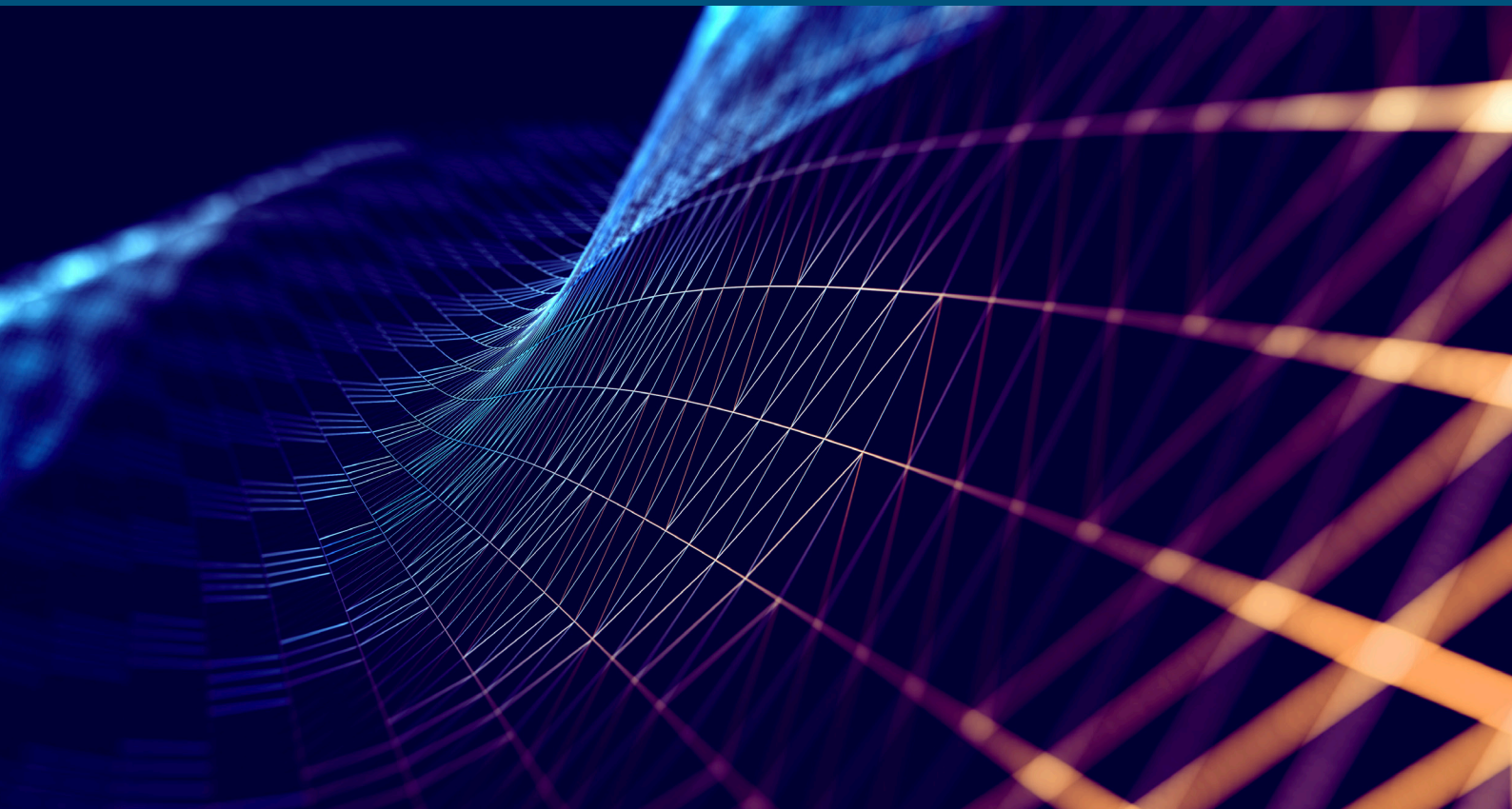




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**ACCC
DIGITAL PLATFORMS
INQUIRY**

GOVERNMENT RESPONSE



Government Response to ACCC Digital Platforms Inquiry

The Australian Government's response to the final report of the ACCC's Digital Platforms Inquiry promises significant regulatory change, but may signal a move away from the holistic approach advocated by the regulator.

The Government's response to the Australian Competition and Consumer Commission's (the **ACCC**) final report of the Digital Platforms Inquiry was released on 12 December 2019 (the **Government Response**).

