

20 April 2018

Mr Rod Sims
Chairman
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

platforminquiry@acc.gov.au

Dear Mr Sims,

The Australian Publishers Association (APA) is pleased to provide a response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issues Paper (26 February 2018).

The APA is the peak national body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools, tertiary and academic publishing.

Scope

1.1. Which digital platforms do you consider to be relevant to this Inquiry?

No examination of competition and digital platforms is complete without examining Amazon. Amazon's global dominance in retail is unprecedented. To quote Lina Khan, Amazon is: "a retailer,...a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading host of cloud server space."¹ Not to mention also a toy manufacturer².

If Amazon is to be examined under the terms of the Inquiry, then its trade in books cannot be ignored. Books have been central to Amazon's marketing strategy of

¹ Lina M. Khan, 'Amazon's Anti-Trust Paradox', Yale Law Journal, Jan 2017 p.710

² <https://thenewdaily.com.au/money/finance-news/2018/03/15/toys-r-us-amazon-liquidation/>

predatory pricing. They have often functioned as a loss leader in markets, undercutting local book retailers (online or bricks and mortar stores) as well as directing consumers to other Amazon offerings. (As noted in the Issues Paper, Amazon is the primary starting point for consumers in the US online retail product search³.)

1.2. Should the Inquiry consider digital platforms that do not currently provide access to news and journalistic content in Australia but may either provide news and journalistic content in the future and/or have an impact in relevant markets (e.g. Amazon, Instant messaging applications)?

Yes. The ‘hub structure’ of the digital economy positions digital platforms as potentially dominating access to news, journalistic and, more broadly defined, public interest content. This structural characteristic of the digital platform has changed the nature of competition and, at the same time, largely side-stepped competition law:

“The global economy is coalescing around a few digital superpowers. We see unmistakable evidence that a winner-take-all world is emerging in which a small number of “hub firms”—including Alibaba, Alphabet/Google, Amazon, Apple, Baidu, Facebook, Microsoft, and Tencent—occupy central positions. While creating real value for users, these companies are also capturing a disproportionate and expanding share of the value, and that’s shaping our collective economic future. The very same technologies that promised to democratize business are now threatening to make it more monopolistic.”⁴

And:

“If current trends continue, the hub economy will spread across more industries, further concentrating data, value, and power in the hands of a small number of firms employing a tiny fraction of the workforce.”⁵

1.3. What ‘news and journalistic content’ is particularly relevant to this inquiry? Should the ACCC consider a broad range of specialist suppliers of news and journalistic content?

The Inquiry should consider the scope of ‘journalistic content’ widely. The creation of book content is a major contributor to the national conversation, though not necessarily part of the daily news cycle. Books, like journalistic content, “can generate benefits to society that are broader than the benefits to readers and advertisers”⁶.

The impacts of digital platforms on the publishing industry are analogous to the impacts

³ ACCC *Digital Platforms Inquiry - Issues Paper* 26 February p.5

⁴ Marco Ianioti and Karim R Lakhani, Harvard Business Review, September-October, 2017 p.86

⁵ *ibid*

⁶ ACCC *Digital Platforms Inquiry - Issues Paper* 26 February p.7

on the news and journalistic content industry:

- The publishing industry produces content that is of public interest. There is significant content crossover. This can be demonstrated by the many books that have had an impact on Australia's public dialogue. (Consider *The End of Certainty* by Paul Kelly or *The Killing Season* by Patricia Drum and Sarah Ferguson, and such classics as Donald Horne's *The Lucky Country*, Geoffrey Blainey's *The Tyranny of Distance* or Anne Summers *Damned Whores and God's Police*.)
- The traditional markets for publishers have been compromised by digital content aggregators, (platforms that are within the scope of this Inquiry). The legal copying of books, such as the Google books project⁷, has had an impact on the book industry similar to the current impacts of content aggregators have had on news markets.
- Digital piracy, enabled by digital platforms and content aggregators, has had a deep impact on the revenue of the publishing industry - particularly in educational publishing. At the same time, digital platforms and search engines have enjoyed 'safe harbour' from liability under copyright in some jurisdictions.

