ACMA and the TIO conclude that it is not feasible for the TIO to undertake this role, a standalone ombudsman should be created to resolve complaints about digital platforms.

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<sup>165</sup> Ibid 81.

<sup>166</sup> Ibid 83, 93.

<sup>167</sup> Ibid 84.

<sup>168</sup> Ibid 88.

<sup>169</sup> Ibid 89-90.

<sup>170</sup> *Social Media (Anti-Trolling) Bill 2022 (Cth)* ss 15-16.

<sup>171</sup> See, for example, submissions to the Senate Legal and Constitutional Affairs Legislation Committee, such as the submission from Digital Rights Watch, Submission No 17 to the Senate Standing Committees on Legal and Constitutional Affairs, *Proposed Social Media (Anti-Trolling) Bill 2021* (28 February 2022).

While our principal concern here is to assess whether it would be viable for the TIO to take on an expanded ombudsman role, we have also considered whether any of the other existing bodies examined in Chapter 3 above could take on an expanded external dispute resolution role, whether or not in the form of an ombudsman. Our analysis is confined to the external resolution of disputes involving social media platforms.

*Should any of the existing external bodies – apart from the TIO – be considered for an enhanced EDR role?*

Our review above of existing external bodies has led us to support what we consider to be implicit in the ACCC’s recommendations: that the TIO is the only existing body that merits serious consideration as the platform ombudsman. We emphasise that we have not reached this view as a result of any perceived failings on the part of other bodies; rather, the other bodies all have functions that mean they are ill-equipped to take on the full range of digital platform complaints, or that the addition of these complaints would be likely to impede their existing work. Before examining in more detail the possibility of the TIO taking on this role – and outlining some possible alternatives to a digital platform ombudsman – in Table 3 below we summarise our reasons for excluding any of the other existing bodies from taking on the complaint handling role.

Office of the eSafety Commissioner	eSafety is perhaps the best suited of all other bodies to take on additional functions in relation to digital platform complaints. It already has powers to issue notices and take action in relation to online content, and it 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.
Australian Communications and Media Authority	ACMA has long had compliance and enforcement functions and its history includes administration of the internet content scheme, but its role in conducting investigations into compliance with telecommunications and broadcasting obligations is far removed from the resolution of individual disputes performed by the TIO. As suggested by the ACCC, ACMA is more likely to play a constructive ancillary role in any platform ombudsman scheme – for example, an enforcement role where a provider does not comply with scheme obligations.
DIGI	DIGI has recently established a complaints mechanism for the code of practice on mis- and dis-information that it oversees, but has chosen not to take on individual consumer disputes. It lacks the resources at present to take on any large-scale complaint scheme. If a decision were made by government to encourage an industry-based self- or co-regulatory model for external complaints handling, DIGI might be the suitable organisation (in an expanded form) to take on this role. This could be the case for mis- and dis-information following the Coalition government's decision, noted in section 4.3, to move to a co-regulatory arrangement. This is considered further in section 5.2.3 below.

<p>Australian Competition and Consumer Commission</p>	<p>The ACCC has clearly signalled that it is not the appropriate body to take on this role. This is understandable given its functions do not include the resolution of individual complaints. It is certain to have an important ongoing role in the regulation of digital platforms, but this would not include performing an ombud role. In addition, its state and territory partners (the fair trading and consumer affairs agencies) are not equipped to deal with non-transactional types of complaints, and devolving the complaint role to eight different agencies would lead to unnecessary fragmentation.</p>
<p>Office of the Australian Information Commissioner</p>	<p>The OAIC has experience dealing with one of the most important types of consumer complaints – those relating to breaches of privacy. It may well have an expanded role in this field as a result of the review of the <i>Privacy Act</i>. The significance of this topic is underlined by consideration of a separate privacy ombudsman; however, the resulting benefit of removing the OAIC from individual complaint handling – along with the focus on this one aspect of consumer complaints – suggests the OAIC is unsuitable as the source of an expanded complaint handling role for digital platforms.</p>
<p>Australian Small Business and Family Enterprise Ombudsman</p>	<p>The limited remit to consider small business and family enterprises, along with the restriction of its dispute role to franchising issues, means that this ombudsman would not be suitable to take on the much larger scale and range of complaints involved in consumer disputes.</p>
<p>Ad Standards</p>	<p>The limited remit of Ad Standards makes it unsuitable to take on the scale and range of complaints required of a digital platform ombud scheme.</p>
<p>Australian Press Council and other news standards organisations</p>	<p>The limited remit of APC and other news standards organisations makes them unsuitable to take on the scale and range of complaints required of a digital platform ombudsman.<sup>172</sup></p>

**Table 3: Summary of reasons for excluding other existing bodies**

This assessment leads us to conclude that none of the following bodies could reasonably be considered to take on an enhanced external disputes role for digital platforms: eSafety, ACMA, ACCC, OAIC, ASBFEO, Ad Standards or APC. As explained below, this had led us to identify three options for the creation of an external dispute resolution mechanism:

1. An expanded TIO
2. A new Digital Platform Ombudsman

<sup>172</sup> For discussion of the replacement of these bodies with a news media oversight body that includes a cross-platform complaints scheme, see: Derek Wilding and Sacha Molitorisz, 'Improving News Media Oversight: Why Australia Needs a Cross-Platform Standards Scheme' *Australian Journalism Review* 44 (1) 19-38.

3. An industry-led clearing house and social disputes resolution scheme.

### **5.2.1 Option 1: An expanded TIO**

Responding to Treasury's consultation on the DPI Final Report,<sup>173</sup> the TIO argued that the time had come for the introduction of a digital platform ombudsman and that industry schemes are a proven model for new industries.<sup>174</sup> The TIO submission then discussed the sorts of complaints it currently handles, the additional areas of complaint it could handle, and the areas of complaint that would be outside of its scope. It said the scheme could be extended to cover:

1. Small business consumers;
2. Individual consumers;
3. Any person or small business suffering harm from the action or inaction by a digital platform.<sup>175</sup>

The areas of complaint that it said could be in its scope include:

- account access and control;
- advertising – billing and performance;
- small business search results;
- charges and billing;
- data access and control;
- misrepresentation of a small business;
- financial hardship;
- identity theft, hacking or impersonation;
- privacy concerns or breaches;
- unwelcome notifications or communications.<sup>176</sup>

A fully developed proposal for expanding the role of the TIO would involve detailed consideration beyond the scope of this paper. Here, we will consider two principal issues: how the remit and membership of the TIO scheme might be expanded; and how the scope of complaints might be expanded.