The Government's Response outlines a commitment of \$27 million for the establishment by the ACCC of a specialist monitoring and enforcement Digital Platforms Branch; an inquiry into online advertising and ad tech services; the development of three voluntary codes of conduct; and a commitment to further consultation on proposed reforms to merger law, consumer law, privacy law and media regulation.

The ACCC's Digital Platforms Inquiry was groundbreaking in its attempt to take a comprehensive and cross-functional view of the complex regulatory landscape applying to digital platforms. The final report, at over 600 pages, considered the intersection of competition, consumer and privacy issues from a broad perspective of consumer welfare and trust and in the context of wider regulatory scrutiny of digital platforms.

The ACCC advocated for an holistic approach that promised to blur the boundaries between competition, consumer, data protection, privacy and media law, arguing that a siloed approach would fail to address the interrelated issues arising from the ubiquity of digital platforms. For an overview of the ACCC's report, please see [ACCC Final Report - 5 things](#).

The Government Response echoes many of the broad themes of the ACCC's report. However, it ultimately breaks these ideas back down into individual topics, offering individual recommendations and specific reforms over varying and staggered timeframes. It also evidences a clear intention to narrow the focus back to the regulatory disconnect between digital platforms and traditional media, notwithstanding that the ACCC had sought to expand this focus significantly when it commenced the Digital Platforms Inquiry.

Consequently, the Government Response potentially falls short, in practice, of giving effect to the ACCC's over-arching vision.

In today's regulatory environment, technology companies will generally welcome regulatory reform that provides certainty and guidance on new challenges and emerging legal issues in today's data-driven world, provided of course that those reforms promote growth and innovation. This attitude stems from the broader decrease in trust in the technology industry — particularly in respect of privacy and data security — and the view that regulation can play an important role in rebuilding that trust. If implemented in a way that drives us toward a coherent and holistic global standard, regulation can help industry participants to establish or maintain a social licence to operate, and accordingly create an environment for their activities to flourish. This view of the facilitative role of regulation arguably permeated the ACCC's report.

The risk here is that the Government Response, while proposing substantial change, could fail to comprehensively meet the regulatory challenge posed by new and emerging technologies and technology providers, thereby squandering an opportunity to establish the regulatory framework to promote the healthy working of the digital economy well into the future.

The ACCC Digital Platforms Inquiry

In December 2017, the Government directed the ACCC to inquire into the impact of digital search engines, social media platforms, and digital content aggregators on the state of competition in media and advertising services markets. In particular, the inquiry examined the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers. The ACCC conducted an extensive inquiry, and produced a 600 plus page report containing 23 recommendations in June 2019.

The Government Response

Following receipt of the ACCC report, the Government undertook a 12 week public consultation process, receiving more than a hundred written submissions and holding numerous stakeholder meetings. On 12 December 2019, it released a twenty page response to the ACCC's report.

Although supporting many of the ACCC's recommendations, the Government Response groups these into: (a) actions to be undertaken immediately, and (b) work to be undertaken over 2020 and 2021. Some key proposals are deferred

for further review and consultation, effectively pushing them off the current reform agenda. The Government Response also includes and should be considered alongside references to already announced initiatives, including in relation to privacy, the Taskforce to Combat Terrorist and Extreme Violent Material Online, and the enhancement of the Regional and Small Publishers Jobs and Innovation Package.

Outline of reforms

Immediate action

- New Digital Platforms Unit within the ACCC for monitoring and enforcement with \$27m funding.
- This Unit to commence an inquiry into the supply of ad tech services and online advertising (the **Ad Tech Inquiry**).
- Digital platforms and news media businesses (assisted by the ACCC) to develop a voluntary code over 2020 to address bargaining power imbalances – if not developed by November 2020, Government to consider mandatory code or other approaches.

Further consultation and review

- Consultation with traditional media businesses and digital platforms, together with the Australian Communications and Media Authority (the **ACMA**), to develop a platform-neutral regulatory framework covering both online and offline delivery of media content to consumers. Any subsequent reform is likely to take place towards the end of 2020 and beyond.
- Review of the Privacy Act, including to consider broadening the definition of personal information and the introduction of stricter notification and consent requirements, as well as a direct right for individuals to commence actions.
- Public consultation on proposed amendments to merger laws.
- Review of the Government's 2018 copyright enforcement reforms, including evaluating opportunities for facilitating online copyright enforcement.
- Decision on proposed strengthening of unfair contract terms and a general unfair trading prohibition.