1.4. Should the Inquiry focus on news and journalistic content *supplied* to consumers in Australia or news and journalistic content *produced* in Australia?

Both are relevant to examining the impact on the news, journalism and the book industry.

1.5. What are appropriate metrics for measuring the choice and quality of news and journalistic content?

We cannot make specific recommendations for choice and quality metrics but make the following comments:

- Choice and quality are interdependent in both the news, journalism, and more broadly, the content industries. A diversity of news and journalistic content feeds better quality public dialogue. High quality content builds on a diversity of sources.
- Any reduction in the plurality of the book industry, in terms of books, publishers and retailers, will negatively impact consumer choice.
- Reduced investment of publishers in authors will negatively impact the quality of published content and damage the income for authors. (See below)

1.6. Are there any other issues relevant to the choice and quality of news and journalistic content that should be considered by the ACCC?

Reducing publisher revenue reduces the investment that Australian publishers can make in Australian content. This is as true for news and journalism as for the book industry. In

⁷ <https://www.google.com/googlebooks/library/>

turn this reduces consumer access to Australian stories. This impoverishment of Australian culture and public dialogue has longterm negative impacts that should be considered in the Inquiry.

We add the following issues:

- how digital platforms function as infrastructure for whole sectors, including for their current or potential competitors
- how digital platforms leverage data, or network-based assets, to solidify market dominance and enter new markets
- how technology, such as Amazon’s Kindle, creates a vertically integrated ‘competitive bottleneck’, linking content, service and hardware. This in turn, chills innovation rather than drives it.
- and, finally, the exponential concentration of wealth into the hands of a few “digital superpowers”.

Questions to Stakeholders

3.1. What are the relevant media and advertising services markets for this Inquiry? Who are the key market participants?

The relevant service market is online book retail and content portals. The key market participants are:

- publishers and authors
- booksellers
- content aggregators
- online book retail.

3.2. What are the relevant markets for assessing the market power of digital platforms? Who do digital platforms compete with?

Few companies control any industry like Amazon controls the book distribution market. In the US, the largest English-language book market in the world, Amazon has:

- over 82% of e-book sales
- nearly 99% of digital audio sales
- over 45% of all print sales (including online and bricks and mortar retail).⁸

Having only just recently launched in the domestic market, Australia does not currently have such an extreme level of market dominance by Amazon (as is currently experienced in the US and the UK). However, the direct competitors to Amazon in the book retail space, such as Booktopia, Bolinda, Dymocks and the many independent bookstores across the country (all competitive Australian companies), are at significant risk if Amazon is permitted to operate without oversight of its anti-competitive business practices.

⁸ source: <http://authorearnings.com/>

3.3. How should the market power of digital platforms be assessed? What are appropriate metrics for measuring any market power (e.g. market concentration, profits, prices, number of users, access to user data)?

Digital platforms, as hub firms, do not compete in the traditional manner. The cited measures (eg: market concentration) do not capture their market power if used in isolation. Rather, it is how these measured factors interact that quantifies the network effects that digital platforms use to fuel their growth strategies and their anti-competitive market impacts.

For example, digital retail platforms like Amazon deliver lower and even below-cost pricing on some goods and services. Lower pricing alone is traditionally seen as a measure of a competitive market. However, through predatory pricing strategy, platforms like Amazon develop a level of market dominance that pushes out competitors and therefore, ultimately, stops price competition. Evidence of this can be seen in the UK and US e-book market whereby prices, once Amazon had established a monopoly, were pushed up an appreciable amount.

Measuring access to data alone does not capture how hub firms use that data. Digital platforms, as the retail infrastructure of the 21st century, have access to their users, including the customers of their competitors. How that data is used is rarely transparent to the businesses that rely on the platform. What has become apparent is Amazon has used customer data of businesses that use their platform to develop Amazon's own position to enter and compete in new markets - at the expense of the established players. The recent collapse of Toy R Us is an example⁹.