#### *Structure and membership of the TIO scheme*

If the expansion of the TIO's remit were to proceed, the TIO acknowledged it would need to 'work collaboratively with government regulators and consumer groups...' This process would include:

- a detailed cost/benefit analysis (including the benefits of sharing common resources);
- establishment of separate funding arrangements by the digital platforms involved;
- careful management to ensure the TIO's existing core functions and services continue to be delivered effectively.<sup>177</sup>

What the TIO's submission to the Treasury consultation did not discuss was how its structure would need to be altered to handle complaints that do not relate to its existing membership. The TIO Constitution already provides for a more broadly based membership. Under it, eligibility for membership in the scheme can include, aside from carriers and carriage service providers, 'those otherwise considered by the Board to be appropriate for membership' and

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<sup>173</sup> *TIO Submission to Treasury on DPI* (n 65).

<sup>174</sup> *Ibid* 5-11.

<sup>175</sup> *Ibid* 17.

<sup>176</sup> *Ibid* 8.

<sup>177</sup> *Ibid* 17.



the classes of members already includes 'Other Members'.<sup>178</sup> One way to include at least some platforms in the TIO scheme would therefore be to extend membership to content service providers. However, this would profoundly change the scheme as, unless it was further restricted, every free-to-air and subscription broadcaster and narrowcaster would need to join the scheme as well. Another option would be to extend membership only to providers of 'social media services' — the focus of this research report. These services have already been identified as a distinct class of service provider in the *Online Safety Act* as well as in the Social Media (Anti-Trolling) Bill discussed in section 5.1.4 above.

In addition, issues may be raised by the lack of legislative backing to compel content service or social media service providers to join the scheme. As described in section 4.1, carriers and eligible carrier service providers must join the TIO scheme, as well as service providers designated by the ACMA. There is no guarantee that digital platforms would join the scheme voluntarily. The lack of legislative backing would also need to be considered if the TIO were to be given the enforcement powers, including compelling the provision of information and ordering the take-down of scam content, proposed by the ACCC in Recommendation 23 of its Final Report (discussed in relation to Option 3 below).

A related issue is funding. The existing funding model for the TIO includes both a set fee for carrier and carriage service provider ('C/CSP') members based on their Australian revenue; and a variable fee, based on the number of complaints relating to each C/CSP member, and the level of TIO involvement in resolving received complaints. However, this funding model is unlikely to be suitable for an expanded TIO without some adjustment, and adjusting the model may be difficult unless agreement can be reached on how to verify that digital platform complainants are geographically located in Australia and when a social and transactional complaint should trigger a financial contribution from the digital platforms.

### *Scope of complaints*

The second principal issue – expanding the type of complaints the TIO would handle – presents more difficulties.

The first problem we see is that, of the issues detailed above that the TIO considered would be within its competency, one of the most important – breaches of privacy – is the subject of existing regulation that is likely to be enhanced in the future, possibly through the creation of a privacy ombudsman. Although telecommunications complaints have been referred by the OAIC to the TIO, the digital platform environment is more complicated owing to the interconnected nature of privacy breaches. Some aspects of identity theft, for example, might be dealt with by an expanded TIO, but others might be better handled under specific privacy protections.

Second, we note the range of matters that would likely be out of scope for the TIO. The TIO itself named the following issues as out of scope for an expanded TIO:

- complaints about misleading advertising (more appropriately addressed by the ACCC and Ad Standards);
- some business-to-business complaints involving franchising, dealt with by ASBFEO;
- bullying and online safety complaints, which sit with eSafety;
- complaints involving breach of copyright or intellectual property;
- algorithm setting which, if implemented, may sit with a newly established ACCC function.<sup>179</sup>

The first of these matters we have identified in section 4.5 above as not having any effective EDR mechanism. While the last has not been taken up by the ACCC, the fact that the TIO identifies the others (bullying, online safety, copyright and franchising) as being matters

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<sup>178</sup> *Constitution*, Telecommunications Industry Ombudsman Limited (at 27 May 2022) Cl. 6.1 - 6.2.

<sup>179</sup> *TIO Submission to Treasury on DPI* (n 65) 19.

better dealt with elsewhere underlines the likely fragmented nature of any ombud scheme. This point is made even more apparent when we refer back to the list of social complaints included in our table in Chapter 2. The following are all issues that arise on social media platforms which are not within scope for the TIO:

- Pornography and other offensive content;
- Disinformation and misinformation;
- Advertising content (breaching community standards);
- News content;
- Election advertisements;
- Censorship;
- Disclosure of confidential or protected information;
- Damage to reputation.

All of the issues the TIO said it could handle – from account access to charges and billing to hacking – were ‘transactional’ in nature because of the exclusion of content-related complaints from its current jurisdiction.<sup>180</sup> This means most of the non-transactional complaints set out in Table 2 above would be excluded. This also means that all the non-transactional complaints, along with transactional complaints that the TIO excludes, would go to another existing complaints body or would remain without an EDR mechanism.

Table 4 below – essentially, Table 2 above without the indicative lists of issues – shows how an expanded TIO’s remit would be confined to the upper right quadrant of the table, unless user-to-user transactional disputes turn into complaints against the platform itself.

	Social	Transactional
User-to Platform Complaint	A complaint that a platform has failed to fulfil its obligations relating to online content or user behaviour <span style="color: red; font-size: 2em;">✗</span>	A complaint about platform service provision <span style="color: blue; font-size: 2em;">✓</span>
User-to User Complaint	A complaint that a user has distributed harmful content or engaged in harmful behaviour <span style="color: red; font-size: 2em;">✗</span>	A complaint about unmet contractual expectations, undesirable business practices or an infringement of intangible property rights <span style="color: red; font-size: 2em;">✗</span>

**Table 4: Complaints that would be within scope of the TIO’s proposed approach**

Source: Centre for Media Transition

The third problem we have identified with the expanded TIO option is the exclusion of all social complaints.<sup>181</sup> When removed with out-of-scope transactional complaints, we are left with the result that many of the problems that consumers encounter on digital platforms would not be addressed by the TIO. In fact, it is possible that an expanded TIO capable of embracing only some digital platform disputes might add confusion for consumers and citizens as to where complaints should be directed.

<sup>180</sup> *Telecommunications Act* s 128(6)(b).

<sup>181</sup> User-to-user social complaints are excluded from the remit of an external dispute resolution body for the reasons given in Chapter 2.

