



AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Digital Platforms Inquiry

Final Report

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Australian Competition and Consumer Commission
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Overview

It would have been difficult to envisage 15 years ago the changes that the arrival of the digital platforms made to our society. These changes have been rapid for both consumers and businesses. Many of these changes have been positive and enhanced the welfare of consumers. They have provided individuals with ready access to information and the ability to connect with family, friends and groups to support each other in ways they may not have been able to before. They have also allowed more efficient and effective advertising, connecting businesses with consumers who want to purchase their products and services.

Despite the magnitude of the changes, there has not been significant reflection on the implications and consequences of the business models of digital platforms for competition, consumers, and society. Until recently, there has also been little reflection on the responsibilities of digital platforms in the markets in which they operate.

In Australia, and in other jurisdictions, wide-ranging questions are being asked about the role and impact of digital platforms, stretching from alleged anti-competitive conduct to privacy concerns, and from disparity in media regulation to copyright issues. Further issues range from deep concerns over disinformation and harmful content, to the scope and scale of user information collected by platforms, and to the risk of exploitation of consumer vulnerabilities.

This Report looks specifically at the impact of digital platforms on: consumers, businesses using platforms to advertise to and reach customers, and news media businesses that also use the platforms to disseminate their content. As directed by the Government in the Terms of Reference, the Report has a particular focus on the impact of digital platforms on the choice and quality of news and journalism.

The ubiquity of the Google and Facebook platforms has placed them in a privileged position. They act as gateways to reaching Australian consumers and they are, in many cases, critical and unavoidable partners for many Australian businesses, including news media businesses. Dominant firms, of course, have a special responsibility that smaller, less significant businesses do not have. The opaque operations of digital platforms and their presence in inter-related markets mean it is difficult to determine precisely what standard of behaviour these digital platforms are meeting.

For many news media businesses, the expanded reach and the reduced production costs offered by digital platforms have come at a significant price. For traditional print (now print/online) media businesses in particular, the rise of the digital platforms has marked a continuation of the fall in advertising revenue that began with the loss of classified advertising revenue in the early days of the internet. Without this advertising revenue, many print/online news media businesses have struggled to survive and have reduced their provision of news and journalism. New digital-only publications have not replaced what has been lost and many news media businesses are still searching for a viable business model for the provision of journalism online. The impact of this reduction in advertising revenue is most evident in relation to local and regional news providers, which do not have the large potential audience of metropolitan and national titles.

The profound impact of digital platforms on media markets requires careful consideration. News and journalism generate important benefits for society through the production and dissemination of knowledge, the exposure of corruption, and holding governments and other decision makers to account. While recognising the important function that public broadcasters, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS), perform in providing news and journalism across Australia, the Australian Competition and Consumer Commission (the ACCC) considers that commercial news media businesses perform a central role in providing journalism and contributing to media plurality.

The ACCC's research has highlighted concerns with the reduced production of particular types of news and journalism, including local government and local court reporting, which are important for the healthy functioning of the democratic process. There is not yet any indication of a business model that can effectively replace the advertiser model, which has historically funded the production of these types of journalism in Australia.

The ACCC considers that the regulatory frameworks governing media, communications and advertising also need to be addressed, as they do not allow competition on the merits. While the ACCC does not consider the functions of digital platforms and news media businesses to be comparable in all cases, where digital platforms do perform comparable functions to media businesses, they should be regulated similarly. The imbalance in the regulatory treatment of content delivered via traditional broadcasting, as compared to digital platforms, is distortionary and should be addressed.

Businesses looking to advertise their services and products, on the other hand, have largely benefited from the rise of the digital platforms. For many advertisers, digital platforms have provided a cheaper and more targeted way of reaching consumers who spend an increasing amount of their time online, particularly on the websites and apps controlled by the two major digital platforms in Australia: Google and Facebook.

Advertisers have always sought to use information collected on potential audiences to target their advertising, but the granularity and immediacy of the targeting ability of digital platforms and the volume and scope of information that digital platforms have access to is a substantial step-change in the ability of advertisers to target their intended audience. However, this too has not been without complexities.

Where Google's and Facebook's business users are also their competitors, there are questions about whether there is a level playing field, or whether they have the ability to give themselves advantages by favouring their own products. As Google and Facebook continue to expand into adjacent markets through acquisitions and organic expansion, these risks increase.

The competition concerns extend beyond specific sets of advertisers. The dominance of Google and Facebook means that many businesses are reliant on the services provided by these platforms in order to reach customers. Such businesses are potentially exposed, given the ability and incentive of digital platforms to favour either their own or a related business and the lack of transparency in their operations compounds this risk.

The problems for business users advertising via digital platforms are magnified by the black box nature of online advertising products and services. The automated or 'programmatic' advertising supply chain is particularly opaque. It can be difficult for advertisers to know where their advertising dollar goes and for websites and apps offering advertising opportunities to know the true value of their advertising inventory. The opacity of this ad tech supply chain leads participants to question its efficiency. Where problems do occur, they may be impossible for participants to detect.

The collection of user data is central to the business model of most advertiser-funded platforms. User data enables digital platforms to offer highly targeted or personalised advertising opportunities to advertisers. The breadth and scale of the user data collected by Google and Facebook is relevant to both the assessment of their market power and consumer concerns. Do the advantages conferred by access to multiple data points create a barrier to entry to both new and future markets? Does access to user data give digital platforms a competitive advantage in entering new markets in competition with their customers? Do consumers make informed choices in relation to how their user data is collected and used by digital platforms? Can the collected data be used in ways that harm society?

The breadth of this Inquiry has enabled the ACCC to consider the linkages between these critical questions of substantial market power and competitive harm, consumer protection and privacy. Enforcement of consumer and privacy laws as well as competition law is critical in addressing potential harms associated with the impact of digital platforms on markets and consumers in Australia. Indeed, consumer law is just as important as competition law in protecting and enhancing consumer welfare.

Australian consumers benefit from the many 'free' services offered by digital platforms and most users now have at least some understanding that certain types of user data and personal information are collected in return for their use of a service. However, the ACCC's view is that few consumers are fully informed of, fully understand, or effectively control, the scope of data collected and the bargain they are entering into with digital platforms when they sign up for, or use, their services.

There is a substantial disconnect between how consumers think their data should be treated and how it is actually treated. Digital platforms collect vast troves of data on consumers from ever-expanding sources and have significant discretion over how this user data is used and disclosed to other businesses and organisations, both now and in the future. Consumers also relinquish considerable control over how their uploaded content is used by digital platforms. For example, an ACCC review of several large digital platforms' terms of service found that each of the terms of service reviewed required a user to grant the digital platform a broad licence to store, display, or use any uploaded content.

The ACCC is concerned that the existing regulatory frameworks for the collection and use of data have not held up well to the challenges of digitalisation and the practical reality of targeted advertising that rely on the monetisation of consumer data and attention. These concerns are not limited to digital platforms, with an increasing number of businesses across the economy collecting and monetising consumer data.

The volume of consumer data collected, as well as the opportunities to interrogate and leverage such data, are expected to increase. The ACCC considers that the Privacy Act needs reform in order to ensure consumers are adequately informed, empowered and protected, as to how their data is being used and collected. This will increase trust in the digital economy and spur competition between businesses on the basis of privacy.

Digital platforms have also provided an important new avenue for scammers to exploit consumers and businesses. The number and sophistication of scams conducted on, or facilitated by, the use of these platforms is rapidly increasing.

The ACCC considers that now is the time to consider the current and likely future issues associated with digital platforms and their business models and to put in place frameworks that enable adverse consequences to be addressed and that reduce the likelihood of new issues arising. Policy makers must ask whether the principles that have applied in the past are still fit for purpose and must review legislative tools, principles and oversight to address further technological and consumer-driven developments.

The pace of technological change needs to be matched by the pace of policy review. As digital markets and the use of data continue to grow and change, governments need to continue to consider the appropriate level of oversight. The recommendations in this Report allow for this: they both address current problems and allow the Government to identify and address new problems as they arise.

The nature of the ACCC's Terms of Reference has necessarily led to the assessment of many interrelated issues. This has brought many benefits to the insight the ACCC can provide, as it is clear that a holistic approach that takes into account the close links between competition, consumer, and privacy issues is needed; a siloed approach will fail to address the core interrelated issues associated with the ubiquity of digital platforms. The ACCC also recognises that the issues covered by this Report are part of an even wider set of policy issues being considered by the Government on the role of digital platforms in our society.

The benefits that digital platforms have brought to consumers and businesses have not come without costs and consequences. It is these costs and consequences that governments must now grapple with, both in Australia and in other countries.

Executive Summary

Introduction

In December 2017, the ACCC was directed to consider the impact of online search engines, social media and digital content aggregators (**digital platforms**) on competition in the media and advertising services markets. In accordance with the Terms of Reference (Appendix A), the ACCC has examined the implications of these impacts for media content creators, advertisers and consumers, focussing, in particular, on the impact on news and journalism.

The ACCC has benefited from extensive engagement in the course of the Inquiry. Over 120 submissions were received in response to the Preliminary Report published on 10 December 2018, and 60 submissions were received in response to the Issues Paper published on 26 February 2018. The ACCC issued approximately 60 statutory notices under section 95ZK of the Competition and Consumer Act 2010 requiring the provision of information and documents to the ACCC. ACCC Commissioners and staff also spoke directly to participants in multiple forums conducted as part of the Inquiry.

Since the Preliminary Report was published in December 2018, there have been a number of significant reports commissioned and published by overseas government agencies and expert panels, which have reached many similar findings to the ACCC. The increased international focus on the impact of digital platforms, their business models and the significance of the user data they collect demonstrates the substantial and widespread impact of digital platforms, irrespective of geography.

The digital platforms at the focus of this Inquiry

The ACCC's Inquiry has focussed on the three categories of digital platforms identified in the Terms of Reference: online search engines, social media platforms and other digital content aggregation platforms.

A large part of this Inquiry has focussed on Google and Facebook. This reflects their influence, size and significance. Google and Facebook are the two largest digital platforms in Australia and the amount of time Australian consumers spend on Google and Facebook dwarfs other rival applications and websites. This focus also reflects the submissions received from interested parties and consumers, almost all of which concerned Google and Facebook.

While other digital platforms such as online marketplaces were not considered by the ACCC (including Amazon, which is currently relatively small in Australia), considerable attention has been paid to ensuring that the recommendations in this Final Report are forward-looking and adaptable to other digital platforms where appropriate.

The Inquiry's focus on three user groups

While the ACCC recognises the significant benefits provided by digital platforms, there are potentially adverse consequences of their growth that need to be considered.

In accordance with the Terms of Reference, the Report focuses on the impact of the digital platforms on competition in the advertising and media markets and on three groups of users:

- advertisers (the largest category of business users of the platforms)
- media content creators
- consumers.

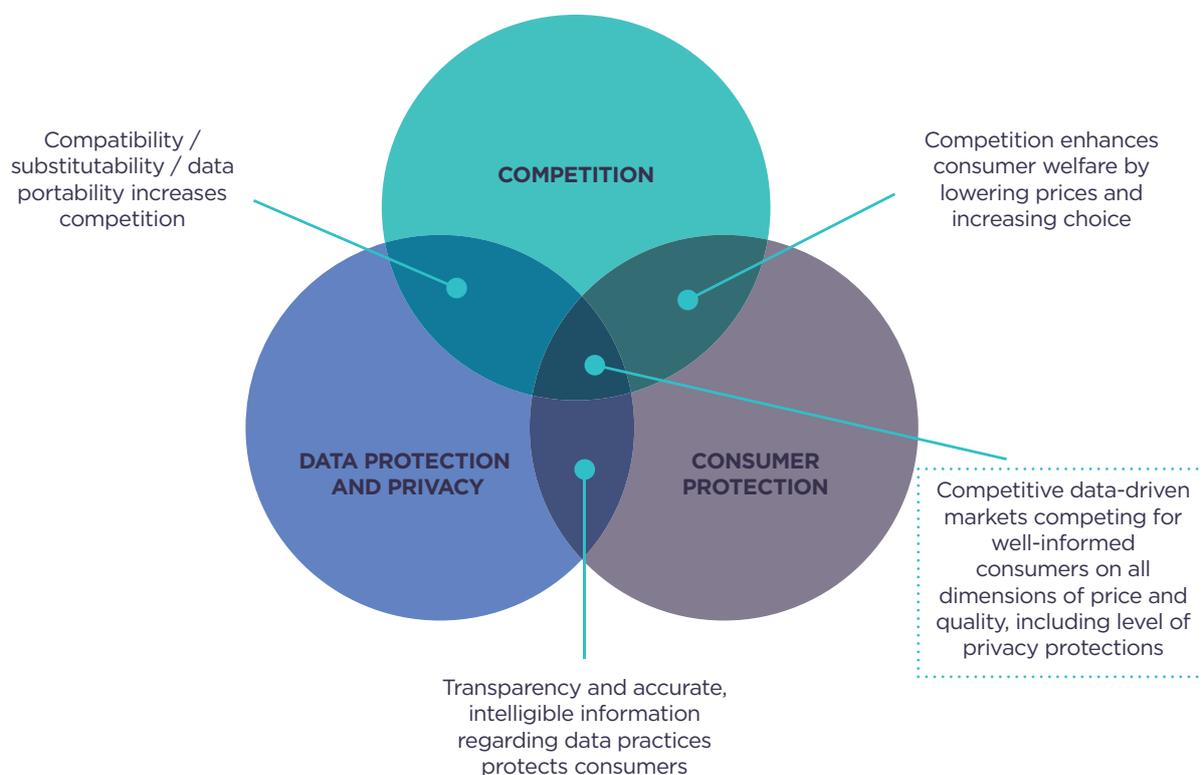
As required by the Terms of Reference, the ACCC has had particular regard to the impact of digital platforms on news and journalism, including their effects on the sustainability of the commercial news sector and their influence on the consumption, choice and quality of news in Australia.

Other important concerns, including the role of digital platforms in promoting terrorist, extremist or other harmful content and how social media is used for political advertising¹, are outside the scope of this Inquiry.

Overlapping issues in data protection, competition and consumer protection

This Inquiry has highlighted the intersection of privacy, competition, and consumer protection considerations. Privacy and data protection laws can build trust in online markets. They can increase consumer protections by addressing sources of market inefficiencies such as information asymmetries and bargaining power imbalances. Strengthened privacy and data protection laws can also empower consumers to make more informed choices about how their data is processed. This, in turn, is likely to increase competition between digital platforms regarding the privacy dimension of their services. It may also encourage the emergence of alternative business models that generate value for, and from, consumers in other ways.

Figure 1: Overlap between data protection, competition and consumer protection



Source: Adapted from the European Data Protection Supervisor, Privacy and competitiveness in the age of big data, March 2014.

¹ This Inquiry does consider the spread of political material on digital platforms when this material is presented as news and journalism. It also considers regulatory imbalance in media regulation more generally which can include content and advertising restrictions (see Chapter 4).

The rise of digital platforms

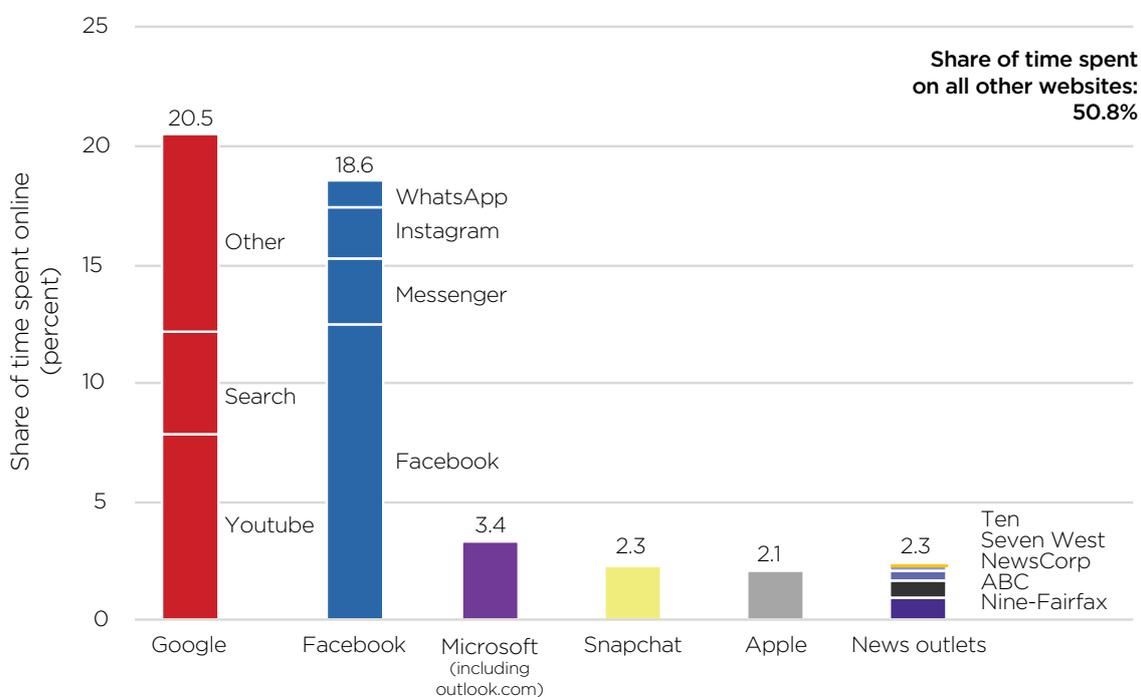
Chapter 1 of the Report documents the growth of the digital platforms. It finds that Australian consumers are frequent users of digital platforms and, in particular, the platforms operated by Google and Facebook. The use and significance of these platforms has grown substantially over the past ten years and they are now an integral part of life for most Australians.

Australians' use of Google and Facebook

Each month, approximately 19.2 million Australians use Google Search, 17.3 million access Facebook, 17.6 million watch YouTube (which is owned by Google) and 11.2 million access Instagram (which is owned by Facebook). Given Australia's current population of 25 million, with 21 million over the age of 13, it is clear that a large majority of the population are regular users of these platforms.

Figure 2 identifies which apps and websites Australians spend the most time on. As can be seen, the amount of time Australians spend on Google or Facebook platforms dwarfs the amount of time spent on other websites or apps.

Figure 2: Australians' time spent online



Source: Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Time Spent Share.

The widespread and frequent use of Google and Facebook means that these platforms occupy a key position for businesses looking to reach Australian consumers. Google, and to a lesser extent Facebook, are able to effectively act as gatekeepers, and to influence and potentially enter multiple markets reliant on attracting online customers.

The ability to determine the content and prominence of material displayed to consumers and the power to set the terms and conditions of access to their service provide Google and Facebook with opportunities to advantage their own related businesses. The significant amount of data that these platforms collect, including on rival businesses, cannot be easily replicated, providing them with a competitive advantage.

Future growth of digital platforms

There is no sign that Australians' use and engagement with digital platforms, and in particular with Facebook and Google, is slowing.

The share prices of Facebook and Alphabet Inc (owner of Google) suggest investors expect continued growth and higher profits in the future. The current share price valuation of each of Alphabet and Facebook incorporates a substantial margin for projected growth. The ACCC's broad calculations indicate that approximately:

- 50-67% of the current share price for Facebook can be attributed to expectations for future growth²
- 46-64% of the current share price for Google can be attributed to expectations for future growth.³

The ACCC does not have concerns with digital platforms pursuing growth and profitability. The pursuit of growth and profits by businesses underpin the effective functioning of a market economy. However, policy makers, and society more generally, must keep in mind that the actions of digital platforms, like all businesses, will be underwritten by a profit motive. This does not mean that digital platforms do not seek to address harms to consumers and society, but that they will do so within this profit model. Policy makers should consider the extent to which important decisions about the dissemination of information, the collection of personal data and business' interaction with consumers online, should be left to the discretion of certain large digital platforms, given their substantial market power, pervasiveness and inherent profit motive (including their need for very strong profit growth).

There are no recommendations made in Chapter 1 of the Report.

Digital platforms: their business models and their market power

Chapter 2 of the Report sets out the ACCC's views on the market power of the two leading digital platforms, Google and Facebook, with a focus on the markets most relevant to this Inquiry.

Google's and Facebook's business models: using consumer attention and data to sell advertising

Google and Facebook provide very different services to consumers. However, Google and Facebook both operate multi-sided platforms. On one side, they offer services to consumers for a zero monetary price in order to obtain consumers' attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers.

Both companies generate most of their revenue from advertising.

The fundamental business model of both Google and Facebook is to attract a large number of users and build rich data sets about their users. The ubiquity of these platforms and their presence in related markets enable them to build particularly valuable data sets. This enables them to offer highly targeted or personalised advertising opportunities to advertisers.

The advertising revenue can in turn be used to invest in the functionality and services provided, improving the consumer experience and attracting greater numbers of users to their platforms, as well as improving data gathering techniques. As discussed below, the breadth and depth of the ongoing data collection reinforces their market power.

The advertising businesses of both Google and Facebook now extend well beyond their core owned and operated platforms. Both platforms sell advertising opportunities on third party websites and apps which are part of their respective advertising networks, as well as on the platforms they own and operate.

The collection of user data by both major digital platforms (and other digital platforms) also extends far beyond the collection of data provided or observed via a user's interaction with the owned and operated apps and services. Data collected from the user's interaction with vast numbers of other websites and apps is combined with the data from the owned and operated platforms, and, in Google's case, with data collected from a user's device, where the device uses the Android mobile operating system.

² Based on the share price for Facebook on 20 June 2019.

³ Based on the share price for Alphabet on 20 June 2019.

Google has substantial market power

The ACCC has found that Google has market power in a number of markets relevant to this Inquiry and that this power is unlikely to erode in the short to medium term.

The ACCC considers that Google has:

- substantial market power in the supply of general search services in Australia
- substantial market power in the supply of search advertising services in Australia
- substantial bargaining power in its dealings with news media businesses in Australia.

There are high barriers to entry and expansion in the markets for the supply of general search and search advertising services and data plays a key role in these barriers. For example, there are network effects from Google's ability to accumulate large quantities of user data that it can then use to improve its online search and search advertising services.

Google also enjoys advantages of scope in accumulating data from consumers using its wide range of services, including Google Search, Google Maps, YouTube and Gmail; and most mobile phones that use the Android operating system. The advantages are compounded by Google's ability to track consumers on the more than two million websites that use Google advertising services or offer sign-in options through Google.

Google's position across a range of markets, such as mobile operating systems (Android), and web browsers (Chrome), enables Google to set Google Search as a default option. As consumers infrequently change defaults, this has the effect of further entrenching its market power. As set out above, while the data collected by Google increases its market power, the market power held by Google and its presence across related markets can also enable it to collect greater quantities and qualities of data.

Strategic acquisitions also appear to have performed an important role in entrenching Google's position in search and search advertising. Through a series of acquisitions, Google has obtained further advantages of scope and reduced potential competition. By expanding into related markets, Google has been able to remove possible rivals to its core products which, in the medium term, weakens the constraints from dynamic competition.

The ACCC has also identified that substantial economies of scale and sunk costs and the strength of Google's brand are barriers to entry and expansion.

These high barriers to entry and expansion underpin Google's substantial market power and its significant share of relevant markets. At the time of writing, approximately 95 per cent of general searches in Australia are performed through Google and Google earns almost 96 per cent of all search advertising revenue in Australia.

The ACCC has carefully considered the role of dynamic competition and the threat of new entry in these markets. The ACCC reached the view that Google is largely insulated from dynamic competition due to the features identified above, which work together to create particularly high barriers to entering the general search market and, therefore, the search advertising market.

There is a two-way relationship between news media businesses and Google. Google provides a referral service to news media businesses, offering a channel through which an online audience can be reached. Links to, and snippets of, news media content enhance the attractiveness of the service Google is able to offer consumers. A significant number of media businesses rely on news referral services from Google to such a degree that it is an unavoidable trading partner. Many news media businesses would be likely to incur a significant loss of revenue, damaging their business, if Google users could no longer click on links to their website in search results. For commercial news media businesses, having links to their websites on Google is a necessity. The ACCC therefore considers that Google has significant bargaining power in its dealings with these media businesses.

Except to the extent relevant to the core markets the subject of this Inquiry, the ACCC has not undertaken a detailed assessment of other markets in which Google offers services. These include markets for advertising technology services offered by Google in the delivery of automated or programmatic display ads (the ad tech supply chain) or the markets for operating systems or app stores. However, the ACCC notes that other international competition agencies, including the European Commission, have found Google to be dominant in both mobile operating system and app store markets.⁴

Facebook has substantial market power

The ACCC has reached the view that Facebook has substantial market power in a number of markets and that this market power is unlikely to erode in the short to medium term.

The ACCC considers that Facebook has:

- substantial market power in the supply of social media services in Australia
- substantial market power in the supply of display advertising services in Australia
- substantial bargaining power in its dealings with news media businesses in Australia.

Large social media platforms such as Facebook and Instagram have a greater ability to attract users than a smaller scale social media platform. This is because the number of users of a platform directly increases the benefit of that platform to the user.

The size of Facebook's audience is more than three times larger than the size of Snapchat's audience (the closest competitor to the Facebook platforms). This network effect creates a significant barrier to entry and expansion.

Facebook also benefits from significant economies of scale, which are characteristic of large digital platforms, with large fixed costs incurred with expenditure on research and development.

Facebook benefits from advantages of scope in its accumulation of data from consumers using the Facebook owned and operated platforms—including the Facebook platform, Instagram, Messenger and WhatsApp. This advantage is compounded by its ability to track users on websites that utilise Facebook business tools or are part of Facebook Audience Network.

Numerous strategic acquisitions by Facebook are also likely to have increased Facebook's advantages of scope and entrenched its market power.

The ACCC has carefully considered the threat of potential new entry in social media markets. While the ACCC considers that the threat of new entry may, in theory, provide a competitive constraint on Facebook, the considerable scale and reach of Facebook (over 20 times that of MySpace at its peak) appears to protect it from dynamic competition.

The display advertising market identified by the ACCC is much broader than advertising on social media services, encompassing display advertising on a huge range of apps and websites. Despite this breadth of options available, no other online supplier of display advertising has a market share of greater than 5 per cent. In contrast, Facebook and Instagram's combined share of the online display advertising market in Australia is estimated to be 51 per cent. This likely reflects the large quantity of 'eyeballs' that Facebook and Instagram attract, as is apparent from figure 2. It also reflects the significant advantages that social media advertising (and, in particular, advertising on Facebook) provides advertisers, which is differentiated from other websites and apps, not just by the size of the audience, but also the level of user engagement on the platform.

The ACCC also considers that Facebook has substantial bargaining power in its dealings with news media businesses. Similar to the case with Google, there is a two-way relationship between news media businesses and Facebook. Facebook is a vital distribution channel for a number of media businesses, particularly those seeking to target particular demographic groups. News content enhances users'

4 European Commission, [Google Android decision](#), 18 July 2018; European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 4 June 2019.

experience of the Facebook platform, providing a significant benefit to Facebook. While the number of referrals from Facebook to news media businesses has declined since the Preliminary Report, it remains the case that many news media businesses in Australia would likely lose significant revenue, with adverse impacts on their business, should they forego referrals from Facebook. The opposite is not the case for Facebook. Access to the news content of any one news media business is unlikely to have a material effect on Facebook or its users.

Implications of substantial market power

Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from ‘out-competing’ its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. However, a firm with substantial market power could damage this competitive process by preventing or deterring rivals, including potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals’ ability to compete, rather than by offering a more attractive product.

It is important to note that the Terms of Reference for this Inquiry do not require the ACCC to focus on whether digital platforms have misused their market power. The Terms of Reference instead pose broader questions, including whether the digital platforms are exercising their market power in their dealings with advertisers and content creators in ways that could, for example, cause market failure.

Updating Australia’s merger framework

The ACCC’s analysis found that a range of factors contributed to each of Google’s and Facebook’s dominant positions in their respective markets. The acquisition of potential competitors by the dominant firms and economies of scope created via control of data sets are two such factors.

The ACCC considers that the mergers framework in Australia should be updated to make it clearer that these factors should be taken into account in assessing whether an acquisition has the effect or likely effect of substantially lessening competition. Identifying these factors in legislation signals their importance to merger parties, the courts and the Australian Competition Tribunal.

Notification of mergers and acquisitions to the ACCC is voluntary in Australia, but the ACCC may request certain businesses to notify the ACCC in advance of all proposed acquisitions of entities that carry on business in Australia. The ACCC considers it appropriate that the large digital platforms should each agree to a protocol to notify the ACCC of proposed acquisitions that may impact competition in Australia.

Addressing default bias

Consumer behaviour favours the use of incumbents, particularly those with strong brands. The operation of default settings further entrenches the market power of incumbents, and increases the barriers to entering these markets.

Google benefits from its position as the default search engine on both the Chrome browser (owned by Google), and the Safari browser (owned by Apple), which together account for more than 80 per cent of the Australian market for browsers. The substantial amount paid by Google to Apple for default status on Safari (estimated at approximately US\$12 billion in 2019) reflects the value of this default status.

Google Chrome is pre-installed on nearly all Android devices and Google Search is the default option on Google Chrome and Apple’s Safari mobile browsers. Google’s Android and Apple’s iOS operating systems are present on over 40 and 55 per cent of mobile devices in Australia respectively. This means Google’s search engine is effectively the default search engine on over 95 per cent of Australian mobile devices.

Competition agencies in other jurisdictions have also recognised the effect of default bias on consumer behaviour and its effect on Google’s dominance in the general search services market. To address this issue, Google is implementing changes to Android devices offered in Europe, to provide consumers with

a choice of search engine and internet browser. The ACCC considers offering Australian consumers this choice would have the effect of improving competition in the search services market and recommends that Google also implement this change in Australia.

The role of data in market power

The ACCC considers that the role of data in future markets is likely to be significant and will be an important factor to be taken into account in assessing the likely competitive effect of relevant mergers and acquisitions.

The breadth and depth of user data collected by the incumbent digital platforms provides them with a strong competitive advantage, creating barriers to rivals entering and expanding in relevant markets, and allowing the incumbent digital platforms to expand into adjacent markets. The multiple touch points that Google and Facebook each have with their users enable them to collect more user data, improve their services and attract more users and advertisers, creating a virtuous feedback loop. While user data is not rare, and a large number of businesses track consumers' digital footprints, no other businesses come close to the level of tracking undertaken by Google and Facebook. It is estimated that more than 70 per cent of websites have a Google tracker and more than 20 per cent of websites have a Facebook tracker. It is also estimated that of the apps available on the Google Play store, 88 per cent send user data back to Google and 43 per cent send user data back to Facebook.

The data held by Google and Facebook is particularly valuable not just because of the scale and scope of user data collected, but also its quality and accuracy, given key data (for example, gender and age) are provided by users directly on sign-up.

Yet access to data is not the sole barrier to entering these markets. For example, the social media market, dominated by Facebook's platforms, demonstrates strong network effects that are independent of the amount of user data Facebook collects. The value of Facebook to individual users depends on the participation of other users (particularly family and friends) and groups. For both the general search market and the social media market, the benefits to advertisers of using these platforms increase with the number of consumers using them. Their businesses also benefit from significant returns to scale.

The leading digital platforms have performed a critical role in developing data-driven technology and applications. Their multiple touch points with users, and their resulting access to large data sets, as well as their experience with artificial intelligence, including machine learning, mean that they are likely to be well-placed to be at the forefront of new data-driven technology.

The ACCC considers that opening up the data, or the routes to data, held by the major digital platforms may reduce the barriers to competition in existing markets and assist competitive innovation in future markets. This could be achieved by requiring leading digital platforms to share the data with potential rivals. One potential mechanism is the application of the Consumer Data Right. Another is to require the platforms to provide interoperability with other services. However, there are practical considerations that need to be carefully addressed, by both market participants and the Government, before such proposals could be implemented. These considerations include the extent to which other network effects in these markets may restrict the incentives for portability, privacy concerns and identifying the extent of data to be shared.

The ACCC considers that data portability is unlikely to have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term. If data portability or interoperability were identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to the Government. However, the ACCC recognises that aside from addressing issues of market power, portability of data held by digital platforms may deliver significant benefits to current and potential future markets, including through innovation and the development of new services. The ACCC will consider the benefits associated with digital platform data portability in the ordinary course as it considers sectors to which the Consumer Data Right regime may apply in the future.

Recommendations in Chapter 2

Recommendation 1: Changes to merger law

Recommendation 2: Advance notice of acquisitions

Recommendation 3: Changes to search engine and internet browser defaults

Direction for future ACCC work: Data portability for digital platforms

Digital platforms and advertisers

Chapter 3 of the Report focuses on the relationship between digital platforms and advertisers. It finds that online advertising is on the rise and that Google and Facebook have captured most of that growth. It also finds that the supply of online advertising is complex and opaque.

Lack of transparency

The ACCC has found that there is a lack of transparency in the online advertising markets. In particular, it is unclear how Google and Facebook rank and display advertisements and the extent to which each platform self preferences their own platforms or businesses in which they have interests.

A lack of transparency makes it difficult for advertisers to understand the factors that influence the display of their advertising to consumers and, in particular, to identify whether Google or Facebook are favouring their own business interests at the expense of rival advertisers and consumers. While the ACCC appreciates the significance of minimising the opportunity for businesses to 'game' the key algorithms, it is not clear that the appropriate balance has been struck between avoiding this risk and ensuring advertisers are appropriately informed of the outcomes.

To compound the lack of transparency in the operation of Google's and Facebook's key algorithms, there is significant opacity in the operation of the ad tech supply chain. The ad tech supply chain involves a range of advertising technology services offered by Google and other businesses to advertisers, websites and apps in order to match advertising demand and supply, and enable the instantaneous delivery of advertisements targeted at particular online users. The opacity of the ad tech supply chain means that the sum of the prices charged by suppliers of ad tech services and the share of advertising expenditure they retain are unknown to many advertisers and websites.

Risk of self-preferencing and other potentially anti-competitive conduct

Google and Facebook have both the ability and incentive to favour their own related businesses (self-preferencing) at the expense of other business users of the platform. They also have the ability and incentive to favour a business with which they have an existing relationship (and through which additional revenue may be generated), such as websites that are members of their display or audience network or use their ad tech services.

Given the substantial market power of each of Google and Facebook, their presence in a significant number of related markets and the opacity of their key algorithms, there is significant potential for self-preferencing by Google and Facebook to substantially lessen competition.

The extensive amount of data available to Google and Facebook provide these platforms with a competitive advantage and assist with entry into related markets. After entering the market, the role of Google or Facebook as a host or gateway then enables these platforms to advantage their own related businesses.

Anti-competitive discrimination by digital platforms in favour of a related business has been established by cases in other jurisdictions. For example, in the European Commission's 2017 decision, Google was found to have systematically given prominent placement to its own comparison shopping service (Google Shopping) and to have demoted rival comparison shopping services in its search results. The European Commission found that this conduct was capable of having, or was likely to have, anti-competitive effects in a comparison shopping services market.

Discrimination may occur in multiple ways where a digital platform is active in related markets. For example, owned and operated platforms may be given advantages in the operation of auction processes (for example, by enabling a last look in auctions for ad inventory) or a greater degree of interoperability. Data obtained by key platforms or interfaces may also be used to advantage their own related businesses at the expense of rivals.

Monopoly or near monopoly businesses are often subject to closer oversight due to the risks of competitive harm. The risk of competitive harm increases when the monopoly (or near monopoly) business operates in related markets. The ACCC considers that Google and Facebook each have substantial market power and each have activities across the online advertising supply chain.

The potential harm caused by dominant firms to business users (principally advertisers) can extend beyond self-preferencing. Other areas where there is a risk of potentially anti-competitive conduct by digital platforms include restrictive clauses in customer contracts, preventing customers partnering with rival businesses and restrictions on access to data and the promotion of competing products.

The ACCC notes two recent decisions of the European Commission that found evidence of anti-competitive conduct by Google:

- the decision in March 2019 that Google had abused its dominant position by imposing unfair restrictions on owners of publisher websites which prevented them from partnering with rival suppliers of advertising services
- the decision in July 2018 that requirements imposed by Google on mobile manufacturers to pre-install certain apps as defaults in order to licence other proprietary apps amounted to an abuse of Google's dominance in licensable smart mobile operating systems.

Significance of digital platforms to the online economy and the need for proactive investigation, monitoring and oversight

Digital platforms such as Google and Facebook occupy a critical position in the digital economy and are the gateways for businesses seeking to access Australian consumers online.

This role, combined with the leading platforms' substantial market power and activities in related markets, and the opacity and complexity of these markets, creates significant risks to the efficient and effective operation of these markets.

While the existing tools and goals of competition law and consumer law frameworks remain applicable to digital markets, the opacity and complexity of these markets make it difficult to detect issues and can limit the effectiveness of the broad principles. As a result, the ACCC considers that existing investigative tools under competition and consumer law should be supplemented with additional proactive investigation, monitoring and enforcement powers to achieve better outcomes for Australian businesses and consumers.

Recommendation 4 gives effect to this by proposing the creation of a branch within the ACCC to focus on digital platforms.

An ongoing focus on digital platforms will facilitate greater and more consistent scrutiny of potentially anti-competitive behaviour and consumer harms. It will shine a light on inefficient outcomes in these markets in order to improve outcomes for consumers and business users. It may also act as a catalyst for sector-driven change. It will enable the ACCC to build on its knowledge and expertise in the markets in which digital platforms operate, which will facilitate more timely outcomes of any competition or consumer enforcement action. The proactive investigation and collection of data and information is central to this. For this reason, the ACCC considers it should be provided with the power to hold an extended public inquiry, enabling it to periodically and systematically collect data, and compel information on an ad-hoc basis that may be used to assess the functioning of markets and for future enforcement action.

It should be noted that since the Inquiry commenced, the ACCC has begun several investigations into the conduct of digital platforms under the *Competition and Consumer Act 2010*. It is unlikely that these investigations would have commenced without the proactive examination made possible by this Inquiry.

The information and evidence collected by this new ACCC branch could also be used to inform potential policy recommendations to Government. The impact of digital platforms on both current and future markets is difficult to predict and proactive monitoring and investigation will enable an evidence base to be established to inform policy decisions.

Concerns with the operation of the ad tech supply chain and the role of advertising and media agencies

The ACCC has identified specific concerns with the complexity and opacity of the services offered by suppliers involved in the ad tech supply chain, including advertising and media agencies. The concerns with the ad tech supply chain go beyond the operation of the auctions and the risk of self-preferencing and include concerns with a lack of transparency as to the effective price paid for each ad tech service.

Advertisers are unable to determine whether the services they purchase offer ‘value for money’. Competition is undermined if advertisers are unable to compare and select the most efficient ad tech partners and publishers with whom to place media spend. The owners of websites are likewise unable to determine whether the ad tech platforms they contract with are the most efficient or not, as comparison between platforms is difficult.

Advertising and media agencies perform a key role in the purchase of advertising inventory, including the purchase of programmatic advertising. The ACCC has concerns about the lack of transparency in the way advertising and media agencies operate, including where the agencies or their holding companies act as intermediaries and purchase advertising opportunities from large platforms or media for resale to clients.

This is a complex area and the ACCC’s experience in this Inquiry suggests that advertisers and others may be unwilling to publicly identify their concerns.

In order to consider these issues more fully and to comprehensively assess whether the ad tech supply chain is operating efficiently, the ACCC recommends that an inquiry into ad tech services and advertising and media agencies be held. Such an inquiry would assist in increasing the transparency in the operation of the ad tech supply chain and the operation of advertising and media agencies, and in determining whether any competition or efficiency concerns exist.

Questions over advertisement verification

In the Preliminary Report, the ACCC identified potential concerns about whether advertisers are able to adequately verify whether advertisements on digital platforms are served to their intended audience.

Further inquiries by the ACCC indicate that the availability of independent third party ad verification and the information available to ad verification businesses will likely address these concerns, should advertisers seek to employ these services. The role of media rating and accreditation bodies in verifying and setting standards also appears likely to address these concerns and provide advertisers with the transparency they seek.

Nevertheless, the ACCC recognises the potential for concerns to arise, given the size and significance of this market and the inherent difficulties in advertisers verifying the delivery of online advertisements. Should any concerns arise, these issues could potentially be identified by the above inquiry and considered by the digital platforms branch proposed under Recommendation 4 below.

Recommendations in Chapter 3

Recommendation 4: Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

Recommendation 5: Inquiry into the supply of ad tech services and advertising agencies

Digital platforms and news media businesses

Chapter 4 of the Report analyses the regulatory frameworks that operate in relation to similar services supplied by news media businesses and digital platforms and **Chapter 5** of the Report details the commercial relationships between news media businesses and digital platforms.

Regulatory imbalance between news media businesses and digital platforms

Digitalisation and the increase in online sources of news and media content highlight inconsistencies in the current sector-specific approach to media regulation in Australia that gives rise to an uneven playing field between digital platforms and some news media businesses. Digital platforms increasingly perform similar functions to media businesses, such as selecting and curating content, evaluating content, and ranking and arranging content online.

Despite this, virtually no media regulation applies to digital platforms. This creates regulatory disparity between some digital platforms and some more heavily-regulated media businesses that perform comparable functions. This regulatory disparity has two potential consequences:

- first, the regulation may be less effective and unable to meet the goals set by policy makers (for example, protecting children from inappropriate advertisements or content)
- second, the disparity risks distorting competition, such as competition between the digital platforms and media businesses supplying advertising opportunities.

The disparity exists due to the failure of current regulatory frameworks to keep pace with changes in technology, consumer preferences and the way in which media businesses now operate.

The ACCC recommends that media regulatory frameworks be updated, to ensure comparable functions are effectively and consistently regulated. The framework should, as far as possible, be platform neutral, clear and contain appropriate enforcement mechanisms and meaningful sanctions.

Recommendation in Chapter 4

Recommendation 6: Process to implement harmonised media regulatory framework

The relationship between news media businesses and digital platforms

Digital platforms are both rivals to, and essential business partners of, content creators including news media businesses in the supply of display advertising opportunities.

The 2019 University of Canberra Digital News Report found that that 33 per cent of Australian consumers report accessing news through social media, with 25 per cent using search engines to search for news brands and 20 per cent using search engines to search for particular news stories.

Google is a critical source of internet traffic (and therefore audiences) for news media businesses.

A news media business risks losing a significant source of revenue if it prevents Google from providing links to its websites in search results. While Facebook contributes a significantly lower proportion of traffic to news media businesses, it remains a vital distribution channel for a number of media businesses, particularly those seeking to target a particular demographic group.

The content produced by news media businesses is also important to digital platforms. For example, between 8 and 14 per cent of Google search results trigger a “Top Stories” result, which typically includes reports from news media websites including niche publications or blogs.

While the digital platforms clearly value the news media content that they are able to display to their users, Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook. As set out above, this provides each of Google and Facebook with substantial bargaining power in relation to many news media businesses.

The reliance by news media businesses on traffic from Google and, to a lesser extent, on traffic from Facebook also means the digital platforms and their business models have a significant effect on news media businesses. Particular concerns raised during the course of the Inquiry include:

- the lack of warning provided by digital platforms to news media businesses of changes to key algorithms relating to the display of news content or news referral links
- the implementation of policies and formats that may have a significant and adverse impact on the ability of news media businesses to monetise their content and/or to build or sustain a brand and therefore an audience
- the impact of such policies on the incentives for news and journalistic content creation, particularly where significant effort is expended to research and produce original content.

A key concern relates to Google's use of news media businesses' content in snippets, the short summaries or extracts of text that accompany links to a news story and are displayed when a consumer searches for a news story. A similar concern exists in relation to the posts of news stories that appear in a user's Facebook News Feed.

The ACCC recognises that news media businesses, digital platforms, and importantly, consumers benefit from the reproduction of news content in snippets.

Media businesses benefit because a snippet provides context and an indication to the user of the value of that content, increasing the likelihood of consumers clicking through than if no snippet were provided (although this may depend on the length of the snippet). Consumers value snippets for a related reason, as the context enables them to make an informed choice of which article to click on. While Google does not generally sell advertising opportunities next to search queries that are considered by Google as having a 'news intent', Google benefits because the inclusion of news stories and snippets in search results increases the attractiveness of the Google search engine. This in turn increases the likelihood that consumers will use the search engine for other queries, which can be directly monetised. Facebook benefits because news stories appearing on a user's news feed retain the user's attention, enabling more advertisements to be displayed.

However, the inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power. Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content.

Proposed codes to address the imbalance in the bargaining relationship between leading digital platforms and news media businesses

Given the imbalance in the relationships between the leading digital platforms and Australian news media businesses, the ACCC recommends that designated digital platforms should each separately be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses. The ACMA would be responsible for designating which digital platforms should be required to implement a code. The development of each code should be informed by a consultation process with news media businesses and contain a strong enforcement mechanism. The ACMA would closely consult with the ACCC in performing its role under this recommendation.

Breaches of the code would be dealt with by the ACMA, which should 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.

The ACCC considers that if a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform.

Recommendation in Chapter 5

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

Copyrighted media content and digital platforms

Digitalisation has made copyrighted material more accessible than ever, amplifying existing policy issues in copyright regulation and enforcement.

In this environment, digital platforms are also increasingly important marketplaces for the distribution of, and access to, copyright-protected content, including that produced by Australian media businesses. As such, the ability of content creators and media businesses to monetise copyright-protected content distributed online rests on their ability to ensure that existing copyright law obligations can be enforced against digital platforms that host copyright infringing content.

The ACCC considers that the enforcement of these obligations could be assisted by a code that provides clear standards to ensure the timely and effective take-down of copyright-infringing content on platforms, including content belonging to Australian news media businesses and smaller rightsholders.

Additional recommendation in Chapter 5

Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms.

The disruption of Australian media and the risk of underinvestment in journalism

Chapter 6 of the Report outlines the impact that digital platforms have had on the revenue of many Australian media businesses, and their effects on the quality and choice of news and journalism in Australia.

Reduced advertising revenue and a decreasing number of journalists

Digitalisation and the growth of digital platforms have had both positive and negative impacts on the production of news and journalism in Australia.

Digital platforms have created opportunities and cost savings for online media by enabling news media businesses to reach a larger potential audience and by lowering the costs of research, production and distribution.

However, the reduction in advertising revenue over the past 20 years, for reasons including the rise of online advertising, appears to have reduced the ability of some media businesses to fund Australian news and journalism.

Australian commercial media, and in particular traditional print media (now print/online media), first suffered a significant reduction in advertising revenue through the unbundling of classified advertisements from newspapers.

This resulted in a decline from AU\$2 billion in classified advertising revenue in 2001 to AU\$200 million in 2016 (nominal figure).⁵ If these figures are adjusted for inflation⁶, the decline over the same period is from AU\$3.7 billion to AU\$225 million.

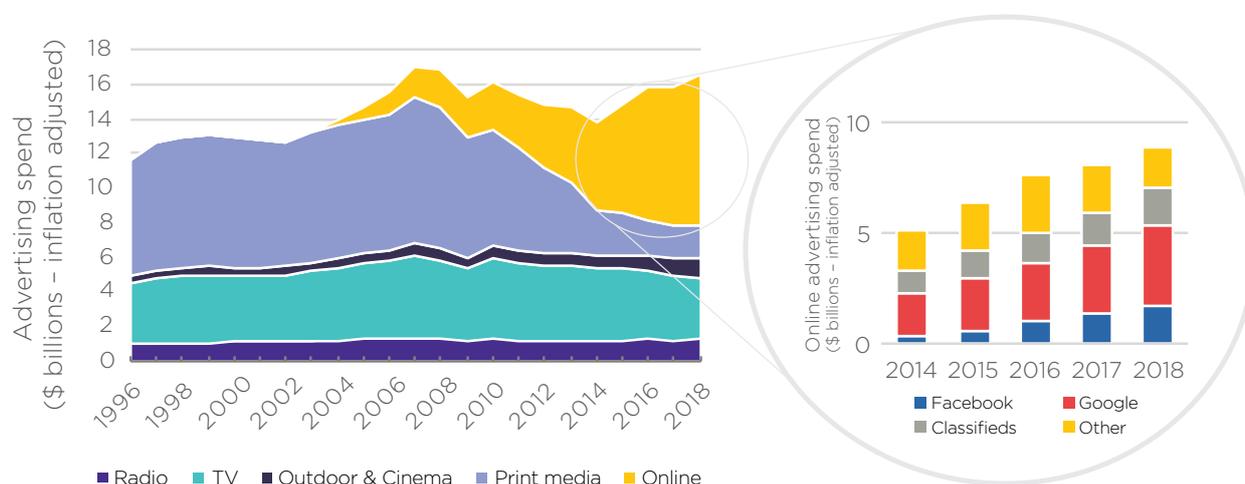
During this same period, Australian traditional print media (now print/online media) faced increased competition from international sources and other media providers, both commercial and publicly funded.

⁵ Commercial Economic Advisory Service of Australia (CEASA) data.

⁶ Inflation adjusted to 2018.

Over the past decade, a strong fall in the print advertising revenue of commercial Australian media publishers has been accompanied by a rise in spending on online advertising (figure 3, left panel). It is clear that digital platforms have taken an increasing share of advertising expenditure, with a significant portion of the increase in online advertising revenue from 2014-2018 going to Google and Facebook (figure 3, right panel).

Figure 3 Australian advertising expenditure by media format and digital platform



Source: ACCC estimates of spend relating to Australian customers based on CEASA data and information provided by market participants. Amounts are shown in 2018 Australian dollars⁷

Importantly, the revenue of the traditional print publishers, including from their print and online advertising businesses, continued to decline even after the vast majority of classified revenue had shifted online.

Census data shows that from 2006 to 2016, the number of Australians in journalism-related occupations fell by 9 per cent overall, and by 26 per cent for traditional print journalists (including those journalists working for print/online news media businesses). Data provided by the main media companies show the number of journalists in traditional print media businesses fell by 20 per cent from 2014 to 2018. This is at a time when Australia's population and economy were growing strongly.

The ACCC recognises Australian consumers can now access a wider range of news and journalism sources (including international outlets, podcasts, blogs and 'citizen journalism'). However, the ACCC is concerned by the declining number of professional journalists focussing on Australian news and the reduction in certain forms of reporting beneficial to society that are unlikely to be the focus of newer forms of journalism.

Types of journalism at risk of under-provision

Since the Preliminary Report, the ACCC has carried out further research to ascertain the impact of the reduction in advertising revenue earned by media businesses on types of journalism that may be at risk of under-provision in Australia.

Data collected by the ACCC show that between 2008 and 2018, 106 local and regional newspaper titles closed across Australia, representing a net 15 per cent decrease in the number of these publications. These closures have left 21 local government areas previously covered by these titles without coverage from a single local newspaper (in either print or online formats), including 16 local government areas in regional Australia.

⁷ Advertising market shares identified in this report are the ACCC's best estimate based on information from a number of sources, including data from CEASA. Where the ACCC has requested information from firms it has done so on the basis of the revenue received from advertisers in Australia. This may include some portion of expenditure that is spent by Australian advertisers targeted at users located outside Australia. Conversely, it does not include expenditure by advertisers located overseas targeted at users in Australia. As with all estimates, there is a potential that this may understate or overstate the actual market share of each firm or the total size of the market. The ACCC notes that the most recent data referenced in this Report relates to the 2018 calendar year and market shares may have changed from this point in time.

The ACCC also carried out a quantitative assessment of print articles published in all metropolitan and national daily newspapers by the three largest Australian news publisher groups.⁸

This analysis indicates a significant reduction in provision of multiple categories of reporting related to public interest journalism; that is, journalism that performs a critical role in the effective functioning of democracy at all levels of government and society.

In particular, the research indicates a significant fall in the number of articles published covering local government, local court, health and science issues during the past 15 years. The reduction exists in both the absolute number of articles published in each of these categories and the percentage of total articles published attributed to these categories.

The decline in provision of each of these categories of journalism coincides with reductions in Australian metropolitan journalists and reductions in print (now print/online) media revenue over the period surveyed.

As these two studies focussed on traditional news publishers, the ACCC recognises that it is important to consider whether new market entrants, and in particular the so-called 'digital natives', can offset the reduced provision of particular types of journalism in Australia.

While coverage of specialist topics such as health and science have broad and indeed global interest and may be provided by specialist digital natives such as *Croakey Health Media* and international sources, it appears unlikely that emerging news outlets will compensate for the reduced coverage of local court and local council issues. The business models of the most prominent digital natives in Australia, such as *Crikey*, *The Guardian Australia* and *BuzzFeed News Australia*, all seek large national audiences, and their journalists are accordingly unlikely to focus on local government or local court reporting. Recent redundancies of journalists employed by digital natives also demonstrate that these new entrants are not immune to the commercial forces affecting production of journalism by more traditional news outlets.

The reduction in the reporting of local and regional affairs likely reflects the consequences of the unbundling of classified advertising from print publications and the shift in display advertising to digital platforms. While there may not be a large audience for such reporting, local court, local government and regional reporting perform an important role in exposing corruption, holding governments, corporations and individuals to account, as well as in the production and dissemination of knowledge.

The role of the public broadcasters

In Australia, the two publicly funded broadcasters, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS), are the predominant means by which the Government has addressed the potential under-provision of public interest journalism.

In recognition of the role performed by the ABC and SBS in addressing the public good nature of journalism and consequent risk of under provision of public interest journalism, the ACCC recommends that stable and adequate funding be provided to the ABC and SBS.

However, while the public broadcasters have performed, and will continue to perform, an extremely important role in addressing under-provision of certain forms of journalism and contributing to media plurality, a wider range of news sources should also be active in the provision of all categories of journalism in order to ensure depth of coverage and broader range of media voices throughout Australia. Further, the public broadcasters are not currently resourced to fully compensate for the decline in local reporting previously produced by traditional commercial publishers.

Targeted funding to support particular categories of journalism at risk

The ACCC considers that continued production of the types of public interest journalism most at risk of under-provision is likely to require government assistance, and that the form of this assistance should be carefully evaluated. While the Preliminary Report identified tax offsets and making personal

⁸ Due to limitations in the database used, the ACCC's research was limited to articles published in print editions. However, the ACCC understands that content of these print publications closely mirrored the online versions of the same publications throughout the period assessed.

subscriptions for publications tax deductible as policy approaches for further analysis, such analysis has indicated that these mechanisms are not the most effective or efficient ways to address the risk of under-provision of particular types of journalism.

This Report recommends a new program of direct grants targeted at local reporting, to replace the Regional and Small Publishers Jobs and Innovation Package, which is due to terminate in June 2021.

This program should provide total funding in the order of AU\$50 million per annum to support the production of local reporting, to be defined as original journalistic coverage of matters relevant to local and regional communities – such as local courts, local issues and local government. These grants should be administered at arm's length and be platform neutral, with print, online and broadcast news providers all eligible to apply.

The nature and scale of this recommendation has been informed by the ACCC's consideration of existing and announced measures taken by governments in other countries, which have faced comparable concerns about the risk of under-provision of local journalism.

Support for philanthropically-funded journalism

The ACCC also considers that philanthropically-funded and not-for-profit journalism could perform a more significant role in addressing the risk of under-provision of public interest journalism in Australia, noting the increasing prevalence and success of this kind of journalism overseas.

Philanthropic support for journalism could be encouraged in Australia by enabling donors to make tax-deductible contributions to not-for-profit organisations that produce, promote or assist the production of public interest journalism. To do so, the ACCC recommends that the Government amend tax settings to create a specific charitable purpose and a new category of deductible gift recipient (DGR) status for not-for-profit organisations that carry out such activities.

The recommendation to create both a new charitable purpose and a new DGR category reflects Government policy that registered charity status will become a prerequisite for DGR status from 1 July 2020.

To be eligible for registered charity and DGR status through these new categories, organisations would need to comply with existing accountability measures overseen by the Australian Charities and Not-for-profits Commission (ACNC).

Applying the existing requirements for charity status overseen by the ACNC would appropriately disqualify organisations that engage in political advocacy. It would guarantee that journalism-focussed organisations seeking tax-deductible philanthropic funding maintain a high level of public accountability.

The new charitable purpose and DGR categories should also require minimum levels of transparency, impartiality and independence. For organisations that produce journalism, this should include compliance with existing industry codes such as the Australian Press Council Standards of Practice.

Recommendations in Chapter 6

Recommendation 9: Stable and adequate funding for the public broadcasters

Recommendation 10: Grants for local journalism

Recommendation 11: Tax settings to encourage philanthropic support for journalism

The impact of digital platforms on the consumption of news and journalism

Chapter 6 also discusses the impact of the digital platforms on the consumption of news, noting the role of digital platforms in fundamentally altering the way that many users find and interact with news. This part of chapter 6 looks at the possible risks that arise from this interaction.

Risk of less reliable and lower quality news on digital platforms and measures to address this risk

Australians are now more easily and frequently able to access news from local and international sources free-of-charge. Digital platforms, and in particular search engines such as Google, have performed an important role in increasing the diversity of news sources accessed by Australian consumers.

The 2019 Digital News Report found that algorithm-driven digital platforms are among the most popular sources of journalism for Australian news consumers, with 33 per cent reporting accessing news through social media, 25 per cent using search engines to find a particular news brand, 20 per cent using search engines to find specific news stories, and 12 per cent accessing content through news aggregators. By comparison, 30 per cent of Australian news consumers accessed online news directly from the websites of news media businesses.

However, as identified in the Report, accessing news and journalism through digital platforms may increase consumers' risk of exposure to less reliable and lower quality news. This is because news and journalism accessed via digital platforms has been de-coupled from the news media business, often limiting a consumer's familiarity with and knowledge of the original source of the story.

Leading digital platforms have taken or are taking steps to help users identify the reliability, trustworthiness and provenance of news. For example, Facebook, Google and Bing work with the 'Trust Project' to incorporate independent assessments of news sources into the way they display news to users and prioritise different sources through algorithms. Both Facebook and Twitter use badges to verify the authenticity of public figures and organisations distributing information on their services.

While these are important initiatives, the ACCC is of the view that efforts in this area should not be designed and implemented at the sole discretion of the digital platforms. The ACCC therefore recommends that an independent regulator such as the ACMA provide oversight of these voluntary initiatives by monitoring digital platforms' efforts to enable users to identify reliability, trustworthiness and provenance of news content featured on their services. This would ensure that these initiatives continue to protect the interests of Australian news consumers.

The ACCC also recommends measures to improve digital media literacy across the community, to ensure all Australians are well equipped to identify and appropriately scrutinise low quality or unreliable news encountered through digital platforms.

In particular, the ACCC recommends that a Government program be established to fund and certify non-government organisations for the delivery of digital media literacy resources and training. It should be based on the frameworks currently used by the Online Safety Grants Program and Be Connected program, which are administered by the Office of the eSafety Commissioner. The resources and training should be broadly delivered through community centres, libraries, schools and senior centres for the benefit of all Australians. The ABC and SBS are already involved in the provision of digital media literacy resources, and the ACCC considers that organisations participating in the proposed program could partner with these entities in the development and delivery of education and training.

The ACCC also considers that there should be separate consideration of the approach to digital media literacy in Australian schools as part of the broader review of the Australian Curriculum scheduled for 2020.

A digital platforms code to address the risk of deliberately misleading and harmful news stories

The ACCC also considers that there is a risk of consumers being exposed to deliberately misleading and harmful news when using digital platforms. The ACCC is particularly concerned about the risk of consumers being exposed to serious incidents of disinformation – false or inaccurate information deliberately created to harm a person, social group, organisation or country.

The ACCC recognises that while the platforms have taken steps in this area, there is a need for consistency of treatment of serious incidents of disinformation, which is an increasing concern in Australia and internationally.

The ACCC therefore recommends that digital platforms establish an industry code to govern the handling of complaints about disinformation. This would relate to news and journalism or content presented as news and journalism, where that content has the potential to cause serious public detriment. This proposal seeks to improve transparency and help consumers by publicising and enforcing the procedures and responses that digital platforms must apply when dealing with these complaints. The proposed code would also consider appropriate responses to complaints about malinformation – information deliberately spread by bad faith actors to inflict harm on a person, social group, organisation or country, particularly where this interferes with democratic processes. While such malinformation has recently become an issue overseas, the ACCC considers it to be a more remote threat than disinformation in the Australian context. If the digital platforms fail to establish an industry code within a designated timeframe, a mandatory standard should be imposed.

The ACCC also recognises concerns that accessing news via digital platforms exposes consumers to an increased risk of ‘filter bubbles’ and ‘echo chambers’. While the ACCC is not of the view that further intervention or regulation is necessary at this time, the ACCC’s recommendations will allow the Government to continue to monitor this area and take further steps as appropriate.

Additional recommendations in Chapter 6

Recommendation 12: Improving digital media literacy in the community

Recommendation 13: Digital media literacy in schools

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

Recommendation 15: Digital Platforms Code to counter disinformation

Digital platforms and consumers

Chapter 7 of the Report discusses the bargain between consumers and digital platforms and the ability of consumers to both be informed about their data and exercise meaningful control over it.

Consumers’ bargain with digital platforms

Digital platforms provide a wide range of valuable services to Australian consumers, often for zero monetary cost. The ubiquity of digital platforms in the daily lives of consumers means that many are obliged to join or use these platforms and accept their non-negotiable terms of use in order to receive communications and remain involved in community life.

The ACCC considers that Australian consumers are better off when they are both sufficiently informed about the collection and use of their data and have sufficient control over their data. Transparency over the collection and use of data is important so that consumers have the opportunity to understand what data they are providing to others and how it is being used.

However, this transparency is not enough. Consumers, once they understand what is being collected and how it is used, must be able to exercise real choice and meaningful control.

The future of the digital economy relies on trust, by both consumers and business users. As the Productivity Commission has noted⁹:

Businesses, as much as governments, rely on the willingness of the public – the source of so much of the data – to continue to trust data handling and use. Against the background of an ocean of personal data that is already public, there is now, and will be in the future, a need for continued community acceptance and trust in the handling of personal data by both governments and business.

Social licence will develop if people:

- *have a sound basis for believing in the integrity and accountability of entities (public and private) handling data*

⁹ Productivity Commission, [Data Availability and Use](#), Final Report, 31 March 2017, p. 13.

- *feel they have some control over how their own data is used and by whom, and an inalienable ability to choose to experience some of the benefits of these uses themselves*
- *better understand the potential community-wide benefits of data use.*

The ACCC's proposals will provide sufficient information to enable consumers to make informed and genuine choices, to increase the accountability of entities handling user data, and to provide the ability for consumers to exercise some control over their user data. The ACCC considers that the most efficient way to make these changes is to amend the existing privacy law and extend protections under consumer law.

A lack of informed and genuine choice

Many digital platforms increasingly collect a large amount and variety of user data. The data collected often extends far beyond the data users actively provide when using the digital platform's services. Digital platforms may passively collect data from users, including from online browsing behaviour across the internet, IP addresses, device specifications and location and movement data. Once collected, digital platforms often have broad discretions regarding how user data is used and also disclosed to third parties.

The user data collected can enable digital platforms to create more detailed segmented user profiles that are then available for use by advertisers wishing to target advertisements. Consumers have informed the ACCC that they have concerns about the extent and range of information collected by digital platforms.

The ACCC is of the view that consumers' ability to make informed choices is affected by:

- *The information asymmetry between digital platforms and consumers.* The ACCC found that consumers are generally not aware of the extent of data that is collected nor how it is collected, used and shared by digital platforms. This is influenced by the length, complexity and ambiguity of online terms of service and privacy policies. Digital platforms also tend to understate to consumers the extent of their data collection practices while overstating the level of consumer control over their personal user data.
- *The bargaining power held by digital platforms compared to consumers.* The ACCC also found considerable imbalance in bargaining power between digital platforms and consumers. Many digital platforms use standard-form click-wrap agreements with take-it-or-leave-it terms and bundled consents, which limit the ability of consumers to provide well-informed and freely given consent to digital platforms' collection, use and disclosure of their valuable data.

Without adequate information on how digital platforms collect and use users' data, or the ability to choose between digital platforms on the basis of their data practices, consumers are unable to make informed decisions. This is likely to impede potential competition between digital platforms on the privacy and data protection offered. This may also impede the new entry of rival services that use alternative business models.

Lack of consumer protection and effective deterrence under existing laws

The lack of both consumer protection and effective deterrence under laws governing data collection have enabled problematic data practices and a lack of transparency and control which undermine consumers' ability to select a product that best meets their privacy preferences. The lack of deterrence under current laws is compounded by individual consumers' inability to bring direct actions for breaches of their privacy under the Privacy Act or for serious invasions of their privacy that cause financial or emotional harm.

The need for strengthened protections in the Privacy Act

The ACCC notes the announcement from the Australian Government on 24 March 2019 of tougher penalties and other measures to protect Australians' online privacy. The announced changes include:

- increased penalties for serious or repeated breaches to whichever is the greater of: AU\$10 million, three times the value of any benefit obtained through the misuse of information, or 10 per cent of a company's annual domestic turnover

- new infringement notice powers for the Office of the Australian Information Commissioner (OAIC) and other expanded options available to the OAIC to address breaches
- a requirement for social media and online platforms to stop using or disclosing an individual's personal information upon request
- specific rules to protect vulnerable groups such as children.

The ACCC welcomes these changes, a number of which also form part of this Report's recommendations. The ACCC also recommends the Government consider further legislative changes to strengthen privacy regulations in Australia, in particular:

1. Updating the definition of personal information in line with current and likely future technological developments to capture any technical data relating to an identifiable individual.
2. Strengthening notification requirements to ensure that the collection of consumers' personal information directly, or by a third party is accompanied by a notice of the collection that is concise, intelligible and easily accessible, written in clear and plain language, provided free of charge, and accompanied by appropriate measures to reduce the information burden on consumers.
3. Strengthening consent requirements to require that consents are freely given, specific, unambiguous and informed and that any settings for additional data collection must be preselected to 'off'. Consents should be required whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act, unless the personal information is necessary to perform a contract to which a consumer is a party, required under law, or otherwise necessary in the public interest.
4. Requiring entities subject to the Privacy Act to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, except in certain circumstances.
5. Introducing direct rights for individuals to bring actions or class actions before the courts to seek compensation for an interference with their privacy under the Privacy Act.

The ACCC also notes that privacy law reform responding to the increasing collection and use of personal information is not unique to Australia. In recent years, a number of jurisdictions have introduced strengthened privacy regulations including in Europe (via the General Data Protection Regulation), certain states in the United States (including California), and Japan.

Future concerns – review of privacy regulation

Innovation and rapid technological change has transformed the ability and incentive of entities to collect, use, and disclose the personal information of Australian consumers in the digital economy. These changes are accompanied by the growing awareness and concern of Australian consumers regarding privacy and data protection.

As observed by the ALRC in their report on Australian privacy law and practice more than a decade ago, 'rapid advances in information, communication and surveillance technologies have created a range of previously unforeseen privacy issues'.¹⁰ The Productivity Commission has also echoed these comments in noting that the Privacy Act may have a limited application in a highly data-driven future.¹¹

The ACCC therefore considers that, in addition to its recommendations for targeted amendments to the Privacy Act, broader reform of the Australian privacy regime may be necessary to maintain effective protection of consumers' personal information in the longer term, including a consideration of the current objectives and scope of the Privacy Act (recommendation 17).

¹⁰ Australian Law Reform Commission, [For Your Information: Australian Privacy Law and Practice](#), ALRC Report 108, 12 August 2008, p. 105.

¹¹ Productivity Commission, [Data Availability and Use](#), Final Report, 31 March 2017, p. 130.

Some privacy law changes should apply economy-wide

The ACCC's inquiries indicate that potentially problematic data practices, and the associated potential for consumer harm, extend beyond digital platforms to other markets. For example, many businesses seek consent to data practices using click-wrap agreements, bundled consents, and take-it-or-leave-it terms where consumers are not provided with sufficient information or choice regarding the use of their personal information.

This results in an increased exposure to data breach risks, a reduction in trust which could result in consumers avoiding transactions, and the potential for particular risk to vulnerable consumers, including children.

Therefore, changes to laws which give consumers greater control over their personal information and increase the accountability of businesses for data practices and the deterrence effect of Australian privacy laws are needed.

The ACCC considers that the proposed amendments to Australian privacy law and the introduction of a statutory tort for serious invasions of privacy (recommendations 16, 17 and 19) should apply across the economy. The ACCC does not consider that only implementing specific changes applicable to digital platforms would be sufficient to protect the long-term interest of consumers or to maintain their trust to facilitate the free flow of information necessary for data-driven markets in the digital economy.

Digital platforms – OAIC Privacy Code of Practice

The Inquiry has identified that, in addition to the large volume of Australian consumer personal information collected by digital platforms, several aspects of digital platforms' notification and consent processes raise particular concerns. As such, it is necessary to supplement the economy-wide amendments to the Privacy Act outlined above with additional obligations specific to digital platforms' data practices, including in relation to notification and consent requirements, opt-out control, the handling of children's data, information security, retention of data and complaints handling.

For example, to address the acute information asymmetry between digital platforms and consumers without increasing the information burden on consumers, digital platforms should be required to provide multi-layered notices about their data practices. This should range from a first layer containing concise statements targeted to areas of potential concern to a consumer to a final layer which can set out all relevant details of how a consumer's data may be collected, used, disclosed and shared by a business (including with third parties).

The ACCC recommends that this be achieved via an enforceable Privacy Code of Practice to be developed by the OAIC to apply to digital platforms. It should also be enforced by the OAIC and accompanied by the same penalties as are applicable to an interference with privacy under the Privacy Act.

The Privacy Code of Practice should be developed through extensive consultation with relevant stakeholders, including consumer and privacy advocates. The ACCC should also be involved in developing the code in its role as the competition and consumer regulator.

As above, the ACCC notes that, in March 2019, the Government announced the creation of a legislated code to apply to social media and online platforms which trade in personal information. The ACCC views that this recommendation could align with and be taken into account in the Government's consideration of the substance and reach of that code.

Consumers require additional protection under consumer law

In the course of this Inquiry the ACCC has identified a number of examples of conduct which are detrimental to consumers that may not be effectively addressed or neatly fit under the existing Australian Consumer Law (ACL).

The ACCC has observed terms in contracts that can involve a significant imbalance in the rights of consumers and digital platforms but which, if held to be an unfair contract term, would not be subject to penalties. While individual terms that are unfair could be declared 'void' by a court, this remedy may not be of much benefit to a consumer and does not effectively deter businesses from using such terms.

Therefore, the ACCC considers that the introduction of civil pecuniary penalties for unfair contract terms in standard form consumer or small business contracts would more effectively deter businesses, including digital platforms, from leveraging their bargaining power to include unfair contract terms in their terms of use or privacy policies.

The ACCC has also observed a range of practices that are significantly detrimental for consumers but which may not neatly fit under existing consumer laws. These practices are driven in part by the significant increase in the amount of consumer data now collected and the increased sophistication in data analysis and consumer targeting, which also creates the potential for significant consumer harm. These practices include:

1. Changing terms on which products or services are provided without reasonable notice or the ability to consider the new terms, including in relation to products with subscriptions or contracts that automatically renew.
2. Adopting business practices to dissuade a consumer from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.
3. Inducing consent or agreement by very long contracts or providing insufficient time to consider them or all or nothing 'click wrap' consents.

Accordingly, the ACCC recommends that the Australian Consumer Law be amended to include a prohibition on certain unfair trading practices, noting that such prohibitions have been used to address similar practices overseas. The ACCC recognises that the scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. It also notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

The ACCC, as the Commonwealth consumer protection agency, will actively enforce the Australian Consumer Law to ensure consumers are protected from any conduct of digital platforms that may raise consumer protection concerns. The digital platforms branch proposed under Recommendation 4, in addition to monitoring and investigating instances of potentially anti-competitive conduct, will have an important role in monitoring the impact of digital platforms on Australian consumers and digital platforms' compliance with the Australian Consumer Law.

The ACCC is also currently investigating conduct identified during the Inquiry that raise concerns under the Australian Consumer Law (see page 38).

Recommendations in Chapter 7

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

Scams on digital platforms and other emerging issues

Chapter 8 of the Report seeks to address issues raised with the ACCC in the course of the Inquiry that the ACCC considers are currently emerging or will arise in the foreseeable future. This includes scams via digital platforms, developments in artificial intelligence and voice activated devices.

Based on complaints received by the ACCC between 2014 and 2018, reports of scams occurring via social media have increased by 188 per cent in the past four years, and the value of losses incurred via scams on social media jumped by 165 per cent. By way of example, in the week of 6-12 May 2019, the ACCC scamwatch team received 165 reports of scams where Facebook was mentioned, with an estimated AU\$70 000 in losses.

These scams occur in a number of different ways, including advertising displayed on Google or Facebook, or on websites that are part of Google's or Facebook's advertising networks, that contains false representations and scam content. This is damaging for businesses that inadvertently display these advertisements, and for consumers who fall victim to these scams and suffer both financial and non-financial loss.

The ACCC is concerned by the increase in this behaviour and the use of digital platforms to facilitate such conduct. However, the ACCC's concerns with an absence of effective dispute resolution are not limited to cases involving scam advertising. To ensure consumers and small businesses have appropriate avenues for complaint and dispute resolution, the internal dispute resolution systems of digital platforms operating in Australia should adhere to a certain minimum standard.

In the event that these complaints or disputes are not solved internally, the ACCC also recommends that an ombudsman have the power to: investigate complaints, including about scams, on digital platforms; require take down of this content where appropriate; and order compensation in appropriate cases.

The scope of the ombudsman scheme and the nature of complaints and disputes that would be subject to the scheme should be determined by the ACMA following broad consultation with relevant stakeholders. This could include:

- complaints or disputes from businesses relating to the purchase of advertising services from digital platforms
- complaints or disputes from businesses that consider digital platforms' representations about the performance or likely performance of purchased advertising to be inaccurate or unsubstantiated
- complaints or disputes from consumers, including in relation to scams and the removal of such content.

The ACCC considers that the Telecommunications Industry Ombudsman (TIO) may be an appropriate body to implement the scheme and the ACCC recommends that the ACMA and the TIO investigate the feasibility of the TIO taking on the 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.

Recommendations in Chapter 8

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

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

Proposals to address these issues

Important for Governments to act now, responding to current problems and anticipating future issues

We are at a critical time in the development of digital platforms and their impact on society. Digital platforms have fundamentally changed the way we interact with news, with each other, and with governments and business. It is also clear that the markets in which digital platforms and news media businesses operate will continue to evolve.

It is very important that governments recognise the role digital platforms perform in our individual and collective lives, be responsive to emerging issues, and be proactive in anticipating challenges and problems.

The ACCC's Preliminary Report contributed to the wider debate about the role digital platforms play and the appropriate level of government oversight.

This Report proposes specific recommendations aimed at addressing some of the actual and potential negative impacts of digital platforms in the media and advertising markets, and also more broadly on consumers.

Increased international scrutiny and the significance of international cooperation

Since the publication of the Preliminary Report, there have been a number of significant reports published by overseas governments that look at the same issues as the Inquiry.

While different recommendations are made in these reports, the findings reached, and the concerns expressed, are broadly consistent with the ACCC's conclusions. Some examples of international reports include:

- In February 2019, the (UK) Department for Digital, Culture, Media and Sport published the report of the Cairncross Review. This review, led by Dame Frances Cairncross, considered the sustainability of production and distribution of high quality journalism and in particular, the future of the press. It looked at the overall state of news media, the threats to the financial sustainability of publishers, the impact of search engines and social media platforms, and the role of digital advertising. The Cairncross Review reached a number of important conclusions and recommendations. These include that, given the evidence of a market failure in the supply of public interest news, public intervention may be the only remedy, and that measures are required to tackle the uneven balance of power between news publishers and the online platforms that disseminate their output. In particular, this review recommended that leading digital platforms be required to set out codes of conduct to govern their commercial arrangements with news publishers in order to rebalance the relationships between publishers and online platforms.
- In March 2019, the House of Lords Select Committee on Communications published a report 'Regulating in a digital world'. This report found that the regulation of the digital world has not kept pace with its role in people's lives and that a comprehensive and holistic strategy for regulation needed to be developed.
- In March 2019, the report of the UK Digital Competition Expert Panel (led by Professor Jason Furman) 'Unlocking Digital Competition' was published (the Furman Report). This report was commissioned by the Chancellor of the Exchequer to inform the work of HM Treasury, the Department for Digital, Culture, Media and Sport, and the Department for Business, Energy and Industrial Strategy. The Furman Report made a number of significant recommendations. These include the creation of a digital markets unit tasked with developing a code of competitive conduct to apply to digital companies with strategic market status, taking steps to enable greater personal data mobility and open standards, and advancing data openness in order to tackle the key barriers to entry in digital markets. A number of other specific recommendations were made including in relation to UK merger policy.
- In 2018, the European Commission's Commissioner for Competition, Margrethe Vestager, asked Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer to consider how competition policy should evolve to continue to promote pro-consumer innovation in the digital age. Their report 'Competition policy for the digital era', published in February 2019, concluded that there was no need to rethink the fundamental goals of competition law in light of digitalisation, but identified specific characteristics of platforms and the data economy which meant established concepts, doctrines and methodologies should be revised. The report also identified that in some areas, a regulatory regime may be required.
- In February 2019, the US Federal Trade Commission launched a task force to monitor technology markets. The Technology Task Force will examine industry practices in technology markets, conduct law enforcement investigations and review completed mergers in technology markets.

In addition, in June 2019, the European Council of the European Union adopted a regulation that seeks to improve relationships between digital platforms and businesses, by providing businesses with a more transparent, fair and predictable online business environment, as well as an efficient system for seeking redress.

These steps demonstrate the commonality of the issues explored by the ACCC in this Inquiry, and the shared momentum and direction to address the concerns identified.

The ACCC will continue to share and discuss its findings and recommendations with fellow regulators and enforcement agencies overseas, both directly and via its existing networks such as the Organisation for Economic Cooperation and Development (the OECD), the International Competition Network (the ICN) and the International Consumer Protection Enforcement Network (ICPEN).

Coordination across national borders is critical to address competition and consumer concerns that arise from the conduct of the leading digital platforms, given their global operations. It is intended that the digital platforms branch within the ACCC, proposed under Recommendation 4, will work closely with equivalent teams at overseas competition agencies and overseas consumer agencies. This coordination will enable competition and consumer agencies to learn from each other, enhance cross-border enforcement and, where appropriate, share information and align their approaches to meet the same objectives.

The ACCC will also assist relevant Australian Government entities as they work closely with their international counterparts in respect of these important issues, to both share findings and further discuss solutions.

Close working relationship with relevant Australian regulators to continue

In carrying out this Inquiry, the ACCC has worked closely with Australian Government entities and, in particular, with regulators the ACMA and the OAIC. The close levels of cooperation between the ACCC and the ACMA are also evident in the formal Memorandum of Understanding between the ACCC and the ACMA.