2020

- Various initiatives to enhance the production of high quality and local news, the development of media literacy materials, and the inclusion of news and media literacy in the Australian curriculum.
- Development by digital platforms (overseen by the ACMA) of codes of conduct for disinformation and news quality.
- Pilot external dispute resolution mechanism for complaints between consumers, businesses and digital platforms.
- Formal introduction of already in-progress reforms to Australian privacy law, including to increase its penalties to match Australian Consumer Law penalties, and to require the development of a binding online privacy code.

Pushed back to 2021

- Report of Google's rollout in Europe of consumer choice in respect of internet browser and search engine. This is to inform whether Google will be required to provide similar choice in Australia.
- Decision regarding the establishment of a Digital Platforms Ombudsman on an ongoing basis.
- Government response to the Ad Tech Inquiry.

Rejected

- Mandatory ACMA take-down code to assist copyright enforcement on digital platforms.
- Changes to tax settings to encourage philanthropic support for journalism.

Increased scrutiny of digital platforms by ACCC

Digital platforms can expect ongoing ACCC scrutiny of their conduct as a result of the Government's commitment of \$27 million over four years for the establishment and funding of a Digital Platforms Branch within the ACCC. The Branch will monitor and biannually report on digital platforms, take enforcement action as necessary, and conduct inquiries as directed by the Treasurer, beginning with the Ad Tech Inquiry (considered below).

The ACCC's report found that digital platforms occupy a critical position in the digital economy (as gateways for businesses seeking to access Australian consumers online), that leading digital platforms have substantial market power in certain markets, and that these markets, as well as related markets in which digital platforms operate, are opaque and complex. The ACCC considered that these factors, in combination, created significant risks to the efficient and effective operation of digital markets; and that existing tools and principles of competition and consumer law had limited ability to detect and address such issues. It recommended that it be given additional proactive investigation, monitoring and enforcement powers to achieve better outcomes for businesses and consumers. The implementation of this recommendation is one of the key (and most immediate) planks of the Government Response.

As a result, digital platforms can expect to face multiple ACCC investigations, and possibly enforcement action, in respect of conduct the ACCC considers to be anti-competitive and/or harmful to consumers.

Ad Tech Inquiry

The first order of business for the newly formed Digital Platforms Branch is an inquiry into competition for the supply of ad tech services and the supply of online advertising by advertising and media agencies (the **Ad Tech Inquiry**). Government support for the immediate commencement of an ad tech inquiry was widely anticipated in the lead up to the Government Response, with the ACCC reportedly establishing a Digital Platforms Branch and assigning responsibilities within it in respect of the Ad Tech Inquiry, well before its release.

"Ad tech" is a commonly used abbreviation for "advertising technology". It broadly refers to the intermediary services (i.e. between suppliers and purchasers of advertising inventory) that are involved in the automated buying, selling and servicing of online display advertising through the use and deployment of algorithms and related technology solutions. These algorithms accept vast quantities of data as inputs in order to output targeted advertising to consumers.

The ACCC's report identified the following issues in respect of ad tech services:

- **A lack of transparency:** advertisers and publishers often do not know how their advertising spend is allocated across the various ad tech intermediaries. Nor, they contend, do they receive detailed information or data about the details of display or consumer behaviour in connection with

viewing their ads. That data is instead held as part of the platform's data pool.

- **Self-preferencing behaviour:** there is a risk that digital platforms could be preferencing their own ad tech intermediaries over a third party.
- **Bundling/tying behaviour:** there is a risk that the bundling and tying together of ad inventory advertising, advertising demand, advertising services and ad tech services may produce anti-competitive effects by "locking away" access to parts of the ad tech supply chain and advertising demand for third party intermediaries.

The Ad Tech Inquiry is likely to focus on obtaining a better understanding of how ad tech operates, particularly the "auction" process used to place display advertising, pricing practices and the use and disclosure of data in connection with online advertising. It may also consider issues of market power. We expect that it will make recommendations for reform of the industry, potentially advocating for the development of codes of conduct for suppliers of online advertising and their intermediaries.

Digital platforms and ad tech intermediaries will likely receive information requests from the ACCC, and should expect ongoing and potentially intense ACCC scrutiny of their conduct in this space.