One part of the problem – that involving user-to-platform social complaints – could in theory be addressed by the addition of a ‘social complaints team’ to the TIO staff. This approach is not without precedent. A division of ACMA already has investigatory teams that consider compliance with the transactional aspects arising under telecommunications regulation and the content aspects arising under broadcasting legislation. This would need to be accompanied by a coordinated campaign involving existing regulatory bodies, social media platforms and government stakeholders to identify all possible complaints channels. This would have the benefit of creating an EDR mechanism for all ‘above the line’ transactional matters; in Table 4 above, both the upper quadrants would be shaded yellow, even though some of the user-to-platforms social complaints would be handled by eSafety and some by the TIO.

On balance, however, we consider this is unlikely to be a successful solution. Our view here is based on a recognition that the TIO’s reluctance to expand its remit beyond transactional complaints is founded on its commitment to ensure the continuing integrity and effectiveness of the telecommunications complaints regime.

The option of an expanded TIO is worth considering, but its limitations would need to be recognised and attention given to complementary policy options that help to fill the gaps that remain in this model.

### 5.2.2 Option 2: A new digital platform ombudsman

Given our research originated in the recommendations of the ACCC in the DPI Final Report, we initially anticipated that our report would include a component that involved scoping a new digital platform ombudsman. This expectation was enhanced by our existing knowledge of the success of the TIO scheme and the value of ombud schemes in general. Indeed, the TIO itself has noted that aspects of the digital platform environment (including the presence of large firms and limited competition, asymmetries of information, and potentially large numbers of disputes) are consistent with those the Productivity Commission identified as supporting the case for an industry ombudsman.<sup>182</sup>

However, our research has led us to the view that establishing an entirely new ombudsman scheme that would cover the field of all consumer and small business complaints involving digital platforms – or even just all user-to-platform complaints – is unlikely to be a viable option. This view is based on a recognition that complaints relating to privacy, online harms covered by the *Online Safety Act*, copyright complaints, perhaps defamation complaints, advertising complaints and news complaints will be dealt with by specialised bodies. We made reference to duplication of bodies with existing complaint functions (or at least, overlapping remits) in Chapter 4. Further detail is provided in the tables in Appendix 2, with a summary provided in Table 5 below.<sup>183</sup>

Office of the eSafety Commissioner	Complaints about image-based abuse, cyberbullying, adult cyber abuse and abhorrent violent material can all be made to eSafety under the Online Safety Act. In addition sections of the industry are developing codes of practice that will include complaint handling provisions for content that is or would be ‘class 1’ or ‘class 2’ material. The Basic Online Safety Expectations require policies and procedures for dealing with breaches of the platforms’ own terms of use. eSafety will
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<sup>182</sup> TIO Submission to Treasury on DPI (n 65) 18-19.

<sup>183</sup> Note that ASBFAO, Ad Standards and APC appear in the ‘Other’ category in this table, rather than as separate entries. This is because, as noted in Table 3, ASBFAO’s role (apart from franchising) is more in the nature advice and advocacy, while the remit of Ad Standards and APC is restricted to their specialised areas.

	be able to investigate failure to comply with these various obligations.
Australian Communications and Media Authority	Following ACMA's 2021 report on implementation of DIGI's <i>Australian Code of Practice on Disinformation and Misinformation</i> , the former Coalition government proposed in March 2022 that ACMA be provided with formal powers relating to misinformation/disinformation on digital platforms.
DIGI	DIGI developed the <i>Australian Code of Practice on Disinformation and Misinformation</i> which requires signatories to implement safeguards against misinformation/disinformation and report on these safeguards annually. Complaints may be made to DIGI concerning the signatories compliance to the Code.
Australian Competition and Consumer Commission and state counterparts	The ACCC does not handle individual complaints under the <i>Competition and Consumer Act</i> , but state and territory consumer affairs and fair trading agencies do. Complaints they handle include matters relating to misleading and deceptive conduct, unconscionable conduct and specific practices such as the sale of gift cards and pyramid schemes, consumer guarantees, product safety and recall.
Office of the Australian Information Commissioner	Complaints relating to non-compliance with the <i>Privacy Act</i> by Australian Government agencies, an Australian Capital Territory Agency or organisations specified in the Act may be made to the OAIC. Complaints about telecommunications issues are referred to the TIO.
Other	<p>As noted in Table 3, ASBFAO provides advocacy and advice to small businesses in their dealings with digital platforms, while Ad Standards hears complaints about advertising and APC (and other organisations) hears complaints about news.</p> <p>The tort of defamation may be pursued through a civil action in state or federal courts.</p> <p>The <i>Copyright Act 1968</i> (Cth) protects intellectual property rights and is enforceable through courts.</p> <p>The common law, contract law and equitable principles may provide protections against the disclosure of confidential information in certain circumstances. The Criminal Code contains secrecy provisions relating to the disclosure of information that may cause harm to Australia's interests, and may be investigated and prosecuted by the Australian Federal Police.</p> <p>State and federal criminal laws provide protection against offences such as stalking, terrorism, the unauthorised use of data and sale of prohibited goods online and are enforceable through courts or tribunals.</p>

**Table 5: Summary of relevant complaint functions performed by existing bodies**

Despite the gaps in coverage of consumer complaints on digital platforms, the complaints existing bodies can address (summarised in Table 5) suggest the creation of an entirely new ombudsman for digital platforms would not be a worthwhile public policy initiative. The continuation of existing complaint functions will leave a depleted jurisdiction for a new ombudsman. As a result, it is unlikely to be cost effective to set up an entirely new ombudsman to deal with some but not all escalated complaints. We also took account of the need to avoid possible consumer confusion that might arise as a result of creating yet another complaint channel. For these reasons, we decided against further developing this option, despite its prominence in the DPI Final Report.

### **5.2.3 Option 3: A clearing house for digital platform complaints**

As an alternative to an entirely new digital platform ombudsman, we think it could be worth exploring a multi-pronged approach that might address some of the main reasons for attempting reform in this area. These reasons include:

- the desirability of providing users with an external means of addressing user-to-platform transactional complaints not currently the subject of other complaint resolution schemes;
- the benefits of encouraging more effective ways of internally resolving disputes between users – including content-related disputes, some of which later become complaints against platforms – that are not of the seriousness of image-based abuse, cyberbullying etc but that users want resolved;
- the need to minimise consumer confusion and possible resource duplication that could develop from the creation of separate complaint channels for different kinds of disputes.