Given the broad range of policy issues and potential enforcement actions raised by the conduct of the digital platforms, Australian Government regulators and departments will continue to work together closely. Regulators and departments will continue to share existing expertise, information and capabilities in order to achieve efficient, effective and consistent outcomes for the Australian public.

In the Preliminary Report, the ACCC indicated that the level of oversight proposed in particular preliminary recommendations could be provided by a new or existing regulatory body. Following strong submissions in response to the Preliminary Report and further consideration of the objectives of such oversight and the necessary regulatory and enforcement functions, the ACCC reached the view that it was not appropriate to recommend the establishment of a new regulator or agency. A new regulator or agency would take considerable time to build the skills already possessed by existing regulators and, being so targeted, would run a clear risk of regulatory capture. Rather, more effective and targeted oversight would be provided by supplementing the functions of existing enforcement and regulatory agencies including the ACCC, the ACMA and the OAIC, which are already working very well together.

Costs of regulation and funding of new functions

The ACCC recognises that the proposals outlined below will have costs for both Government and industry. Some of the proposals will have implications for the Australian Government Budget through direct funding, industry support or providing resourcing for new regulatory functions.

For example, Recommendations 4 and 5 involve additional functions for the ACCC, Recommendations 7, 8, 22 and 23 involve additional functions for the ACMA and Recommendations 16 and 18 involve additional functions for the OAIC. The ACCC considers that these functions, as well as functions proposed for Government agencies in other recommendations will require additional funding from the Government.

A number of the proposals would also place regulatory compliance costs on digital platforms. These costs of compliance include both administrative costs associated with new reporting obligations and the negotiation and development of new codes of practice, and substantive costs, such as making changes to internal business practices to meet new regulatory obligations. The ACCC has not sought to calculate these costs but does not consider these costs are likely to be disproportionate given the range of issues identified. The ACCC also considers it important and relevant to note the significant revenues earned by the digital platforms from Australian advertisers, and the compliance costs already incurred by many Australian businesses in the media and advertising sectors.

Certain recommendations, and in particular Recommendation 16, apply to businesses other than digital platforms. The ACCC does not consider that the costs of compliance should be extensive for businesses that do not place personal information at the centre of their business models.

List of Recommendations

The ACCC's recommendations are listed below.

Chapter 2

Recommendation 1: Changes to merger law

Section 50(3) of the *Competition and Consumer Act 2010 (CCA)* be amended to incorporate the following additional merger factors:

- (j) the likelihood that the acquisition would result in the removal from the market of a potential competitor;
- (k) the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.

Recommendation 2: Advance notice of acquisitions

Large digital platforms to agree to a notification protocol, to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. The details of the notification protocol will be agreed between the ACCC and each large digital platform, and would specify:

- the types of acquisitions requiring notification (including any applicable minimum transaction value), and
- the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition.

If such a commitment were not forthcoming from the large digital platforms, the ACCC will make further recommendations to the Government that address this issue.

Recommendation 3: Changes to search engine and internet browser defaults

Google should provide Australian users of Android devices with the same options being rolled out to existing Android users in Europe; that is, the ability to choose their default search engine and default internet browser from a number of options.

If Google does not introduce similar options for Australian Android users by six months from the date of the Report, the ACCC will submit to the Government that it should consider compelling Google to offer this choice.

Direction for future ACCC work: Data portability

The ACCC will revisit the applicability of the Consumer Data Right to digital platforms in the future. The ACCC considers that data portability is unlikely to have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term. If data portability or interoperability were identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to government, as part of the role envisaged under Recommendation 4.

However, the ACCC recognises that aside from addressing issues of market power, portability of data held by digital platforms may deliver significant benefits to current and potential future markets including through innovation and the development of new services. The ACCC will consider the benefits associated with digital platform data portability in the ordinary course as it considers sectors to which the Consumer Data Right regime may apply in the future.

Chapter 3

Recommendation 4: Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

A specialist digital platforms branch be established within the ACCC to build on and develop expertise in digital markets and the use of algorithms, with the purpose of:

- proactively monitoring and investigating instances of potentially anti-competitive conduct and conduct causing consumer harm by digital platforms, which impact consumers, advertisers or other business users (including news media businesses)
- taking action to enforce competition and consumer laws relating to the conduct of digital platforms
- conducting inquiries and making recommendations to Government to address consumer harm and impediments to the efficient and effective operation of the markets in which digital platforms operate, caused by market failure.

This branch should be empowered by Ministerial direction to hold an extended public inquiry covering a period of at least five years and have the ability to compel relevant information.

Recommendation 5: Inquiry into ad tech services and advertising agencies

The specialist digital platforms branch (as proposed by Recommendation 4) be directed to hold an inquiry into competition for the supply of ad tech services and the supply of online advertising services by advertising and media agencies. Matters to be taken into account should include:

- whether a lack of transparency is impacting the efficient operation of these markets
- the prices charged by suppliers of these services and the share of advertising expenditure they retain (including whether any potential excessive margins are obtained)
- how these services are purchased and sold, including any auction and bidding processes
- the relationship between suppliers and customers of these services, including the extent to which company structures or contractual arrangements limit effective competition
- the impact of consolidation of services on competition.

This inquiry should be empowered by Ministerial direction, have the ability to compel relevant information, and be completed over a period of 18 months.

Chapter 4

Recommendation 6: Process to implement harmonised media regulatory framework

A new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms. This would create a level playing field that promotes competition in Australian media and advertising markets.

The framework should reflect the evolving media landscape and be underpinned by a sound policy rationale based on the functions or impact of the regulated entities. The framework should include the following matters:

- **Underlying principles:** clear platform-neutral guiding principles that are applicable across media formats and platforms, and adaptable to new services, platforms and technologies
- **Extent of regulation:** determination of the appropriate extent of regulation and determining appropriate roles for self-regulation and co-regulation.
- **Content rules:** a nationally-uniform classification scheme to classify or restrict access to content consistently across different delivery formats.
- **Advertising restrictions:** a consistent system of advertising restrictions across all delivery platforms, including online and offline channels.

- **Enforcement:** appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions.

Given the significance of this reform, the ACCC recommends it be approached in stages to ensure that regulatory disparities of immediate concern are promptly addressed.

Chapter 5

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

Designated digital platforms to each implement a code of conduct to govern their relationships with news media businesses. Each platform's code of conduct should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them, and contain at least the following commitments:

- the sharing of data with news media businesses
- the early notification of changes to the ranking or display of news content
- that the digital platform's actions will not impede news media businesses' opportunities to monetise their content appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps
- where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media businesses should be compensated.

The ACMA will publish guidelines regarding how the code should be developed and what should be included in the code. In performing its role under this recommendation, the ACMA shall closely consult with the ACCC.

The ACMA will also designate the digital platforms that will be required to implement a code; review and approve the content of the codes (after consulting news media businesses). The ACMA will enforce the codes and have appropriate investigative and information gathering powers and the capacity to impose sufficiently large sanctions for breaches to act as an effective deterrent. The ACMA will also have the ability to require digital platforms to amend their codes in specific ways, if it considers that the objectives of the code are not being achieved.

Digital platforms will have nine months to develop a code, and will be required to demonstrate that they have consulted fully with news media businesses in drafting their code, and carefully assessed the issues raised by them. The duration of the code will be proposed by the digital platform and subject to approval by the ACMA.

If a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform.

Recommendation 8: Mandatory ACMA take-down code to assist copyright enforcement on digital platforms

A mandatory industry code be implemented to govern the take-down processes of digital platforms operating in Australia. The code will enable rights holders to ensure the effective and timely removal of copyright-protected content from digital platforms.

The mandatory code should be enforced by the ACMA and have appropriate sanctions and penalty provisions. The content of the code should be developed by the ACMA in consultation with industry including rights holders and digital platforms, and include a framework for cooperation between rights holders and digital platforms which provides guidance regarding key issues of concern for stakeholders including:

- **Cooperation framework:** a framework for cooperation between rightsholders and digital platforms to proactively identify and prevent the distribution of copyright-infringing content online, including an appropriate division of the responsibility for monitoring online content for copyright-infringement.

- **Communication:** measures to improve the ease of communications between rightsholders and digital platforms, including requirements for designated agents of digital platforms to be available during Australian business hours as well as appropriate periods where key Australian live events are broadcasted.
- **Timeframes:** reasonable timeframes for the removal of infringing content and processes targeted at the timely removal of particularly time-sensitive content such as live commercial broadcasts.
- **Bulk notifications:** mechanisms for rightsholders to make bulk notifications to address repeated infringements of the same content and to sanction users who commit multiple or regular infringements.
- **Proof of copyright:** measures to streamline the process by which rightsholders may prove copyright ownership, particularly in cases where there is joint-authorship.

Chapter 6

Recommendation 9: Stable and adequate funding for the public broadcasters

Stable and adequate funding should be provided to the ABC and SBS in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society.

Recommendation 10: Grants for local journalism

The Regional and Small Publishers Jobs and Innovation Package should be replaced with a targeted grants program that supports the production of original local and regional journalism, including that related to local government and local courts.

The program should be platform-neutral and administered at arm's length from Government, with eligibility criteria designed by an independent expert committee. Due to its broader scope than the Regional and Small Publishers Jobs and Innovation Package, which provided AU\$20 million per year, the program should provide a greater amount of funding – totalling in the order of AU\$50 million per year.

The Government should review this program after three years of operation to assess its effectiveness and to determine whether it should be expanded to other areas of public interest journalism at risk of under-provision by the Australian commercial media market.

Recommendation 11: Tax settings to encourage philanthropic support for journalism

Tax settings should be amended to establish new categories of charitable purpose and deductible gift recipient (DGR) status for not-for-profit organisations that create, promote or assist the production of public interest journalism.

To be eligible for 'registered charity' and DGR status through these new categories, organisations will need to comply with existing accountability measures overseen by the Australian Charities and Not-for-profits Commission (ACNC). The new charitable purpose and DGR categories should require minimum levels of transparency, impartiality and independence.

For organisations that produce journalism, this should include compliance with existing industry codes such as the Australian Press Council Standards of Practice. In assessing applications for registered charity and DGR status under the new categories, the ACNC and the Australian Tax Office should consider the advice of an independent expert committee.

Recommendation 12: Improving digital media literacy in the community

A Government program be established to fund and certify non-government organisations for the delivery of digital media literacy resources and training based on frameworks currently used by the Online Safety Grants Program and Be Connected program administered by the Office of the eSafety Commissioner. The resources and training should be broadly delivered through community centres, libraries, schools and seniors centres for the benefit of all Australians.

Recommendation 13: Digital media literacy in schools

The Terms of Reference for the review of the Australian Curriculum scheduled for 2020 should include consideration of the approach to digital media literacy education in Australian schools.

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

An independent regulator, such as the ACMA, should be directed to monitor the voluntary initiatives of digital platforms to enable users to identify the reliability, trustworthiness and source of news content featured on their services.

In undertaking this role, the regulator should be empowered to obtain data and information from digital platforms relevant to its inquiries, publicly report on its findings and make recommendations in relation to regulatory action if platforms' voluntary initiatives are ineffective.

Recommendation 15: Digital Platforms Code to counter disinformation

Digital platforms with more than one million monthly active users in Australia should implement an industry code of conduct to govern the handling of complaints about disinformation (inaccurate information created and spread with the intent to cause harm) in relation to news and journalism, or content presented as news and journalism, on their services. Application of the code should be restricted to complaints about disinformation that meet a 'serious public detriment' threshold as defined in the code. The code should also outline actions that constitute suitable responses to complaints, up to and including the take-down of particularly harmful material.

The code should be registered with and enforced by an independent regulator, such as the ACMA, that:

- is given information-gathering powers enabling it to investigate and respond to systemic contraventions of code requirements
- is able to impose sufficiently large sanctions to act as an effective deterrent against code breaches
- provides frequent public reports on the nature, volume and handling of complaints received by digital platforms about disinformation
- reports annually to Government on the efficacy of the code and compliance by digital platforms.

While the code should focus on addressing complaints about disinformation it should also consider appropriate responses to malinformation (information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to democratic processes).

In the event that an acceptable code is not submitted to the regulator within nine months of an announced Government decision on this issue, the regulator should introduce a mandatory industry standard.

The code should be reviewed by the regulator after two years of operation, and the regulator should make recommendations as to whether it should be amended, replaced with an industry standard, or replaced or supplemented with more significant regulation to counter disinformation on digital platforms.

Chapter 7

Recommendation 16: Strengthen protections in the Privacy Act

16(a) Update 'personal information' definition: Update the definition of 'personal information' in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data, and any other online identifiers that may be used identify an individual.

16(b) Strengthen notification requirements: Require all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an overriding legal or public interest reason.

The notice must be concise, transparent, intelligible and easily accessible, written in clear and plain language, provided free of charge, and must clearly set out how the APP entity will collect, use and disclose the consumer's personal information. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user.

To provide consumers with a readily understood and meaningful overview of an APP entity's data practices and as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of multi-layered notifications or the use of standardised icons or phrases.

16(c) Strengthen consent requirements and pro-consumer defaults: Require consent to be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

Valid consent should require a clear affirmative act that is freely given, specific, unambiguous and informed (including about the consequences of providing or withholding consent). This means that any settings for data practices relying on consent must be pre-selected to 'off' and that different purposes of data collection, use or disclosure must not be bundled. Where the personal information of children is collected, consents to collect the personal information of children must be obtained from the child's guardian.

It may also be appropriate for the consent requirements to be implemented along with measures to minimise consent fatigue, such as not requiring consent when personal information is processed in accordance with a contract to which the consumer is a party, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers' comprehension and decision-making.

16(d) Enable the erasure of personal information: Require APP entities to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

16(e) Introduce direct rights of action for individuals: Give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy under the Privacy Act.

16(f) Higher penalties for breach of the Privacy Act: Increase the penalties for an interference with privacy under the Privacy Act to mirror the increased penalties for breaches of the Australian Consumer Law.

Recommendation 17: Broader reform of Australian privacy law

Broader reform of Australian privacy regime to ensure it continues to effectively protect consumers' personal information in light of the increasing volume and scope of data collection in the digital economy.

This reform should have regard to the following issues:

1. **Objectives:** whether the objectives of the Privacy Act should place greater emphasis on privacy protections for consumers including protection against misuse of data and empowering consumers to make informed choices.

2. **Scope:** whether the Privacy Act should apply to some of the entities which are currently exempt (for example small businesses, employers, registered political parties, etc.).
3. **Higher standard of protections:** whether the Privacy Act should set a higher standard of privacy protection, such as by requiring all use and disclosure of personal information to be by fair and lawful means.
4. **Inferred information:** whether the Privacy Act should offer protections for inferred information, particularly where inferred information includes sensitive information about an individual's health, religious beliefs, political affiliations.
5. **De-identified information:** whether there should be protections or standards for de-identification, anonymisation and pseudonymisation of personal information to address the growing risks of re-identification as datasets are combined and data analytics technologies become more advanced.
6. **Overseas data flows:** whether the Privacy Act should be revised such that it could be considered by the European Commission to offer 'an adequate level of data protection' to facilitate the flow of information to and from overseas jurisdictions such as the EU.
7. **Third-party certification:** whether an independent certification scheme should be introduced.

Recommendation 18: OAIC privacy code for digital platforms

An enforceable code of practice developed by the OAIC, in consultation with industry stakeholders, to enable proactive and targeted regulation of digital platforms' data practices (DP Privacy Code). The code should apply to all digital platforms supplying online search, social media, and content aggregation services to Australian consumers and which meet an objective threshold regarding the collection of Australian consumers' personal information.

The DP Privacy Code should be enforced by the OAIC and accompanied by the same penalties as are applicable to an interference with privacy under the Privacy Act. The ACCC should also be involved in developing the DP Privacy Code in its role as the competition and consumer regulator.

The DP Privacy Code should contain provisions targeting particular issues arising from data practices of digital platforms, such as:

1. **Information requirements:** requirements to provide and maintain multi-layered notices regarding key areas of concern and interest for consumers. The first layer of this notice should contain a concise overview followed by more detailed information in subsequent layers. The final layer of the notice should contain all relevant information that details how a consumer's data may be collected, used, disclosed and shared by the digital platform, as well as the name and contact details for each third party to whom personal information may be disclosed.
2. **Consent requirements:** requirements to provide consumers with specific, opt-in controls for any data collection that is for a purpose other than the purpose of supplying the core consumer-facing service and, where consents relate to the collection of children's personal information, additional requirements to verify that consent is given or authorised by the child's guardian.
3. **Opt-out controls:** requirements to give consumers the ability to select global opt-outs or opt-ins, such as collecting personal information for online profiling purposes or sharing of personal information with third parties for targeted advertising purposes.
4. **Children's data:** additional restrictions on the collection, use or disclosure of children's personal information for targeted advertising or online profiling purposes and requirements to minimise the collection, use and disclosure of children's personal information.
5. **Information security:** requirements to maintain adequate information security management systems in accordance with accepted international standards.
6. **Retention period:** requirements to establish a time period for the retention of any personal information collected or obtained that is not required for providing the core consumer-facing service.
7. **Complaints-handling:** requirements to establish effective and timely mechanisms to address consumer complaints.

The ACCC considers that this recommendation could align with the Government's March 2019 announcement to create a legislated code applying to social media and online platforms which trade in personal information.

Recommendation 19: Statutory tort for serious invasions of privacy

Introduce a statutory cause of action for serious invasions of privacy, as recommended by the Australian Law Reform Commission (ALRC). This cause of action provides protection for individuals against serious invasions of privacy that may not be captured within the scope of the Privacy Act. The cause of action should require privacy to be balanced against other public interests, such as freedom of expression and freedom of the media. This statutory cause of action will increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

Recommendation 20: Prohibition against unfair contract terms

Amend the *Competition and Consumer Act 2010* so that unfair contract terms are prohibited (not just voidable). This would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract.

Recommendation 21: Prohibition on certain unfair trading practices

Amend the *Competition and Consumer Act 2010* to include a prohibition on certain unfair trading practices. The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.

The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

Chapter 8

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.

Ongoing investigations and ACCC action under the Competition and Consumer Act

The ACCC is investigating particular alleged conduct of certain digital platforms under the *Competition and Consumer Act 2010 (CCA)*.

The ACCC's continuing investigations include:

- whether access restrictions imposed by a digital platform on a third-party app developer raise issues under section 46 of the CCA
- whether representations made by Google to some users about the control users have over Google's collection of location data, raise issues under the ACL
- whether representations by Google about its privacy policy, and the level of disclosure about subsequent privacy policy changes that enabled Google to combine or match different sets of user data, raise issues under the ACL
- whether representations made by Facebook (and/or its related entities) in relation to the nature of its services and the scope of its terms and conditions, including terms and conditions that allowed user data to be shared with third parties, raise issues under the ACL
- whether terms of use and privacy policies used by Facebook (and/or its related entities) contain unfair contract terms.

As is clear from the descriptions above, most of these investigations concern alleged contraventions of the ACL. Given the nature of the issues being investigated, the potential impact on the significant numbers of Australian consumers who use Google and Facebook's services and the significant industry and community interest in the matters being considered in the Inquiry, the ACCC considers it to be in the public interest to disclose these investigations. The investigations are continuing, and the ACCC has not formed a view on the issues being investigated. The ACCC expects to conclude the investigations later in the year and will not make further comment until that time.

The ACCC will also investigate any other conduct of digital platforms that raises concerns under the CCA and consider whether it is appropriate for the ACCC to take enforcement action.



01

1. The rise of digital platforms



Key findings

- There has been a rapid growth of digital platforms in Australia. Platforms operated by Google and Facebook are an integral part of life for most Australians.
- Digital platforms, and in particular Google and Facebook, have succeeded in attracting significant advertising expenditure due to their ability to offer highly targeted advertising, based on data they collect from users, and because of the large amount of time consumers spend on these platforms.
- Google and Facebook receive nearly two thirds of all online advertising revenue in Australia¹² and this share is growing.
- Digital platforms and consumers provide benefits to one another: consumers derive value from platforms' services while platforms derive value from consumers' attention and data.
- Digital platforms impact both the production and consumption of news and journalism in Australia, through their roles as:
 - platforms for the distribution of news stories to Australian consumers
 - rival suppliers of online advertising opportunities.

This chapter provides an introduction to the more substantive analysis in the rest of the Report and is structured as follows:

Section 1.1 describes the characteristics of digital platforms.

Section 1.2 examines digital platforms' rapid increase in size and profitability.

Section 1.3 explores the relationship between platforms and consumers, and the value they provide to one another.

Section 1.4 briefly explores the growing influence of digital platforms on the consumption of news and journalism in Australia.

Section 1.5 outlines the significant disruptions that Australian media and advertising markets have experienced from digital platforms.

As the purpose of this chapter is to serve as an introduction to the more substantive analysis undertaken in the rest of the report, it does not include any recommendations.

¹² Google and Facebook sell advertising on their owned and operated platforms, as well as on other websites and applications. Revenue received by Google and Facebook from the sale of advertising on other websites and applications is shared with owners of the properties where those advertisements appear. This analysis is based on the revenue that Google and Facebook keep after these revenue splits as well as the revenue Google and Facebook receive for the sale of advertising on their own platforms. Additional detail about how the ACCC has estimated market shares in advertising markets is set out in chapter 2 under 'Scope of the ACCC's market power assessment'.

1.1 What are digital platforms?

Key findings

- The digital platforms covered by this Inquiry are search engines, social media platforms and digital content aggregation platforms.
- Google and Facebook are the two largest digital platforms in Australia and are the most visited websites/apps. These two platforms are the major focus of this Inquiry.

Digital platforms are applications that serve multiple groups of users at once, providing value to each group based on the presence of other users. As explored in chapter 2, the economic concept of ‘multi-sided platforms’ is used to describe and explain how digital platforms function. The multiple sides of these platforms consist of groups of individuals who use the platforms for different reasons. For example, one side of a platform may consist of individuals who use its search services to find content or products, while another side may consist of businesses wanting to advertise to targeted groups of those individuals.

Using different types of digital platforms, a user can communicate with other users, find and access content or services, transact with merchant businesses, or produce and publish their own user-generated content. At the same time, content publishers and advertisers can use digital platforms to easily reach online audiences. These interactions are discussed further in chapter 2.

Types of platforms that are the focus of this Inquiry

The Terms of Reference for this Inquiry direct the ACCC to consider the impact of three types of platforms on the media and advertising services market: ‘digital search engines’, ‘social media platforms’ and ‘other digital content aggregation platforms’.

The types of platforms mentioned in the Terms of Reference can be broadly defined in the following ways:

- **Search engines:** software systems designed to search for information on the World Wide Web, generally returning a curated, ranked set of links to content websites. Search engines operate in an automated fashion using sophisticated algorithms to collect information (commonly known as ‘crawling’) and to provide search results. Examples include Google Search, Bing, Yahoo! and DuckDuckGo.
- **Social media platforms:** online services that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users (including professional publishers). Social media platforms generally display content for consumption as linear ‘feeds’, curated by algorithms or displayed chronologically. Examples include Facebook, Instagram and Snapchat. Platforms may also offer additional functions including instant messaging services.
- **Digital content aggregation platforms:** online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product. Those specialising in journalism – ‘news aggregators’ – are the most relevant example for the purposes of this Inquiry. Users may be able to customise, filter or search their aggregation results. Examples include Google News, Apple News, and Flipboard.

This Report does not focus on online shopping and e-commerce platforms such as Amazon and eBay.

Some of the major digital platforms offer combinations of services. For example:

- while Facebook’s primary consumer-facing social media service allows communication between networked users, it now includes online marketplaces for goods and jobs
- while Google’s search engine is its primary service, it is linked to other services including mapping, email and cloud storage

- while Snapchat began as primarily a medium for creating and privately sharing photo-based content with other networked users, it later expanded to include public content services.

The services provided by digital platforms are constantly changing due to technological advancement and shifts in consumer preferences. This constant change and expansion encourages the digital platforms' future growth, which drives their market value.

Today's major digital platforms

As businesses, the leading digital platforms are some of the world's most valuable listed companies. As at 17 June 2019, Facebook had a market capitalisation of US\$517.6 billion¹³ and Google's parent company Alphabet had a market capitalisation of US\$754.2 billion.¹⁴ These businesses have built this market value through extremely rapid growth (as described in section 1.2 below) and investors' related expectation that this growth will continue.

The most widely used digital platforms in Australia are also those with globally dominant positions. Among search engines, in 2018 Google Search accounted for 90 per cent of search traffic originating from Australian desktop computer users¹⁵ and over 98 per cent of search traffic from Australian mobile users.¹⁶

Among social media platforms, Facebook has by far the largest user base in Australia, with approximately 17 million users accessing its platform on a monthly basis in 2019.¹⁷ Assuming the users are all adults¹⁸, this equates to approximately 84 per cent of Australian adults accessing the Facebook platform at least monthly.¹⁹ Instagram (owned by Facebook) is the next most popular social media platform with approximately 11 million monthly users (see table 1.1 for reported monthly users of major digital platforms), equating to approximately 54 per cent of Australian adults.

News aggregators are less widely used in Australia than search or social media platforms, but are still used by a significant proportion of the population. Survey data indicates that Apple News had an approximate unique Australian audience of 5.5 million in February 2019 while Google News had an approximate unique Australian audience of 1.5 million in the same month.²⁰

13 Nasdaq, [Facebook, Inc. Class A Common Stock \(FB\) Quote & Summary Data](#), accessed 17 June 2019.

14 Nasdaq, [Alphabet Inc. Class A Common Stock \(GOOGL\) Quote & Summary Data](#), accessed 17 June 2019.

15 StatCounter, [Desktop Search Engine Market Share Australia](#), accessed 24 April 2019.

16 StatCounter, [Mobile Search Engine Market Share Australia](#), accessed 24 April 2019.

17 Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience.

18 Defined as over 13 years old, which is the minimum age Facebook requires for its users. See Facebook, [How do I report a child under the age of 13](#).

19 Based on the Australian Bureau of Statistics, [Australian Demographic Statistics](#), Sep 2018, Cat no. 3101.0, Table 59, accessed 2 May 2019.

20 Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience.

1.2 The rise of the digital platforms

Key findings

- Digital platforms generate their revenue primarily from advertising, generally through collecting and harnessing user data and capturing user attention. User attention is at least as important as user data in monetising services.
- Digital platforms such as Google and Facebook have a significant presence in various aspects of the online advertising supply chain.
- The growth of today's leading digital platforms can be explained by a number of distinct contributing factors, including:
 - the transition of communications to the online world, and the rapid increase in the number of internet users in the past two decades
 - the innovative, user-friendly services the platforms provide
 - the role of network effects in building scale in platform user bases
 - the ability of digital platforms to collect and harness user data for advertising purposes
 - the vertical and horizontal integration of platform businesses.

Fifteen years ago, the most popular digital platforms at the focus of this Inquiry were at relatively early stages of development, or did not yet exist (table 1.1).

- Facebook launched its services in 2004 and started showing advertisements in 2007 (it had 2.3 billion monthly active users worldwide in December 2018, and earned US\$16 billion in advertising revenue in the fourth quarter of 2018).²¹
- Google became a public company in 2004, when it was already the most widely used search engine in the world, and was handling around 200 million queries per day. The number of queries it receives in a given year is now estimated to be in the trillions.²²

Table 1.1 Australian usage of selected major digital platforms

Digital platform	Year of launch	Unique monthly audience in Australia (February 2019)
Google Search	1997	19.2 million
Google News	2002	1.5 million
Facebook	2004	17.3 million
YouTube	2005	17.6 million
Instagram	2010	11.2 million
Snapchat	2011	5.5 million
Twitter	2006	7.2 million
Bing	2009	6.0 million
LinkedIn	2003	9.1 million
Apple News	2015	5.5 million

Source: Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience.

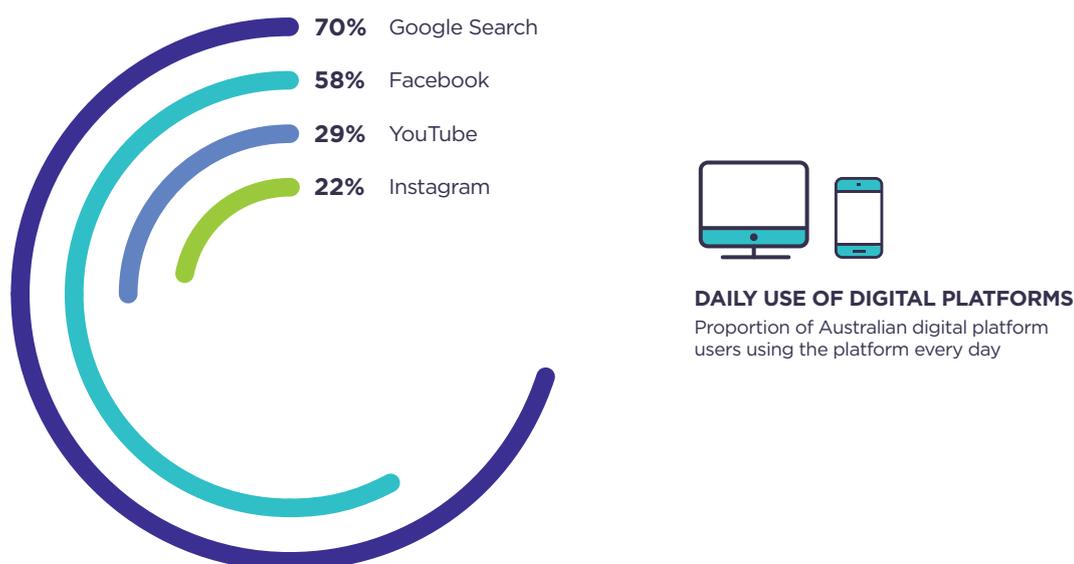
21 Facebook, [Facebook Unveils Facebook Ads](#), accessed 22 October 2018; Facebook, [Facebook Q4 2018 Results](#), accessed 24 April 2019.

22 Google, [Prospectus](#), 18 August 2004, accessed 22 October 2018; S Olsen, [Google files for unusual \\$2.7 billion IPO](#), CNET, 30 April 2004, accessed 15 November 2018; D Sullivan, [Google now handles at least 2 trillion searches per year](#), Search Engine Land, 24 May 2016, accessed 15 November 2018.

These digital platforms have now become a part of daily life for many Australians. A 2018 Roy Morgan Research survey commissioned by the ACCC (**the ACCC consumer survey**) shows that high proportions of the 4 000 Australian digital platform users surveyed use these services daily, as set out in figure 1.1 below.

Not only are these digital platforms used daily, they are used for significant amounts of time each day. Facebook’s 17 million Australian monthly users spend an average of 31 minutes a day on Facebook. Australian Instagram users spend an average of seven minutes a day and Australian Google users (excluding YouTube) spend an average of 23 minutes a day on these respective platforms.²³

Figure 1.1 Digital Platform Users: Daily use of digital platforms in 2018



Source: Roy Morgan Research, Consumer Views and Behaviours on Digital Platforms, November 2018, p. 11.

This Inquiry has identified a number of distinct factors that have contributed to the extremely rapid and widespread growth of the digital platforms. These include:

- the rapid growth of internet use in Australia and overseas
- the innovative, high-quality and popular products digital platforms supply to users
- the complementary benefits that digital platforms provide to various groups of internet users
- the way that successful digital platforms can increase their value to users through the presence of other users ('network effects', discussed in chapter 2)
- the way that successful digital platforms have been able to harness their large user bases to generate revenue through their supply of advertising services
- the acquisition and ownership of multiple digital platforms and related services by the same companies, which may provide business efficiencies (that is 'vertical and horizontal integration').

The sections below provide some more detail about each of these contributing factors.

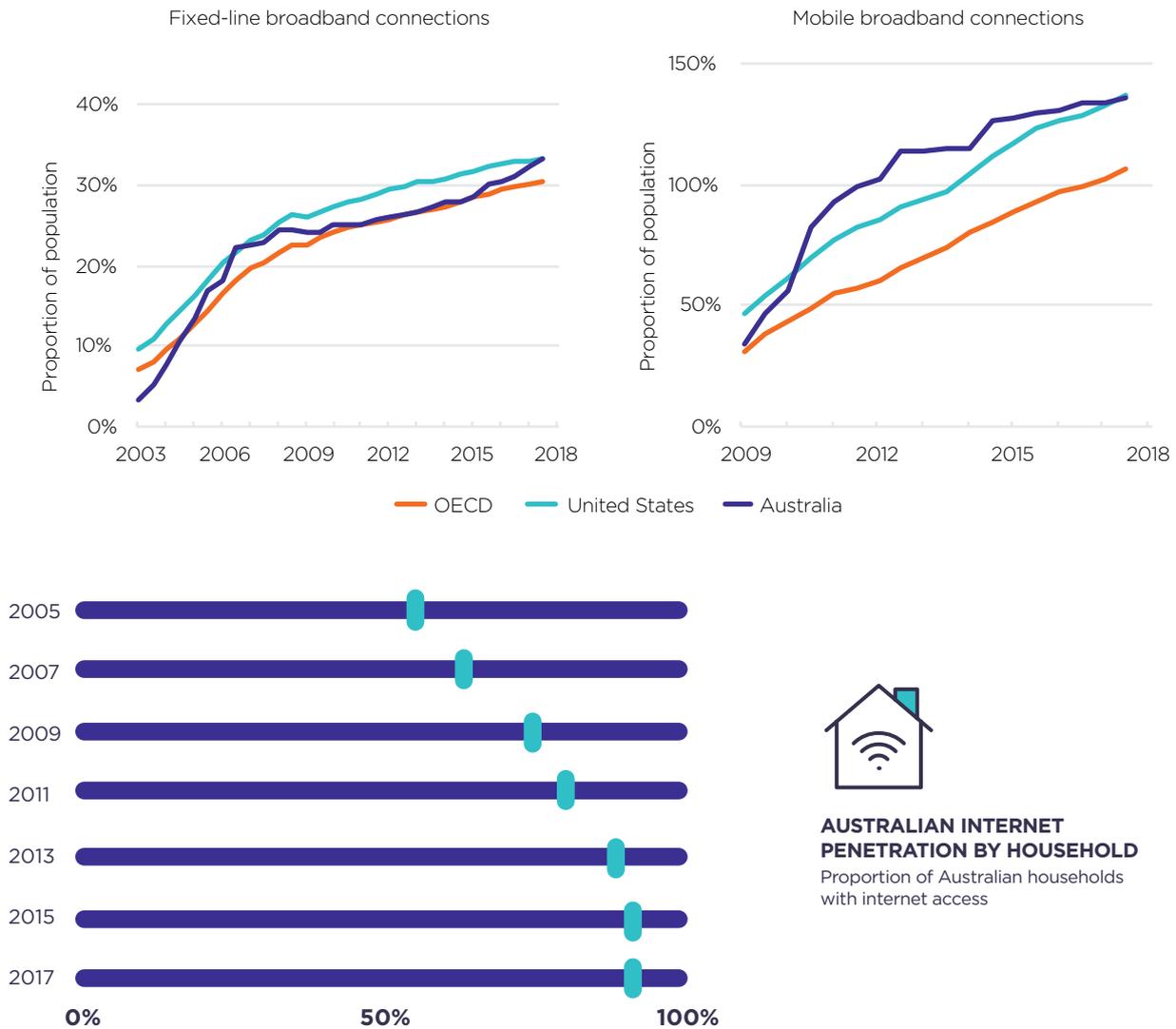
Moving online

The number of internet users has grown rapidly over the past 15 years in Australia, in the United States (where most of today’s major digital platforms started) and across the world (figure 1.2). In particular, the dramatic increase in smartphone usage during the past decade means that the internet is constantly accessible, further changing consumers’ internet usage habits.

²³ Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Time Spent Share.

Today, there are around four times more mobile handset subscribers than fixed internet subscribers in Australia²⁴, and by December 2018 more searches on Google Search were being undertaken on mobile devices than on desktop computers.²⁵

Figure 1.2 Broadband penetration rates in Australia and worldwide



Sources: OECD, [Broadband Subscriptions](#), 28 February 2019, accessed 10 April 2019; Australian Bureau of Statistics, [Household Use of Information Technology](#), 8 February 2010 and 28 March 2018, accessed 10 April 2019.

These trends have meant that the number of potential digital platform users, and the potential frequency of their activity, has grown exponentially. The interaction between higher broadband penetration and the growth of digital platforms has not been one-way, as the benefits that digital platforms provide to users have encouraged more common and more frequent internet use.

The movement of consumer and business activity to the online environment created an opportunity for new software systems and applications to help users fully realise the potential of the internet. Digital platforms made use of this opportunity by devising and implementing online services that provide significant benefits to different groups of users, discussed further in section 1.3.

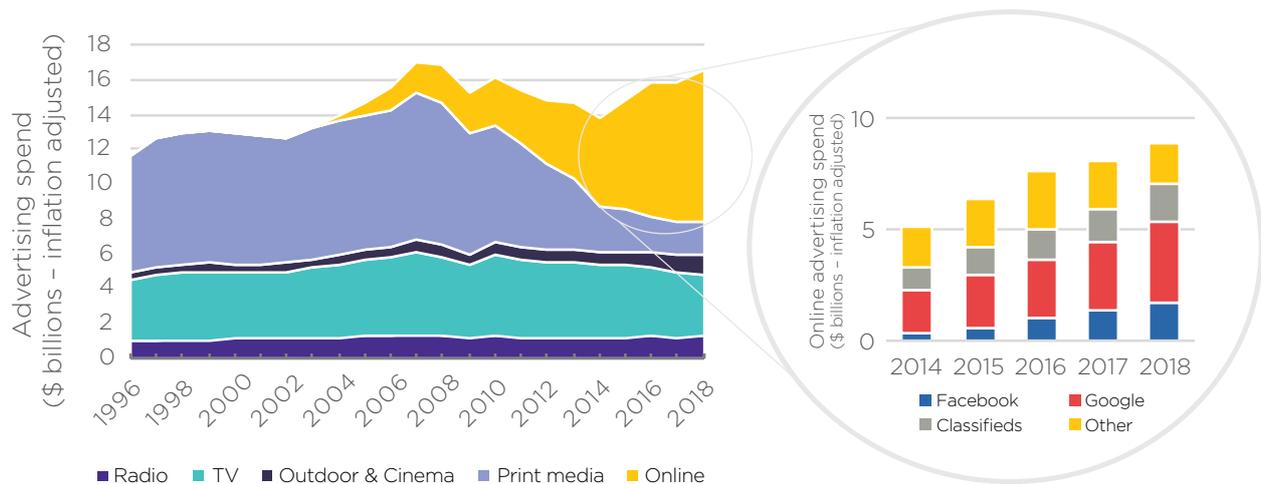
24 Australian Communications and Media Authority, [Communications Report 2017-18](#), 9 January 2019, p. 8.

25 Information provided to the ACCC.

While providing valuable services to consumers has enabled digital platforms to build scale and attract large user bases, that scale does not, in itself, explain their growth as profitable businesses. It is the ability of digital platforms to generate revenue through advertising that has made certain digital platforms extremely profitable. Advertising allows digital platforms to make use of their scale, as advertisers value access to larger user bases (see ‘cross-side network effects’ discussed in chapter 2). Importantly, the major digital platforms can offer highly-targeted advertising by collecting and harnessing personal data from their users.

From 2012 to 2018, the proportion of total Australian advertising spend allocated to online media has increased from 25 per cent to 53 per cent (figure 1.3).²⁶

Figure 1.3 Advertising expenditure by media format and digital platform, adjusted for inflation



Note: Amounts adjusted to 2018 dollars.

Source: Commercial Economic Advisory Service of Australia, [Advertising Expenditure in Main Media, 1996 – 2018](#)²⁷, accessed 11 April 2019. ACCC Analysis. Data provided to the Inquiry.

While not all online advertising revenue goes to digital platforms, a large proportion has flowed to Google and Facebook in particular. The total online advertising market in Australia has grown by AU \$3.7 billion between 2014 and 2018, and Google and Facebook account for 84 per cent of that growth. If classified advertisements are excluded from this analysis, Google and Facebook account for 102 per cent of the total market increase from 2014 to 2018.²⁸

Google is estimated to have accounted for 42 per cent of online advertising spend in 2018, with Facebook accounting for 19 per cent. If online classifieds are excluded, this increases to 51 per cent for Google and 24 per cent for Facebook.²⁹ The role of digital platforms in the advertising market, including their integration in the advertising supply chain, is discussed in more detail in chapter 3.

Several of the digital platforms relevant to this Inquiry have also benefited from an increasing degree of horizontal and vertical integration, acquiring multiple businesses. These acquisitions and their effects are discussed further in chapter 2.

²⁶ Commercial Economic Advisory Service of Australia (CEASA), [Advertising Expenditure in Main Media, 1996 – 2018](#), accessed 11 April 2019. Data provided to the Inquiry.

²⁷ The print media category of the Commercial Economic Advisory Service of Australia (CEASA) data includes newspapers, magazines and print classified directories such as the Yellow and White Pages. The majority of print media spend goes to newspapers. Advertising spend on print classified directories is not included after 2013. In 2013 the advertising spend on print classified directories was \$0.7 billion (nominal). Amounts for 1998-2000 and 2003-05 have been interpolated from CEASA data in 1997, 2001-02 and 2006.

²⁸ Facebook and Google account for over 100 per cent of total market increase as advertising revenue for other sites and apps fell by 2 per cent from 2014 to 2018.

²⁹ Based on Google Australia Pty Ltd financial statements and reports for the year ending 31 December 2018 lodged with ASIC and information provided to the ACCC.

1.3 Value exchange of consumers and digital platforms

Key findings

- Digital platforms and consumers provide benefits to one another: consumers receive benefits from the use of innovative digital services while platforms derive value from consumers' attention and data. However, estimating the benefits and costs to consumers of digital platforms is challenging as monetary costs alone do not fully capture these values.
- Attempts to estimate monetary benefits of digital platforms to consumers have adopted various methodologies. Estimates can vary widely and are potentially subject to error. For example, one study estimated that the median willingness to pay for Facebook for one month is US\$5, whereas the median amount that users require as compensation for losing access to Facebook for one month is US\$87.50.
- There is no precise measure of the monetary value digital platforms derive from consumers' attention and data. Various methodologies have been adopted in attempts to measure this value, including revenue per user. The ACCC estimates that the average monthly revenue for Facebook per Australian user was approximately US\$6 in 2018.³⁰

Value of platforms to consumers

Digital platforms offer innovative and popular services to consumers that have in many cases revolutionised the way consumers communicate with each other, access news and information and interact with businesses.

The value that consumers derive from digital platforms is indicated not only by the platforms' significant audience size but also by the time consumers spend on these platforms (discussed earlier in this chapter at section 1.2). Consumers are also attracted by the innovations in digital products and services offered by the platforms.

- **Social media platforms** allow users to participate in social networking, communicate with other users, and share and consume content generated by other users.³¹ Some social media platforms have made it possible for users located around the world to communicate seamlessly. A recent survey noted that a key incentive to use Facebook was to connect with family and friends, and to alleviate feelings of isolation and loneliness.³²
- **Search engines** can make it easier and cheaper for users to find information within the vast number of web pages on the internet,³³ allowing consumers to find relevant information more often and more quickly.³⁴
- **Content or news aggregators** collect and group information from disparate sources, making it easier for consumers to access a collated, curated product.

Submissions from stakeholders also noted that consumers obtain numerous benefits from digital platforms' services, including a useful resource for gathering information and exchanging ideas,³⁵ access to a vast array of online media with greater convenience and personalisation³⁶, and new distribution, marketing and revenue generating channels for Australian businesses and content creators.³⁷

30 This figure is based on the values presented in figure 1.4. It adopts the annual Australian ad revenue per user for Facebook in 2018 (US\$72.8 per year) and divides this number by 12 to get an average monthly value (i.e. \$72.8 divided by 12 is approximately equal to \$6).

31 Monopolkommission, [Competition Policy: The Challenge of Digital Markets](#), 2015, p. 70.

32 D Lupton, [Why are Australians still using Facebook](#), *The Conversation*, 7 February 2019, accessed 25 April 2019.

33 Monopolkommission, [Competition Policy: The Challenge of Digital Markets](#), 2015, p. 51.

34 For example, one study shows that an online search takes less time than an offline search, and that the quality of the search results for common online search queries is not compromised by using online search. See Y Chen, G Jeon and Y Kim, [A day without a search engine: an experimental study of online and offline searches](#), *Experimental Economics*, 17 (2014), p. 1.

35 Consumer Policy Research Centre, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018, p. 2.

36 Australian Communications and Media Authority, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018, p. 6.

37 Digital Industries Group Incorporated, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018, p. 1.

The internet has lowered a range of economic costs, such as the cost of creating and distributing certain products and services, of acquiring and providing information, and of collecting and using data on consumer preferences and behaviour.³⁸ More broadly, digital platforms can benefit consumers through:

- increased access to information, including news and news commentary³⁹
- allowing access to benefits from increased supplier competition, including from international firms, leading to lower prices
- better matching of purchases with consumer preferences through:
 - increased access to information on the quality of products and on the firms that supply them⁴⁰
 - more choice or variety of products
 - more personalised products, services or content.⁴¹

Estimating the benefits to consumers of digital platforms

Despite the widespread use of digital platforms in our society, estimating the benefits to consumers is extremely challenging. Researchers have used various methods for estimating consumer benefits. While these estimates provide some guidance on the consumer benefits from digital platforms, they vary widely and are subject to error.

A key difficulty in estimating the consumer benefits of digital platforms is that, in many cases, consumers do not have to pay to use them. Some researchers have attempted to estimate the benefits to consumers of digital platform products and services by estimating the willingness to pay (WTP) or willingness to accept compensation (WTA) for these services. The WTP is the maximum amount a consumer is willing to pay for a product or service, and the WTA is the minimum amount that a consumer requires as compensation for losing access to a product or service. As such, the WTP and WTA can provide an indication of the benefit of these products and services to consumers in monetary terms.

Typically, the WTP and WTA are estimated through consumer surveys. In a 2019 study in the US⁴², survey participants were asked to consider giving up access to different types of services. These services covered the eight most widely used applications and websites. The researchers found that 50 per cent of survey participants required at least US\$17 530 to give up access to all search engines for a year (see table 1.2). Similarly, 50 per cent of participants required at least US\$322 dollars to give up all social media, and 50 per cent of participants required at least US\$155 to give up all messaging services.

38 J Levin, [The Economics of Internet Markets](#), 15 January 2012, p. 1.

39 For example see Y Chen, G Jeon and Y Kim, [A day without a search engine: an experimental study of online and offline searches](#), *Experimental Economics*, 17 (2014).

40 Productivity Commission, [Digital disruption: what do governments need to do?](#), June 2016, p. 35.

41 J Levin, [The Economics of Internet Markets](#), 15 January 2012, p. 2.

42 E Brynjolfsson, A Collis and F Eggers, [Using massive online choice experiments to measure changes in well-being](#), *PNAS*, 116 (2019), p. 7251.

Table 1.2 Estimates of the willingness to accept compensation for loss of service by service type

Service type	Median WTA per year 2017, US\$
Search engines	\$17,530
Email	\$8,414
Maps	\$3,648
Video	\$1,173
E-commerce	\$842
Social media	\$322
Messaging	\$155
Music	\$168

Source: E Brynjolfsson, A Collis and F Eggers, [Using massive online choice experiments to measure changes in well-being](#), PNAS, 116 (2019).

A number of international papers present median and mean estimates of the WTA for particular services such as Facebook and Google Search. Some of these papers estimate the WTA for a month while others estimate it for a year. The 2019 US study mentioned above found that the median WTA for Facebook for one month was US\$48.49 in 2016 and US\$37.76 in 2017.⁴³ In contrast, a UK report found that the median WTA for Facebook for one month was US\$87.50⁴⁴. For Google Search, studies have found that: 52 per cent of the UK population would not give up access to Google Search for a month for £5⁴⁵, and that the average WTA to give up Google Search for one year for Singaporean and New Zealand internet users was SG\$190⁴⁶ and NZ\$190⁴⁷ respectively.

There is, however, some debate over the reliability of WTA and WTP survey results as estimates of consumer benefits. This has stemmed in part from the significant disparities observed between WTP and WTA survey responses for social media. One study found that the median WTP for Facebook for one month was US\$5, whereas the median WTA was US\$87.50 (see table 1.3 below).⁴⁸

Table 1.3 Willingness to pay vs. willingness to accept compensation, US\$ per month

	Median WTP	Mean WTP	Median WTA	Mean WTA
Facebook	\$5.00	\$16.99	\$87.50	\$89.17
Instagram	\$5.00	\$21.67	\$100.00	\$102.60
Snapchat	\$5.00	\$24.92	\$100.00	\$106.20
WhatsApp	\$10.00	\$34.90	\$100.00	\$101.16
Twitter	\$5.00	\$19.94	\$100.00	\$104.18

Source: C Sunstein, [Valuing Facebook](#), Behavioural Public Policy, 2018.

43 E Brynjolfsson, A Collis and F Eggers, [Using massive online choice experiments to measure changes in well-being](#), PNAS, 116 (2019), p. 7251.

44 C Sunstein, [Valuing Facebook](#), Behavioural Public Policy, 2018, p. 4.

45 Public First, [Google's Impact In The UK: At Home, At School, At Work](#), 2018, p. 61.

46 AlphaBeta, [Google Economic Impact Singapore 2015](#), 2017, p. 37.

47 AlphaBeta, [Google Economic and Social Impact New Zealand](#), 2017, p. 39.

48 C Sunstein, [Valuing Facebook](#), Behavioural Public Policy, 2018, p. 4. One possible explanation for the low median WTP, given by the author, was that people were giving protest answers that signalled their opposition to being asked to pay for something they previously bore no monetary cost for. Another explanation provided was that social media is a good that people use, but that they also consider, on reflection, to be useless or valueless.

These are international studies and it is unclear whether they reflect the value of these services to Australians. However, assuming Australian consumers have similar valuations, the value of Facebook to Australian consumers would likely exceed AU\$1 billion per year.⁴⁹ Again, assuming Australian consumers have similar valuations to these international studies, the value of Google Search to Australian consumers could be in the vicinity of AU\$3.5 billion per year.⁵⁰ However, as noted above, these estimates are potentially subject to significant error.

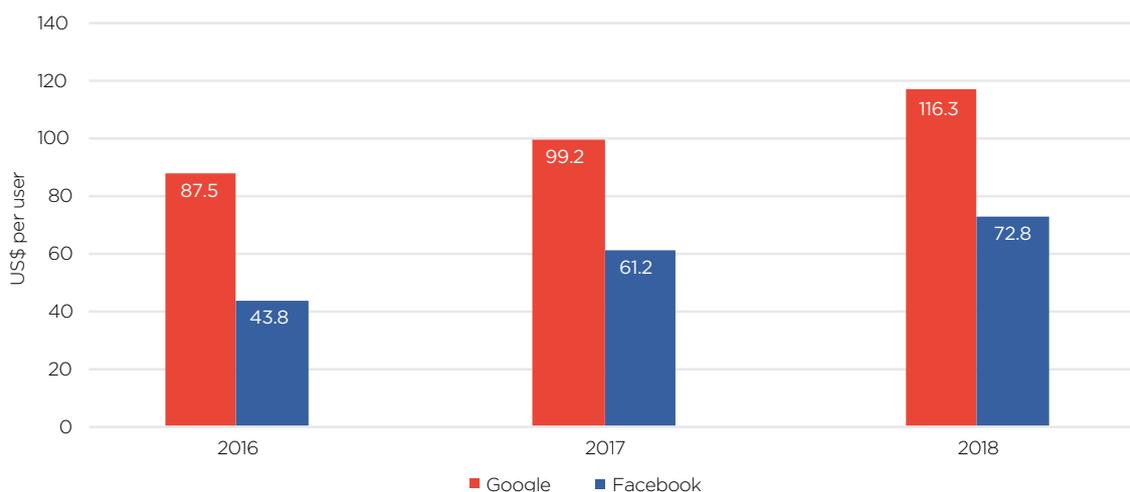
Value that consumers bring to platforms

As with measuring the value of digital platforms to consumers, there is no precise measure for the value that consumers provide to digital platforms. However, a number of methodologies have been used in attempting to measure consumer value.⁵¹

Annual revenue generated per user (ARPU) is one such measure. For businesses that receive a large amount of their revenue from online advertising, ARPU provides a potential metric to measure relative success and can help demonstrate the value that digital platforms are able to derive from consumers spending time using their services.⁵²

Figure 1.4 below plots the average Australian advertising revenue per monthly active user for Facebook⁵³ and Google⁵⁴, using the advertising revenue figures and monthly active users for each digital platform.⁵⁵

Figure 1.4 Annual Australian ad revenue per user for Google Search and Facebook



Source: Google Australia Pty Ltd financial statements and reports for the year ending 31 December 2018 lodged with ASIC, and information provided to the ACCC. Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience. Note: calculations based on yearly Australian revenue in US\$ and number of Australian monthly active users in December of each year.

49 This figure is based on 'back-of-the-envelope' calculations that assume Facebook has 17 million active users in Australia for each month in the year, and that the benefit to each active user of Facebook for each month is AU\$5. The \$1 billion value is then calculated as 17 million users multiplied by the \$5 consumer benefit multiplied by 12 months (i.e. 17 million x \$ 5 x 12 is approximately \$1 billion).

50 This figure is based on 'back-of-the-envelope' calculations that assume Google Search has 19 million active users in Australia each year, and that the benefit to each active user of Google Search for each year is AU\$190. The \$3.5 billion value is then calculated as 19 million users multiplied by the \$190 consumer benefit (i.e. 19 million x \$190 is approximately \$3.5 billion).

51 See, for example: OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220 (2013), which examined methodologies for measuring the value of consumer data.

52 T Louis, 'How much is a user worth,' *Forbes*, 31 August 2013, accessed 25 April 2019.

53 Based on information provided to the ACCC.

54 Based on Google Australia Pty Ltd Financial statements and reports for the year ending 31 December 2018 lodged with ASIC and information provided to the ACCC.

55 The revenue figures for Facebook incorporate all Facebook products, including Instagram.

These types of measurements provide an indication of the value that an Australian consumer provides to a platform.

The ACCC notes that the value of consumers to digital platforms comes from both the time spent on the platform (attention) and the data obtained which enables the platforms to sell targeted advertising opportunities. ARPU does not distinguish between the value derived from attention and that derived from data, so it does not by itself measure the value of user data. However, it is clear that user data forms a significant value to digital platforms (as it is highly valued by advertisers)⁵⁶, so a significant portion of the value of consumers to digital platforms is likely to come from their user data.

Other benefits and costs to consumers

Attempting to calculate the monetary worth of the relationship between digital platforms and consumers can assist in understanding the value each represents to the other. However, focusing on the monetary values described previously in this section may overlook benefits and harms not captured by these estimates, resulting in an incomplete picture of the benefits and costs. The OECD, in its paper examining methodologies for measuring the value of personal data, stressed that: 'Focusing only on methodologies of monetary valuation [that emerge from market transactions] does not capture the full social and economic benefits and costs of personal data'.⁵⁷

The ACCC notes that some of the harms suffered by consumers – and, conversely, the benefits they derive – are not expressly captured in the monetary amounts discussed above. This is partly because some of the benefits and costs are associated with individual rights, for which a value is difficult to assign. Additionally, the ability to store data indefinitely, to combine it with other data and to apply analytics to the data can yield great social benefits that may not be considered by the consumer at the time of the transaction. Conversely, the indefinite capture of insights into an individual's trends, movements, interests and activities may result in harms that a consumer may not or could not have anticipated when the data was initially collected, nor during the time they use a digital platform's service. Potential consumer harm is discussed in depth in chapter 7.

1.4 The role of digital platforms in news and journalism

Key findings

- Digital platforms have significant influence on the consumption of journalism in Australia. These platforms are extremely popular avenues for accessing news, and have the ability to select and rank the news stories and sources they provide to consumers.

At the time of writing this Report, digital platforms do not directly produce journalism within Australia. However, they do perform a number of key roles in the supply and consumption of this content in Australia, including:

- as platforms for publication and marketing for media businesses, providing new ways for media companies to reach audiences, and thereby monetise online content
- as a source of collated and curated news for a significant number of Australians
- as a rival supplier of advertising opportunities, placing increasing financial pressure on the production of journalism.

The Inquiry has considered the implications of the roles of digital platforms for news and journalism in Australia.

56 For further discussion of the value of targeted advertising, see discussion in chapter 3 and chapter 7. Also see H Beales, [The Value of behavioural targeting](#), National Advertising Initiative, March 2010, accessed 26 April 2019.

57 OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220 (2013), p.9.

Digital platforms such as search engines and social media services have become extremely effective tools for journalists, aiding the effectiveness and efficiency of news gathering and reporting.⁵⁸ Publishing content online and using digital platforms to disseminate news and journalism involves lower costs than traditional physical production.⁵⁹ The cost of traditional production and distribution methods generally limited the production of journalism to large media organisations. The lower cost of online content production and distribution has assisted the entry of smaller-scale ‘digital native’ news producers.

Digital platforms have also changed the way Australians access and consume news and journalism. The section below includes a short discussion of these issues, which are addressed in further detail in chapter 4, which focusses on the implications of the rise of digital platforms for Australia’s media regulation framework, chapter 5, which focusses on the relationship between digital platforms and Australia’s news media businesses, and chapter 6, which focusses on implications for Australian media businesses and news consumers.

Australians increasingly get their news online

As Australians increasingly made the internet part of their daily lives, the consumption of journalism became one of the main activities to move online. As shown in figure 1.5, survey results suggest there are more Australians who look for or read online news daily than Australians who consume online entertainment content or conduct financial transactions daily.

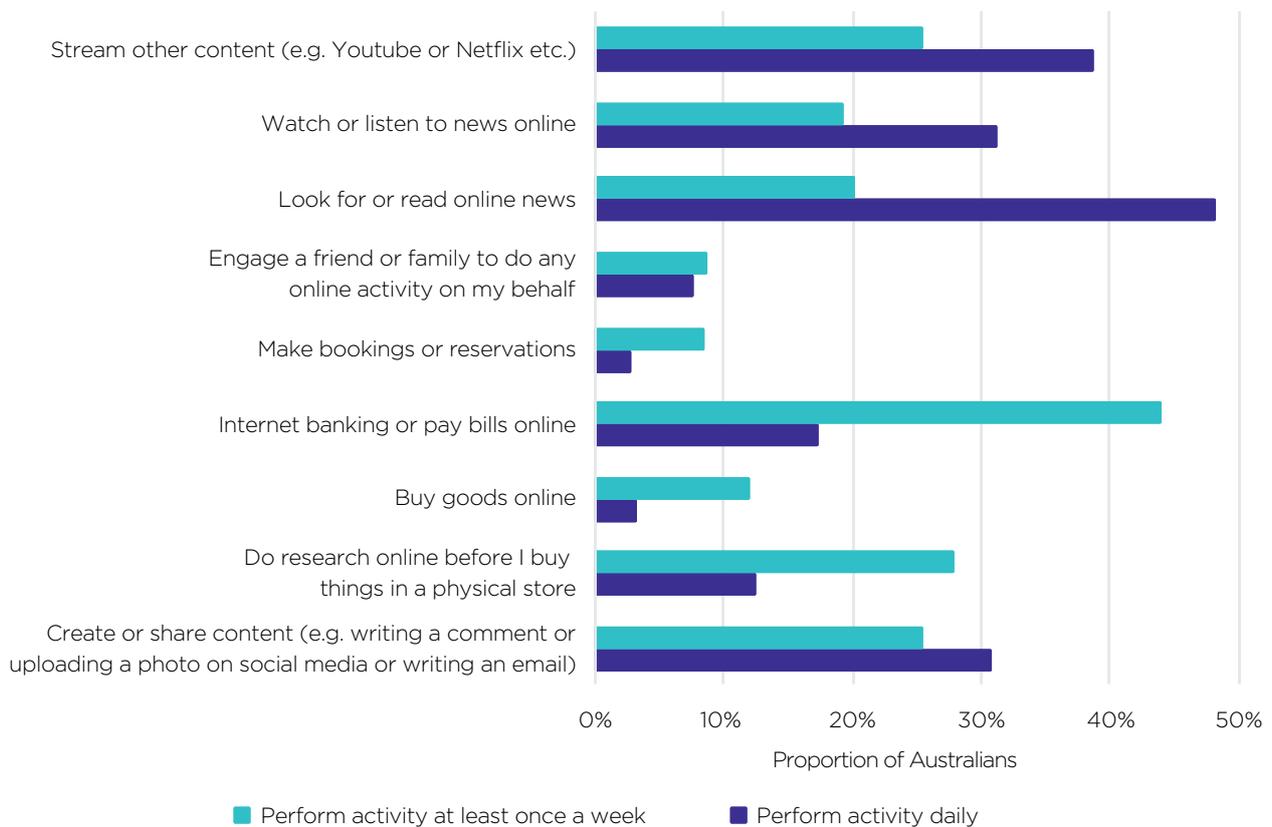
While the growth of online news has provided an *additional* source of news for many Australians, it has become the *primary* source of news for a large proportion of the population. The 2019 Digital News Report found that around 43 per cent of Australians use online sources as their primary source of news – similar to trends in the United Kingdom (42 per cent), Canada (44 per cent), and the United States (48 per cent).⁶⁰

58 Facebook, [Submission to the Digital Platforms Inquiry Issues Paper](#), 18 April 2018, p. 23; Twitter, [Submission to the Digital Platforms Inquiry](#), 17 April 2018, p. 3-4; E Tandoc Jr and T Vos, [The Journalist is Marketing the News: Social media in the gatekeeping process](#), *Journalism Practice*, 10 (8) (2016), p. 952; QUT Creative Industries Research Office, [Digital Platforms and Australian News Media: Report](#), April 2018, pp. 11-12.

59 Queensland University of Technology, [Digital Platforms and Australian News Media: Report](#), Creative Industries Faculty, April 2018, p. 5.

60 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, 12 June 2019, p. 13.

Figure 1.5 Frequency of online activities

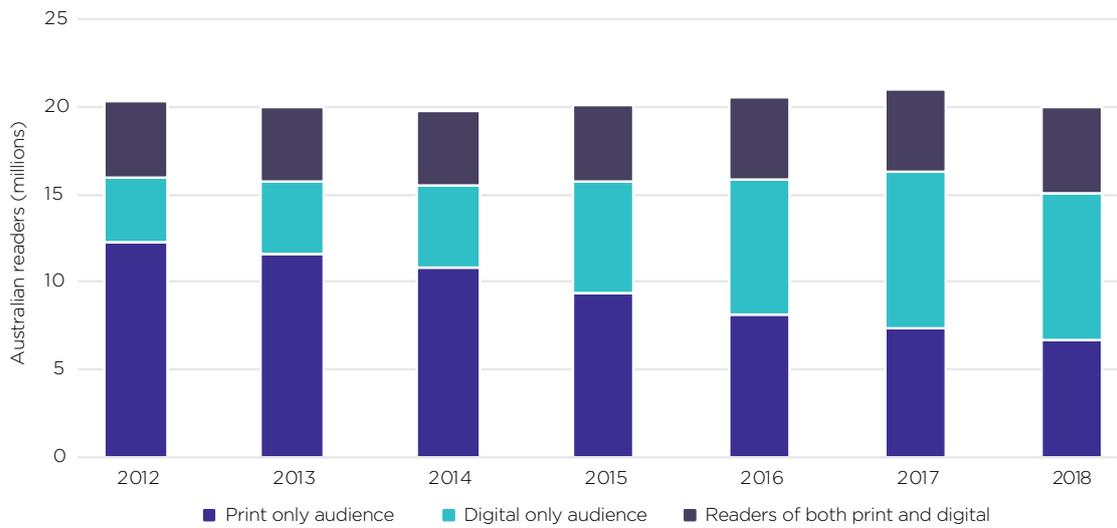


Source: Roy Morgan Research, Consumer Views and Behaviours on Digital Platforms, November 2018, p. 14.

While print, radio and television remain significant sources of news, the vast majority of media businesses using these formats also operate news websites. Some of the most frequently accessed and trusted brands of online news are those associated with established broadcasters and newspapers.⁶¹ In the case of the traditional print media, increases in audiences accessing the website and app editions of publications have followed a decrease in print newspaper readership (figure 1.6).

⁶¹ C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 78.

Figure 1.6 Newspaper readership shifting from print to digital

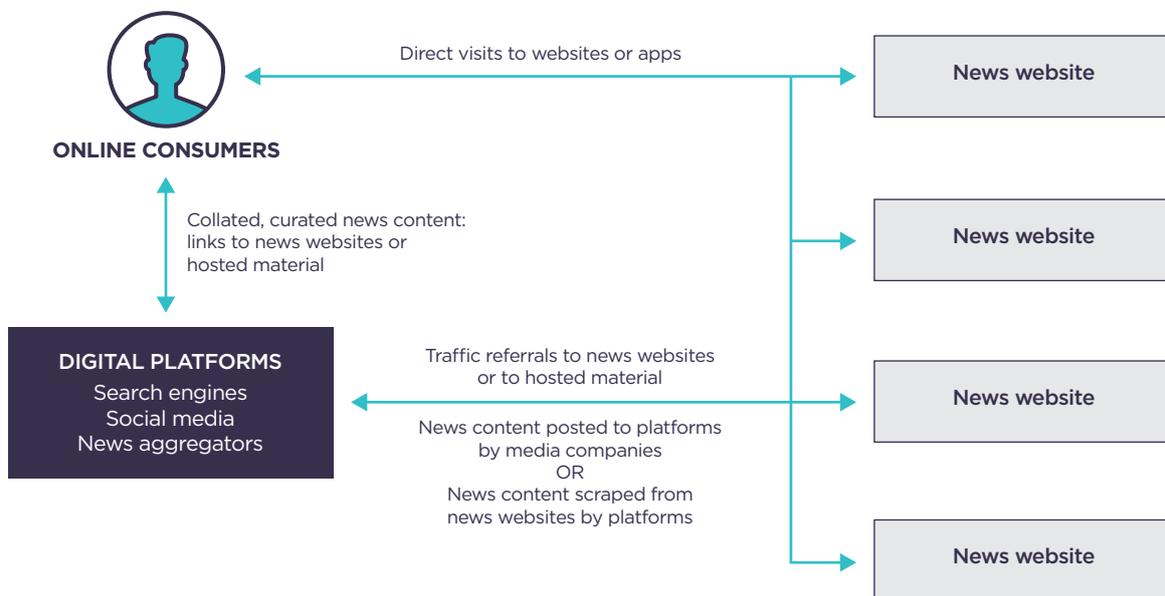


Source: Roy Morgan Single Source Australia: 2012 – 2018.

Digital platforms and news consumption

Search engines play an important role in news consumption by determining the listing of news articles (and news media websites) from which a user might choose. On social media services, news is often presented as part of a ‘feed’ or ‘chat’, determined by a user’s interests or friends. Users are also able to access news directly from the websites or apps of media companies.

Figure 1.7 How consumers access news online



Increasingly, consumers are accessing news websites via digital platforms. The 2019 Digital News Report suggests that algorithm-driven digital platforms are among the most popular methods of accessing online news for Australian consumers, with 33 per cent reporting accessing news through social media, 20 per cent searching for stories through search engines and 12 per cent accessing content through news aggregators. By comparison, 30 per cent of Australian news consumers accessed online news directly from the websites of news media businesses.⁶²

By acting as an intermediary between consumers and media businesses, digital platforms are inherently influential in shaping consumers' choices of news and journalism:

- Search engines provide links to news results that are ranked according to a user's search terms, and the top ranked links are significantly more likely to be clicked.⁶³
- On social media platforms such as Facebook, media businesses post news content directly to the platform, and this content is shown to users according to user preferences and curation decisions made by algorithms. The platform may provide direct links to news websites, or the content may be hosted on the platform itself if the media business's relationship with the platform provides for a hosting arrangement.
- News aggregators may present a 'front page' of collated news links, or may allow users to search for specific keywords among news stories.

People who access news via digital platforms are also likely to access news in other ways. The ACCC consumer survey showed that 91 per cent of Australians who use digital platforms accessed some form of online news in the past month; and a large share of these respondents did so via social media (48 per cent), through search engines (47 per cent), or by searching online for the name of a news website (35 per cent). About 56 per cent of people who used digital platforms also accessed news websites or apps directly. About 34 per cent had an online news article forwarded to them by a friend or family member, and 30 per cent received email alerts or newsletters.⁶⁴

While Google and Facebook are, by a wide margin, the digital platforms with the largest role in Australian consumption of news and journalism, a significant number of Australians also get their news from other platforms, such as Apple News, Twitter and Instagram.

1.5 A disrupted media sector

Key findings

- Australian media (including both print and broadcast) have traditionally relied heavily on advertising revenue to fund the production of journalism.
- Online advertising now accounts for around half of all advertising spend in Australia. Advertising in traditional media, particularly traditional print media, has fallen over the past decade.
- Digital platforms have captured a significant share of the advertising revenue that has moved online.

The Terms of Reference seek an examination of digital platforms' impact on the media and advertising services markets. Given this context, it is necessary to consider the history and nature of the disruptions to the media sector caused by digitalisation and the online ecosystem, before this Inquiry can assess the role that the digital platforms have played in that disruption.

Australian commercial media businesses have traditionally relied heavily on advertising. Free-to-air commercial television and radio services provide programming without charging their audiences, and rely almost exclusively on the sale of broadcast advertising to generate revenue.

62 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 28.

63 D Wilding, P Fray, S Molitorisz and E McKewon, [The Impact of Digital Platforms on News and Journalistic Content](#), Centre for Media Transition, University of Technology, 2018, p. 68.

64 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 33.

Australian print publishers traditionally generated the vast majority of their revenue by printing display advertisements and classifieds (once referred to in the print industry as its 'rivers of gold'), with subscription fees and cover prices only contributing a small proportion of income. For example, in 1999, around 80 per cent of Fairfax's (acquired by Nine in December 2018) revenue derived from advertising, while subscriptions and cover prices only contributed 20 per cent.⁶⁵ Even Australian subscription television generates meaningful advertising revenue, despite limiting its services to paying subscribers.⁶⁶

Print publishers thrived throughout the twentieth century. However, this changed because of competition for audiences and advertising from online services. First, online classified platforms such as eBay, SEEK and Carsales.com.au removed a major revenue stream from print newspapers, though some publishers followed this trend and moved their classifieds online (News Corp's realestate.com.au is one key example). More recently, the success of the leading digital platforms has put pressure on advertising revenue for all media businesses and caused difficulties in monetising content in the online environment. Chapter 5 discusses the commercial relationships between media businesses and digital platforms.

Newspapers, television and radio have historically played an important role in producing, publishing and distributing news and journalism, which provides broad benefits to the functioning of Australia's democratic society. Chapter 6 explores the challenges that digital platforms pose for the production and consumption of news and journalism in more detail.

65 Fairfax, [Fairfax Media Submission to the Digital Platforms Inquiry Issues Paper](#), 20 April 2018, p. 2.

66 News Corp, [News Corporation Reports Fourth Quarter and Full Year Results for Fiscal 2018](#), 9 August 2018, accessed 18 October 2018, p. 29.

02

2. Do digital platforms have market power?

Key findings

- Google and Facebook operate multi-sided platforms. On one side, they offer services to consumers for a zero monetary price in order to obtain consumers' attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers. Advertising is the source of most of the revenue earned by the two major digital platforms in Australia.
- Google has substantial market power in supplying general search services in Australia. Google is likely to retain its dominant share of the market at least in the short- to medium-term.
- Facebook has substantial market power in supplying social media services in Australia, which are provided by its platforms, Facebook and Instagram. Facebook is expected to retain substantial market power in at least the short- to medium-term.
- Google has substantial market power in the supply of search advertising in Australia.
- Facebook has substantial market power in the supply of display advertising in Australia.
- In addition to the amount of time spent on the platforms, the breadth and depth of the user data collected by each of Google and Facebook provides them with strong competitive advantages. The multiple touch points that Google and Facebook each have with their users enable them to collect user data, improve their services, attract more users and advertisers, thereby creating a feedback loop. No other businesses come close to the level of tracking undertaken by each of Google and Facebook.
- Google and Facebook supply news referral services to media businesses. The ACCC considers that these services probably constitute a market and that Google and Facebook are each likely to have substantial market power in that market. The ACCC has decided, however, that it is not necessary for the purposes of this Report to reach a conclusion on those matters.
- A significant number of media businesses rely on news referral services from Google and Facebook to such a degree that Google and Facebook are each unavoidable trading partners. This provides each of Google and Facebook with substantial bargaining power in their dealings with these media businesses. This bargaining power significantly affects the manner in which these media businesses deal with Google and Facebook and the outcomes of those dealings.
- There are considerable barriers to entry and expansion for search platforms and social media platforms that entrench and reinforce Google and Facebook's market power. These include barriers arising from same-side and cross-side network effects, branding, consumer inertia and switching costs, economies of scale and sunk costs.
- Dynamic competition may place some degree of competitive constraint on Google. However, Google is insulated to a substantial extent from dynamic competition by barriers to entry and expansion for search platforms, Google's advantages of scope, and its acquisition strategy.
- Dynamic competition may also place some degree of competitive constraint on Facebook. However, this constraint is tempered by barriers to entry and expansion for social media platforms, Facebook's advantages of scope and its acquisition strategy.
- The ACCC has focussed on those markets most relevant to media and advertising markets but there may be related markets where digital platforms, and in particular Google, hold market power.

This chapter sets out the ACCC's findings regarding the extent to which digital platforms have market power and is structured as follows:

- **Section 2.1** sets out the scope of the ACCC's market power assessment.
- **Section 2.2** discusses the business models of digital platforms (in particular, the nature of multi-sided platforms and how digital platforms monetise their services) and provides an overview of Google's and Facebook's operations.
- **Section 2.3** discusses the types of search services supplied in Australia and the state of competition in the supply of general search services, including market concentration and barriers to entry and expansion. The section analyses the extent to which Google has market power in the market for general search services and also considers the effect of Google's strategic acquisitions on that market power.

- **Section 2.4** examines the state of competition in the supply of social media services, including market concentration and barriers to entry and expansion. This section analyses the extent to which Facebook has market power in the supply of social media services and also considers the effect of Facebook's strategic acquisitions on that market power.
- **Section 2.5** provides an overview of the different types of data that each of Google and Facebook have access to, and how that access to data provides them with a competitive advantage in the supply of advertising services.
- **Section 2.6** provides a background of online advertising services. It then examines the market for search advertising services in particular, and the extent to which Google has market power in that market.
- **Section 2.7** examines the market for display advertising services and examines Facebook's market power in the supply of display advertising services.
- **Section 2.8** describes the market for news media referral services and considers the extent to which each of Google and Facebook have market power in this market.
- **Section 2.9** sets out the ACCC's recommendations aimed at addressing the market power of Google and Facebook. These recommendations seek to ensure that factors relevant to the competition impact of acquisitions in digital markets are taken into account in a merger assessment; that the ACCC is properly notified of such acquisitions; and also seeks to remove default biases that contribute to Google's market power in the search services market.
- **Section 2.10** outlines the ACCC's views regarding data portability and interoperability between digital platforms, and also considers stakeholder submissions regarding the divestment of certain digital platforms.

2.1 Scope of the ACCC's market power assessment

The Terms of Reference directed the ACCC to examine the extent to which platform service providers (that is, search engines, social media or digital content aggregators) are exercising market power in commercial dealings with the creators of journalistic content and advertisers, and the impact of such platforms on media and advertising markets. In this respect, the ACCC notes that:

- The ACCC's analysis primarily relates to Google and Facebook. This is for three reasons. First, almost all the submissions received from interested parties and consumers concern Google and Facebook. Second, Google and Facebook are by far the largest digital platforms in Australia by revenue.⁶⁷ Finally, Google and Facebook are the most visited websites and apps in Australia.⁶⁸ For these reasons, Google and Facebook are the platforms most likely to be having an impact on creators of journalistic content and advertisers.
- Advertisers in Australia acquire online advertising space from various firms, including digital platforms and media businesses. In examining the extent to which digital platforms have market power in commercial dealings with advertisers, the ACCC has focused on online search and display advertising.
- In examining the extent to which digital platforms have market power in commercial dealings with the creators of journalism, the ACCC considers it useful to identify a market for the supply of news media referral services to news media businesses.
- Digital platforms (including Google and Facebook) are multi-sided platforms. That is, the platforms bring together multiple sets of users that interact via the platform. The number of users on one side (e.g. consumers) increases the value of the platform to other sets of users (e.g. advertisers). Recognising the multi-sided nature of these platforms, the ACCC has been careful to take into account the competitive constraint provided by the different sides of the relevant platforms in determining whether market power is held in the relevant market(s).

67 Data provided to the ACCC.

68 Similar Web, [Top Website Ranking](#), accessed 8 November 2018; Alexa, [Top Sites in Australia](#), accessed 8 November 2018.

The markets discussed are limited to markets the ACCC considers are directly relevant to this inquiry. Digital platforms such as Google and Facebook may have substantial market power in other markets. In particular, the ACCC notes that other regulators have found Google to hold a dominant position in other markets, including mobile operating system and app store markets. This includes the European Commission's decision that Google engaged in illegal practices in relation to its mobile devices, to strengthen the dominance of its search engine (discussed in box 2.3 below).

Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. This conduct is part of the competitive process, which drives firms to develop and offer products that are more attractive to customers, and should not be deterred.

However, it is illegal for a firm with substantial market power to damage this competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals' ability to compete, rather than by offering a more attractive product.

The Terms of Reference for this inquiry are broad and do not limit the ACCC to only examine whether digital platforms have misused their market power (or otherwise breached the CCA), but poses a wider question asking whether digital platforms are exercising their market power in their dealings with advertisers and content creators and examining any price or non-price effect of this. A key example may be if users of a digital platform are facing worse terms of access than they would otherwise, if there was a competitive market for the services offered.

Finally, market shares listed in this report are the ACCC's best estimates, based on information from a number of sources including, in the case of advertising markets, data from the Commercial Economic Advisory Service of Australia (CEASA). Where the ACCC has requested information from firms on advertising revenue, it has done so on the basis of the revenue received from advertisers in Australia. This may include some portion of expenditure that is spent by Australian advertisers targeted at users located outside Australia. Conversely, it does not include expenditure by advertisers located overseas targeted at users in Australia. As with all estimates, there is a potential that this may under or overstate the actual market share of each firm or the total size of the market.

The ACCC notes that the advertising revenue used in this report is larger than the revenue booked by the digital platforms in Australia and includes revenue generated from Australian advertisers which is booked offshore.

The ACCC also notes that the most recent data referenced in this report relates to the 2017 and 2018 calendar years (depending on the availability of data). While market shares may have changed, the ACCC does not expect there to be any significant differences.