Digital platforms and media convergence

In its final report, the ACCC set a strong agenda for reform in relation to how traditional news media and digital platforms intersect to seek to achieve a more competitive media market and harmonised media regulatory framework, flagging concerns around:

- a lack of a level playing field when digital platforms are compared to traditional media;
- 'fake news' promulgated through social media; and
- the impact of a perceived inability to monetise content shared through social media to the level necessary to sustain quality local journalism, or Australian content.

The Government's short roadmap in response signals a preference for industry to work with regulators to implement some of the ACCC's recommendations. However, the effectiveness of this implementation will then be in the hands of stakeholders, as the Government's approach relies heavily on the willingness of traditional media and digital platforms to work together to

reach positions acceptable to both – which hasn't occurred to date.

Setting a level regulatory playing field

Whilst acknowledging that there are important differences between digital platforms and media businesses, the ACCC concluded that virtually no media regulation applies to digital platforms, despite platforms increasingly performing similar functions to media businesses in bringing content to consumers (both entertainment and news reporting and journalism content).

The ACCC is concerned that this regulatory disparity is distorting competition, imposing compliance costs and regulatory obligations upon media businesses (and not digital platforms), and leading to a decline in local Australian content offered to consumers, in particular in relation to news reporting and journalism. It therefore recommended implementing a platform-neutral regulatory framework that would ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses and digital platforms. These recommendations are supported by a wide range of stakeholders, including digital platforms.

The challenge for the Government, however, is how reform should proceed.

To date, the regulatory approach has been responsive and piecemeal, rather than with an overarching regulatory framework in mind. For instance:

- in response to how widely videos of the Christchurch terrorist attack were shared across social media, the Government passed the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019*, making it a criminal offence for social media platforms to fail to remove abhorrent violent material expeditiously (for more details on this and other responses to the Christchurch attacks, please see [Online harmful content: The race to regulate](#)); and
- in response to a decision by the NSW Supreme Court that found publishers (not platforms) could be liable for defamatory comments on social media posts and pages, which is now the subject of an intervention by a number of news media outlets seeking to have the decision overturned, the Attorney-General Christian Porter revealed recently that the Government will push for social media platforms to be made legally liable for defamatory comments made by their users.

The ACCC's inquiry provides no clear answer to how the Government's reform should proceed. It suggested that the Government should proceed

incrementally, starting with 'regulatory disparities of immediate concern' such as election advertising restrictions and local content obligation. But the ACCC did not make a firm recommendation about its view as to whether the playing field should be levelled by easing the regulatory burden across the field (i.e. by removing those restrictions and obligations for media businesses) or instead by strengthening it (i.e. by also imposing them upon digital platforms — which would be particularly difficult, given the global nature of digital platforms).

The Government has followed the ACCC's suggestion of incremental reform, but in doing so it in effect pushed the issue back onto industry. The immediate action that the Government has announced it will take is to consult with traditional media and digital platforms, together with the ACMA, to develop a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers. This will be conducted in two stages:

- The first stage, in early 2020, will involve discussions around local content obligations in a modern, multi-platform environment. These discussions will at minimum cover subscription video-on-demand services (presumably limited to those offered to Australian consumers).
- The second stage, later in 2020, will involve a review of advertising rules, enforcement mechanisms and media regulation for all platforms (presumably including political advertising and appropriate approaches to sensitive content, including terrorist and other violent material). It is not clear whether and how this stage will interact with the Government's recent proposal for a harmonised legislative framework governing online safety and harmful online content, which is currently undergoing consultation.

Given this consultation timeframe, it is likely that any reform will take place towards the end of 2020 and beyond. Noting that the ACCC's report was only issued after months of stakeholder consideration, it is difficult to feel optimistic that this process will be painless.

Formulating a voluntary code of conduct – digital platforms accessing content from traditional media

The ACCC expressed strong concern that in their view, the standard of journalism and news reporting in Australia, in particular in relation to national and regional news, has declined steadily over the last two decades. In part, the ACCC seems to point at the ease of sharing of content on digital platforms, and the entry into the market of digital native publishers with smaller news

teams as contributing factors to the decline. This is in part because, due to the incentives to maximise page views and accordingly advertising revenue, digital platforms are not incentivised to subsidise important, 'in depth' journalism relative to pieces with wider 'clickbait' appeal.