In attempting to address these objectives we have been conscious of an inherent limitation in our research – its attention to EDR to the exclusion of internal dispute resolution systems. Given the difficulties in developing an EDR scheme, it appears that further work is necessary on implementing Recommendation 22 in the ACCC's Final Report – that the ACMA develop standards for internal complaint handling. Internal dispute resolution is not only important in providing a platform off which EDR would launch; as a pragmatic response to the difficulties involved in EDR, it may be the only immediately achievable outcome, at least for large numbers of social complaints.

Our alternative to a single, comprehensive digital platform ombudsman would therefore be a composite scheme comprising the following elements:

1. The continuation of existing or enhanced complaint handling roles performed by the OAIC or a Privacy Ombudsman and the eSafety Commissioner, along with any new arrangement for mis- and disinformation resulting from anticipated co-regulatory arrangements, and the existing law enforcement functions associated with criminal matters.
2. An expanded role for the TIO in dealing with residual user-to-platform transactional complaints not addressed in (1).
3. The addition of a standards development role for the ACMA or eSafety to encourage improved IDR systems across all types of complaints; this could include the development of online dispute resolution for addressing user-to-user disputes, both social and transactional.
4. A clearing house or portal that enables user complaints to be redirected to the appropriate external disputes scheme and that collects data on the subject and outcomes of complaints.

While the second element – the expanded TIO – would still require changes to the TIO Constitution, some legislative amendment and additional resources, it would not fundamentally alter the nature of the TIO. Equally, it would not comprehensively address the



problems raised by the ACCC in the DPI Final Report. It is the third and fourth elements of this proposal that offer a more substantial solution.

A clearing house would help alleviate the complexity arising from multiple dispute resolution schemes. While the term ‘clearing house’ has different meanings, we use the term in preference to ‘one stop shop’ because we do not intend to suggest it would itself have a range of functions such as resolution of complaints. Nevertheless, it would be more than just ‘a single point of entry’. We think it could have a role in collating and reporting information on complaints, as well as directing complainants to the most relevant complaint-handling body.<sup>184</sup> The need for one point of entry to address consumer confusion and frustration was an emphatic recommendation of the community and consumer representatives we consulted as part of this research.

Other industries have found a clearing house or one stop shop to be of considerable benefit. The TIO’s submission to the DPI Final Report noted, for example, that the Ramsay Review of the Financial System External Dispute Resolution and Complaints strongly endorsed a single scheme to reduce confusion and achieve fair and reasonable outcomes.<sup>185</sup> The Ramsay Review found that the existing multi-body framework for financial services resulted in consumer confusion as to where they should seek redress, inconsistent outcomes and processes, and administrative difficulties arising from industry disputants being members of different EDR schemes. The clearing house model we propose here would avoid some of these difficulties because it would maintain separate schemes where appropriate. Nonetheless, difficulties may arise from overlap in regulatory jurisdictions; these will need to be reduced as much as possible if a proposal for either a centralised dispute body (Option 2) or a clearing house is to be effective.

We also suggest that, as an alternative to (or in addition to) the TIO taking on user-to-platform social complaints (discussed in Option 1), attention should move to Recommendation 22 of the DPI Final Report that proposed the ACMA develop standards for effective IDR that would cover, among other things, ‘requirements for the visibility, accessibility, responsiveness, objectivity, confidentiality and collection of information of digital platforms’ internal dispute resolution processes’.<sup>186</sup> As we note in Chapter 2, there is justification for the distinction that platforms draw between ‘reports’ made of problematic content posted by another user and ‘complaints’ made by a telecommunications consumer against the actions of their service provider. Encouraging platforms to provide effective means of resolving *disputes between users* over matters that arise as a result of the use of the platform might, in the short term at least, provide some form of adjudication needed to resolve these matters. These tools or forums for dispute resolution could also be used, in the first instance, for user complaints about the platform’s own conduct, even though some of these matters – under the approach we suggest here – could be the subject of later external dispute resolution by the TIO. As part of this approach, further research could be undertaken on the ways in which these social disputes could be addressed by online dispute resolution. Admittedly, this would only progress the treatment of social disputes to the IDR level, but it would be progress nevertheless. And in time, options for referral to human agents on appeal could be considered, building on the way existing Facebook complaint channels involve both automated decision-making and human review. In our view, there is merit in exploring this

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<sup>184</sup> A ‘clearing house’ can have different functions. In financial settings the term is used to describe an intermediary that performs functions such as the clearing of trades in shares (see <<https://www2.asx.com.au/about/regulation/clearing-and-settlement-of-cash-equities-in-australia/clearing>>). The Australian Tax Office operates a clearing house to accept superannuation payments from employers and distribute them to employees’ funds (see <<https://www.ato.gov.au/Business/super-for-employers/paying-super-contributions/how-to-pay-super/small-business-superannuation-clearing-house/>>). In contrast, the Clearinghouse for Sport (<<https://www.clearinghouseforsport.gov.au/about>>) operates as ‘an information and knowledge sharing platform’. Perhaps the closest function to the one we envisage is the way clearing houses have been used in the coordination of community and pro bono legal services. See, for example, the ACT Pro Bono Clearing House (<<https://www.actlawsociety.asn.au/for-the-public/legal-help/clearing-house>>) and Samantha Burchell and Emma Hunt, ‘From Conservatism to Activism: The Evolution of the Public Interest Law Clearing House in Victoria’ 28(1) (2003) *Alternative Law Journal* 8-12.

<sup>185</sup> *Ibid* 7.

<sup>186</sup> ACCC, *DPI Final Report* (n 2) 37-38.



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.<sup>187</sup>

This development of more effective IDR schemes meeting some minimum standards, along with the implementation of a clearing house function, could be left to industry as a self-regulatory initiative or it could be subject to some regulatory oversight. The form of regulation adopted would itself need further consideration, taking into account aspects such as the variation in services provided by digital platforms coupled with the scale of problems experienced by users. If there is to be some regulatory oversight of the clearing house, ODR and possible appeal processes, there would need to be consideration of which body should perform that role and what powers it should be given. The ACCC proposed that the ACMA develop the minimum standards. This remains a viable option, and we note that the ACMA has developed such standards for the telecommunications sector.<sup>188</sup> We also note that since that time eSafety has developed the Basic Online Safety Expectations, which include an expectation that platforms will develop ‘policies and procedures for dealing with reports and complaints’, including complaints about breaches of their own terms of use.<sup>189</sup> As the BOSE expectations are likely to include much of the subject matter of social complaints, it may be possible to adapt this aspect of regulation to provide extended guidance on IDR schemes.