2.2 How Google and Facebook monetise their services

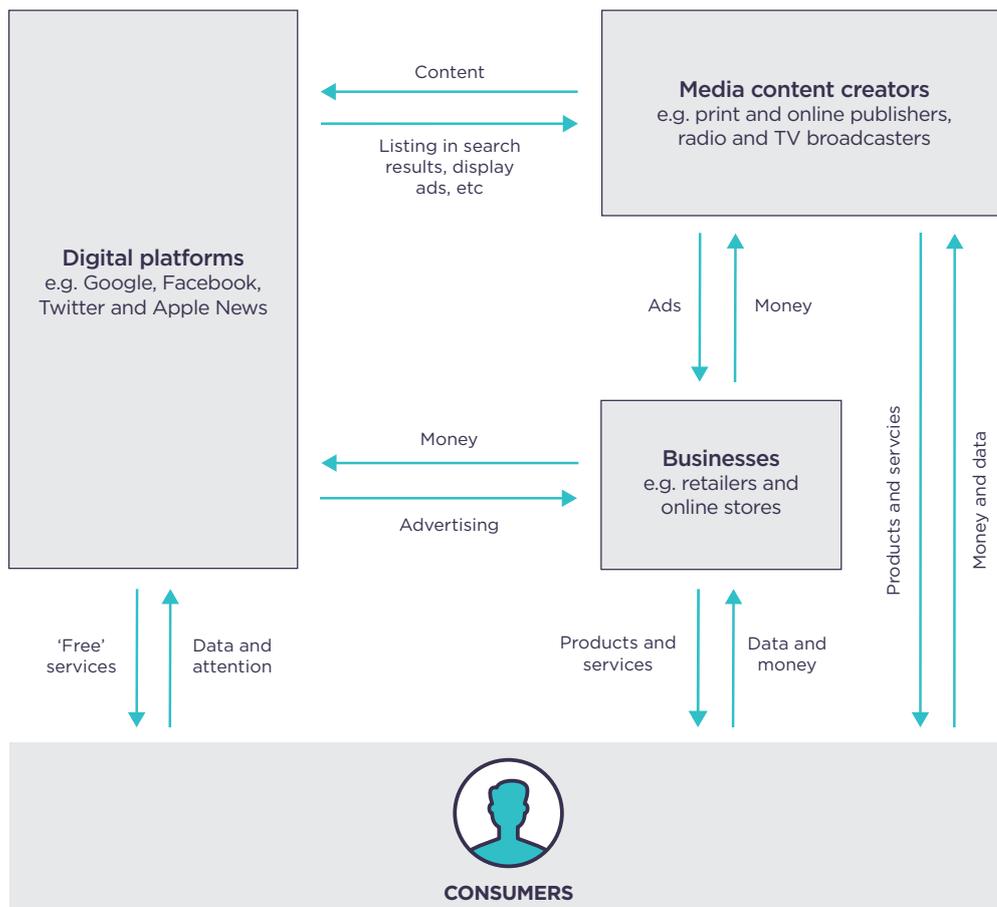
2.2.1 Digital platform business model

Google and Facebook, along with other digital platforms, are multi-sided platforms that interact with a number of groups:

- consumers who utilise services provided by the digital platform
- advertisers who are purchasing the opportunity to display ads to consumers
- content creators, including creators of news and journalistic content.

Figure 2.1 illustrates these relationships.

Figure 2.1 Relationships between digital platforms, consumers, businesses (advertisers) and media content creators



Source: Extracted from figure 3, 'Big Data Ecosystem' from OECD, Bringing Competition Policy to the Digital Era: [Background note by the Secretariat](#), 29-30 November 2016, p. 12. Figure 2.1 has been updated and adjusted as relevant to the Australian context and matters of key relevance to the Inquiry.

The business models used by Google and Facebook for consumer facing services, such as Google Search, YouTube, the Facebook platform and Instagram, is to charge a zero monetary price to consumers in return for their attention, the collection of their data, and the subsequent ability to sell targeted advertising opportunities.⁶⁹ Users effectively pay for these services by allowing Google and Facebook to collect and use their data and by viewing advertisements. Because Google and Facebook collect a great depth of information about their users (both on and off their own platforms, as discussed in section 2.5), they are able to offer advertisers very specific targeting opportunities. This business model is outlined further below:

- By offering its services without a monetary price to users, Google and Facebook are able to attract a high number of users to the platform.
- This increases the revenue that they are able to obtain from advertisers because:
 - by gaining the attention of more users, Google and Facebook increase the supply of advertising opportunities available to be sold
 - a higher number of users increases the quantity and quality of user data accessible to Google and Facebook, allowing them to provide higher calibre ad targeting services
 - a higher number of users increases the quantity of traffic for an advertising campaign, which reduces the average fixed costs of advertising, making the platform more attractive to advertisers.

⁶⁹ While some subscription revenue may be obtained from these services, such as from the YouTube Premium service, this accounts for a small fraction of the revenue.

- As Google collects more data on users, it is able to improve the relevance algorithm of its organic search service, which allows it to attract more users. Similarly, if Facebook obtains more data on users, it may be able to improve the quality of its news feed algorithm, which, in turn, may allow it to attract more users. These effects give rise to positive feedback loops.

Google

Google was founded in 1998. It operates Google Search, which is by far the largest general search engine internationally, with an estimated 93 per cent global market share, as at April 2019.⁷⁰ In Australia, Google Search is estimated to have a 95 per cent market share in general search as at April 2019.⁷¹ Google earns revenue predominantly by selling advertising on Google Search.

Google's business model is very successful—in 2018, it earned US\$136 billion of revenue globally.⁷² Around AU\$3.7 billion of this revenue is attributable to customers in Australia⁷³:

- approximately 80 per cent of the total advertising revenue generated in Australia is from selling ads that appear within Google Search results⁷⁴
- less than 10 per cent of the total advertising revenue generated in Australia is from the provision of its advertising intermediary services.⁷⁵

Facebook

Facebook, founded in 2004, operates the Facebook social media platform, which is the leading social media platform globally and within Australia, based on traffic.⁷⁶ Globally, Facebook reports that in the first quarter of 2019, it had approximately 2.3 billion monthly active users.⁷⁷ Australian usage in 2018 is approximately 13 million users accessing the platform on a daily basis, and approximately 17 million accessing the platform on a monthly basis.⁷⁸ A recent survey by the Productivity Commission suggests that 95 per cent of Australian consumers who use social networking use the Facebook platform.⁷⁹

Facebook also owns Instagram, WhatsApp and Messenger.

The Facebook platform gradually introduced advertising, including Facebook Ads, which was introduced in 2007. Facebook predominantly earns revenue from selling advertising opportunities on its social media platforms. Facebook also earns revenue when advertisements are shown on those websites which have joined the Facebook Audience Network.

Facebook generated global revenue of US\$55.8 billion in 2018.⁸⁰ In Australia, Facebook generated AU\$1.7 billion in advertising revenue.⁸¹

70 Statcounter, [Search engine market share](#), accessed 30 April 2019.

71 Statcounter, [Search engine market share](#), accessed 30 April 2019.

72 Alphabet Inc., [Form 10-K form lodged with United States Securities and Exchange Commission](#), for the fiscal year ended December 31 2018, p. 27.

73 Google Australia Pty Ltd, Financial statements and reports for the year ending 31 December 2018 lodged with ASIC.

74 Data provided to the ACCC.

75 Data provided to the ACCC. Google says that 'Google Marketing Platform (previously DoubleClick and Analytics) represent less than 10% of Google's Australian total accounted advertising revenues. They experienced higher growth rates in Australia from 2014 to 2017 than more established advertising offerings, such as for example Google Ads'.

76 SimilarWeb, [Top Websites Ranking](#), accessed 8 November 2018; We Are Social, [2018 Digital Report — Australia](#), accessed 8 November 2018.

77 Facebook, [Facebook Reports First Quarter 2019 Results](#), p. 1, accessed 30 April 2019.

78 Nielsen Digital Panel data, 2018.

79 Productivity Commission, [Data Availability and Use](#), Final report, 31 March 2017, p. 573.

80 Facebook Inc., [Form 10-K lodged with United States Securities and Exchange Commission](#), for the fiscal year ended December 31, 2018, p 33.

81 Data provided to the ACCC. The ACCC notes that advertising revenue figures for Facebook relate to the amount of advertising revenue from customers in Australia based on the location of the invoiced party (which may differ from the country in which the advertisements are shown). The ACCC understands that these figures are not recorded in the ordinary course of business by Facebook and are not audited, verified or otherwise reported on. As such, the ACCC considers that these are approximate estimates of relevant advertising revenue attributable to Australia for Facebook.

Cross-subsidisation on Google and Facebook's multi-sided platforms

As discussed above, both Google and Facebook operate multi-sided digital platforms. Typically, multi-sided platforms have an incentive to cross-subsidise. That is, the platforms have an incentive to set a relatively low price to users on one side of the platform, in order to increase the revenue earned on another side of the platform. The prices charged by Google and Facebook involve a cross-subsidy, with individual users being charged a zero monetary price so as to enable them to increase the revenue earned from advertisers. Box 2.1 defines a multi-sided platform, as well as cross-side network effects, and explains that the incentive to cross-subsidise arises from the operation of cross-side network effects on the platform.

Box 2.1 Multi-sided platforms and cross-subsidisation⁸²

A multi-sided platform can be characterised by the following pair of properties:

- distinct types of users or parties ('economic agents') interact on the platform
- an increase in usage by one type of user or party increases the value of the platform to users of the other type.

The first property can be illustrated with the examples of Google and Facebook. On Google's search platform, advertisers interact with users of the search service. On the Facebook social media platform, advertisers interact with users of the social media platform.

Other examples of multi-sided platforms are newspapers and credit cards. The two types of users that interact on a newspaper platform are readers and advertisers, and the two types of users on a credit card platform are merchants and consumers.

The second property is sometimes referred to as a 'cross-side network effect'.⁸³ It operates for example on a newspaper platform when an increase in usage by readers increases the value of the platform to an advertiser.

Economists developed the theory of multi-sided platforms, in part, to explain some unusual pricing structures involving cross-subsidisation. This refers to the tendency of a platform to set a price structure such that revenue earned from one type of user, in effect, subsidises another type of user, who is charged a relatively low price, potentially less than the marginal cost. For example, a newspaper may use revenue earned from advertisers to subsidise readers, who are charged a cover price or subscription which is less than the marginal cost. The cross-side network effect provides the newspaper with an incentive to cross-subsidise in this way. By charging readers a relatively low price, the newspaper ensures that a high number of readers use its service, increasing the value of the newspaper to advertisers. Accordingly, the newspaper is able to obtain a relatively high quantity of revenue from advertisers.

Search platforms and social media platforms are examples of multi-sided platforms characterised by cross-side network effects. There are at least three kinds of cross-side network effects which ensure that an increase in the number of individual users increases the value of the platform for advertisers:

- An increase in the number of users increases the number of users exposed to an advertising campaign, which may increase an advertiser's return from that campaign.
- An advertiser may incur fixed set-up costs from using a particular platform.⁸⁴ There may also be fixed set-up costs of running a particular campaign. If there are more users on a platform, an advertiser and a campaign obtain more traffic, which in turn reduces the average fixed costs. All else being equal, an advertiser is likely to prefer a large platform over a small one, on the grounds that running campaigns on the former has lower average fixed costs.⁸⁵

82 For discussions of multi-sided platforms, see P Belleflamme and M Peitz, *Industrial Organization*, ed. 2, Cambridge University Press, Cambridge, 2015; J Rochet and J Tirole, Two-sided markets: A progress report, *The RAND Journal of Economics*, vol. 37, no. 3 (Autumn 2006), pp. 645-667; M. Rysman, The Economics of Two-Sided Markets, *Journal of Economic Perspectives*, vol. 23, no. 3 (Summer 2009).

83 Alternative terminology includes 'indirect network effect' and 'indirect network externality'.

84 D Evans, [Platform Economics: Essays on Multi-Sided Businesses](#), Competition Policy International, 2011, ch. 7.

85 D Evans, [Platform Economics: Essays on Multi-Sided Businesses](#), Competition Policy International, 2011, ch. 7.

- A platform with more users has access to more data, which can improve the relevance of ads presented to users. All else being equal, an advertiser may prefer a larger platform, because its ads will tend to be more targeted.

As will be discussed in section 2.4, the second and third cross-side effects ensure that a larger platform has a competitive advantage in attracting advertisers.

There is also a cross-side network effect that potentially operates in the opposite direction. That is, an increase in the number of advertisers may increase the value of the platform to a user. If a platform has more advertisers, for any given user, the platform is able to serve ads that are more relevant to that user. For at least some users, being shown more relevant ads (as opposed to generic ads) improves the user experience.⁸⁶ However, for other users, the serving of targeted ads could decrease their user experience due to privacy concerns.

Revenue earned from advertisers is used to subsidise the users of the platform. Indeed, the magnitude of the cross-subsidy is such that users of the platforms are charged a zero monetary price. The cross-side network effects explain why the platforms have an incentive to subsidise users in this fashion. By charging a zero monetary price, a platform increases the number of users. As a consequence of the cross-side network effects, this increases the value of the platform to an advertiser which, in turn, increases the revenue that the platform earns from advertisers.

2.3 Market power in search

Key findings

- Google has substantial market power in supplying general search services in Australia. Google is likely to retain its dominant share of the market at least in the short- to medium-term.

2.3.1 Types of search

It is helpful to distinguish between two types of online search services. The first is the 'general search service' that is supplied in Australia by, for example, Google, Bing, Yahoo and DuckDuckGo. The second is the specialised search services that are supplied, for example, by Amazon, Expedia and eBay, which are also known as 'vertical searches'.

There is limited substitutability between generalised search services and specialised search services. Specialised search is restricted to providing information regarding its area of specialisation. They typically provide certain features that are unavailable on generalised search services. For example, a hotel booking service may provide its own star rating service, the verification of reviews and an ability to book and pay directly from its search results.

Google argues that it 'competes directly with specialised search services for many categories of queries, including shopping, local, travel and more.'⁸⁷ While the ACCC considers that this may place some degree of competitive constraint on Google's search service in relation to specific classes of searches, the extent of the competitive constraint is limited.

First, for a broad range of classes of searches, such as searches for professional services, there are no specialised search services with a reach comparable to that of Google.

Second, even when specialised search services have considerable reach, such as travel and hotel booking search services, Google's general search service enjoys the following competitive advantage over them. Given that users of search services display customer inertia (discussed further below in section 2.3.3), one key source of traffic for travel searches on Google is from users who employ Google for other types of searches. That is, customers already using Google Search for generalised search queries would be inclined to also use Google Search for specialised search queries, such as

⁸⁶ D Evans, [Platform Economics: Essays on Multi-Sided Businesses](#), Competition Policy International, 2011, ch. 7.

⁸⁷ Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 33.

travel searches. The same cannot be said of users of specialised travel search services, so this source of traffic is not available to suppliers of specialised travel search services. In this respect, Google Search is insulated, to some extent, from competition from specialised search services.

Third, the time spent by users on Google Search, relative to specialised search services, provides further evidence that specialised search services place little competitive constraint on Google Search. Users spend far more time on Google Search than on even the largest specialised search services. For example, in Australia, the time spent on Google Search during February 2019 was more than 25 times the time spent on Amazon and more than 250 times the time spent on Expedia.⁸⁸ That said, given that Amazon has only recently launched its Australian business, its presence in Australia has the potential to grow significantly.

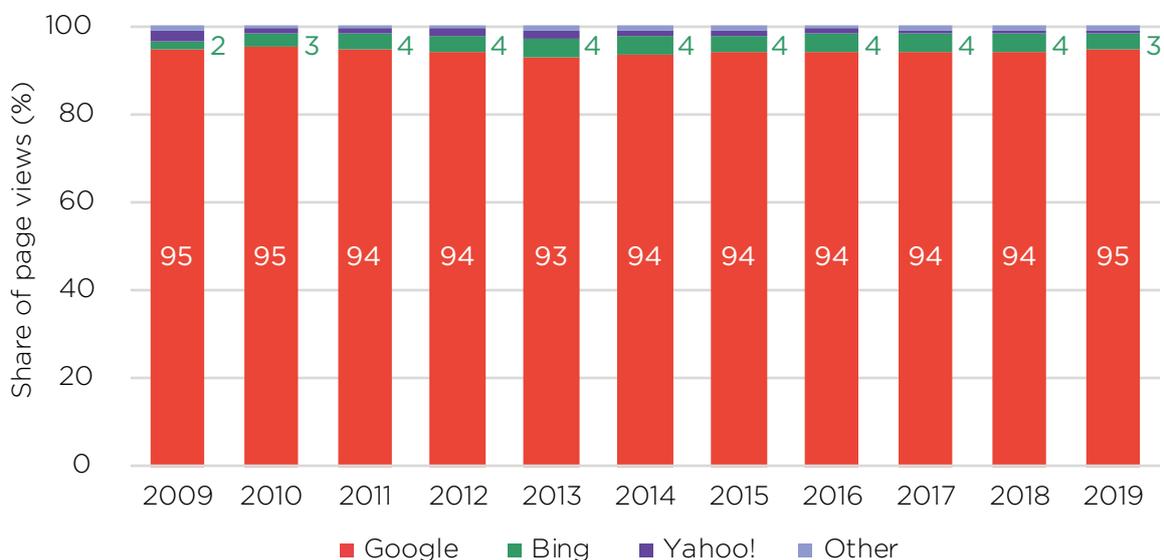
2.3.2 Google’s market share and dynamic competition

To assess the market power of a business, it is necessary to evaluate the competitive constraints on the price and quality of the product. As Google charges users a zero monetary price for its search service, and obtains value through consumer attention and collection of their data, an assessment of Google’s market power in relation to users focuses on the competitive constraint on the quality, and other non-price features, of its search service.

Also, as is the case with all multi-sided platforms, an assessment of market power on one side also involves a consideration of any competitive constraints provided by the operation of the other side of the platform.

In Australia, there are a number of general search engines, including Google, Bing, Yahoo and DuckDuckGo. Google and Bing are the only suppliers with a market share of more than 1 per cent.⁸⁹ Further, as shown in figure 2.2, Google has been the dominant provider for the past decade, enjoying a market share of between 93 and 95 per cent since 2009.⁹⁰

Figure 2.2 Market share of general search services in Australia



Source: Statcounter, [Search engine market share](#), accessed 1 April 2019.

88 Nielsen Total Minutes in Australia in February 2019 (Nielsen Digital Panel data, 2019) estimates the total minutes (000) on Google Search as 12,525,821; Amazon 466,372 and Expedia 45,638.

89 Statcounter, [Search engine market share](#), accessed 11 September 2018.

90 Statcounter, [Search engine market share](#), accessed 11 September 2018.

Google's high market shares could be seen as evidence that there is little competitive constraint on the quality of their services. However, it has been argued that digital platforms such as Google are constrained by 'dynamic competition'.⁹¹ That is, digital platforms are subject to competitive pressures on account of the possibility that a rival develops an innovation that allows it to enter and/or expand.

Dynamic competition is claimed to be especially relevant to markets involving digital platforms – including the market for general search services and the market for social media services – because of the importance of innovation in these markets. Potentially, a technological innovation could be developed at a relatively low cost, which allows a rival to enter and/or expand, displacing large incumbents. For example, when Google entered the market, it rapidly overtook the incumbent search services, including those of Yahoo! and AltaVista, principally because it provided a superior relevance algorithm.

As discussed in section 2.4, such innovation has also been prominent in the market for social media services. Disruptive innovation is claimed to characterise markets involving digital platforms and accordingly, even large incumbents must vigorously innovate, ensuring they invent new features, as well as copying, and improving on, the new features introduced by rivals, in order to maintain their market share.⁹² Dynamic competition and the threat of new entry is therefore likely to place a substantial constraint on the quality of the services provided by large incumbents in these markets.

While the ACCC has carefully considered the role of dynamic competition, the ACCC has reached the view that, to a substantial extent, Google is insulated from dynamic competition by barriers to entry and expansion for search platforms, due to Google's advantages of scope, and its acquisition strategy. The role of these three factors in insulating Google from dynamic competition is discussed below.

2.3.3 Barriers to entry and expansion

A potential new entrant to the market for search services, or a small-scale competitor of Google, is likely to face several barriers to entry and/or expansion.

Same-side network effects arising from data accumulation

Google's search platform has accumulated, and continues to accumulate, a considerable quantity of data on its users and their use of the search platform. All else being equal, a large amount of data improves the relevance algorithm in the search engine, increasing the quality of the search service. A greater quantity of user data, including data on user searches and user interactions with search results, allows the Google relevance algorithm to update in a timely fashion, improving its relevance ranking. In particular, large quantities of these types of data improves the ability for the algorithm to generate reliable relevance rankings for queries that are uncommon.⁹³

Google maintains that 'large-scale user data are not a key input in Google Search', suggesting that data may provide diminishing returns for improving the quality of the search service.⁹⁴ Nevertheless, it does acknowledge that 'user query data may play some role in improving our search algorithms'. Given that query data has at least some role in improving the algorithms, then such data can be expected to provide Google with a substantial comparative advantage, on account of the considerable magnitude of Google's search data relative to its rivals, both in Australia and globally. Based on the page-view metric in figure 2.2, in the first quarter of 2019, Google obtained more than twenty five times the query data as Bing, for Australia and also globally. It obtained more than one hundred and fifty times the query data as DuckDuckGo, for Australia as well as globally.⁹⁵

91 See, for example, D Evans, [Multi-sided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms](#), Coase-Sandor Institute for Law and Economics Working Paper, no. 753, March 2016.

92 This is referred to as 'feature competition'. See D Evans, [Multi-sided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms](#), Coase-Sandor Institute for Law and Economics Working Paper no. 753, March 2016.

93 See European Commission's [Google Search \(Shopping\) case prohibition decision](#), 18 December 2017, p. 62.

94 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36

95 Statcounter reports that, in Australia in the first quarter of 2019, the share of page views for Google was 95, for Bing was 3.66 and for DuckDuckGo was 0.52. Globally in that period, the share of page views for Google was 92.42, for Bing was 2.61 and for DuckDuckGo was 0.37.

Google cites a study by Lesley Chiou and Catherine Tucker (2017), which found that changes in the length of time that search data was retained by search engines had little impact on the accuracy of search results.⁹⁶ Note, however, that this study is not inconsistent with the view that a greater quantity of *recent* data enables more accurate search results.

The relationship between the quantity of data and the quality of the search service is an example of a same-side network effect. Box 2.2 defines a same-side network effect, contrasts it to a cross-side network effect, and describes how network effects may give rise to barriers to entry and expansion.

Box 2.2 Network effects and barriers to entry and expansion

Both same-side and cross-side effects can operate on a platform. In general, a same-side network effect is said to operate if an increase in the number of users on one side of a platform affects the value of the service to a given user on that side of the platform. A simple example of a same-side network effect is a traditional telephone network. If there are only a few users of a telephone network, that network will be of relatively low value to any given user, and may, therefore, have difficulty attracting new users. Conversely, a network with many users will be of relatively high value to a user and thus, be attractive to new users. As a consequence, a small-scale new entrant may have difficulty attracting new users relative to a large incumbent, creating barriers to entry and expansion.

As noted in box 2.1, a cross-side network effect operates if an increase in the number of users on one side of the platform affects the value of the service to a given user on another side of the platform. On a credit card platform, cross-side effects operate in both directions – an increase in the number of consumers with the card increases the value of the card to a merchant and if more merchants accept the card, the card is more valuable to a consumer. This creates a positive feedback loop. Both merchants and consumers, therefore, will tend to find large-scale credit card platforms more attractive than small-scale credit card platforms, which may create a barrier to entry and expansion.

Cross-side network effects

As noted in box 2.2, cross-side network effects may give rise to barriers to entry or expansion. Section 2.2 identified two cross-side network effects which ensure that Google has a competitive advantage in the supply of search advertising over a small-scale search platform.

If a potential entrant expects that, for a substantial period of time, it will operate at a relatively small-scale, then on account of these cross-side network effects, the potential new entrant will expect that for this period of time, Google will enjoy a competitive advantage. This will provide a disincentive for a potential entrant to enter the market.

Further, as noted in section 2.2, a cross-side network effect may potentially operate in the opposite direction. If a large number of advertisers use a search platform, then the search platform can provide users with ads for goods and services that are more relevant to their interests. So for those users who prefer ads that are more relevant (or targeted) over ads that are less relevant, the platform would be valued more (although the same would not be said for those users who did not value targeted advertising). When cross-side network effects operate in both directions, a positive feedback loop may result.⁹⁷

96 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 37. See L Chiou and C Tucker, [Search Engines and Data Retention: Implications for Privacy and Antitrust](#), MIT Sloan School Working Paper, no. 23815, 1 September 2017.

97 D Evans, [Platform Economics: Essays on Multi-Sided Businesses](#), Competition Policy International, 2011, ch. 7.

Google denies that such a feedback loop operates on its search platform, that, in effect, amounts to a claim that users do not prefer ads that are more relevant than those which are less relevant.⁹⁸ The ACCC acknowledges that the extent to which a feedback loop operates depends upon the fraction of users who prefer ads that are more relevant to those that are less relevant. Nevertheless, even if such a feedback loop does not operate, a barrier to entry and expansion still arises from cross-side network effects: in particular, if a search platform has a large number of users, it gains a competitive advantage in the supply of advertising for the reasons described in section 2.2.

Customer inertia and the effect of default settings

Chrome and Safari internet browsers

The Chrome browser is owned by Google and the Safari browser is owned by Apple. Google Search is currently the default search engine on both internet browsers, which together account for more than 80 per cent of the Australian market for browsers (across desktop, mobile and tablet devices).⁹⁹ As Google is installed as the default search engine on both browsers, it substantially increases the propensity of Australians to use Google, for the following three reasons:

- in general, setting a product as the default option substantially increases the likelihood that a consumer will choose it¹⁰⁰.
- consumers may stick with a default option on account of imperfect information. For example, consumers may remain with an incumbent search service rather than switch to a new entrant if they do not know whether the incumbent provides a higher quality search service than the new entrant, and substantial information costs would have to be incurred to compare the quality of the two search services¹⁰¹.
- for consumers with relatively low level information-technology skills, there may be costs to switching from the default option search service (e.g. the time needed to learn how to do so).

Accordingly, a barrier to expansion arises from the prevalence of Google Search as the default option on Australian browsers. In 2018, Chrome comprised 49 per cent of the browser market and Safari 33 per cent. As figure 2.3 illustrates, Chrome and Safari's share of the market has grown steadily since 2009.¹⁰²

98 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36.

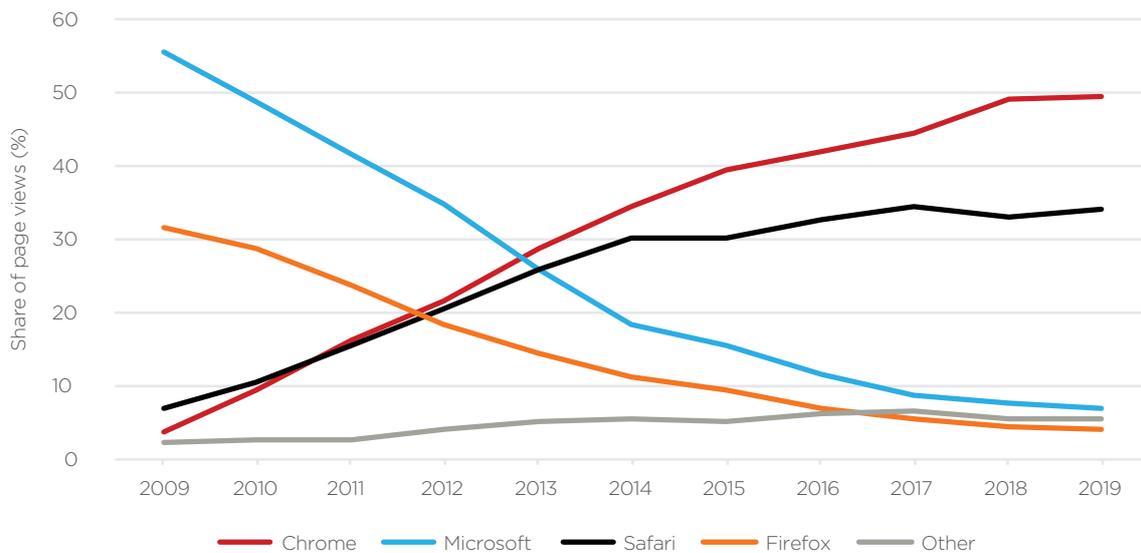
99 Statcounter, [Browser market share](#), accessed 1 April 2019.

100 This is a central finding of behavioural economics. See, for example, R Thaler and C Sunstein, *Nudge: Improving decisions about health, wealth, and happiness*, Yale University Press, New Haven, 2008.

101 M Patterson, [Google and Search-Engine Market Power](#), Harvard Journal of Law and Technology Occasional Paper Series, (July 2013).

102 Statcounter, [Browser market share](#), accessed 24 September 2018.

Figure 2.3 Shares of Australian browser market (for desktop, mobile and tablet devices)



Source: Statcounter, [Browser market share](#), accessed 1 April 2019.

Google clearly recognises the value of installing Google Search as the default option; it pays a substantial fee to Apple for using Google Search as the default search service on Safari. The exact amount paid by Google to Apple to secure Google Search as the default option on Safari is not known to the ACCC, but estimates reported by the media suggest that, globally, Google paid US\$3 billion in 2017 and US\$9 billion in 2018 and will pay US\$12 billion in 2019 to remain as the default option on Safari.¹⁰³

Safari is the default browser on mobile phones with Apple's iOS operating system. If, for example, Bing were the default search engine on the Apple iOS operating system, then the growing tendency for users to access search services via mobile devices would pose a potential threat to Google's dominant hold on the search market. Conversely, by paying Apple to ensure that Google is the default search engine on mobile phones with the Apple iOS operating system, Google is able to suppress this threat to its dominance of the search market.

Google has also purchased the right to serve as the default search engine on a number of other browser services, including Mozilla Firefox in the United States and Canada.¹⁰⁴ While this protects Google's market share in search, it also imposes on Google a substantial cost of acquiring traffic, reducing its margin on advertising. But Google is better placed to incur this cost than its smaller rivals, because, as discussed in section 2.5, it has a competitive advantage in providing advertising, allowing it to enjoy higher advertising margins. This may allow Google to outbid its smaller rivals in future negotiations for purchasing the default status on a browser, further entrenching its market power.

As shown in figure 2.3, in the first quarter of 2019, Microsoft (Internet Explorer and Edge) had a 7 per cent share of the Australian browser market. As Bing is the default search engine on Microsoft browsers, then, for those consumers who use Microsoft browsers, default settings may provide Bing with a competitive advantage over Google. But given that Google Search is the default option on over 80 per cent of browsers, default settings provide a substantial barrier to expansion for Bing.

103 K Leswing, [Google may have paid Apple \\$3 billion to remain the iPhone's default search engine](#), AOL, 14 August 2017, accessed 2 May 2019; S. Ovide, [Apple Looks Down on Ads But Takes Billions From Google](#), Bloomberg, 29 September 2018, accessed 8 November 2018; K. Leswing, [Apple makes billions from Google's dominance in search — and it's a bigger business than iCloud or Apple Music](#), Business Insider, 29 September 2018, accessed 9 November 2018.

104 D Dixon, [Firefox Features Google as Default Search Provider in the U.S., Canada, Hong Kong and Taiwan](#), Mozilla, 14 November 2017, accessed 8 November 2018.

Android mobile operating system

As discussed above, the ACCC considers that customer inertia in switching between search engines is likely to be reinforced where Google services are pre-installed on mobile devices. Where Google's services are frequently set as the default, this is likely to make it more difficult for alternative mobile browsers and search engines to challenge Google's market position.

Google is the global owner of Android, a licensable mobile operating system used as the base software by many mobile manufacturers, such as Samsung, LG, HTC and Sony. As a licensable operating system, Android is different from an operating system like Apple iOS that is exclusively used by Apple and not available to third parties. In Australia, it is estimated that Android and iOS are present on over 40 and 55 per cent of mobile devices respectively, meaning combined, they are on over 95 per cent of Australian mobile devices.¹⁰⁵ As Google Chrome is pre-installed on Android devices and Google Search is the default option on Google Chrome and Apple's Safari mobile browser, Google's search engine is effectively the current default search engine on over 95 percent of mobile devices in Australia.

As discussed in box 2.3, the European Commission found that Google breached EU antitrust laws by imposing restrictions on Android device manufacturers and mobile network operators between 2011 and 2014, to cement its dominant position in Europe in general internet search. As discussed below, Google is appealing this decision but has also announced changes to its policies which aim to address the European Commission's concerns.

¹⁰⁵ Statcounter, [Mobile Operating System Market Share in Australia](#), accessed 30 April 2019.

Box 2.3 European Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine

In July 2018, the European Commission (EC) found that Google imposed illegal restrictions on Android device manufacturers and mobile network operators between 2011 and 2014 to cement its dominant position in general internet search. The EC fined Google EU€4.34 billion for breaching EU antitrust rules in respect of abuse of a dominant position.

The EC explained the role of Google in licensing Android as follows:

When Google develops a new version of Android it publishes the source code online. This in principle allows third parties to download and modify this code to create Android forks. The openly accessible Android source code covers basic features of a smart mobile operating system but not Google's proprietary Android apps and services. Device manufacturers who wish to obtain Google's proprietary Android apps and services need to enter into contracts with Google, as part of which Google imposes a number of restrictions. Google also entered into contracts and applied some of these restrictions to certain large mobile network operators, who can also determine which apps and services are installed on devices sold to end users.¹⁰⁶

The EC did not question the open source model or the Android operating system as such. Instead, its decision concerned three specific types of contractual restrictions that it found Google had imposed between 2011 and 2014 on device manufacturers and mobile network operators, being:

- requiring Android device manufacturers to pre-install the Google Search app and Google Chrome mobile browser, as a condition for licensing the Google Play Store
- making payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed Google Search on their devices
- preventing manufacturers wishing to pre-install Google apps from selling smart mobile devices running on alternative versions of Android that were not approved by Google (known as Android forks).

The EC found that Google offered its mobile apps and services to device manufacturers as a bundle, which included the Google Play Store, Google Search and Google Chrome, and that Google's licensing conditions made it impossible for manufacturers to pre-install some apps but not others. In particular, the EC found that Google Play Store (Google's official app store which enables users to download apps) was a 'must have' as mobile phone users expected it to be pre-installed on their devices and they could not lawfully download it themselves.

The EC found that about 80 per cent of smart mobile devices in Europe, and worldwide, run on Android and discussed the impact of pre-installed services on mobile devices in its findings:

Pre-installation can create a status quo bias. Users who find search and browser apps pre-installed on their devices are likely to stick to these apps. For example, the Commission has found evidence that the Google Search app is consistently used more on Android devices, where it is pre-installed, than on Windows Mobile devices, where users must download it. This also shows that users do not download competing apps in numbers that can offset the significant commercial advantage derived through pre-installation. For example, in 2016:

- *on Android devices (with Google Search and Chrome pre-installed) more than 95 per cent of all search queries were made via Google Search*
- *on Windows Mobile devices (Google Search and Chrome are not pre-installed) less than 25 per cent of all search queries were made via Google Search. More than 75 per cent of search queries happened on Microsoft's Bing search engine, which is pre-installed on Windows Mobile devices.*

¹⁰⁶ European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

Google's practice has therefore reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google.¹⁰⁷

The EC also found that Google had illegally obstructed the development and distribution of competing Android operating systems by preventing device manufacturers from using unapproved Android forks:

This practice reduced the opportunity for devices running on Android forks to be developed and sold. For example, the Commission has found evidence that Google's conduct prevented a number of large manufacturers from developing and selling devices based on Amazon's Android fork called "Fire OS". In doing so, Google has also closed off an important channel for competitors to introduce apps and services, in particular general search services, which could be pre-installed on Android forks. Therefore, Google's conduct has had a direct impact on users, denying them access to further innovation and smart mobile devices based on alternative versions of the Android operating system. In other words, as a result of this practice, it was Google – and not users, app developers and the market – that effectively determined which operating systems could prosper.¹⁰⁸

The EC concluded that Google's practices had denied rival search engines the possibility to compete on the merits. The tying practices ensured the pre-installation of Google's search engine and browser on practically all Google Android devices and the exclusivity payments strongly reduced the incentive to pre-install competing search engines. Google also obstructed the development of Android forks, which could have provided a platform for rival search engines and other app developers to gain traffic and thrive. Google's strategy also prevented rival search engines from collecting more data from smart mobile devices, including search and mobile location data, which helped Google to cement its dominance as a search engine. Furthermore, Google's practices also harmed competition and further innovation in the wider mobile space, beyond just internet search because they prevented other mobile browsers from competing effectively with the pre-installed Google Chrome browser.

The ACCC understands that Google's appeal against the decision of the EC was filed to the General Court of the European Union on 9 October 2018.¹⁰⁹

On 19 March 2019, Google announced that it would do more to ensure that Android phone owners know about the wide choice of browsers and search engines available to download to their phones. This will involve asking users of existing and new Android devices in Europe which browser and search apps they would like to use.¹¹⁰ This is discussed further in section 2.9.3.

Branding

For a new or smaller search platform, another barrier to expansion arises from the strength of Google's brand. One simple indication of Google's brand strength is the fact that the verb 'to Google' has appeared in the Oxford English Dictionary for the past decade. Google is generally assessed to be one of the most valuable brands in the world. For example, according to studies by Kantar and Millward Brown, Google was the most highly valued brand globally in 2016, 2017 and 2018.¹¹¹

The ACCC recognises the strength of Google's brand partly reflects the high quality of its search service. When first developed, the Google algorithm provided an innovative method for ranking the relevance of search results. Google invests a considerable sum each year on improving the quality of its service. The brand recognition that Google enjoys is partly a consequence of such investments.

¹⁰⁷ European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

¹⁰⁸ European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

¹⁰⁹ F Yun Chee, [Google challenges record \\$5 billion EU antitrust fine](#), *Reuters*, 10 October 2018, accessed 23 November 2018.

¹¹⁰ K Walker, [Supporting choice and competition in Europe](#), *The Keyword (Google Blog)*, 19 March 2019, accessed 6 May 2019.

¹¹¹ Millward Brown, [2018 BrandZ Top 100 Global Brands](#), accessed 8 November 2018.

While some consumers may make the active choice to use Google's products, as they are of the view that it offers a higher quality search service, brand recognition can have other additional influences on consumer choice. If a consumer does not know the quality of a product and does not have the time to assess the quality of the product, the consumer may treat the prominence of a brand as an indicator of the quality of the product.

Extreme economies of scale and sunk costs

Google's search platform maintains its large share of the search market, in part, through considerable capital expenditure and research and development (R&D). Google's global R&D expenditure in 2018 was over US\$21 billion, equal to approximately 15 per cent of its revenue.¹¹²

More generally, a search platform faces substantial fixed costs. In contrast, the marginal cost of an additional user of the platform is relatively low. Accordingly, a search platform enjoys considerable economies of scale. To the extent that the fixed costs are 'sunk', they give rise to substantial barriers to entry for a potential new entrant.¹¹³ For such an entrant, sunk costs create a risk in the event that the costs cannot be recovered by advertising revenue. Even if fixed costs are not sunk, they may give rise to a barrier to entry if capital markets are imperfect.

As noted in a recent report on digital platforms written for the European Commission, while economies of scale is a feature of a range of industries, 'the digital world pushes it to the extreme and this can result in a significant competitive advantage for incumbents.'¹¹⁴ Google enjoys the 'extreme' returns to scale characteristic of a number of large digital platforms.¹¹⁵

2.3.4 Advantages of scope and conglomeration effects

The previous subsection identified features of Google's search platform that help to ensure its market power will persist and reduce the constraint arising from dynamic competition. But Google provides a variety of related services in addition to its search platform. Its presence in a collection of related markets gives Google certain advantages of scope, giving rise to 'conglomeration effects'.¹¹⁶ These advantages of scope further serve to entrench Google's market power, weakening the constraint from dynamic competition.¹¹⁷

Advantages of scope through data accumulation

One important advantage of scope stems from Google's accumulation of user data. Google obtains this data from two principal sources:

- First, data is obtained from Google's owned and operated sites. Such sites include Google's search engine, YouTube, Google Shopping, Gmail, and Google Maps.¹¹⁸
- Second, data is obtained from third party sites. For example, Google is able to collect such data when a consumer uses a device with an Android operating system or a Chrome browser to access a third party website, or when a user visits a third party website that uses Google's advertising services (of which Google claims there are more than two million sites, reaching 90 per cent of users worldwide) independent of the browser or operating system they use.¹¹⁹

112 Alphabet Inc., [Form 10-K form lodged with United States Securities and Exchange Commission](#), for the fiscal year ended December 31 2018, p. 33.

113 Capital expenditure gives rise to a cost that is not only fixed but is also 'sunk' if it cannot be recovered by selling or redeploying the asset in the event that an entrant to the market subsequently exits.

114 J Cr mer, Y de Montjoye, H Schweitzer, [Competition policy for the digital era](#), 2019, pp. 2, 20.

115 J Cr mer, Y de Montjoye, H Schweitzer, [Competition policy for the digital era](#), 2019, pp. 2, 20.

116 Firms that interact or potentially interact across several separate markets and supply goods or services that are in some way related to each other, for example, products that are complementary in either demand or supply.

117 'Advantages of scope' is a broader concept than the standard notion of 'economies of scope', which relates to the effect of scope on production costs.

118 Google recently announced that it plans to close down Google+ for consumers. B Smith, [Project Strobe: Protecting your data, improving our third-party APIs, and sunseting consumer Google+](#), *The Keyword (Google Blog)*, 8 October 2018, accessed 8 November 2018.

119 Google, [Google Display Network](#), accessed 8 November 2018.

Google's access to this data then allows it to provide a high quality ad targeting service. This ensures that Google has a comparative advantage in the supply of a number of services, including:

- the supply of search inventory on Google Search and Google Maps
- the supply of display inventory on YouTube and Gmail
- sales of inventory on third party sites through Google Ads, including advertising on sites that are members of the Google Search Network and Google Display Network (through AdSense and AdMob)
- the supply of services in the ad tech stack that rely on data to provide ad targeting.¹²⁰

Google maintains, in its response to the Preliminary Report, that 'there are strong indications that the scale and scope of the user data we collect has not created or increased barriers to entry in search advertising.'¹²¹ The ACCC considers, however, that for the reasons presented in section 2.5 below, Google's access to user data does provide it with a competitive advantage in delivering targeted advertisements.

Advantages of scope arising from the Google Ads entry point

Google provides a number of its services through Google Ads, including:

- sales of search inventory on its own websites
- sales of display inventory on its own websites
- sales of search inventory on third party websites
- sales of display inventory on third party websites.

Further, advertising inventory on Google's search engine can only be purchased through Google Ads, and advertising inventory on YouTube can only be purchased through Google Ads or through Display & Video 360. If an advertiser purchases a Google service through Google Ads, it may also have an incentive to purchase other services through Google Ads. There are considerable fixed costs of setting up a new online advertising campaign, including 'costs of setting up the platform, installing software and learning how to use it'.¹²² Therefore, once an advertiser has incurred the fixed costs of purchasing one service through Google Ads, it may choose to purchase another service through Google Ads, in order to avoid incurring additional set-up costs.

Advantages of scope arising from control of default settings

As noted above, the prominence of Chrome in the browser market and Android in the mobile operating system market gives Google an advantage in the supply of search services, through Google Search serving as the default search engine.

Advantages of scope arising in the ad tech stack

Google provides ad tech services throughout the ad tech stack. As will be discussed in chapter 3, the provision of a number of related services provides it with certain advantages of scope.

2.3.5 Google's strategic acquisitions

Google has spent substantial sums acquiring other businesses. Some of these acquisitions may have enabled Google to entrench its position in search and search advertising, including through expanding into related markets which may have been a source of possible rivals to Google's core products in the medium term. This potentially weakens the constraint from dynamic competition.

120 Ad tech refers to services involved in the automatic buying, selling and serving of some types of display advertisements. The combination of ad tech services involved in completing an end-to-end display ad transaction between advertisers and websites is often referred to as the ad tech supply chain or the ad tech stack. See chapter 3 for further discussion on ad tech.

121 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p.37.

122 See D Evans, [Platform Economics: Essays on Multi-Sided Businesses](#), Competition Policy International, 2011, p. 209.

In the period 2004 to 2014, Google is reported to have spent at least US\$23 billion buying 145 companies.¹²³ Some of the key acquisitions of Google during this time include¹²⁴:

- **Nest Labs** – US\$2.6 billion (2014), home automation software
- **Waze** – US\$969 million (2013), GPS navigation software
- **Motorola** – US\$12.4 billion (2011), mobile device manufacturer
- **ITA Software** – US\$676 million (2011), travel technology software
- **Admeld** – US\$400 million (2011), online advertising
- **AdMob** – US\$681 million (2009), mobile advertising software
- **DoubleClick** – US\$3.2 billion (2008), demand side platform software
- **YouTube** – US\$1.19 billion (2006).

This series of acquisitions has served to entrench Google’s position in search services and search advertising, particularly by providing it with advantages of scope and by reducing competition.

For example, YouTube had a strong position in video that could not easily be replicated. Google’s purchase of YouTube yields a number of competitive advantages. First, it provides Google with an advantage of scope through the accumulation of data. YouTube provides Google with access to data that can be used to improve the quality of its ad targeting services provided by Google Ads and also by Google’s demand side platform. Second, as advertising inventory on YouTube, since 2015, can only be purchased through Google Ads and Google’s demand side platform, Google is able to encourage advertisers to use these services¹²⁵.

To take another example, Google’s purchase of DoubleClick also helped to entrench its market power in search and search advertising for two reasons. First, DoubleClick represented a source of competition to Google’s intermediary service that sold advertising inventory on websites part of Google Display Network through AdWords. At the time, DoubleClick had developed an ad exchange, as well as advertising-facing and publisher-facing ad servers¹²⁶, which could have provided a rival service for selling programmatic advertising. Second, the purchase of DoubleClick gave Google a number of advantages of scope. For instance, following the acquisition, Google used the DoubleClick cookie to improve the quality of the ad targeting on Google’s AdSense network.¹²⁷

The acquisition by an incumbent firm of smaller innovative companies (often active in closely connected markets), discontinuing the target’s innovative projects and eliminating potential future rivals has been referred to as part of a so-called ‘killer acquisition strategy’.¹²⁸ These acquisitions are typically seen in the pharmaceutical industry but may also apply in digital markets.

Cremer, de Montjoye and Schweitzer in the 2019 report prepared for the European Commission titled ‘*Competition Policy for the digital era*’ (the Competition Policy for the digital era report) considered that there may be cases in digital markets where a killer acquisition strategy was evident but noted that this was not the typical scenario; the projects of the company being acquired are frequently integrated into the ‘ecosystem’ of the acquirer or into one of their existing products, rather than being eliminated. The report concludes that these types of acquisitions often have a plausible efficiency rationale.¹²⁹

123 J Lipton, [Google’s best and worst acquisitions](#), *CNBC*, 19 August 2014, accessed 8 November 2018.

124 Information provided to the ACCC.

125 L O’Reilly, [The advertising community is seriously annoyed about a move Google just made that makes it harder to buy ads on YouTube](#), *Business Insider*, 7 August 2015, accessed 24 June 2019.

126 SEC, [Google to Acquire DoubleClick](#), 13 April 2007, accessed 8 November 2018.

127 SEC, [Google to Acquire DoubleClick](#), 13 April 2017, accessed 8 November 2018.

128 C Cunningham, F Ederer and S Ma, [Killer Acquisitions](#), Yale Working Paper, 2017.

129 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), 4 April 2019, pp. 117-118.

The report published by the UK Digital Competition Expert Panel (the Furman Report) noted that such a strategy could indirectly lead to consumer harm.¹³⁰ It also noted that these types of acquisitions could be harmful if the newly acquired position in adjacent markets is exploited to harm existing or downstream rivals.¹³¹ While the Furman Report did not make any quantitative findings about the proportion of acquisitions by digital platforms that could constitute killer acquisitions, it did note that:

*While many mergers may be expected to be benign, recent robust analysis of the pharmaceutical sector, also characterised by competition for the market and the centrality of innovation, estimated that **more than 6% of acquisitions every year in that sector are killer acquisitions**. The report highlights that this is likely to be a lower bound. In the absence of any detailed analysis of the digital sector, these results can be roughly informative. (emphasis added)¹³²*

The European Commission's chief competition economist, Tommaso Valletti, has also spoken publicly about the issues surrounding killer acquisitions. Mr Valletti highlighted the issues competition agencies have with bringing merger enforcement actions in this area and noted that a potential solution to this problem is to shift the burden of proof onto larger companies, to prove the efficiencies of their deals.¹³³ These comments were echoed by Jean Tirole and European Commissioner for Competition Margrethe Vestager during the European Commission's 'Shaping competition policy in the era of digitisation' conference in January 2019. In particular, Vestager noted that the acquisitions of smaller firms by digital platforms in related markets meant platforms could control the terms of access, which allowed them to 'expand their power across the digital world'.¹³⁴

2.3.6 Conclusion: Google's market power in online search

The ACCC's view is that Google has substantial market power in the market for general search services. It is arguable that dynamic competition and the threat of new entry places some constraint on the quality of the general search service supplied by Google. However, the ACCC considers Google is insulated from dynamic competition to a considerable degree, by barriers to entry and expansion, advantages of scope as well as its acquisition strategies. Accordingly, while dynamic competition provides a degree of competitive constraint, large-scale entry is unlikely to occur at least in the short- to medium-term, ensuring that this constraint arising from dynamic competition remains somewhat weak.

Further, suppose that, despite these difficulties, a rival search platform were eventually able to successfully enter and expand. It is plausible that the new search platform would then become the dominant platform in the market because of (i) same-side network effects (ii) cross-side network effects (iii) economies of scale and (iv) advantages of scope. The presence of these four characteristics in the supply of general search services ensures that the market has the characteristics of a 'winner takes all' market. In the absence of changes to the regulatory environment, concerns regarding the limited extent of competition in the online search market in Australia could potentially re-emerge as the new platform attains its dominant position. Note, however, for the reasons given above, the threat of a rival search platform successfully entering and expanding is unlikely in the short- to medium-term.

130 J Furman et. al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 45.

131 J Furman et. al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 92.

132 J Furman et. al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 49.

133 J Aranze, [DG Comp chief economist: Reverse burden of proof to catch killer acquisitions](#), *Global Competition Review*, 20 November 2018, accessed 13 May 2019. A similar proposal to change the burden of proof is presented in M Motta and M Peitz, *Challenges to EU Merger Control*, Concurrences, May, 2019.

134 M Richards, [Killer acquisitions are a recurring issue, says Vestager](#), *Global Competition Review*, 17 January 2019, accessed 13 May 2019.

2.4 Market power in social media services

Key findings

- Facebook has substantial market power in supplying social media services in Australia, which are provided by its platforms, Facebook and Instagram. Facebook's substantial market power can be expected to persist at least in the short- to medium-term.

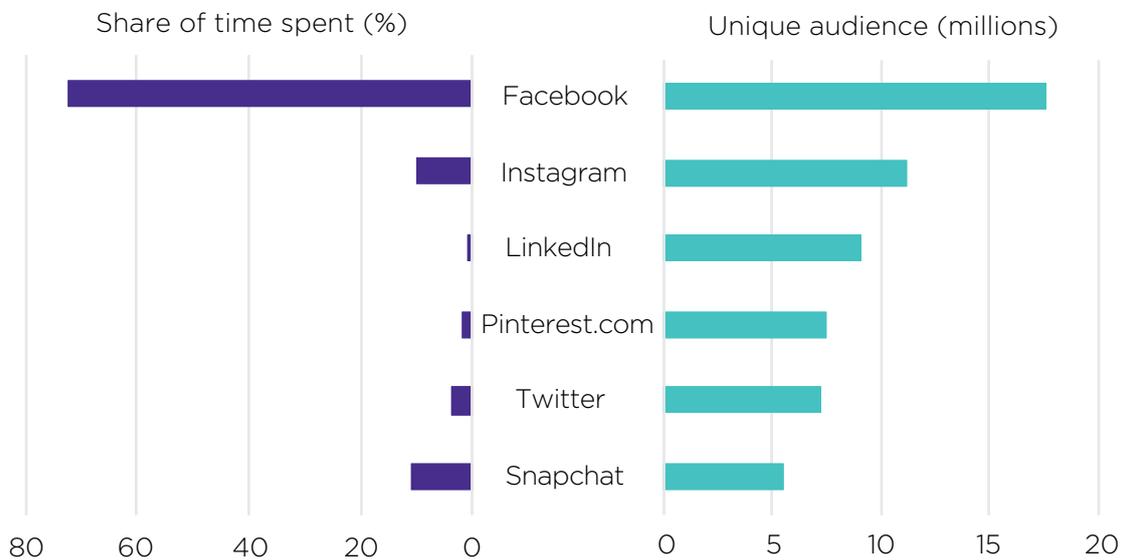
The ACCC considers that suppliers of social media services include the Facebook platform, Instagram (owned by Facebook), Snapchat and Twitter.

2.4.1 Facebook's market share and dynamic competition

Facebook charges a zero monetary price for the social media services that it provides, and obtains value from consumer attention and the collection of consumer data, so an assessment of its market power in this market considers the extent to which rivals provide a competitive constraint on the quality of the services offered by Facebook.

The closest competitor to the social media services provided by the Facebook platform and Instagram is Snapchat. As depicted in figure 2.4, in Australia the unique audience of Facebook is more than three times that of Snapchat, and the unique audience of Instagram is more than double that of Snapchat. The time spent on Facebook and Instagram, taken together, is more than eight times that spent on Snapchat. The unique audiences of Facebook and Instagram are also each significantly larger than the unique audience of Twitter, and the time spent on the two Facebook platforms is more than twenty times the time spent on Twitter. Accordingly, the Facebook platform, together with its subsidiary Instagram, accounts for a large share of the market for social media services.¹³⁵

Figure 2.4 The unique audience and time spent on selected platforms in Australia



Source Nielsen Digital Panel, February 2019.

In response, Facebook maintains that it 'competes with not only Snapchat and Twitter as the Preliminary Report suggests but with a wide range of news media and other websites and apps, including Google, YouTube, Microsoft, TikTok, Skype, LinkedIn, Oath, Yahoo, BuzzFeed, Apple iMessage, Twitter, Rakuten, Pinterest, Yelp and Dailymotion'.¹³⁶

¹³⁵ Nielsen Digital Panel, February 2019.

¹³⁶ Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 45.

The ACCC considers that the businesses listed by Facebook do not provide a substantial competitive constraint to Facebook's supply of social media services. In relation to the businesses cited, the three platforms that are most similar to Facebook and Instagram (other than Twitter and Snapchat) are Google+, Pinterest and LinkedIn.¹³⁷

First, Google closed the main Google+ platform, the version for consumers, in April 2019.

Second, the social media services supplied by Facebook and Instagram are somewhat differentiated from Pinterest, especially in respect of the feed they provide and sharing capabilities. In any event, the two Facebook platforms are considerably larger than Pinterest: Facebook's unique audience in Australia is more than two and a half times the size of Pinterest and Instagram's is more than one and a half times Pinterest's. Further, time spent on the two Facebook platforms is more than forty times the time spent on Pinterest.

Third, as the Bundeskartellamt (German Federal Cartel Office) observes, LinkedIn provides a professional network service, which can be contrasted to the social network provided by the Facebook platform.¹³⁸ Each of Facebook and Instagram have a higher unique audience than LinkedIn, and the time spent on the two Facebook platforms is more than eighty times the time spent on LinkedIn.

It is notable that the Bundeskartellamt adopts a narrower view of the market than the ACCC, concluding that not only is LinkedIn in a different market to the Facebook platform, but also that Twitter and Snapchat are in different markets to Facebook.¹³⁹

Accordingly, the ACCC considers that Facebook's platform and its subsidiary Instagram have a large share of the social media market. Facebook's large market share could be seen as evidence that there is little competitive constraint on the quality of its social media services. This said, as in the case of Google, it is argued that dynamic competition places a competitive constraint on the quality of services provided to users by Facebook. In particular, in the market for social media services, Friendster was initially leapfrogged by MySpace, which, in turn, was rapidly replaced by Facebook. It is argued that, more broadly, the market for social media services is characterised by innovation, which places a competitive constraint on the market.¹⁴⁰

However, the barriers to entry and expansion may be substantially higher now than in the early phase of the social media market. In particular, the global size of Facebook now dwarfs the size of MySpace at its peak. Whereas MySpace peaked at approximately 100 million monthly active users¹⁴¹, Facebook, which was founded in 2004, currently has more than 2.3 billion monthly active users globally.¹⁴² As discussed in the next section, the considerable scale of Facebook may serve to protect it from dynamic competition enabling its substantial market power to persist, through the operation of same-side and cross-side network effects, as well as economies of scale and advantages of scope.

The ACCC considers that, like Google, to a large extent, Facebook is insulated from dynamic competition by barriers to entry and expansion, advantages of scope, and its acquisition strategies.

2.4.2 Barriers to entry and expansion

A new entrant to the social media market, or a low-scale competitor, faces the following barriers to entry and expansion.

137 As noted above, Google recently announced that it plans to close its social media service Google+. B Smith, [Project Strobe: Protecting your data, improving our third-party APIs, and sunsetting consumer Google+](#), *The Keyword (Google Blog)*, 8 October 2018, accessed 8 November 2018.

138 Bundeskartellamt, [Background information on the Bundeskartellamt's Facebook proceeding](#), 7 February 2019, p. 4.

139 Bundeskartellamt, [Background information on the Bundeskartellamt's Facebook proceeding](#), 7 February 2019, p. 4.

140 Facebook, [Facebook Reports First Quarter 2019 Results](#), 24 April 2019, accessed 30 April 2019.

141 MySpace unique user numbers can be found in News Corporation's 10-K reports. See for example, [News Corporation's 2010 report](#) which states there were 101 million unique users in June 2010. Additionally, there were 68.4 million, 73 million, and 70 million unique users in June 2010, 2009 and 2008 respectively.

142 Facebook, [Facebook Reports First Quarter 2019 Results](#), 24 April 2019, accessed 30 April 2019.

Same-side network effects

Social media platforms exhibit same-side network effects on the user side of the platform. In particular, an increase in the number of users tends to raise the value of the platform to a given user. That is, if a large number of a user's social group and family are on the platform, then the platform will be relatively valuable for the user. As a consequence, large scale social media platforms, such as Facebook and Instagram, may have a greater ability to attract users than a smaller scale social media platform, such as Snapchat. The Bundeskartellamt observes that 'from the users' perspective, decisive criteria for the choice of a social network are its size and the possibility to find the persons they want to be in contact with on it (so-called "identity-based network effects")'.¹⁴³

A further explanation on same-side network effects is provided above in box 2.2.

Nevertheless, same-side network effects may not preclude the entry of a niche or differentiated social media platform. For example, LinkedIn provides a professional network, providing the opportunity to establish contacts with other people for professional purposes. Snapchat provides a network that is especially popular for people in younger age demographics.

Branding

Another barrier to expansion is the branding of Facebook's social media services. According to Kantar and Millward Brown, Facebook was the sixth most valuable brand globally in 2018, and the fifth most valuable in 2016 and 2017. In 2018, Instagram joined the top 100 most valuable brands, being ranked at 91.¹⁴⁴

The barriers to entry and expansion arising from branding for a social media platform are similar to those discussed above in section 2.3.

Economies of scale and cross-side network effects

The barriers to entry and expansion arising from economies of scale and cross-side network effects for a social media platform are similar to those discussed above in section 2.3. Facebook incurs large fixed costs on R&D and enjoys the 'extreme' returns to scale characteristic of a number of large digital platforms.

Facebook disagrees with the ACCC's arguments that two cross-side network effects operate on the platform, so as to provide it with a comparative advantage over smaller platforms. First, Facebook has questioned whether more users necessarily lowers the average fixed costs of advertising on a platform, and thus makes the platform more attractive to advertisers. So long as an advertiser is paying a price per impression or per click, the advertiser wants the 'right' users to see or click on the ad, not every Facebook user.¹⁴⁵ While the ACCC acknowledges that it is possible that a smaller platform will have more of the 'right' users for a given advertiser than a larger platform, nevertheless, on average, a larger platform will tend to have more of the 'right' users than a smaller platform.

Second, Facebook has questioned whether the high quantity of data that it is able to obtain through having a large number of users provides it with a comparative advantage in the provision of ad targeting.¹⁴⁶ Section 2.5 sets out the reasons for the ACCC's view that the personal data collected by Facebook is of considerable value.

2.4.3 Advantages of scope

Facebook provides a number of related services, allowing it to enjoy various advantages of scope.

First, while the social media services provided by the Facebook platform and Instagram are differentiated products, they are nevertheless closely related, allowing Facebook potentially to enjoy economies of scope.

143 Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017, p. 3.

144 Millward Brown, [2018 BrandZ Top 100 Global Brands](#), accessed 8 November 2018.

145 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 44.

146 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 26.

Second, Facebook is able to access data from its various owned and operated sites—including the Facebook platform, Instagram, Messenger, WhatsApp—as well as from Facebook Audience Network. It can then use this large pool of data to improve the quality of the ad targeting service it provides for advertisements sold on the Facebook platform, Instagram, Messenger and Facebook Audience Network.

Third, Facebook Ads serves as a single entry point for sales of advertising inventory on the Facebook platform, Instagram, Messenger and Facebook Audience Network. Given the set-up costs of using an advertising service, an advertiser that wishes to purchase any one type of advertising inventory sold through Facebook Ads may have an incentive to purchase other types of advertising inventory through Facebook Ads.

2.4.4 Facebook’s strategic acquisitions

Facebook has undertaken a considerable number of strategic acquisitions that may have served to entrench its market power. This strategy increases the probability that Facebook’s market power will persist.

In the past 12 years, Facebook is reported to have spent at least US\$23 billion buying 66 companies.¹⁴⁷ These acquisitions include:

- **WhatsApp** – US\$19 billion (2015)¹⁴⁸
- **Instagram** – US\$715 million (2012).¹⁴⁹

Facebook’s acquisitions have had the effect of entrenching its power in the supply of social media services, particularly through providing it with various advantages of scope and reducing competition.

For example, in acquiring Instagram, Facebook eliminated a potential competitor. At the time of the acquisition, Instagram was primarily a photo-sharing app, and did not sell advertising inventory. Following the purchase, however, Facebook developed Instagram into a broader social media platform, with the ability for users to share information and photos, to message other users, and to now sell advertising inventory. While, at the time of the acquisition, Instagram was more differentiated from Facebook than it is now and it is difficult to determine how Instagram would have developed in the absence of its acquisition by Facebook, Instagram had at least the potential to develop into an effective competitor. Even at the time of the acquisition, Instagram was, like Facebook, a platform facilitating the development of social networks of users, and it attracted consumer attention that was ripe for monetising with advertising.

Facebook suggests that the ACCC is assuming that ‘because Instagram is such a successful product today, it would have been competing with Facebook had Facebook not been permitted to acquire the company’, and that ‘this is entirely speculative’.¹⁵⁰

On the one hand, there was at least some indication at the time of the acquisition of the potential for Instagram to grow into a future competitor of Facebook.¹⁵¹ However, the ACCC recognises the difficulty of predicting the future, in a rapidly changing market, of an acquired business and is not forming a firm view on the appropriateness or otherwise of this or any other particular merger decision.

147 S Toth, [66 Facebook Acquisitions - The Complete List \(2018\)! \[INFOGRAPHIC\]](#), *TechWyse (blog)*, 4 January 2018, accessed 15 November 2018.

148 European Commission, [Regulation \(EC\) No 139/2004 – Merger Procedure](#), 3 October 2019, accessed 9 November 2018; SEC, [Facebook to Acquire WhatsApp](#), 19 February 2019, accessed 9 November 2018.

149 SEC, [Facebook, Inc. Quarterly report for the period ended September 30, 2012](#), accessed 9 November 2018. Facebook paid a total purchase price of US\$521 million (consisting of the issuance of approximately 12 million vested shares of Facebook’s Class B common stock to non-employee stockholders of Instagram and US\$300 million in cash) and issued approximately 11 million unvested shares of its Class B common stock to employee stockholders of Instagram on the closing date, with an aggregate fair value of US\$194 million. Together, this amounted in a total acquisition price of US\$715 million as at the date of the transaction.

150 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 46.

151 J Furman et. al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 98.

Facebook's acquisition of Instagram highlights an inherent challenge for competition agencies reviewing potential acquisitions by digital platforms: the need to speculate about changing digital habits by consumers, and the likelihood of firms to grow and develop to match those changing habits in the absence of a proposed acquisition.

Instagram is just one example of a pattern of acquisitions by Facebook.

Facebook also obtained advantages of scope from the purchase of WhatsApp. For instance, through the ownership of WhatsApp, Facebook is able to access data, which can be used to improve the quality of ad targeting on the Facebook platform, Instagram, Messenger and Facebook Audience Network.¹⁵²

In addition, Facebook has acquired the following businesses¹⁵³:

- **ConnectU** – a social networking site
- **Friendster** – a social networking site
- **Sharegrove** – a service that provides private online spaces where family and close friends can share content in real-time
- **Hot Potato** – a network that specialises in social activity updates
- **Gowalla** – a location-based social network
- **Glancee Glance** – a mobile app that enables users to discover and connect with people around them (location based social network)
- **Tbh** – an anonymous social media app
- **Friend.ly** – a social Q& A app
- **Divvyshot** – a photo sharing platform
- **Lightbox** – a photo sharing start-up
- **Masquerade** – face-altering tool like that offered by Snapchat
- **FriendFeed** – a social-media feed aggregator
- **Oculus** – a virtual reality entertainment company

While any of these acquisitions may not have amounted to a substantial lessening of competition, there appears to be a pattern of Facebook acquiring businesses in related markets which may or may not evolve into potential competitors, which has the effect of entrenching its market power.

The box below sets out an example of an acquisition by Facebook, which effectively provided it with a channel through which it could gather user data to facilitate its acquisition strategy, and describes other ways in which Facebook sought to gather further user data and behaviour (which may have the effect of providing Facebook with further knowledge to aid its acquisition strategy).

Box 2.4 Onavo, Facebook Research and Bolt

Onavo Protect (Onavo) is an app owned by Facebook that offers users a number of security features, including security alerts and access to a virtual private network (VPN) service. VPNs create a virtual encrypted tunnel between users and a remote server operated by a VPN service. All external internet traffic is routed through this tunnel, and a user's computer appears to have the IP address of the VPN service (see illustration in figure 2.5).¹⁵⁴ This allows users to secure their personal information by establishing secure connections when using public wi-fi hotspots or while working remotely.

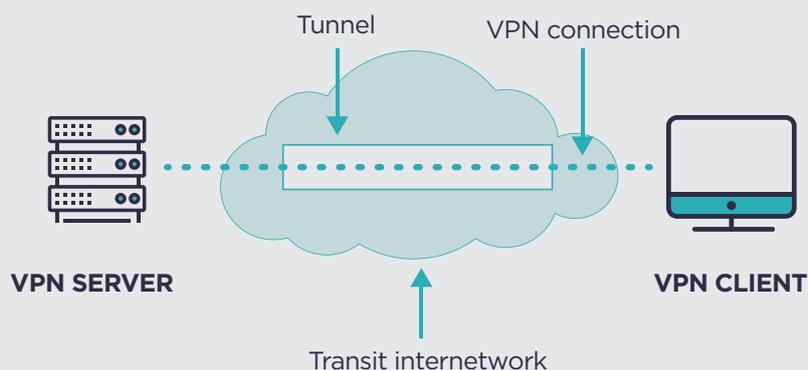
It also allows users to hide their location and internet activities from their internet service provider and to bypass geographic restrictions on websites.

¹⁵² For further detail on the type of data collected by Facebook, see Section 2.5 below.

¹⁵³ Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 44.

¹⁵⁴ M Eddy, [What Is a VPN, and Why You Need One](#), PC Mag, 7 August 2018, accessed 30 October 2018.

Figure 2.5: How a VPN works



The Onavo website states the following:

*Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when your apps use lots of data and secure your personal details.*¹⁵⁵

*Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.*¹⁵⁶

The Onavo privacy policy from 2013 (which was in effect until December 2018) provided that Facebook can¹⁵⁷:

- receive all of a user's mobile data traffic, including location data, after a user downloads and agrees to use the Onavo app, which directs a user's mobile data traffic through or to Facebook's server
- receive personally identifying information such as the user's name, email address, or other contact information and use the information that Facebook receives to operate and improve the services, develop new products and services, analyse usage of Facebook's apps and other applications on the user's device, to support advertising and related activities, and for other purposes.

As of February 2018, Onavo has been downloaded more than 33 million times across both iOS and Android globally.¹⁵⁸ At the time, users could download Onavo as a standalone app, or it could be downloaded through the Facebook app.

Onavo is now obsolete. It was deleted from the Apple iOS store in 2018. This was reported in the media to be because Apple deemed Onavo to have violated its App Store user privacy and data security policies.¹⁵⁹ Around 22 February 2019, it was removed from the Google Play Store, and as of 10 May 2019, there is a message on Onavo's website that Onavo will stop servicing and supporting the app from 6 May 2019.

In response to concerns about Onavo raised in the Preliminary Report, Facebook submitted that it had 'announced that [it] will end the Onavo program and have already stopped collecting data for market research purposes on Onavo'.¹⁶⁰ The ACCC notes that there are media reports that Onavo will continue operating as a Virtual Private Network in the short-term to allow users to find a replacement¹⁶¹ and in response to the Preliminary Report, Facebook stated: 'People who have Onavo downloaded on their phone will still be able to use the VPN functionality on the app for the coming weeks. Going forward, data collected will only be used to operate the VPN and provide the app.'¹⁶²

155 Onavo, [Home page](#), accessed 30 October 2018.

156 Onavo, [Home page](#), accessed 30 October 2018.

157 Onavo, [Privacy Policy](#), accessed 4 October 2018

158 T Hatmaker, '[Apple removed Facebook's Onavo from the App Store for gathering app data](#)', *TechCrunch*, August 2018, accessed 9 November 2018.

159 T Hatmaker, '[Apple removed Facebook's Onavo from the App Store for gathering app data](#)', *TechCrunch*, August 2018, accessed 9 November 2018.

160 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 65.

161 J Constine, '[Facebook will shut down its spyware VPN app Onavo](#)', *TechCrunch*, February 2019, accessed 29 April 2019.

162 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 65.

However, no timeframe has been provided about how long Onavo users would still be able to use the VPN functionality on the app.

Claims have been made in the media that Facebook had the ability, through Onavo, to obtain detailed insights into consumers' online activity and track the popularity of rival websites and apps. *The Washington Post* reports that Onavo 'sends anonymised data to Facebook on what apps consumers have installed, how frequently they open those apps, how long they linger inside them, and the sequence throughout the day of consumers' app usage'.¹⁶³ *The Wall Street Journal* reports that data from Onavo helped inform Facebook's acquisition of WhatsApp and its live video strategy in response to Twitter.¹⁶⁴

With such data from Onavo, Facebook had been able to effectively determine the popularity of apps and implement similar features into its own existing apps, create new apps that mirror the popular apps and purchase promising new start-ups or competing businesses.

The ACCC considers that if Facebook had the ability to track consumer use of rival apps, this could have provided Facebook with a significant competitive advantage and facilitated a strategy of acquiring potential rivals, or competing suppliers with a large user base. This would have further enhanced Facebook's market power in the relevant markets.

More information about the effect of Onavo on consumer privacy can be found in chapter 7.

Facebook Research

In February 2019, it was reported in the media that Facebook had repurposed Onavo's source code for use in a new VPN app called 'Facebook Research' which was available as a direct download to users on both Android and iOS.¹⁶⁵ It was reported that Facebook paid users aged between 13 and 35 up to US\$20 per month to download and install an enterprise certificate, which would grant Facebook access to their mobile app usage and browser traffic.¹⁶⁶ Facebook is alleged to have used intermediary beta testing services to obscure its involvement in the research; and to have only informed users that they were part of the Facebook Research program once they had signed a non-disclosure agreement.¹⁶⁷

In January 2019, Apple is reported to have found that Facebook Research was in violation of Apple's Enterprise Certificate Program, which prohibits app developers using enterprise certificates to grant root network access to customers' iPhones.¹⁶⁸ As a result, Apple is reported to have banned the Facebook Research app from iOS and blocked Facebook's enterprise certificate, which temporarily disabled all of Facebook's internal applications. As at April 2019, the Facebook Research app is no longer available on Android.¹⁶⁹

As of February 2019, media reports suggest that Facebook ceased recruiting new users for its Facebook Research program.¹⁷⁰ However, it has been reported that existing Facebook Research studies will continue to operate.¹⁷¹ The disclaimer underneath the app description in the Google Play app store could only be accessed when users tapped 'read more', and revealed that the app collects and sends user data to Facebook.

163 E Dvoskin, [Facebook's willingness to copy rivals' apps seen as hurting innovation](#), *Washington Post*, 10 August 2017, accessed 9 November 2018.

164 D Seetharaman and B. Morris, [Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users](#), *Wall Street Journal*, 13 August 2017, accessed 9 November 2018.

165 J Constine, [Facebook will shut down its spyware VPN app Onavo](#), *TechCrunch*, 21 February 2019, accessed 29 April 2019.

166 J Saarinen, [Facebook tries to sidestep Apple ban to keep capturing data](#), *iTNews*, 30 January 2019, accessed 29 April 2019.

167 J Constine, [Facebook will shut down its spyware VPN app Onavo](#), *TechCrunch*, 21 February 2019, accessed 29 April 2019.

168 C Newton, [Facebook will shut down its controversial market research app for iOS](#), *The Verge*, 30 January 2019, accessed 29 April 2019.

169 M Moon, [Facebook shuts down Onavo VPN app following privacy scandal](#), *Endgadget*, 22 February 2019, accessed 29 April 2019.

170 J Constine [Facebook will shut down its spyware VPN app Onavo](#), *TechCrunch*, 21 February 2019, accessed 29 April 2019.

171 J Constine, [Facebook will shut down its spyware VPN app Onavo](#), *TechCrunch*, 21 February 2019, accessed 29 April 2019.

Bolt App Lock

In March 2018, Onavo, owned by Facebook, launched the Bolt App Lock application that allows users to lock certain apps on their devices behind a passcode or fingerprint.¹⁷² The disclaimer underneath the app description in the Google Play app store could only be accessed when users tapped 'read more', and revealed that the app collects and sends user data to Facebook.¹⁷³

It was claimed in the media that the app amounted to a violation of user privacy.¹⁷⁴ Facebook appears to have then removed the app from the Google Play app store less than one week after it was launched.¹⁷⁵ At the time of its removal, the app was only downloaded 5 000 times.¹⁷⁶ A Facebook spokesperson is said to have later revealed that the launch of Bolt App Lock was a 'small, brief test.'¹⁷⁷

2.4.5 Conclusions: Facebook's market power in social media services

The ACCC's view is that Facebook has substantial market power in the market for social media services. While dynamic competition may provide a degree of competitive constraint on Facebook's supply of social media services, the barriers to entry and expansion for social media platforms, Facebook's advantages of scope and its acquisition strategy mean that large-scale entry is not likely in the short- to medium-term. The implication is that any constraint arising from dynamic competition is somewhat weak and that Facebook's substantial market power is likely to persist in the short- to medium-term.

Nevertheless, the persistence of Google's market power is, perhaps, more probable than that of Facebook. As discussed above, same-side network effects do not preclude the entry of smaller rivals, such as Snapchat, which appeal to specific groups. If such rivals are able to expand the breadth of their appeal, they may provide a challenge to Facebook's dominance in the provision of social media services.

2.5 Facebook and Google's access to personal data

The previous two sections identified cross-side network effects that provide Google and Facebook with a competitive advantage in the provision of targeted advertising. This arises, in part, from the value of the personal data accumulated by Facebook and Google. This section discusses in more detail the value of personal data to the digital platforms.

2.5.1 Facebook

Facebook's direct collection of personal data

Facebook is able to collect an extensive amount of high quality user data. This includes on platform data, such as:

- Registered user sign up data – name, date of birth, gender, email, phone number
- On Facebook platform data – pages liked/followed, friend network, content and ads liked/commented/clicked on, time spent looking at ads, phone contact details

172 S Perez, [Facebook-owned Onavo quietly launches Bolt App Lock, a data tracking app that locks other apps](#), *TechCrunch*, 9 March 2018, accessed 30 April 2019.

173 R Sandler, [Facebook removed a new Android security app that critics said unfairly collects private data](#), *Business Insider Australia*, 6 March 2018, accessed 30 April 2019.

174 D Cameron, [Facebook launches another deceptive 'security' App designed to siphon your data](#), *Gizmodo*, 10 March 2018, accessed 30 April 2019.

175 S Perez, [Facebook-owned Onavo quietly launches Bolt App Lock, a data tracking app that locks other apps](#), *TechCrunch*, 9 March 2018, accessed 30 April 2019.

176 R Sandler, [Facebook removed a new Android security app that critics said unfairly collects private data](#), *Business Insider Australia*, 6 March 2018, accessed 30 April 2019.

177 R Sandler, [Facebook removed a new Android security app that critics said unfairly collects private data](#), *Business Insider Australia*, 6 March 2018, accessed 30 April 2019.

- On other owned and operated platform data – Instagram (pages followed, friend network, content and ads liked/commented/clicked on, people messaged), WhatsApp (people messaged, phone numbers, contacts), and Messenger (people messaged, phone numbers, contacts, ads clicked on)¹⁷⁸

Facebook’s off platform personal data collection includes data on users that visit websites:

- or apps that utilise or are part of the Facebook Audience Network. Four per cent of the top 500 free and paid apps across Apple’s App Store and Google Play are integrated with the Facebook Audience Network¹⁷⁹
- that use ‘Facebook Business Tools’ such as Like/Share buttons
- that gives users the ability to sign-up to services/websites using Facebook account credentials
- that have Facebook Pixel (a Facebook analytics tool (piece of code)) on the website or app in order to monitor usage and track performance of advertising campaigns

Other off platform personal data collection includes:

- Device data – operating system, battery level, browser type, device operations, IP address and other network connection information, location, device attributes, device signals, cookie data
- Payment data (when financial transactions are made on Facebook platforms such as in game purchases and donations) – credit/debit card details, billing addresses.

Importantly, while users of Facebook may expect a certain level of data to be generated through their use of the main Facebook services as a quid pro quo for their use of the service, users may not expect Facebook to be collecting data on their interactions on other seemingly unrelated sites and apps, and using that data to assist it sell ad inventory.