As Lina Khan¹⁰ writes:

“Although Amazon has clocked staggering growth, it generates meager profits, choosing to price below-cost and expand widely instead. Through this strategy, the company has positioned itself at the centre of e-commerce and now serves as essential infrastructure for a host of other businesses that depend upon it. Elements of the firm's structure and conduct pose anti competitive concerns - yet it has escaped antitrust scrutiny¹¹.”

3.4. Do digital platforms have market power? If so, which digital platforms and in which markets?

In particular:

⁹ <https://thenewdaily.com.au/money/finance-news/2018/03/15/toys-r-us-amazon-liquidation/>

¹⁰ Lina M. Khan, 'Amazon's Anti-Trust Paradox', Yale Law Journal, Jan 2017 p.710

¹¹ Khan's comment relates to the US experience.

- (a) What realistic alternatives are available to users (i.e. consumers, advertisers and media content creators) of digital platforms? Do these alternatives effectively constrain the behaviour of digital platforms?
- (b) Do users use multiple digital platforms for similar functions? Do you have any evidence or observations on switching between platforms or the growth of new platforms?
- (c) What difficulties do users encounter in switching between platforms? Do digital platforms engage in behaviour that makes switching between platforms more costly or more difficult for users?
- (d) Does increasing the number of users increase the attractiveness of that digital platform for other users? Does this mean that it is only viable for one or two digital platforms providing a similar service to consumers to operate at the one time?
- (e) What difficulties are faced by providers in establishing competing platforms? Does the threat of new entry limit the market power of digital platforms? Over what timeframe should the threat of new entry be assessed?
- (f) Are there examples where digital platforms have engaged in behaviours that indicate the exercise of market power? What types of users are most at risk from any exercise of market power by digital platforms?

Yes. Digital platforms have significant market power.

a) The alternatives for book consumers are bricks and mortar stores and the local online book retailer. Neither, however, represent a modifying influence on Amazon market behaviour.

b) User behaviour in the market may be constrained by:

- the integration of technology (eg. Kindle) to content distribution (Amazon) to the exclusion of other platforms and technologies (or at least, in order to facilitate other platforms (eg. iBooks) additional apps, programs and expense are required;
- the use of algorithms that, whilst personalising content, also privileges some content over others¹² (publishers regularly report that Amazon, now also a

¹² There has already been research in this area regarding certain search engines manipulating search algorithms to influence which products, services, and sellers are being offered as the top results to a consumer's search query.

<https://www.recode.net/2017/6/27/15878980/europe-fine-google-antitrust-search>

<https://www.engadget.com/2015/03/20/ftc-report-google-search-bias/>

<http://www.businessinsider.com/tim-wu-study-finds-google-manipulates-search-results->

Similar results occur with respect to search results that direct consumers to counterfeit products and pirate sites in response to queries pertaining to content offered or made available online.

<https://gigaom.com/2011/04/06/419-congress-asks-google-why-do-searches-lead-to-counterfeit-and-pirate-sit/>

<http://www.voxindie.org/google-search-piracy/>

publisher, privileges its published content in customer searches over the content of other publishers). A recent investigation by ProPublica found that Amazon recommended its own products 75% of the time for a selection of 250 high turnover items, even though cheaper products were available on the platform.¹³

d) Yes. In a digital domino effect, the growth of digital platforms as 'hub firms' has been enabled by three phenomenon¹⁴:

- Moore's law - which states that computer processing power will double every two years, and continuing as a driver of augmentation and labor market change;
- Connectivity - digital technology allows the sharing of information networks at near zero-marginal cost;
- Metcalfe's law - which states "that a network's value increases with the number of nodes (connection points) or users¹⁵"