There are likely to be calls for any new arrangements such as the ones we propose here to have statutory backing, and we note that in Recommendation 23 of the DPI Final Report the ACCC said:

The ombudsman should have the ability to compel information, make decisions that are binding on digital platforms, order compensation in appropriate cases and compel digital platforms to take down scam content.

We have not yet formed a view on the enforcement aspects, but we note that a clearing house function at least is likely not to require the same coercive powers. We note the recommendations in the recent report of the Social Media and Online Safety Parliamentary Inquiry that the eSafety Commissioner establish and manage a ‘single point of entry service for victims of online abuse to report complaints and be directed to the most appropriate reporting venue’.<sup>190</sup> While we acknowledge the clearing house function we envisage here could also be performed by the Office of the eSafety Commissioner, we think that it would be worth considering whether it is a task that could be funded and performed by an industry body such as DIGI or a specific company formed by it. If that were the case, there would need to be sufficient safeguards in place to ensure the scheme operated transparently and independently from service providers. There may be merit in considering a minimal legislative element – in the way, for example, that the TIO scheme is given authority via the *TCPSS Act* but without burdening the complaints service itself with an enforcement role. If it were considered necessary to embed such an enforcement role, we think the ACMA would be the appropriate agency.

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<sup>187</sup> Further research is also needed to consider cross-jurisdictional matters, for example how an ODR would interact with platform terms of service that require disputes to be determined by courts in foreign jurisdictions.

<sup>188</sup> Telecommunications (Consumer Complaints Handling) Industry Standard 2018.

<sup>189</sup> Online Safety (Basic Online Safety Expectations) Determination 2022 ss 14-15.

<sup>190</sup> House of Representatives Select Committee on Social Media and Online Safety, *Social Media and Online Safety* (Report, March 2022) xvii. See Recommendation 6.

## 6. Conclusion

As we mentioned at the outset, this report is not intended to present any conclusive view on the best way forward. It is designed to assist in the conversation around an issue brought forward in the Digital Platforms Inquiry and likely to grow in importance over time.

As we noted in the introduction, greater consultation and additional data-gathering are needed to make a robust assessment of the options considered in Chapter 5. Such research might enable a clearer demarcation of ‘above the line’ user-to-platform matters (in Table 2) from ‘below the line’ user-to-user matters, in turn supporting clearer principles for applying external complaint handling. Further research into online dispute resolution schemes would also be beneficial, including how both social and transactional user-to-user disputes could be addressed by online dispute resolution in the first instance and referral to human agents on appeal. Among other points for further research are users’ experience and satisfaction with internal complaint handling systems and with the existing external mechanisms noted in this report. Finally, a limitation of this report is that its examination of internal complaint mechanisms was restricted to only one large social media service; the research would be strengthened by expanding this study to compare the experience across different platforms.

Nevertheless, our research has taken us through: a consideration of the types of complaints likely to be made about consumers’ interactions with social media platforms; the ways in which complaints are currently handled internally by Facebook, the leading social media service in Australia; the range of existing bodies that oversee some aspect of the conduct likely to be the subject of complaints; and the options for a new EDR scheme for digital platforms. Earlier in this report, we also discussed some of the principles or benchmarks of complaint handling, namely accessibility, independence, fairness, accountability, efficiency and effectiveness.

Our research has revealed some of the problems that are likely to arise in developing a new scheme in an environment where several existing channels of complaints are already well established and perhaps likely to be further entrenched over the next few years. It is for this reason that the two models we have identified as worthy of further consideration – an expanded TIO that would represent incremental change; and a more far-reaching, multi-faceted approach that utilises existing bodies but adds a clearing house function and development of more effective forms of internal dispute resolution – would both involve some prioritisation and some necessary compromise on the principles for good complaint handling. For example, the TIO model may score highly on independence, fairness and accountability, but less highly on accessibility, efficiency and effectiveness on account of the necessary overlap with other channels of complaint. The clearing house model might score less highly on aspects such as accountability and independence but more highly on efficiency and ultimately effectiveness if the referral system works well and the scheme includes a social complaints arm.

Ultimately, a ‘bare bones’ clearing house model, without the TIO having an expanded role, would be an improvement on the current situation. In any event, it is reasonable to expect that when weighing the pros and cons of these various options, industry and government would seek to maximise the returns against the benchmarks of effective complaint handling as far as possible.

## Appendix A

# ACCC Recommendations and Government Response

### **Digital Platforms Inquiry: Recommendations 22 and 23**

Recommendation 22: Digital platforms to comply with internal dispute resolution requirements

The development of minimum internal dispute resolution standards by the ACMA to apply to digital platforms. The standards should, among other things, set out requirements for the visibility, accessibility, responsiveness, objectivity, confidentiality and collection of information of digital platforms internal dispute resolution processes. They should also set out the processes for continual improvement, accountability, charges and resources.

All digital platforms that supply services in Australia, and have over one million monthly active users in Australia, will be required to comply with the standards. Once published, relevant digital platforms will have six months to comply with the standards. Breaches of the standards would be dealt with by the ACMA, which will be vested with appropriate investigative and information gathering powers and the capacity to impose sufficiently large sanctions for breaches to act as an effective deterrent.

Recommendation 23: Establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers

The establishment of an independent ombudsman scheme to resolve complaints and disputes between consumers and digital platforms, and businesses and digital platforms. The ACMA and the relevant ombudsman will determine the nature of complaints and disputes that would be subject to the scheme. At a minimum, it should cover complaints or disputes from businesses relating to the purchase or performance of advertising services and complaints or disputes from consumers, including in relation to scams and the removal of scam content.

The ombudsman should have the ability to compel information, make decisions that are binding on digital platforms, order compensation in appropriate cases and compel digital platforms to take down scam content.

The ACCC recommends that the ACMA and the Telecommunications Industry Ombudsman (TIO) investigate the feasibility of the TIO taking on this role. If the ACMA and the TIO conclude that it is not feasible for the TIO to undertake this role, a standalone ombudsman should be created to resolve complaints about digital platforms.<sup>191</sup>

### **Government response**

Digital platforms to comply with internal dispute resolution requirements (Recommendation 22) and establishment of an ombudsman scheme to resolve complaints and disputes with digital platform providers (Recommendation 23)

Support in principle. The Government will develop a pilot external dispute resolution scheme in consultation with major digital platforms, consumer groups and relevant government agencies. The Government will assess the development and rollout of the pilot scheme over the course of 2020, along with any parallel improvements in associated internal dispute resolution processes. The outcomes of the pilot scheme will inform consideration of whether to establish a Digital Platforms Ombudsman to resolve complaints and disputes between digital platforms and the individual consumers and small businesses using their services.<sup>192</sup>

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<sup>191</sup> *Digital Platforms Inquiry Final Report* (n 2) 37-38.