Off platform data collection

A paper published by Princeton University that analysed online tracking of the top one million websites found that over 81 000 third party trackers were present on at least two first parties.¹⁸⁰ A third party tracker is an entity (other than the website directly visited by the user) that tracks or assists in tracking a user’s visit to the site; third parties can obtain users’ browsing histories through a combination of cookies and other tracking technologies that allow them to uniquely identify users.

All of the top five third party trackers, and 12 of the top 20 trackers, were owned by Google. Apart from Google, Facebook and Twitter were the only other third parties to have trackers present on more than 10 per cent of websites.

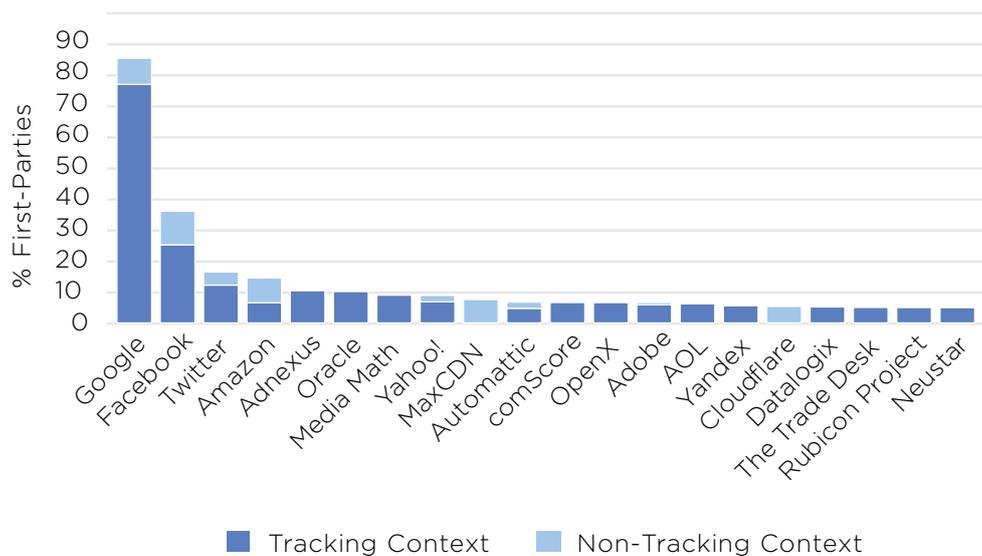
As depicted in figure 2.6, more than 70 per cent of websites had a Google tracker, and over 20 per cent of websites had a Facebook tracker. In addition, only 123 of these 81 000 trackers were present on more than one percent of websites.

178 [Data Policy](#), accessed 24 June 2019.

179 Facebook, [Audience Network](#), accessed 2 May 2019.

180 S Englehardt and A Narayanan, [Online Tracking: A 1-million-site Measurement and Analysis](#), *Princeton Web Census*, p. 8.

Figure 2.6 Online tracking by Google and Facebook



Source S Englehardt and A Narayanan, [Online Tracking: A 1-million-site Measurement and Analysis](#), Princeton Web Census, p. 8.

Even though a large number of trackers are present across the top one million websites, it is clear that Google, in particular, and also Facebook have trackers on significantly more websites than other firms using third party trackers to collect data. That is, Google and Facebook are collecting considerably more data from third party websites than other businesses.

Why is Facebook’s data valuable?

Facebook is able to combine all of this data and attach it to a user’s Facebook account. Facebook can collect and combine information about users on any of the Facebook products they use and under Facebook’s terms of service, it can also combine this with any other data collected from third party websites.

As the Bundeskartellamt describes in its press release accompanying its decision that Facebook has abused its dominant position:

If a third party website has embedded so-called “Facebook Business Tools” such as the “Like” button, “Facebook login” or analytical services such as “Facebook Analytics”, data will be transmitted to Facebook via [Application Program Interfaces (APIs)¹⁸¹] the moment the user calls up that third party website for the first time. It is not necessary for the user to interact with those tools (e.g. ‘like’ the page).¹⁸²

In accordance with Facebook’s terms and conditions, this data can be combined with data from the user’s Facebook account and used by Facebook, even if users have blocked web tracking in their browser or device settings.

Due to the ubiquity of Facebook ‘like’ buttons on Australian websites, Facebook is also able to build up profiles of non-Facebook users. For example, if a user that isn’t a registered Facebook user accesses a page utilising Facebook Business Tools, data on that user can be collected by Facebook. The ability to track users’ online browsing and interaction is not unique, but the scale on which Facebook is able to do it (because of ‘like’ buttons) is unmatched except by Google.

The ability of Facebook to merge off platform data with the unique data obtained via the user’s interactions creates a very detailed picture of a user that Facebook is able to track across not only on its own platform but on many other websites and apps. No other publisher or website, with the exception of Google, is likely to hold data that is as extensive as that collected by Facebook.

181 APIs are a set of tools for building software applications that specify how software components should interact.

182 Bundeskartellamt, [Bundeskartellamt prohibits Facebook from combining user data from different sources](#), press release, 7 February 2019, p. 1.

While other firms may be able to collect high quality data, Facebook's dataset is characterised by a large quantity of high quality data. As is apparent from the discussion above, the high quality of the data is due to the granularity and specificity of the different attributes. Additionally, Facebook is able to collect information not only on its own platforms but also on a large number of third party websites as indicated in the chart above. Furthermore, as Facebook is collecting all this data itself, it does not need to purchase third party data to the extent that other providers of digital advertising may need to.

Facebook's data is also made more valuable as it can be used to serve ads on third party websites and apps through its Audience Network program, as well as on the Facebook owned and operated platforms. It can also collect data through its Audience Network, through which, as discussed in chapter 3, Facebook supplies an integrated offering to both advertisers and publishers.

In the past, Facebook also had partnerships with global data providers that allowed Facebook to target users with advertising based on purchasing and other offline behaviour and demographic information. These partnerships with data brokers were terminated in March 2018 after the Cambridge Analytica privacy issue. However, users can still be targeted by Facebook with advertising based on their purchasing and other off platform behaviour if advertisers upload data they have collected first hand from the user (for example, via a customer membership list), or have bought from a third party.

Facebook asserts that the data it uses to personalise advertising is not rare or unique¹⁸³, and that the data it uses to personalise ads is entirely replicable.¹⁸⁴ Facebook engaged Professor Catherine Tucker to prepare a submission on the extent to which large amounts of data confers a competitive advantage.¹⁸⁵ Professor Tucker argues that the amount of data an entity has is not inherently valuable. For example, she cites her prior research where the ability to predict gender was not correlated with the amount of data a data broker had access to.¹⁸⁶ Professor Tucker concedes that what makes data valuable is the ability to make the right inferences based on the data that a firm has access to.

The ACCC disagrees with Professor Tucker's assertion that Facebook obtains little competitive advantage as a result of the data held.

While other businesses may seek to infer particular characteristics such as gender, age or other demographics, Facebook has very accurate user data as a result of the direct information users provide when using the Facebook platform. This provides Facebook with a strong competitive advantage. For example, in predicting gender, Facebook would have accuracy rates much higher than any data broker, given gender is a feature selected when signing up to Facebook. Professor Tucker's own work implicitly highlights this as she uses Facebook data (via Nielsen Digital Ad Ratings) as a baseline to validate whether data brokers were right or wrong in their predictions about a consumer's gender.¹⁸⁷

Cremer, de Montjoye and Schweitzer in the *Competition Policy for the digital era* report also reject Professor Tucker's arguments that big data does not confer a competitive advantage.¹⁸⁸ They conclude that 'having accumulated large amounts of relevant data over a long period of time often provides a strong competitive advantage to incumbents'.¹⁸⁹ The ACCC agrees with this view.

2.5.2 Google

Google's collection of data

Google collects an extensive amount of high quality data, including from the following sources:

- **Registered user sign up data** – name, date of birth, gender, email, phone number
- **On Google platform data** – Search, Maps, YouTube, Gmail, Blogger

183 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 27–32.

184 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 32–33.

185 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), November 2018.

186 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), November 2018, p. 42

187 N Neumann, C Tucker, T Whitfeld, [How Effective Is Black-Box Digital Consumer Profiling And Audience Delivery?: Evidence from Field Studies](#), 25 June 2018, p. 25.

188 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), 4 April 2019, p. 29.

189 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), 4 April 2019, p. 29.

- **Device data** – data collected on Android phones and devices manufactured by Google (Pixel, Google Home etc.) phones and devices running on Android operating system (estimates state there are 10.3 million Android users in Australia),¹⁹⁰ data collected via apps (such as YouTube, Gmail and Chrome which can be downloaded on non-Android devices), IP address and other network connection information, location, device attributes, device signals
- **Off platform data** – data collected on pages that utilise Google APIs for services such as Google Analytics, Google Ad Manager, Google Ads/AdSense (includes the 2 million websites that are part of Google Display Network), and log-ins that give users the ability to sign-up for services/websites using Google account credentials¹⁹¹
- **Internet of Things data** – Google offers Google Home, a speaker and connected home assistant and owns Nest, which produces a number of different connected home devices such as smoke alarms, indoor and outdoor cameras, thermostats, and doorbells. Google is able to collect information on all these devices
- **Payment data** – Google Pay, which acts as a digital wallet and method of payment, can collect data such as purchase history, credit/debit cards details and billing address under its terms of use.¹⁹²

Why is Google's data valuable?

Search data as distinct from other datasets

Search data, in general, is highly valuable as it provides very clear information about a consumer's desires. For example, a search for 'Flights from Sydney to Japan' reveals that the consumer is likely to be interested in flying from Sydney to Japan. However, it is possible to infer such a conclusion from other types of data sources. For example, a user may visit a number of travel websites that advise on activities to do in Japan, and this data can be tracked by platforms such as Google.

Data gained from search is also distinctive in that it is more likely to reveal user intent at a particular point in time. For example, the information that is provided by a user searching for 'fix a broken water pipe' is really only valuable in that immediate moment. Google is able to offer immediate advertising services to this consumer which is highly valuable.

While other search engines such as Bing also have access to this type of data, given the much lower number of search queries received, the volume of data received is significantly smaller than that received by Google Search.

Collection of data on and off its platforms

Google is also able to collect data not only on its owned and operated platforms but data on platforms/websites/apps that it does not own and operate. Google does this via APIs and software development kits (SDKs) of platforms/websites/apps that utilise Google services.¹⁹³ For example, Google's DoubleClick for Publishers (now known as Google Ad Manager) is used by the vast majority of websites. Running DoubleClick for Publishers requires websites to install Google SDKs on their properties, which also allows Google to collect data on those properties. Google is therefore likely to always be 'one-up' on websites as it has data on their audience's use and interaction with their webpages.

190 L Spencer, '[Australians bought 9.2M smartphones last year](#)', *ARN*, 20 February 2018, accessed 2 May 2019.

191 The Google Analytics cookie is reported to be found on 61 per cent of sampled website in a study conducted by Princeton Web Census. R Brandom, '[Google and Facebook still dominate tracking on the web](#)', *The Verge*, 18 May 2016, accessed 2 May 2019.

192 Google, '[Data transparency](#)', accessed 24 June 2019; Google, '[Data security & privacy on Google Home](#)', accessed 24 June 2019; D C Schmidt, '[Google Data Collection](#)', 15 August 2018.

193 An SDK is software that is used to develop applications.

As Rubinfeld and Gal observed, ‘those who enjoy more portholes from which to gather data, who have a substantial database to which they can compare new data, or who possess unique data synthesis and analysis tools, may enjoy a competitive comparative advantage.’¹⁹⁴ Google has many more portholes than anyone else and this gives it a significant competitive advantage.

Google has a number of advantages compared to other platforms and firms that offer digital advertising. While other platforms and firms may have high quality data, Google’s dataset is of high quantity and high quality, thereby giving it better insights into consumer behaviour. In addition, it does not pay a monetary fee to access this data, giving it an advantage over rival services that may need to purchase the data from data brokers.

2.6 Market power in search advertising

Key findings

- Google has substantial market power in the supply of search advertising in Australia, with a market share of more than 96 per cent of general search advertising revenue.

2.6.1 Background: Online advertising in Australia

In chapter 1, figure 1.3 presents a breakdown of advertising revenue in Australia, showing the shift from offline to online advertising. It is useful to distinguish between three broad types of online advertising: search, classified, and display.

Search advertising can be divided into two types—general and specialised. General search advertising is the advertising that appears on the search results of general search engines, such as those of Google and Bing. Specialised search advertising is the advertising that appears alongside the search results of search engines that perform more specialised functions, such as the search engines on the platforms of Amazon or Expedia (which are also examples of vertical search).

Classified advertising can also be divided into general and specific services. A classified advertising service is said to be specific if it focuses on a specific type of product. For example, in Australia, specific classified advertising is supplied by carsales.com.au for motor vehicles, by Seek for employment, and by Domain and realestate.com.au for real estate. In contrast, general classified advertising services provide advertising for a broader range of products. In Australia, sites that provide general classified advertising include Gumtree and Trading Post.

In this Report, the term ‘display advertising’ will be used to refer to a residual category of online advertising—in particular, online advertising other than classifieds and search. In this Report, display advertising includes banner advertisements, video advertisements, as well as advertisements that appear on social media platforms.¹⁹⁵ In Australia, major suppliers of display advertising inventory include the social media platforms Facebook and Instagram, the video platform YouTube, as well as news media platforms. These various types of advertising are depicted in figure 2.7.

¹⁹⁴ D Rubinfeld and M Gal, [Access Barriers to Big Data](#), Arizona Law Review, 59 (2017) 339, p. 342.

¹⁹⁵ The term ‘display advertising’ is sometimes used in narrower senses – for example, in a sense that does not include video advertising.

Figure 2.7 The varieties of advertising

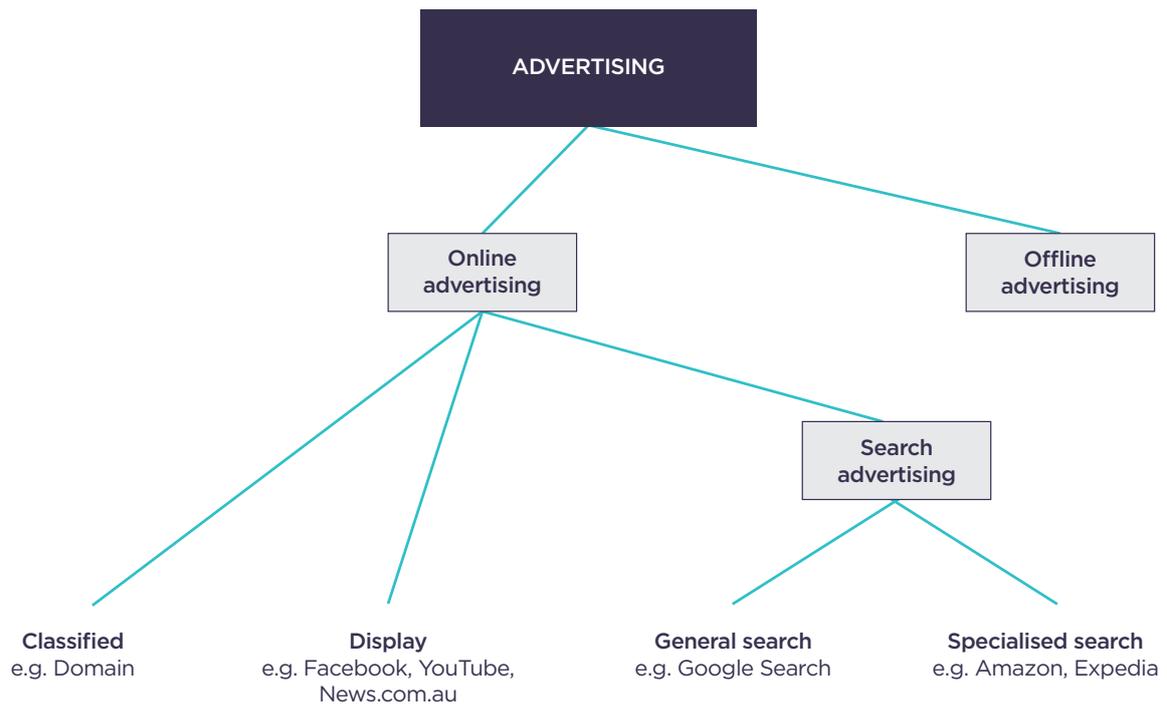
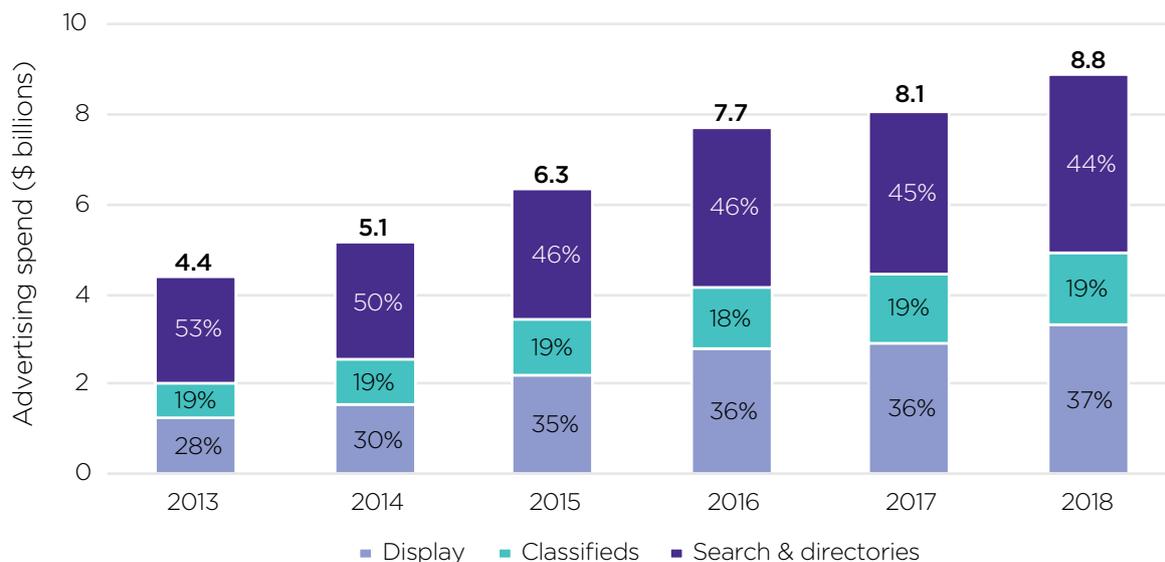


Figure 2.8 shows the levels of expenditure on the various types of online advertising in Australia.¹⁹⁶ While search and directories advertising (noting that advertising on directories can be expected to be a relatively small component of this type of advertising) continues to increase in value, it has fallen somewhat in prominence over the past few years. In 2013, it accounted for more than half of advertising expenditure, whereas in 2018, it comprised 44 per cent of total advertising expenditure. Conversely, in 2018, display advertising comprised 37 per cent of advertising revenue, higher than its contribution of 28 per cent in 2013.

196 CEASA, ACCC analysis.

Figure 2.8 A breakdown of online advertising expenditure in Australia



Note: Amounts are shown in 2018 dollars.

Source: CEASA, ACCC analysis.

Google supplies general search advertising inventory on its search engine site, as well as on Google Maps and other platforms it owns and operates. Additionally, Google sells search advertising inventory on behalf of third party content websites that are part of the Google Search Network. In relation to the supply of search advertising, Google is subject to little competitive constraint from offline advertising, display advertising, and classified advertising, for the reasons outlined below.

Offline advertising

In identifying a relevant market, it is important to keep in mind the purpose of defining the market. In the context of this Inquiry, the ACCC has been directed to consider the effect of digital platforms on advertisers and creators of journalistic content. To assess the appropriate framework in which to consider these issues, the ACCC has consulted extensively with advertisers and creators of journalistic content, including meetings and public forums, to gather relevant data and information.

As discussed in chapter 1, the main types of suppliers of offline advertising are radio and TV advertising, outdoor and cinema advertising and advertising in print media. The ACCC considers that these forms of advertising are not a close substitute for online advertising.

First, the type of targeting employed in online advertising, which tracks consumers' online behaviour to form predictions about their purchasing intentions, is not currently widely available for offline advertisers. While, to some extent, audiences can be targeted with offline advertising campaigns – for example, by advertising in specialised magazines – such targeting generally does not have the same degree of granularity that is available to online advertising campaigns.¹⁹⁷

Second, as ad targeting can be used in online campaigns and many goods and services can now be purchased online, online advertising facilitates direct response campaigns, which encourage a consumer to click and purchase the advertised product. Offline advertising is less suited to direct response campaigns.

¹⁹⁷ Note, however, that, with the recent introduction of 'addressable TV advertising', which is connected to the internet, relatively granular targeted advertising will become available for TV advertising.

Google and Facebook each maintain that their supply of online advertising faces substantial competition from offline advertising.¹⁹⁸ The ACCC considers that, while there may be a degree of substitutability between online and offline advertising, it does not follow that offline advertising places a substantial competitive constraint on online advertising.¹⁹⁹

Goldfarb and Tucker (2011a; 2011b) find evidence of a degree of substitutability between online and offline advertising.²⁰⁰ But as is noted in Goldfarb and Tucker (2011c)²⁰¹ and Ratliff and Rubinfeld (2011)²⁰², these studies do not establish that substitutability is sufficiently close to satisfy market definition criteria in competition law. Accordingly, the ACCC considers that these studies do not provide a reason to depart from the conclusion reached above: that, given the way in which online advertising can be targeted and used for direct response campaigns, the degree of substitutability is limited.

Notably, Facebook's own description of the objectives of advertisers on its platforms suggests there is limited substitutability between offline and online advertising. Facebook observes that 'no advertiser seeks to show an ad to *all* Facebook users. They want to show the ad to a subset of the *right* people—those most likely to be potential customers.'²⁰³ This extract highlights the value of ad targeting on online platforms, which is generally currently unavailable for offline advertising.

Any potential substitutability between offline and online advertising may also be asymmetric. For some advertisers, online advertising may be a substitute for offline advertising but *not* vice versa. This is primarily because online advertising provides opportunities for targeting and direct response campaigns that are not available in offline advertising. For example, advertising on Google Search may be a substitute for small businesses who previously advertised in the Yellow Pages, but advertising in the Yellow Pages is unlikely to be regarded as a substitute for advertising on Google Search, at least for advertisers who want to reach a targeted audience at the point of time when they manifest a purchase intention in the course of using Google Search.

Similar observations can be made in other markets where new technology has disrupted previous business models. For example, the report by the Body of European Regulators for Electronic Communications on fixed-mobile substitution in telecommunications, which was released in 2012, highlights the possibility of asymmetric substitution, according to which 'end users may substitute from fixed services to mobile services but not the other way around'.²⁰⁴

Display advertising

The ACCC considers that display advertising is not a close substitute for search advertising. The process of online search provides specific information to the search service about the purchasing intentions of a user. If a user types into the Google search engine the keyword 'Canberra vacuum cleaner', this keyword provides good evidence that the user is considering buying a vacuum cleaner in Canberra. Google can then serve an ad to that user that is relevant to that user's purchasing intention. This is not to say, however, that advertisers cannot obtain evidence about a user's purchasing intentions when serving display advertising. After all, ad targeting is used for both display and search advertising. But the keywords used in online search provide a particular form of strong evidence about the user's purchasing intentions.

198 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 34; Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), April 2018, pp. 43–4.

199 In a series of decisions over the past decade, the European Commission has consistently maintained that online advertising belongs to distinct markets from advertising that is offline. For a discussion of these decisions, see the *Autorité de la Concurrence* (French Competition Authority), [Opinion no.18-A-03 of 6 March 2018 on data processing in the online advertising section](#), p. 70.

200 A Goldfarb and C Tucker, [Advertising Bans and the Substitutability of Online and Offline Advertising](#), *Journal of Marketing Research*, 48(2) (2011a), pp.207–227; A Goldfarb and C Tucker, [Search Engine Advertising: Channel Substitution When Pricing Ads to Context](#), *Management Science*, 57(3) (2011b), pp. 458–470.

201 A Goldfarb and C Tucker, 'Substitution between Offline and Online Advertising Markets', [Journal of Competition Law and Economics](#), 7(1) (2011c), pp. 37–44.

202 J Ratliff and D Rubinfeld, 'Online Advertising: Defining Relevant Markets', *Journal of Competition Law and Economics*, 6(3) (2011), pp. 653–686.

203 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 44.

204 Body of European Regulators for Electronic Communications, [Report on the Impact of Fixed-Mobile Substitution on Market Definition](#), 13 July 2012, p. 2.

Accordingly, search advertising is often favoured over display advertising for campaigns focused on 'conversion'. A conversion occurs when:

- a consumer clicks on an advertisement, which takes them to the landing page
- the consumer takes some action desired by the advertiser from the landing page—for example, purchasing the advertised product, or contacting the supplier of the product.

Given the evidence of a user's purchasing intention provided by their choice of keyword, search advertising is especially suitable for 'direct response campaigns' that focus on conversion. Conversely, display advertising is often used for promoting general brand awareness rather than inducing a direct response.

Google and Facebook maintain, to the contrary, that the ACCC's views understate the degree of substitutability between search and display advertising. Facebook claims that there has been a 'convergence between display and search advertising': display advertising now uses the automated bidding systems that were originally most common in search advertising; and search advertising uses retargeting and images that previously were more common in display advertising. Facebook claims that advertisers may have conversion as an objective of a display advertising campaign.²⁰⁵ Google points to marketing tools that 'help advertisers and agencies manage and shift spend across all types of digital advertising providers.'²⁰⁶

The ACCC agrees with Facebook that there may have been a degree of convergence between display and search advertising over the past 15 years. However, the two varieties of advertising perform somewhat different functions and substitutability between them is still limited. First, display advertising is generally more suitable for brand awareness campaigns than search advertising. Second, whereas both search advertising and display advertising are used for direct response campaigns, search advertising is a particularly effective means for obtaining conversions for cases where consumers begin their online search process using a general search engine. Advertisers who desire access to such consumers early in their search process, as well as good evidence about their purchase intentions, will place a relatively high value on the advertising opportunities provided by search advertising.

The European Commission, in its Facebook/WhatsApp decision in 2014, left the issue open, but did note that:

The market investigation also supported to a large extent the existence of a further sub-segmentation of the online advertising market between search and non-search advertising. Indeed, the majority of the advertisers who took part in the market investigation considered that search and non-search ads are not substitutable as they serve different purposes (for search ads, mainly directing direct user traffic to the merchant's website, while, for non-search ads, mainly building brand awareness) and, as a result, most advertisers would not be likely to switch from one type to another in the event of a 5-10 per cent price increase. Similarly, the majority of competitors who took part in the market investigation submitted that search and non-search ads are not substitutable from an advertiser's point of view.²⁰⁷

There are a number of other findings by competition authorities that the degree of substitutability between search and display advertising appear to be limited. The Federal Trade Commission (FTC), in its 2008 decision on the Google/DoubleClick merger, decided that search advertising is not a substitute for non-search advertising, observing that:

A user's visit to a particular content page may reveal some insight into the user's interests. However, users visiting a website do not declare their interests in the same way they do when they type in a keyword on a search engine.²⁰⁸

205 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 41.

206 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 34.

207 European Commission, [Case No COMP/M.7217 - Facebook/WhatsApp](#), p. 13 [76].

208 Federal Trade Commission, [Statement of Federal Trade Commission Concerning Google/DoubleClick](#), FTC File no. 071-0170, p. 3.

The FTC also emphasised the suitability of search advertising for direct response campaigns, in contrast to brand advertising.²⁰⁹

The Autorité de la Concurrence (French Competition Authority), in its 2010 sector inquiry into competition in online advertising, found that 'display is not a close substitute for search-based ads and therefore cannot be deemed part of the same market.'²¹⁰ Its grounds were that the purposes of the two types of advertising are distinct, targeting operates in different ways and the costs are notably different.

In its discontinued investigation into Google's online advertising services, the Canadian Competition Bureau defined one of the relevant markets to be search advertising services in Canada, and another relevant market to be exchange based online display advertising services in North America.²¹¹

In contrast, in its 2008 decision on the Google/DoubleClick merger, the European Commission found that the market investigation was 'inconclusive' as to the extent of the substitutability between search and display advertising.

Given that the substitutability of search and display advertising is a contentious question, it is helpful to consider how the ACCC's market power assessment would be affected if, instead, search and display were treated as substitutes. In the broader market, comprising both search and display, Google's search advertising has a market share of 45 per cent (and so the total market of Google, which also would include revenue from advertising on YouTube, would be in excess of 45 per cent).²¹² Facebook's market share would be 27 per cent.²¹³ Having regard not only to Google's market share but also its other competitive advantages, the finding that Google has substantial market power would still be sustained even if this broader market definition were applied. While Facebook's market share is considerably less than Google's, it might nevertheless be argued that Facebook has market power given the considerable differentiation, which has been described above, between distinct types of online advertising.

Classified advertising

General classified advertising, such as that provided by Gumtree and Trading Post, is not a close substitute for Google's search advertising. Many of the advertisements on these platforms are for 'one off' sales of a single product or a few products, often by private individuals. As noted above, there are considerable set-up costs for running an advertising campaign on Google Search, so it is unsuitable for such 'one off' sales.

The ACCC considers that specific classified advertising, such as that provided by Domain, Carsales.com.au and Seek, is not a close substitute for Google's search advertising. In Australia, specific classified advertising is provided at scale for only a few products, such as real estate, motor vehicles and employment. While the supply of such advertising may, potentially, place some competitive constraint on Google's search advertising service that relates to each of these specific ranges of products, it places no competitive constraint on the search advertising services that relate to the broad range of other products advertised on Google's search engine.

2.6.2 Google's market power in search advertising

Google has two kinds of competitors in the supply of search advertising—competitors in general search advertising and suppliers of specialised (vertical) search advertising. Neither class of competitor place significant competitive constraint on Google's supply of search advertising.

209 Federal Trade Commission, [Statement of Federal Trade Commission Concerning Google/DoubleClick](#), FTC File no. 071-0170, pp. 5-11.

210 Autorité de la Concurrence, [Opinion No 10-A-29 of 14 December 2010 on the competitive operation of online advertising](#), 10 December 2010, p. 30.

211 Canadian Competition Bureau, [Statement regarding its investigation into alleged anti-competitive conduct by Google](#), 19 April 2016.

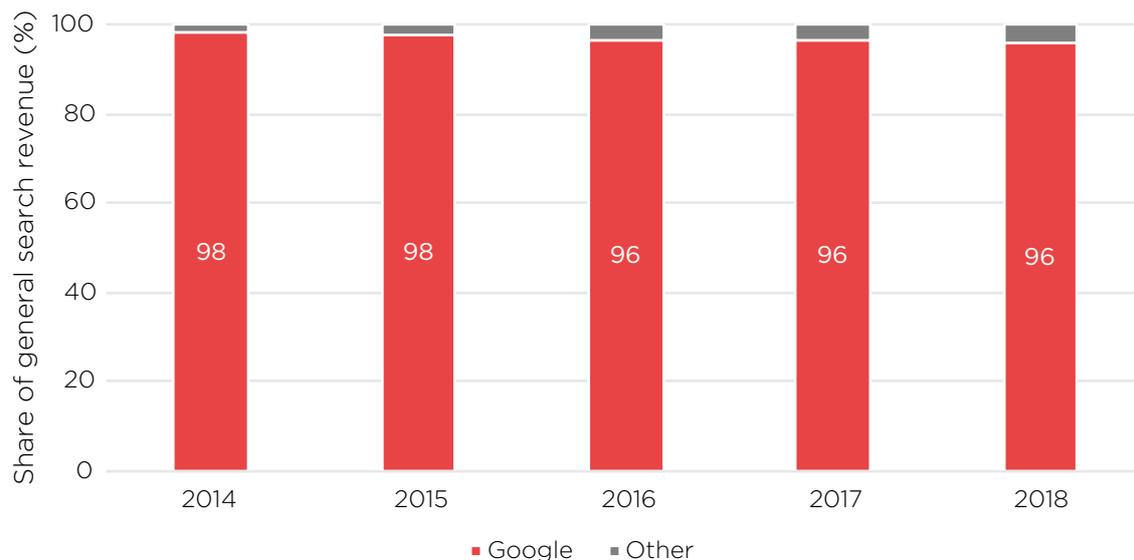
212 Information provided to the ACCC.

213 Information provided to the ACCC.

Competitive constraint from suppliers of general search advertising

As noted above in section 2.3, while there are a number of suppliers of general search services in Australia, Google and Bing are the only suppliers with a market share of more than 1 per cent.²¹⁴ Google has also been the dominant search engine provider for the past decade (see Figure 2.2), enjoying a market share of 93 per cent or more since 2009.²¹⁵ Figure 2.9 shows Google's share of general search advertising in Australia. For the past few years, Google's market share has ranged from 96 to 98 per cent.²¹⁶

Figure 2.9 Share of general search advertising revenue in Australia²¹⁷



Source: Data provided to the ACCC.

Given Google's large share of both general search services and general search advertising, as well as the reasons below, other search engines place little competitive constraint on Google.

First, a large proportion of Australian users of general search services effectively 'single home' on Google. A user is said to 'single home' on a platform if it uses that platform and no others. Given Google's large share of general search services, it follows that most Australian users of general search almost always use Google, and thus effectively single home. If an advertiser wishes to reach these single homing customers of general search services, it cannot do so through another search engine and must use Google. For such advertisers, Google is a must have product—Google has a monopoly over access to the attention of these single homing customers.²¹⁸

Second, an advertiser may have a target level, or a minimum level, of traffic that it desires to reach. Given Google's dominance of the market for general search services, it provides far greater reach than rival search services. An advertiser may find that, even if it advertises on all of the search engines that compete with Google, it is unable to obtain a sufficient level of reach, requiring the advertiser to use Google in order to achieve its desired reach. For such an advertiser, Google is a must have product.

²¹⁴ Statcounter, [Search engine market share](#), accessed 11 September 2018.

²¹⁵ Statcounter, [Search engine market share](#), accessed 11 September 2018.

²¹⁶ Data provided to the ACCC.

²¹⁷ Data provided to the ACCC.

²¹⁸ The economic literature has explored the implications of single-homing by users of a multi-sided platform, pointing, in particular, for the potential for such single-homing to ensure the platform obtains market power. See, for example, M Armstrong, Competition in Two-sided Markets, *Rand Journal of Economics*, vol. 37 no. 3 (2006); P Belleflamme and M Peitz, Platform Competition: Who Benefits from Multihoming, *International Journal of Industrial Organization*, vol. 64 (2019) pp. 126.

Third, Google's large share of the general search service market gives it a competitive advantage over other search engines in the supply of search advertising. This competitive advantage is a consequence of two of the cross-side network effects discussed in section 2.2.

- Many advertisers incur fixed set-up costs from using a particular search platform and/or from running a particular campaign. As advertisers tend to obtain more traffic on Google's platform compared to other search engines, their average fixed costs may be lower on Google than on other search engines. All else being equal, such advertisers may therefore prefer to advertise with Google than with other search engines.
- As there is more search traffic on Google, it has access to more search data than other search engines which it can use to show more relevant ads to users.

Google maintains that its 'pay-per-click model undercuts network effects in search advertising'.²¹⁹ Google refers to a specific type of network effect that arises in 'traditional advertising where an advertiser is charged a fixed price to place an ad', and observes that this type of network effect does not operate on the Google Search platform.²²⁰ The ACCC agrees that this specific network effect, common with traditional advertising does not arise on Google's platform. But this does not mean the two cross-side network effects described above do not exist. The ACCC's view is that Google obtains a competitive advantage in search advertising for the reasons given above.

Competitive constraints from suppliers of specialised search advertising

Advertising appears alongside search results not only on general search services but also more specialised (vertical) search services, such as those provided by the Amazon and Expedia platforms. The ACCC considers that such suppliers of specialised search advertising place little competitive constraint on Google.

First, such suppliers of specialised search advertising only provide advertising inventory for a specific range of products or services, ensuring that, for a broad range of products and services, Google's supply of advertising is not constrained by specific search advertising.

Second, suppliers of specific search advertising still have a relatively small presence in the advertising market compared to Google. For example, Amazon and Expedia are two of the larger digital platforms that supply specific search advertising. Figure 2.10 compares the global advertising revenue from Google's sites to estimates of the advertising revenue earned by Amazon and Expedia.²²¹ While Amazon's presence in online advertising is growing, it still has a small presence relative to Google, globally.²²²

Amazon's presence in Australia is currently relatively small, and so the discrepancy between Google and Amazon's Australian advertising revenue is likely to be significantly larger than that represented in figure 2.10. As noted above, however, Amazon has considerable potential to grow in Australia over the next decade. This is explored in further detail in chapter 8.

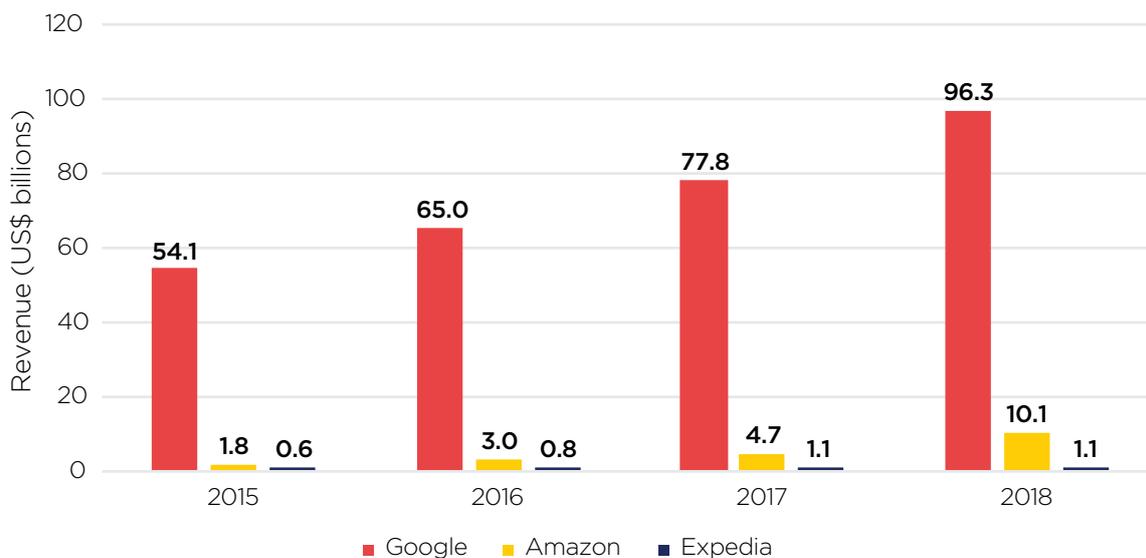
219 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36.

220 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36. The specific type of cross-side network effect that arises with traditional advertising can be described as follows. Consider two newspapers that adopt a pay-per-ad pricing model, rather than pay-per-impression or pay-per-click. The newspaper with more readers has a competitive advantage over the newspaper with fewer readers, on account of the following cross-side network effect: for a given price, advertisers who use the larger newspaper obtain more 'eyeballs per dollar' than advertisers who use the smaller newspaper. But this specific type of network effect does not operate if the pricing model is pay-per-impression or pay-per-click. Accordingly, the ACCC did not maintain in its Preliminary Report that this specific type of cross-side network effect provides Google with a competitive advantage.

221 The data in figure 2.10 is taken from the companies' 10-K financial statements. For Amazon and Expedia, the estimates represent upper bounds on their annual advertising revenue. The figure for Amazon is its 'other sales' item, which is primarily advertising revenue. The figure for Expedia is its 'advertising and media' component of its revenue, which includes third-party revenue from Trivago.

222 Note that the online marketplace provided by Amazon may place, to some degree, a competitive constraint on Google's supply of search advertising. If prices for advertising on Google were to increase, a business that had previously advertised on Google's search service might instead shift to selling on the Amazon marketplace. Moreover, Google maintains that Expedia's referral service provides a competitive constraint on Google's supply of search advertising (Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 35) The marketplace service provided by Amazon and the referral service supplied by Expedia are not, however, advertising services. Accordingly, the degree of substitutability can be expected to be limited.

Figure 2.10 Global revenue from the supply of advertising opportunities (US\$)



Source: Google, Amazon and Expedia 2017 10-K forms. The figures for Amazon and Expedia are proxies for advertising revenue: the figure for Amazon is the 'Other' component of the 'Net Sales' item; the figure for Expedia is the 'Advertising and media' item.

In summary, the ACCC's view is that Google has substantial market power in the supply of search advertising. In supplying search advertising inventory, Google faces little competitive constraint, either from suppliers of general search advertising or from suppliers of specific search advertising. In addition, section 2.3 concluded that large-scale entry by a search platform is unlikely in at least the short- to medium-term, because of barriers to entry and expansion for search platforms, Google's advantages of scope, and its strategic acquisitions. Accordingly, Google's market power in search advertising is not merely transitory.

Further, even the largest advertisers have budgets that are small relative to Google's advertising revenue. While some larger advertisers have been able to negotiate pricing discounts from Google for search advertising, advertisers generally have little bargaining power in negotiations with Google because of their small size relative to Google. For completeness, it is worth noting that advertisers clearly have little opportunity to bypass Google's search advertising service, either by vertical integration with a search service or by sponsoring a new entry.²²³

2.7 Market power in display advertising

Key findings

- Facebook has substantial market power in the supply of display advertising in Australia, with a market share of around 51 per cent. The rest of the market is highly fragmented; the ACCC estimates no other firm has a market share of more than 5 per cent.

Companies supplying display advertising are subject to little competitive constraint from offline advertising, search advertising, or classified advertising. The reasons for this conclusion are analogous to the reasons set out above that Google is subject to little competitive constraint from offline advertising, display advertising and classified advertising. Specifically, display advertising is particularly suitable for promoting brand awareness, in contrast to search and classified advertising.

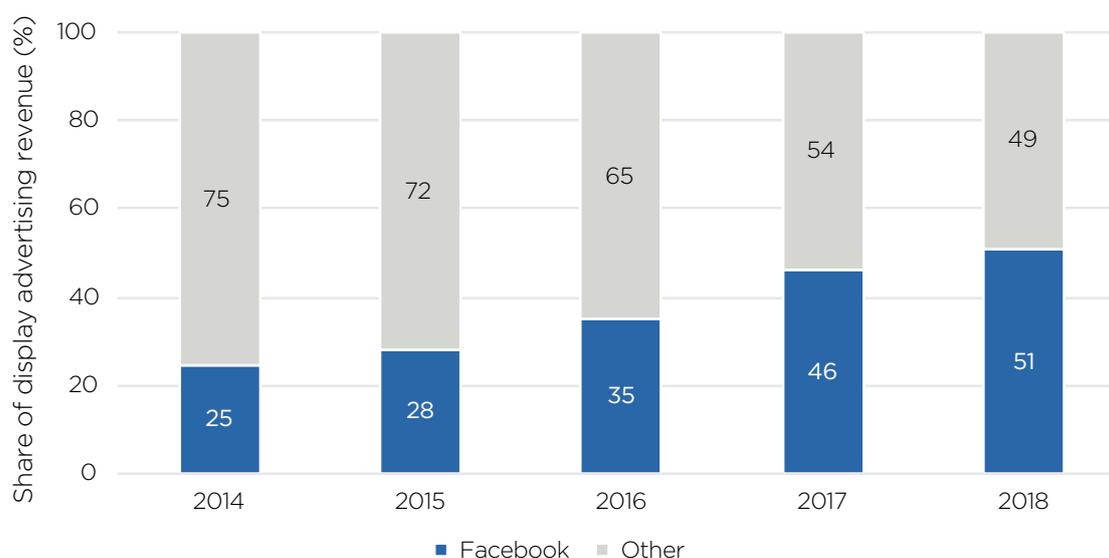
²²³ See ACCC, [Merger Guidelines](#), November 2008, p. 44, for the relevance of such bypass opportunities for the assessment of market power.

The advertising on Facebook’s social media platforms, Facebook and Instagram, is display advertising, as is advertising on multiple other websites, including the websites of online news sites. Display advertising may take the form of a banner, image or video advertisement.

2.7.1 Facebook’s market power in display advertising

Figure 2.11 depicts the shares of Australian display advertising revenue.²²⁴ In 2018, Facebook and Instagram accounted for 51 per cent of the market.²²⁵ The rest of the market is highly fragmented, with the ACCC estimating no other firm having a market share of more than 5 per cent (including, for example, YouTube and Snapchat). Facebook and Instagram’s share of the market has grown substantially over the past few years.²²⁶ Now Facebook and Instagram, taken together, account for almost half of the display advertising market.²²⁷

Figure 2.11 Shares of digital display advertising revenue in Australia



Source: Data provided to the ACCC.

In supplying advertising inventory on Facebook and Instagram, Facebook faces little competitive constraint from other suppliers of display advertising.

First, Facebook is a relatively large supplier of display advertising. Facebook and Instagram dwarf the revenue of all other competitors.²²⁸ For example, the News Corp and Fairfax (now Nine) websites and apps, two other suppliers of display advertising in Australia, each earn significantly less display advertising revenue than Facebook.

Second, the advertising inventory on social media platforms is a specific kind of display advertising – social media advertising – which is differentiated from other kinds of display advertising. For instance, users of social media platforms can interact with advertising – for example, by ‘liking’ advertisements (or other types of response, such as making comments about the advertisement or sharing the advertisement). So if an advertiser believes that its product is such that advertisements for that product are prone to be ‘liked’ (or otherwise responded to) on a social media platform, then that advertiser may prefer to

224 Data provided to the ACCC. Several assumptions are made to estimate the total Australian display advertising expenditure that could affect our market share estimates. However, even if total Australian display advertising expenditure is, in fact, US\$1bn higher than the estimate used, Facebook’s share is still 39 per cent. Note that that the revenue attributed to Facebook includes not only revenue from display advertising on its Facebook and Instagram platforms but also from the Facebook Audience Network. Revenue from the Audience Network, however, makes only a relatively small contribution to this figure.

225 Data provided to the ACCC.

226 Data provided to the ACCC.

227 Data provided to the ACCC.

228 Data provided to the ACCC.

advertise on a social media platform than, say, using a banner ad on an online newspaper. For example, viral marketing is a form of advertising that relies specifically on social networks to promote products. In attracting those advertisers with a preference for advertising on social media, Facebook faces little competitive constraint from other suppliers of social media advertising.

In Australia, Facebook's largest and closest competitor in the supply of social media advertising is Snapchat. Nevertheless, Facebook has a much larger presence in social media advertising. The combined revenue from advertising inventory sold on Facebook and Instagram is many times more than Snapchat.²²⁹ The unique audience of Facebook is also more than three times that of Snapchat, and the unique audience of Instagram is more than double than that of Snapchat.²³⁰ These numbers indicate that a substantial fraction of users 'single home' on Facebook's social media platforms. That is, a substantial proportion of those who use Facebook and/or Instagram do not use Snapchat.²³¹ For advertisers with a preference for advertising on social media, Facebook has a monopoly over access to the attention of its single-homing users.

Further, given that Facebook enjoys greater usage than Snapchat, the operation of cross-side network effects confer on Facebook a competitive advantage. In particular, Facebook has a competitive advantage over social media platforms with fewer users for at least two reasons: it has access to more data and so can provide a higher quality ad targeting service; and advertisers on Facebook can expect to receive more traffic, and so enjoy lower average fixed costs.

Accordingly, the ACCC considers that Facebook has substantial market power in the supply of display advertising. Facebook is subject to little competitive constraint, either from suppliers of social media advertising or, more generally, from suppliers of display advertising. Moreover, given the discussion in section 2.4 of the barriers to entry and expansion in social media services, advantages of scope and Facebook's strategic acquisitions, large-scale entry or expansion by a provider of social media services is unlikely in the short- to medium-term.

Given the significance of the Facebook's platforms for advertisers looking to reach an online Australian audience, advertisers have little bargaining power. Further, advertisers have little opportunity to bypass Facebook's display advertising services, by vertical integration or by sponsoring new entry.²³²

2.8 News media referral services and bargaining power

Key findings

- Google and Facebook supply news referral services to media businesses. The ACCC considers that these services probably constitute a market and that Google and Facebook are each likely to have substantial market power in that market. The ACCC has decided, however, that it is not necessary for the purposes of this Report to reach a conclusion on those matters.
- A significant number of media businesses rely on news referral services from Google and Facebook to such a degree that Google and Facebook are each unavoidable trading partners. This provides each of Google and Facebook with substantial bargaining power in their dealings with these media businesses. This bargaining power significantly affects the manner in which these media businesses deal with Google and Facebook and the outcomes of those dealings.

Media businesses interact with digital platforms in a variety of ways. Social media platforms, search engines and media aggregation platforms are increasingly common ways for Australian consumers to access news and journalism. As set out in chapter 1, 33 per cent of Australian consumers report accessing news through social media, 20 per cent searching for stories through search engines and

229 Data provided to the ACCC.

230 Nielsen Unique Audience in Australia in August 2018 (Nielsen Digital Panel data, 2018) estimates the unique audience of Facebook as 16.9 million; Snapchat 5.1 million and Instagram 10.8 million.

231 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018.

232 See ACCC, [Merger Guidelines](#), November 2008, p. 44, for the relevance of such bypass opportunities for the assessment of market power.

12 per cent accessing content through news aggregators. By comparison, 30 per cent of Australian news consumers accessed online news directly from the websites of news media businesses.²³³

If a search is undertaken on Google's search engine, the search results page may include a hyperlink to the website of a news publisher, accompanied by a small snippet of news content. If the search occurs on a mobile phone, the link may alternatively take the user to a news publisher's app or to a news article that is published in the Accelerated Mobile Pages format. Posts on Facebook and Instagram can also contain images and hyperlinks that refer users to a platform of a news publisher. Links associated with the Facebook Instant Articles product, however, do not take a user to the news publisher's platform; instead these links take users to a news article that is viewed on the Facebook platform.

The principal benefit to a platform of providing these links is that they attract consumers to the platform. For example, consumers searching for news on particular topics expect to find links to large media businesses. If digital platforms did not provide links to this content, at least some consumers may shift to other platforms.

While news content will not always be directly monetised by the platform (for example, in most cases Google does not place advertisements alongside the search results for news stories) digital platforms benefit from consumers' attraction to the platform (and the brand).

News publishers benefit from links from Google and Facebook because the links generate traffic that can be monetised, either on the platforms of news publishers (their apps or websites) or on third party platforms (such as Apple News or Facebook). The traffic may be monetised through the sale of advertising inventory, subscriptions, membership fees or donations.

The ACCC refers to this as the supply of news media referral services.

The ACCC's Preliminary Report examined the dealings of Google and Facebook with news media businesses in the context of a news referral market and expressed the preliminary view that Google and Facebook have substantial market power in this market. In their respective responses to the Preliminary Report, Google and Facebook each submitted that there is no such market and Google submitted that if there is that it does not compete in such a market.

The ACCC considers that these services probably constitute a market and that Google and Facebook are likely to have substantial market power in that market. The ACCC has decided, however, that it is not necessary for the purposes of this Report to reach a conclusion on those matters.

This is because a significant number of media businesses rely on news referral services from Google and Facebook to such a degree that Google and Facebook are unavoidable trading partners. This provides Google and Facebook with substantial bargaining power in their dealings with these media businesses.

This bargaining power significantly affects the manner in which these media business deal with Google and Facebook and the outcomes of those dealings. The crux of the issues raised in submissions by news media businesses is the imbalance in bargaining power, and this is the issue the ACCC has focused on in this Report. The reasons for the ACCC's view that each of Google and Facebook have substantial bargaining power is set out in this section.

2.8.1 The bargaining power of Google and Facebook in dealings with media businesses

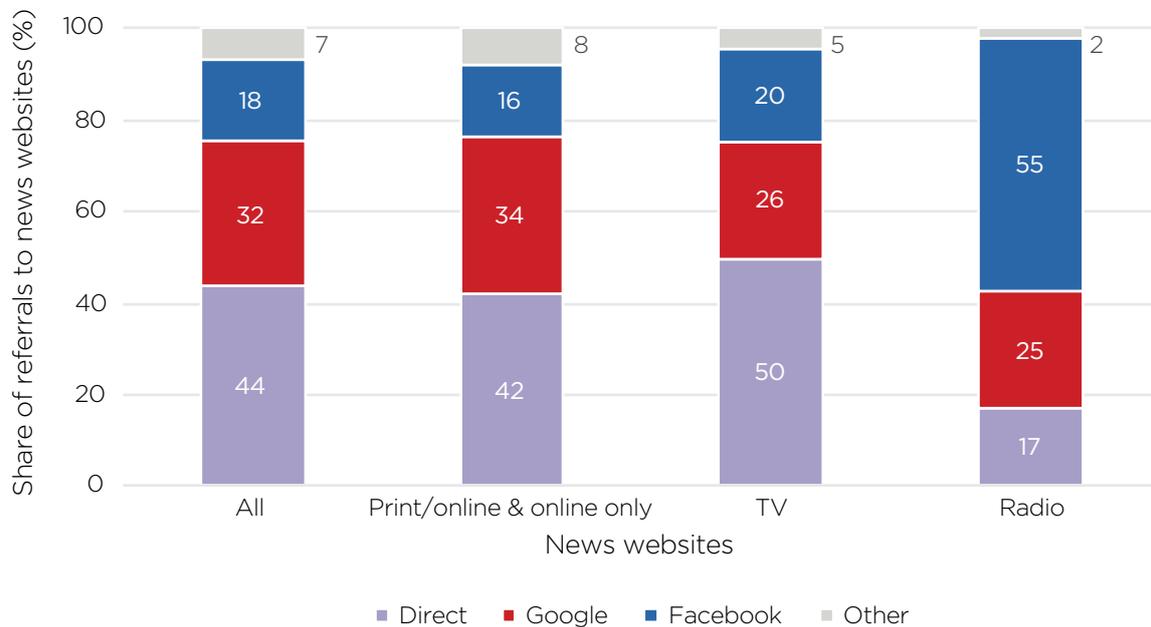
In order to assess whether the digital platforms have substantial bargaining power in dealings with creators of journalistic content, it is necessary to consider the quantity of referrals that news media businesses obtain from Google and Facebook (and the consequences of losing these referrals), as well as the other means by which consumers view the content supplied by news media businesses.

Visitors can access a news media website either by directly typing its address into their browser, or by being referred from another website or app, such as Google or Facebook.

²³³ C Fisher, S Park, JY Lee, G Fuller, Y Sang (2019), [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, 12 June 2019, p. 28.

Figure 2.12 portrays how visitors accessed news media websites, specifying the proportions that accessed the websites directly by typing the address into the browser, via a referral from Google, via a referral from Facebook, or via a referral from another website.

Figure 2.12 Means of accessing news media websites in Australia: Financial year 2017-18



Source: Data provided to the ACCC.

2.8.2 Google’s role in news referrals

Google is the largest source of referrals for websites of print/online and online only news media businesses and websites of TV news media businesses. Facebook is the largest source of referrals for websites of radio news media businesses.²³⁴

As depicted in figure 2.12, for the financial year 2017-18, 34 per cent of referrals to the websites of print/online and online only news media businesses came from Google.²³⁵ However, this does not include traffic to the publishers’ apps. The ACCC estimates that, if an adjustment is made to allow for usage of publishers’ apps, approximately 26 per cent of referrals to the platforms of print/online and online only news media business are from Google.²³⁶ Google’s own estimate is of a similar magnitude.²³⁷

For print/online and online only news media businesses, most of their revenue is derived from traffic on their websites and apps. Such traffic yields revenue from advertising, subscriptions and donations. This revenue is heavily dependent upon referrals, and for print/online and online only news media businesses, Google’s referral service is a must have product. Given the significant number of referrals, as a proportion of print/online and online only news media’s websites and apps that are sourced from Google, such businesses would suffer a substantial loss of traffic – and consequently a considerable fall in revenue – if they did not allow, or were not supplied with, referrals from Google to their websites.

However, the ACCC recognises that the proportion of referrals sourced from Google only provides a measure of the direct effect of a news media business not receiving referrals from Google. It is also necessary to assess indirect effects, which may mitigate the direct effect – for example, whether removal of referrals from Google may increase the referral rate from other channels. The ACCC has

²³⁴ Data provided to the ACCC.

²³⁵ Data provided to the ACCC.

²³⁶ Data provided to the ACCC.

²³⁷ Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 32 estimates that, for December 2018, 21 per cent of traffic to the Top 40 Australian News Websites was sourced from Google organic search. Note that this is for a different time period than the data in Figure 2.12.

identified four principal channels through which referrals may be supplied: search engines, social media, news aggregators and direct access. If a news media business were to refuse referrals from Google, the direct effect on referrals to its platform might be mitigated if, as a consequence, referrals made via other substitute channels increased – for example, if the refusal of referrals from Google caused direct access to the newspaper to increase. Such indirect effects will be referred to as mitigating effects.

To assess the mitigating effects of a refusal of referrals from Google on the direct access channel, it is helpful to distinguish between navigational and non-navigational referrals. A navigational referral is initiated by a search query involving the name of a news publisher – for example, if ‘Sydney Morning Herald’ is entered into the search box. A non-navigational referral typically is initiated by a search for a topic – for example, ‘Federal Budget 2019’.

Plausibly, if a news media business were to refuse referrals from Google, many of the users who had previously accessed the news media business via navigational referrals from Google may subsequently substitute to accessing the news website directly or via an app. Conversely, many of the users who had accessed the news media business via non-navigational referrals from Google would presumably continue to access online news through non-navigational referrals (i.e. general search time) after the news media business had refused referrals from Google, ensuring that most of those non-navigational referrals would be lost to that news publisher. According to Google’s estimates, only about one sixth of referrals to Australian news websites from Google’s organic search were navigational referrals. Accordingly, while a refusal of referrals from Google can be expected to cause an increase in direct access, this mitigating effect would be relatively small compared to the direct effect of a 26 per cent fall in referrals.²³⁸

The mitigating effect of a refusal of referrals from Google on the number of referrals a news media business might obtain from the social media channel can be expected similarly to be small. A mitigating effect may arise if a user (i) encounters in their social media feed an article missing from a Google search they undertook, which they would have clicked on had the media business not refused referrals and (ii) is still interested in reading about the news topic and clicks on the article. Given that the likelihood of this event is somewhat small, the mitigating effect is relatively small.

The mitigating effect of a refusal of referrals from Google on the news aggregator channel is also expected to be small, for similar reasons. In addition, the audience of the largest news aggregator in Australia (Apple News, with a unique audience of about 5.5 million) is much smaller than Google Search, which has a unique audience of 19.7 million in Australia.²³⁹ This limits the magnitude of any mitigating effect. Further, a referral of a news article from Apple News does not take the reader to one of the news publisher’s platforms; the reader remains within the ecosystem of Apple News. News publishers have reported that referrals to their content that is viewed on third party platforms typically do not monetise as well as on their own websites or apps.²⁴⁰

In summary, if a news publisher were to refuse referrals from Google, the direct effect is likely to be a substantial loss to the news publisher regarding the revenue earned on its websites and apps. While this loss may be offset, to some extent, by mitigating effects, these mitigating effects are likely to be relatively small. The ACCC considers that the news referral services supplied by Google Search are a must have product for news media businesses. This gives Google substantial bargaining power in its dealings with news media businesses.

2.8.3 Facebook’s role in news referral services

As shown in figure 2.12, for the financial year 2017-18, approximately 16 per cent of referrals to the websites of print/online and online only media businesses come from Facebook. The ACCC estimates that, if the figure is adjusted to account for access via publishers’ apps, approximately 12 per cent of referrals to print/online and online only media businesses come from Facebook.²⁴¹ This suggests that

238 Data provided to the ACCC.

239 Nielsen panel data, February 2019. Apple News is considerably larger than the news aggregator Google News, for example, which has a unique audience of around 1.5 million.

240 J Davies, [The Guardian pulls out of Facebook’s Instant Articles and Apple News](#), *DigiDay UK*, 21 April 2017, accessed 2 May 2019. See also News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Discussion Paper](#), April 2018, p. 85.

241 Data provided to the ACCC.

the direct effect of a media business refusing referrals from Facebook's social media platforms would be a substantial fall in the newspaper's revenue earned on its own platforms. Again, however, to assess the net effect, it is necessary to consider possible mitigating effects.

While there may be some mitigating effect of a refusal of referrals from Facebook on the number of users accessing the website or app directly or via a search engine, it can be expected to be limited. Most users of Facebook go to the platform for a general social media experience, rather than for the purpose of searching for news either in a specific newspaper or on a general news topic. Further, some news links displayed to users in their Facebook feed may be a consequence of news articles posted by friends, and would not therefore be likely to have been encountered outside of the Facebook platform.

The mitigating effect of a refusal of referrals from Facebook on the news aggregator channel is also expected to be relatively small, for similar reasons. Further, the audience of Apple News (the largest news aggregator in Australia) is considerably less than the unique audience of the Facebook platform, estimated to be approximately 17.6 million,²⁴² and as noted above referrals to Apple News may monetise more poorly than referrals to a news publisher's own websites or apps.

Given that the direct effect of a refusal of referrals from Facebook would be a substantial fall of revenue earned from a newspaper's platforms, and the indirect mitigating effects are of limited magnitude, the referrals from Facebook would be expected to be must have product for news publishers. As a consequence, the ACCC considers that Facebook has substantial bargaining power in its dealings with news media businesses.

The ACCC acknowledges that the proportion of referrals to print/online and online news media sites and apps, coming from Facebook decreased during the 2017 calendar year. Data available to the ACCC suggests the proportion of referrals from Facebook stabilised after this period of time.

2.8.4 The market for news referral services

Both Google and Facebook submitted, in their respective responses to the Preliminary Report, that there is no relevant market for the supply of news referrals. They each submit that, while they compete for users and advertisers, they do not compete in a news referral market. Google describes news referral traffic as 'incidental to', or a 'by product of', the supply of search services to users.²⁴³

While it was not necessary for the purposes of this Report to reach a firm conclusion on this, the ACCC remains of the view that there is probably a market for news referral services, and makes a number of observations in this regard.

First, the market for online print news referral services may look different from a number of markets because it does not, typically involve an exchange of a monetary price for a service. Instead, it involves a mutually beneficial exchange of services, which either party could cease to supply. In this market, an exercise of market power by Google or Facebook may take the form not of a high monetary price for supply of the service but, rather, a reduction in the quality of the services. For example, arguably, an increase in the snippet length on Google's search engine above the length that is optimal for media businesses, or a reintroduction of the First Click Free policy, would constitute a lowering of the quality of the service. Similarly, an increase in the unpredictability or volatility of the Facebook feed may amount to a lowering of the quality of the service provided to news media businesses.

Google's submission emphasises that it has 'partnered with news organisations' to pursue mutually beneficial opportunities, which is consistent with the view of the online print news referral services market comprising a mutually beneficial exchange of services.²⁴⁴

Second, as noted above, the ACCC has decided that it is not necessary, for the purposes of this Report, to form a concluded view on whether Google and Facebook have substantial market power in the supply of news referral services. Rather, the finding established in this section is that Google and Facebook have substantial bargaining power in their dealings with news media businesses.

242 Nielsen Panel Data, February 2019.

243 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 30; Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 36.

244 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 16.

Facebook submits that the Facebook referral figure cited in the Preliminary Report for the calendar year 2017 (that 25 per cent of referrals to print/online and online only news websites were sourced from Facebook) is an insufficiently high market share to assess that Facebook has market power in this market.²⁴⁵

The ACCC also notes that since the publication of the Preliminary Report, Facebook's share of referral to print/online and online only news websites has decreased to 16 per cent. While the ACCC recognises that this share of referrals does not appear particularly high, it does not undermine the ACCC's finding that Facebook has substantial bargaining power in its dealings with media businesses. The conclusion that Facebook likely has substantial bargaining power does not rely upon a premise that Facebook has a 'large' market share. Instead, the reasoning above rests on an assessment of the magnitude of the loss an online newspaper might be expected to incur if it were to refuse referrals from a platform. If this loss is substantial, a news publisher is unlikely to refuse referrals from the platform in response to an exercise of Facebook's bargaining power. In evaluating the magnitude of this loss, as set out above, the ACCC considers not only the direct effects of a refusal of referrals, but also mitigating effects on substitute channels.

Facebook submits that a recent natural experiment provides evidence that the ACCC's assessment of substitution possibilities is inadequate. The natural experiment referred to by Facebook is a brief Facebook outage, during which traffic to many news sites increased significantly, even though referrals to those news sites from Facebook fell. This was because direct access increased.²⁴⁶

The ACCC disagrees that the consequences of the Facebook outage and the increase in direct traffic to the news websites demonstrates greater substitution possibilities. In considering the relevance of this example, it is important to distinguish between two questions.

- (1) If an online publisher were to refuse referrals from Facebook, but Facebook was still available to users, what would be the effect on direct access to that news website or app?
- (2) If Facebook were to become unavailable to users, what would be the effect on direct access to that publisher's website or app?

The natural experiment suggests that in response to the second question, direct access would increase substantially. This is unsurprising because users, when allocating how they spend their time online, allocate the time that they would have spent on Facebook to other online services, including online news sites. But the natural experiment provides little indication about the answer to the first question, and it is the first question that is relevant to the assessment of Facebook's bargaining power. In particular, the first question is relevant to the assessment of the extent to which an increase in direct access would mitigate the direct effect of an online publisher's refusal of referrals from Facebook.

Facebook also submitted that the ACCC does not 'consider all relevant substitutes', highlighting the need to consider referrals from publishers' own apps, email newsletters and alerts, mobile notifications, news aggregator apps and offline means of accessing news.²⁴⁷

The ACCC agrees that the analysis of Facebook's bargaining power should include consideration of traffic from publishers' own apps and news aggregator apps; the analysis above explicitly considers such referrals. Referrals from email newsletters and alerts are accounted for in the direct access channel. Referrals from mobile notifications generally will occur through a publisher's app or through the news aggregator channel. Finally, the ACCC does not consider that the direct effect on a newspaper's referrals of its refusal to allow referrals from Facebook would be substantially mitigated by a rise in sales of offline newspapers.

245 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 38. Note that this fraction does not represent a market share, because it does not account for referrals from publishers' apps and referrals from news aggregators for which articles are viewed on an aggregator's platform.

246 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 39.

247 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 36. Google also submitted that referrals from publishers' apps should be considered. See Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 31.

Google submits that, in its dealings with news media businesses, it is subject to considerable constraints because if it lost the opportunity to provide users with referrals ‘to high quality sites’, it ‘would lose users and advertisers’.²⁴⁸ In response, the ACCC considers that the constraint on Google arising from the possibility of any single news publisher refusing to allow referrals is relatively weak.

The above analysis has focussed on print/online and online only news publishers, because they account for the bulk of news media referrals in Australia. That said, a significant proportion of news media referrals in Australia are to TV and radio news media business websites. Further, as figure 2.12 indicates, 20 per cent of referrals to the websites of TV news media businesses come from Facebook and 26 per cent come from Google; 55 per cent of referrals to the websites of radio news media businesses come from Facebook and 25 per cent from Google. Accordingly, for those TV and radio news media businesses that obtain a substantial number of news media referrals, Facebook and Google are must have products. Nine, Seven West and Free TV submit that that the digital platforms have considerable bargaining power in negotiating the terms of their interactions.²⁴⁹

2.9 Recommendations

2.9.1 Update to mergers legislation

Recommendation 1 – changes to merger law

Section 50(3) of the Competition and Consumer Act 2010 be amended to incorporate the following additional merger factors:

- (j) the likelihood that the acquisition would result in the removal from the market of a potential competitor;
- (k) the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.

Overview

In the Preliminary Report, the ACCC recommended amending section 50(3) to include the following as factors relevant to a merger analysis:

- (a) the likelihood that an acquisition would result in the removal from the market of a potential competitor, and
- (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

This recommendation was intended to signal the significance of these factors in relevant cases and remove any ambiguity as to their relevance. Articulating these factors in legislation makes it clear to the merger parties, as well as the Australian Competition Tribunal (the Tribunal) and the courts, that these factors should be taken into account in assessing whether a merger or acquisition has the effect or likely effect of substantially lessening competition.

This recommendation was put forward to address the following concerns relevant to acquisitions in fast moving markets and/or acquisitions in markets involving emerging technologies:

- the acquisition of nascent competitors by a dominant platform (for example, Facebook’s acquisition of Instagram may have removed a key potential competitor to Facebook)
- the importance of data in digital markets, and the extent to which mergers or acquisitions enable a platform, which already has access to a large volume and wide scope of data, to further increase its competitive advantage relative to its rivals (for example, Google’s acquisition of Waze).

248 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 31.

249 Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 17; Seven West Media, [Seven West Media, Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 3; Free TV Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36.

Some stakeholders have noted that the current legislation does not preclude the ACCC, the courts or the Tribunal from considering the proposed factors in assessing mergers and acquisitions.²⁵⁰ Stakeholders critical of this recommendation have indicated that the proposed factors could result in unintended consequences across the economy and a speculative approach being adopted to the review of mergers and acquisitions.²⁵¹

The ACCC recognises that, where relevant, the ACCC can, and does, take the proposed merger factors into account in deciding whether an acquisition is likely to substantially lessen competition. However, the ACCC remains of the view that the legislative amendment is necessary to highlight the significance of these two factors in merger analysis. The ACCC considers that the proposed amendment is required to signal to merger parties, the courts and the Tribunal the need to consider these factors in considering whether an acquisition will substantially lessen competition.

It is also important to note that section 50 of the CCA is non-exhaustive and merger factors that are irrelevant to a particular merger or acquisition do not have to be taken into account.

Expert panels analysing the digital economy and its effect of competition have also recognised the need to consider updating legislation to address the challenges of digital mergers and acquisitions. For example, the expert panel appointed by the UK Government and responsible for the Furman Report recognised the difficulties in assessing mergers and acquisitions involving the assessment of harm that could result from the removal of a potential competitor:

In mergers involving digital companies, the harms will often centre around the loss of potential competition, which the target company in an adjacent market may provide in the future, once their services develop. The key concern here is that the removal of an important future competitor could harm innovation – if the acquired company is not developed to its full potential and if the acquiring company is not incentivised to innovate in response.

Although potentially harmful to consumers, these outcomes are likely to be relatively uncertain at the time of the merger. This may make it hard to demonstrate that a substantial lessening of competition is more likely than not, despite the potentially very large scale of lost benefit if the merger prevents competition from emerging in that digital market. Under the current system, there is therefore a risk that digital companies continue to acquire innovative potential future rivals unchallenged.²⁵²

An expert panel appointed by the European Commission identified specific concerns with the control of data resources, in its *Competition policy in the digital era* report:

One concern that is gaining in importance in the digital era is whether and when the acquisition of targets with specific data resources can significantly impede competition, through horizontal, vertical or conglomerate effects. These mergers can have procompetitive consequences, by allowing the provision of new services thanks to the access to richer sets of data, but they sometimes bring about a concentration in control over valuable and non-replicable data resources and result in better data access for the merging parties than for their competitors; when they lead to a particularly valuable combination of different data troves, they may strengthen a dominant position or allow the acquiring entity to leverage market power, and sometimes raise foreclosure concerns. The European Commission has analysed such effects in depth in recent cases. We find that the theories of harm used are generally sound.

Some of the relevant cases have raised another issue, however, which has not yet been fully addressed either in theory or in practice: a debate has emerged on how to deal with acquisitions of small, but successful start-ups with a quickly-growing user base and significant competitive potential by dominant platforms. More particularly, the debate is also whether the current regime of EU merger control is in need of modification in order to enable it to better address concerns relating, inter alia, to the early elimination of a potential rival. These concerns have been reinforced by the importance of network externalities in the digital economy.²⁵³

250 See, for example, Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 17; News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 21.

251 See, for example, Microsoft, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 5–6; REA Group, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

252 J Furman et al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 98.

253 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), 4 April 2019, pp. 110-111.

While the two reports put forward different recommendations to those set out in this Report, the comments about the issues raised by digital mergers and the difficulty in assessing mergers in this area are important to note.

Some stakeholders have also criticised the ACCC recommendation as being specific to two firms,²⁵⁴ or a particular industry.²⁵⁵ In proposing these merger factors, the ACCC has ensured that they are sufficiently broad, such that they can potentially be applied to a wide array of industries and markets, where relevant.

While these additional factors have been proposed in response to issues relating to acquisitions by digital platforms, these merger factors would have equal application to mergers and acquisitions in other industries. This would be a broader beneficial change. For example, the likelihood that a merger or acquisition would remove potential competitors may be an issue in the pharmaceutical industry, particularly in the case of mergers or acquisitions concerning merging entities or target companies with products in development that may compete with those of the acquiring company.

The ACCC's consideration of these proposed factors is set out below.

Removal of potential competitors

A number of stakeholders expressed support for this recommendation, including the Guardian, Oracle, Australian Privacy Foundation, the Outdoor Media Association and the Media, Entertainment and Arts Alliance (MEAA). Google also supported this recommendation, stating 'While the ACCC already takes these factors into account when doing so is relevant and appropriate, adding these factors to Section 50(3) would improve transparency in the ACCC's processes and decisions by making express that these factors may be relevant in merger reviews'.²⁵⁶ Facebook did not respond to this recommendation, or the recommendation discussed in the next section.

This recommendation was also subject to criticism by a number of stakeholders, including the REA Group, Microsoft, Startup Aus and DIGI. In particular, the REA Group submitted that the amendments proposed in the Preliminary Report were unclear, and may be misread as requiring consideration of whether a merely potential competitor would, if it entered a relevant market, be likely to be vigorous and effective. It also considered that the amended factor has a disproportionate emphasis on potential competitors.²⁵⁷ Microsoft similarly submitted that the term 'potential competitor' is open to broad interpretation and that the additional factors could result in the blocking of acquisitions that are pro-competitive, with the effect of chilling innovation.²⁵⁸

The ACCC does not consider that this additional merger factor would result in false positives, or a chilling effect on competition. As discussed above, the ACCC already considers the likelihood of a merger or acquisition reducing competition in a market, both current and potential. This is highlighted in the ACCC's Merger Guidelines.²⁵⁹ As such, this merger factor will put into legislation, and emphasise the importance of, something that is already considered in merger analysis by the ACCC, to merger parties, the Courts and Tribunal.

254 See, for example, Guillaume Roger, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), January 2019, p. 5.

255 American Bar Association Section of Antitrust Law, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; StartUp Aus, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 3-4.

256 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 17.

257 REA Group, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

258 Microsoft, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

259 See, for example, ACCC, [Merger Guidelines](#), November 2008, pp. 3, 5, 10.

Nature and significance of assets being acquired, including data and technology

The Guardian, Oracle, Australian Privacy Foundation, the Outdoor Media Association and the MEAA have also expressed support for this proposed merger factor.²⁶⁰ Oracle, in particular, highlighted a number of examples of Google's past acquisitions that have strengthened its data position.²⁶¹

The REA Group and Microsoft have similarly criticised this recommendation. In particular, the REA Group suggested that there is no compelling justification for the introduction of a largely industry-specific merger factors, in reference to data.²⁶² Microsoft noted that gaining access to additional data may not be problematic and that data are simply a class of assets that vary in their competitive significance.²⁶³

The ACCC remains of the view that data is a very valuable asset and particularly in digital markets, acts as an important competitive advantage for a number of firms. For large digital platforms, acquisitions that enhance their already large volume and scope of data may well further entrench their market power and raise barriers to entry and expansion in relevant markets. At the same time, the acquisition of data may enhance the product offerings of a firm and thus lead to large efficiency gains. This chapter, and especially section 2.5, has discussed the way in which data may provide digital platforms with a competitive advantage.

However, the ACCC accepts that data is one of a number of assets that may be competitively significant for firms. The ACCC has widened the scope of the factor, from that identified in the Preliminary Report, to include consideration of assets in general and highlighting data as an example of such an asset. Other assets may include intellectual property rights. Broadening the scope of this factor will ensure that this merger factor is appropriately forward facing and applicable across the broader economy, so that assets being acquired, as part of a merger or acquisition in which assets are an important consideration, are suitably taken into account.

Broader issues in relation to the mergers regime in Australia

If the ACCC considers that an acquisition is likely to substantially lessen competition and thereby contravene section 50 of the CCA, the ACCC may institute proceedings seeking an injunction to stop the acquisition going ahead or, where an acquisition has already completed, apply to the Federal Court for divestiture, among other things. In such proceedings, the ACCC has the burden of proving that the acquisition is likely to contravene section 50. Given the forward looking nature of the legal test, it can be difficult for the ACCC to obtain probative evidence of what is likely to happen in the future, relative to the acquiring party, who would have relevant knowledge and expertise in-house in the relevant industry.

The ACCC is increasingly concerned about the hurdles it faces in opposing anticompetitive mergers in court, and these hurdles are likely to be even greater in digital markets where market dynamics are particularly fast-moving and predicting the future direction is more challenging.

The ACCC has taken on board previous comments made by the Tribunal and the courts regarding the sufficiency of the evidence provided by the ACCC, and is taking steps to address the perceived gaps. For example, the ACCC is placing a greater focus on gathering documentary and other evidence to assist in its decision making, and to better assist the Tribunal or the courts in proceedings. However, the ACCC remains concerned that the Tribunal and the courts appear to give greater weight to evidence from parties to the transaction, who have a vested interest in the acquisition proceeding, rather than the evidence from third party witnesses.

Recent cases also suggest that there can be undue confidence placed by the Tribunal and the courts in the ability of market forces or behavioural commitments to overcome increased barriers caused by an acquisition – a view which the ACCC does not always share.

260 The Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 6-7. Oracle Corporation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p.2; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3; Outdoor Media Association, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p.6;p Media, Entertainment and Arts Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p.1

261 Oracle Corporation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 3.

262 REA Group, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 3.

263 Microsoft, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 6.

The ACCC, and many regulators around the world, have concerns about the capacity of behavioural undertakings to solve structural competition concerns. The tendency for the Tribunal and the courts to look for options to permit structural change in the face of proven competition concerns reinforces our concerns over the effectiveness of our current merger enforcement framework.

The ACCC considers it may be worthwhile to consider whether a rebuttable presumption should also apply, in some form, to merger cases in Australia.

The Chair of the ACCC has previously spoken about the possibility of adopting a rebuttable presumption in Australia to assist in addressing the issues identified above.²⁶⁴ The benefit of the rebuttable presumption is when the ACCC challenges a contentious merger in court and the rebuttable presumption is triggered, it signals that, absent clear and convincing evidence put by the merger parties, the starting point for the court is that the acquisition will substantially lessen competition. In the United States, mergers that result in a significant increase in in market concentration are presumed likely to substantially lessen competition absent evidence to the contrary.²⁶⁵

Separate to the recommendations of the Inquiry, the ACCC is considering whether it is appropriate to advocate for legislative changes that might address these concerns.