The result is that value capture is becoming more contorted and concentrated. User traffic drives more user traffic. This in turn feeds into the emerging dynamic of "positive feedback loops that create increasingly important, highly connected hubs."¹⁶

To quote Ianisti and Lakhani:

"Once a hub is highly connected (and enjoying increasing returns to scale) in one sector of the economy (such as mobile telecommunications), it will enjoy a crucial advantage as it begins to connect in a new sector (automobiles, for example)."¹⁷

The result is traditional markets with many players are increasingly winnowed to a few (or one) hub firm. This outcome is the opposite of the objective of competition policy. It constrains innovation and does not deliver consumer benefits of either lower prices or a diversity of choice in the medium to long term. And in the digital space, this market transformation is rapid.

e) An established hub firm in a market sets the terms of competition, has more financial resources, controls supply chain and can 'bundle' customer benefits across business lines. These are major imbalances to the competitive field and compelling barriers to new entrants.

f) Yes. An example of exercise of market power by Amazon is in its contractual dispute with the Hachette Book Group in 2014¹⁸. The punitive measures by Amazon of removing access to Hachette e-book titles, slashing sales, significantly impacted Hachette's business and compromised author income. The impact of that action is still felt within the global book industry¹⁹.

¹³ <http://moneyinc.com/amazons-algorithm/>

<https://www.technologyreview.com/s/602442/amazons-algorithms-dont-find-you-the-best-deals/>

¹⁴ Marco Ianisti and Karim R Lakhani, Harvard Business Review, September-October 2017, p.87

¹⁵ ibid

¹⁶ ibid

¹⁷ ibid

¹⁸ <https://www.businessinsider.com.au/how-did-the-amazon-feud-with-hachette-start-2014-10?r=US&IR=T>

<https://bits.blogs.nytimes.com/2014/05/23/amazon-escalates-its-battle-against-hachette/>

¹⁹ <http://knowledge.wharton.upenn.edu/article/amazon-vs-hachette-battle-future-publishing/>

3.5. Do digital platforms engage in any behaviour that enhances their market position by excluding competitors or potential competitors, e.g. through the acquisition of rivals or restrictive contract terms?

Yes. Amazon has had a significant impact on the global book industry through its 'hub economics', rival acquisitions and restrictive contractual terms. Amazon has bought out competitors in the past as a shortcut to market share before building on the data of customers of the acquired companies to cement further market dominance. Amazon bought Book Depository²⁰ in the UK and AbeBooks in Canada²¹. In both circumstances book consumers and retail competitors were concerned by the potential competition implications. Whilst Amazon is credited with great customer focus and service ethos, not all customers of the pre-Amazon incarnation have been pleased with the post-Amazon company transformation.²² (Another example is Amazon's acquisition of Whole Foods chain in the US, which, unlike the other previously described acquisitions, is dominated by bricks and mortar stores. After the failure of AmazonFresh in the grocery delivery market to achieve dominance, Amazon took another tactic and bought the grocery chain and 'bundled' customer benefits with other established Amazon services.²³)

Amazon is, for all publishers, an unavoidable trading partner. As a result it has been able to set contract terms that are non-negotiable and have little regard for the sustainability of the publishing industry.

Most Favoured Nation clause (MFN)

Amazon has an established pattern of conduct in embedding clauses in its contracts, in Australia and overseas, which prevent publishers from offering Amazon's rivals a lower list price, and rivals setting their own discounts. Amazon has also embedded in its contracts:

- fines for publishers for late delivery of books (when they are being delivered by the publisher and its distributor rather than Amazon's own customer fulfillment centres) so that all supply-chain risk is carried by the publisher;
- Discount Pool Provisions which meant if an Amazon competitor had a lower price on the same title, the publisher would be charged the price differential between Amazon's pre-discounted price and the price matched to the competitors.