<sup>192</sup> *Regulating In The Digital Age: Government Response and Implementation Roadmap* (n 6) 19.

## Appendix B

### Table of Complaints to Social Media Platforms

As stated in the body of the report, this table should not be regarded as a comprehensive account of all aspects of law and regulation; instead, it is designed to provide some guidance on where there might be an avenue for complaints arising from the use of digital platforms. In addition, the notes on possible Facebook classifications are our own observations and do not necessarily accord with how Facebook itself would classify these matters. There is some overlap between categories – for example, ‘objectionable content’ could apply to many social matters and ‘violence and criminal behaviour’ could apply to a number of transactional matters.

1. SOCIAL COMPLAINTS – User to platform		
Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook’s Community Standards or other policies could apply for a user to report the matter?
<ul style="list-style-type: none"> <li>Illegal content and conduct including depiction of abhorrent violent conduct, child sexual abuse material (CSAM), instruction in criminal acts</li> </ul>	<ul style="list-style-type: none"> <li>The <i>Online Safety Act 2021</i> (Cth) applies, including codes of practice to be developed under that Act. Some complaints would be made direct to the eSafety Commissioner; others (under the new codes of practice) would go to the service provider first.</li> <li>Legislation covering national security and law enforcement could apply to dangerous organisations (eg terrorist organisations). There is scope for some of these laws to apply to platforms. Users could inform security and law enforcement agencies.</li> </ul>	<ul style="list-style-type: none"> <li>Violence and criminal behaviour (eg, violence and incitement, coordinating harm and promoting crime)</li> <li>Safety (child sexual exploitation, abuse and nudity)</li> </ul>
<ul style="list-style-type: none"> <li>Content such as pornography that could offend against community standards</li> </ul>	<ul style="list-style-type: none"> <li>The <i>Online Safety Act</i> applies, including codes of practice to be developed under that Act.</li> <li>Some complaints would be made direct to the eSafety Commissioner; others (under the new codes of practice) would go to the service provider first.</li> </ul>	<ul style="list-style-type: none"> <li>Objectionable content (violent and graphic content, adult nudity and sexual activity)</li> <li>Safety</li> </ul>

<ul style="list-style-type: none"> <li>Disinformation and misinformation</li> </ul>	<ul style="list-style-type: none"> <li>DIGI's Australian Code of Practice on Disinformation and Misinformation (self-regulation) applies to signatories, but not to complaints from individuals about specific content/conduct.</li> </ul>	<ul style="list-style-type: none"> <li>Integrity and authenticity (misinformation, manipulated media, inauthentic behaviour)</li> </ul>
<ul style="list-style-type: none"> <li>Content moderation disputes – the removal or restriction of online content</li> </ul>	<ul style="list-style-type: none"> <li>All of the mechanisms above, along with platforms' actions in addressing breaches of internal policies and Community Standards, could give rise to the removal or restriction of content. There is no explicit constitutional or legislative protection for freedom of expression in Australia at a federal level, although some states have legislative protections, and some of the Acts and schemes mentioned above have defences or exemptions to protect expression (eg, s 18D of the <i>Racial Discrimination Act 1975</i> (Cth)). The constitutional implied freedom of political communication is very limited in scope.</li> </ul>	<ul style="list-style-type: none"> <li>Users whose content is removed or restricted can seek a review of these decisions (see explanation in Chapter 3 of this report).</li> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to laws applicable in their country of residence.</li> </ul>
<ul style="list-style-type: none"> <li>Sale of prohibited goods and services eg, illicit drugs, firearms, or funding prohibited groups or activities (eg financing of terrorism)</li> </ul>	<ul style="list-style-type: none"> <li>Commonwealth and state legislation may apply, such as the <i>Tobacco Advertising Prohibition Act 1992</i> (Cth) (enforceable through the <i>Criminal Code</i>) and the <i>Firearms Act 1996</i> (NSW).</li> <li>The financing of terrorism is criminalised by the <i>Criminal Code</i> and may result in imprisonment for life.</li> </ul>	<ul style="list-style-type: none"> <li>Violence and criminal behaviour (restricted goods and services)</li> <li>Advertising policies (prohibited restricted content)</li> </ul>
<ul style="list-style-type: none"> <li>Election advertisements</li> </ul>	<ul style="list-style-type: none"> <li>There are state and federal requirements for the authorisation of electoral communications, including those on social media, with possible breaches investigated by the Australian Electoral Commission and state equivalents. But there are no laws (except in South Australia and the ACT) concerning misleading content except in relation to misleading voters in the act of casting a vote at an election or referendum.</li> </ul>	<ul style="list-style-type: none"> <li>Advertising policies (ads about social issues, elections or politics)</li> <li>Facebook's 'Ad Library' allows users to search a database to see who is responsible for political ads. Users can flag ads from within a social media feed.</li> </ul>
<ul style="list-style-type: none"> <li>Propagation via fake accounts and other inauthentic behaviour</li> </ul>	<ul style="list-style-type: none"> <li>The Australian Code of Practice on Disinformation and Misinformation includes provisions aimed at disrupting the business model for fake accounts.</li> </ul>	<ul style="list-style-type: none"> <li>Integrity and authenticity (account integrity and authentic identity, cybersecurity, inauthentic behaviour)</li> <li>Violence and criminal behaviour (fraud and deception).</li> </ul>