Traditional media made submissions to the ACCC's inquiry that digital platforms such as Google and Facebook have, and are using, significant market power, and this negatively impacts on traditional news media in terms of the monetisation of their content, the data that they obtain in relation to sharing of their content, and how their content is prioritised as against other content. The less return traditional news journalism sees for content, the less likely it is to invest in the systems that lead to quality journalistic content being produced.

As a result, the ACCC recommended that it work with digital platforms and news media to develop a voluntary code to address these issues.

The Government has now set a timetable for traditional news media and digital platforms to come together (with help from the ACCC) to develop a voluntary code of conduct on terms of access to content (which will bind those that sign up to it). Consultation is to start immediately, with the ACCC to report to the Government by May 2020 as to progress, and the code to be finalised by November 2020. The Government has threatened that if no code is agreed within this timeframe, a mandatory code — or alternative options — will be introduced.

The Government also announced that it would 'enhance' the Regional and Small Publishers Jobs and Innovation Package, but did not commit to how this would occur.

Formulating a voluntary code of conduct – disinformation wants to be spread

The ACCC also flagged concern around the sharing of disinformation – false information spread with the intent of deception. Disinformation that has been created with the intent of being shared is often difficult to detect. It has been alleged, for example, that sophisticated disinformation was created and shared to influence the results of the US elections in 2016 and 2018.

One of the problems identified by the ACCC with the current regulatory framework is that it relies on all media companies to self-regulate in relation to matters of journalistic quality and disinformation, as the print media has traditionally done. However, although digital platforms may perform comparable functions to media businesses in the print industry in the dissemination of information, their role and business model differs significantly.

Digital platforms do not incur the same threshold regulatory compliance cost, nor a threshold scrutiny of the quality, accuracy or currency of the information that is being shared – indeed, imposing that kind of scrutiny would have a chilling effect on the sharing of content by consumers.

The ACCC therefore recommended that digital platforms with more than one million active Australian users should implement an industry code of conduct to deal with complaints about disinformation, which would be enforced by the ACMA. The ACCC's recommendations as to the content of such a code were comprehensive, dealing with doctoring of videos and photographs and sharing of incorrect information, where the content is claimed to have the potential to cause 'serious public detriment'. The code was proposed to only deal with disinformation, and not the ACCC's broader concerns around the decline in journalistic quality.

The ACCC's recommendation can be contrasted with approaches taken in other jurisdictions. For example:

- Facebook, Google, Microsoft and Twitter have been signatories to the voluntary EU 'code of practice on disinformation' (the **EU Code**) for over a year. Each of them have taken steps in accordance with the EU Code to seek to remove 'fake news' and 'fake accounts', but the problems still persist. This demonstrates the difficulty in curbing our natural tendency to share, particularly in a digital environment where sharing is frictionless, quick and easy.
- Singapore implemented the *Protection from Online Falsehoods and Manipulation Act* in November 2019, which allows the Singapore Government to impose heavy fines in relation to the sharing of false information, and to order (among other things) that relevant social media platforms publish a corrective notice together with the 'false information'. Facebook has already published two such notices, in the following form: *Facebook is legally required to tell you that the Singapore Government says this post has false information*.

The Government has adopted the ACCC's recommendation, and has announced that over 2020 it will ask digital platforms to work with the ACMA to develop voluntary codes in relation to implementing measures to address disinformation and news quality. The Government will also explore ways in which to improve digital media literacy in the community, including students, and older adults, and the vulnerable.

Given the high volume of content shared on digital platforms and the difficulty in scrutinising it all, and

that the EU Code has not been successful in dealing with the issue, this may be a challenging goal to achieve. ACMA will report to the Government on the efficacy of the voluntary code by no later than June 2021.

Australian privacy laws beyond digital platforms

The ACCC's final report contained ambitious recommendations to strengthen Australian data protection laws, including targeted amendments to the *Privacy Act 1988* (Cth) and several areas for further review as part of a broader reform of Australian privacy law.

Many of these recommendations would lead to greater alignment of the Australian privacy laws with the European General Data Protection Regulation (**GDPR**) if they were to be implemented. For example, the broadening of the definition of personal information, the imposition of stricter consent and notice requirements, and the introduction of a right to be forgotten, would more closely harmonise the Australian legislation with the GDPR.