In 2017, the EU ruled Amazon's MFN's were not in alignment with European anti-trust law²⁴. Despite a public commitment in various jurisdictions by Amazon not to enforce

²⁰ <https://www.theguardian.com/books/2011/oct/27/amazon-takeover-book-depository-of>

²¹ <https://www.thebookseller.com/news/amazon-buys-abebooks>

²² <http://realitystudio.org/bibliographic-bunker/abebooks-sucks/>

²³ <https://www.forbes.com/sites/gregpetro/2017/08/02/amazons-acquisition-of-whole-foods-is-about-two-things-data-and-product/#69e53195a808>

²⁴ europa.eu/rapid/press-release_IP-17-1223_en.pdf

MFN clauses and Discount Pool Provisions²⁵, they are still found in Amazon contracts.

3.6. Describe the nature of any impacts (positive and negative) that digital platforms are having on media content creators? What causes these impacts? Are these impacts temporary or ongoing?

Despite digital reach and an age when ‘content is king’, a phrase made famous by Bill Gates, there has been diminished growth in the creative industries in Australia over the last 14 years (including traditional journalism and media). Analysis of Australian Bureau of Statistics (ABS) and Australian National Accounts data shows that:

- Copyright industries’²⁶ value add²⁷ growth in Australia failed to keep up with economy-wide growth, amounting to a nearly \$170 billion cumulative shortfall in value add for core copyright industries between 2000 and 2014; the estimated shortfall is even higher, \$332 billion, when compared against earlier copyright industry value add growth rates;
- Copyright industries’ employment growth in Australia also failed to maintain pre-2000 levels, resulting in a shortfall of around 260,000 industry jobs by 2011;
- The estimated shortfall in Film and Video Production and Post-Production value add compared to GDP growth was \$1.5 billion as of 2011-2012, the latest year available, with employment similarly failing to keep pace.²⁸

There are numerous reasons for the drop in growth rates but a significant factor, that is difficult to quantify, is digital piracy. What was once limited to photocopying of books is now facilitated by a digital environment that includes file-sharing and torrent sites of global reach. Copyright infringement has exponentially increased, damaging markets, publisher revenue and author income, and increasing the risk of publishing investment.

The cost of copyright infringement has been borne by the copyright industries and this has not been offset by increased sales because of an increased market reach. A recent study by Niensens in the US put the figure as \$315 million in lost sales annually²⁹.

Digital has opened creative opportunities for content (online, interactive, gamified) but it has not made book production much cheaper as so often supposed. Digital piracy has

²⁵ <https://www.michelmores.com/news-views/news/amazon-most-favoured-nation-clauses>

²⁶ following the World Intellectual Property Organisation definition which includes media and journalism industries

²⁷ value add is defined as “ the value of gross outputs of a particular industry less the value of inputs from other industries. The sum of all industries’ value add is the nation’s gross domestic product (GDP). Thus, looking at the value add of copyright industries provides a measure of copyright industries contribution to GDP.” Dr George Barker, *Diminished Creative Industry Growth in Australia in the Digital Age* Law and Economics Consulting Associates 10 February 2017 p.3

²⁸ Dr George Barker, *Diminished Creative Industry Growth in Australia in the Digital Age* Law and Economics Consulting Associates 10 February 2017

²⁹

<https://www.prnewswire.com/news-releases/e-book-piracy-costs-publishers-315-million-in-lost-sales-300423534.html>

lead to the loss, in some cases, of as much as 90% of certain markets³⁰. Add to this the pricing pressure of digital retail platforms, and a picture can be formed as to the factors that have negatively impacted copyright industry growth. And these factors are ongoing.

3.7. What are the advantages and disadvantages for media content creators of using digital platforms to publish or distribute their content?

The chief advantages of using digital platforms for the distribution of published material are reach and customer engagement. The chief disadvantages are the risk of infringement and the unfavourable commercial arrangements and returns from platforms that content creators themselves have no control over. This is as true for the individual content creator as it is for large publishing houses, journalists and news media.

3.8. What terms and conditions do digital platforms offer media content creators to publish or distribute their content? How do they differ from those offered by other distributors of media content? Do digital platforms offer different terms to different media content Creators?