2.9.2 Large digital platforms to provide advance notice of acquisitions

Recommendation 2 – advance notice of acquisitions

Large digital platforms to agree to a notification protocol, to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. The details of the notification protocol will be agreed between the ACCC and each large digital platform, and would specify:

- the types of acquisitions requiring notification (including any applicable minimum transaction value), and
- the minimum advance notification period prior to completion of the proposed transaction to enable the ACCC to assess the proposed acquisition.

If such a commitment were not forthcoming from the large digital platforms, the ACCC will make further recommendations to the Government that address this issue.

In the Preliminary Report, the ACCC proposed to request undertakings from key digital platforms (principally Google and Facebook but possibly other platforms) to:

- inform the ACCC in advance of the proposed acquisition of any business with activities in Australia, and
- provide the ACCC with a sufficient time period to review such proposed acquisitions.

This was considered to be necessary, in light of the absence of a compulsory merger filing obligation in Australia. The ACCC has sought similar agreements from other businesses in the past, particularly when there had been a history of transactions which required scrutiny.

While Google, Facebook and other large digital platforms are incorporated overseas, the ACCC notes that any acquisitions by overseas entities that carry on business within Australia is subject to section 50 of the CCA. Section 50 of the CCA provides that a corporation must not acquire another corporation if it would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia. Accordingly, the ACCC can, and frequently does, review mergers and acquisitions involving overseas corporations that carry on business within Australia.

Only a few stakeholders responded to the version of this recommendation included in the Preliminary Report.

264 See, for example, Australian Competition and Consumer Commission, [Keynote Address: RBB Economic Conference](#), 27 October 2016, accessed 29 April 2019.

265 U.S. Department of Justice and the Federal Trade Commission, [Horizontal Merger Guidelines](#), 19 August 2010, p. 3.

Oracle, the Outdoor Media Association, the Guardian and the MEAA all expressed support for this recommendation.²⁶⁶ Google indicated that it was not opposed to providing the ACCC advanced notice, provided that notice is only triggered where there is a connection to Australia and Google is not put at a disadvantage compared to other possible acquirers.²⁶⁷ News Corp also did not raise concerns about this recommendation and noted that it would be in line with changes in some overseas jurisdictions that have introduced ‘transaction value’ notifications.²⁶⁸ Facebook did not respond to this recommendation.

The stakeholders expressing criticism for this recommendation raised concerns in relation to its focus on digital platforms and the potential for it to chill innovation and entrepreneurship.²⁶⁹

In light of the ACCC’s findings that strategic acquisitions contribute to Google’s and Facebook’s market power in the relevant markets and the sizeable effects on competition of past acquisitions by Google and Facebook (such as Facebook’s acquisition of Instagram and Google’s acquisition of DoubleClick), the ACCC considers it critical to establish processes that ensure the ACCC is notified early of potential acquisitions. This recommendation ensures that the ACCC is made aware of, and is at least provided the opportunity to review, acquisitions by large digital platforms that may substantially lessen competition.

The ACCC is cognisant of the burden that this recommendation may place on digital platforms. It may also have unintended effects on innovation and investment in digital markets, as noted by some stakeholders. Accordingly, the ACCC recommends that a notification protocol should be negotiated with large digital platforms and contain certain minimum commitments. This would include the types of acquisitions requiring notification (including, for example, any applicable minimum transaction value), so that platforms do not need to notify the ACCC of every merger or acquisition they engage in. The ACCC also notes that while digital platforms would be required to provide notification of proposed transactions, the ACCC may not necessarily require a public review of every transaction for which it receives a notification.

This recommendation would ensure that the ACCC’s reviews of mergers or acquisitions by large digital platforms occur concurrently with reviews of the same transaction by overseas competition authorities. In such cases, the ACCC would connect with its international counterparts, share information and discuss relevant issues (subject to any legal restrictions and applicable confidentiality undertakings).

2.9.3 Default bias

Recommendation 3 – changes to search engine and internet browser defaults

Google should provide Australian users of Android devices with the same options being rolled out to existing Android users in Europe; that is, the ability to choose their default search engine and default internet browser from a number of options.

If Google does not introduce similar options for Australian Android users by six months from the date of the Report, the ACCC will submit to the Government that it should consider compelling Google to offer this choice.

One of the ACCC’s key findings in chapter 2 is that Google has substantial market power in the supply of search services and in the supply of search advertising. The ACCC identified customer inertia as a barrier to expansion and considered that that customer inertia is reinforced by a default bias that exists with Google Search being the default search engine on a number of internet browsers, and Google Chrome being the default internet browser on a number of operating systems.

266 Oracle Corporation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p.2; Outdoor Media Association, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p.6; The Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5; Media, Entertainment and Arts Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p.1.

267 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 18.

268 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 22.

269 See, for example, DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 10; StartUp Aus, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

To facilitate competition in the supply of search services (and consequently, the supply of search advertising), the ACCC had recommended in the Preliminary Report that:

- (a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and
- (b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).

By providing consumers with a choice of internet browser and search engine, this recommendation was intended to reduce the default bias that currently exists and lower barriers to entry and expansion.

Feedback from stakeholders regarding this preliminary recommendation has been mixed. While some stakeholders supported the recommendation and considered that it would improve competition in the supply of search services, a number of other stakeholders expressed strong reservations about its effect. DuckDuckGo submitted that this recommendation would increase competition in the search and browser markets both in Australia and internationally.²⁷⁰ In contrast, Microsoft suggested that it would further entrench dominant companies by reason of their strong brand recognition, raising barriers to entry and expansion of smaller rivals who would no longer benefit from being installed as default search engines or browsers on some devices.²⁷¹

The ACCC considers that the preliminary recommendation has the potential to improve competition in the supply of search services by lowering barriers to entry and expansion for rivals to Google Search that are not vertically integrated with browsers. That is, it would lower barriers to entry and expansion, by removing the cost of paying to be a default search engine. It may also improve competition in the supply of internet browsers by lowering barriers to entry and expansion for rivals to Google Chrome that are not vertically integrated with an operating system and do not obtain their revenue by providing search services with the default option. At the least, the preliminary recommendation would provide consumers with information about alternative options for their choice of search engine and internet browser, which could enhance consumer welfare.

However, while the preliminary recommendation could improve competition in the search services market, the ACCC recognises that it could also have negative effects. For example, it could raise barriers to expansion for existing smaller suppliers of search services that are vertically integrated with an internet browser, which could further entrench Google's position in the browser market.

After careful consideration of preliminary recommendation 3 and its likely effects on competition in the search services market, the ACCC does not propose to proceed with this recommendation.

However, the ACCC notes Google's proposals to improve consumer choice for consumers in Europe, by providing them with the ability to select their internet browser and search engine from a number of options, rather than only being provided with a default browser or a default search engine.

On 19 March 2019, Google announced that it would:²⁷²

..do more to ensure that Android phone owners know about the wide choice of browsers and search engines available to download to their phones. This will involve asking users of existing and new Android devices in Europe which browser and search apps they would like to use. On 18 April 2019, Google provided further information about this choice. The following text is taken from Google's blog post announcing its plans.²⁷³

Following the changes we made to comply with the European Commission's ruling last year, we'll start presenting new screens to Android users in Europe with an option to download search apps and browsers.

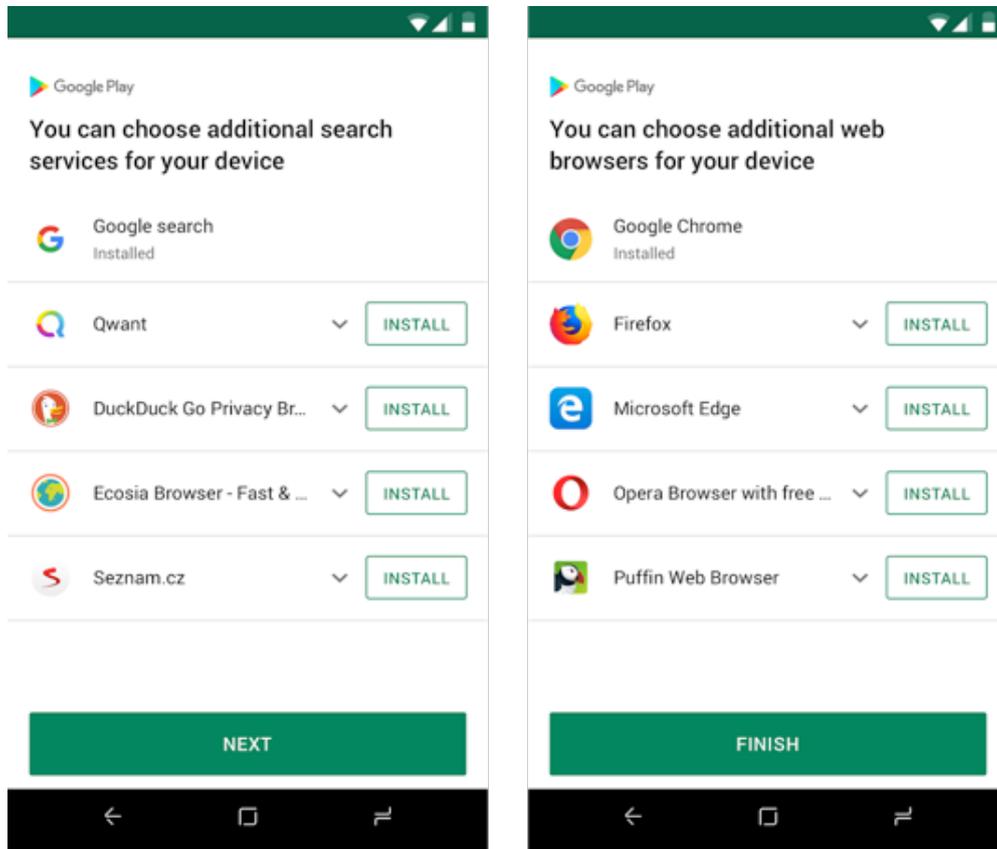
270 DuckDuckGo, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

271 Microsoft, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

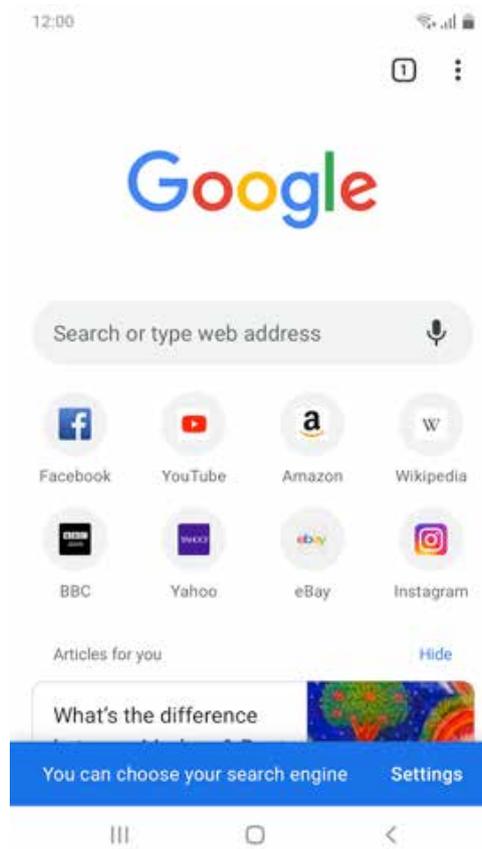
272 K Walker, [Supporting choice and competition in Europe](#), *The Keyword (Google Blog)*, 19 March 2019, accessed 6 May 2019.

273 P Gennai, [Presenting search app and browser options to Android users in Europe](#), *The Keyword (Google Blog)*, 18 April 2019, accessed 14 May 2019.

These news screens will be displayed the first time a user opens Google Play after receiving an upcoming update. Two screens will surface: one for search apps and another for browsers, each containing a total of five apps, including any that are installed. Apps that are not already installed on the device will be included based on their popularity and shown in a random order.



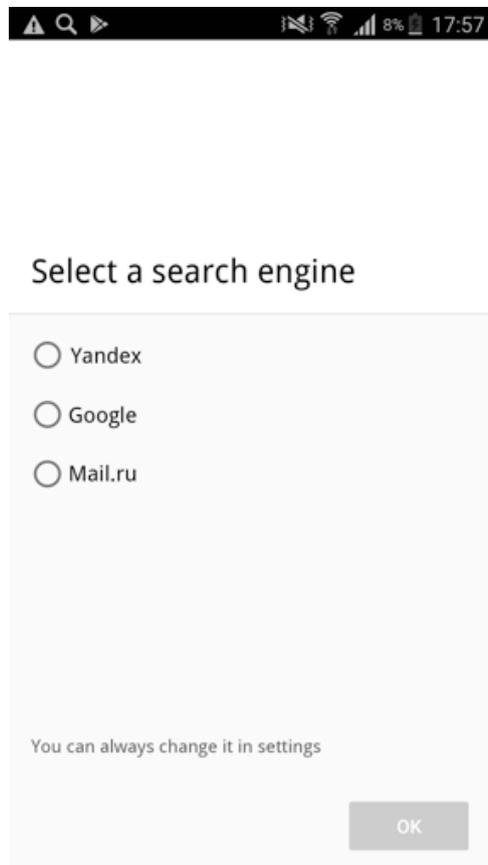
Users can tap to install as many apps as they want. If an additional search app or browser is installed, the user will be shown an additional screen with instructions on how to set up the new app (e.g., placing app icons and widgets or setting defaults). Where a user downloads a search app from the screen, they will also be asked whether they want to change Chrome's default search engine the next time they open Chrome.



The screens are rolling out over the next few weeks [from 18 April 2019] and will apply to both existing and new Android phones in Europe.

While these apps will be pre-installed on Android devices, they will not be the default option and consumers will be presented with a range of choices.

Google has also implemented a similar choice screen in Russia, following a decision by the Russian Federal Antimonopoly Service that Google had restricted competition in the market of mobile applications by placing restrictions on the manufacturers of mobile devices with access to the Google Play application. These restrictions included mandatory pre-installation of other Google apps together with Google Play, their preferential placement on the device home screen and mandatory instalment of the Google search engine as default.²⁷⁴ An example of this choice screen is provided below.²⁷⁵



The ACCC considers that offering this choice screen for Australian consumers, for both search engines and internet browsers, would improve consumer choice and be pro-competitive. Consumers who may not otherwise be aware of alternative offerings would be provided with information on alternative options, at no cost to the search engine provider or internet browser provider. This would also lower barriers to entry and expansion for those search engine suppliers and internet browser suppliers. It would also remove the requirement that third party search engines and internet browsers offer a similar choice; for those that are vertically integrated, this would help preserve their competitive advantage in the face of a dominant supplier.

The ACCC does not consider that there are any technical reasons why the same option cannot be provided to Android phone owners in Australia. Google has also recognised that this option supports consumer choice and competition, and the ACCC expects that it would similarly encourage the same consumer choice and competition in markets in Australia.

If Google does not implement this option in Australia within six months of the date of this Report, the ACCC will submit to the Government that it should consider whether Google should be compelled to offer this choice.

274 Federal Antimonopoly Service (FAS) of the Russian Federation, [FAS Russia Reaches Settlement with Google](#), 17 April 2017, accessed 23 April 2019.

275 Yandex, [Choosing Yandex search on Android](#), 7 August 2017, accessed 25 April 2019.

Once the recommendation is implemented, the ACCC could also, through the functions of the specialist digital platforms branch proposed in Recommendation 4, monitor the effectiveness of this remedy and consider whether any other recommendations should be made to the Government to improve consumer choice and competition.

The ACCC notes that this proposal would not apply to third party search engines and internet browsers. In the case of internet browsers, this constitutes almost half of the supply of market in Australia, noting that Chrome comprised 49 per cent of the browser market in 2018. For those smaller suppliers that are vertically integrated, this may help provide a competitive advantage in the face of a dominant supplier. However, it would also mean that Google Search would likely remain the default search engine on third party internet browsers, such as Apple Safari and Mozilla Firefox (subject to commercial arrangements between those browser suppliers and Google).

The specialist digital platforms branch of the ACCC, proposed in Recommendation 4, could monitor any further developments in the browser market, including the competitive impact of commercial arrangements between Google and suppliers of search services and Internet browsers, and if necessary, take enforcement action and/or make recommendations to the Government.

2.10 Future issues

2.10.1 Data portability and interoperability

The ACCC considered whether to recommend specific data portability mechanisms as a means of addressing the market power of digital platforms. For example, the ACCC considered whether the application of the Consumer Data Right (CDR) could improve competition in the relevant markets by facilitating competitive entry and consumer switching. The ACCC notes that reviews in other jurisdictions have made recommendations along these lines. For example, in the UK, the Furman Report recommended that greater personal data mobility and systems with open standards could increase competition and consumer choice.²⁷⁶

The ACCC considers there are possible benefits to this type of approach in addressing the market power and impediments to competition it has identified. In particular:

- increased data portability could promote competition by reducing barriers to entry and expansion. Relevant to the markets the ACCC has considered, data portability may reduce the height of barriers to switching and increase the likelihood of new entrants and competition in social media and/or search services markets. This increased competition may drive innovative offerings to the benefit of consumers.
- In addition, digital platforms' business models are built around gathering and using data to supply advertising services. In particular, Google and Facebook have a greater depth and volume of consumer data, relative to other digital platforms. Data portability may have the effect of helping rival firms overcome this competitive disadvantage by providing them that data.

Despite these benefits, **at this point in time** the ACCC has chosen not to recommend increased data portability obligations to address the market power and competition issues it has identified. This is because, specific to the markets the ACCC examined, it was unlikely to significantly address these issues in the short term.

While Google and Facebook already offer users the ability to download data, as the ACCC has argued in relation to other sectors, a more formalised and consistent data portability right can enhance voluntary arrangements considerably. However, in relation to the platforms the ACCC has focused on in this Inquiry, it is not clear that enhanced data portability would generate new entry or facilitate switching.

276 J Furman et. al, [Report of the Digital Competition Expert Panel, Unlocking digital competition](#), 13 March 2019, p. 5.

At this time, there are no other competing platforms in some markets for consumers to upload their data onto and switch. The introduction of a data sharing regime would not overcome this issue.

Unlike banking services, online search and social media services are provided for free. Consequently, there is less of an incentive for consumers to seek a transfer of their personal data. In the case of social media, a user may be incentivised to port the data collected directly to a rival network (provided sufficient contacts also joined the rival network) but in the case of an online search platform, it is difficult to identify any reasons why a consumer would seek to port their online search history.

Additionally, it seems that data portability would not reduce network effects and may not have a significant effect on barriers to entry and expansion. For example, even if data portability made it easier for a user of Facebook to switch to another social media platform, if none of the user's friends or family are moving away from Facebook, that user would be unlikely to switch platforms (although a consumer may be more likely to multi-home and use multiple platforms until the rival platform attracts their family and friends).

As the ACCC has previously indicated in relation to the roll out of the new CDR in other industries such as banking and energy, facilitating entry and switching is not the complete universe of 'use-cases' and there are other benefits of data portability and sharing. Allowing consumer to share data about them with other service providers can result in the development of new products and innovative offerings that could benefit consumers. This may well be so with consumer data held by digital platforms. These use cases and benefits wouldn't necessarily go to the issue of market power and competition for digital platforms and so, the ACCC is not recommending it in this Report.

However, the ACCC will revisit this issue in the future under its role in the Consumer Data Right including having regard to the other 'use-case' benefits raised above.

Direction for future ACCC work – Data portability

The ACCC will revisit the applicability of the Consumer Data Right to digital platforms in the future. The ACCC considers that data portability is unlikely to have a significant effect on barriers to entry and expansion in certain digital platform markets in the short term. If data portability or interoperability were identified to be beneficial in addressing the issues of market power and competitive entry or switching, the ACCC could recommend this to government, as part of the role envisaged under Recommendation 4.

However, the ACCC recognises that aside from addressing issues of market power, portability of data held by digital platforms may deliver significant benefits to current and potential future markets including through innovation and the development of new services. The ACCC will consider the benefits associated with digital platform data portability in the ordinary course as it considers sectors to which the Consumer Data Right regime may apply in the future.

2.10.2 Divestment

Some submissions to this inquiry have called on the ACCC to consider structural remedies such as divestment. For example, News Corp submits that Alphabet Inc, the parent company of Google, should divest Google Search or Google Ad Manager (formerly known as DoubleClick for Publishers and DoubleClick Ad Exchange).²⁷⁷

The ACCC recognises that divestitures can enhance competition, and may be beneficial in circumstances where a firm has substantial market power that is unlikely to be eroded by market forces. Divestments, in theory, may drive competition on price, quality and/or service. They may also address competition problems that arise from a firm abusing its substantial market power by engaging in conduct to prevent entry or to prevent new entrants from gaining scale. In the longer term, it may drive dynamic competition which in turn increases efficiency, lowers prices and/or increases quality.

However, the ACCC considers that there are significant risks accompanying divestiture and considers that, at this point in time, it is not appropriate to recommend that either Google or Facebook divest its subsidiary businesses. This is for three reasons.

²⁷⁷ News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 3, 17.

First, as a general principle, the ACCC considers that market structure is best left to competitive forces that drive efficient outcomes for consumers.

In particular, divestitures may reduce incentives for investment and efforts to improve productivity. It can also result in the loss of economies of scale and/or scope. As a result, welfare may decrease and there may be increased prices or reductions in the quality dimensions of the services offered. This could lead to a detrimental effect on consumer outcomes. In addition, the ACCC considers that regulatory solutions are also not as dynamic as market competition.

Second, it is not clear that the proposed divestitures would address the particular competition and consumer concerns identified in this Report. As discussed in this chapter, social media platforms and search engines are characterised by significant network effects, which act as barriers to entry and expansion by potential entrants or small-scale competitors. There are also other substantial barriers to entry and expansion that insulate these platforms, such as brand effects and economies of scale. Divestiture is unlikely to significantly reduce these barriers, and accordingly, may not be an effective long term solution to addressing Google's or Facebook's market power in (respectively) search services or social media services.

Alternatively, the ACCC believes that the package of recommendations proposed in this report will go a very long way in dealing with the market failures associated with digital platforms identified in this Report, as well as any other potential market failures which may be identified.

Third, implementing structural solutions necessarily involves risks in design and implementing divestitures. This risk is particularly acute in digital markets. Successful divestment remedies require time and planning. In non-digital markets, physical assets and businesses can potentially be quarantined during any transition period. In digital markets, this may be more difficult, given the data flows between businesses or parts of businesses.

Based on the information provided to the ACCC, it is not clear that the benefits associated with the divestiture proposed by News Corp would outweigh the risks and costs associated with direct intervention. However, it is possible that in the future, this balance will change and warrant this type of intervention.

It is envisaged that the specialised digital platforms branch (proposed in Recommendation 4) will monitor the activities of leading digital platforms and their impact on competition. The ACCC will be able to make further recommendations to Government in order to address any competition or consumer concerns identified by this branch.

03

3. Digital platforms, advertisers and other business users

Key findings

- Online advertising makes up an increasing portion of the total advertising spend in Australia.
- Google and Facebook are the channels by which most online advertising is purchased and sold in Australia.
- Google and Facebook receive the majority of online advertising revenue in Australia; and have captured more than 80 per cent of growth in online advertising in the past three years.
- Google and Facebook provide advertisers with numerous and significant benefits through an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers, often at a lower cost than traditional forms of advertising.
- Market driven solutions have emerged, and are continuing to emerge, that allow advertisers to overcome difficulties in measuring the performance of advertisements on Google and Facebook.
- Digital platforms with substantial market power have the ability and incentive to engage in leveraging behaviour which may affect competition in advertising and other markets. There is international evidence that digital platforms have engaged in anti-competitive leveraging behaviour in the past and the risk of leveraging behaviour is increasing as Google and Facebook expand into other markets.
- There is a lack of transparency in the pricing of services used to facilitate automated or programmatic online display advertising, known commonly as 'ad tech' services. This means that both advertisers and websites lack visibility over pricing. They do not know what proportion of advertiser spend goes to ad tech services versus how much goes to the purchasing of advertising inventory. This has led many participants in the display advertising market to question the efficiency of the ad tech supply chain.
- The ACCC has concerns about the potential for the misuse of market power within advertising and other markets, and about the potential for other market inefficiencies to be caused by a lack of transparency.
- There is the potential for bundles of advertising inventory, advertising demand, advertising services, and ad tech services to lessen competition in certain advertising markets.
- Advertising and media agencies add another layer of opacity to the advertising supply chain. Because advertisers have little visibility into the advertising supply chain, there may be an incentive for agencies to act in ways that benefit their own interests and are to the detriment of advertisers.
- Advertisers have a limited ability to negotiate with Google and Facebook. Google and Facebook are each likely to have the ability to charge advertisers more (or offer less in terms of service) in the provision of search and display advertising services than they could if competition were effective.
- Advertisers appear to have a limited ability to seek review of decisions by Facebook or decisions by Google and access effective dispute resolution processes.

As set out in the Terms of Reference, the ACCC must consider the impact of digital platforms on the state of competition in advertising markets. In particular, the ACCC is to take into consideration:

- the extent to which digital platforms are exercising market power in commercial dealings with advertisers
- the impact of digital platforms on advertising markets
- the impact of information asymmetry between digital platforms, advertisers and consumers and the effect on competition in advertising markets.

This chapter primarily focuses on the behaviour of digital platforms that impacts businesses which utilise the platforms to advertise and/or reach customers. News media businesses are one such category of business user that can be impacted. While the specific concerns of news media businesses are discussed in chapter 5, the findings and recommendations in this chapter are also relevant to media businesses. Similarly, while key consumer concerns are addressed in chapter 7, the findings and recommendations in this chapter are also relevant to addressing potential consumer harm.

This chapter sets out the ACCC's findings and is structured to discuss topics in depth as follows:

- **Section 3.1** - provides an overview of the growth of digital advertising in Australia, and background information about online advertising.
- **Section 3.2** - describes the benefits that digital platforms provide to advertisers, including the ability to target consumers, accessibility and ease of use (particularly for small to medium sized businesses), and the ability to reach consumers on a global scale.
- **Section 3.3** - examines the ability and incentive of digital platforms with substantial market power to engage in behaviour that may affect competition in advertising and other markets. This section also discusses the risks of market failure and sets out the ACCC's recommendation to establish a specialist digital platforms branch, to proactively monitor and investigate instances of anti-competitive conduct, consumer harm and market failures.
- **Section 3.4** - discusses the ability of advertisers to measure and verify the performance of advertising on digital platforms.
- **Section 3.5** - examines the lack of transparency in online advertising services, including the opacity associated with ad tech services and the role of advertising and media agencies. This section also sets out the ACCC's recommendation that the specialist digital platforms branch (proposed in recommendation 4) conduct an inquiry into ad tech services and advertising agencies.
- **Section 3.6** - discusses the potential for digital platforms to engage in practices of bundling and tying.
- **Section 3.7** - discusses the limited ability of advertisers to negotiate with digital platforms.

3.1 Online advertising in Australia

Key findings

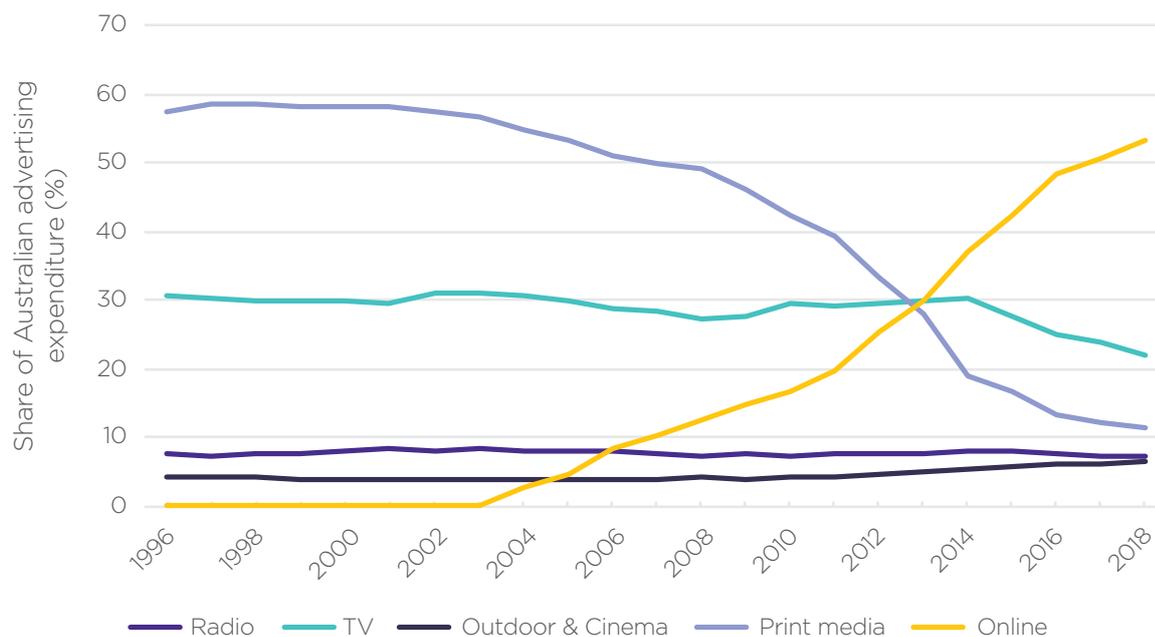
- Online advertising makes up an increasing portion of the total advertising spend in Australia.
- Google and Facebook are the channels by which most online advertising is purchased and sold in Australia.
- Google and Facebook receive the majority of online advertising revenue in Australia; and have captured more than 80 per cent of growth in online advertising in the past three years.

3.1.1 Growth of online advertising

As explained in chapter 1, advertising in Australia has undergone significant change in the past 20 years. Twenty years ago, most advertising expenditure was on print, television and radio, and was critical to the supply of news and journalism over these mediums in Australia. Consumers accessed news, journalism and entertainment content on these mediums at zero monetary cost or at subsidised rates, which were then cross-subsidised by advertiser dollars. As shown in figure 3.1, advertising expenditure largely mirrored this with print accounting for just under 60 per cent of Australian advertising expenditure, television with 30 per cent, and radio with just under 10 per cent in 1998.²⁷⁸

²⁷⁸ Commercial Economic Advisory Service of Australia (CEASA), ACCC analysis.

Figure 3.1: Share of Australian advertising expenditure



Source: CEASA, ACCC analysis based on stakeholder data.

Consumer habits have changed dramatically over the past 20 years. Large numbers of consumers are now accessing news and entertainment through the internet (websites and apps), and in general, consumers are spending significantly more time online.

As consumers have increased the amount of time spent online, advertisers have similarly increased the amount spent on online advertising as they seek to go where consumers spend their time (where ‘the eyeballs’ are). The expenditure on online advertising has increased substantially in Australia, as shown in figure 1.3 in chapter 1, rising from less than AU\$1 billion in 2005 to AU\$8.8 billion in 2018.²⁷⁹ Over the same time, spending on print advertising has fallen from AU\$7.9 billion to just under AU\$1.9 billion. As a share of all advertising, online advertising rose from less than 1 per cent in 2003 to 53 per cent in 2018. Over the same period, print advertising fell from more than 55 per cent in 2003 to 11 per cent in 2018.

Online advertising has also dramatically changed the way advertising works as the use of data has opened up the opportunity for advertisers to engage in a higher level of ad targeting and new ways of targeting that were previously not possible. Instead of targeting broad audience segments with print or TV, advertisers are now able to serve ads in real time, taking into account factors such as individual user interests, browsing history, time, location, and website content, and can also target users at specific points in the purchasing journey (for example, search advertising can reach users when they show purchasing intent). The Commercial Economic Advisory Service of Australia (CEASA) estimates that in 2018, AU\$3.9 billion was spent on search advertising in Australia and AU\$3.3 billion was spent on online display advertising in Australia.²⁸⁰

3.1.2 Online advertising expenditure in Australia

The rise in online advertising has also been accompanied by the rise of Google and Facebook as the two largest suppliers of online advertising opportunities. Outside of Google and Facebook, online advertising is highly fragmented with a large number of websites offering ad inventory, each with a small market share.

²⁷⁹ CEASA, ACCC analysis.

²⁸⁰ CEASA.

Examples of other websites that provide online ad inventory include:

- traditional news media businesses; for example, Nine Entertainment Co Holdings Ltd (Nine) through its online mastheads such as *The Sydney Morning Herald* and *The Age* and *Ninenews.com.au*, and News Corp Australia, through its online mastheads such as *The Australian* and *News.com.au*.
- other types of digital platforms; for example, eBay, Bing, Reddit, and Amazon.

The owners of media websites can be considered competitors to digital platforms for the supply of ad inventory but are also reliant on Facebook and Google, which offer ad services that assist websites in the selling of their ad inventory.

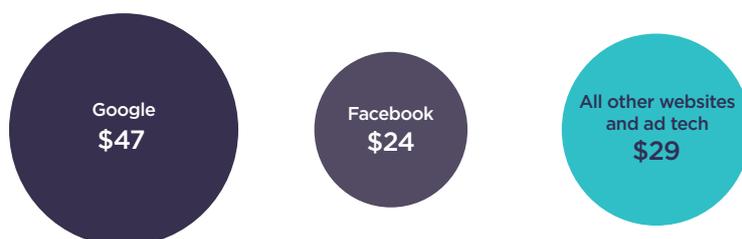
The ACCC notes that any website can offer ad inventory; however, not all websites choose to. Estimates of the top 50 websites by traffic in Australia include a number of websites that do not sell advertising opportunities to third parties, such as the websites of the four major banks, Wikipedia, Netflix and a variety of government websites.²⁸¹

The ACCC estimates that for a typical AU\$100 spent by advertisers on online advertising (excluding classifieds):

- \$47 goes to Google (some of which is for the provision of ad tech services)
- \$24 goes to Facebook²⁸²
- \$29 goes to all other websites and ad tech.²⁸³

The ACCC estimates that over the past three years, Google and Facebook have captured more than 80 per cent of all growth in online advertising.

Figure 3.2: Breakdown of AU\$100 spent by an advertiser in online advertising (excluding classifieds)



Source: ACCC estimates, based on information provided to the ACCC.

3.1.3 Types of online advertising

As set out in chapter 2, online advertising can be divided into three broad categories in this Report:

- **Search ads** – appear on search engines as a result of a user performing a search query. These search ads are typically found at the top of a search engine’s search results page and are denoted with an ‘Ad’ or ‘Sponsored’ tag. They can appear on dedicated search engine websites, such as Google and Bing, or on other websites that have a search function and have partnered with search engines to allow them to sell search ads on their behalf.
- **Classified ads** – appear on classifieds websites such as carsales.com.au, Domain, Gumtree and Trading Post.

281 Alexa, [Top Sites in Australia](#), accessed 4 June 2019.

282 The ACCC notes that advertising revenue figures for Facebook relate to the amount of advertising revenue from customers in Australia based on the location of the invoiced party (which may differ from the country in which the advertisements are shown). The ACCC understands that these figures are not recorded in the ordinary course of business by Facebook and are not audited, verified or otherwise reported on. As such, the ACCC considers that these are approximate estimates of relevant advertising revenue attributable to Australia for Facebook.

283 ACCC estimates, based on information provided to the ACCC.

- **Display ads** – refer to a residual category of online advertising, being online advertising other than search and classifieds ads. They can be made up of different visual elements such as text, images, animations, and video that appear alongside website content. For example, a display ad may appear as an image at the top or next to content on a website (this is often referred to as a banner ad). As discussed in chapter 2, ads that appear on social media are a category of display ads. These generally contain a combination of different visual elements, allow for user engagement (for example, the ability to like, comment, and share), and can be purchased in a number of different formats as offered by the relevant social media platform.

As discussed in chapter 2, Google and Facebook have substantial market power in the supply of search advertising and in the supply of display advertising in Australia, respectively. As such, this chapter will focus on search and display advertising.

3.1.4 How online advertising is purchased and sold

Search advertising

The most common channel for purchasing search ads is through Google. The ACCC estimates over 96 per cent of search ads are currently purchased this way in Australia.²⁸⁴ Most of these ads are displayed on Google’s own search site. A small proportion are displayed on third party sites.

Search ads can also be purchased through other search engines such as Bing and DuckDuckGo.

Display advertising

Display advertising is purchased through four primary channels:

- **Facebook:** These ads may be displayed on the Facebook platform, Instagram, Messenger, or third party websites that are part of Facebook Audience Network.
- **Google:**
 - through Google’s integrated products
 - through Google’s ad tech services.
 - These ads may be displayed on Google websites, such as YouTube, and on third party websites (including news media websites).
- **A range of ad tech services:** These ads are purchased through the use of different interfaces and software (commonly referred to as ad tech) that facilitate the automated purchase and sale of some types of display advertising. For example, this includes ads displayed on third party websites (including those of news publishers).
- **Direct deals:** These ads are displayed on third party websites (including those of news publishers).

Box 3.1: Difference between direct deals and programmatic advertising

In direct deals, advertising proposals are negotiated between advertisers and websites directly and outside of ad tech services. For example, an advertiser may negotiate with an online news website to purchase banner advertising on the website’s home page for a specified period of time on a specified date. Direct deals occur in advance of ads being served to users. Typically, only display ads are purchased through direct sales.

Programmatic advertising is the automated buying, selling and serving of advertising, which occurs in real time and allows advertisers, websites and intermediaries to utilise various data sources for targeting users. It involves the use of ad tech to facilitate the advertising process. Both display ads and search ads can be purchased programmatically.

²⁸⁴ Data provided to the ACCC.

3.1.5 Main online advertising services

Facebook

Facebook sells display advertising on the Facebook platform, Messenger and Instagram as well as on third party websites that have agreements with Facebook via Audience Network. Advertisers looking to purchase ads from Facebook can do so in several ways but this is predominantly done via Ads Manager—Facebook’s self-service interface for ad creation.

Ads Manager

When creating an ad in Ads Manager, advertisers can choose to have ads shown on the Facebook platform, Messenger, Instagram and also on third party websites which are part of Audience Network. Advertisers are also able to select from and specify a number of different target audiences, marketing objectives, budgets and ad formats. Facebook then determines what ads a user sees on Facebook properties (or on Audience Network properties) and where they might see them.

Boosted Posts

Publishers can pay Facebook to increase the number of users that see a post, and such posts are called boosted posts. For example, a publisher may have a post that is already published on its Facebook page and would like to increase its visibility. The publisher can then pay money to boost the post, which will increase its reach to a specified target audience. Boosted posts are considered ads but they are not created via the Ads Manager and as such, don’t have the same level of customisable features.

Audience Network

As mentioned above, advertisers can choose to have their ads shown on third party websites or apps that are part of Facebook’s Audience Network, effectively extending their Facebook ad campaign off the Facebook platform but utilising the same targeting information. Audience Network works in a similar way to Google AdSense (discussed below), in that websites and apps apply to be part of Audience Network and allow Facebook to sell ads on their behalf.²⁸⁵ Once a website becomes part of Audience Network, Facebook serves ads on the website and the revenue is split between Facebook and the website.

Publishers that sell their advertising space via Facebook Audience Network receive the majority of the revenue collected from the advertiser and the remainder is kept by Facebook.²⁸⁶ Facebook claims on its website that ‘1 billion+ people see a Facebook Audience Network ad each month’.²⁸⁷

Google’s integrated product offerings

Google Ads

Google’s most significant service, by revenue, is Google Ads (previously known as Google AdWords). Google Ads allows advertisers to create and purchase both search and display ads.²⁸⁸ Advertisers are able to select from and specify a number of different target audiences, marketing objectives, budgets, and ad formats.

When an advertiser chooses to advertise with Google Ads, their ads can appear on:

- Google owned and operated sites (for example, Google Search, YouTube, Gmail, Google Play)
- third party websites and apps that sell ad inventory through Google AdSense or AdMob (these are sometimes referred to as sites on Google Display Network and Google Search Network).²⁸⁹ Google claims on its website that Google Display Network has ‘over 2 million websites worldwide and reaches over 90 per cent of people on the internet’.²⁹⁰

285 Facebook, [How Audience Network works](#), accessed 24 May 2019.

286 Information provided to the ACCC.

287 Facebook, [About Audience Network](#), accessed 24 May 2019.

288 Google, [Google Ads – How it Works](#), accessed 24 May 2019.

289 Google, [Where your ads can appear](#), accessed 24 May 2019.

290 Google, [About targeting for Display Network campaigns](#), accessed 24 May 2019.

Google AdSense

AdSense is the service by which websites supply ad inventory to Google Display Network or Google Search Network. AdSense enables website owners to monetise their websites by allowing Google to sell ad inventory on those websites through Google Ads to advertisers on their behalf.

Any revenue generated from the sale of this ad inventory is then shared between Google and the website. Websites signing up for AdSense for display advertising, and websites signing up for AdSense for search advertising, receive 68 and 51 per cent of the ad revenue respectively, when using the online terms.²⁹¹

AdMob

AdMob is a service offered to application developers to help monetise their applications by allowing Google to sell ad inventory on their applications through AdMob to advertisers on their behalf.

Ad tech services

Ad tech services are tools that assist in the automatic purchasing, selling and serving of some types of display ads. These ad tech tools can be configured to interact with each other in different ways and are generally interoperable (that is, the services connect and are able to be used with each other). The combination of ad tech services involved in completing an end-to-end display ad transaction between advertisers and websites is often referred to as the ad tech supply chain or the ad tech stack.

Ad tech services include:

- **Publisher ad servers** – servers used by websites to organise and manage ad inventory and opportunities on their website. Publisher ad servers typically determine what ads will be shown, serve ads, and also collect information on their performance.
- **Supply side platforms (SSPs)** – platforms used by websites to help maximise the price at which ad inventory is sold, and which utilise various data to provide ad targeting services.
- **Demand side platforms (DSPs)** – platforms used by advertisers to help them purchase ad inventory from suppliers of ad inventory as effectively and cheaply as possible, and which utilise various data to provide ad targeting services.
- **Ad exchanges** – platforms on which supply and demand side sources meet to take part in an auction for ad inventory. The function of ad exchanges however is increasingly being combined with SSPs.
- **Ad networks** – networks which purchase ad inventory from different publishers and, similar to brokers, repackage and sell these to advertisers directly, or through ad exchanges.
- **Advertiser ad servers** – servers used by advertisers to manage and track all ad and campaign information in one location.
- **Data management platforms (DMPs)** – platforms used by websites and advertisers to store, manage and analyse data collected, which can then be used in the selling and buying of ad inventory.
- **Third party data** – data purchased by websites and advertisers to supplement the data they collect first-hand. Third party data includes information such as user purchase history, geographic data and sociodemographic data, which can be used to increase the ability of websites and advertisers to target ads.
- **Data analytics** – tools used by websites and advertisers to measure and track the performance of ads as well as the behaviours of users more broadly online.
- **Trading desks** – centralised management platforms specialising in programmatic ad purchasing and the optimisation of these ads. Trading desks are often in-house departments found in the major advertising and media agencies.

²⁹¹ Google, [AdSense revenue share](#), accessed 24 May 2019.

Box 3.2: How is a display ad served?

The process of serving an online display ad to a user occurs seamlessly, and in a matter of milliseconds when users view a website. This process is often facilitated by a number of different ad tech products. The below explanation steps through, at a high level, how ad tech is utilised to serve display ads to users.

When a user clicks on a website, two main things occurs. First, the user effectively sends a request for the website to be shown and user data is collected via first and third party cookies present on the website.²⁹² Second, the website and any subsequent ads are shown to the user.

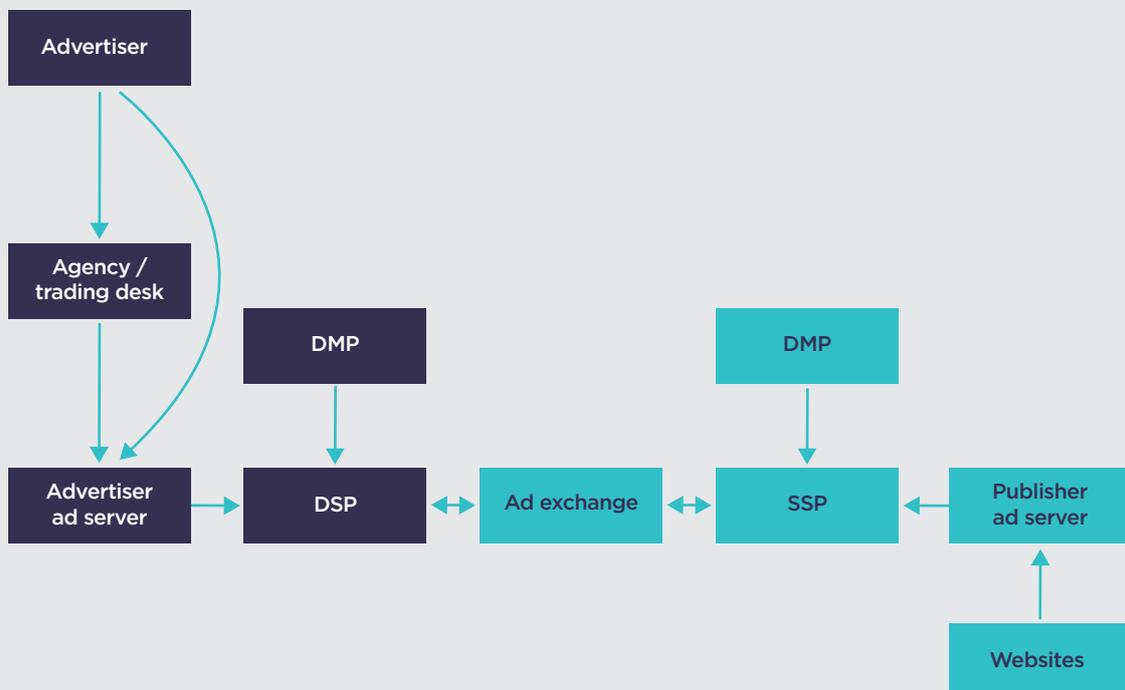
Figure 3.3: Interaction between users and websites



While this process is invisible from a user point of view, there is a complex process by which the resulting ad is chosen. This can involve a number of ad tech services, which is sometimes referred to as the ad tech supply chain.

Figure 3.4 shows what the typical ad tech supply chain looks like. While there can be slight variations depending on the method by which display ads are purchased, figure 3.4 seeks to capture the main components that are typically used.

Figure 3.4: Ad tech supply chain



292 First party cookies are commonly used for functions, such as allowing a user to stay logged into a website, or keeping a user's preferences (for example, language and location) across browsing sessions. Third party cookies are commonly used for ad targeting purposes as they assist advertisers in tracking users across different websites. Further discussion on cookies can be found in chapter 7.

Components shaded in aqua are contracted with and utilised by website owners and components shaded in dark purple are contracted with and utilised by advertisers. Ad exchanges are increasingly being combined with SSPs.

The steps below explain the process by which a display ad is selected to be served to a user:

1. When a user visits a website, the website and the display ad space available on the website begins to load. As the website loads, a request is sent to the publisher ad server. The publisher ad server is a tool used to manage ad inventory and determine how it will be sold.
2. The publisher ad server does this by ranking the different avenues through which ad inventory can be sold to demand sources. Avenues include direct deals, programmatic guaranteed deals, private marketplaces, and open auctions. Different avenues yield different prices, which can be ranked in a similar way to rungs on a ladder. Ad inventory is first sent to the top rung in the ladder, where inventory can be sold at the highest price. Any remaining unsold inventory is then sent to the next rung in the ladder, where the price is generally lower, and so on until all ad inventory is sold. Typically, with the exception of direct deals and programmatic guaranteed, these different avenues of selling inventory all involve websites and advertisers meeting at ad exchanges.²⁹³
3. Advertisers will also receive information about the website and the user visiting the website. This information influences the automatic actions taken by ad tech services on the advertiser side, such as demand side platforms which are used to submit bids on ad inventory. For example, an advertiser may only want to purchase ads when a user aged between 18 and 35 visits the website. As another example, when bidding for advertising, a sportswear advertiser is more likely to put in a high bid if it knows the user visiting the website has an interest in sports, as opposed to if the user has shown no interest in sports. Advertisers and publishers can supplement available information with information stored in each of their respective data management platforms.
4. Once the ad inventory is sold, the website contacts the winning advertiser's ad server, where the ad content is stored. The ad server sends the ad to the website, as well as instructions regarding its delivery.
5. The website then serves the relevant display ad, which the user sees on the website almost instantly. This whole process takes place in a matter of milliseconds.

293 A number of methods of purchasing and selling display ads do not occur via ad exchanges. This includes direct deals and programmatic guaranteed deals which are typically facilitated by direct communications between publisher ad servers and advertiser ad servers.

Table 3.1 Integrated advertising services and ad tech services

Ad tech functionality	Facebook's integrated services	Google's integrated services	Google's ad tech services	Other ad tech providers²⁹⁴
Publisher ad server	Facebook Audience Network is Facebook's integrated website facing product	Google AdSense and AdMob are Google's integrated website facing products	Google Ad Manager	AppNexus, OpenX, Freewheel, Sizmek, Flashtalking, AdZerk
Supply side platform				AppNexus, Rubicon, PubMatic, OpenX
Ad exchange				AppNexus, Rubicon, OpenX, PubMatic
Demand side platform	Facebook Ads is Facebook's integrated advertiser facing product	Google Ads is Google's integrated advertiser facing product	Google Marketing Platform	AppNexus, One (AOL), MediaMath, TubeMogul, DataXu
Advertiser ad server				Sizmek, AdZerk
Data management platform				Adobe Audience Manager, BlueKai (Oracle), MediaMath
Data analytics				Integral Ad Science, Moat, comScore
Third party data providers	Allows the use of additional data provided by the advertiser ²⁹⁵	Allows the use of additional data provided by the advertiser	Allows the use of additional data provided by the advertiser/publisher	Quantium, Experian, Equifax, Data Republic, Acxiom, Red Planet
Ad verification	Allows third party ad verification	Allows third party ad verification	Allows third party ad verification	Integral Ad Science, Moat, comScore, DoubleVerify

While there are many firms that supply ad tech services, Google is the only company that offers ad tech services across the entire ad tech supply chain. Google's and Facebook's integrated services are also listed in this table. These products do not directly interconnect with third party ad tech services and are therefore not the focus of the discussion in this section.

The revenue and ad inventory flowing through Google's ad tech services are significantly larger than any other firm or supplier. For example, some estimates suggest Google's market share of ad exchange services is 66 per cent, with the next largest competitor having an 11 per cent share.²⁹⁶ Similarly, some estimates suggest that Google's market share of demand side platform services is 66 per cent, with the next largest firm having a 8 per cent share.²⁹⁷

294 This list is not exclusive and there may be other firms supplying each of these services.

295 In addition to allowing advertisers to utilise their own data or third party data, Facebook previously had a partnership program called Partner Categories which allowed advertisers using Facebook's Ad Manager to target users based on purchasing and other offline information provided by Quantium, Acxiom and Experian. However this was discontinued in March 2018 due to privacy concerns. Announcement of this decision can be found on Facebook newsroom, [Shutting Down Partner Categories](#), 28 March 2018, accessed 24 May 2019.

296 Google 66%; AppNexus 11%; Datanyze, [Market Share: Ad Exchanges](#), accessed 15 May 2019.

297 Google 66%; AOL 8%; Datanyze, [Market Share: Demand Side Platforms](#), accessed 24 June 2019.

Google's ad tech services

Google Ad Manager

Google Ad Manager is the new brand name for the platform which houses a number (but not all) of the website-facing Google products used for the selling of ad inventory via the ad tech supply chain, though each product can be used separately. It houses the following products:

- Supply side platform (previously called DoubleClick Ad Exchange)
- Ad exchange (previously called DoubleClick Ad Exchange)
- Publisher ad server (previously called DoubleClick for Publishers).²⁹⁸

Google Ad Manager enables website owners to sell ad inventory on their website via programmatic channels (for example, through Google's ad exchange and other third party ad exchanges). Websites that use Google Ad Manager can make available individual ad inventory to buyers and optimise ad placement and revenue.

As a service for websites, it differs from Google AdSense in that it allows for more automation, greater use of data and customisation (for example, websites can select or favour the advertisers that can purchase inventory and set the number of ads being sold), and also makes the website's ad inventory available not just to Google's ad tech services, but also to other third party ad tech. Google Ad Manager is typically aimed at larger, more sophisticated website owners and firms, whereas Google AdSense is aimed at smaller advertisers and businesses.

Google Marketing Platform

Google Marketing Platform is the new brand name for the platform which houses a number (but not all) of Google's advertiser-facing products used for the purchasing and measurement of advertising inventory via the ad tech supply chain, though each product can be used separately. It houses the following products:

- Demand side platform (previously called DoubleClick Bid Manager; DoubleClick Search)
- Advertiser ad server (previously called DoubleClick Campaign Manager)
- Analytics tools (previously called Google Analytics 360 Suite).²⁹⁹

The Google Marketing Platform is typically aimed at larger, more sophisticated advertisers and firms, whereas Google Ads is aimed at smaller advertisers and businesses.

The Google Marketing Platform differs from Google Ads in that it offers a higher level of automation and ad targeting, and a greater ability for advertisers to use data. It also allows advertisers to purchase ad inventory available not just on Google's ad tech services, but also on third party ad tech services. For example, advertisers can purchase ad inventory from Google's own ad exchange as well as from other third party ad exchanges.

Other ad tech providers

Ad tech services are also offered by a number of other providers as listed above in table 3.1. The ACCC has received consistent feedback that the other providers identified in the table above operate on a far smaller scale in comparison to Google, and are more likely to operate in niche areas.

For example, other providers may focus on providing ad tech services to advertisers and websites where more control is sought, or may charge higher prices for what they consider to be a premium product.

²⁹⁸ J Bellack, [Introducing Google Ad Manager](#), 27 June 2018, accessed 25 May 2019.

²⁹⁹ B Bender, [Introducing Google Marketing Platform](#), 27 June 2018, accessed 25 May 2019.

There are a number of reasons that these offerings may be less attractive than the offering by larger players such as Google. Smaller ad tech providers have less access to data, are less able to follow users across multiple touchpoints and therefore may be less attractive to advertisers.

Box 3.3: Data used in advertising

Data used in advertising can be collected by numerous parties including advertisers, websites and platforms that supply ad inventory, firms that offer ad tech services, and mobile operating system owners.³⁰⁰

The extensive data collected by each of Google and Facebook on their own users (off-platform as well as on-platform) and the data collected via Google and Facebook's own activities in online advertising is likely to be unparalleled.

Google and Facebook can collect data in various ways including the following:

- **Sign-in/subscription data** – Data can be collected when users sign-up or subscribe to websites and apps online. For example, users will often identify themselves when signing up for different services and websites, such as Gmail, Facebook, or any other website that allows for a user log-in. Information provided could include name, age, address, phone number, date of birth, payment details and different preferences.
- **Cookies** – Cookies are small files that are placed on users' computers and store data on their activity and browsing, specific to different websites. When a user visits a website, that website might automatically and invisibly send a cookie to the user's computer. This cookie then helps the website keep track of the user's visits and activity on the website and allows the website to deliver webpages tailored specifically to that user. For example, an online retailer website may use cookies to keep track of what a user is adding to their shopping cart as they navigate the website across different sessions.
- **Web tags** – Web tags are similar to cookies except that they are elements found within webpages as opposed to files sent to users' computers. These tags can be used to recognise and track users as they browse the internet.
- **Ad tags** – Ad tags help advertisers and publishers measure the performance of ads and to track users' engagements with the ads (viewing the ad, clicking the ad).
- **Pixels** – There are a number of different pixels that websites and advertisers use to track users in different ways. For example, there are pixels that gather technical information on users (IP address, device used), track users as they purchase products or complete equivalent actions, and track how long users are on specific pages. One example of a pixel that advertisers use is the Facebook Pixel, which helps them track when someone visits their website and takes an action such as making a purchase. This data then allows advertisers to target that user through Facebook ads in the future.
- **Mobile apps** – Mobile apps offer a number of tools that enable developers of mobile apps to analyse users and track their behaviours. For example, Google Maps and other navigational apps can allow the tracking and collection of geolocation data. As discussed in more detail in section 7.3.3 of chapter 7, app developers will frequently share information collected on user's use of those apps with third parties including with Facebook. Additionally, mobile phone operating systems more generally, such as Android and iOS, can be a source of data.³⁰¹

300 See section 7.3.2 of chapter 7 for further discussion on online tracking of consumers for targeted advertising purposes.

301 Autorité de la concurrence, [Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector](#), March 2018, pp. 30-31.

The effect of digital platforms on advertisers

The rest of this chapter focuses on the following effects of digital platforms on advertising markets including the:

- benefits to businesses in reaching customers
- ability and incentive of digital platforms with substantial market power to engage in behaviour that may affect competition in advertising and other markets
- ability of advertisers to measure and verify the performance of advertising on digital platforms
- lack of transparency in online advertising services
- ability of digital platforms that operate in multiple markets, to engage in potentially anti-competitive bundling and tying
- limited ability for businesses to negotiate with digital platforms.

3.2 Benefits to advertisers

Key findings

- Google and Facebook provide advertisers with numerous and significant benefits, through an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers, often at a lower cost than traditional forms of advertising.

The ACCC considers that digital platforms provide broad benefits to businesses. In particular, the online advertising services supplied by digital platforms provide businesses seeking to advertise with numerous and significant benefits above those of traditional advertising. Accordingly, the focus of this section is on the benefits of advertising services provided by digital platforms.

For example, the Australian Association of National Advertisers submits that:

*...digital platforms have provided a number of positive impacts for advertisers, offering strong and innovative advertising services to the market. These services empower advertisers with robust targeting and format options. In conjunction with cost efficient buying methodologies, digital platforms are appealing for advertisers.*³⁰²

The NSW Business Chamber submits that in response to a survey of its members, 71 per cent had utilised digital platforms to advertise and indicated online advertising had positively affected their business; 62 per cent of respondents indicated online advertising had increased customers; 43 per cent indicated it had increased sales; and 34 per cent indicated it helped reduce costs.³⁰³

As discussed in the introduction of this chapter, one of the most significant advantages of advertising using the services of digital platforms is the ability to more specifically target consumers, resulting in a potentially higher return on ad spend. This ability to more specifically target consumers stems from the algorithm-based and data-driven nature of advertising services that digital platforms offer.³⁰⁴

As discussed earlier in chapter 2, digital platforms like Google and Facebook have a high quantity of high quality data. This enables them to offer better targeting services to advertisers. For example, digital platforms like Google and Facebook are able to offer a higher number of specific consumer segments that advertisers can target. The presence of cookies, IDs, ecosystems that require/enable log-ins, and other tracking methods enables digital platforms to offer advertisers high quality services for the targeting of consumers across devices and both on and off platforms owned and operated by the digital platform. These factors have the ability to increase the efficiency and effectiveness of advertising, as advertisers can direct ads to consumers most likely to respond to them.³⁰⁵

302 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

303 NSW Business Chamber, [Submission to the ACCC Issues Paper](#), April 2018, p. 3.

304 J Furman et al, UK Digital Competition Expert Panel, [Unlocking Digital Competition](#), 13 March 2019, pp. 114-115.

305 J Furman et al, UK Digital Competition Expert Panel, [Unlocking Digital Competition](#), 13 March 2019, p. 114.

The Australian Association of National Advertisers submits that:

...the ability for advertisers to reach their desired audience, confident in the accuracy of the targeting and armed with insights that will drive relevant messaging enables a much more effective marketing approach compared to broad brush techniques that some more traditional channels offer. The greater potential to target specific audiences assists in the ability to measure the short term effects of a campaign with respect to consumers and sales.³⁰⁶

Targeted marketing helps improve the relevance of content to the consumer, tailoring ads depending on language, location, context, interest and other parameters... Tailoring advertising provides a better experience, both in terms of content and to avoid repeatedly serving up the same advertisements to a particular audience.³⁰⁷

In particular, digital platforms have provided a new advertising avenue for small to medium sized businesses that may not have been able to afford the advertising available on the high-reach traditional newspapers or commercial television and radio network. For some small to medium businesses, online advertising has become a significant part of their business models, and many have become successful through an online only focused strategy, building a brand and following entirely through social media. As one submission notes:

Small business owners must utilise digital platforms if they want to survive in today's current economic climate. It's not a choice anymore, it's a necessity.³⁰⁸

Similarly, Facebook submits the following:

More than half of all Australian SMBs have a Facebook Page. An estimated 8.2 million Australians have purchased from, or visited an SMB after seeing content relevant to the business on Facebook.³⁰⁹

Additionally, digital platforms have provided Australian small to medium sized businesses with access to potentially global audiences. Due to the ubiquity of platforms owned by Google and Facebook worldwide, and the network of advertising opportunities that they offer, Google and Facebook are able to provide Australian small to medium sized businesses the ability to target prospective customers globally with very little additional effort. Facebook submits the following:

By providing a platform for Australian SMBs to compete to reach relevant customers locally and internationally, Facebook has empowered Australian SMBs to compete with larger and more established companies in Australia and around the world.³¹⁰

For small to medium businesses, the self-serve platforms of Google and Facebook are easy to use services that enable them to efficiently acquire their advertising needs. Businesses can easily set up accounts and business pages for advertising on both platforms in a short amount of time. Due to the complete end-to-end service that Google and Facebook offer via their self-serve platforms, businesses do not need to contract with multiple parties. Additionally, no minimum spend is required and businesses can start and stop ad campaigns and spend at any time. For example, the Australian Association of National Advertisers submits that:

...advertising budgets can be deployed in a nimble, responsive manner and can be optimised in real time.³¹¹

For these reasons, the ACCC considers that digital platforms, and in particular Google and Facebook, provide significant benefits to businesses.

306 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

307 Australian Association of Nation Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

308 Confidential Party #2, [Submission to the ACCC Issues Paper](#), May 2018, p. 3.

309 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 20.

310 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 20.

311 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

3.3 Potential for anti-competitive conduct by digital platforms and the risk of market failure

Key findings

- Digital platforms with substantial market power have the ability and incentive to engage in leveraging behaviour which may affect competition in advertising and other markets. There is international evidence that digital platforms have engaged in anti-competitive leveraging behaviour in the past and the risk of leveraging behaviour is increasing as Google and Facebook expand into other markets.
- The ACCC has concerns about the potential for the misuse of market power within advertising and other markets, and about the potential for other market inefficiencies to be caused by a lack of transparency.

3.3.1 Misuse of market power

Past evidence of leveraging behaviour

Firms with substantial market power, including the leading digital platforms, are likely to have the ability and incentive to leverage their market power into related markets. Submissions to this Inquiry and international experiences highlight that this may have previously occurred in a number of ways.³¹²

In Europe, there have been examples of firms leveraging substantial market power from:

- the smart mobile operating system market to reinforce dominance in other markets. The European Commission found in 2018 that Google's pre-installation of search and browser apps on Android created a status quo bias towards consumers using Google Search which strengthened the dominance of Google Search.³¹³ The European Commission imposed fines on Google of EUR€4.34 billion for this conduct. This decision has been appealed by Google.³¹⁴
- the general search services market to other vertical search markets. The European Commission found in 2017 that Google had abused its market dominance in the search services market by giving an illegal advantage to another Google product, its comparison shopping service, Google Shopping. The European Commission imposed fines of EUR€2.42 billion on Google for this conduct. This decision has been appealed by Google.³¹⁵ Media reports indicate that other companies such as Yelp made similar complaints to the European Commission in 2018.³¹⁶

There have also been allegations raised recently in the UK and Australia about similar types of conduct, for example:

- From the social media market into the online display advertising market – documents originating from a lawsuit filed by Six4Three against Facebook, and released by the UK House of Commons, highlight a number of examples where this is alleged to have occurred in the past. The House of Commons concludes there are interlinkages between Facebook giving companies access to users' data and ad spend. For example, it appears from the documents released that Facebook's consideration to give firms access to user data (through APIs) took into account their ad spend.³¹⁷

312 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p.36; News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 12, 18-19.

313 European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

314 Google, [Android has created more choice, not less](#), 18 July 2018, accessed 30 April 2019.

315 Google, [The European Commission decision on online shopping: The other side of the story](#), 27 June 2017, accessed 30 April 2019.

316 G Sterling, [Yelp asks Europe to take new antitrust action against Google, Search Engine Land](#), May 2018, accessed 30 April 2019.

317 UK Commons Digital, Culture, Media and Sport Committee, [Disinformation and 'fake news': Final Report](#), 14 February 2019, pp. 30-31.

- From the social media market into the market for social media marketing and management services – Dialogue Consulting Pty Ltd commenced legal proceedings against Facebook in April 2019, alleging that it has breached the misuse of market power laws in the CCA by restricting Dialogue’s access to Facebook and Instagram. Dialogue provides a service that automatically logs in and out of Facebook and Instagram accounts and allows users to schedule posts. Dialogue claims that Facebook and Instagram wrongly purported to terminate its access to the Facebook services/platforms, in breach of section 46 of the CCA. Dialogue also claims that the terms enabling Facebook to terminate access immediately were unfair under sections 23 and 24 of the Australian Consumer Law (ACL); that Facebook’s conduct was unconscionable under section 21 of the ACL, and that its conduct and silence (which led Dialogue to believe that access would not be terminated) was misleading.
- From the mobile operating system or mobile application store market into the online display advertising market – in Australia and the United Kingdom, Unlockd commenced (but subsequently discontinued) legal proceedings against Google, alleging that Google terminated its access to the Google Play Store and AdMob advertising service because Google viewed Unlockd as a threat to its own mobile advertising revenue. Unlockd was an app that offered consumers rewards in return for displaying ads when they unlock their phone screen.

These allegations concerning local and/or overseas conduct go beyond the advertising markets examined in this Inquiry and illustrate the potential for other markets to be affected.

There are also examples where digital platforms may have leveraged their market power in more subtle ways. For example:

- The search engine, DuckDuckGo has made public complaints that each time it updates its Chrome browser extension, all of its users are presented with a dialogue box asking them if they’d like to revert their search settings back to Google Search and disable the entire extension.³¹⁸
- In 2015, Mozilla published an open letter complaining that Microsoft stripped users of their browser choice when updating to Windows 10 by overriding existing user preferences for the web browser and other apps. The effect of this was to give an advantage to Microsoft’s web browser.³¹⁹
- More recently, some media reports also suggest that Microsoft ‘interrupts’ users trying to install Mozilla Firefox with a popup that prompts them to use a Microsoft browser instead.³²⁰
- The former CEO of Firefox, Jonathan Nightingale, has recently raised public complaints that when Google launched Chrome, it delayed fixing technical issues between Firefox and other products. In particular, one complaint was that Gmail and Google Docs started to experience selective performance issues and bugs on Firefox and that as a result, Firefox lost a lot of users to Chrome.³²¹

Ability and incentive to engage in leveraging in the future

The ACCC identified in its Preliminary Report a number of areas where digital platforms may have the ability and incentive to engage in this type of behaviour in the future:

- Technical specifications introduced by Google or Facebook have the potential to benefit their own products and services, to the detriment of competitors. The most prominent example raised was the Coalition for Better Ads and the Better Ads Standards. Some submissions claim that Chrome did not apply restrictions to video content sites including Google-owned YouTube, but did apply this restriction to websites from other publishers, including news websites.³²² While the ACCC has not received evidence that this conduct has had a material adverse impact on Google’s competitors, it illustrates a scenario where market power in one market may be leveraged into another.

318 DuckDuckGo, [Twitter Update](#), 18 Jul 2018, accessed 30 April 2019.

319 C Beard, [An Open Letter to Microsoft’s CEO: Don’t roll back the clock on choice and control](#), The Mozilla Blog, 30 July 2015, accessed 30 April 2019.

320 M Brinkmann, [Microsoft Intercepting Firefox and Chrome Installation on Windows 10, ghacks.net](#), 12 September 2018, accessed 30 April 2019.

321 J Nightingale, [Twitter Update](#), 12 April 2019, accessed 30 April 2019.

322 News Corp Australia, [Submission to the ACCC Digital Platform Inquiry Preliminary Report](#), March 2019, p. 31.

- Favouring or preferencing their own ad inventory. For example, Google's DSP, which offers advertisers the ability to place ads across a range of platforms, including its own, could preference the purchasing of ads on locations which generate the most revenue for its own business (for example, ads on YouTube or other Google websites), as opposed to acting in the best interests of the advertiser.
- Favouring their own advertising services by ranking their own advertising services higher on search results or social media feeds, or by excluding rivals from their platform. For example, by preferencing its own specialised search results (such as Google Shopping or Facebook Marketplace) instead of websites that offer competing services.
- Favouring their own advertising services by excluding rival suppliers of advertising from other products. For example, by refusing rival advertising apps access to the Google Play Store, or by Facebook refusing access to rivals for its API services.
- Favouring websites that are a part of Google Display Network or Facebook Audience Network. For example, for Google Search, publishers that are a part of Google Display Network could be ranked more highly in organic search results, or in sponsored or ad results, than publishers that are not a part of Google Display Network.
- Favouring advertisers that use Google's or Facebook's advertising services, in the display of organic results or ordering of the news feed. For example, organic posts from advertisers with high expenditure may be displayed more prominently.
- Favouring or preferencing their own ad tech services. For example, Google's DSP or SSP could preference ad inventory made available through its own ad exchange, rather than a third party ad exchange. If this occurred, it may have flow on effects. For example, if a digital platform is able to drive additional volume to its exchange, it may decrease the viability of competing ad exchanges as they would receive less advertiser demand.

Since the publication of the Preliminary Report, an article by academics Damien Geradin and Dimitrios Katsifis has provided more specific examples of where this type of favouring may occur.³²³

Geradin and Katsifis raise the following examples regarding favouring and preferencing:

- DoubleClick for Publishers sheltering Google Ad Exchange from real-time competition, by allowing Google Ad Exchange to submit a real-time bid to DoubleClick for Publishers but prohibiting third-party ad exchanges from doing so, resulting in a lower purchase price for Google Ad Exchange.
- Google Ad Exchange having the 'last look' at ad impressions, and therefore, being able to use the highest estimated price of all ad exchanges as the price floor for its own auction, making it possible for Google Ad Exchange to beat any other exchanges by submitting a slightly higher bid.³²⁴
- Using information gathered by DoubleClick to favour Google Ad Exchange to cherry pick users that 'happened to be at the end-of-funnel stage in a purchase journey, essentially stealing attributions from other exchanges'.³²⁵

Similar to the concerns about leveraging market power through industry standards, there are also concerns about potential privacy related changes to the way the Chrome browser treats first and third party cookies. Media reports suggest that Google may differentiate between the way Chrome treats its own cookies versus rival ad tech supplier cookies.³²⁶ For example, Andrew Buckman, Chief Operating Officer of ad tech vendor Sublime, has been quoted as saying: 'This move by Google is very bad as it's highly anti-competitive... they control about 80 per cent of the global market with

323 Geradin and Katsifis disclose that they represent news publishers in competition matters, however they say that the article was written independently.

324 The ACCC notes that Google introduced a feature in DoubleClick for Publishers called Exchange Bidding which allows third party ad exchanges connected to Google Ad Exchange to submit real-time bids. This removes Ad Exchange's 'last look' advantage. However, Google Ad Exchange retains a 'last look' advantage over third party ad exchanges that do not participate in Exchange Bidding.

325 D Geradin and D Katsifis, '[An EU competition law analysis of online display advertising in the programmatic age](#)', *Social Science Research Network*, 12 December 2018, pp. 25-27.

326 M Graham, '[Google cracks down on ads tracking you across the web, and advertisers are preparing for the worst](#)', *CNBC*, 8 May 2019, accessed 24 May 2019.

Chrome and they seem to be proposing that users block tracking on every other tech vendor but Google. It's another example of Google abusing their dominant position.³²⁷

The ACCC notes that these browser changes may have positive privacy effects for consumers, and that given this change has not yet occurred, it is not possible to tell whether this will have a material impact on competition.

Google submits that the scenarios raised in the Preliminary Report are either implausible or unlikely to be anticompetitive.³²⁸

Google submits that it:

- is not favouring or preferencing its own ad inventory in DSP services. Google says such a practice would undercut the value of Google's DSP services. Google submits its DSP service competes against many popular DSPs and that if it favoured its own ad inventory to the detriment of advertisers, it would degrade the quality of its DSP service and drive advertisers to alternate DSPs.³²⁹
- is not favouring its own ad inventory on Google's ad exchange over inventory on other ad exchanges to the detriment of advertisers, for similar reasons explained in the point above. Google submits that this too would degrade the quality of its DSP service and drive advertisers to alternative DSPs.³³⁰
- does not change the ranking or display of websites in its organic search results based on whether they buy services from Google or participate in the Google Display Network, and that it has no incentive to sacrifice search quality, which is its greatest source of revenue and profits, in order to promote a business in which Google earns a comparatively small proportion of revenue and profits.³³¹

Facebook submits that it is not vertically integrated and that it has strong incentive to deliver a good return on investment for advertisers.³³² It submits that 'the examples of digital platforms "favouring their own business interests" in the operation of advertising and ad tech services enumerated in the Preliminary Report are simply not relevant to Facebook'.³³³

While Facebook is not a provider of ad tech services, Facebook is present in related markets. Facebook sells ad inventory on its owned and operated platforms (Facebook, Instagram, Messenger) to advertisers, but also operates in a related market through the operation of Audience Network (discussed in section 3.1.4), a service by which Facebook acts as an intermediary and sells ad inventory on third party websites.

The ACCC remains of the view that digital platforms with substantial market power, and which are present in related markets, have the ability and incentive to engage in this type of self-preferencing behaviour. Digital platforms will have incentives to engage in self-preferencing if the profits they receive from favouring their own business outweighs any losses they incur from customers switching to rival products. Additional proactive monitoring, investigation and enforcement tools, as proposed under recommendation 4, will enable the ACCC to better examine these issues.

Increasing risk

Google operates across a number of markets other than the supply of search services, including mobile operating systems, web browsers, mapping applications, email, advertising, file storage, IoT products, and payment services. Similarly, Facebook operates across Facebook, Instagram, messaging services including WhatsApp and Messenger; provides a platform for publishers to sell advertising through Audience Network; and offers a platform for classifieds through Marketplace and Facebook Jobs. The broad range of markets that each of Google and Facebook operates in provides many opportunities for self-preferencing to occur.

327 J Davies, [How Google's privacy moves will spur changes to ad tech](#), Digiday, 8 May 2019, accessed 24 May 2019.

328 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 40.

329 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 40.

330 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 40.

331 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 40.

332 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 22-23.

333 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 23.

Google and Facebook also have a strong history of expanding into related markets. For example, Instagram's recent entry into online shopping (whereby Instagram directly facilitates the purchase of certain brands), Facebook's entry into jobs and dating services, and Google's entry into flights and hotels. As a result, it is likely the risk of digital platforms leveraging market power from one market to another will increase in the future.

Misuse of market power within a market

Another way in which digital platforms may misuse market power is *within* a market in which they have substantial market power.

During the course of this Inquiry, many examples of misuse of market power were raised with the ACCC, including the following:

- **Foreclosing competitors' access to data** – the House of Commons released a number of documents which, it notes in its *Disinformation and 'fake news': Report*, suggests that Facebook has taken aggressive positions against certain apps, especially against direct competitors, which resulted in rivals being denied access to data.³³⁴
- **Restrictive clauses** – in 2018, the European Commission found that Google had abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites, which prevented Google's rivals from placing their search ads on these websites. The European Commission imposed fines on Google of EU€1.49 billion for this conduct. Google announced changes to its terms to address the issues raised.³³⁵
- **Restricting user behaviour**– allegations have been raised that platforms such as Instagram and Twitter have restricted the ability of users to post links to rival social media sites such as Snapchat.³³⁶ These types of allegations highlight the potential for digital platforms with market power to foreclose links to competitor platforms and increase barriers to switching.
- **Exclusionary behaviour** – the Bundeskartellamt (German Federal Cartels Office), is currently investigating Amazon for a range of potentially exploitative terms, as well as considering issues of exclusion, through the non-transparent termination of sellers' accounts.³³⁷ While Amazon has only recently launched in Australia, this example highlights the potential for such issues to arise in the future.

3.3.2 Inefficient operation of markets

As noted previously, the economic activity conducted on, or directly affected by, digital platforms is substantial. It is important for the effective functioning of the economy that the markets in which digital platforms participate and the markets affected by digital platforms operate as efficiently as possible.

Two characteristics of advertising and related markets are particularly important in this regard: market power and lack of transparency.

Market power

As noted in chapter 2, the ACCC is of the view that Google has substantial market power in the supply of search advertising services and Facebook has substantial market power in the supply of display advertising services. The use of this market power can impede the efficient operation of advertising markets in two main ways.

First, it provides Google and Facebook with the freedom to 'give less and charge more'. Prices that are inflated by the use of market power will likely discourage advertising expenditure at the margin.

334 UK Commons Digital, Culture, Media and Sport Committee, [Disinformation and 'fake news': Final Report](#), 14 February 2019, p. 38.

335 European Commission, [Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising](#), 20 March 2019, accessed 16 May 2019.

336 G Sloane, [Twitter and Facebook want publishers and brands to stop promoting their Snapchat accounts](#), Digiday, 28 April 2016, accessed 30 April 2019; L Myers, [Did Instagram block your bio link? Try this. Louise Myers Visual Social Media](#), 20 March 2019, accessed 30 April 2019.

337 Bundeskartellamt, [Bundeskartellamt initiates abuse proceeding against Amazon](#), 29 November 2018, accessed 30 April 2019.

Second, it provides Google and Facebook with the ability and incentive to self-preference and favour their own businesses in related markets. To the extent self-preferencing prevents or handicaps rival businesses from competing with Google or Facebook on their merits, it will impede the efficient operation of the markets in which they compete. The scope for anti-competitive self-preferencing is particularly acute in the ad tech supply chain where Google operates businesses at multiple levels.

Lack of transparency

This Report discusses a number of examples of lack of transparency in online advertising markets, including a lack of transparency as to the prices charged by suppliers of advertising services and various ad tech suppliers, and the proportion of value appropriated by firms operating at different levels of the ad tech supply chain. This opacity is compounded by the ‘black box’ operation of various algorithms and auction processes which determine both the serving and ranking of ads.

Probably the most substantial economic cost of this lack of transparency or opacity is the lack of ‘trust’ it may engender. Buyers and sellers are more likely to participate in markets, including advertising markets, if they have a strong expectation that they ‘get what they pay for’ or are ‘getting value for the money they spend’. Some sellers of ad inventory (websites or app owners) question whether the ad tech supply chain is delivering them the best possible return on their ad inventory. Some buyers of advertising question how much they are paying to firms for advertising services, supplied directly by digital platforms and at various levels of the ad tech supply chain, and if they are getting value for money for those services.