## 2. SOCIAL COMPLAINTS – User to user

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook’s Community Standards or other policies could apply for a user to report the matter?
<ul style="list-style-type: none"> <li>Forms of online abuse eg, publishing intimate images, cyber-bullying; harms with an online dimension committed against an individual such as stalking, discrimination and harassment</li> </ul>	<ul style="list-style-type: none"> <li>The <i>Online Safety Act</i> covers a limited number of matters: image-based abuse, cyber-bullying, adult cyber abuse. Complaints may be made to the eSafety Commissioner.</li> <li>State and federal laws (eg the <i>Criminal Code Act 1995 (Cth)</i>) include provisions relating to stalking, terrorism etc. Victims would ordinarily make complaints to police, but complaints about conduct meeting the thresholds in discrimination/vilification laws could be pursued via the appropriate commission or tribunal and/or court.</li> <li>There may be no regulation of comments with a religious focus or race or sex-based comments that do not meet legal thresholds.</li> </ul>	<ul style="list-style-type: none"> <li>Violence and criminal behaviour</li> <li>Safety</li> <li>Objectionable content</li> <li>Integrity and authenticity, content-related requests and decisions (memorialisation)</li> </ul>
<ul style="list-style-type: none"> <li>Damage to reputation</li> </ul>	<ul style="list-style-type: none"> <li>Tort of defamation. This is an individual cause of action that might be exercised through state courts or the Federal Court.</li> </ul>	<ul style="list-style-type: none"> <li>Not explicitly covered in the Community Standards. Defamatory posts can be reported using Facebook’s defamation reporting form.</li> </ul>
<ul style="list-style-type: none"> <li>Identity theft, impersonation</li> </ul>	<ul style="list-style-type: none"> <li>Identity theft is covered implicitly by legislation such as the <i>Crimes Act 1900 (NSW)</i>, the <i>Criminal Code</i> and the <i>Financial Transaction Reports Act 1988 (Cth)</i> which prohibits the illicit use of personal information to engage in certain activities. Unclear the extent to which impersonation unconnected to a criminal offence is covered by Australian law (could be ‘social’ complaint).</li> </ul>	<ul style="list-style-type: none"> <li>Integrity &amp; authenticity (account integrity and authentic identity, cybersecurity, inauthentic behaviour)</li> <li>Violence and criminal behaviour (fraud and deception)</li> </ul>



<ul style="list-style-type: none"> <li>• Disclosure of secret or confidential or otherwise protected information</li> </ul>	<ul style="list-style-type: none"> <li>• There is state and federal legislation and aspects of the common law that would apply (eg: sub judice contempt under common law, state laws for the protection of court orders that restrict publication, parts of the federal <i>Criminal Code</i> dealing with secrecy, and other legal protections for confidential information such as in contract law or the equitable cause of action for breach of confidence). While individuals have a cause of action under some of these areas of law and/or could complain to police in some circumstances, other breaches are pursued by state or federal authorities.</li> </ul>	<ul style="list-style-type: none"> <li>• Some aspects (eg, disclosure of undercover law enforcement) covered in Violence and Criminal Behaviour (coordinating harm and promoting crime).</li> </ul>
<ul style="list-style-type: none"> <li>• Other privacy breaches by third parties eg, posting of personal or sensitive information</li> </ul>	<ul style="list-style-type: none"> <li>• The <i>Privacy Act 1988</i> (Cth) and codes developed under it may apply (currently under review); can be difficulties where consumers say they had no choice or did not give informed consent. The eSafety Commissioner may handle complaints relating to online abuse. Complaints about the misuse of personal information may be made to the Office of the Australian Information Commissioner.</li> </ul>	<ul style="list-style-type: none"> <li>• Safety (privacy violation)</li> <li>• Violence and criminal behaviour (coordinating harm and promoting crime)</li> <li>• Collection of data on pages, groups and events.</li> </ul>
<ul style="list-style-type: none"> <li>• News content eg, accuracy and fairness</li> </ul>	<ul style="list-style-type: none"> <li>• MEAA's Journalist Code of Ethics applies only to journalists. Media industry codes (both co-regulation and self-regulation) apply only to media organisations, not platforms. For matters relating to licensed broadcasters, complainants must be lodged with the broadcaster and can then be referred to the ACMA where they are not resolved. Complaints about print/online media can be made to the Australian Press Council (APC) and the Independent Media Council where the publisher is a member of the scheme. APC accepts complaints about content on publisher members' social media pages, including content posted by readers.</li> </ul>	<ul style="list-style-type: none"> <li>• Integrity and authenticity (misinformation, manipulated media)</li> </ul>
<ul style="list-style-type: none"> <li>• Advertising eg, stereotypes, fast food advertising to children, alcohol</li> </ul>	<ul style="list-style-type: none"> <li>• Advertising industry codes (self-regulation) apply only to advertisers but not to platforms. Complainants can lodge a complaint with the various schemes. Ad Standards offers the most developed scheme with independent complaint handling, including complaints about ads appearing on social media.</li> </ul>	<ul style="list-style-type: none"> <li>• Advertising policies (prohibited and restricted content)</li> <li>• Objectionable content</li> <li>• Violence and criminal behaviour</li> <li>• Safety</li> </ul>

### 3. TRANSACTIONAL COMPLAINTS – User to platform

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook's Community Standards or other policies could apply for a user to report the matter?
<ul style="list-style-type: none"> <li>Claims made against digital platforms about their own conduct in relation to other businesses (eg, use of news content, supply of advertising services, fees and charges)</li> </ul>	<ul style="list-style-type: none"> <li>Competition law covers some aspects, eg News Media Bargaining Code. Australian consumer law could protect in relation to standard form agreements (where unfair terms can be declared void and courts may provide redress for losses incurred as a result of the loss) as well as contract law.</li> <li>The ACCC (<i>DPSI Discussion Paper 2022</i>, p.65) has noted difficulties in local businesses using competition laws against platforms as a result of 'prohibitive dispute resolution clauses ... as well as the imbalance in access to financial resources'.</li> </ul>	<ul style="list-style-type: none"> <li>Advertising and commerce policies may also apply</li> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> </ul>
<ul style="list-style-type: none"> <li>Where digital platforms provide products and services to consumers (eg, cloud storage), complaints about the product quality, advertising claims, charges and billing etc</li> </ul>	<ul style="list-style-type: none"> <li>Competition and consumer law, as well as contract law, will apply as they do for third parties</li> </ul>	<ul style="list-style-type: none"> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> <li>Users may request reviews for some decisions under Facebook's advertising and commerce policies and Community Standards.</li> </ul>
<ul style="list-style-type: none"> <li>Privacy breaches and other personal violations by digital platforms eg, sale of private information to other parties for marketing purposes</li> </ul>	<ul style="list-style-type: none"> <li>The <i>Privacy Act</i> and codes to be developed under it may apply; can be difficulties where consumers say they had no choice or did not give informed consent. Digital Platforms are required to notify affected individuals and the OAIC when there is a data breach that poses a risk of serious harm to such individuals under the <i>Privacy Act's</i> notifiable data breaches scheme. The OAIC may</li> </ul>	<ul style="list-style-type: none"> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> </ul>