Refer to 3.5 regarding Amazon's contractual terms.

3.10. Do digital platforms have access to user data that is helpful to media content creators (e.g. readership statistics)? Does this access to user data create any information asymmetry between digital platforms and media content creators and, if so, how does this impact competition in the relevant markets?

Yes - Amazon has access to user data that would be helpful to content creators. Yes - this access does create information asymmetry in the market. Amazon has access to all the customer data of the businesses that use its platform. Given that many of its customers are also competitors, this data access provides Amazon with an unprecedented competitive advantage.

3.11. If so, how much do media content creators value access to such user data? How does the access to or control over user data impact the relationship between digital platforms and media content creators? For instance, how transparent are digital platforms about how content reaches consumers via their algorithms and how much notice do media content creators receive when significant changes are made?

Digital platforms are not transparent in the way they use data. (Recent news regarding

³⁰ based on APA experience in contrasting student enrolments to textbooks sold in select private English language colleges.

FaceBook has underlined this problem from an individual's privacy perspective.³¹⁾ Publishers do not have access to their own customer's data when sold through Amazon. The algorithms that drive consumer behaviour are not transparent. The result is an information asymmetry that augments network effects and is detrimental to competition in the market.

3.12. How important are digital platforms in delivering audience (and revenue) to media content creators relative to total audience and revenue?

Amazon has significant global reach (Refer to market statistics under 3.2). It is so crucial to delivering audience that publishers cannot avoid trading with Amazon without risking the commercial viability of their business. Most trade publishers globally rely on Amazon for the majority of their sales.

3.36. Are the existing laws and regulations sufficient to address the activities of digital platforms? Is there a case for the specific regulation of digital platforms and, if so, what issues would proposed regulation seek to address?

No. Current laws are not sufficient to curb anti-competitive behaviour of digital platforms.

The APA recommends the ACCC follow the lead of the European Commission (EC) in its antitrust investigation of Amazon's contractual terms with European e-book publishers. To quote Commissioner Margrethe Vestager at the time of the announced decision:

"Today's decision will open the way for publishers and competitors to develop innovative services for e-books, increasing choice and competition to the benefit of European consumers. Amazon used certain clauses in its agreements with publishers, which may have made it more difficult for other e-book platforms to innovate and compete effectively with Amazon. We want to ensure fair competition in Europe's e-books market worth more than 1 billion euros.^{32"}

Under the EC decision, Amazon undertook:

- Not to enforce (i) relevant clauses requiring publishers to offer Amazon similar non-price and price terms and conditions as those offered to Amazon's competitors or (ii) any such clauses requiring publishers to inform Amazon about such terms and conditions. The commitments cover in particular provisions related to alternative/new business models, release date and catalogue of ebooks, features of e-books, promotions, agency price, agency commission and wholesale price.
- To allow publishers to terminate e-book contracts that contain a clause linking discount possibilities for e-books to the retail price of a given e-book on a

³¹

<https://www.cnet.com/videos/cambridge-analytica-is-just-the-tip-of-the-iceberg-for-facebooks-data-issues/>

³² europa.eu/rapid/press-release_IP-17-1223_en.pdf

- competing platform (so-called Discount Pool Provision). Publishers are allowed to terminate the contracts upon 120 days' advance written notice.
- Not to include, in any new e-book agreement with publishers, any of the clauses mentioned above, including Discount Pool Provisions.³³

If Amazon were to breach the commitments, the Commission could impose a fine of up to 10% of Amazon's total annual turnover, without having to find a violation of the EU competition rules.

We further recommend the ACCC examine the anti-competitive aspects of Amazon's structure and conduct. In particular, issues around structural harm to the market, the competitive advantages of the networked hub firm, the role of the digital platform as a utility and the tactic of predatory and monopoly pricing.

We look forward to the opportunity to be involved in further dialogue.

Yours sincerely,



Lee Walker
President

³³ ibid