A lack of transparency also creates the risk of consumers and businesses making uninformed choices, or being misled in their dealings with major digital platforms. Consumers and businesses rely on accurate information to make informed purchasing decisions. If that information is not available or is misleading, the risk of uninformed choices increases. This is discussed further in section 3.3.5.

The lack of transparency and the risk of being misled is not just a consumer issue. It can also distort competition. If firms win customers by misleading them, then it penalises firms that are upfront with consumers and represent their offers in a transparent and accurate way. There is a risk that competition will become a race to the bottom. The more transparent the terms and condition that sellers offer buyers, the more likely it is that competition will reward those sellers who offer the more attractive terms and conditions.

3.3.3 Why aren’t existing competition laws sufficient to deal with leveraging or misuse of market power? Why is additional proactive investigation, monitoring and enforcement needed?

Some submissions responding to the ACCC’s Preliminary Report consider that existing competition laws are sufficient to deal with these issues. For example, Google submits that anti-competitive favouring can be addressed by existing law and cites examples of competition investigations in other jurisdictions such as Europe.³³⁸

The ACCC is responsible for investigating and enforcing the competition provisions of the CCA, including section 46 of the CCA, which deals with conduct where a firm with a substantial degree of market power engages in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

The ACCC considers that the existing tools and goals of the competition law framework remain applicable for digital markets but that there are conditions which limit the effectiveness of the broad prohibition on misuses of market power. The ACCC has identified five areas where this is the case.

338 Google, [Submission to ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 39.

First, competition law is insufficient to deal with market failures that arise due to a lack of transparency or due to externalities in other markets. While section 46 of the CCA can address misuses of market power, it provides no basis for the ACCC to investigate issues stemming from a lack of transparency or from other market failures. A lack of transparency in these markets also means that potential breaches of section 46 may go undetected.

Second, effective enforcement may rely on a body of data built up over time to assess competition matters. For example, the European Commission's investigation into Google Shopping relied on data collected by a third party to show the effect of Google's changes to the algorithm. It is unlikely that data will be collected by third parties in relation to all potential areas of concern. Some proactive monitoring and collection of data will enable the ACCC to build an evidence base for future matters assessed under existing competition laws. Given the opaque nature of many digital markets, competition enforcers cannot gather this data through observations or monitoring public data and outputs alone.

Third, investigations can take a significant amount of time and by the time they are complete, it may be too late to effectively remedy the competition concern. Building up knowledge and industry expertise may result in more timely outcomes when using existing competition laws as it will reduce the learning curve for the agency. This may be a significant benefit given the international experience regarding the time and resources other competition agencies have needed to conclude cases. For example, in relation to the European Commission's Google Shopping case, the initial complaint was lodged by the UK vertical search engine, Foundem, in November 2009, and the European Commission officially opened its investigation in November 2010, and came to a decision in June 2017.³³⁹

Additionally, the ACCC's experience with financial services, agriculture and commercial construction is that there is significant benefit in having staff dedicated to specific industries. By devoting resources to assess the conduct of digital platforms and proactively investigating issues in the markets in which digital platforms operate, more timely resolutions, capable of addressing competition concerns before they become entrenched, may be possible.

Fourth, existing laws rely on conduct to be brought to the ACCC's attention. It is likely that some discrimination will not be able to be detected by market participants. This possibility is heightened where digital platforms operate as 'black boxes'.

Finally, some conduct may not substantially lessen competition (and therefore not breach the CCA) but there may be public benefit in reporting on that conduct. For example, the ACCC may want to highlight conduct that has the potential to substantially lessen competition in the future, or which may suggest that a firm with substantial market power is taking advantage of the imbalance of bargaining power in a way that causes significant detriment to user groups.

3.3.4 What is the role of consumer protection law in promoting consumer welfare in digital markets?

In addition to investigating and enforcing competition law, the ACCC is jointly responsible, along with State and Territory consumer protection agencies, for administering the ACL. The ACL is set out in schedule 2 of the CCA and contains the rights of Australian consumers and obligations on businesses advertising and selling goods and services in Australia.

The ACCC considers that the goals and functions of competition and consumer protection laws are closely linked and mutually-reinforcing. Competition law seeks to maintain competitive markets to enhance consumer welfare and increase consumer choice. Consumer protection law safeguards consumers' ability to make free and informed choices that further their own interests which, in turn, promotes competitive markets.

Consumer protection law can be particularly critical in consumer transactions with digital platforms. This is because the relationships between digital platforms and consumers are characterised by acute information asymmetries and bargaining power imbalances (see further chapter 7). A lack of bargaining power can leave consumers open to exploitation, information asymmetries compromise consumers'

339 Oxera, [The Google Case: Shop till you drop \(off the screen\)](#), March 2018, accessed 29 April 2019.

ability to make informed choices, and both can lead to market failures that give rise to consumer protection issues.³⁴⁰ Accordingly, consumer protection law is as important and effective as competition law in addressing issues of market power and market inefficiencies arising in digital markets.

The ACCC recognises that the ACL contains several effective tools for addressing digital platforms' practices that give rise to consumer protection issues. However, the ACCC considers that more can be done to ensure that any conduct on the part of digital platforms that leads to consumer harm, but may fall short of a breach of the ACL, is proactively investigated and appropriate enforcement action taken. Recommendations 20 and 21 address this.

3.3.5 Proactive investigation, monitoring and enforcement – more needs to be done to address market failures and conduct that harms competition and consumers in digital markets

This section examines the need for additional proactive monitoring, investigation and enforcement tools to supplement existing competition and consumer protection enforcement mechanisms.

Existing investigation and enforcement mechanisms have proved flexible enough to address some competition and consumer issues in digital markets. However, a key finding of this Report is that they are not adequate to deal with all issues. There is substantial international jurisprudence that digital platforms have engaged in anti-competitive conduct and conduct that harms consumers. The ACCC considers that the ability and incentive exists for digital platforms to engage in such conduct in the future in Australia. The opaque nature of the services offered makes the detection of issues difficult, and in some cases may be a cause of market failure. This creates significant risks for the Australian economy and for Australian consumers. If these risks come to pass, the impact on both would be substantial.

Because of this, the ACCC considers that existing investigative and enforcement tools need to be supplemented with additional proactive investigation, monitoring and enforcement powers to achieve better outcomes for Australian markets and consumers. This approach will also allow information to be gathered to establish the effect that digital platforms are having in Australia and give Government and policy makers an evidence base to make informed policy decisions in the future.

The cost of not acting is likely to be large. Digital platforms play a significant role in the Australian economy and in the lives of Australian consumers. This will continue to increase as Australian commerce continues to move online. Even very small distortions in markets where digital platforms operate can result in reductions of tens of millions of dollars to the Australian economy and create substantial consumer detriments.

3.3.6 What does proactive investigating, monitoring and enforcement involve?

Given the problems identified, there are four objectives that should guide the creation of any proactive investigation enforcement functions. These are:

- increased visibility of problems occurring in digital markets – shining a light on issues in these markets will improve outcomes for consumers, and may also act as a catalyst for industry driven change
- allowing existing competition and consumer law provisions to be used more effectively
- allowing evidence and information to be collected that allows Government to make informed policy decisions in the future – one of the biggest challenges that will face Government and public policy makers in the short to medium term is evaluating the impact of digital platforms on the markets they operate in, and any externalities they create for other markets or society more broadly. Proactive monitoring and investigation will enable an evidence base to be built to make these decisions
- providing flexibility so that the ACCC can respond to changing circumstances and dynamic markets.

340 R Smith, '[When Competition is Not Enough: Consumer Protection](#)' (2000) 39(4) *Australian Economic Papers* 408, p. 408.

The ACCC has identified four changes that are required to achieve the objectives listed above.

First, the creation of a specialist digital platforms branch within the ACCC to investigate competition issues relating to digital platforms. This will facilitate greater and more consistent scrutiny of competition matters in the sector. The Digital Platforms Inquiry has already resulted in several enforcement investigations that would have not otherwise been found across both competition and consumer issues, and dedicated resources will enable the ACCC to take further action.

The ACCC considers that it would be appropriate for the ACCC to carry out the proposed functions, rather than a new regulator. The ACCC already possesses skills and expertise in relation to competition and consumer law that could be utilised. This position is supported by strong submissions to the Preliminary Report and careful consideration of the objectives of the proposed functions. Additionally, the ACCC has existing relationships with Australian Government entities such as the Australian Communications and Media Authority (ACMA) and the Office of the Australian Information Commissioner, which could continue to be built upon and utilised, given the broad range of policy issues and potential enforcement actions raised by the conduct of digital platforms.³⁴¹ A new regulatory body would not have the benefit of these existing relationships. As such, supplementing the ACCC's functions via the creation of a permanent team would be more effective than establishing a new regulatory body.

Second, the ability to proactively investigate and gather information. This will enable the investigation of broader issues and will enable the ACCC to investigate potential market failures as well as potential breaches of the CCA where information has not been forthcoming through complaints by market participants.

Third, the ability to periodically compel data from digital platforms. Similar to other industries, such as telecommunications, the ACCC considers there is value in collecting information from digital platforms that will facilitate the monitoring of competition and market developments, and will assist in informing decisions. For example, competition enforcers in other jurisdictions such as Europe have noted that real-world data was an important part of the evidence base for reaching decisions.³⁴² As is recognised in the telecommunications industry, information gathered on a periodic basis is necessary to make informed decisions.

Fourth, the ability and resources to publicly report on issues of concern that may fall beneath the threshold of breaching the CCA, and to make recommendations based on evidence gathered by the branch, to Government, Treasury, Department of Communications and the Arts, ACMA and other policy departments.

There is considerable scope for the ACCC to work closely with the ACMA and other government departments in considering and providing advice on the impact of digital platforms, to help inform decision making in relation to policy settings for digital platforms. For example, the information obtained through these functions will help the ACCC determine whether there is an imbalance in the position of particular digital platforms and business users. Where the ACCC's inquiries identify serious consequences arising from this imbalance in bargaining power, the ACCC may make recommendations. For example, the developments of codes of conduct to govern such relationships, similar to that proposed in the report of the UK Digital Competition Expert Panel (led by Professor Jason Furman) '*Unlocking Digital Competition*' (the Furman Report).

3.3.7 Who will it apply to?

The ACCC recommends that proactive investigation, monitoring and enforcement extend to *all* digital platforms.

While some of the issues identified stem from various platforms holding significant market power, issues relating to market failure are not dependent on market power.

341 Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 17; Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 9; News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 25-26.

342 European Commission, [Summary of Commission Decision, Google search \(shopping\)](#), 27 June 2017, accessed 30 April 2019.

Platforms may increase or decrease in significance – this recommendation is forward looking and will enable the ACCC to act flexibly as markets evolve.

The investigation of issues may require information from platforms that do not hold substantial market power. For example, data may be needed as a point of comparison. To the extent this occurs, we expect the information required is likely to be limited.

In practice, the ACCC would focus its investigations on the larger digital platforms, which at the moment are Google and Facebook, because:

- where platforms hold substantial market power, it is more likely that issues of concern will arise.
- larger platforms have more significant effects on the community, consumers and the economy.

Recommendation 4 – Proactive investigation, monitoring and enforcement of issues in markets in which digital platforms operate

A specialist digital platforms branch be established within the ACCC to build on and develop expertise in digital markets and the use of algorithms, with the purpose of:

- proactively monitoring and investigating instances of potentially anti-competitive conduct and conduct causing consumer harm by digital platforms, which impact consumers, advertisers or other business users (including news media businesses)
- taking action to enforce competition and consumer laws relating to the conduct of digital platforms
- conducting inquiries and making recommendations to Government to address consumer harm and impediments to the efficient and effective operation of the markets in which digital platforms operate, caused by market failure.

This branch should be empowered by Ministerial direction to hold an extended public inquiry covering a period of at least five years and have the ability to compel relevant information.

3.3.8 Other countries have identified similar concerns

Since the ACCC released its Preliminary Report, a number of other countries have advocated similar approaches. The ACCC considers that the proposed digital platforms branch within the ACCC would work closely with equivalent teams at these overseas competition agencies and overseas consumer agencies. This coordination will enable competition and consumer agencies to learn from each other, enhance cross border enforcement and, where appropriate, share information and align their approach to meet the same objectives.

In the United Kingdom, the Digital Competition Expert Panel led by Professor Jason Furman published a report into digital competition in March 2019. The Furman Report found that:

...instead of just relying on traditional competition tools, the UK should take a forward-looking approach that creates and enforces a clear set of rules to limit anti-competitive actions by the most significant digital platforms while also reducing structural barriers that currently hinder effective competition.³⁴³

The Furman Report recommended the establishment of a digital markets unit that would be given a remit to use tools and frameworks to support greater competition and consumer choice in digital markets, and backed by new powers in legislation to ensure they are effective.⁶⁶ The Furman report also noted that ‘the existing competition tools also need to be updated to more effectively address the changing economy...’.

343 J Furman et al, UK Digital Competition Expert Panel, [Unlocking Digital Competition](#), 13 March 2019, p. 2.

The UK's Competition and Markets Authority (CMA) in its response to the Furman report noted that:

*...the CMA's markets regime was not designed to provide the powers or capability to perform an ongoing role where it acts as a dynamic counterparty to market participants, adjusting solutions in response to innovations and market dynamics. These new regulatory functions will likely need to be established in statute with accompanying new legal powers...*³⁴⁴

The CMA also noted that 'in relation to the recommendation on algorithms specifically, a general information-gathering power, outside the context of a "formal" investigation, would better enable the CMA to monitor developments in the digital economy, including the growth in the use and sophistication of algorithms'.³⁴⁵

In February 2019, Dame Frances Cairncross concluded her review into the sustainability of high quality journalism in the UK. Dame Frances observed in relation to fake news that:

*Indeed, at the moment, one of the biggest problems facing policy-makers is the difficulty of understanding and assessing what platforms are already doing...If platforms were more transparent about the steps they are taking and their impact, the government may be better able to judge whether there is still a case for further intervention.*³⁴⁶

The ACCC considers that similar challenges arise for public policy makers concerning the conduct of digital platforms more generally.

In February 2019, the US Federal Trade Commission (FTC) announced the creation of a task force dedicated to monitoring competition in US technology markets, investigating any potential anti-competitive conduct in those markets, and taking enforcement actions when warranted. FTC Chairman Joe Simons stated when this was announced:

*As I've noted in the past, it makes sense for us to closely examine technology markets to ensure consumers benefit from free and fair competition. Our ongoing Hearings on Competition and Consumer Protection in the 21st Century are a crucial step to deepen our understanding of these markets and potential competitive issues. The Technology Task Force is the next step in that effort.*³⁴⁷

This mirrors the example of jurisdictions such as Canada, which announced the creation of the role of Chief Digital Enforcement Officer within its Competition Bureau, and an aim to commence 10 digital economy investigations in 2018-2019.³⁴⁸

In May 2019, the Danish Competition and Consumer Agency (DCCA) announced the establishment of a Centre for Digital Platforms, designed to strengthen the enforcement of their current competition rules against digital platforms.³⁴⁹ The centre would also analyse the behaviour of digital platforms to determine how they affect competition in the market, growth of smaller competitors, and consumers.³⁵⁰ In a statement announcing the centre's establishment, DCCA Director Jakob Hald stated: 'The digital platforms are playing an increasingly important role in the trade in goods and services. We are now establishing a new centre that will focus on enforcement of the competition rules vis-à-vis digital platforms and through new analyses, establish new knowledge about platforms'.³⁵¹ In addition to its

344 Competition & Markets Authority, [Digital Competition Expert Panel recommendations – CMA view](#), 21 March 2019, accessed 25 May 2019, p. 3.

345 Competition & Markets Authority, [Digital Competition Expert Panel recommendations – CMA view](#), 21 March 2019, accessed 25 May 2019, p. 8.

346 The Department for Digital, Culture, Media & Sport, [The Cairncross Review: A Sustainable Future for Journalism](#), London, 12 February 2019, p. 36.

347 Federal Trade Commission, [FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets](#), 26 February 2019, accessed 25 May 2019.

348 Competition Bureau of Canada, [Building Trust to Advance Competition in the Marketplace – The Competition Bureau of Canada 2018-2019 Annual Plan](#), accessed 25 May 2019.

349 Danish Competition and Consumer Agency, [The Competition and Consumer Agency increases focus on digital platforms](#), 1 May 2019, accessed 3 May 2019.

350 Danish Competition and Consumer Agency, [The Competition and Consumer Agency increases focus on digital platforms](#), 1 May 2019, accessed 3 May 2019.

351 Danish Competition and Consumer Agency, [The Competition and Consumer Agency increases focus on digital platforms](#), 1 May 2019, accessed 3 May 2019.

enforcement and analytical role, the centre will also act as a hub for the DCCA's analyses of big data, machine learning and artificial intelligence, as well as the use of algorithms.³⁵²

In February 2019, the European Parliament announced that the Council of the European Union and the European Commission had reached a political deal on rules aimed at creating a fair, transparent and predictable business environment for businesses and traders when using online platforms. These include specifying within their terms and conditions the grounds on which they could suspend a user, stating in terms and conditions, or publicly, a description of any differentiated treatment they may give to themselves or a business they control, and a description of the access that business users will have to data that they or consumers provide when using the service. In making the announcement, Vice-President for the Digital Single Market, Andrus Ansip stated that the new rules were:

*...today's agreement marks an important milestone of the Digital Single Market that will benefit millions of European companies relying on digital platforms to reach their customers. Our target is to outlaw some of the most unfair practices and create a benchmark for transparency, at the same time safeguarding the great advantages of online platforms both for consumers and for businesses.*³⁵³

On 14 June 2019, the European Council adopted a regulation setting out these rules. The online platforms covered by the regulation include search engines and social media platforms, irrespective of their place of establishment, provided they serve business users established within the European Union and offer goods and services to consumers also located within the European Union. This would likely include advertisers, among other business users.³⁵⁴

Finally, a number of prominent economists have highlighted similar issues. For example, Crémer, de Montjoye and Schweitzer, in their report on competition policy in the digital era prepared for the European Commission, argue that 'the specific characteristics of many digital markets have arguably changed the balance of error cost and implementation costs, such that some modifications of the established tests, including allocation of the burden of proof and definition of the standard of proof, may be called for'.³⁵⁵ They highlight that 'in the context of highly concentrated markets characterised by strong network effects and high barriers to entry (that is, not easily corrected by markets themselves), one may want to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its conduct'.³⁵⁶

Nobel prize winner Jean Tirole has advocated in the context of digital platforms, that competition law needs to reconsider the burden of proof in antitrust concerns. Tirole argues that regulators should 'err on the side of competition'.³⁵⁷ As Tirole observes, the possibility of error must be accepted, and so the regulatory innovations must evolve as the authorities learn by doing, and slowly incorporate them into guidelines.³⁵⁸

The ACCC notes the focus of other overseas agencies or regulators, taskforces and market studies is on the use of competition law and policy to examine the behaviour of digital platforms and address any competition concerns or breaches arising out of that analysis. As both a competition and consumer law agency, the ACCC will utilise both Australian competition and consumer laws to address any identified breaches of those laws, consumer harms and market failures, in carrying out its functions under the proposed specialist digital platforms branch.

Online advertising market studies currently in progress

In April 2019, the Comisión Nacional de los Mercados y la Competencia (Spanish National Commission of Markets and Competition (CNMC)) announced that it would commence a study on the competition environment of the online advertising sector in Spain.³⁵⁹ This study comes from a commitment made

352 Danish Competition and Consumer Agency, [The Competition and Consumer Agency increases focus on digital platforms](#), 1 May 2019, accessed 3 May 2019.

353 European Commission, [Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices, 14 February 2019](#), accessed 18 June 2019.

354 European Council, [EU introduces transparency obligations for online platforms](#), 14 June 2019, accessed 25 June 2019.

355 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), *European Commission*, 4 April 2019, p. 4.

356 J Cremer, YA de Montjoye and H Schweitzer, [Competition policy for the digital era](#), *European Commission*, 4 April 2019, p. 4.

357 A Schragar, [A Nobel-winning economist's guide to taming tech monopolies](#), Quartz, 27 June 2018, accessed 14 May 2019.

358 A Schragar, [A Nobel-winning economist's guide to taming tech monopolies](#), Quartz, 27 June 2018, accessed 14 May 2019.

359 Comisión Nacional de los Mercados y la Competencia, [Consultation online advertising](#), 25 April 2019, accessed 21 May 2019.

by the CNMC to prepare studies on new sectors which have grown due to digitisation, or where new digital technologies have disrupted traditional business models. The CNMC expects the study will be completed in a period of six to nine months.

The Furman Report similarly recommended that the CMA should conduct a market study into the digital advertising market encompassing the entire value chain, to examine whether competition is working effectively and whether consumer harms are arising.³⁶⁰ This is in response to the finding that the digital advertising market is opaque with limited information disclosed either at an aggregate or an individual level.

The ACCC intends to closely watch the outcomes of these two market studies. More broadly and as mentioned above, the ACCC will continue to work with and build ongoing relationships with overseas competition and consumer agencies as it seeks to address concerns in relation to the conduct of digital platforms.

3.4 Measurement and verification of advertising performance on digital platforms

Key findings

- Market driven solutions have emerged, and are continuing to emerge, that allow advertisers to overcome difficulties in measuring the performance of advertisements on Google and Facebook.

A number of stakeholders have raised concerns about ad verification and ad fraud regarding the use of Google and Facebook's advertising products. The crux of these complaints is that Google and Facebook are measuring the performance of their own advertising services while restricting the ability of advertisers to engage independent parties to do so.

For example, the Australian Association of National Advertisers submits that:

...a key risk for advertisers is a lack of transparency in measurement and viewability. While digital platforms offer more to advertisers in terms of immediate measurement of campaign results, these measures and results are not independently audited. Nor is there the opportunity to compare across platforms due to the difference in metrics used.³⁶¹

Similarly, media businesses that compete with Google and Facebook for the supply of advertising opportunities allege that the unilateral verification and measurement carried out by Google and Facebook compares unfavourably with what they consider to be objective sector-wide measures applicable to traditional print and now online publications and commercial TV broadcasters.³⁶²

This could potentially occur in the following ways:

- There may be instances when the performance of Google and Facebook's advertising services is overstated; this may be as a result of over reporting the number of visitors to a platform.³⁶³
- The standards adopted by Facebook and Google may mislead advertisers into thinking more consumers have viewed their ads than actually did.³⁶⁴
- Ads purchased through Google and Facebook may be subject to ad fraud. Google and Facebook may not have strong incentives to address this because they generate revenue whenever an ad is served, regardless of whether it is a human or a bot that views the ad.³⁶⁵

If third parties are not able to effectively monitor the delivery of ads for advertisers, the risks to advertisers would appear greater.

³⁶⁰ J Furman et al, UK Digital Competition Expert Panel, [Unlocking Digital Competition](#), 13 March 2019, pp. 116-117.

³⁶¹ Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

³⁶² Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 23.

³⁶³ Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 20.

³⁶⁴ Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 20.

³⁶⁵ Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 24.

Box 3.4: Ad fraud

Ad fraud involves the practice of creating fraudulent ad clicks, impressions and conversions to generate online ad revenue. The result is that advertisers are charged for advertising that does not actually reach their intended audience. Ad fraud has been represented to be a US\$7.2 billion global crime.³⁶⁶ The World Federation of Advertisers has predicted ad fraud to grow to be in excess of US\$50 billion globally by 2025, which is considered a conservative estimate.³⁶⁷ While fraudulent websites are unlikely to be Australian websites, the advertisers impacted by ad fraud would include Australian advertisers. However, it is difficult to determine the scale of such ad fraud on Australian advertisers.

Ad fraud is a term that can be used to describe a range of fraudulent conduct. One form of ad fraud operates in the following way:

1. Fraudsters create fraudulent websites that look like legitimate websites. Fraudsters then sign up to advertising services such as Google AdSense to allow Google to sell ad inventory on their website on their behalf.
2. Viruses and malware are then used by the fraudster to create and send bot traffic to the fraudulent website.
3. Advertisers' ads are then delivered on the website via Google AdSense and are viewed by the bots.
4. Payment is made to Google by the advertiser for the delivery of their ads. A share of that revenue is passed onto the fraudster as part of the Google AdSense revenue share agreement.

Another way in which ad fraud can occur, often referred to as 'domain spoofing', involves the following:

1. Fraudsters create fraudulent websites.
2. Fraudsters list ad inventory on programmatic ad markets such as ad exchanges, and mask the fraudulent website so that it appears to be a different reputable website.
3. Advertisers see the ad inventory and purchase it thinking that it is a reputable website.
4. Advertiser pays for the ads which are delivered on the fraudulent website and not the reputable website the advertiser thought it was buying ad inventory on.

Industry solutions

The Interactive Advertising Bureau (IAB) has introduced a number of products and services aimed at reducing the occurrence of ad fraud, and increasing the control advertisers and website owners have over transactions that occur through the online advertising supply chain. One of these services is 'ads.txt', which is aimed at removing the ability of fraudsters to profit from ad fraud techniques such as domain spoofing and unauthorised selling of inventory.³⁶⁸ Ads.txt achieves this by providing a method by which website owners can publicly declare the companies that are authorised to sell their inventory on the website. When used, advertisers can check to see if the ad tech services they deal with are actually authorised sellers of ad inventory on a given website.

IAB Tech Lab has also introduced 'ads.cert', which acts as a digital signature that shows the path of ad inventory and authenticates information being transferred.³⁶⁹ IAB Tech Lab has announced two additional technologies named 'sellers.json' and 'OpenRTB SupplyChain Object'. These allow buyers to verify entities that are authorised resellers, and reveal what sellers and resellers have been involved in each bid request.³⁷⁰

366 G Slefo, [Ad Fraud Will Cost \\$7.2 billion in 2016, ANA Says, Up Nearly \\$1 billion](#), Ad Age, 19 January 2016, accessed 9 November 2018.

367 World Federation of Advertisers, [Compendium of ad fraud knowledge for media investors](#), accessed 9 November 2018, p. 3.

368 IAB Australia, [Ads.txt Technical Information](#), accessed 16 May 2019.

369 Clearcode, [What is Ads.cert and How Does It Work?](#), accessed 3 May 2019.

370 J Davies, [WTF is Sellers.json](#), Digiday, accessed 3 May 2019.

The services developed by the IAB Tech Lab are voluntary measures that ad tech providers, publishers and advertisers can utilise. In regard to the adoption of these technologies, 91 per cent of Australian domains that offer display advertising to programmatic buyers have implemented ads.txt.³⁷¹ The ACCC understands that sellers.json and OpenRTB SupplyChain Object are currently in a beta testing phase.³⁷²

The ACCC notes that verifying whether advertising has reached its intended audience is not a problem unique to online advertising. For example, the often cited quote 'I know that half the money I spend on advertising is wasted. My only problem is that I don't know which half' has persisted for more than one hundred years.³⁷³ TV ratings are sometimes criticised for being blunt estimates of audience size because the number of viewers may fluctuate across a program (and may be lower in ad breaks).³⁷⁴ Similarly, the veracity of print circulation and readership estimates is sometimes questioned.³⁷⁵

Google and Facebook each reject claims that advertisements displayed on their platforms are not verifiable.

Facebook has stated that:

- There are currently 40 different companies globally offering independent verification services for ads served on the Facebook platform and are able to measure outcomes such as reach, viewability, attribution, brand lift and outcome lift.
- In Australia, seven companies (Nielsen, Moat, Integral Ad Science, AppsFlyer, Datalicious, Quantum, Acxiom) currently offer these services.
- Third-party viewability companies like Integral Ad Science and Moat run daily discrepancy checks to test for fraud across Facebook's owned and operated platforms.
- Facebook has received accreditation from the Media Ratings Council (MRC) for its first party measurement of ad impressions in News Feed.
- Facebook works closely with companies that are currently able to offer verification services on its platform to implement each company's measurement code within the Facebook infrastructure.
- Where Facebook determines that an advertiser was materially overbilled as a result of incorrect measurement of an ad, it will issue a refund to the affected advertiser.³⁷⁶

Specifically in relation to ad measurement, Google has stated that:

- It has over 20 independent third party measurement partners that can be engaged by advertisers to measure and verify their metrics.
- The primary body it deals with in relation to ad measurement and verification is the MRC. Google currently has over 30 accredited metrics with the MRC and is in the process of applying for accreditation for further metrics.³⁷⁷

Specifically in relation to ad fraud and the existence of bad ads delivered through Google Ads, Google has stated that:

- It has put into place automated systems as well as human reviewers that review ads to prevent fraud.
- It has increased investment in staff and has more than 10 000 people reviewing and enforcing policies.

371 IAB Australia, [Digital Fact Pack: Programmatic Summit 2019](#), accessed 3 May 2019, p. 12.

372 IAB Tech Lab, [IAB Tech Lab announces two new technologies to build more transparency & trust in the programmatic supply chain](#), 11 April 2019, accessed 16 May 2019.

373 This quote has been attributed to a number of different people including William Hesketh Lever and John Wanamaker; See J Bullmore, [Why it's Time to Say Goodbye to IKTHTMISOAIW*](#), WPP, accessed 9 November 2018.

374 B Higgs, [The Gloss Free Glossary](#), Marketing and Media Survival Guide, 2006, (A practitioner's planning guide), Niche Media, St Kilda, Melbourne, p. 8.

375 B Higgs, [The Gloss Free Glossary](#), Marketing and Media Survival Guide, 2006, (A practitioner's planning guide), Niche Media, St Kilda, Melbourne.

376 Information provided to the ACCC.

377 Information provided to the ACCC.

- Publishers that place their websites on Google Display Network have access to opt in and opt out controls which determine what ads can show on their websites.
- Where ad fraud or invalid clicks is identified as having occurred, Google says that it can refund advertisers.³⁷⁸

Free TV submits that it is incorrect that Google and Facebook are subject to third party verification or that their measurement systems are independently verified.³⁷⁹ It says:

- The process of calculating audience reach and video viewership on Google and Facebook products relies on data solely captured and collated by the digital platforms themselves.
- Independent measurement and verification needs to occur directly by a third party, rather than through the ex-post interpretation of usage data collated by the platforms themselves.
- The right of third parties to audit the proprietary data (which is how Free TV characterises Nielsen's measurement of Google and Facebook) should not be confused with third party verification.³⁸⁰

ACCC's view on measurement and verification of advertising performance on digital platforms

In the Preliminary Report, the ACCC found that a lack of transparency in the supply of advertising services meant that advertisers were unable to verify for themselves whether ads on Google and Facebook were delivered to their intended audience. The ACCC considered that this had the potential to lessen competition in the supply of advertising services. This was because it had the potential to mislead advertisers into thinking their ads performed better than they actually did. In turn, this may impede the transmission of price and quality signals in the market and encouraged some advertisers to advertise on certain platforms, rather than with competing suppliers of advertising services.

The ACCC also recognised that third party verification tools may be a way to overcome these problems. At that point in time, the ACCC had not yet reached a view about the extent to which these third party tools overcame these issues.

In response to the Preliminary Report, a number of stakeholders (including Nine, Free TV and Commercial Radio Australia) raised issues with third party verification companies not being able to directly verify and measure ads on 'walled garden' platforms such as Google and Facebook.³⁸¹ These submissions argued that, instead of third party verification companies directly measuring data on Google and Facebook platforms, Google and Facebook were themselves measuring and collecting data on their ads using their own systems and then handing this data over to third party verification companies. These stakeholders were therefore of the view that true independent third party measurement was not occurring as platforms were 'marking their own homework'.

While a number of media businesses raised issues, the ACCC notes that advertisers raised little concern about the effectiveness of third party verification. The Australian Association of National Advertisers submission states that many advertisers have ensured that additional checks are in place to verify the activity on digital platforms, including to verify that digital platforms:

- deliver advertisements to the intended audience
- deliver impressions to the agreed volume and/or buying method as indicated in the insertion order
- do not inflate their results and/or performance.³⁸²

378 Information provided to the ACCC.

379 Free TV Australia, [Submission 3 to the Digital Platforms Inquiry](#), November 2018, pp. 3-4.

380 Free TV Australia, [Submission 3 to the Digital Platforms Inquiry](#), November 2018, p. 4.

381 Commercial Radio Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 3-6; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 34-35; Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 19, 33.

382 Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

Significantly, the Australian Association of National Advertisers noted that major advertisers are increasingly taking ownership of the relationships they enter into, are challenging existing commercial arrangements, building in-house models and seeking third party involvement in measurement and audits.³⁸³

ACCC Chair, Rod Sims, publicly called for advertisers to provide input in February 2019 in a speech delivered at the ThinkTV & ANAA Top 50 CMO Event.³⁸⁴ In response to this call, the ACCC did not receive any further public submissions. While a number of advertisers approached the ACCC confidentially with particular digital platform concerns, none raised issues about the effectiveness of third party verification.

No concerns regarding third party verification were raised at the stakeholder forums held by the ACCC in March 2019.

In response to the Preliminary Report, Facebook submitted that advertisers have sufficient tools and data to measure and manage campaign performance in real time.³⁸⁵ Facebook submits that its metrics are independently verifiable.³⁸⁶ For example, Facebook states that its measurement of impressions for ads in News Feed is accredited by the MRC. Additionally, Facebook notes that its processes for collecting and transmitting data to third party viewability measurement partners complies with MRC standards and industry measurement guidelines.³⁸⁷ This is confirmed by the MRC's public announcement.³⁸⁸

In addition, Facebook has indicated to the ACCC that they work directly with third party verification partners to build an integration approach which is subject to end-to-end review by verification partners.³⁸⁹

Google reiterates that there is third party measurement of ads delivered on its platforms and that its own metrics are approved by the MRC.³⁹⁰ Google has received MRC accreditation for over 30 measurements (covering all billable metrics, including clicks, impressions and viewability) on a range of its search, display and video products,³⁹¹ and is currently undergoing MRC audits of its brand safety and unique reach metrics.³⁹² Google is also currently seeking MRC accreditation of its third party integrations for viewability and brand safety measurements.³⁹³ Additionally, Google has indicated to the ACCC that third party viewability measurement partners on YouTube select which ad impression signals and events they would like to receive in order to calculate viewability, which are then sent through server-to-server data transfers.³⁹⁴

Google also considers that it has a strong incentive to both combat ad fraud and provide advertisers with trusted, accurate measurement solutions because if it doesn't, advertisers will leave its platform.³⁹⁵ Google claims that mismeasurement is most common in display ads where Google suggests it has a small market share.³⁹⁶

383 Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

384 R Sims, Chair, ACCC, [Examining the impact of digital platforms on competition in media and advertising markets](#), ThinkTV & ANAA, 27 February 2019, accessed 25 May 2019.

385 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 23.

386 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 24.

387 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 24.

388 Media Rating Council, [Update on Status of MRC's Audit of Facebook's Viewability Pipeline Integrations](#), November 2018, accessed 10 May 2019.

389 Information provided to the ACCC.

390 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 67.

391 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 67.

392 B Pahlavan, [New MRC accreditations and partners for Google and YouTube ads measurement](#), 26 Sep 2018, accessed 25 May 2019.

393 B Pahlavan, [New MRC accreditations and partners for Google and YouTube ads measurement](#), 26 Sep 2018, accessed 25 May 2019; G Marvin, [Google receives new MRC accreditations, touts 3rd-party measurement progress](#), MarTech Today, 26 September 2018, accessed 25 May 2019.

394 Information provided to the ACCC.

395 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 67.

396 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 69.

In response to Free TV's submission to the Issues Paper, which recommended the ACCC require Google to implement software development kits (SDKs) for measurement and verification,³⁹⁷ Google submits the following:

*The fact that Free TV would prefer an SDK-based approach, however, does not mean that other alternatives are necessarily inferior or insufficient. Google makes use of a variety of measurement solutions that offer equally accurate and verifiable results.*³⁹⁸

*SDKs can pose a significant risk of leaking consumer data. To avoid these risks, we ensure the availability of other third-party measurement solutions. Those alternatives seek to balance quality measurement for advertisers with rigorous protection of user privacy, whereas SDKs inherently involve sharing user data with third-parties, which can put such data at risk.*³⁹⁹

As a result of the feedback and submissions received, the ACCC considers that market driven solutions appear to be on the way to solving issues around verification and the measurement of ads. Four factors are important to this conclusion:

- First, Google and Facebook have sought and are continuing to seek accreditation from the MRC for various metrics they provide to advertisers that enable the measurement of their advertising products. Therefore, even if advertisers do not engage third party verification companies, advertisers have some baseline level of assurance that a range of metrics presented by Google and Facebook have been, or are undergoing the process to be, accredited by the MRC.
- Second, in relation to third party verification and measurement services, the systems by which Google and Facebook collect and send data to third party verification companies are developed in partnership with these third party verification companies.
- Third, for some metrics, the integration by each of the platforms with third party verification companies are undergoing, or have undergone, independent audit for accreditation by the MRC. This accreditation aims to validate and provide assurance that the way in which data is collected by platforms, passed on to third party verification companies, and processed for reporting by the third party verification companies meets industry standards. The indication that digital platforms such as Google and Facebook (as well as Twitter) are now undergoing processes to receive MRC accreditation for aspects of their third party verification services can be seen as evidence that the market is solving issues which have arisen in this area.
- Fourth, the ACCC has not received significant feedback from advertisers and third party verification companies on this issue. If there were major issues with the ability to verify and measure ads on digital platforms, more engagement from advertisers and third party verification companies would be expected.

Therefore, the ACCC considers that there is unlikely to be significant value in requiring additional monitoring of ad verification and measurement. Any benefits of such regulation or monitoring are unlikely to outweigh the costs of imposition. The ACCC notes that if a specialised digital platforms branch were established, as proposed under recommendation 4, it would provide the ACCC with the ability to further monitor and investigate if complaints were raised by advertisers in the future.

3.5 Lack of transparency in online advertising services

A number of stakeholders have raised issues with the opaque nature of online advertising markets. There are two aspects which feedback suggests may be contributing to this lack of transparency – ad tech services used to facilitate automated or programmatic online display advertising, and the role of advertising and media agencies. This section will discuss these two areas in more detail.

397 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 3.

398 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 69.

399 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 69-70.

3.5.1 Complexity and opacity associated with ad tech pricing

Key findings

- There is a lack of transparency in the pricing of services used to facilitate automated or programmatic online display advertising, known commonly as ‘ad tech’ services. This means that both advertisers and websites lack visibility over pricing. They do not know what proportion of advertiser spend goes to ad tech services versus how much goes to the purchasing of advertising inventory. This has led many participants in the display advertising market to question the efficiency of the ad tech supply chain.

The issues discussed in this section predominantly arise in relation to ad tech services involved in the serving of display ads. This includes Google products such as Google Ad Manager, Google Marketing Platform, as well as ad tech services offered by competitors such as AppNexus, MediaMath, Rubicon Project, and The Trade Desk. Additionally, the analysis in this section also relates to Google Ads and Google AdSense, as the advertiser demand and website ad inventory that are generated by these services are sent to Google’s Ad Exchange, which interoperates with a number of other ad tech services.

The ACCC notes that the issues relating to ad tech services do not apply in the same way to Facebook’s advertising platform. While Facebook’s advertising platform facilitates the sale and purchase of programmatic display ads, the entire Facebook advertising service offered to advertisers and websites does not interconnect with other parts of the ad tech supply chain. The Facebook advertising platform is therefore not considered to be an ad tech service.

As discussed in section 3.1.5, the process of serving an online display ad to consumers is often facilitated by a number of different ad tech services and is completed seamlessly in milliseconds.

Ad tech services have been described to the ACCC as being opaque in nature. This is largely due to the number of suppliers and services that can be involved in the ad tech supply chain and the ‘black box’ nature in which ad tech services operate.

This lack of transparency gives rise to concerns regarding the pricing of ad tech services and the proportion of advertiser spend being retained by ad tech providers. This issue also occurs in other advertising markets (for example, television advertising). However, it is magnified in online advertising because of the many intermediaries involved.

There is also a lack of transparency in relation to non-price issues. For example, it is often difficult for advertisers and websites to understand how ad tech platforms determine what advertising inventory to buy or sell, how winners in auctions are determined, or how advertising bid requests are passed along the ad tech supply chain.

This section primarily focusses on price opacity. The extent to which opacity may assist the ability of platforms to self-preference, including in the operation of the ad-tech services, is discussed in section 3.3 and addressed by recommendation 4.

Box 3.5: How do ad tech services earn revenue?

The majority of the ad tech services described in section 3.1.5 charge a fee based on the number of ad impressions sold or value of ad spend that occurs on the platform. For example, an SSP generates revenue by keeping a percentage of the revenue received from ad inventory sold through the SSP, and an ad exchange generates revenue by keeping a cut of the media spend that occurs on the platform.

Third party data providers and ad verification companies charge a fee whenever advertisers use their services. For example, if an advertiser uses a data provider to increase the level of targeting of an ad, the data provider will be paid a percentage of the cost of the ad. Similarly, an advertiser will be charged a fee if they choose to use an ad verification company to verify the delivery of ads.

Figure 3.5 below shows each of the typical components in the ad tech supply chain and notes who is paying for the services and on what basis. The ACCC notes that there are many different ways in which online advertising can be purchased programmatically. As such, the number of ad tech components present, and the consequent fees charged, can often vary.

Figure 3.5: Fees charged by the ad tech supply chain

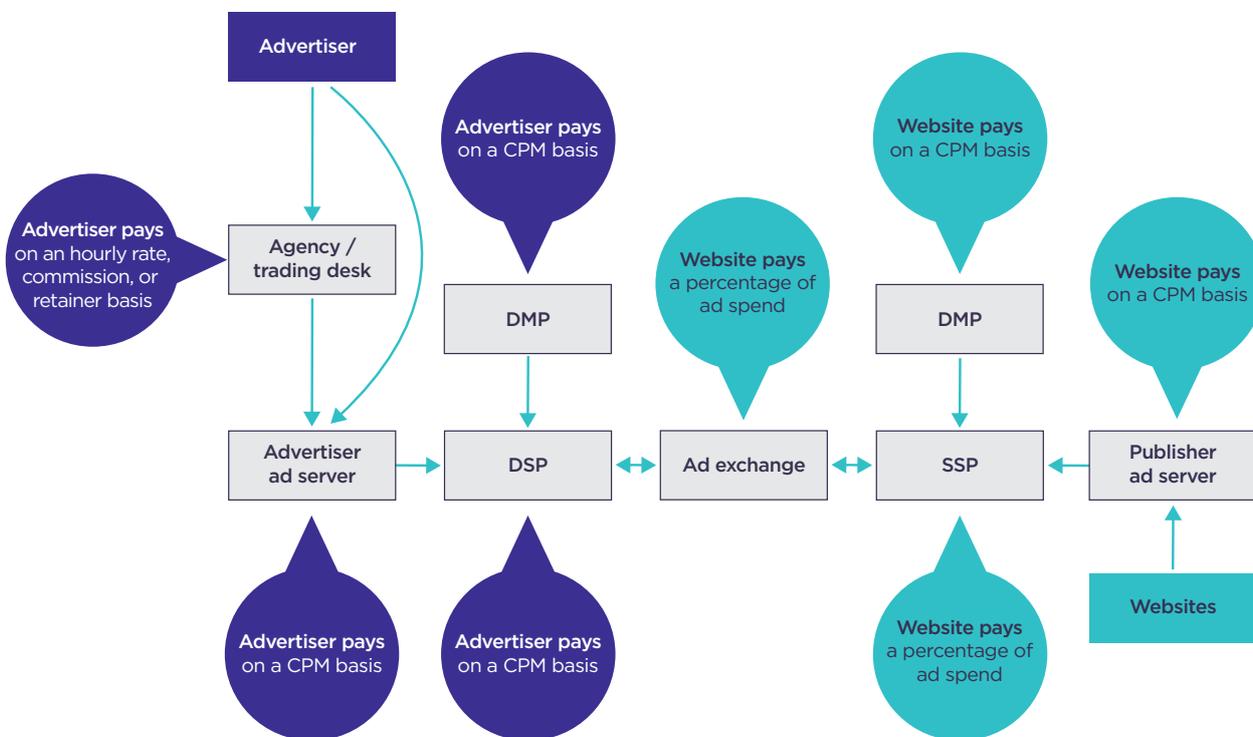
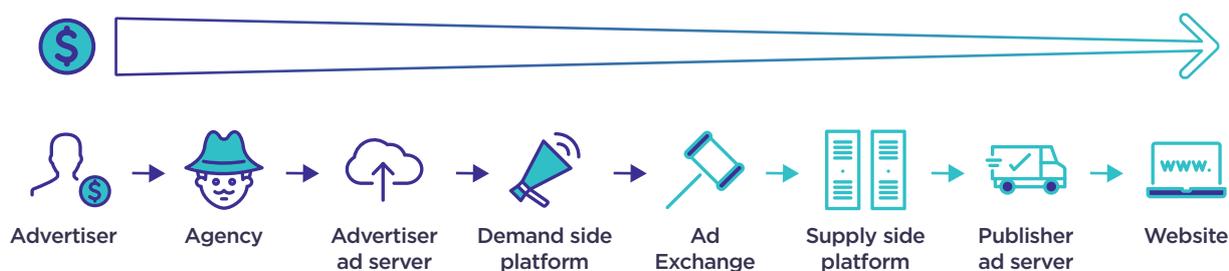


Figure 3.6: Ad spend taken by the ad tech supply chain



There are various estimates of the proportion of revenue that is collectively retained by ad tech services in the online advertising supply chain. For example:

- Some submissions state that the total ad budget spent by the advertiser is reduced by approximately 25 per cent before it even reaches an ad exchange, and that ad spend is 75 per cent less efficient than the advertiser had intended or believes – that is, out of \$100 from an advertiser, only \$25 becomes working ad spend and \$75 is taken up by various ad tech platforms along the advertising supply chain.⁴⁰⁰
- The World Federation of Advertisers estimates that publishers receive 40 per cent of ad spend, with ad tech services and other intermediaries sharing 60 per cent of spend.⁴⁰¹ They estimate agencies take 5 per cent, trading desks take 15 per cent, DSPs take 10 per cent; data, targeting and verification services take 25 per cent; and ad exchanges take 5 per cent.

400 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 28.

401 World Federation of Advertisers, [Compendium of ad fraud knowledge for media investors](#), accessed 27 May 2019, p. 13.

- Other public estimates suggest between 45 and 63 per cent of ad spend flows to publishers.⁴⁰²
- Google's US financial reporting indicates that it passes approximately 70 per cent of revenue to publishers.⁴⁰³ This figure does not appear to take into account any fees paid by advertisers.
- In 2016, The Guardian UK conducted an experiment and purchased programmatic advertising on its own website.⁴⁰⁴ In some cases, it found that The Guardian, as the relevant website and supplier of the ad inventory, received less than 30 pence in the pound.
- In 2018, Jon Ones, head of digital for Duracell's international markets, stated that 'at worst', 20 per cent of its initial ad spend in 2017 may have reached consumers as effective media.⁴⁰⁵
- In 2018, the House of Lords Select Committee on Communications published a report on 'UK advertising in a digital age' and noted that publishers were receiving as little as 29 per cent of advertisers' original spend.⁴⁰⁶

From the information submitted to the ACCC, it is clear that for both advertisers and websites, the pricing of the ad tech services frequently used to deliver programmatic advertising is opaque.⁴⁰⁷

This pricing opacity relates to all suppliers of ad tech services. While Google is by far the largest platform involved in the supply of ad tech services (on both the advertiser side and on the website side), pricing opacity in the ad tech supply chain is not limited to services offered, and the fees or commissions charged, by Google.

Pricing opacity arises in relation to the actual price charged by ad tech platforms, and also in relation to the determination of that price. The opacity is in part due to the supply chain structure in which ad tech operates. This is because components are often used together in a single transaction, making it difficult to isolate individual prices and determine the total fee charged by ad tech firms across the ad tech supply chain. Additionally, pricing opacity arises due to the lack of visibility advertisers and websites have over the processes that determine the outcome of bidding and auction processes in the ad tech supply chain.

The lack of pricing transparency means that both advertisers and websites lack visibility and may not know what proportion of ad spend is consumed by ad tech services. As set out in the above estimates, between 20 to 75 per cent of advertiser expenditure is taken up by suppliers in the ad tech supply chain. The lack of transparency may assist suppliers of ad tech services generate excessive margins. The lack of transparency may also increase search costs for advertisers and websites in selecting ad tech providers, and contribute to participants in the display advertising market questioning the efficiency of the ad tech supply chain.

Some parties have called for the ACCC to recommend the introduction of a transparent system of receipting.⁴⁰⁸ For example, The Guardian proposes a transparent system of programmatic receipting to address issues of opacity in the programmatic ecosystem.⁴⁰⁹ The Guardian states that the transparent system of programmatic receipting would involve the creation of a complete, reconcilable record for every

402 48 cents in every dollar goes to ad tech: A Hickman, [Programmatic 'tech tax' costs 48 cents of every dollar—ANA study](#), AdNews, 20 June 2017, accessed 27 May 2019; 55 cents in every dollar goes to ad tech: IAB, [The Programmatic Supply Chain](#), accessed 27 May 2019; 37 cents in dollar goes to ad tech: G Kaye, [Where does your programmatic spend go?](#), Marketing Land, 12 April 2017, accessed 27 May 2019.

403 According to [Alphabet's Annual Report \(10-K\) for the fiscal year ending 31 December 2017](#), traffic acquisition costs to Google Network Members as a percentage of Google Network Members' properties revenues' was 68.1 per cent in 2015, 69.9 per cent in 2016 and 71.9 per cent in 2017. The ACCC understands the traffic acquisition cost to be the amount paid to Google Network Members primarily for ads placed on their properties through AdMob, AdSense and DoubleClick Ad Exchange (now part of Google Ad Manager). That is, using the figures above, Google paid 71.9 per cent of the revenue Google received from advertisers, for the display of ads on Google Network Member properties (Google Network Members' properties revenue), to those Google Network Members. Expressed in a different way, Google kept 28.1 per cent of the revenue that it received from advertisers displaying their ads on Google Network Member properties in 2017.

404 B Ice, [Guardian buys own ad inventory, only gets 30p to the pound](#), Marketing, 12 October 2016, accessed 27 May 2019.

405 S Joseph, [How Duracell is addressing its programmatic problems](#), Digiday, 3 April 2018, accessed 27 May 2019.

406 House of Lords Select Committee on Communications, [UK advertising in a digital age](#), April 2018, p. 15.

407 As noted above, the ACCC has broader concerns with the opacity of the programmatic intermediary services, including the operation of auction processes and interoperability. The ACCC considers that these issues and in particular the potential for self-preferencing in the operation of the various auction processes can be scrutinised via recommendation 4.

408 See the [Summary of the Digital Platforms Inquiry Industry Stakeholder Forum](#), 18 March 2019.

409 Guardian News and Media Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 11.

ad transaction. The Guardian considers that this would function as a form of dual-book accounting and involve ad tech vendors filling in an additional field of data in reports provided to advertisers and publishers.

News Corp, Free TV and MEAA supported the idea of price monitoring being conducted by a regulatory authority. News Corp additionally noted that the regulatory authority could require platforms with market power to undergo external verification of auction systems at regular specified intervals.⁴¹⁰

Google submits that while it supports transparency for its customers and partners in a fragmented space, it disagrees with the appropriateness of price monitoring as a solution. It argues that it is the variety and number of advertising intermediary services that is the cause of complexity and opacity, as opposed to the pricing policies of any individual supplier of intermediary services.⁴¹¹ Google submits that regulatory price monitoring cannot reduce the inherent complexity associated with the number of players involved in a typical programmatic ad placement.

In regard to its own services, Google submits the following:

For its part, Google negotiates contracts with separate pricing for each of its intermediary and other ad tech services. We also provide each of our advertiser and publisher customers with a clear breakdown of the services we have provided and the amount charged for each, rarely using aggregated prices and only at a customer's request.⁴¹²

Google additionally states that the industry is already evolving through consolidation, which resolves some complexity and opacity of pricing, and that price monitoring is burdensome and could disincentivise firms to expand so that they stay below any monitoring threshold.⁴¹³

The Australian Association of National Advertisers submits the following:

...while advertisers are keen to obtain greater transparency in relation to their financial outlay, particularly in relation to intermediary services and audience verification, we do not believe an additional or differently-empowered regulatory authority would deliver that transparency to advertisers. With each commercial arrangement, advertisers are required to make decisions based on the information they have. Increased information supplied to a regulatory authority will not affect this daily requirement, nor would annual reporting, as advertisers would not have access to timely information, relevant to their decision making.⁴¹⁴

ACCC's view on complexity and opacity associated with ad tech pricing

In the Preliminary Report, the ACCC identified that it was giving further thought to whether monitoring could improve transparency in relation to ad tech pricing.

The ACCC has not been provided with evidence that private efforts by digital platforms or industry have made significant progress in addressing the lack of price transparency in this market. It appears to be unlikely that this will change in the short to medium term.

The ACCC remains of the view that the lack of pricing transparency regarding ad tech services is a significant issue for both advertisers and websites. This lack of transparency leads participants in the display advertising market to question the efficiency of the ad tech supply chain. In particular, they do not know what proportion of ad spend ad tech services are retaining across the ad tech supply chain. This may make it difficult for advertisers to optimise their spending decisions, leading to increased costs for advertisers. Websites may also be receiving less of the advertiser's dollar than they would if advertisers were more easily able to optimise spend. This lack of transparency also increases search costs for advertisers and websites in selecting ad tech providers, as they are not empowered to seek out more competitive deals.

410 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 54.

411 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 65.

412 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 65.

413 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 66.

414 Australian Association of Nation Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

The ACCC has considered submissions suggesting proposals to increase transparency including the adoption of a transparent system of programmatic receipting. However, the ACCC considers that it is not practical at this stage for Australia to require the implementation of a transparent system of programmatic receipting across online advertising, or to require platforms to undergo external verification of auction systems, as proposed by stakeholder submissions.

The ACCC also recognises that there may be difficulties in monitoring of prices for individual components of the ad tech supply chain, due to the complexity of the number of services involved, the volume and the range of transactions that occur through each service, and the ability of firms to bundle or separately supply services. Rather than propose the publication of average prices, the ACCC considers that the opaque nature of ad tech services requires additional in-depth study to determine the extent of competition and inefficiency issues, and the nature and extent of intervention needed. In particular, further work should focus closely on:

- the prices charged by suppliers of ad tech services and the share of advertising expenditure they retain, with the purpose of identifying any potential excessive margins
- how ad tech services are purchased and sold, including any auction and bidding processes
- the impact of consolidation of ad tech services (for example, SSPs and exchanges) on competition.

This study should include the publication of information about the operation of these markets. For example, publication of the share of advertising expenditure retained by each level of the supply chain. This type of transparency may bring significant benefits, including the following:

- it may encourage advertisers to seek further information and make more informed decisions about their ad spend and the selection of ad tech services. More efficient and optimised ad spend could reduce advertiser costs and flow through to lower costs for those products and services to consumers
- it will better equip government and policy makers to understand whether other steps need to be taken to improve the operation of these markets.

The ACCC acknowledges that while Google is by far the largest supplier of ad tech services, the complexity and opacity of the market is largely due to the very nature of the ad tech supply chain itself, which involves a large number of intermediaries that each charge their own prices. The study will therefore extend beyond looking specifically at any one supplier of ad tech services and will look more broadly at the industry, and each supplier involved, as a whole.

3.5.2 Agencies' role in the advertising supply chain

Key findings

- Advertising and media agencies add another layer of opacity to the advertising supply chain. Because advertisers have little visibility into the advertising supply chain, there may be an incentive for agencies to act in ways that benefit their own interests and are to the detriment of advertisers.

While there are a number of different types of agencies that operate in the online advertising supply chain, the focus of this section (and also more broadly in the Report) is on agencies that deal with client ad/media spend, rather than agencies responsible for designing creative content for their clients.

Due to the complexity of the online advertising markets, advertising and media agencies are often used by advertisers to manage the purchase of advertising, such that the majority of Australia's spend on advertising flows through advertising and media agencies. Agencies purchase advertising across different channels and so are likely to provide greater expertise in managing advertiser spend than the advertiser itself. Due to the size of some agencies, they are more likely able to negotiate discounts and deals with publishers that would not be possible for single advertisers to achieve.

Despite the benefits to advertisers in using advertising and media agencies in an otherwise complex market, agencies represent another layer of opacity in the advertising supply chain. Because advertisers have little visibility into the complex advertising supply chain, there may be an incentive for advertising and media agencies to act in ways that benefit their own interests, to the detriment of advertisers.

Information from stakeholders suggests that a number of transparency and pricing issues in the online advertising supply chain may in part be attributable to the role of advertising and media agencies, and more particularly, the holding groups that they are part of. In its submission to the Preliminary Report, Google noted that advertisers may not be fully aware of what agencies are doing on their behalf.⁴¹⁵ For example, Google submits that an advertiser will permit an agency to purchase media on the advertiser's behalf, with the agency often pooling its purchases on behalf of all clients to secure volume discounts. The agency then resells advertising inventory to its clients, without disclosing the original purchase price.

Agencies may seek to benefit their own interests, rather than their clients in the following ways:⁴¹⁶

- Websites and other suppliers of advertising inventory may offer agencies or the agency holding company discounts or rebates if they reach minimum spends. This has the effect of influencing the agency's decisions about where to direct client spend and may create incentives to act in ways that are inconsistent with the interests of the client.
- There may be an incentive for agencies to not pass on any cost savings, discounts or refunded payments received by the agency or holding company from the relevant website or platform to advertisers.
- Agencies may encourage clients to use particular ad tech services that are owned by the agency or holding company, in order to generate additional revenue. For example, an agency could preference its own DSP over other DSPs available.

Further complexity may arise due to the way the large agencies are structured and how they report their revenue and purchasing arrangements. The major advertising agencies operating in Australia are part of large international holding groups. The five major international advertising companies in the world, WPP Group, Omnicom Group, Publicis Groupe, Interpublic Group, and Dentsu, each hold a number of smaller advertising and media agencies that operate in Australia, as well as creative and data agencies.

Holding groups often deal directly with suppliers of ad inventory (such as Google, Facebook and publishers), rather than the advertising or media agency. The holding groups then sell this ad inventory to the agencies that are part of the holding group. However, clients of the advertising and media agency typically have a direct contractual relationship with the agency, rather than the holding group. As such, they have no visibility or control over the relationship between the agency and the holding group, or the contractual relationships between the holding group and suppliers of advertising services.⁴¹⁷

Accordingly, while a client may receive full transparency in regard to its dealings with the contracted agency, it may not have a similar level of transparency over the relationship between the agency and the holding group, or the relationships between the holding group and suppliers of advertising services. It is in this space that a holding company can potentially increase their profit margins, to the detriment of the advertiser.⁴¹⁸

The ACCC has received submissions, outside of the course of this Inquiry, which have also raised concerns regarding rebates received by agencies in both the outdoor and television advertising sector, and the effect of these rebates on advertisers.

The issues surrounding advertising and media agencies are likely to be further exacerbated as online advertising grows. The ACCC considers that these issues need to be properly examined and addressed and accordingly, recommends that an inquiry should be held which covers the supply of online advertising services by advertising and media agencies.

415 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 65-66.

416 P Chambers, [Dubious media agency behaviour - what and how it happens](#), AdNews, 10 February 2015, accessed 25 May 2019.

417 Information provided to the ACCC.

418 Information provided to the ACCC.

3.5.3 Inquiry into ad tech services and advertising and media agencies

The ACCC considers that the complexity of the operation of ad tech services and the role of advertising and media agencies both contribute to a lack of transparency in the online advertising supply chain.

The lack of transparency regarding ad tech services is in part due to the use of multiple services in a single transaction, resulting in an accumulation of fees charged across the supply chain. It is also due to the 'black box' nature of the algorithms that facilitate and determine the outcome of the automated bidding and auction processes that occur in the milliseconds between a webpage loading and a consumer being shown an ad. As a result, the sum of the fees charged by ad tech suppliers and the determination of these fees is opaque.

The lack of transparency regarding advertising and media agencies is due to the structure of agencies and the presence of a principal-agent issue. For example, advertisers permit agencies to purchase advertising on their behalf but advertisers often have little visibility into how their ad spend is actually used, due to the structure of agencies and the way in which they purchase advertising. As a result, there may be an incentive for agencies to act in ways that benefit their own interests and to the detriment of advertisers.

In order to more properly understand each of these areas and to determine whether any competition or efficiency concerns present, the ACCC recommends that the specialist digital platforms branch within the ACCC (as proposed in recommendation 4) be empowered to conduct an inquiry into ad tech services and advertising and media agencies.

Recommendation 5 – Inquiry into ad tech services and advertising agencies

The specialist digital platforms branch (as proposed by recommendation 4) be directed to hold an inquiry into the competition for the supply of ad tech services and the supply of online advertising services by advertising and media agencies. Matters to be taken into account should include:

- whether a lack of transparency is impacting the efficient operation of these markets
- the prices charged by suppliers of these services and the share of advertising expenditure they retain (including any potential excessive margins obtained)
- how these services are purchased and sold, including any auction and bidding processes
- the relationship between suppliers and customers of these services, including the extent to which company structures or contractual arrangements limit effective competition
- the impact of consolidation of services on competition.

This inquiry should be empowered by Ministerial direction, have the ability to compel relevant information, and be completed over a period of eighteen months.

3.6 Bundling and tying

Key findings

- There is the potential for bundles of advertising inventory, advertising demand, advertising services, and ad tech services to lessen competition in certain advertising markets.

Bundling and tying are common commercial arrangements which usually do not harm competition and in many scenarios, promote competition by offering consumers more compelling offers. However, in some circumstances, tying or bundling by a firm with a substantial degree of market power could result in anti-competitive effects. This can occur when a firm with substantial market power in one market uses a tie or bundle to extend or 'leverage' this market power into another market.

As previously discussed, the ACCC considers that Google has substantial market power in the supply of search advertising services and Facebook has substantial market power in the supply of display advertising services. Because of the substantial degree of market power Google and Facebook each

have over their respective types of inventory, they may be able to leverage this into other related markets such as the delivery of advertising.

Submissions suggest there are a number of ways in which tying or bundling by digital platforms could occur, which are discussed below.

3.6.1 Bundling of advertising services, or ad tech services, with access to website inventory

Ad tech services may be bundled with ad inventory. For example, access to ad inventory on YouTube is only available through Google's advertiser facing ad tech services (Google Ads and Display & Video 360).⁴¹⁹ Media companies submit that access to video advertising on YouTube inventory is critical. For example, Free TV submits that YouTube is an unavoidable media partner for advertisers wishing to achieve maximum reach of Australians using video ad formats.⁴²⁰ Accordingly, if advertisers want access to video advertising, which is becoming more and more important for reaching consumers, they are effectively required to use Google's Display & Video 360 platform or Google Ads.

Search ad inventory on Google Search can only be purchased through Google Ads and Search Ads 360.

In the case of Facebook, advertising inventory on its owned and operated platforms (Facebook, Instagram, Messenger) as well as third party ad inventory from the Facebook Audience Network, is only accessible through Facebook's own advertising platform.

3.6.2 Bundling of advertising services, or ad tech services, with access to advertiser demand

Ad tech services may also be bundled with advertiser demand. For example, Google Ads, Google's main advertiser facing platform, only sends advertiser demand to Google Ad Exchange. Therefore, in order to access Google Ads advertiser demand, websites need to connect with Google Ad Exchange. This incentivises websites to use Google Ad Manager and Google AdSense because both have access to Google Ads advertiser demand through Google Ad Exchange.

Advertisers using Google's Display & Video 360 can only engage in programmatic guaranteed deals with websites using Google Ad Manager as their ad server.⁴²¹ That is, if a website utilises a third party publisher ad server, it will not be able to access demand from advertisers using Display & Video 360's programmatic guaranteed deal function. Programmatic guaranteed deals are generally of higher value than other forms of programmatic selling. This incentivises publishers to utilise Google Ad Manager in order to generate revenue from Display & Video 360 programmatic guaranteed deals.

3.6.3 Bundling of multiple advertising services, or multiple ad tech services

Submissions suggest that websites or advertisers may be encouraged to use a single digital platform for all ad tech services when other ad tech services are set as defaults, or services are supplied in a way that each service functions better when used together.⁴²²

Alternatively, if the ad tech services offered by digital platforms are unable to interoperate with rival services, these rival services may be rendered uncompetitive and ineffective. For example, if a DSP is unable to connect to any ad exchanges, the advertiser will not be able to purchase any advertising as it cannot link up with any supply sources. Similarly, if a SSP cannot connect to any ad exchanges, the website offering ad inventory will be unable to sell its advertising as it cannot link up with any demand sources. A similar effect may be observed if the speed of the connection between rival ad tech services

419 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 94; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 36.

420 Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), May 2019, p. 7.

421 Google, Display & Video 360 Help, [Programmatic Guaranteed deals](#), accessed 25 May 2019.

422 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 94; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 36.

involved in matching ad inventory and demand is too slow. This is because a website needs to ensure ads are served when a page loads, and any bids from demand sources that occur too slowly will ‘time-out’ and not be taken into consideration.

Google describes the following benefits to websites and advertisers when Google Ads and Display & Video 360 are used to buy ads on Google Ad Exchange:⁴²³

- Google Ads has a better connection with Google Ad Exchange (as it runs on the same server) and is therefore more likely to successfully submit bids on website inventory compared to third party DSPs that connect to Google Ad Exchange. Google notes that in some cases, latency issues can prevent buyers from successfully submitting a bid on up to 25 per cent of bid requests, preventing them from fully participating in auctions.
- There is a greater ability to match cookies when using Google Ads and Display & Video 360 to buy ad inventory on Google Ad Exchange. That means the cookie matching loss that might occur when Google Ads and Display & Video 360 buy on other exchanges is minimised when buying on Google Ad Exchange.
- Advertisers can have more confidence in the quality of website inventory on Google Ad Exchange because of Google’s direct relationship with the websites.

Media businesses submit that Google bundles its analytics software with its ad tech services.⁴²⁴ They consider that, as a result, this increases the incentive for advertisers that use Google Analytics to use other Google products.

In the case of Facebook, its advertising platform is completely integrated and can be seen as performing all the functions of an end-to-end advertising service. This includes advertising services provided to advertisers and websites. None of these specific functions of the Facebook advertising platform can be isolated. As such, all of its advertising services can be seen as being bundled together.

3.6.4 Bundling of advertising services, or ad tech services, with data

Submissions suggest that digital platforms are able to use data they collect from their owned and operated websites and third party websites in the supply of ad tech and other advertising services.⁴²⁵ This data cannot be utilised by third parties outside of this platform.

In this respect, both Google and Facebook have the ability to collect and combine the data they receive through their owned and operated platforms and information gathered from services they offer. They can then use this data and information to increase the quality of their advertising services, thereby increasing the attractiveness of their platforms to both advertisers and publishers. As set out above, both Google and Facebook have extensive tracking capability. As depicted in figure 2.6, more than 70 per cent of websites had a Google tracker, and over 20 per cent of websites had a Facebook tracker.

Google is one of the only companies that offers both search and display advertising services. Google can collect data on its display advertising, Google Search, and other platforms, and utilise this on its own ad tech platforms.

For example, Free TV submits that Google bundles its data from Google Search into Display & Video 360 as a source of data that advertisers can use.⁴²⁶ Free TV submits that Google bundles web browsing and search data with Display & Video 360 by making this data available as ‘Affinity Audiences’ and ‘In Market Audiences’ in Display & Video 360. Search data is often a strong signal of purchase intent and as such, this creates an incentive for advertisers to utilise Display & Video 360.

Free TV submits that this is evidence of Google using bundling to extend its market power in search and web browsing into the adjacent DSP market, strengthening its position across the advertising supply chain.

423 Google, [How Google Ads and Display & Video 360 work with Ad Exchange](#), accessed 17 May 2019.

424 Nine, [Submission to the ACCC Issues Paper](#), 3 May 2018, pp. 40–41.

425 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 94–95; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40.

426 Free TV Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), May 2019, p. 7.

Submissions in response to Preliminary Report

In response to the ACCC's discussion about bundling and tying in the Preliminary Report, Google submits:

- Bundling and tying examples do not involve market power and thus cannot be anti-competitive.
- Advertisers wishing to purchase video ads can utilise a number of other sites and as such can avoid any attempt to 'force' them to use Google's services.
- Google does not require advertisers purchasing search ads to also purchase display ads or use Google's ad tech services. As a result, Google's search ad inventory does not give advertisers additional reasons to use Google's services.
- Purported bundling and tying practices in the Preliminary Report point to pro-competitive practices. In particular, it notes the following benefits that arise for publishers, advertisers and users:
 - Intermediary services run on the same technical infrastructure so that customers experience less latency and fewer glitches.
 - Integration enables more comprehensive troubleshooting support to publishers and a higher standard of user experience to be maintained.
 - Bundled services benefit advertisers and publishers that prefer to use multiple services from one vendor.
- Google has built over 100 different integrations with different ad tech services. Many advertisers also multi-home, thereby increasing competition at each level of the ad tech stack.
- If Google were to increase prices, reduce quality, or impose unwarranted contractual terms, customers would quickly switch to other ad tech services.
- Google's ad tech services referred to in the Preliminary Report are overwhelmingly, if not exclusively, used in connection with display advertising, not search advertising. Based on the data in the Preliminary Report, Google accounts for five percent or less of revenues of display advertising and therefore does not have market power in display advertising.
- Google does not require advertisers who want to purchase search advertising to also buy display advertising or use Google's intermediary ad tech services.⁴²⁷

News Corp submits that it is very difficult to conclusively identify bundling and tying abuses because of the complex way in which ad tech services operate:

Thus, while News Corp Australia can point to instances where digital platforms – and Google in particular – have a strong incentive to engage in bundling and tying behaviour, the opacity surrounding the way in which digital platforms operate make it impossible to ascertain the full scale of the problem.⁴²⁸

News Corp submits the following:⁴²⁹

- Access to Google's data and interoperability of Google's ad-tech services means that it is much more likely for advertisers to 'single-home' on Google-owned ad tech. Similarly, advertisers are unlikely to choose to switch to non-Google owned ad tech services, even if the potential to do so exists.
- Once an advertiser or website utilises one part of the Google ad-tech stack, there is an increased incentive to utilise other Google ad tech platforms rather than third party ad tech, as Google's ad tech is designed to integrate and work together.
- Google offers both display and search advertising services to advertisers, suggesting that 'Google has an incentive to bundle/tie search and display intermediary services, which it can market as able to be integrated with the Google-owned analytics software'.

427 Google Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 70-72.

428 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 10.

429 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 10-11.

ACCC's view on bundling and tying

Bundling results in competitive advantages

The ACCC observes that the bundling of ad tech services with other services, inventory, data and demand gives Google competitive advantages because:

- Google's ad tech services have access to exclusive inventory. As discussed in chapter 2, Google Search has an advantage of scope that arises from Google Ads. Through Google Ads, Google sells search and display advertising inventory on its own websites as well as on third-party websites – most of Google's inventory is only accessible through its platforms. Advertising inventory on Google Search (as discussed in chapter 2, Google has substantial market power in search advertising) can only be purchased through Google Ads, and advertising inventory on YouTube can only be purchased through Google Ads. As access to each of these specific types of inventory is very valuable and important to advertisers, there is a strong incentive created for advertisers to utilise Google Ads and/or Google Marketing Platform (which houses Display & Video 360 and Search 360).
- Google's ad tech services have access to exclusive demand. Advertiser demand on Google Ads is only sent to Google Ad Exchange. Publishers are therefore incentivised to utilise Google services that have access to Google Ad Exchange (Google Ad Manager and Google AdSense). Additionally, publishers have to use Google Ad Manager if they want to access demand from advertisers using the programmatic guaranteed function in Display & Video 360. Programmatic guaranteed is a growing and important source of advertising inventory for advertisers and similarly, a growing and important source of advertising revenue for publishers. For example, sources indicate that programmatic guaranteed deals account for 58 per cent of all programmatic display spend in the United States.⁴³⁰
- While Google has built different integrations with third party ad tech services, there continue to be potential connectivity issues, and areas of incompatibility which incentivises the utilisation of Google ad tech services together. For example, as discussed above, Google Ads and Display & Video 360 have a greater ability to match cookies, and are also less likely to face timeout and latency issues, when buying on Google Ad Exchange as services run on the same infrastructure.

Advertisers and websites that use Google's ad tech services to access, respectively, Google exclusive inventory and Google exclusive demand are likely to have lower incentives to use third party ad tech services to purchase and sell other forms of advertising. This is because advertisers and websites incur further costs of setting up and operating an ad campaign if they choose to use an additional ad tech platform. Google is more likely to be a convenient one-stop shop for advertisers and websites, which gives Google a competitive advantage.

While some websites and advertisers may multi-home at different points in the ad tech supply chain (that is, use multiple providers for ad tech services), this is likely to only be prevalent with the largest advertisers and websites. Small to medium enterprises are unlikely to have the expertise or the resources to manage multiple platforms. Given the incentives outlined above, it is likely that the prevalence of multi-homing for these websites and advertisers is lower. As Google offers a convenient bundled product, it is likely to be the platform utilised by advertisers and websites that single-home.

The ACCC rejects Google's assertions that it should be unconcerned with bundling and tying because Google does not have substantial market power in display advertising. As discussed in section 3.1.5, Google is the only company that offers ad tech services across the entire ad tech supply chain and publicly available information suggests Google has a much larger market share than its rivals in multiple ad tech services. For example, some sources estimate Google's market share of ad exchange services is 66 per cent with the next largest competitor having an 11 per cent share.⁴³¹ Similarly, some sources suggest that Google's market share of demand side platform services is 66 per cent, with the next largest firm having a 8 per cent share.⁴³² In addition, information provided to the ACCC suggests that, for at least some ad tech services, Google's revenue in Australia is significantly higher than its competitors' revenue.

430 A Weissbrot, [EMarketer: Buyers Embrace PMPs And Programmatic Guaranteed](#), AdExchanger, 12 October 2018, accessed 2 May 2019.

431 Google 66%; AppNexus 11%; Datanyze, [Market Share: Ad Exchanges](#), accessed 15 May 2019.

432 Google 66%; AOL 8%; Datanyze, [Market Share: Demand Side Platforms](#), accessed 24 June 2019.

While the ACCC has not done an in-depth analysis of Google's market power in these markets, Google may well have a substantial degree of market power in relation to the provision of at least some of these services.

To a lesser extent, the bundling of advertising services and inventory also gives Facebook certain competitive advantages. This is because Facebook's advertising platform has access to exclusive inventory. Inventory on Facebook's owned platforms (Facebook, Instagram, and Messenger) and inventory on websites part of Audience Network is only accessible through Facebook's advertising platform. As discussed in chapter 2, Facebook has substantial market power in relation to display advertising. Any advertiser looking to have access to any of this inventory must use Facebook's advertising platform.

Do these competitive advantages harm competition?

Businesses are generally entitled to supply goods or services as part of a tied or bundled arrangement – this includes in relation to ad tech services. Where this type of bundling is efficient conduct designed to drive down costs or provide a better service to users, the ACCC considers that it will not generally raise concerns. The ACCC is only concerned by bundling or tying if it results in a firm with substantial market power in one market using a tie or bundle to extend or leverage this market power into another market.

Given the examples identified in submissions, if Google and/or Facebook were engaging in anti-competitive bundling that was leveraging market power from one market to another, the firms most likely to be disadvantaged are rival suppliers of ad tech services.

Significantly, no rival ad tech supplier made submissions to this Inquiry despite being invited to do so. This suggests that the conduct raised in submissions is unlikely to be significantly harming competition.

The ACCC notes that while it has received some further confidential complaints, it has been hindered in its ability to investigate these issues because no firm was willing to make a public submission which set these out in detail. The ACCC considers that further investigation and analysis may be needed into these markets and that, if implemented, recommendation 4 may give the ACCC the ability to do this.

3.7 Limited ability for advertisers to negotiate with digital platforms

Key findings

- Advertisers have a limited ability to negotiate with Google and Facebook. Google and Facebook are each likely to have the ability to charge advertisers more (or offer less in terms of service) in the provision of search and display advertising services than they could if competition were effective.
- Advertisers appear to have a limited ability to seek review of decisions by Facebook or decisions by Google and access effective dispute resolution processes.

As discussed in chapter 2, the ACCC considers that Google and Facebook each have substantial market power in the markets for search advertising and display advertising respectively. Google and Facebook both offer targeted advertising services that are highly valued by advertisers and face limited competitive constraints by other suppliers of search advertising and display advertising. This substantial market power results in a limited ability for advertisers to negotiate with Google and also Facebook, resulting in:

- the potential for the relevant platforms to charge more than they otherwise would if competition were effective
- a lack of bargaining power to negotiate terms on which advertisers acquire services.

3.7.1 Price

As Google and Facebook each face limited competitive constraints in the supply of search and display advertising respectively, they are each likely to have the ability to charge advertisers significantly more in providing search and display advertising services than would be the case if competition were effective. As advertisers have few other attractive alternatives for search advertising, Google is likely to be able to charge prices that are higher than it would if there was a risk it would lose a material level of advertising expenditure to rival platforms. The same is likely to be true of Facebook in respect of display advertising.

The auction based mechanisms used by Google and Facebook do not mean that they have no control over price. For example, Google is able to influence prices by its specification of:

- how many advertisements can appear alongside search results, which affects its supply of advertising
- how the various inputs to the auction algorithm—such as the bids, Google’s assessment of ad relevance and Google’s assessment of landing page quality—determine the outcome of the auction.

Similarly, Facebook is able to influence price by its specification of how many ads appear on Facebook or Instagram.

It is difficult to determine whether the pricing for search or display advertising may be higher than would be the case under competitive conditions. In some other industries, the ACCC is able to estimate what prices it considers would prevail if a market were more competitive. The ACCC does this as part of its regulatory function and in other contexts. In regard to online advertising, there are a number of issues that make a similar analysis particularly challenging.

The ACCC has broad estimates for the prices charged by various digital platforms and the relativity of these prices. However, the ACCC is not disclosing this information in this Report due to confidentiality reasons.

Excessive prices charged to advertisers would be of concern to the ACCC because a proportion of such prices are likely to be ultimately passed on to Australian consumers, in the form of higher priced goods and services.

3.7.2 Bargaining power

Bargaining power relates to the relative ability of parties in a negotiation to exert pressure and influence over each other. The ACCC considers that one effect of Google and Facebook’s substantial market power in the markets for search and display advertising respectively, is that some advertisers, particularly small businesses, appear unable to negotiate the terms on which they do business with Google and Facebook. This can be evident in the difficulties businesses may encounter when attempting to seek effective dispute resolution.

While Google and Facebook can provide many different benefits to small businesses in advertising and reaching current and prospective customers, there are also a number of challenges that small businesses face in dealings with Google and Facebook.