### 3. TRANSACTIONAL COMPLAINTS – User to platform

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook's Community Standards or other policies could apply for a user to report the matter?
	handle complaints, orchestrate investigations and take other regulatory action.	
<ul style="list-style-type: none"> <li>Service disruption (eg, account suspension or termination, services generally unavailable)</li> </ul>	<ul style="list-style-type: none"> <li>Not covered by regulation in the way that CSPs and ISPs are, but aspects could be covered by consumer law if social media services are in breach of a consumer guarantee, or by contract law relating to a social media platform's terms of service which contains provisions relating to account suspension and termination.</li> </ul>	<ul style="list-style-type: none"> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> </ul>
<ul style="list-style-type: none"> <li>Failure to protect user information or account, eg, hacking</li> </ul>	<ul style="list-style-type: none"> <li>Existing law is directed at the perpetrator rather than the platform. For example, unauthorised access to, or modification of, restricted data as well as unauthorised impairment of electronic communication are offences under the <i>Criminal Code</i> which may be prosecuted in state and federal courts and may incur a penalty of up to 10 years imprisonment.</li> <li>State legislation such as the <i>Crimes Act 1900</i> (NSW) contains computer offences such as the unauthorised access, modification, or impairment of data with the intent to commit a serious indictable offence.</li> </ul>	<ul style="list-style-type: none"> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> </ul>
<ul style="list-style-type: none"> <li>Dissatisfaction with internal complaint handling processes, including the increasing reliance on automation to resolve complaints</li> </ul>	<ul style="list-style-type: none"> <li>Not the subject of regulation, other than requirement under the Australian Code of Practice on Disinformation and Misinformation to support systems for complaints about compliance with that code.</li> </ul>	<ul style="list-style-type: none"> <li>Section 4.4 (Disputes) of Facebook's terms of service refers users to the laws applicable in their country of residence.</li> </ul>

#### 4. TRANSACTIONAL COMPLAINTS – User to user

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook's Community Standards or other policies could apply for a user to report the matter?
<ul style="list-style-type: none"> <li>Scams perpetrated by third parties (eg, deceiving someone to give money for social or commercial reasons but failing to deliver what was promised)</li> </ul>	<ul style="list-style-type: none"> <li>Scammers can be prosecuted under the <i>Crimes Act 1914</i> (Cth) for offences such as fraud, or specific provisions concerning the use of carriage services or by Australian Consumer Law. Scams may be reported to the ACCC's Scamwatch or state consumer protection agencies and action may be able to be taken in a tribunal that hears consumer law matters. Reports can be made to relevant authorities, such as the ATO in relation to tax-related scams, and ASIC in the case of financial and investment scams.</li> </ul>	<ul style="list-style-type: none"> <li>Integrity and authenticity (account integrity and authentic identity)</li> <li>Violence or criminal behaviour (fraud and deception)</li> </ul>
<ul style="list-style-type: none"> <li>Advertising and product claims made by third parties; unfair terms in contracts made with third parties via social media services; defects in products and services supplied</li> </ul>	<ul style="list-style-type: none"> <li>Consumer laws (state and federal) such as the Australian Consumer Law and the <i>Sale of Goods Act 1923</i> (NSW) offer some protection, eg misleading and deceptive conduct, warranties, and unfair contract terms. Complaint may be able to be made to state and territory consumer affairs/fair trading agencies and in local tribunals. Contract law also applies.</li> <li>A business operating a social media page may incur liability for third party comments that are false or likely to mislead or deceive consumers under the Australian Consumer Law, as held in <i>Australian Competition and Consumer Authority v Allergy Pathway Pty Ltd (No 2)</i> [2011] FCA 22. Businesses will be expected to moderate social media pages to ensure any false, misleading or deceptive content is removed or an adequate response is provided as soon as they have notice of it. The ACCC may choose to enforce any identified contraventions through court actions or infringement notices.</li> <li>Complaints may be made directly to the third party or the ACCC may be contacted to advise on the best method of managing the complaint. Complaints may be heard by a tribunal or small claims court.</li> </ul>	<ul style="list-style-type: none"> <li>Violence and criminal behaviour (restricted goods and services)</li> </ul>

#### 4. TRANSACTIONAL COMPLAINTS – User to user

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook's Community Standards or other policies could apply for a user to report the matter?
<ul style="list-style-type: none"> <li>Breach of copyright</li> </ul>	<ul style="list-style-type: none"> <li>Regulated by the <i>Copyright Act 1968</i> (Cth) which protects the material expression of original works, published editions, sound recordings, broadcasts and films. A digital platform may incur liability where they have authorised an infringement. Rightsholders can apply to courts and may be granted damages, an account of profits, an injunction or an order requiring a digital platform provide search engine services to block copyright infringing online content.</li> <li>ACCC noted in the DPI Inquiry Final Report that difficulties may be faced when dealing with overseas defendants and also when applying the take-down measures mandated by the US <i>Digital Millennium Copyright Act</i> which governs US digital platforms to Australian rightsholders.</li> </ul>	<ul style="list-style-type: none"> <li>Respecting intellectual property</li> </ul>
<ul style="list-style-type: none"> <li>Comments in reviews of products and services</li> </ul>	<ul style="list-style-type: none"> <li>A business' failure to remove reviews that they know to be fake (reviews presented as impartial but written by the business, a competitor or someone writing a false review for a financial benefit) may incur liability under the <i>Competition and Consumer Act 2010</i> (Cth). The ACCC might consider bringing an action against a business that breaches competition law.</li> <li>Small businesses may be able to seek assistance with the resolution of disputes with digital platforms about fake online reviews with the Small Business and Family Enterprise Ombudsman or in some states with the Small Business Commissioner.</li> </ul>	<ul style="list-style-type: none"> <li>Businesses can report a review for a breach of Facebook's Community Standards, but this does not appear to provide an option to notify Facebook of fake reviews.</li> </ul>
<ul style="list-style-type: none"> <li>Spam and unwelcome notifications or communications from third parties</li> </ul>	<ul style="list-style-type: none"> <li>The <i>Spam Act 2003</i> (Cth) may cover electronic messages sent by electronic addresses in connection with instant messaging accounts. Under the <i>Spam Act</i>, a person will not be considered as sending an electronic message or causing an electronic</li> </ul>	<ul style="list-style-type: none"> <li>Integrity and authenticity (Spam)</li> </ul>

#### 4. TRANSACTIONAL COMPLAINTS – User to user

Topic of complaint	Can a social media user make a complaint under existing law or regulation?	Which of Facebook's Community Standards or other policies could apply for a user to report the matter?
	<p>message to be sent merely because they provide a carriage service for the message to be sent.</p> <ul style="list-style-type: none"><li>• Complaints about spam can be made to ACMA, who may contact the sender with a notification of their responsibilities under the <i>Spam Act</i> or may launch an investigation if the issue is ongoing.</li></ul>	



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