The ACCC's report also proposed changes that went beyond the focus of the Digital Platforms Inquiry on the digital platforms themselves. These changes would, if adopted, significantly impact businesses across all sectors of the economy, beyond digital platforms. Of the 11 recommendations in the ACCC's report that related to data practices, only one — the introduction of a binding privacy code for digital platforms — was targeted at digital platforms.

The Government appears to have recognised the potential for these broader recommendations to reverberate across the economy, and has in the short term committed only to rapidly implementing this single targeted recommendation, together with already mooted amendments to introduce tougher penalties under the Privacy Act. The ACCC's other privacy recommendations will be subject to further consultation, and a broader review of Australian privacy law will take another 18 months.

Interestingly, many of the ACCC's privacy recommendations echo recommendations made by the Australian Law Reform Commission (**ALRC**) over a decade ago in its 2008 report on

Australian privacy law. This includes the introduction of a statutory tort for breach of privacy, and the removal of the current exemptions for small businesses and employee records under the *Privacy Act*. These recommendations only received a limited Government response at the time, and were never implemented.

The Government Response also appear to back away from the holistic approach advocated by the ACCC in relation to data protection. The ACCC's proposed recommendations relating to data were not limited to the Privacy Act but extended to Australian consumer laws more broadly, including to prohibit unfair contract terms and unfair (data) trade practices. The Government notes, but does not specifically respond to, these recommendations, instead referring to the separate review work underway through Consumer Affairs Australia and New Zealand.

Our upcoming briefing on Australian privacy reforms will explore the impacts of the ACCC's privacy recommendations in more detail, including in comparison with the GDPR and the ALRC's 2008 recommendations.

Conclusion

The Government Response contains a collection of specific, targeted and incremental actions proposed to be taken by the Government, as detailed in this report.

This is a departure from the more comprehensive approach advocated by the ACCC in its report, but is arguably consistent with the Government's more targeted and responsive approach to regulation of digital platforms and the technology sector more broadly.

Given the ongoing interaction of many of the recommendations and reforms outlined in the ACCC's report, and the Government Response, with other proposals for regulatory reform of the sector, it remains to be seen whether this approach will be maintained or whether a cohesive technology regulatory framework will ultimately emerge.

We are monitoring the progress of these and related reforms closely and will provide updates and insights as further details emerge.

Our team

Contact directory

Competition, Regulation and Trade



Sarah Benbow
Partner
T +61 3 9288 1252
M +61 427 603 867
sarah.benbow@hsf.com



Patrick Gay
Partner
T +61 2 9322 4378
M +61 407 400 530
patrick.gay@hsf.com

Media



Kristin Stammer
Partner
T +61 2 9225 5572
M +61 414 957 572
kristin.stammer@hsf.com



Amalia Stone
Special Counsel
T +61 2 9225 5522
M +61 438 220 498
amalia.stone@hsf.com

Technology, Data and Privacy



Julian Lincoln
Partner
T +61 3 9288 1694
M +61 419 685 104
julian.lincoln@hsf.com



Kaman Tsoi
Special Counsel
T +61 3 9288 1336
M +61 412 687 842
kaman.tsoi@hsf.com



Anna Jaffe
Senior Associate
T +61 3 9288 1152
M +61 439 160 651
anna.jaffe@hsf.com

HERBERTSMITHFREEHILLS.COM

BANGKOK

Herbert Smith Freehills (Thailand) Ltd

BEIJING

Herbert Smith Freehills LLP
Beijing Representative Office (UK)

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Herbert Smith Freehills LLP

DÜSSELDORF

Herbert Smith Freehills Germany LLP

FRANKFURT

Herbert Smith Freehills Germany LLP

HONG KONG

Herbert Smith Freehills

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm

JOHANNESBURG

Herbert Smith Freehills South Africa LLP

KUALA LUMPUR

Herbert Smith Freehills LLP
LLP0010119-FGN

LONDON

Herbert Smith Freehills LLP

MADRID

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Herbert Smith Freehills CIS LLP

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PARIS

Herbert Smith Freehills Paris LLP

PERTH

Herbert Smith Freehills

RIYADH

The Law Office of Mohammed Altammami
Herbert Smith Freehills LLP associated firm

SEOUL

Herbert Smith Freehills
Foreign Legal Consultant Office

SHANGHAI

Herbert Smith Freehills LLP
Shanghai Representative Office (UK)

SINGAPORE

Herbert Smith Freehills LLP

SYDNEY

Herbert Smith Freehills

TOKYO

Herbert Smith Freehills