For small businesses who deal with Google and Facebook, it can:

- take considerable time and effort to receive an explanation or the rationale behind decisions which adversely affect their businesses
- appear that decisions are arbitrary, inconsistent or lack detail
- be difficult to dispute decisions or seek remedies
- result in negative financial consequences if they are blocked from using services.

Over the past two years, almost half of all complaints received by the ACCC about Google and Facebook from small businesses have been in relation to a lack of transparency in advertising services, including difficulties in disputes. This is likely because of two factors—the terms of service provided by Google and Facebook, which may limit or restrict the remedies available to its customers, and the lack of an effective external dispute resolution mechanism available.

This is likely to be inconsistent with what might reasonably be expected of a competitive market where firms would consider the loss of sales to each other if they treated customers in such ways. As previously discussed in this Report, Google and Facebook have substantial market power in the supply of search advertising services and display advertising services respectively. This is partly due to the reach of the two digital platforms and the data that they have, which enable both platforms to provide a more highly targeted advertising service than other suppliers.

Because of this market power, Google and Facebook arguably each have a reduced incentive to maintain the quality of all attributes of these services. For example, they may have less incentives to be transparent about pricing or to put in place effective dispute resolutions mechanisms, as advertisers would likely continue to use their services despite these issues. This issue may be remedied if small businesses and advertisers had access to effective dispute resolutions.

The ACCC considers this can be achieved by the internal dispute resolution and ombudsman scheme recommendations identified in chapter 8.

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4. Digital platforms and media - regulatory frameworks

Key findings

- Both media businesses and digital platforms are evolving in the digital economy, with shifting functions, revenue streams, and business models.
- Digital platforms actively participate in the online news ecosystem, performing several of the same functions as news media businesses. This means that digital platforms are considerably more than mere distributors or pure intermediaries in the supply of news content in Australia.
- Despite this, virtually no media regulation applies to digital platforms in comparison with some other media businesses.
- The regulation of media sectors supplying news and journalism varies by sector and different regulatory models and obligations apply for TV, radio, print and online publishers.
- Digitalisation and the increase in online sources of news and media content have highlighted the inconsistencies in the sector-specific approach to media regulation.
- Media regulatory disparity can distort competition by providing digital platforms with a competitive advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions.
- The current, sector-specific approach to media regulation in Australia has not adapted well to digitalisation and media convergence, including not readily capturing new media providers such as digital platforms. This reduces the overall effectiveness of the current media regulatory framework.

The Terms of Reference direct the ACCC to examine the impact of digital platforms on media and advertising markets and the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets.

This chapter focuses on the Australian regulatory framework governing media and advertising markets and the continuing effectiveness of this framework in light of the innovation and technological change, and in particular the impact of digital platforms in these markets.

This chapter sets out the ACCC's findings and is structured as follows:

- **Section 4.1** briefly outlines the changing roles and activities of media businesses as they adapt to compete in the online news ecosystem.
- **Section 4.2** discusses the role and impact of digital platforms in online news markets by selecting, curating, evaluating, and ranking news content for audiences in Australia.
- **Section 4.3** considers the existing regulations in print publishing, TV and radio broadcasting, online publishing, advertising services and telecommunications industries to identify inconsistencies in how media businesses and digital platforms are regulated when performing comparable functions.
- **Section 4.4** examines how regulatory imbalance in Australian media and advertising markets is likely to impact competition between media businesses and digital platforms for advertising revenue and for access to content rights. This section then considers the impact of regulatory imbalance on consumers.
- **Section 4.5** assesses the effectiveness of the existing media and advertising regulatory framework in light of digitalisation and media convergence and makes a case for broader reform to create a coherent, platform-neutral legal framework that covers both online and offline delivery of media content to Australian consumers.
- **Section 4.6** sets out the ACCC's recommendation to address some of the key detriments caused by the regulatory imbalance discussed in this chapter.

4.1 News publishing and broadcasting in the digital economy

Key finding

- Both media businesses and digital platforms are evolving in the digital economy, with shifting functions, revenue streams, and business models.

4.1.1 The evolving activities and functions of media businesses

Media businesses create, curate, edit and promote a wide range of media content both online and offline, including news and journalism. Traditionally, print news publishers performed a range of functions that can be broadly divided into content creation, manufacturing, and distribution:

- content creation refers to the creation of news content based on research, investigation and analysis of current events by journalists, photographers and news agencies, plus a range of copy-editing, editing, rearranging and graphics work
- manufacturing refers broadly to the physical printing process
- distribution refers to the circulation of newspapers by wholesalers and retailers, with newspapers either being sold at individual sales points or via subscription.⁴³³

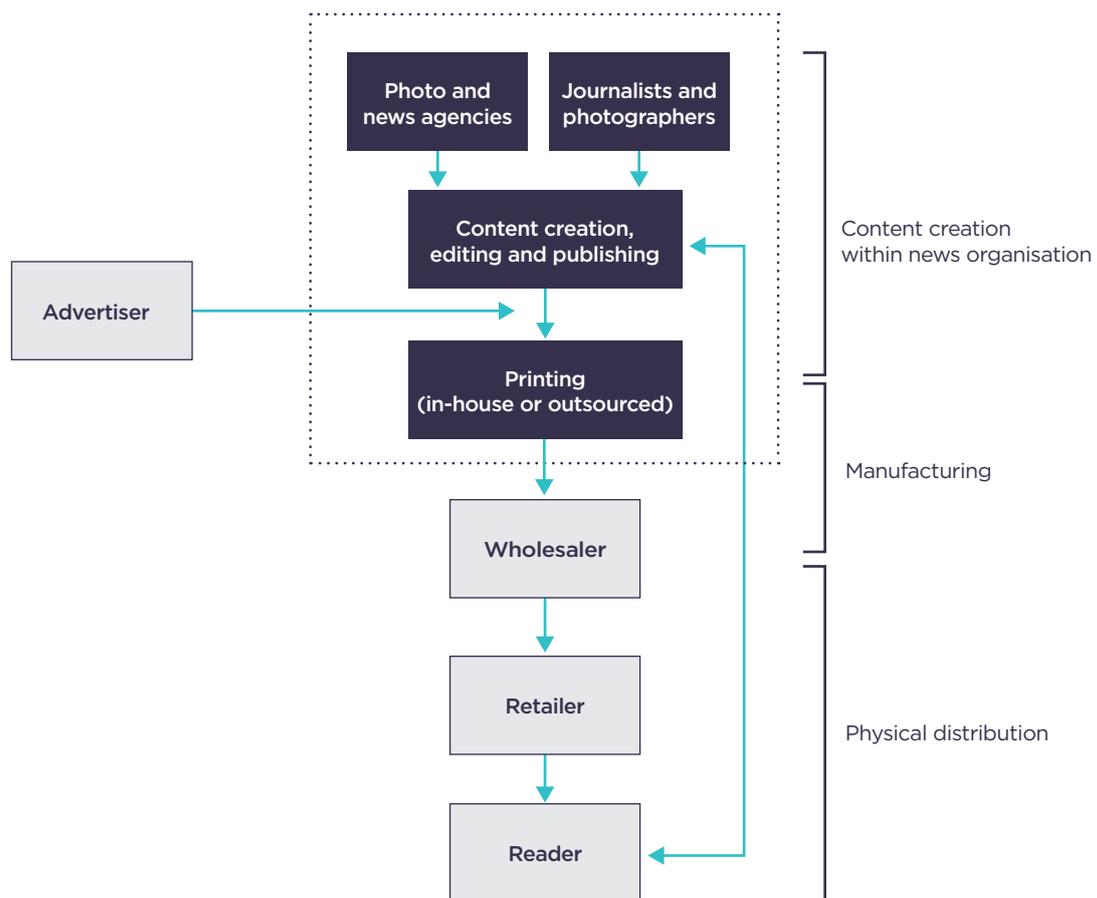
The functions in a traditional newspaper value chain are depicted in figure 4.1.

Other forms of media, such as television and radio broadcasting, also involve content creation. However, the manufacturing and distribution process is largely combined with broadcast and transmission. The greater regulation of broadcasting compared to other media sectors was historically justified on the basis of the airwaves being a public resource, the scarcity of spectrum, and the distinctive power of broadcast media to influence public attitudes. However, the continuing applicability of these justifications in the current media environment have been called into question.⁴³⁴

433 OECD, 'News in the Internet Age' (2010), pp. 56-7.

434 R. Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 46.

Figure 4.1 Traditional newspaper value chain



Source: Extracted from figure 2.1 'Traditional newspaper value chain' in OECD, 'News in the Internet Age' (2010), p. 56.

4.1.2 Adaptation to the online news ecosystem

Rapid technological advancements and digitalisation are reshaping the functions of news media businesses in both incremental and transformative ways. The incremental changes include the development of new software, standards and graphic tools for content creation and new digital print processes, as well as advancements in television production and the conversion from analogue to digital television.⁴³⁵

The more transformative changes involve the emergence of new online news ecosystems characterised by shifting functions, revenue streams, and business models.⁴³⁶ Technological innovations have enabled these online news ecosystems to remove or streamline key steps in the traditional value chain above, such as printing and distributing hard-copy newspapers or the transmission of news content on expensive and scarce broadcasting frequencies.⁴³⁷

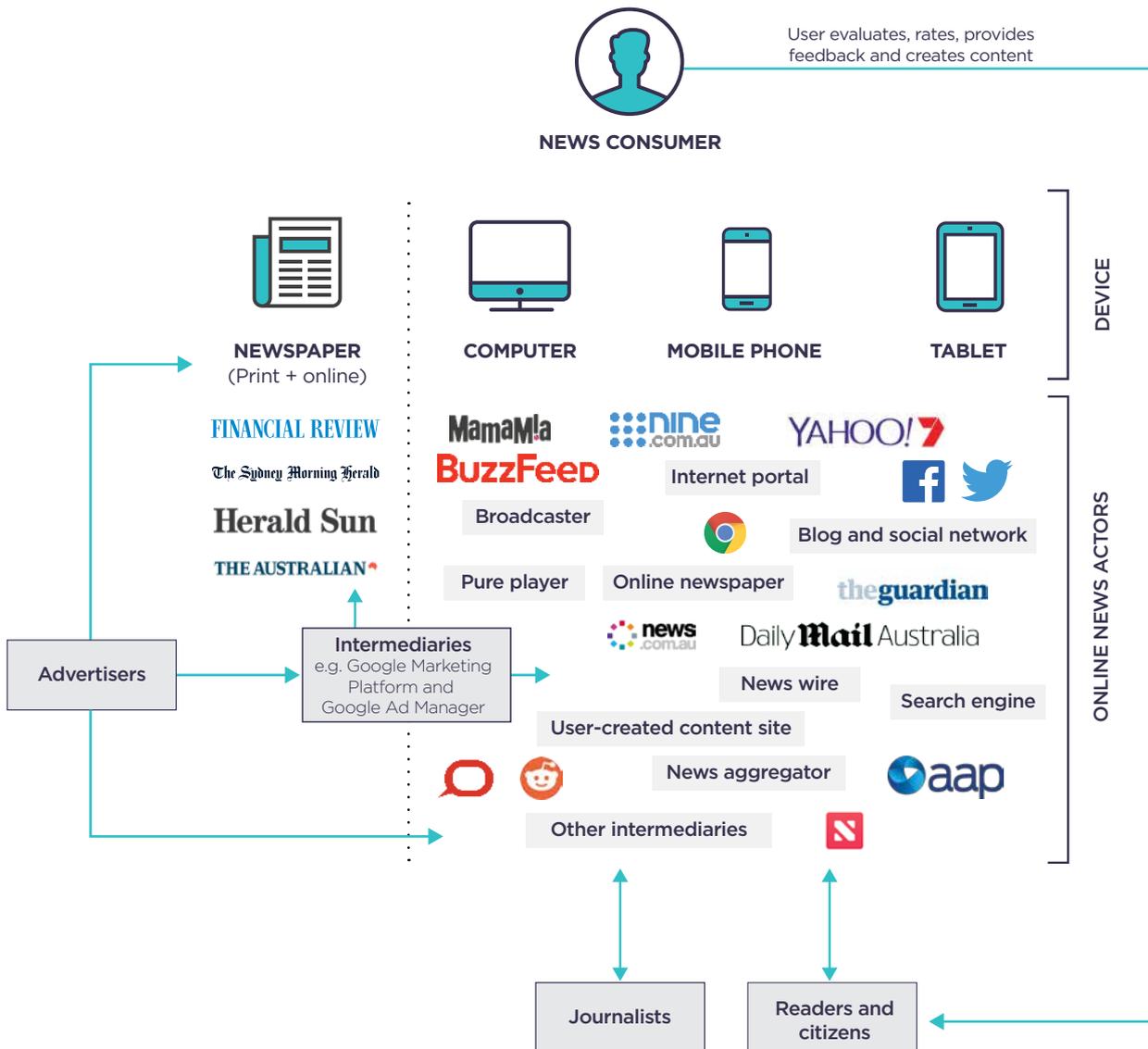
A stylised illustration of the online news value network is shown at figure 4.2.

435 OECD, 'Communications Outlook' (2013), p. 57, 178.

436 OECD, 'News in the Internet Age' (2010), p. 86.

437 See OECD, 'The Development and Diffusion of Digital Content' (2011), pp. 21-26 for further discussion on the impact of technological changes on established media business models.

Figure 4.2 Online news value network



Source: Extracted from figure 3.7 'A stylised online news value network' from OECD, 'News in the Internet Age' (2010), p. 87. Figure has been updated and adjusted as relevant to the Australian context and matters of relevance to the Inquiry.

The traditional functions of media businesses in supplying news and journalism—namely creating, manufacturing, and distributing news—are evolving to fit within these new online ecosystems. Some of the traditional functions are obsolete in the online ecosystem (for example, physical printing or distribution), while new functions are also created (for example, digital rights management, content aggregation, content hosting).⁴³⁸

The creation of online news content has become a more immediate, interactive and multidirectional process. Increasing sources of information are continually monitored, distilled, and updated by a network of participants and presented to widespread audiences in a rich variety of formats.⁴³⁹

438 OECD, 'News in the Internet Age' (2010), p. 86.

439 OECD, 'News in the Internet Age' (2010), ch. 3.

4.2 The roles of digital platforms in Australian media markets

Key finding

- Digital platforms actively participate in the online news ecosystem, performing several of the same functions as news media businesses. This means that digital platforms are considerably more than mere distributors or pure intermediaries in the supply of news content in Australia.

4.2.1 Digital platforms' involvement in the supply of news content

Digital platforms in Australia are actively involved in the publication, distribution and/or broadcast of news online including through performing some functions that overlap with those of news media businesses such as: selecting and curating content, evaluating content, and ranking and arranging content. Although the ACCC is not currently aware of digital platforms directly creating news content in Australia, some digital platforms appear to have an increasing role in creating or commissioning other content.

The ACCC's view is that digital platforms are considerably more than mere distributors or pure intermediaries in Australian media markets and perform several of the same functions as those of media businesses publishing news media content online. Each of these functions will be discussed below.

Selecting and curating news content

News media businesses make deliberate editorial choices in curating content to be published or broadcast to maintain a certain breadth, depth, or quality of coverage; to meet the preferences or expectations of their audiences; and to meet broader public service objectives. Digital platforms undergo a comparable process of selecting and curating the best content to display to their users based on specific and often personalised criteria set by the platforms. Criteria may include relevance and usefulness to the user, timeliness, and likelihood of user engagement.⁴⁴⁰

Content aggregation platforms can have a central role in selecting and curating the news content to be displayed to users. Many digital platforms build complex algorithms to cache or index available online content, select relevant content, extract titles and links, and group or rank them in order of relevance. While many of these processes are automated, different aggregators provide for differing degrees of human editorial control, either in setting the parameters for the algorithms or in selecting the content to be displayed and ranked.

Examples of editorial actions by content aggregation platforms include:

- *Apple News* employs editors in Australia to select and curate the articles displayed in the 'Top Stories' and 'Spotlight' sections, while it uses a combination of algorithmic personalisation and editorial curation to select and curate the articles displayed in the 'For You' section.⁴⁴¹
- *Google News* automatically indexes and links to relevant news articles online from over 80 000 news publications worldwide and has 70 country-specific editions, including an Australian edition.⁴⁴²

Similarly, online search platforms can have an important role of selecting and curating news content, as search results often include news content. See chapter 5 section 5.1.2 on 'Online search services' regarding the proportion of Google Search queries from devices in Australia that lead to the appearance of Top Stories on the Google Search results page.

440 Google, [How Search algorithms work](#), accessed 2 November 2018, and Facebook, Newsroom, [News Feed Ranking in Three Minutes Flat](#), 22 May 2018, accessed 2 November 2018.

441 Information provided to the ACCC. See also, for example, S. Dredge, '[Apple News app to rely on editors rather than algorithms for curation](#)', *The Guardian*, 16 June 2015, accessed 2 November 2018.

442 Information provided to the ACCC as this Inquiry.

Social media platforms also perform many of the functions of a publisher of selecting and curating the content displayed to users, which can include news and journalism. For example, Facebook uses algorithms that consider thousands of data points regarding the available inventory of stories to surface and rank the most relevant content on the Facebook News Feed for its users, including consideration of factors such as Facebook’s predictions on how likely a user is to comment on a story or share it with a friend.⁴⁴³

The increasingly editorial role of digital platforms in the selection and curation of content has been subject to scrutiny by expert panels in the EU and the UK as well as overseas government officials, such as the European Commission and the UK House of Commons Digital, Culture, Media and Sport Select Committee.⁴⁴⁴ For example, the Joint Research Committee of the European Commission found that digital platforms’ use of algorithmic distribution ‘blurs the branding efforts of newspaper editors and weakens their trusted intermediary relationship with readers’.⁴⁴⁵

This suggests that the selection and curation functions of digital platforms are not only of increasing importance, but are also decreasing the influence of the media businesses’ selection and curation functions – see chapter 6 section 6.6.3 on ‘*The ‘atomisation’ of journalism and dilution of brand value*’.

Evaluating content based on specific criteria

Media businesses employ staff such as editors, copy-editors and fact checkers who are responsible for evaluating the quality and accuracy of content to be published or broadcast.⁴⁴⁶ Although different in method, digital platforms also evaluate content to filter out information that is not relevant to the user, often by using algorithms.⁴⁴⁷ Arguably, a central function of platforms is to moderate content. As noted by Tarleton Gillespie in his book ‘Custodians of the Internet’:

*... moderation is, in many ways, the commodity that platforms offer. Though part of the web, social media platforms offer to rise above it, by offering a better experience of all this information and sociality: curated, organised, archived and moderated.*⁴⁴⁸

Digital platforms also evaluate content in accordance with their internal policies that outline types of content that are not permitted on their platforms. For instance, Facebook’s Community Standards prohibit objectionable content such as hate speech, graphic violence, adult nudity and sexual activity, and cruel or insensitive content.⁴⁴⁹

Moreover, although digital platforms generally evaluate and moderate content for relevance to their individual users, there are some cases where digital platforms have a role in assessing the accuracy of the content. In the US, Facebook has begun working with third-party fact-checkers such as Associated Press, Factcheck.org, and PolitiFact to evaluate information to establish the truth or falsity of a story,⁴⁵⁰ although the ACCC notes that Associated Press and Snopes have since ceased working with Facebook as fact-checkers.⁴⁵¹

443 Facebook, Newsroom, [News Feed Ranking in Three Minutes Flat](#), 22 May 2018, accessed 2 November 2018.

444 See, for example, JRC Digital Economy Working Paper 2018-02, [The digital transformation of news media and the rise of disinformation and fake news](#), April 2018; DCMS, [The Cairncross Review: a sustainable future for journalism](#), 12 February 2019, DCMS, ‘[Disinformation and ‘fake news’: Final Report](#)’, February 2019, Digital Competition Expert Panel, [Unlocking digital competition](#), March 2019.

445 JRC Digital Economy Working Paper 2018-02, [The digital transformation of news media and the rise of disinformation and fake news](#), April 2018, p. 6.

446 See, for example, P. Meyer, *The Vanishing Newspaper: Saving Journalism in the Information Age* (University of Missouri Press, 1st ed., 2006), chs. 5, 8 (cited in OECD, ‘News in the Internet Age’ (2010)) for a discussion on connecting the accuracy of content and language in a publication and the number of copy editors at work.

447 In addition, The Australian has reported that an internal document produced by Google’s Insights Lab called ‘The Good Censor’ states that Google has become a ‘moderator in chief’ of online content. *The Australian*, ‘[Google revises ‘neutrality’ stand](#)’, 15 October 2018, p. 19, originally published in *The Sunday Times*, accessed 28 May 2019.

448 T Gillespie, *Custodians of the Internet—Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press, 2018), p. 13.

449 Facebook, Community Standards, [Objectionable content](#), accessed 12 November 2018.

450 See Facebook Business, [Third -party fact-checking on Facebook](#), accessed 16 May 2019; [Facebook response to questions on notice before US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, p. 68, accessed 9 September 2018.

451 D Lee, ‘[Key fact-checkers stop working with Facebook](#)’, *BBC News*, 2 February 2019, accessed 16 May 2019.

In April 2019, Facebook announced that it will expand its third-party fact-checking into Australia, which will be provided by international news agency Agence France-Presse. When news stories are rated as false, they will be moved lower down on a user's Facebook News Feed.⁴⁵²

Ranking and arranging content for display

Similar to the ways in which print news publishers arrange articles, pictures and design elements of a newspaper before printing, digital platforms rank and arrange how content is displayed to their users. Examples of digital platform activities that involve ranking and arranging content for display to users include Facebook's News Feed, Apple News, Twitter Moments, and Snapchat Discover.

Where media businesses such as publishers and broadcasters arrange content for a mass audience, digital platforms often arrange content that is personalised for each user. The ranking functions of digital platforms and media businesses have important implications for consumers' exposure to the content – just as audiences of broadsheet newspapers are most likely to read articles arranged 'above the fold', Facebook users are most likely to view content ranked near the top of their News Feed. Therefore, the way in which digital platforms rank news stories can have a significant impact on the ways people arrive at and understand the importance of particular items of news.⁴⁵³

Creation of original news content?

A core function of media businesses is to create news content by employing journalists to undertake research, investigation and analysis of current events. However, in relation to news and journalism, digital platforms tend to focus on facilitating users' access to online content rather than the creation of original content themselves. For example, Google's submission to the Inquiry argues that 'search engines are not news publishers',⁴⁵⁴ noting that Google does not author news articles.⁴⁵⁵

This represents a key distinction in the functions of digital platforms and media businesses, although there are some indications that this distinction may be beginning to blur. For instance, Facebook has recently launched Facebook Watch in Australia, which is a visual content platform distributing original content produced and funded by Facebook.⁴⁵⁶ Google's video-sharing platform YouTube has been producing its own original content, named YouTube Originals. YouTube Originals has already released more than 65 projects to-date, with 50 scheduled for release in 2019.⁴⁵⁷ To date, these projects have tended to involve entertainment content rather than news and journalism, although some include a number of documentaries.⁴⁵⁸ There are also instances where digital platforms and media businesses may be rivals for content rights (see section 4.1.2 on 'Impact on rivalry for access to content rights').

452 Facebook, Newsroom, [Working to Safeguard Elections in Australia](#), 4 April 2019, accessed 13 May 2019.

453 DCMS, [The Cairncross Review: a sustainable future for journalism](#), 12 February 2019, p. 65.

454 Google, [Second submission to the ACCC Issues Paper](#), October 2018, p. 8.

455 Google, [Second submission to the ACCC Issues Paper](#), October 2018, p. 8.

456 M Collett, [Facebook Watch joins the television disruption party with Sorry For Your Loss](#), *ABC News*, 19 September 2018, accessed 2 November 2018.

457 A Ritman, [YouTube to Release 50 Original Shows in 2019](#), *The Hollywood Reporter*, 22 August 2018, accessed 16 May 2019, quoting YouTube Head of Originals EMEA, Luke Hyams: "We've had more than 65 shows and movies since it launched at the end of 2016, and we've got 50 shows releasing in 2019." See also YouTube Blog, [YouTube Music and YouTube Premium launch in 17 countries; It's all here](#), 18 June 2018, accessed 16 May 2019. While much of this is not news content, the ACCC has received submissions arguing that the documentaries are intended to inform as well as entertain and should therefore fall within the Inquiry's Terms of Reference: see for example Australian Film & TV Bodies, [Submission to the ACCC Issues Paper](#), April 2018, p. 1.

458 See Australian Film & TV Bodies, [Submission to the Digital Platforms Inquiry Issues Paper](#) April 2018, p. 1. For an example of recent documentary produced by YouTube Original, see Demi Lovato, 'Demi Lovato: Simply Complicated', *YouTube*, 17 October 2017, accessed 16 May 2019, a documentary that chronicles the singer's bipolar diagnosis, substance abuse and rehabilitation. The film has been viewed more than 25.7 million times globally as at May 2019.

Both Facebook and Google have announced a range of initiatives to support news and journalism. In 2018, Google announced its US\$300 million Google News Initiative, which is intended to strengthen quality digital journalism and combat the proliferation of fake news and misinformation over three years.⁴⁵⁹ In 2019, Facebook announced plans to invest \$300 million in news programs, partnerships, and content over the next three years.⁴⁶⁰ Facebook is also reported to be planning to invest \$5 million into Australian journalism and to help publishers understand how they can profit from its platform as part of the Facebook Journalism Project News Accelerator, which will be launched in partnership with the Walkley Foundation later in 2019.⁴⁶¹

4.2.2 Digital platforms' involvement in the supply of advertising services

The media-like functions of digital platforms discussed above focus on the *consumer-facing* side of the market. As news media markets are multi-sided markets, it is important to consider the extent to which digital platforms monetise the attention of their users by performing comparable functions to media businesses on the *advertiser-facing* side of the market. The advertiser-facing side of digital platforms is both part of the online advertising ecosystem and a potential rival for news media businesses for digital marketing opportunities.

A more in-depth discussion of Google and Facebook's market power in the markets for display advertising and search advertising is in chapter 2. More details on the operation of the online advertising market in Australia is in chapter 3. Chapter 6 section 6.7.1 discusses digital platforms' impact on media businesses' advertising revenue.

4.2.3 Digital platforms' many other roles and functions

The ACCC recognises that digital platforms also perform myriad other roles and functions which are valuable to consumers. Each digital platform provides users with a distinctive and dynamic array of product offerings, including many unrelated to the supply of news content.⁴⁶²

The ACCC considers that there are important differences between digital platforms, which select, evaluate, rank and distribute news media content online, and news media businesses which perform all of those functions but also create original news media content.

Nevertheless, the role of digital platforms as gateways to news media on the internet for a large number of Australians increases the impact and importance of their media-like functions on Australian media markets. As discussed in chapter 2, chapter 5 and chapter 6, referrals from social media feeds or search results to online news sources are becoming increasingly important and digital platforms have increasing influence in shaping the online news choices of Australian consumers.

Accordingly, it is important that there is appropriate and consistent regulation of digital platforms' functions of selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display to Australian consumers.⁴⁶³

459 E Meixler, '[Google Has Announced a \\$300 Million Initiative to Support News Organizations](#)', *Fortune*, 21 March 2018, accessed 16 May 2019.

460 N Bach, '[Facebook Commits \\$300 Million to Support Local News](#)', *Fortune*, 15 January 2019, accessed 16 May 2019.

461 S Shead, '[Facebook tries to make friends with media by investing \\$5 million into Australian journalism](#)', *Business Insider Australia*, 28 February 2019, accessed 8 May 2019.

462 For example, Google Maps, which provides location-based services such as a directory and navigation assistance; Google's email account Gmail, Facebook's photo-sharing and instant-messaging features; online browsers such as Safari, Chrome, and Internet Explorer.

463 See also discussion in DCMS, '[The Cairncross Review: a sustainable future for journalism](#)', 12 February 2019, p. 31.

4.3 Regulatory imbalance in Australian media markets

Key findings

- Despite digital platforms increasingly performing similar functions to media businesses, virtually no media regulation applies to digital platforms in comparison with some other media businesses.
- The regulation of media sectors supplying news and journalism varies by sector and different regulatory models and obligations apply for TV, radio, print and online publishers.
- Digitalisation and the increase in online sources of news and media content have highlighted the inconsistencies in the sector-specific approach to media regulation.

4.3.1 Overview of Australian Media and Communications Regulations

Traditionally, there have been three silos of communications regulation in Australia: telecommunications, radiocommunications and broadcasting, which are multi-layered and interlocked. As such, the existing media regulatory landscape in Australia is a complex structure of separate regulatory frameworks applicable to each of the different telecommunications, radiocommunications, and broadcasting industries.

Increasingly, however, distinctions between these separate sectors are blurring due to technology shifts to internet platforms, digital communications and faster broadband networks (see section 4.5.1 on '*Impact of media convergence on current regulatory silos*').⁴⁶⁴

Within the existing regulatory framework, the level and type of regulation can vary significantly for suppliers of news and journalism depending on how the news media content is delivered. In general, digital platforms are governed under the currently sector-specific Australian media law as follows:

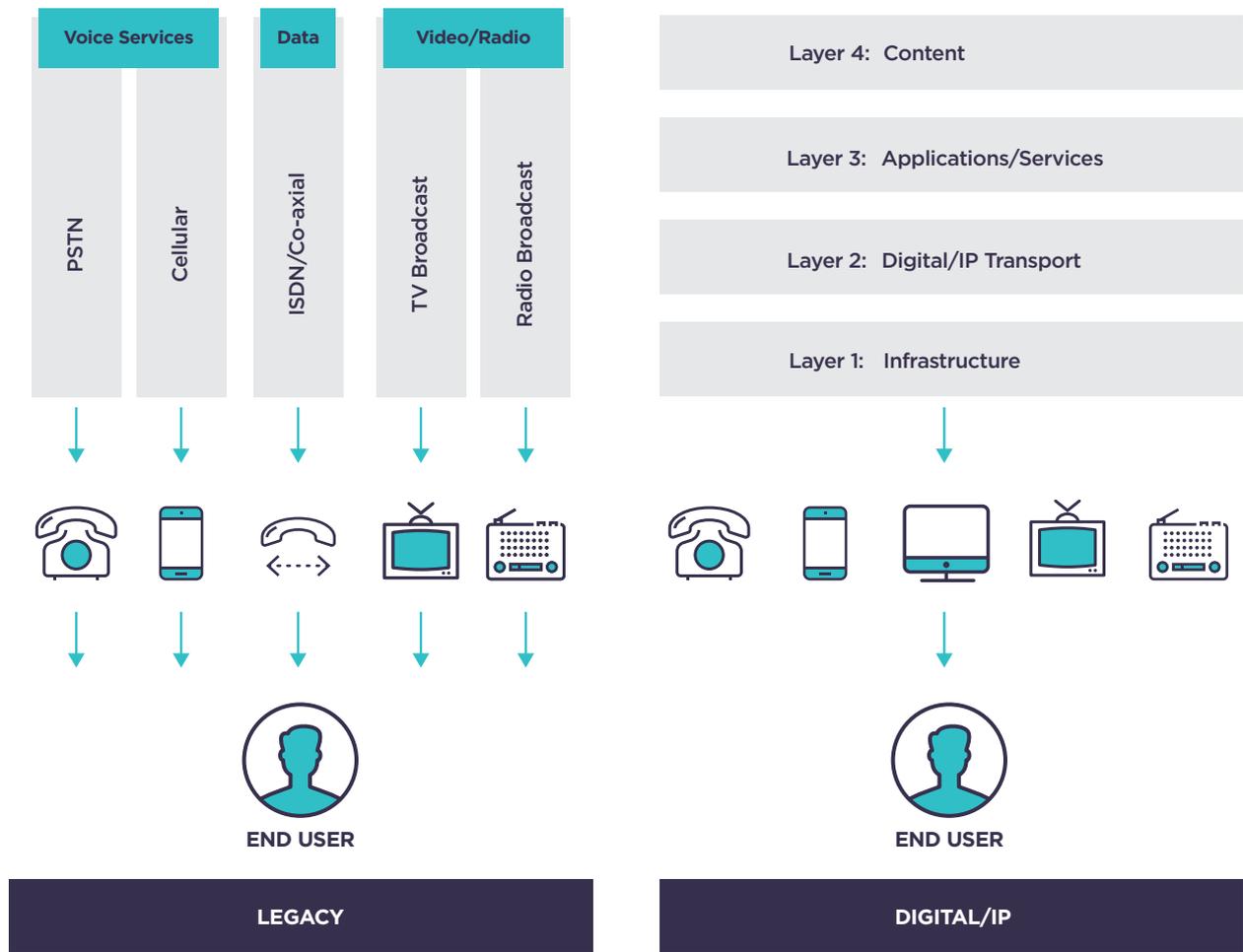
- **Print:** Digital platforms are not governed by the self-regulatory regime supervised by the Australian Press Council (APC), which only governs publishers who have opted-in to become APC members and accordingly does not apply to all news publishers.
- **Broadcasting:** Digital platforms are not governed by the complex co-regulatory system of legislative restrictions, licensing conditions, standards and codes of practice that regulates news broadcasters, as supervised by the ACMA. Broadcasters are required to meet minimum content quotas for Australian or local content and have obligations in relation to children's programming that are not imposed on digital platforms.
- **Advertising:** In the supply of advertising, more restrictions are imposed on TV and radio broadcasters in legislation, licence conditions, and industry codes than on other media formats, which means broadcasters are subject to greater advertising restrictions than digital platforms. In particular, political advertising is regulated by broadcasters' licence conditions.
- **Telecommunications:** The telecommunications industry is subject to the obligations set out in the obligations set out in Industry Codes of Practice, including the Telecommunications Consumer Protection Code.

While copyright and defamation laws in Australia do regulate digital platforms and apply to industries other than media, the challenges of enforcing copyright against digital platforms adds another layer to the regulatory imbalance between digital platforms and media businesses.

Media regulation follows service-specific networks and devices. Technological change means that service delivery is now largely independent of network technologies. This can be represented as a shift from the vertical, sector-specific approach to the horizontal, layered approach depicted in figure 4.16 below. Essentially, the pervasiveness of broadband services and the use of Internet Protocol as a delivery format for content and carriage services has blurred the boundaries between telecommunications services and the digital platform services, and the boundaries between traditional broadcasting services and internet content delivery.

⁴⁶⁴ ACMA '[Enduring concepts: communications and media in Australia](#)', November 2011, p.10.

Figure 4.16 Convergence in the legislative landscape



Source: ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 6, accessed 24 October 2018.

The key features and variation in application of regulatory frameworks between different content providers that increasingly supply similar services in a convergent media environment are summarised in table 4.1 'The regulatory frameworks for media and advertising services in Australia'.

Table 4.1 The regulatory frameworks for media and advertising services in Australia

Industry/sector	Laws/regulations/codes	Main system of regulation	Regulator	Applies to DPs?
Print news publishing	APC statements of principles, standards of practice, and advisory guidelines MEAA Journalist Code of Ethics	Self-regulated	APC	X
Online news publishing	APC statements of principles, standards of practice, and advisory guidelines	Self-regulated	APC	X
	<i>Broadcasting Services Act 1992</i> (Cth) schedules 5 and 7 Internet Industry Codes of Practice 2005 Content Services Code 2008	Co-regulated	ACMA	X
Radio and TV news broadcasting	<i>Radiocommunications Act 1992</i> (Cth) (RA) and regulations <i>Broadcasting Services Act 1992</i> (Cth) (BSA) and regulations Broadcasting licence conditions under the RA and BSA Apparatus licence conditions Relevant regulatory standards set by ACMA Relevant Industry Codes of Practice	Co-regulated	ACMA	X
Advertising	(Supplied generally) Codes of conduct adopted by AANA and other relevant industry bodies	Self-regulated	Ad Standards and AANA	✓
	Other federal and state legislation regulating advertising of gambling products, medicine. ⁴⁶⁵	Co-regulated	ACMA at federal level State and territory regulators	Sometimes
	(Supplied on TV and radio) Broadcasting licence conditions Relevant regulatory standards set by ACMA Relevant Industry Codes of Practice	Co-regulated	ACMA	X
Telecommunications	<i>Telecommunications Act 1997</i> (Cth) and regulations Telecommunications (Consumer Protection and Service Standards) Act 1999 (Cth) and regulations Relevant industry codes of practice, including the TCP Code and industry standards made by ACMA Carrier licence conditions	Co-regulated	ACMA	X
Copyright	<i>Copyright Act 1968</i> (Cth)	Privately-enforced	NA	✓
Defamation	Nationally-uniform State defamation laws	Privately-enforced	NA	✓

465 Interactive Gambling Act 2001 (Cth); Therapeutic Goods Act 1989 (Cth); Broadcasting Services (Online Content Service Provider Rules) 2018.

In table 4.1, self-regulation refers to when an industry sets its own standards of conduct and is supervised by an industry body representing the interests of its members.⁴⁶⁶ Co-regulation refers to a legislative framework supervised by a statutory authority and, within the parameters set by the legislation and the statutory authority, the industry self-regulates.⁴⁶⁷

In addition, other economy-wide regulation applies to media businesses and digital platforms, as with other businesses including the Australian Consumer Law (ACL). See box 4.1 'The Australian Consumer Law and application to media businesses and digital platforms' for a discussion of how the ACL applies to provision of services of media businesses and digital platforms, particularly as it relates to the provision of news and advertising.

Box 4.1 The Australian Consumer Law and application to media businesses and digital platforms

Various ACL provisions apply to activities of media business and digital platforms, including the prohibitions on misleading or deceptive conduct (s18) and false or misleading representations (s29). The ACL also contains exemptions for information providers and a defence for publishers that apply to the publication of news and ads.

Publication of news – Information provider exemption

Information providers are exempt from claims of misleading or deceptive conduct and false or misleading representations when the relevant representation was made in the course of carrying on a business of providing information.⁴⁶⁸ Depending on the circumstances, this exemption may apply to publication by certain media businesses and digital platforms of news or editorial stories. The exemption does not apply to the publication of ads.⁴⁶⁹

Publication of advertising – Publisher's defence

A defence applies to the publication of ads in the ordinary course of business by a company whose business is to publish or arrange the publication of ads.⁴⁷⁰ The defence is designed to avoid publishers having to verify the content of every ad they publish.⁴⁷¹ However, the defence does not operate unless the publisher "did not know, and had no reason to suspect," that publication would amount to a contravention of the ACL.⁴⁷²

4.3.2 Print publishing regulation

Overview of regulations

There are no specific laws regulating print media in Australia. While the supply of print news is subject to the general laws of the land, including copyright and defamation laws, print news media is otherwise self-regulated.

The Australian Press Council

News publishers are mostly regulated by the APC. The APC's Standards and Guidelines apply to material published by its constituent bodies, which are publishers of newspapers, magazines and associated digital outlets of roughly 900 mastheads covering about 95 per cent of print circulation in Australia.⁴⁷³

466 See discussion on regulation, co-regulation and self-regulation in Senate Select Committee on Information Technologies, ['In the Public Interest: Monitoring Australia's Media'](#), April 2000, p. 7.

467 See discussion on regulation, co-regulation and self-regulation in Senate Select Committee on Information Technologies, ['In the Public Interest: Monitoring Australia's Media'](#), April 2000, p. 7.

468 Section 19 of the ACL exempts information providers from claims under s18 of the ACL ('misleading and deceptive' provisions) provided the requirements of s19 are met. Section 38 of the ACL exempts information providers from claims under s.29 of the ACL ('false or misleading representations' provisions) provided the requirements of s38 are met. ACL, ss. 19, 30.

469 ACL, ss. 19(2), 38(2).

470 ACL, s. 251(2)(a)–(b).

471 Explanatory Memorandum, Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, para 1513.

472 ACL, s. 251(2)(c).

473 See Australian Press Council, [Who are our members?](#), accessed 2 November 2018.

As noted in the 'Report of the Independent Inquiry into Media and Media Regulation' conducted by the Honourable Ray Finkelstein QC (the Finkelstein Review), while APC membership covers established media, membership is optional.⁴⁷⁴ Publishers can withdraw from membership if they provide sufficient notice and alter their funding contributions as they see fit.⁴⁷⁵

Because there is no statutory requirement for publishers to be governed by the APC, this self-regulatory regime does not apply consistently to all print publishers and does not fully cover new media or many online only news publishers (as discussed at section 4.3.4 on 'Online publishing regulation').

The Media Entertainment and Arts Alliance

The Media Entertainment and Arts Alliance (MEAA) is a union for journalists and others working in the media, entertainment, sports and the arts. Journalist members of the MEAA are bound by ethics rules enforced by the MEAA.⁴⁷⁶ The MEAA is a constituent body of the APC. Journalist members of the MEAA are governed by its 'Journalists' Code of Ethics' that sets out obligations in relation to 'honesty, fairness, independence, and respect for the rights of others'.⁴⁷⁷ This code of ethics only applies to journalists who are members of MEAA's Journalists Section.⁴⁷⁸

In addition to these external self-regulation regimes, some news publishers may also impose internal regulation by adopting standards or codes of ethics which are enforced by the editor or by appointment of an ombudsman.⁴⁷⁹

Table 4.2 summarises the key media regulations applicable to print publishing.

Table 4.2 Key media regulations applicable to print publishing in Australia

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all print publishers?	Applies the same rules to media businesses?	Applies the same rules to digital platforms?
APC Standards and Guidelines	Newspaper and magazine publishers who are members of the APC (inc Fairfax and News Corp).	✗ Does not apply to print publishers who are not APC members.	✗ Does not apply to TV or radio broadcasters. ✗ Does not apply to all print publishers.	✗
MEAA Journalist Code of Ethics	Journalists who are members of the MEAA.	✗ Does not apply to all journalists (only applies to MEAA journalist members). ⁴⁸⁰	✗ Does not apply to anyone who is not a journalist member of the MEAA.	✗

474 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 8.

475 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 8.

476 MEAA, [Registered rules of the Media Entertainment & Arts Alliance](#), 6 March 2019, pp. 48–9, accessed 16 May 2019. For further information, see D. Rolph et al, *Media Law: Cases, Materials and Commentary*, 2nd ed., Oxford University Press, 2015, ch.3 'Print Media and Journalists'.

477 MEAA, [Registered rules of the Media Entertainment & Arts Alliance](#), 6 March 2019, p. 49, accessed 16 May 2019.

478 See R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 194.

479 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 189.

480 Australian Bureau of Statistics, Characteristics of Employment, Australia, August 2018, category no. 6333.0 found union membership in 'information, media and telecommunications industry' was approximately 10.54 per cent.

Application to digital platforms

None of the digital platforms relevant to this Inquiry have opted to become constituent bodies of the APC. This means that, even in a wholly self-regulated industry such as print publishing, media businesses in fact bear costs of regulatory compliance which are not borne by digital platforms. For example, publishers allocate funds for compliance with the APC's standards and codes as well as contribute funding for the APC's operations.⁴⁸¹ Publishers who wish to withdraw from the APC must give four years' notice.⁴⁸²

Digital platforms have no requirement to contribute to such industry associations, nor do they face the costs of ensuring compliance with the APC's standards, such as the cost of employing fact-checkers to ensure that factual material is accurate and not misleading to meet the standard for 'accuracy and clarity'.⁴⁸³ The APC's submission to the Inquiry raises concerns regarding the impact of this inequity on its publisher members, noting that:

*'Publishers that are members of the Press Council, which are the majority of publishers in Australia, agree to abide by the General Principles and Specific Standards as determined by the Council.'*⁴⁸⁴

*'The more the Australian media's viability is threatened, the more the Press Council and the high standards it asks members to adhere to are placed under strain.'*⁴⁸⁵

*'Facebook is now a leading global publisher in all but name.'*⁴⁸⁶

4.3.3 TV and radio broadcasting regulation

Overview of regulations

TV and radio broadcasting bear a significantly heavier regulatory burden than the publishing sectors. Broadcasters must obtain a broadcasting licence before commencing service and are subject to a complex, sector-specific rules under a co-regulatory regime, which include restrictions and obligations set out in the conditions of their broadcasting licence, along with the provisions of the *Broadcasting Services Act 1992* (Cth) (the BSA), *Radiocommunications Act 1992* (Cth) (the RA), and any applicable industry codes of practice and mandatory standards.

The greater regulation of broadcasting over other media sectors was historically justified on the basis of the airwaves being a public resource, the scarcity of spectrum, and the distinctive power of broadcast media to influence public attitudes, although the continuing applicability of these reasons in the current media environment has been called into question.⁴⁸⁷

Table 4.3 sets out the key sources of regulations in the broadcasting industry and their application across the broadcasting sector and the media industry more broadly.

481 For instance, in the 2016-17 financial year, the APC's constituent bodies contributed just over \$2 million to fund its operations. See APC, [Annual Report 2016-17](#), p. 39.

482 Australian Press Council, Update, [New package to strengthen the Press Council](#), 11 April 2012, accessed 2 November 2018.

483 Australian Press Council, [Statement of General Principles](#), July 2014, p. 2, paras 1-2, accessed 16 May 2019.

484 Australian Press Council, [Submission to the ACCC Issues Paper](#), April 2018, p. 3, accessed 30 September 2018.

485 Australian Press Council, [Submission to the ACCC Issues Paper](#), April 2018, p. 3, accessed 30 September 2018.

486 Australian Press Council, [Submission to the ACCC Issues Paper](#), April 2018, p. 6 quoting Former Chair of the Press Council Professor David Wesibrot AM on 13 September 2016, accessed 30 September 2018.

487 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), pp.167-8.

Table 4.3 Application of TV and radio broadcasting regulations in Australia

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all broadcasters?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
<i>Radiocommunications Act 1992</i> (Cth) <i>Broadcasting Services Act 1992</i> (Cth)	Providers of 'broadcasting services', (anything transmitted over the broadcasting services bands).	✗ Applies differently to different types of broadcasters.	✗ Does not apply to print publishers. ⁴⁸⁸	✗
Broadcasting licence conditions	Public, commercial, and community radio and TV broadcasters.	✗ Different broadcasting licences impose different conditions.	✗ Does not apply to print publishers.	✗
Relevant regulatory standards set by ACMA Relevant industry codes of practice	Public, commercial, and community radio and TV broadcasters.	✗ Different broadcasters bound by different industry codes and standards.	✗ Does not apply to print publishers.	✗

Broadcast TV and radio are subject to numerous content requirements in relation to the broadcast of Australian or local content and children's content. For instance, the BSA requires that Australian programming must comprise at least 55 per cent of the content broadcast by commercial free-to-air television licensees on their primary channels between 6 am and midnight.⁴⁸⁹ The Australian Content Standard 2016 sets out minimum annual sub-quotas for Australian drama, documentary and children's programs that all commercial free-to-air television broadcasters must meet.⁴⁹⁰ The broadcasting of children's program content is also regulated by the Children's Television Standards 2009.⁴⁹¹

Regional commercial broadcasters in the licence areas of Northern NSW, Southern NSW, Regional Victoria, Regional Queensland, and Tasmania must meet broadcasting licence conditions that require them to broadcast minimum amounts of 'material of local significance'.⁴⁹² Broadcasters are responsible for ensuring their own compliance with the applicable rules and standards and ACMA has a role in resolving complaints or setting standards, where appropriate.⁴⁹³

Application to digital platforms

The broadcasting regulations outlined above do not apply to online content under a Ministerial Determination made in 2000 that specifies that 'broadcasting services' does not include 'a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands'.⁴⁹⁴

Despite increasing amounts of audio and visual content being broadcast online, this means that the rules under the BSA and related standards and codes do not regulate the online activities of TV and radio broadcasters. For instance, each of Channels 7, 9 and 10, as well as the ABC and SBS, operate websites that provide news and journalism, among other material. Although these do not fall within the definition of 'broadcasting services' under the BSA, there is evidence to suggest that most broadcasters voluntarily apply the same editorial principles in the codes to their online news services.⁴⁹⁵

488 Most of the regulations in the RA and the BSA are specific to TV and radio broadcasting, though the media ownership rules also apply to publishers of newspapers deemed to be 'associated' with particular broadcasting licence area.

489 *Broadcasting Services Act 1992* s. 121G; ACMA, [Australian TV Content](#), accessed 16 May 2019.

490 ACMA, [Broadcasting Services \(Australian Content\) Standard 2016](#), made under s. 122(1) of the *Broadcasting Services Act 1992*.

491 ACMA, [Children's Television Standards 2009](#), made under s. 122(1) of the *Broadcasting Services Act 1992*.

492 See ACMA, Regional television local content changes, accessed 16 May 2019; ACMA, [Local content conditions on regional commercial television broadcasters](#), accessed 7 November 2018.

493 *Broadcasting Services Act 1992* (Cth) ss. 123(2)(h), 148. See also D Rolph et al, *Media Law: Cases, Materials and Commentary*, 2nd ed., Oxford University Press, 2015, p. 90.

494 See [Determination under paragraph \(c\) of the definition of "broadcasting service" \(No. 1 of 2000\)](#).

495 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), pp.165-6.

As indicated in table 4.3, none of the broadcasting regulations apply to digital platforms. This creates a significant regulatory imbalance between broadcasters and digital platforms in the provision of audio and/or visual content to the Australian public. For example:

- digital platforms are not required to ensure a minimum amount of Australian or regional local content is distributed on their platforms
- digital platforms are not under any obligations to classify content or to restrict access to prohibited content.⁴⁹⁶

The exact extent of the imbalance between digital platforms and each broadcaster will depend on how that broadcaster is categorised under the BSA (that is, as a commercial broadcaster, national broadcaster, community broadcaster, and so forth), as different types of broadcasters are subject to different regulatory obligations.⁴⁹⁷

4.3.4 Online publishing regulation

Overview of regulations

Online content providers are co-regulated under industry codes registered with the ACMA in accordance with the framework set out in Schedules 5 and 7 to the BSA,⁴⁹⁸ which is administered by the ACMA in cooperation with industry bodies.⁴⁹⁹

Schedule 5 of the BSA regulates internet content hosted outside Australia by imposing regulation on internet service providers (ISPs), and Schedule 7 regulates online and mobile content hosted inside or provided from within Australia by imposing regulation on commercial content services providers.

- Under Schedule 5, industry codes must be developed for internet services providers dealing with matters including: enabling parents to better monitor the online activities of their children; provision of filtering technologies; content labelling; legal assessments of content; and complaints handling procedures.⁵⁰⁰ The Internet Industry Codes of Practice 2005 (the Internet Code) was developed in accordance with Schedule 5, which regulates the conduct of internet content hosts in Australia, which includes mobile carriers and ISPs.⁵⁰¹
- Under Schedule 7, industry codes must be developed for commercial content service providers; trained content assessors must be engaged; and content must be assessed by these content assessors.⁵⁰² The Content Services Code 2008 (the Content Code) was developed in accordance with Schedule 7.⁵⁰³

Online news publishers may opt in to the self-regulatory regime overseen by the APC, although some prominent online publishers such as Guardian Australia, BuzzFeed, Junkee, and Mamamia have not elected to do so.⁵⁰⁴

Table 4.4 summarises the application of key online publishing regulations across the online publishing sector and to the media industry more broadly.

496 For example, sch. 7 of the BSA currently imposes obligations to classify online content only on 'commercial content service providers' who provide content services to the public on payment. This does not include the bulk of services and content provided through digital platforms, which users can access without a charge, and is typically funded through the sale of associated advertising space; see ALRC, '[Classification—Content Regulation and Convergent Media](#)', 1 March 2012, pp. 109–110 see also pp. 47–62, 359.

497 *Broadcasting Services Act 1992* (Cth), ss. 13–18.

498 The provisions allowing for industry bodies to develop industry codes as well as the provisions governing complaints handling mechanisms are set out in schs. 5 and 7 to the BSA.

499 As discussed in Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), Appendix G.

500 See *Broadcasting Services Act 1992* (Cth) sch. 5, cl. 60 (matters that must be dealt with by industry codes and standards).

501 Australian Broadcasting Authority, Internet Industry Code of Practice, [Codes for Industry Co-regulation in areas of internet and mobile content](#), May 2005, version 10.4, accessed 1 November 2018.

502 See *Broadcasting Services Act 1992* (Cth) sch. 7, s. 81 (matters that must be dealt with by industry codes and industry standards--commercial content providers), s. 82 (examples of matters that may be dealt with by industry codes and industry standards).

503 Australian Communication and Media Authority, Internet Industry Code of Practice, [Codes for Industry Co-regulation in areas of internet and mobile content](#), May 2005, version 10.4, accessed 1 November 2018.

504 APC, Media Release, '[World Press Freedom Day 2017](#)', 3 May 2017.

Table 4.4 Application of key online publishing regulations to online publishing in Australia

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all broadcasters?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
<i>Broadcasting Services Act 1992</i> (Cth) Schedules 5 and 7	Content services providers in Australia, mobile carriers and ISPs.	✗ Does not apply to providers outside Australia.	✗ Does not apply to print publishers, TV or radio broadcasters.	✗
Internet Industry Codes of Practice 2005	Hosts of internet content in Australia, mobile carriers and ISPs.	✗ Does not apply to internet content hosts outside Australia.	✗ Does not apply to print news publishers, TV broadcasters or radio broadcasters.	✗
Content Services Code 2008	Content service providers who provide a service with 'an Australian connection'.	✗ Does not apply to providers of content services without 'an Australian connection'.	✗ Does not apply to print news publishers, TV broadcasters or radio broadcasters.	✗
APC Standards and Guidelines	Online publishers who are members of the APC.	✗ Does not apply to online publishers who are not APC members.	✗ Does not apply to TV or radio broadcasters. ✗ Does not apply to all publishers.	✗

Application to digital platforms

Neither Schedule 5 nor Schedule 7 to the BSA applies to digital platforms which do not charge a monetary fee for displaying content.⁵⁰⁵ Nor do the industry codes apply to digital platforms:

- The Internet Code applies to internet content hosts in Australia, which includes mobile carriers and internet service providers (ISPs) but not digital platforms.⁵⁰⁶
- The Content Code imposes obligations on content service providers with '... an Australian connection'.⁵⁰⁷ A 'content service' means any combination of text, data, speech, music, sounds or visual images delivered through a carriage service such as a communications network.⁵⁰⁸ An 'Australian connection' will be established where content is hosted on servers physically located in Australia or where it refers to live content that originates in Australia.⁵⁰⁹ Multi-national digital platforms host content in servers around the world, which makes it difficult to ascertain whether they supply content that will provide an 'Australian connection'.⁵¹⁰

The Australian Government's 2012 Convergence Review noted that the restriction to content services with an Australian connection 'is becoming increasingly irrelevant with the emergence of international cloud-based services for the hosting of content'.⁵¹¹ Similarly, an ACMA research paper noted that the distinction between content hosted in Australia and overseas is 'challenged by the recent industry practice of hosting content in the cloud so that its location inside or outside of Australia is not able to be determined'.⁵¹²

505 To note, sch. 7 of the *Broadcasting Services Act 1992* (Cth) does regulate services which charge a fee as it applies to 'commercial content services' which are services that are 'operated for profit or as part of a profit making enterprise' and is 'provided to the public but only on payment of a fee (whether periodical or otherwise).'

506 Australian Broadcasting Authority, Internet Industry Codes of Practice, [Codes for Industry co-regulation in areas of Internet and Mobile content](#), May 2005, version 10.4, accessed 1 November 2018.

507 *Broadcasting Services Act 1992* (Cth) sch. 7 cl 3.

508 *Broadcasting Services Act 1992* (Cth) sch. 7, s. 2 definitions of content and content service. The definition of carriage service is set out in s. 7 of the *Telecommunications Act 1997* (Cth) and means 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.

509 *Broadcasting Services Act 1992* (Cth) sch.7 cl 3 see also ACMA, Internet Industry Code of Practice, [Content Services Code for Industry co-regulation in the area of content services](#), 10 July 2008, Version 1.0, accessed 1 November 2018.

510 Google, Privacy Policy, [Introduction](#), accessed 1 November 2018. 'We maintain servers around the world and your information may be processed on servers located outside of the country where you live.'

511 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 146 see also ACMA, [Broken Concepts: The Australian communications legislative landscape](#) (2011), p. 81.

512 ACMA, [Broken Concepts: The Australian communications legislative landscape](#) (2011), p. 81.

Nevertheless, digital platforms hosting content overseas or in the cloud are unlikely to be bound by similar requirements or incur similar costs to other content hosts in Australia, such as the requirement to be bound by industry codes or the costs of engaging and using trained content assessors.

4.3.5 Advertising standards

Overview of regulations

Different media formats are bound by different advertising restrictions – most ads in Australia are self-regulated under industry codes and supervised by Ad Standards,⁵¹³ but advertising on TV and radio is bound by additional legislative restrictions and co-regulated by the ACMA.

The ACL applies to representations made in advertising, although a defence is available under the ACL for publishers of advertising, which can include TV, print, radio and digital platforms (see box 4.1).

Table 4.5 summarises the application of advertising regulations across the media industry.

Table 4.5 Application of advertising regulation in Australia

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all advertisers?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
Industry codes adopted by industry associations	All advertising services directed at consumers in Australia.	✓ Applies to advertising directed to consumers in Australia.	✗ Applies to advertising supplied over any medium.	✓
Broadcasting codes and licence conditions overseen by ACMA ⁸²	Advertising broadcast on radio and TV.	✗ Different restrictions apply to different broadcasters.	✗ Does not apply to online or print publishers.	✗ ⁸²

Advertising regulations generally

Under the self-regulatory regime, the Australian Association of National Advertisers (AANA) states that its codes above apply to ‘advertising and marketing communications’ directed to customers in Australia in ‘any medium whatsoever including without limitation cinema, internet, outdoor media, print, radio, television, telecommunications, or other direct-to-consumer media including new and emerging technologies.’⁵¹⁵ The AANA Code of Ethics, for example, prohibits advertising that is misleading or deceptive, misrepresentative, discriminatory, sexually exploitative, unjustifiably violent, contrary to health and safety standards, or not clearly distinguishable as advertising to the audience (similar to the BSA regime above).⁵¹⁶ Other industries apply additional self-regulatory Codes to digital communications and social media, such as the alcohol industry’s Responsible Alcohol Marketing Code under which complaints are reviewed in parallel with Ad Standards.⁵¹⁷

513 Formerly referred to as the Ad Standards Bureau, see Ad Standards, About, [Our purpose](#), accessed 1 November 2018.

514 Noting that there is an exception for gambling advertising during live sporting broadcasts pursuant to the passage of the Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018 and associated ACMA Rules. This regulation applies to broadcast TV and radio via licences and creates separately liability for online live content providers including social networking services. A breach of the rules may result in a civil liability and ACMA may give remedial direction. See: ACMA, [FAQs Gambling Ads Live Streamed Sports](#), accessed 26 April 2019.

515 AANA, Codes, Practice Notes and Guidelines, [Advertising regulatory guide](#), accessed 13 February 2019.

516 AANA, [Code of Ethics](#), July 2018.

517 ABAC, [Frequently Asked Questions](#), accessed 13 March 2019.

Ad Standards handles complaints made under various advertising industry codes.⁵¹⁸ Ad Standards must take into account the relevant industry codes when evaluating complaints from the public regarding ads.⁵¹⁹ If the Ad Standards Community Panel upholds a complaint, it will ask an advertiser to remove or amend the offending ad as soon as possible.⁵²⁰

None of AANA, Ad Standards nor Australian Digital Advertising Alliance (ADAA) has any powers underpinned by law to compel advertisers to remove ads found to be in breach of codes of practice or to impose any other sanctions apart from public reporting of the breach.⁵²¹

Despite the regulation of TV ads under broadcasting legislation and codes, the majority (83 per cent) of recent complaints received by Ad Standards have been about TV ads.⁵²² Online ads, Posters and Pay TV were the subject of about 5 per cent, 4 per cent and 3 per cent of complaints respectively.⁵²³

Additional advertising regulations in broadcasting licence conditions

In addition to the above system of self-regulation (under which TV ads attracted the majority of advertising complaints), TV and radio broadcasting are also subject to co-regulatory restrictions under the BSA, RA and their broadcasting licence conditions.

Some licence conditions apply across multiple licence types, including prohibitions on tobacco advertising, prohibitions on therapeutic goods advertising (unless approved by the Therapeutic Goods Administration), and restrictions on political advertising.⁵²⁴ Others impose obligations on specific licensees, such as prohibiting community broadcasters from broadcasting ads, but allowing them to advertise sponsorship announcements within hourly limits.⁵²⁵

If a broadcaster breaches a standard licence condition, this constitutes an offence and the breach of a civil penalty provision; in contrast, the breach of a Code allows the ACMA to issue a remedial direction to a licensee, and any failure to comply constitutes an offence and the breach of a civil penalty provision.⁵²⁶ The ACMA can act on complaints about the content of radio broadcasts, including ABC and SBS services, provided those complaints have first been made directly to the broadcaster.⁵²⁷

Additional TV-specific advertising regulations

Ads provided on commercial TV broadcasting services are also regulated by:

- the Commercial Television Industry Code of Practice⁵²⁸, which requires ads to be classified and only broadcast in specific classified zones,⁵²⁹ places limits of no more than 13–16 minutes of advertising content per hour,⁵³⁰ and restricts the broadcast of ads for matters including alcoholic drinks, betting and gambling, intimate products and services.⁵³¹

518 These industry codes include the AANA, [Code of Ethics](#), AANA, [Code for Advertising and Marketing Communications to Children](#), AANA, [Food and Beverages Advertising and Marketing Communication Code](#), AANA, [Wagering Advertising Code](#), AANA, [Environmental Claims Code](#), as well as a number of other advertising industry codes adopted by the Australian Food and Grocery Council and Federal Chamber of Automotive Industries.

519 Ad Standards, [Review of Operations 2017](#), p. 11, accessed 1 November 2018.

520 Ad Standards, FAQs, [What happens when complaints about an advertisement are upheld by the Ad Standards Community Panel?](#), accessed 16 May 2019.

521 AANA, [What happens if the ad is in breach of a code?](#), March 2017, p. 4, accessed 1 November 2018; [Ad Standards, Self-Regulation](#), accessed 1 November 2018; iab Australia, [Australian Digital Advertising Policy & Regulation Guide 2015](#), accessed 22 February 2019.

522 Ad Standards, [Review of Operations 2017](#), p. 18, accessed 16 May 2019.

523 Ad Standards, [Review of Operations 2017](#), p. 18, accessed 16 May 2019.

524 ACMA, [Advertising on radio and TV](#), accessed 1 November 2018.

525 *Broadcasting Services Act 1992* (Cth) sch. 2, ss. 9(1)(b) and 9(3). Community television broadcasters are also subject to the Community Television Codes of Practice, and Community radio broadcasters are also subject to the Community Radio Broadcasting Codes of Practice, which outline how sponsorship announcements should be 'tagged' or distinguished: ACMA, [Community Television Broadcasting Codes of Practice](#), 9 June 2011, code 6, accessed 5 March 2019; ACMA, [Community Radio Broadcasting Codes of Practice](#), 23 October 2008, appendix 7, accessed 5 March 2019.

526 *Broadcasting Services Act 1992* (Cth), ss. 139–140, 141(6), 142, 142A.

527 ACMA, [Regulating radio broadcasters](#), accessed 1 November 2018.

528 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, accessed 1 November 2018.

529 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, section 2, accessed 1 November 2018.

530 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, section 5, accessed 1 November 2018.

531 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, section 6, accessed 1 November 2018.

- the Children’s Television Standards 2009⁵³², which restricts the amount and content of ads broadcast during designated children’s viewing periods
- the Broadcasting Services (Australian Content in Advertising) Standard 2018⁵³³, which requires that at least 80 per cent of advertising time broadcast annually between 6am and midnight be Australian-produced ads.⁵³⁴

Subscription broadcast, subscription narrowcast and open narrowcast TV broadcasters must comply with additional codes of practice. These contain obligations regarding the exposure of children to advertising, additional placement restrictions for sensitive ads and advertising during live sporting events.⁵³⁵

If a TV broadcast licensee breaches the Codes or Standards above, ACMA may issue a remedial direction and any failure to comply constitutes an offence and the breach of a civil penalty provision.⁵³⁶

Additional radio-specific advertising regulations

Regulations for commercial radio broadcasting ads are found in:

- the Commercial Radio Australia Code of Practice 2017,⁵³⁷ which restricts betting and gambling ads in live sports coverage and requires that advertising is clearly distinguishable from other programs⁵³⁸
- the Commercial Radio Disclosure Standard, which regulates the disclosure of sponsorship arrangements and requires broadcasters to publish a record of such arrangements on their website.⁵³⁹

Subscription narrowcast radio and open narrowcast radio broadcasters are subject to additional codes of practice,⁵⁴⁰ which restrict advertising that is offensive to certain minorities or advertising during a live sporting event, and impose complaints-handling procedures.

If a radio broadcast licensee breaches the Codes or Standards above, the ACMA may issue a remedial direction and any failure to comply constitutes an offence and the breach of a civil penalty provision.⁵⁴¹

Regulation of online advertising by broadcasters

The BSA and related Codes do not expressly apply to broadcasters’ online content and there is a lack of clarity about the treatment of certain broadcasting-like services distributed over the internet, where advertising often features heavily.⁵⁴² In some cases, it is unclear if a service falls under the BSA at all, such as certain subscription IPTV services.⁵⁴³ Where a service does not fall under the BSA, such as catch-up TV provided by commercial TV broadcasters,⁵⁴⁴ it is unclear whether broadcasters are voluntarily applying the same advertising restrictions to those excluded services and whether broadcasters are doing so consistently.

532 ACMA, [Children’s Television Standards 2009](#), accessed 1 November 2018.

533 ACMA, [Broadcasting Services \(Australian Content in Advertising\) Standard](#), 14 December 2018, accessed 5 March 2019.

534 ACMA, [Broadcasting Services \(Australian Content in Advertising\) Standard](#), 14 December 2018, s. 8, accessed 5 March 2019.

535 ASTRA, [Subscription Broadcast Television Codes of Practice 2013](#), s. 6, accessed 5 March 2019; [ASTRA, Subscription Narrowcast Television Code of Practice 2013](#), ss. 3.12–3.13, accessed 5 March 2019; [ASTRA, Open Narrowcast Television Codes of Practice 2009](#), s. 3.10, accessed 5 March 2019.

536 *Broadcasting Services Act 1992* (Cth), sections 139–140, 141(6), 142, and 142A.

537 ACMA, [Register of broadcasting codes and schemes index](#), accessed 1 November 2018.

538 Commercial Radio Australia, [Commercial Radio Code of Practice](#), 9 March 2018, ss. 4, 9, accessed 5 March 2019.

539 ACMA, [Commercial radio disclosure standard](#), accessed 27 April 2019.

540 ASTRA, [Codes of Practice 2013: Subscription Narrowcast Radio](#); ANRA, [Codes of Practice: Open Narrowcast Radio](#), ss. 2, 3A,6, accessed 5 March 2019.

541 *Broadcasting Services Act 1992* (Cth) ss. 139–140, 141(6), 142, 142A.

542 See R. Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#), 28 February 2012, p. 164 and ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 46.

543 ALRC, [Copyright and the Digital Economy \(DP 79, 2013\)](#), section 16.11; Department of Broadband, Communications and the Digital Economy, [Convergence Review \(2012\)](#), p. 167, accessed 26 February 2019.

544 Catch-up TV services are excluded from the BSA either because they make TV programs available ‘using the internet’ under the 2000 Determination (see Federal Register of legislation, [Determination under paragraph \(c\) of the definition of “broadcasting service” \(No. 1 of 2000\)](#), accessed 13 March 2019) or make ‘material available on demand’ which is exempted from the BSA (see *Broadcasting Services Act 1992* (Cth) section 6).

While there is evidence that most broadcasters apply the same principles in the BSA and codes to their digital media services, it is less clear whether broadcasters are taking the same approach in relation to services such as catch-up TV.⁵⁴⁵ Some commercial TV broadcasters have also adopted advertising terms and conditions that require ads for their online catch-up services to comply with applicable laws, regulations and codes without specifying what the applicable laws, regulations and codes are.⁵⁴⁶

Application to digital platforms

Not only are digital platforms not bound by the regulations specific to TV and radio broadcasters set out above, the general advertising regulations set out in the self-regulatory industry codes impose minimal restrictions on the advertising activities of digital platforms. The AANA codes apply to both online and offline ads, including ads on social news sites (such as Reddit), video-sharing sites (such as YouTube) and photo-sharing sites (such as Instagram).⁵⁴⁷ Google and Facebook are both members of AANA.⁵⁴⁸ However, digital platforms may not have many obligations under AANA Codes, because these Codes apply only to material published by or on behalf of advertisers or marketers who have 'a reasonable degree of control' over that material.⁵⁴⁹

There is minimal industry oversight over digital platforms' advertising services. In general, cases brought by Ad Standards are directed at the advertisers themselves rather than the platform displaying the ads.⁵⁵⁰ In contrast, the ACMA investigations are directed against broadcasters themselves.⁵⁵¹ The ADAA, established in part by AANA, has published self-regulatory Australian Best Practice Guidelines on Interest Based Advertising.⁵⁵² The signatories to the ADAA Guidelines include Google (but does not include social media platforms) and these Guidelines only provide for complaints to be made and dealt with by the signatories.⁵⁵³

An example of how advertising regulations result in additional requirements for broadcast TV and radio advertising is noted below in Box 4.2.

545 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#), 28 February 2012, p. 164–5.

546 See Network Ten, [Advertising Terms & Conditions](#), section 3.1(a)(i), accessed 28 May 2019; Seven West Media, [Terms and Conditions](#), Advertising Code of Practice, accessed 28 May 2019.

547 See AANA, Codes, Practice Notes and Guidelines, [Advertising regulatory guide](#), accessed 1 November 2018 and AANA, [AANA Marketing in the Digital Space Industry Practice Notice](#), s 1(b), accessed 15 February 2019.

548 AANA, [Our members](#), accessed 1 November 2018.

549 AANA, [Code of Ethics](#), p. 2 (definitions) accessed 7 March 2019.

550 Ad Standards, [Ad Standards Community Panel cases](#), accessed 27 February 2019.

551 See ACMA, [2017 television investigations](#), accessed 13 March 2019.

552 iab Australian on behalf of Australian Digital Advertising Alliance (ADAA), [Australian Best Practice Guidelines Interest Based Advertising \(September 2014\)](#), accessed 27 February 2019.

553 iab Australian on behalf of Australian Digital Advertising Alliance (ADAA), [Australian Best Practice Guidelines Interest Based Advertising \(September 2014\), accessed 27 February 2019.](#)

Box 4.2 Broadcast requirements for advertising that is ‘political matter’

The BSA contains a range of requirements for the broadcast of any ‘political matter’ at the request of another person.⁵⁵⁴ Compliance with these requirements is a condition of all television and radio broadcasting licences.⁵⁵⁵

‘Political matter’ in advertising is not limited to material broadcast during an election campaign and can include advertising that attempts to influence or comment upon a matter which is currently the subject of extensive political debate.⁵⁵⁶ Under the BSA, all licenced TV and radio broadcasters must ensure that they identify political matter and keep detailed information about the advertisers (which must be provided to the ACMA by notice) as well as ensure that such ads contain prescribed tagging after the announcement.⁵⁵⁷ Such rules do not apply to digital platforms. If a licence condition regarding the broadcast of any ‘political matter’ is breached, the ACMA may take enforcement action.⁵⁵⁸ However, the ACMA is not responsible for election or political matter appearing on the internet (unless that material is prohibited content, potential prohibited content or unsolicited commercial electronic messaging).⁵⁵⁹

The difference in the application of these requirements is highlighted in a 2018 Facebook ad that was distributed online and via free-to-air TV. In the TV version of the ad, it was reported that the words ‘fake news’ and ‘privacy’ were required to be removed from the narration, after industry association Free TV raised concerns that the ad could be construed as being political matter in nature if they remained. The online version was not required to make any changes.⁵⁶⁰

4.3.6 Telecommunications services providers

Overview of regulations

The *Telecommunications Act 1997* (Cth) (the Telecommunications Act) provides a regulatory framework for electronic communications, regulating network and infrastructure providers and carriage service providers. It has the capacity to regulate content service providers, though its ‘potential to serve as a vehicle for regulating content has been exploited to only a limited extent’.⁵⁶¹ The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) sets out additional provisions on consumer protection and the complaints-handling scheme administered by the Telecommunications Industry Ombudsman.

As noted above, ISPs are subject to some regulations under Schedules 5 and 7 to the BSA. The Telecommunications Consumer Protections Code (the TCP Code) is one of several industry codes of practice that include consumer safeguards. It sets out a range of consumer safeguards for mobile, landline and internet consumers.⁵⁶² It includes rules about how to communicate and deal with customers, advertising and point of sale, billing and payment methods, and complaints handling.⁵⁶³

Section 118 of the Telecommunications Act enables the ACMA to request the development of an industry code by defined sections of the telecommunications industry.⁵⁶⁴ The ACMA may issue directions to comply with the relevant industry code⁵⁶⁵ and formal warnings if a person has contravened an industry code.

554 ACMA, ‘[Election and political matter guidelines](#)’, accessed 31 May 2019.

555 ACMA, ‘[Election and political matter guidelines](#)’, accessed 31 May 2019.

556 Ad Standards, [Political and election advertising](#), accessed 31 May 2019.

557 *Broadcasting Services Act 1992*, sch. 2, pt. 2-(special conditions), s. 4.

558 ACMA, ‘[Election and political matter guidelines](#)’, accessed 31 May 2019.

559 ACMA, ‘[Election and political matter guidelines](#)’, accessed 31 May 2019.

560 J Duke and J. McDuling, [Facebook forced to take ‘fake news’ out of TV ad](#), *Sydney Morning Herald*, 4 July 2018, accessed 1 November 2018.

561 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 162.

562 ACMA, Communications Alliance, Industry Code, [Telecommunications Consumer Protections Code](#), variation 1/2018, accessed 1 November 2018.

563 ACMA, [The TCP Code](#), accessed 1 November 2018.

564 *Telecommunications Act 1997* (Cth), s. 118(1)(a).

565 *Telecommunications Act 1997* (Cth), s. 121.

Compliance with a direction from ACMA is compulsory and any subsequent failure to comply will trigger the civil penalty provisions under Part 31B.⁵⁶⁶ ACMA also has the power to determine mandatory industry standards under the Telecommunications Act in certain circumstances.⁵⁶⁷

Application to digital platforms

The rules that have been developed ensure that, among other things, consumers can access carriage services wherever they reside or carry on business, and that carriage services are supplied at certain performance standards that meet the needs of end users.⁵⁶⁸

Digital platforms do not fall within the current telecommunications framework, despite becoming increasingly important as communications platforms that are similar to traditional carriage services. For instance, in 2016, Mark Zuckerberg stated that Facebook Messenger and WhatsApp together accounted for around 60 billion messages a day, which is around three times more than the peak of global SMS traffic.⁵⁶⁹

4.3.7 Copyright and defamation law

Other general laws that impact on content creators and media businesses, such as copyright and defamation, can significantly impact the costs and benefits of creating content, including news and journalism. The ACCC notes that these are both complex areas of law and that stakeholders have raised difficulties and uncertainties with their application. Notwithstanding these complexities, the ACCC considers that these areas of law apply broadly the same rules to digital platforms as they do to other businesses which perform comparable functions.

Copyright law

Digital platforms such as search engines, social media platforms and content aggregation platforms, distribute vast amounts of third-party content online, including copyright-protected news media content. In performing this role, digital platforms are regulated by Australian copyright law in a broadly similar way as media businesses which perform comparable roles in distributing third-party copyright-protected content online. Content distributed via digital platforms constitutes published works that are eligible for copyright protection if they meet criteria for subsistence of copyright, similarly to content distributed via media outlets. A high-level overview of some key features of Australian copyright law as applicable to digital platforms and media businesses is set out at chapter 5 section 5.4 '*Regulation of digital platforms under copyright law*'.

There are, however, particular difficulties faced by rightsholders in enforcing copyright protections against digital platforms which have published copyright-infringing content. The ACCC's assessment of these enforcement difficulties and recommendation of a take-down code to address these difficulties is discussed in chapter 5 section 5.5 on '*Enforcing copyright protections against digital platforms*'.

Defamation law

Digital platforms are regulated by Australian defamation law in a broadly similar way to media businesses which perform comparable functions. That is, digital platforms that distribute defamatory materials on their platforms may be liable as 'secondary publishers' under defamation law, much like any media business which distributes defamatory material on its website or via another channel.

A high-level overview of some key features of Australian defamation law as applicable to digital platforms and media businesses is set out at appendix B.

566 *Telecommunications Act 1997* (Cth), s. 21(4) and pt. 31B s. 572G.

567 *Telecommunications Act 1997* (Cth), s. 125AA (ACMA must determine an industry standard if directed by the Minister). See, for example, the [Telecommunications \(Consumer Complaints Handling\) Industry Standard 2018](#) and the [Telecommunications \(Consumer Complaints\) Record-Keeping Rules 2018](#).

568 ACMA, Communications Alliance, Industry Code, [Telecommunications Consumer Protections Code](#), variation 1/2018, s. 1.3 (scope), accessed 23 May 2019.

569 Facebook Earnings Call Q2 2016 at [Facebook, Inc., Second Quarter 2016 Results Conference Call, July 27th 2016](#), p. 14. The ACCC notes that Mark Zuckerberg in a Q1 Earnings Call stated that Facebook Messenger and WhatsApp accounted for around 60 billion messages a day: SeekingAlpha, [Facebook \(FB\) Mark Elliot Zuckerberg on Q1 2016 Results – Earnings Call Transcript](#), 27 April 2016, accessed 28 May 2019.

4.4 The impact of regulatory imbalance on competition

Key finding

- Media regulatory disparity can distort competition by providing digital platforms with a competitive advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions.

The above section discussed the differing layers of regulations imposed on different types of media businesses and on digital platforms, even when they perform similar functions. As both news media businesses and digital platforms compete in the supply of advertising services and sometimes also for rights to content, the regulatory disparities can distort competition in these markets.

Digital platforms are likely to have a competitive advantage where media businesses operate under more restrictions on their ability to generate revenue, and where they incur greater compliance costs.

4.4.1 Impact on rivalry for advertising revenue

Regulatory imbalance may impede the ability of media businesses to compete with digital platforms for advertising revenue by imposing greater costs on media businesses. These costs can relate to:⁵⁷⁰

- compliance costs** associated with the time and resources needed to meet the requirements under any additional regulations
- regulatory restrictions** that constrain media businesses' commercial decisions and thereby limit their opportunities to generate revenue.

Compliance costs incurred by media businesses

Compliance costs include the time and resources dedicated to ensuring compliance with regulations such as the BSA or relevant mandatory industry codes. For example, some codes require broadcasters to meet minimum quotas for certain types of content, which can impose significant additional costs on the broadcasters.⁵⁷¹

Stakeholder submissions note the increased compliance costs imposed by additional regulation on media businesses.⁵⁷² For example, Free TV submits that commercial free-to-air broadcasters are required to screen a collective total of at least 1 170 hours of programming annually for children aged up to 14, despite reporting significantly declining audience figures in recent years.⁵⁷³ Commercial Radio Australia submits that 'radio is forced to divert significant portions of its resources into compliance with the regulatory framework', in contrast with digital platforms who 'are able freely to meet new audience demands and direct almost all resources towards the creation of further revenue'.⁵⁷⁴ Other compliance costs not borne by digital platforms include requirements for some broadcasting licensees to provide compliance reports⁵⁷⁵ or to publish registers disclosing any commercial agreements to the ACMA.⁵⁷⁶

In 2014, the ACMA commissioned a report from PwC on 'The cost of code interventions on commercial broadcasters' (the PwC Report), which assessed the financial impacts imposed on commercial television and radio broadcasters by industry codes of practice by conducting online surveys and targeted interviews with radio and television networks. The PwC report found that commercial TV broadcasters perceived complaints handling to be the most burdensome compliance cost, followed by captioning provisions and scheduling-related requirements (including the classification and placement of commercials).⁵⁷⁷

570 See further discussion in ACMA, [The cost of code interventions on commercial broadcasters](#), March 2014, ch. 5.

571 See also Free TV, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 27-28.

572 See, for example Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2; Free TV, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 27.

573 Free TV, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 27.

574 Commercial Radio Australia, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 6.

575 *Broadcasting Services Act 1992* (Cth)s. 130ZZC.

576 ACMA, [Commercial Radio Disclosure Standard](#), s. 11.

577 ACMA, [The cost of code interventions on commercial broadcasters](#), March 2014, p. iv.

The majority of these compliance costs are not similarly imposed on digital platforms by regulations on their supply of audio-visual content online.

Regulatory restrictions imposed on media businesses

Advertising regulations imposed on media businesses can constrain their commercial decisions and thereby limit their opportunities to generate revenue relative to the digital platforms. In general, digital platforms have far greater flexibility regarding the frequency and number of ads shown (for example, YouTube’s introduction of stacked ads⁵⁷⁸) in comparison to commercial TV broadcasters who are limited to 13–16 minutes of advertising content per hour.⁵⁷⁹ In the PwC report, TV broadcasters considered this restricted advertising time to impose the greatest opportunity cost burden, because restricting advertising to 13 minutes per hour during prime time even though the average length of program material is 42–44 minutes leaving a three-to-five minute gap every hour that broadcasters cannot monetise.⁵⁸⁰ Figure 4.17 below demonstrates the different layers of advertising regulations applicable to video content delivered over live TV, subscription TV, catch-up TV and online.

Figure 4.17 Advertising regulations applicable to video content delivered over different channels

Regulatory layers with advertising restrictions	Free-to-air live TV	Subscription TV	Catch-up TV	Online (digital platforms)
Internal codes and policies (if any)	Yes	Yes	Yes	Yes
Self-regulation (Ad Standards) - AANA Codes Cover offensive, misrepresentative, discriminatory advertising; ‘clearly distinguishable’ as advertising; advertising to children, etc	Yes	Yes	Yes	DPs are signatories but do not appear to have obligations under AANA
Co-regulation (ACMA) - legislation and licences Must have broadcasting licence and comply with BSA, RA and licence conditions	Yes	Yes	Unclear if co-regulatory regime applies	No
Co-regulation (ACMA) - Industry Codes and standards Advertising time, local content, sensitive material, sponsorship and record-keeping	Yes	Yes	Unclear if co-regulatory regime applies	No

578 Google Ads Blog, [How evolving user patterns drive new and experiences on YouTube](#), 21 November 2018, accessed 4 April 2019.

579 ACMA, [Commercial Television Industry Code of Practice](#), ss. 5.3–5.4.

580 Between 42–44 minutes is the typical length of program material produce in the United States, and this has become the de-facto ‘standard’ in Australia. There is, however, no industry standard for how long television programs should be in the United States and their length is ultimately determined by each network’s consideration of factors such as production costs, audience tolerance, market demand for advertising, and the artistic needs of the producer/director: ACMA, [The cost of code interventions on commercial broadcasters](#), March 2014, p. 85–6.

Advertising restrictions in radio broadcasting codes of practice similarly impose significant costs on radio broadcasters. For example, the majority of radio broadcasters surveyed in the PwC report identified advertising regulations as imposing the greatest cost burden at a value of millions of dollars a year in lost revenue.⁵⁸¹ Figure 4.18 below demonstrates the different layers of advertising regulations applicable to audio content delivered over live radio, subscription radio, podcast, and online.

Figure 4.18: Advertising regulations applicable to audio content delivered over different channels

Regulatory layers with advertising restrictions	Free-to-air live radio	Subscription radio	Catch-up radio	Online (digital platforms)
Internal codes and policies (if any)	Yes	Yes	Yes	Yes
Self-regulation (Ad Standards) - AANA Codes Cover offensive, misrepresentative, discriminatory advertising; 'clearly distinguishable' as advertising; advertising to children, etc	Yes	Yes	Yes	DPs are signatories but do not appear to have obligations under AANA
Co-regulation (ACMA) - legislation and licences Must have broadcasting licence and comply with BSA, RA and licence conditions	Yes	Yes	No	No
Co-regulation (ACMA) - Industry Codes and standards Advertising time, local content, sensitive material, sponsorship and record-keeping	Yes	Yes	No	No

Submissions from stakeholders have noted that additional regulations specific to radio and broadcasters directly impacted on their ability to generate advertising revenue.⁵⁸² For example, there are particular election advertising restrictions applicable to broadcasters (but not online or print publishers).⁵⁸³

581 ACMA, [The cost of code interventions on commercial broadcasters](#), March 2014, p. 100-1.

582 Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 14; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 6-7.

583 See for example, Australian Radio Network, [Submission to the ACCC Issues Paper](#), April 2018, p. 4. Schedule 2, cl. 3A of the BSA requires that a broadcaster must not broadcast an election ad from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a licence area, or an area where a broadcast can normally be received.

Box 4.3 below discusses a key example which restricts broadcasters' ability to display advertising during blackout periods.

Box 4.3 Case study – Election advertising restrictions: Blackout periods

The BSA provides that a broadcaster must not broadcast any election ads during a blackout period before an election, where an election is to be held in an area which relates to a broadcast licence area or an area where a broadcast can normally be received.⁵⁸⁴

This election advertising blackout applies to all TV and radio broadcasters, but does not apply to any print publishers, online publishers, or digital platforms.⁵⁸⁵ This leads to an imbalance where digital platforms are able to earn advertising revenue from the display of election advertising during a blackout period during which TV broadcasters are not able to earn advertising revenue in the same way.

The ACCC has been provided with information which suggests that, in the weeks prior to a blackout period, election advertising spend on broadcast TV trends upwards, reaching a peak immediately prior to blackout (noting that the level of that revenue, given the range of varying factors in marketing spend, is not clear).⁵⁸⁶

box 4.4 discusses requirements which apply to the display of election advertising more generally via broadcasting licences as well as initiatives some digital platforms have introduced relating to election advertising.

Box 4.4 Case study – Election advertising requirements: Display of election ads

The BSA requires TV and radio broadcasters to announce the name and address of the person or entity authorising an ad; provide all contesting parties a reasonable opportunity to have election matter broadcast; and keep records relating to a broadcast of a political subject or current affairs, or of persons requesting political matter be broadcast.⁵⁸⁷

However, these restrictions do not apply to catch-up TV or video content streamed online via digital platforms including YouTube or Facebook, although digital platforms are subject to the restrictions in the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act) discussed below.

Although traditional broadcasters and digital platforms are subject to the AANA self-regulatory codes, Ad Standards does not hear consumer complaints about the truth and accuracy of political advertising or the offensiveness of political advertising.⁵⁸⁸

Following amendments in 2018, the Electoral Act now applies to electoral communications all year round and encompasses electoral ads on social media, search advertising and video-sharing applications such as YouTube. It requires advertising on such digital platforms to disclose the name and address of the person responsible for the ads, aligning with the authorisation (but not additional) requirements in the BSA above.⁵⁸⁹

There have been public reports, however, that enforcement of these obligations against some digital platforms has been difficult,⁵⁹⁰ and there have been some reports that some digital platforms have failed to ensure sufficient transparency about links to political ads.⁵⁹¹

584 Broadcasting Services Act, sch. 2, Clause 2A. See also, Australian Radio Network, [Submission to the ACCC Issues Paper](#), April 2018, p. 4; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 28.

585 ACMA, [Election and political matter guidelines](#), accessed 30 April 2019.

586 Information provided to the ACCC as part of this inquiry.

587 ACMA, [Election and political matter guidelines](#), accessed 13 March 2019.

588 Ad Standards, [Political and election advertising](#), accessed 13 March 2019.

589 Australian Electoral Commission, [Electoral Background: Electoral communications and authorisation requirements](#), updated 23 April 2019.

590 P McGrath, 'Facebook probed by Australian Electoral Commission over mysterious political ads', 26 February 2019, *ABC News*, accessed 30 May 2019.

591 C Knaus, 'Authorities can do nothing about pro-coal ads linked to Glencore campaign', *The Guardian*, 12 March 2019, accessed 30 May 2019.

In response to growing concerns regarding transparency of online political advertising, some digital platforms are implementing new rules and policies to deal with this issue. For example, Twitter now requires political ads to be labelled and advertisers to verify they are located in Australia,⁵⁹² while Facebook has introduced an Ads Library archive that lets users search the number of times an ad was viewed and what audiences saw it.⁵⁹³ The ACCC notes, however, that these initiatives are self-imposed and largely self-regulated by the digital platforms.

4.4.2 Impact on rivalry for access to content rights

Many digital platforms access a range of different sources of content, including significant amounts of user-uploaded content and most do not compete directly with media businesses for content. However, there is evidence to suggest that some digital platforms and media businesses may be rivals in overseas markets for content rights.

In some instances, for example, digital platforms compete with other media businesses for sports streaming rights:

- In June 2018, Facebook won exclusive broadcast rights to show live Premier League matches in Thailand, Vietnam, Cambodia and Laos. The deal is reportedly worth about GB£200 million and Facebook won the auction for these coveted rights over television networks BeIn Sports and Fox Sports Asia.⁵⁹⁴
- In May 2018, Amazon purchased the rights to broadcast 20 live Premier League matches a season for three years from 2019 to Amazon Prime's UK members (noting that Amazon is not considered a digital platform within the scope of this Inquiry).⁵⁹⁵

There are media reports that Facebook has signed deals to stream content from the NRL, AFL and Women's Big Bash League cricket.

Radio broadcasters submit that they consider digital platforms to be rivals in the supply of audio content, following the increasing popularity of voice-activated devices, including Amazon's Echo smart speakers, Google Home smart speakers, and Apple Homepod smart speakers.⁵⁹⁶ Smart devices that are asked news related queries may play snippets of audio taken directly from commercial radio news broadcasts.⁵⁹⁷ For example, Google Home will respond to commands to play "the latest news", or play news from a specific media provider or by topics including general news, technology, sports, world, politics, local, business, science and health.⁵⁹⁸ See chapter 8 for further discussion on these devices.

Where digital platforms and media businesses are rivals for content rights, digital platforms will again have a competitive advantage over media businesses if they can operate under fewer regulatory restraints and with lower regulatory compliance costs.

592 A Bogle, '[Twitter rolls out new advertising rules to fight political misinformation](#)', *ABC News*, 20 February 2019, accessed 30 May 2019. See also 'Political Content' section in Twitter, [Twitter Ads Policies](#), accessed 30 May 2019; Twitter, [Political content in Australia](#), accessed 30 May 2019; Twitter, [How to get certified as a political campaigning advertiser](#), accessed 30 May 2019.

593 M Zuckerberg, '[The internet needs new rules. Let's start in these 4 areas](#)', *Washington Post*, 30 March 2019, accessed 30 May 2019.

594 M Hughes, '[Facebook agreed first Premier League broadcast deal](#)', *The Times*, 6 July 2018, accessed 30 May 2019.

595 BBC Sport, '[Premier League TV Rights: Amazon to show 20 matches a season from 2019-2022](#)', 7 June 2018, accessed 9 September 2018.

596 See for example, [Southern Cross Austereo, Submission to the ACCC Issues Paper](#), April 2018, p. 4, accessed 30 May 2019.

597 There are media reports that Google is asking some publishers to break down audio content such as podcasts, audio news briefings, and radio broadcasts into "single topic stories" that Google's algorithm can reorganise into a personalised newsfeed for individual users based on their interests: see, for example M Miller, '[Google opens up new front to exploit audio](#)', *The Australian*, 11 February 2019, accessed 30 May 2019.

598 Google Home help, Explore features, [Listen to news](#), accessed 19 October 2018.

4.4.3 Impact on consumers

Regulatory disparities between digital platforms and media businesses may have other impacts on consumers by exposing consumers to advertising or content that is subject to fewer controls, which is particularly likely to impact vulnerable consumers and children. For instance, consumers may be harmed by being exposed to content that has been through less rigorous quality control, fewer content filters, and less general oversight in comparison with content supplied by media businesses. As a consequence of digital platforms' personalisation of content to users, it can also be difficult to get a clear indication of the quality and quantity of information and advertisements presented to individual digital platforms users.⁵⁹⁹

Consumers may be exposed to inappropriate ads where regulations do not consistently restrict advertising across all media formats. Stakeholders have made submissions raising concerns that there is little effective regulation to protect children from targeted online advertising.⁶⁰⁰ The Foundation for Alcohol Research and Education submits that '[d]espite digital platforms having age requirements, many children under the age of 13 regularly use Facebook, Snapchat and Instagram', which can increase children's exposure to alcohol marketing and their likelihood to start drinking earlier.⁶⁰¹ The Obesity Policy Coalition has noted that the immersive and embedded nature of some ads that are blended with unpaid content may particularly affect children who have reduced capacity to understand the commercial and persuasive intent behind advertising messages.⁶⁰² A 2018 report by the Obesity Policy Foundation found that:

'The way the food industry codes apply to digital marketing is complex and often unclear. Overall, the codes have failed to keep pace with the changing media landscape and the rise of digital marketing, and do not adequately protect children'.⁶⁰³

The Public Health Association of Australia submits that the growth of marketing on digital platforms has 'created new opportunities for marketers of unhealthy commodities such as alcohol, unhealthy food and gambling', because they are cheaper, lack transparency, make parental surveillance more difficult, and have only minimal regulatory requirements.⁶⁰⁴

Consumers may be exposed to inappropriate content where content rules do not consistently regulate the content being displayed to audiences across Australia. A recent example of inconsistent content standards with the potential to result in harm to Australian audiences is the disparity in regulation covering media businesses' and digital platforms' delivery of video content from the Christchurch attack in March 2019 – see discussion in box 4.4 'Case study – Video content from Christchurch terrorist attack'.

599 UK Commons Select Committee, Digital, Culture, Media and Sports, 8th Report, [Disinformation and 'fake news': Final Report](#), 18 February 2019, p. 11-12, accessed 30 May 2019. See also N. Evershed and C Knaus, '[Help us monitor political advertising in Australia](#)', The Guardian, 24 July 2018, accessed 30 May 2019; C Knaus and N. Evershed, '[Electoral watchdog powerless to crack down on offshore political ads targeting Australians](#)', The Guardian, 24 July 2018, accessed 30 September 2018; Facebook, Response to questions on notice before [US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, p. 204, question 3, accessed 30 May 2019.

600 See for example, [Obesity Policy Coalition, Submission to the ACCC Issues Paper](#), April 2018, p. 3.

601 Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platform Inquiry Preliminary Report](#), February 2019, p. 10.

602 [Obesity Policy Coalition, Submission to the ACCC Issues Paper](#), April 2018, p. 6.

603 Obesity Policy Coalition, '[Overbranded, Underprotected: How industry self-regulation is failing to protect children from unhealthy food marketing](#)', July 2018, p. 14.

604 Public Health Association of Australia, [Submission to the ACCC Digital Platform Inquiry Preliminary Report](#), February 2019, p. 4.

Box 4.4 Case study – Video content from Christchurch terrorist attack

During the Christchurch terrorist attack in March 2019, Facebook and other platforms were used to live-stream the 17-minute attack on two mosques in Christchurch.⁶⁰⁵

A number of commercial, national and subscription television broadcasters displayed redacted versions of the live-streamed content to Australian audiences and are now under formal investigation by the ACMA.⁶⁰⁶ The ACMA has also announced that it is in close contact with the Australian Press Council as it reviews its member publishers' coverage of the Christchurch attack.⁶⁰⁷ As discussed earlier, compliance with mandatory industry codes of practice is a licence condition for Australian broadcasters and the ACMA can impose fines for any breaches of a licence condition.

The digital platforms that were used to live-stream the video content, however, fall outside the ACMA's remit and cannot be similarly investigated or sanctioned.

Following this event, in April 2019, the Australian Government passed legislation which introduced new criminal offences which apply to providers of hosting services or content services (which includes social media services) and internet service providers and require the referral to authorities and expeditious removal of 'abhorrent violent material' reasonably capable of being accessed within Australia.⁶⁰⁸

Another example of regulatory disparity that may result in harm to consumers is inconsistent restrictions on alcohol advertising. This regulatory disparity is discussed in Box 4.5 'Case study – Alcohol advertising restrictions'.

Box 4.5 Case study – Alcohol advertising restrictions

Advertising on broadcast TV is overseen by a co-regulatory regime with oversight by the ACMA, whereas advertisers on digital platforms are only self-regulated under industry codes.

The co-regulatory regime imposes restrictions on commercial TV broadcasters regarding when alcohol ads can be broadcast (for example, at specified times within mature classification zones or certain sporting events, and not during a children's or preschool program) and also limits more generally the amount and frequency of advertising to children.⁶⁰⁹

The self-regulatory codes applicable to digital platforms impose some similar conditions to the co-regulatory regime (for example, they also prohibit alcohol advertising targeted at children⁶¹⁰), other self-regulatory codes additionally require alcohol marketers using digital communications to use age restrictions where available on media platforms.⁶¹¹ Many digital platforms include these requirements in their policies.⁶¹² However, there have been growing concerns about children's exposure to theoretically age-restricted online ads where they have lied about their age,⁶¹³ and it is not clear whether or how certain digital platforms corroborate the age inputs of users. Comparable risks arise with traditional TV broadcasts if children watch content outside children's programming hours, and reviews have suggested that regulations such as time zone restrictions are 'anachronistic' given developments in online content and should be phased out in favour of tools like parental locks.⁶¹⁴

605 M Mason and P. Smith, '[Facebook, Twitter, Google escape as old media faces ACMA Christchurch censure](#)', *Australian Financial Review*, 18 March 2019, accessed 30 May 2019.

606 ACMA press release, '[Investigation into broadcasts of Christchurch terrorist attack](#)', 18 March 2019, accessed 30 May 2019.

607 ACMA press release, '[Investigation into broadcasts of Christchurch terrorist attack](#)', 18 March 2019, accessed 30 May 2019.

608 *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth).

609 ACMA, '[Commercial Television Industry Code of Practice](#)', 1 December 2015, accessed 6 March 2018; ACMA, '[Children's Television Standards 2009](#)', made under s. 122(1) of the BSA.

610 AANA, '[Code for Advertising and Marketing Communications to Children](#)', section 2.12; ACMA, '[Children's Television Standards 2009](#)', section 36.

611 The ABAC '[Responsible Alcohol Marketing Code](#)' applies to marketing communications on television, radio, digital communications (including mobile and social media and user-generated content) which are 'by or within the reasonable control of a marketer': ABAC, '[ABAC Responsible Alcohol Marketing Code](#)', s. 2(a).

612 Google, Facebook and Instagram, YouTube, Twitter and Snap's policies prohibit alcohol ads from targeting minors, restrict the content of alcohol ads using similar language, and some use age-screening features that prevent access to minors with accounts.

613 Ad Standards, '[Community Perceptions 2007-2017](#)', p. 31, accessed 8 May 2019; NSW Legislative Council Standing Committee on Social Issues, '[Strategies to reduce alcohol abuse among young people in New South Wales](#)', report 48, December 2013), pp. 60 (para. 5.57) 67 (para. 5.96), accessed 27 February 2019.

614 ALRC, '[Classification—Content Regulation and Convergent Media](#)', 1 March 2012, p. 61.

4.5 The case for fundamental regulatory reform of media services industries

Key finding

- The current, sector-specific approach to media regulation in Australia has not adapted well to digitalisation and media convergence, including not readily capturing new media providers such as digital platforms. This reduces the overall effectiveness of the current media regulatory framework.

This Inquiry has required an examination of the impact of digital platforms on the state of competition in media services markets and the impact of longer term trends, such as innovation and technological change, on competition in this market.

The ACCC's findings above indicate that the existing Australian media services regulatory framework has not adapted consistently to digitalisation and the shift to online provision of media services, including not consistently capturing new media providers such as digital platforms.

4.5.1 Impact of media convergence on current regulatory silos

As described above, the different regulatory frameworks that currently govern the media, communications, and telecommunications industries reflect historic industry silos that imposed different rules on the providers of different services.⁶¹⁵ However, the increasing convergence of these industries means that their once separate functions increasingly overlap—for example, where video content previously available only via television broadcast is now widely accessible over the internet.⁶¹⁶

The ACMA has previously observed that the blurring of boundaries between devices, services and industry sectors within a regulatory landscape that has nevertheless retained its historical distinctions is leading to inconsistent regulatory treatment of similar content, devices and services.⁶¹⁷

The ACMA has also noted that there are enduring policy objectives of the Australian media and communications regulation 'that are of continuing public and commercial significance in Australia and which persist independently of the technology, service or business model used to deliver content and services'.⁶¹⁸

These include maintaining safeguards for the community, cultural values, social and economic participation and maintenance of market standards.⁶¹⁹ It is important that the design of any new communications and media regulatory framework takes into account these enduring concepts that underpin present and future intervention in communications and media markets in Australia.⁶²⁰

Are sector-specific rules still necessary?

The ACCC recognises that sector-specific regulations are often underpinned by sound reasons based on differences in the functions or impact of the regulated entities. However, the convergence of industries calls into question the continuing necessity of many elements of the current regimes. As noted in the ACMA's Broken Concepts report:

*'the process of convergence has broken, or significantly strained, the legislative concepts that form the building blocks of current communications and media regulatory arrangements.'*⁶²¹

615 As discussed in Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 162; ALRC, [Classification - Content Regulation and Convergent Media](#), 1 March 2012, p. 61.

616 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), see definition of 'convergence' at p. 174.

617 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

618 ACMA, [Enduring concepts: communications and media in Australia](#), November 2011, p. 10.

619 ACMA, [Enduring concepts: communications and media in Australia](#), November 2011, p. 14.

620 ACMA, [Enduring concepts: communications and media in Australia](#), November 2011, p. 5.

621 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 5.

In particular, the Broken Concepts report notes that convergence has resulted in a ‘misplaced emphasis in the legislative framework or underlying policy that skews regulatory activity towards traditional media or communications activity’ and away from other newer forms of content delivery.⁶²² For instance, the ACMA has noted that many of the consumer safeguards under the Telecommunications Act focus on voice services, with much less emphasis in regulation on other communications services such as video communications that are of increasing commercial and social significance.⁶²³

As such, many of the existing broadcasting legislative concepts have been highlighted in past reviews as outdated and no longer necessary in the new media landscape.⁶²⁴ For example, the current broadcasting and datacasting licensing arrangements may no longer be necessary, as new online content services reduce the rationale for special regulation of broadcasting services through licence arrangements.⁶²⁵

Are sector-specific rules still effective?

Media and communications convergence calls into question the continuing effectiveness of existing laws at achieving their intended objectives. Both the ACMA and the Department of Communications and the Arts (DOCA) have noted that, although ‘many of the objectives of existing regulation remain appropriate, the regulatory mechanisms used to achieve those objectives are not working’.⁶²⁶ For example, the online programs are still excluded from the definition of a ‘broadcasting service’ under a Ministerial Determination discussed, which has created a widening gap in the regulation of online and offline content over time as online content grows in availability and popularity.⁶²⁷

The ACMA has noted that some results of media convergence include:⁶²⁸

- misalignment of policy and legislative constructs with market, behavioural and technological realities
- gaps in the existing framework’s coverage of new forms of content and applications
- piecemeal responses to new issues, as core communications legislation is incrementally amended and supplemented to address the rapid change occurring in the communications sector over the past two decades (see figure 4.16), fragmenting the communications legislative landscape and reducing the overall coherence of the regulatory scheme
- institutional ambiguity as a consequence of sectoral convergence such that several regulators—or no regulators—have a clear mandate to address pressing market or consumer concerns.

4.5.2 The benefits of a harmonised framework

In contrast to the fragmentary frameworks currently in place, a coherent, platform-neutral legal framework that covers both online and offline delivery of media content to Australian consumers could create significant benefits for consumers and for participants in the Australian media and communications industries.⁶²⁹

Potential benefits of a coherent legal framework that would remove redundant legislation and implement a platform-neutral legal framework for consumers and for industry participants include the following:

- improve regulatory parity to enable different businesses that perform comparable functions to be regulated in the same way, thereby creating a more level playing field between market participants and increasing competition on the merits

622 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

623 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

624 See Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), Appendix K, ALRC Content regulation report; and ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011.

625 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 23.

626 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 3.

627 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

628 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

629 Such an approach to regulation would also be consistent with that outlined in the Department of Prime Minister and Cabinet, [The Australian Government Guide to Regulation](#), March 2014, p. 5, accessed 24 October 2018.

- remove redundant legislation to reduce the overall regulatory cost on media and communications industries and to reduce the associated regulatory burden on relevant Government agencies
- simplify the complex system of regulations currently in place
- enable the determination of issues most important to Australian audiences and ensure that such issues are more consistently and reliably protected under the new regime. The coverage of the law would evenly extend to all the different types of content delivered to Australian consumers across different media formats, including online content. This would improve the ability of the law to safeguard community expectations and standards
- allow the establishment of more flexible, technology-neutral principles that could better respond to technological change and adapt to new innovations in the dynamic and rapidly-changing media and communications industries
- improve the competitiveness of Australian digital content industries in a dynamic and increasingly-global media environment.

There are significant benefits to be derived from a fundamental reform of the Australian media and communications regulatory frameworks to adequately address the challenges of digitalisation and convergence. The realisation of these benefits, however, requires an analysis of issues and markets beyond the remit of this Inquiry. This is because the regulatory disparities identified above affect a large number of policy areas, outside the focus of the Inquiry and any proposals for reform will similarly have far-reaching and impacts.

Broader reform of these intricate and technical areas of law and policy requires a fine balancing of competing interests that warrants in-depth consideration and guidance by the Government. A number of issues raised with the ACCC in this course of this Inquiry have been the subject of previous Government reviews and reports in relation to media and intellectual property regulation. These are listed at appendix C.

4.6 Recommendation to address regulatory imbalance

4.6.1 Recommendation 6 – process to implement harmonised media regulatory framework

A new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms. This would create a level playing field that promotes competition in Australian media and advertising services markets.

The framework should reflect the evolving media landscape and be underpinned by a sound policy rationale based on the functions or impact of the regulated entities. The framework should include the following matters:

- **Underlying principles:** clear platform-neutral guiding principles that are applicable across media formats and platforms, and adaptable to new services, platforms and technologies.
- **Extent of regulation:** determination of the appropriate extent of regulation and determining appropriate roles for self-regulation and co-regulation.
- **Content rules:** a nationally-uniform classification scheme to classify or restrict access to content consistently across different delivery formats.
- **Advertising restrictions:** a consistent system of advertising restrictions across all delivery platforms, including online and offline channels.
- **Enforcement:** appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions.

Given the significance of this reform, the ACCC recommends it be approached in stages to ensure that regulatory disparities of immediate concern are promptly addressed.

Overview

Digitalisation and media convergence have transformed Australian media markets and raised questions about the continuing efficacy of differing layers of regulation applied to publishers, broadcasters, and digital platforms. As such, the ACCC recommends the Government to undertake broader reform of the existing fragmentary systems of regulations that apply to converging media and communications industries in Australia, such that common rules apply to the production and delivery of content occurring online and offline.

Removing obsolete regulations and updating the remaining regulations for the new media and communications landscape will benefit both market participants and consumers, by creating a level playing field that improves competition in the relevant markets and ensures consistent coverage of the regulations to achieve their objectives.

The Preliminary Report indicated in its preliminary recommendations that a process to create a platform-neutral framework should be commenced through a separate, independent review. However, following consideration of submissions and the views of parties which generally supported the creation of a platform-neutral framework, Recommendation 6 has been amended to emphasise that the ACCC is not recommending a specific review process but supports a process, as deemed appropriate by the Government, that can commence the design of a platform-neutral media regulatory framework. The design of this process may be supported by relevant findings from the many recent Government reviews and reports in relation to media and intellectual property regulation listed at appendix C.

Stakeholder views

A large range of stakeholders expressed support for the Preliminary Report's recommendation that a review be undertaken into Australia's media regulatory frameworks, including media businesses such as ABC, Foxtel, The Guardian, and Getty Images; industry associations such as MEAA, Commercial

Radio Australia, and Croakey Health Media; and advocacy groups such as the Obesity Policy Coalition, Public Health Association of Australia, and the Foundation for Alcohol Research and Education.⁶³⁰

In particular, Getty Images and the Guardian supported the creation of a platform-neutral framework to level the playing field between digital platforms and other media businesses to ensure that all parties involved in content creation and delivery are governed by the same regulatory framework.⁶³¹ SBS submits that a 'platform-neutral approach to the regulation of broadcast and online platforms would be more efficient, and clearer for audiences as it standardises rules, complaint and compliance processes'.⁶³² The AANA supports 'mechanisms that would create a new level playing field across all media providers, given that both 'traditional' and 'new' media platforms embrace digitisation'.⁶³³ Google submits that it 'understands that aspects of media regulation in Australia may benefit from review' to 'adjust to modern technology and community expectations'.⁶³⁴

Some stakeholders argued that, instead of or in addition to a review, more immediate changes should be implemented to remove regulatory disparity in media regulations. Free TV submits that, although it would be 'an active and willing participant' in the recommended review, there have already been several recent reviews of the media landscape and 'there are clear actions that the Government can take immediately to address the regulatory disparity'.⁶³⁵ Commercial Radio Australia submits that such a review 'is likely to take several years to complete and implement' and strongly urges immediate action to address the most glaring inequalities present in the current regulatory structure.⁶³⁶

Some stakeholders opposed broader reform of the current media regulatory frameworks. For example, the Australian Press Council submits that it is 'not convinced about the need for major change to the current regulatory arrangements covering the print and news sector'.⁶³⁷ The Australian Council on Children and the Media submits that it is also 'not convinced that uniformity across platforms is necessary' as different platforms present different regulatory challenges and, if some platforms can be regulated more effectively than others, this regulation should be retained.⁶³⁸

The ACCC notes that the goal of this recommendation is not to achieve absolute uniformity of regulation across media businesses and digital platforms, particularly where they perform different functions. Instead, the process to create a platform-neutral media regulatory framework seeks to set out clear rules based on sound policy objectives applicable to a converging media landscape and adaptable to future developments. This new system of regulation should both establish a level playing field between market participants who perform comparable functions in the production and delivery of content in Australia, as well as take into account relevant differences between market participants, whether in the scope, impact, or nature of their activities and functions.

630 See submissions from Australian Broadcasting Corporation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 13; Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 1-2; Getty Images, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Media, Entertainment and Arts Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 3-4; Croakey Health Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 10; Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 2-3; Public Health Association of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5; Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 5, 12-16; Commercial Radio Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 2, 7; Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 1, 7-9; Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 1, 16-17.

631 Getty Images, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1. Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 16.

632 Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

633 Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report, February 2019](#), p. 1.

634 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 50.

635 Free TV, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 27.

636 Commercial Radio Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

637 Australian Press Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

638 Australian Council on Children and the Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

Key matters for consideration

The process to create a platform-neutral media regulatory framework should focus on regulating content production and delivery in a platform-neutral framework and include a review of each of the following matters.

1. Underlying principles

First, it is critical to establish clear guiding principles for platform-neutral regulations that can apply effectively to the digital economy and accommodate continuing technological changes and shifts in how media services are created and delivered to Australian audiences. This is key to creating a level playing field where entities which perform similar functions in Australian media markets can be regulated similarly. In this regard, the ACCC notes Google's submission that 'any review of media regulation should be conducted with the guiding principle that companies engaged in the same activity should be consistently regulated in respect of that activity' and that the review should account for differences among different types of online activities.⁶³⁹

The ACCC notes that the underlying principles for the media regulatory framework must continue to protect the freedom of the media, including the independence of Australia's public broadcasters and other independent media organisations. In this regard, the ACCC notes the ABC's submission that 'public broadcasters and commercial entities do not, and should not, require the same regulatory treatment'.⁶⁴⁰ Similarly, SBS submits that '[a]ny such framework should retain the independence of the public broadcasters'.⁶⁴¹ Croakey Health Media submits that the regulatory framework should accommodate the needs and aspirations of independent media organisations and 'should be driven by public interest considerations rather than corporate media interests'.⁶⁴² The Australian Press Council submits that the existing industry self-regulatory arrangements best ensure an independent and free print and online news media sector operating without the threat of government interference or oversight.⁶⁴³

2. Extent of regulation

Second, a process would need to consider the policy reasons for the regulations that apply in the Australian media and communications markets, in order to determine whether more regulations should apply to digital platforms and online publishers or whether the regulation should be removed from TV and radio broadcasters. It should also consider the appropriate roles for self-regulation and co-regulation in the media regulatory framework. In this regard, the ACMA's work on optimal conditions for self- and co-regulatory frameworks should be considered, along with the objectives to be achieved and public interests to be protected by the regulations.⁶⁴⁴

The ACCC notes that some media industry stakeholders have expressed support for deregulation or maintaining existing self-regulatory models rather than more regulations.⁶⁴⁵ For example, the Australian Press Council submits that the existing industry self-regulatory arrangements best ensure an independent and free print and online news media sector operating without the threat of government interference or oversight. MEAA submits that it strongly supports regulatory equality but is concerned that a review may result in 'additional government encroachment into the conduct of news media organisations'.⁶⁴⁶

639 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 50.

640 Australian Broadcasting Corporation, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 7.

641 Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

642 Croakey Health Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 10.

643 Australian Press Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 6.

644 See ACMA, [Optimal conditions for effective self- and co-regulatory arrangements](#), first published in June 2010 and updated in September 2011 and April 2015, cited in Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 9.

645 See, for example, Australian Press Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; and Media, Entertainment and Arts Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019.

646 Media Entertainment and Arts Alliance, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4 (emphasis removed).

In contrast, the Australian Council on Children and the Media cautions that ‘the quest for uniformity often translates into a race to the bottom’.⁶⁴⁷ The ACCC notes the differing views of stakeholders and considers that setting the appropriate level of regulations that should apply to Australian media markets is a key area that should be assessed in the review.

The ACCC notes that some submissions have advocated for immediate changes to address regulatory disparity that particularly affect TV and radio broadcasters. For example, Free TV submits that there should be urgent reform of the outdated Australian content quota system, the election advertising blackout restrictions applicable only to broadcasters, and the requirement for tagging of election material.⁶⁴⁸ Commercial Radio Australia cites the election advertising blackout restriction and local content requirements as examples of ‘glaring inequalities’ in the present regulatory structure that ‘threaten the viability of commercial radio broadcasting if not corrected without delay’.⁶⁴⁹

While such obligations do create clear regulatory disparity, they involve important social and other policy decisions regarding the conduct of Australian elections and promoting Australian music and film industries. The ACCC notes the findings of an April 2019 report by the House of Representatives Standing Committee on Communications and the Arts which made recommendations for additional content regulation such as requiring all commercial broadcasters to meet an Australian content quota of 25 per cent of all music played during peak listener times.⁶⁵⁰ The report also noted the importance of streaming services on the success of Australian artists but acknowledged that ‘content quotas, such as those applied to commercial radio, would not be practical in the on-demand streaming context’.⁶⁵¹

In light of the pressing concerns of broadcasters regarding important policy issues that extend to matters not limited to competitive neutrality, the ACCC recommends the Government consider structuring a process in stages such that it could first address regulatory disparities of immediate concern, such as election advertising restrictions and local content obligations. Such a process could then ensure that the range of social and other policy matters can be considered.

3. Content rules

Third, the process should determine consistent rules for classification and content regulation. Past reviews of content regulation by the Australian Law Reform Commission (ALRC) in its 2012 Final Report on ‘*Classification—Content Regulation and Convergent Media*’ (ALRC Classification Report) found that there is a continuing community expectation that certain media content will be accompanied by classification information based on decisions that reflect community standards.⁶⁵² It found that key principles informing media classification in Australia—‘such as adults being free to make their own informed media choices and children being protected from material that may cause harm—continue to be relevant and important’.⁶⁵³

Developing a coherent regulatory framework is important to competition and innovation in the media sector and the existing system requires reform. As noted in the ALRC Classification Report:⁶⁵⁴

In the context of media convergence, there is a need to develop a framework that focuses upon media content rather than delivery platforms, and which can be adaptive to innovations in media platforms, services and content. Failure to do so is likely to disadvantage Australian digital content industries in a highly competitive global media environment.

647 Australian Council on Children and the Media, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

648 Free TV, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 27-29.

649 Commercial Radio Australia, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 2, 7-9.

650 House Standing Committee on Communications and the Arts, [Report on the inquiry into the Australian music industry](#), 2 April 2019, recommendation 5, p. 53.

651 House Standing Committee on Communications and the Arts, [Report on the inquiry into the Australian music industry](#), 2 April 2019, pp. 53 (recommendation 5), 56.

652 ALRC, [Classification—Content Regulation and Convergent Media](#), 1 March 2012, p. 22.

653 ALRC, [Classification—Content Regulation and Convergent Media](#), 1 March 2012, p. 22.

654 ALRC, [Classification—Content Regulation and Convergent Media](#), 1 March 2012, p. 61.

The ALRC's report found that the current classification framework is 'highly fragmented, with different guidelines and regulatory arrangements for different media platforms' and that the 'costs and regulatory burden of the current classification framework align poorly to community standards and expectations'.⁶⁵⁵ The submission from the Australian Council on Children and the Media proposes a close consideration of how a nationally-uniform content classification scheme would fit within the National Classification Scheme and advocates for an overhaul of the existing classification scheme to include age-based categories.⁶⁵⁶

4. Advertising restrictions

Fourth, the process should determine appropriate rules to place consistent advertising restrictions across different media delivery formats. This is because the supply of advertising has an important impact on consumers as well as a critical role in the business models of digital platforms and commercial media businesses.

Stakeholder submissions note that the new media regulatory framework should harmonise restrictions on advertising services in Australia across different formats.⁶⁵⁷ In particular, the AANA submits that advertisers 'no longer differentiate in terms of newspapers, television broadcasters or social media platforms; they are all media providers and increasingly all driven by digital, data and machine learning capability'.⁶⁵⁸

Stakeholder submissions note that harmonised advertising restrictions are important for maintaining a consistent level of protection for consumers and, in particular, for children.⁶⁵⁹ The Public Health Association of Australia submits that regulations should be designed 'to protect children from unhealthy marketing, including unhealthy food, alcohol and gambling' and applied to all media formats, including digital platforms'.⁶⁶⁰ The Obesity Policy Coalition submits that the review should examine 'unhealthy food advertising to children, with the aim of establishing a best practice regulatory framework to effectively protect children from exposure to unhealthy food advertising in all forms of media'.⁶⁶¹ The Public Health Advocacy Institute of Western Australia and the Foundation of Alcohol Research and Education both submit that the regulatory framework should protect children and young people from alcohol marketing on digital platforms.⁶⁶²

5. Enforcement

Fifth, an effective mechanism for monitoring and enforcing compliance with the regulatory framework is essential.

Stakeholder submissions note that the regulatory framework must have effective enforcement mechanisms overseen by an independent regulator. The Australian Council on Children and the Media is in favour of a single regulator to be responsible for the media regulatory framework, which would enable

655 ALRC, [Classification—Content Regulation and Convergent Media](#), 1 March 2012, p. 61.

656 Australian Council on Children and the Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2. See also Australian Council on Children and the Media, [It's time Australia changed to age-based classification](#), accessed 30 May 2019.

657 See, for example, Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Public Health Advocacy Institute of WA, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Public Health Association of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019.

658 Australian Association of National Advertisers, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report, February 2019](#), p. 1.

659 See, for example, Public Health Advocacy Institute of WA, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Public Health Association of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019; Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019.

660 Public Health Association of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4.

661 Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

662 Public Health Advocacy Institute of WA, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

a more coordinated approach and ease the burden on consumers.⁶⁶³ The Public Health Association of Australia propose that the regulatory framework should impose sanctions and monetary penalties for regulatory breaches involving the marketing of unhealthy products to children.⁶⁶⁴ The Foundation for Alcohol Research and Education submits that the current self-regulatory system for alcohol advertising has been found to be ineffective and that the regulatory framework must be underpinned by independent, well-funded and authoritative governance and enforcement, with appropriate penalties to incentivise compliance.⁶⁶⁵

Some stakeholders have made specific recommendations as to powers that the regulator should have. For example, the Guardian Australia proposes a regulatory framework 'through which a regulator is able to make information requests of the platforms, as well as hold the platforms to account for performance against codes of practice'.⁶⁶⁶

The ACCC considers that a process to create a platform-neutral regulatory framework should pay close attention to designing an effective and robust enforcement framework that both incentivises and ensures compliance by all media industry participants.

663 Australian Council on Children and the Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2. See also Australian Council on Children and the Media, [It's time Australia changed to age-based classification](#), accessed 30 May 2019.

664 Public Health Association of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4.

665 Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 13.

666 Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 17.



05

**5. Digital platforms and
media - commercial
relationships and
monetisation**



Key findings

- Digital platforms are the gateways to online news media for many consumers and provide news referral services for media businesses via media aggregation services, online search services and social media services.
- Google Search and Facebook are important channels through which consumers access news. Many news businesses are dependent on Google and Facebook as key sources of referral traffic, and Google and Facebook are unavoidable trading partners for a significant number of media businesses.
- Google's supply of search services and Facebook's supply of social media services influences their incentives and how they approach their role in referring audience to news media websites.
- There is a fundamental bargaining power imbalance between media businesses and Google and Facebook that results in media businesses accepting terms of service that are less favourable.
- Media businesses accept terms that are less favourable to them, in order to appear in Google Search results. Due to an imbalance of bargaining power with Google, they cannot negotiate to optimise the length and content of snippets (described in section 5.3.2) to maximise the number of users clicking through to their websites without diminishing the value of their content.
- The Accelerated Mobile Page (AMP) format impedes the ability of media businesses to monetise content as effectively as on their own websites. It also creates difficulties with attribution, branding and the sharing of data.
- Media businesses' uptake of Facebook's Instant Articles has been minimal. However, media businesses face broader monetisation issues on Facebook beyond Instant Articles.
- The rapid increase in consumers' use of Apple News in Australia may result in Apple becoming a 'must have' platform for Australian media businesses. Some media businesses have had difficulties in monetising content on Apple News and in combining their business models with the use of Apple's app store.
- Digital platforms are regulated by Australian copyright law in a broadly similar way as media businesses performing comparable roles. However, the uncertainties in the operation of authorisation liability under the copyright regime creates challenges for rightsholders seeking to enforce their copyright protections against secondary publishers such as digital platforms.
- Digital platforms use a variety of notice-and-takedown processes for rightsholders to request the removal of copyright-infringing content, which do not always provide for the timely take-down of Australian copyright-protected content.
- Rightsholders can face particular challenges in enforcing copyright against digital platforms because of uncertainties regarding authorisation liability. The challenges are exacerbated by the cost and delay associated with bringing court proceedings against overseas-based digital platforms hosting content outside Australia.
- The challenges in enforcing copyright against digital platforms create detriments for rightsholders because they lower the incentives for digital platforms to respond promptly to take-down requests and erode the value of their copyrighted content.

This chapter sets out the ACCC's findings and is structured as follows:

- **Section 5.1** discusses the concept of news referral services and describes each type of news referral service offered in Australia and the key platforms on which Australian consumers access news.
- **Section 5.2** discusses the roles of each of Google and Facebook in the news referral services market, analyses the role of Apple News in the same market, and describes the business models and incentives of these platforms in the supply of news referral services.
- **Section 5.3** discusses stakeholder concerns with the implications of each of Google's and Facebook's substantial bargaining power in the supply of news referral services and provides the ACCC's views about the balance of bargaining power between each of Google and Facebook and news media businesses. The section sets out the ACCC's recommendation for designated digital platforms to implement their own code of conduct, to govern their commercial relationships with media businesses.

- **Section 5.4** considers how digital platforms are regulated under Australian copyright law.
- **Section 5.5** discusses particular challenges faced by rightsholders in enforcing copyright against digital platforms. This section sets out the ACCC's recommendation to clarify complexities in Australian copyright law and recommends that the ACMA develop a take-down code applicable to content distributed on digital platforms.

5.1 What are news referral services?

Key findings

- Digital platforms are the gateways to online news media for many consumers and provide news referral services for media businesses.
- In Australia, the key platforms on which consumers access news are Google Search and Facebook. Consumer use of Apple News is growing quickly.

News referral services can take the form of media aggregation services, online search services or social media services. These are explained below.

5.1.1 Media aggregation services

A digital platform that supplies a media aggregation service collects and presents news content from across the internet. Most providers of media aggregation services have desktop and mobile options available to assist with accessibility and improve readability for users.

Media aggregation providers in Australia include Google News, Apple News, YouTube News, News360 and Flipboard. Media businesses may also be considered media aggregation services, although the news content is limited to news content produced by the relevant media business. For consumers who prefer a variety of news sources, media business' websites and apps are unlikely to be an effective substitute.

The News and Media Research Centre of the University of Canberra reports in its Digital News Report 2019 that the majority of surveyed consumers who access news online (62 per cent) access online news via indirect methods, such as social media, news aggregators, email newsletters and mobile alerts. 12 per cent of consumers that access news online have used a news aggregator in the past week to access news, an increase of 3 per cent since 2016.⁶⁶⁷

Google News

Google News is Google's news aggregation service, offered as a website (on desktop and mobile) and as an app. Google News aggregates news from thousands of media businesses on the Internet and presents a continuous flow of headlines from news articles, grouped by story. Stories on Google News are in categories, such as 'For you' (recommended by Google based on a user's interests), 'Australia' (if the user is based in Australia), 'Business', 'Technology' and others. Users are also able to search for news on Google News.

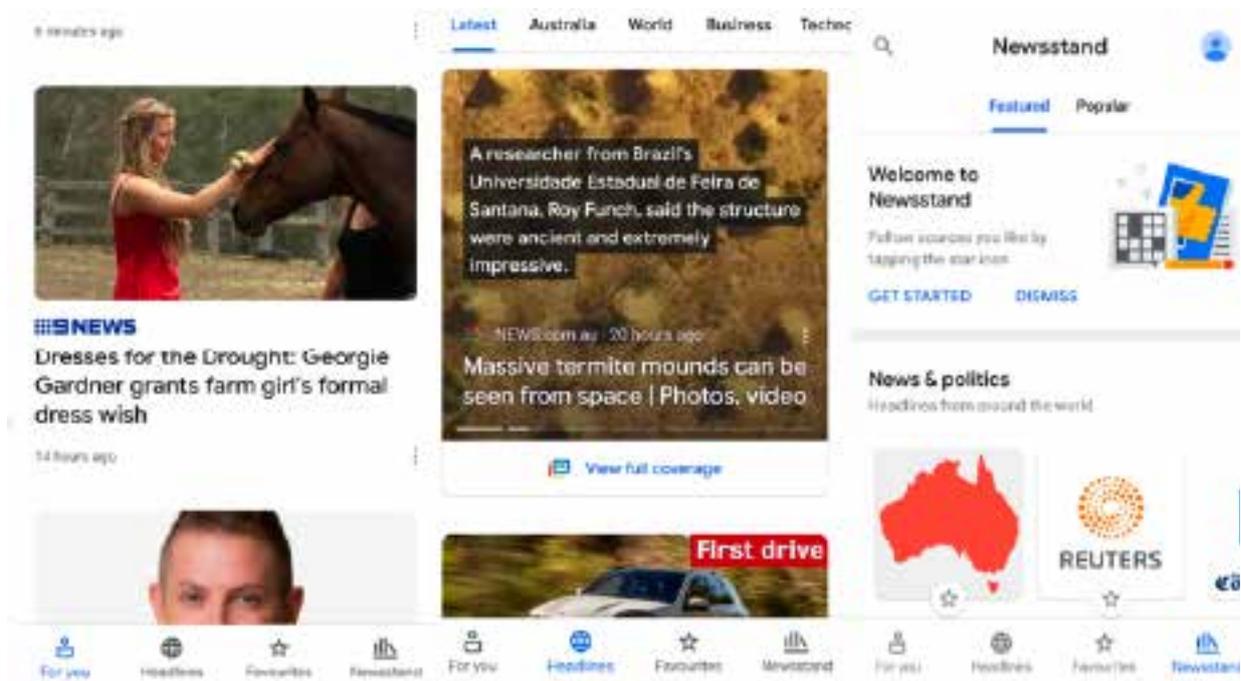
Google also offers a news tab in Google Search, which aggregates news content relevant to the search term entered by a user. Only a very small percentage of Google Search users in Australia access the news tab.⁶⁶⁸

⁶⁶⁷ C Fisher, S Park, JY Lee, G Fuller, Y Sang, [Digital news report: Australia 2019](#), June 2019, p. 28.

⁶⁶⁸ Information provided to the ACCC.

An example of a mobile app version of Google News is provided below.

Figure 5.1 Example of Google News' media aggregation service



Source: Google News app, accessed 22 November 2018.

A number of submissions to the Inquiry discuss Google News. However, only a small number of consumers in Australia use this service compared to Apple News. Recent Nielsen survey data estimates the unique monthly audience of Apple News as 5.5 million users, compared to 1.5 million users for Google News.⁶⁶⁹

Australian consumers are, however, frequent users of Google Search. This is discussed below. Given the small number of consumers that access news via Google News relative to the number of consumers that access news via Google Search, Google News will not be a key focus of this chapter.

Apple News

Apple News aggregates and personalises news content for users, using both editorial and algorithmic elements to determine what and how news content is presented to consumers. In Australia, Apple has paid agreements with approximately 50 Australian publishers who supply content for Apple News.⁶⁷⁰

According to recent survey data by Nielsen, Apple News is the most popular news aggregator in Australia, with approximately 5.5 million monthly active users as at February 2019.⁶⁷¹ The use of Apple News is growing rapidly in Australia. Based on the Nielsen data mentioned above, the annual growth in unique audience numbers from February 2018 to February 2019 for Apple News was more than 25 per cent.

As discussed in chapter 1, the growth in users of Apple News is likely due to the fact that users of Apple iPhones receive and use Apple News as part of the iPhone offering, with Apple News pre-installed on all iOS devices. In this respect, the ACCC notes that Apple has a large share of the Australian markets for operating systems, with approximately 57 per cent of the mobile operating system market⁶⁷²; 90 per cent of the tablet operating system market⁶⁷³ and 25 per cent of the desktop operating system market⁶⁷⁴, in March 2019.

669 Nielsen Audience Data, February 2019.

670 Information provided to the ACCC.

671 Nielsen Audience Data, February 2019.

672 Statcounter, [Mobile Vendor Market Share Australia](#), accessed 9 April 2019.

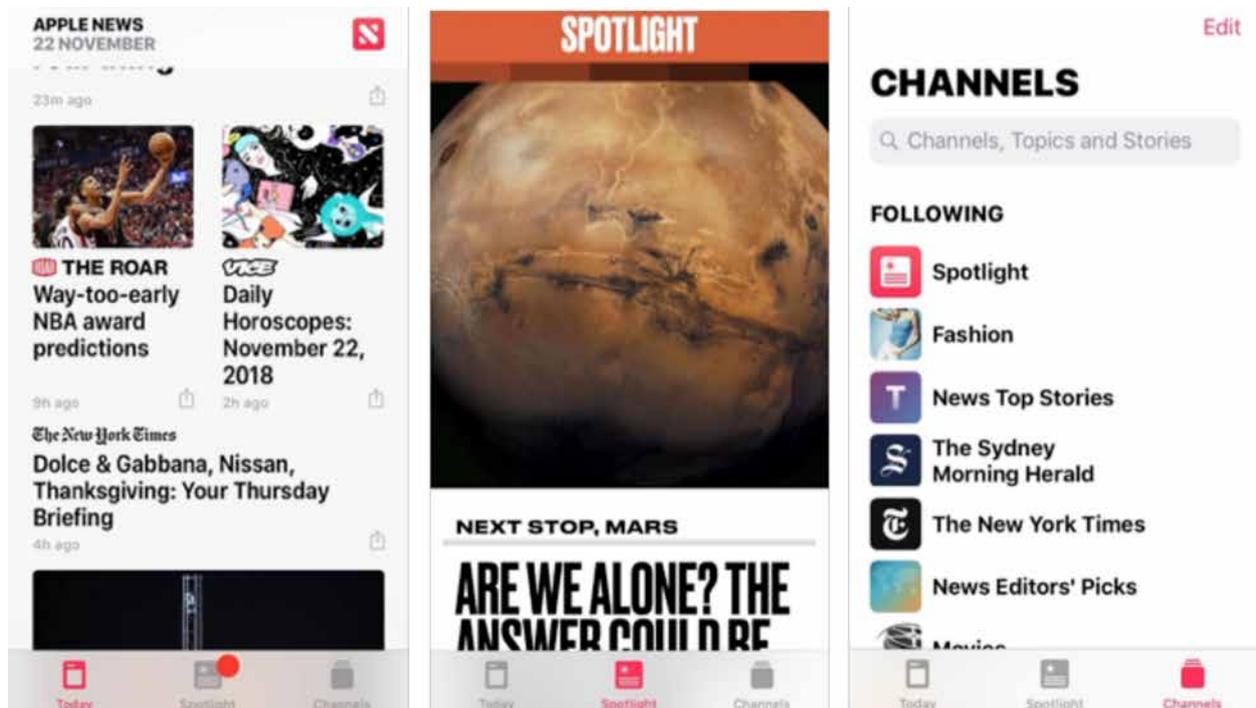
673 Statcounter, [Operating System Market Share Australia](#), accessed 9 April 2019.

674 Statcounter, [Desktop Operating System Market Share Australia](#), accessed 9 April 2019.

This suggests that although Apple News is limited to Apple devices, any activities in relation to or about Apple News may have wide-ranging effects, given the widespread use of Apple devices in Australia.

An example of Apple News on a mobile device is provided below.

Figure 5.2: Example of Apple News' media aggregation service



Source: Apple News app, accessed 22 November 2018.

5.1.2 Online search services

A key method for consumers to access news online is through online search services. Consumers use online search services to access news content by entering keywords relevant to the news story, or the brand or name of their chosen news supplier, into a search engine. The search engine then provides hyperlinks and frequently, snippets of the relevant news content and/or relevant images, using its algorithm to rank the results. As noted above, search services have become an increasingly popular method for consumers to access news content. As set out in chapter 2, Google Search has a dominant position in the provision of search services in Australia, with a 95 per cent market share.⁶⁷⁵ The products and services search engines supply that are specific to news referral services are set out below.

Google Search

When a user types a search term in Google Search, Google produces a set of hyperlinks that its algorithm considers to be relevant to the given search term. These are known as organic search results.

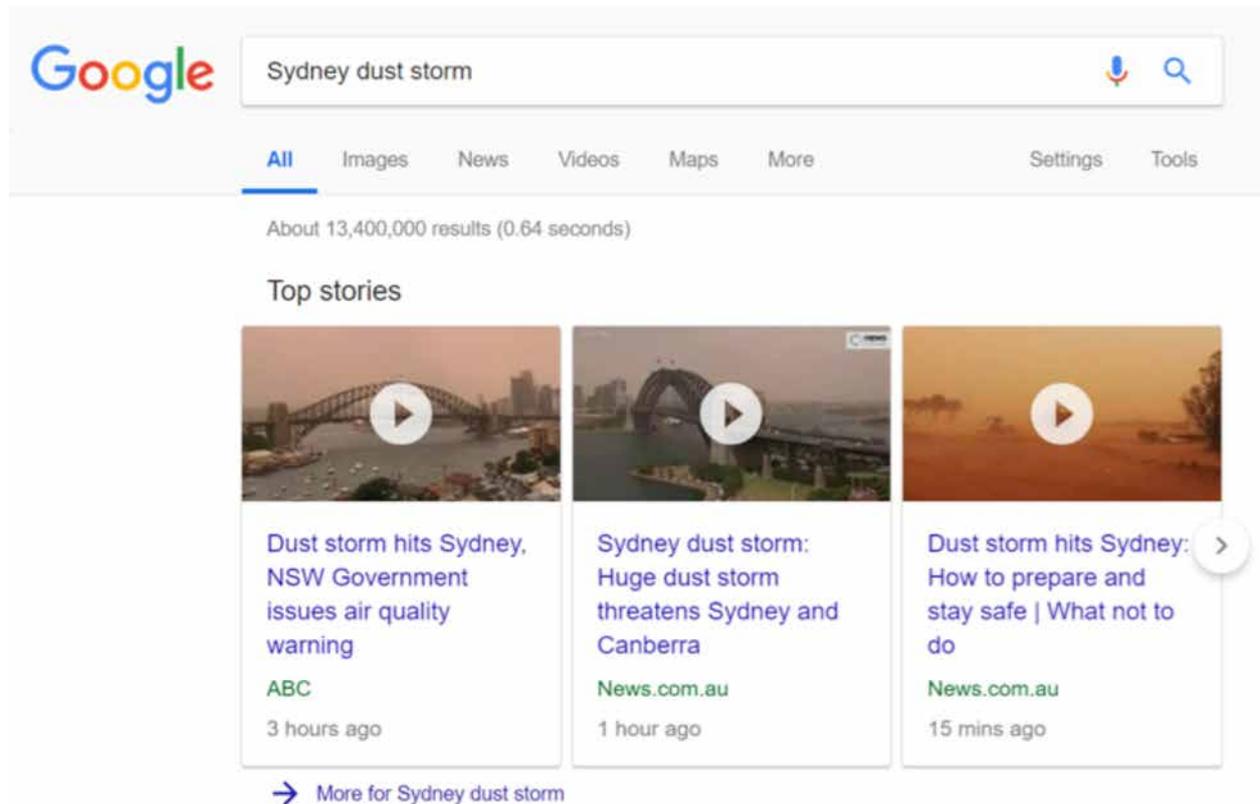
When a user types a search term in Google Search that Google considers to have a 'news intent' (that is, relevant to a current news item), Google Search may also present the user with a 'Top Stories' carousel on its search engine results page, in addition to the organic search results. Top Stories is a type of specialised result (known as Universal Search results) designed to respond to user queries with news intent and consists of a group of news results that Google crawls and places in a separate index.⁶⁷⁶

675 Statcounter, [Search engine market share](#), accessed 30 April 2019.

676 Information provided to the ACCC

Google's Top Stories carousel is a container that includes articles, live blogs and videos on breaking news stories and displays sets of related results horizontally with images. Top Stories can contain news articles from different publishers, or from one news publisher. News publishers have the option of using structured data to mark-up content on their web pages, which makes the web page eligible for inclusion in Google's Top Stories carousel. An example of a Top Stories carousel on a desktop is set out below:

Figure 5.3: Example of Google's Top Stories carousel on a desktop device



Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

Google employs specialised algorithms to rank news results within Top Stories, determine whether to display Top Stories within Google's results page, and where to place it when it is displayed. The stronger the user intent for news and the higher the quality of the results, the higher on the page Top Stories will be displayed. Conversely, if the user intent is not clear or the quality of the results is not as high, then Top Stories will appear lower on the page or not at all.⁶⁷⁷

On mobile devices, Google's Top Stories carousel only displays news stories published in the AMP format, which provides consumers with the ability to instantly swipe between full pages of content.⁶⁷⁸

AMP is an open-source publishing technology that allows mobile pages to be loaded more quickly on the user device by uploading them onto the Google cache. It has been reported that AMP pages 'typically load four times faster and use ten times less data than non-AMP pages'.⁶⁷⁹

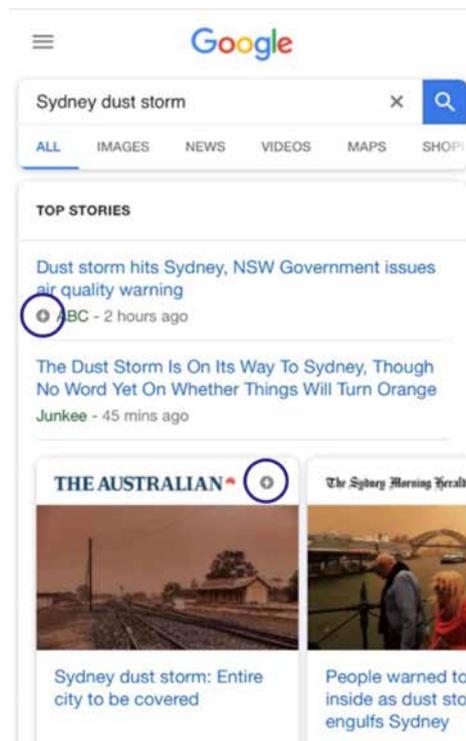
An example of a Top Stories carousel on a mobile device is provided below. The lightning bolt next to the media business' name highlighted by the purple circle symbol indicates stories are in the AMP format.

677 Information provided to the ACCC.

678 Google, [Mark Up Your Content Items](#), last updated 29 April 2019, accessed 10 May 2019.

679 C Crivallaro, [Accelerated Mobile Pages \(AMP\): Why They Are Important to Your Website](#), *Rawfish*, 20 July 2017, accessed 12 November 2018.

Figure 5.4: Example of Google's Top Stories carousel on a mobile device



Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

AMP was made available in Google Search on mobile devices in early 2016.⁶⁸⁰ Further detail about AMP pages and AMP Stories (a related service) is set out in section 5.3.4.

When searching for news stories on Google Search, stories from traditional Australian print news businesses appear prominently in the search results.

680 C Newton, [Google's answer to Facebook Instant Articles is now available on the mobile web](#), *The Verge*, 24 February 2016, accessed 10 May 2019.

Box 5.1 Sources of news presented in news searches on Google Search

From 15 to 26 October 2018, the ACCC ran searches on three separate phrases on Google Search: 'Banking Royal Commission', 'AFL' and 'Scott Morrison' and recorded the media businesses that appeared on Google's Top Stories carousel and the first page of the organic search results.⁶⁸¹ While this is not representative of all news searches, it provides an insight into the types of news sources that are surfaced to Australian users using Google Search.

Appendix D shows the results of this experiment. There were a broad range of media businesses represented in the Top Stories carousel and organic search results for the three search terms examined, although some media businesses were featured much more frequently than others. Overall, the ABC, *The Sydney Morning Herald*, *The Guardian* and *The Australian Financial Review* were consistently featured in the Top Stories carousel and the first page of organic search results, for search terms unrelated to sport. For the sport-related search term, Fox Sports featured heavily on the Top Stories carousel and organic search results.

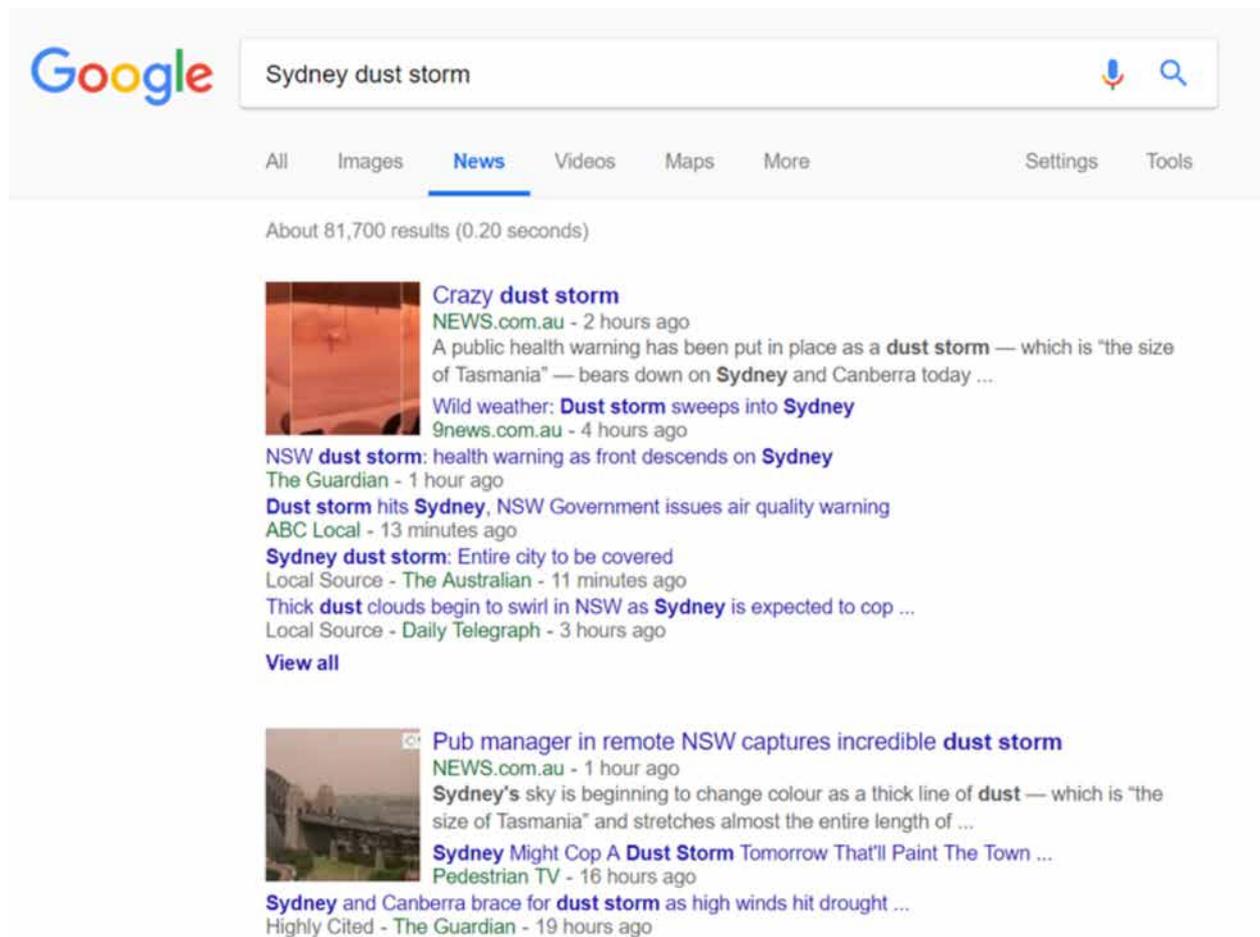
In this respect, it is clear that the search term influences the frequency with which media businesses are featured on the Top Stories carousel or organic search results. For instance, *The Australian Financial Review* was featured more frequently in organic search results for the 'Banking Royal Commission' search term, compared to 'Scott Morrison'. The spread with which *The Guardian*, News.com.au, *The Australian* and *The Sydney Morning Herald* (a mix of News Corp, Nine (Fairfax) and other independent publications) were featured in the Top Stories carousel in response to the 'Scott Morrison' search term was relatively even, compared to the 'Banking Royal Commission' search term, where the ABC appeared more than half the time.

These examples suggest that the Google Search results reflect the content focus, and presumably the likely relevance, of each news media business' content.

Google also provides a news tab on Google Search, which groups news articles relevant to the search query. An example of Google's news tab is set out on the next page.

⁶⁸¹ The searches were conducted in Sydney, using the 'Guest' window function of Google Chrome.

Figure 5.5: Example of Google Search's news tab



Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

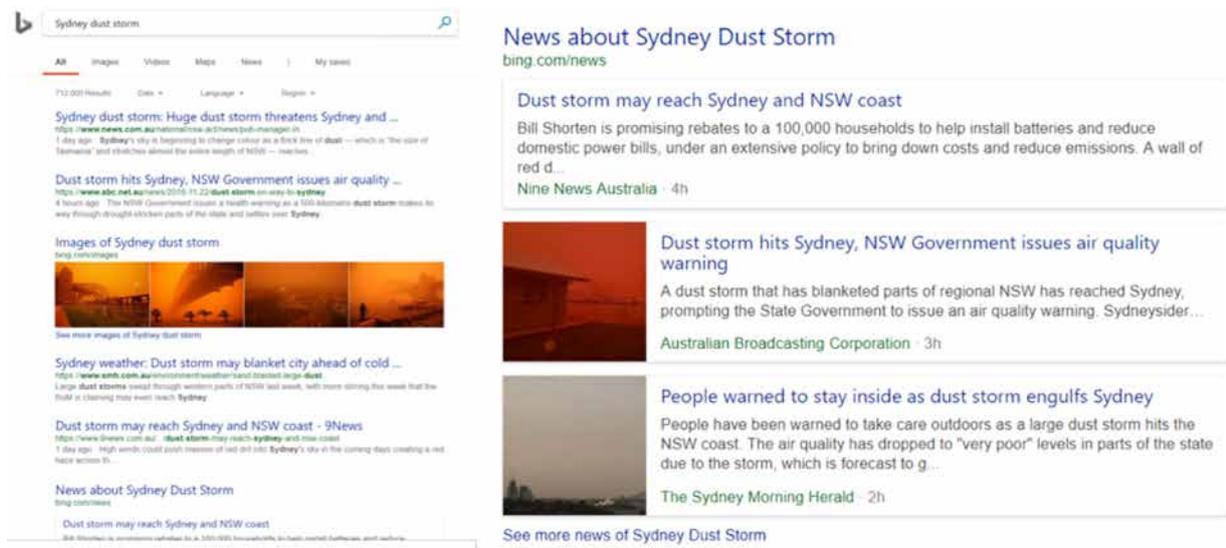
Search services offered by Bing and DuckDuckGo

Bing and DuckDuckGo both offer news tabs in their search engines, which provides news content relevant to a search query.

On its news tab, Bing provides users with the ability to select news categories, sort news items in terms of 'best match' (in relation to the search query) or 'most recent', and filter news based on sources.

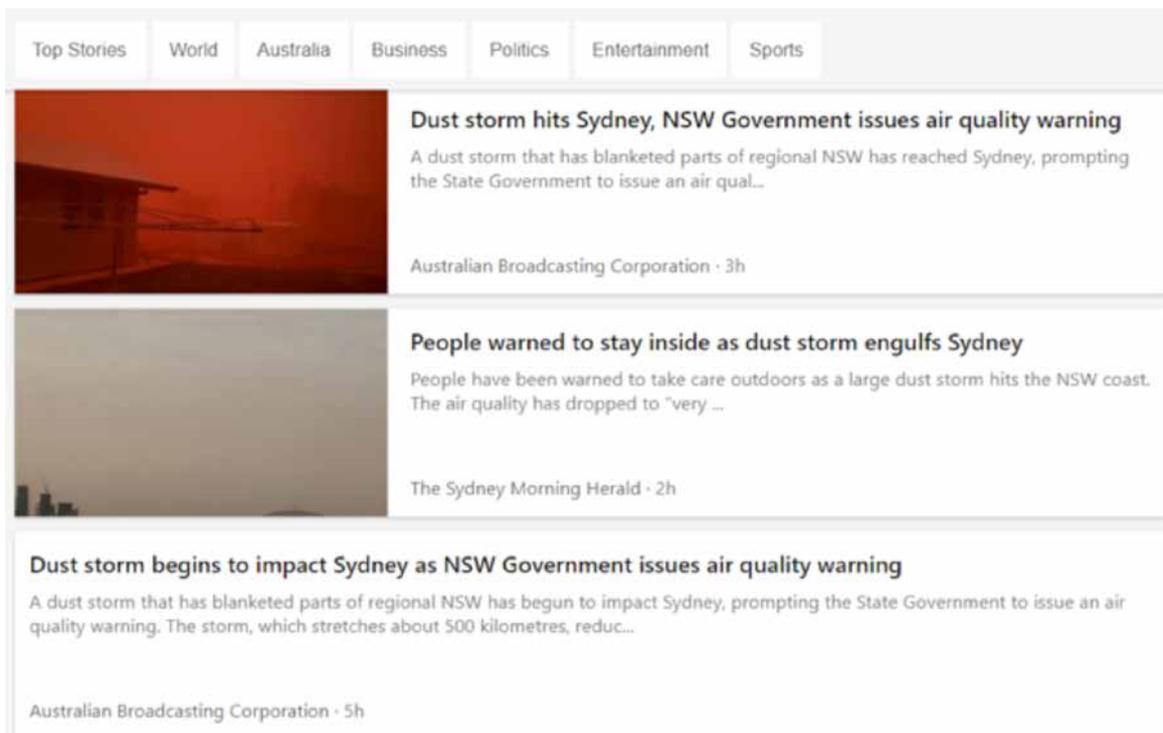
In the organic search results, Bing provides a product similar to Google's Top Stories carousel, highlighting news content relevant to the search query in boxes separate to the organic search results. Examples of Bing's search results and news tab are set out below.

Figure 5.6: Examples of Bing's organic search results and highlighted news items featured in Bing's organic search results



Source: Bing, Results for 'Sydney dust storm', accessed 22 November 2018.

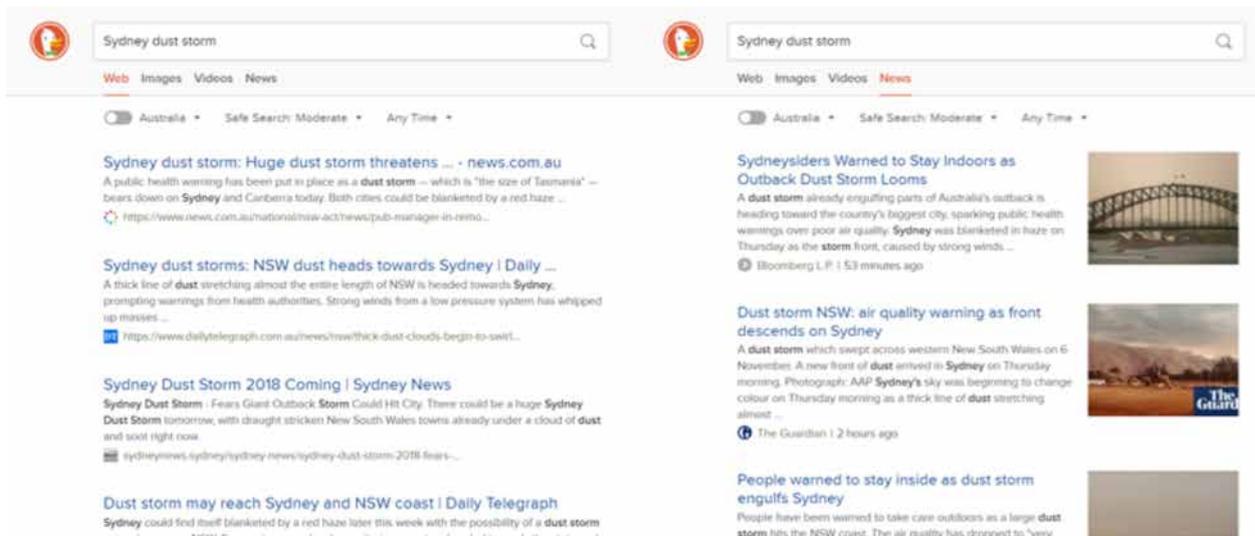
Figure 5.7: Example of Bing's news tab



Source: Bing, Results for 'Sydney dust storm', accessed 22 November 2018.

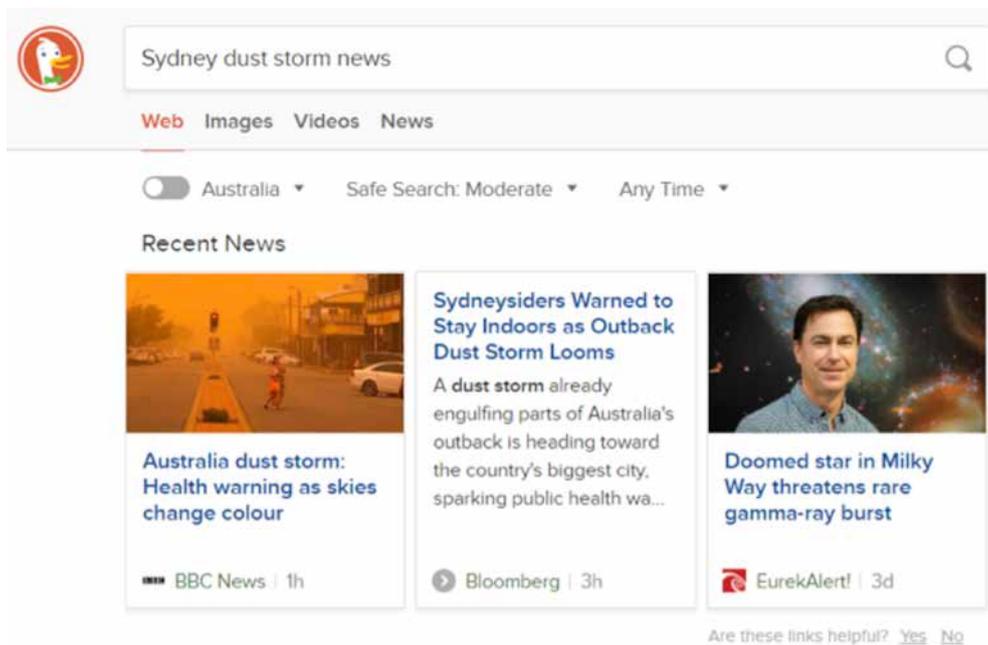
DuckDuckGo offers a news tab in its search service that, like Google and Bing, provides hyperlinks to news content relevant to a search query. DuckDuckGo provides users with the option to select 'Australia' as the user's location for both organic search results and its news tab. DuckDuckGo highlights particular news stories in its organic search results. Examples of both DuckDuckGo's organic search results page and news tab, using the same search term as above for Bing, and DuckDuckGo's highlighted news stories for the search term 'Sydney dust storm news', are set out below.

Figure 5.8: Examples of DuckDuckGo's organic search results and news tab



Source: DuckDuckGo, Results for 'Sydney dust storm', accessed 22 November 2018.

Figure 5.9: Example of DuckDuckGo's highlighted news stories in organic search results



Source: DuckDuckGo, Results for 'Sydney dust storm', accessed 22 November 2018.

5.1.3 Social media services

Consumers also access news stories via social media platforms. As noted above, the Digital News Report 2019 reported that 46 per cent of respondents indicated that one of the ways in which they access news is through social media.⁶⁸²

Of the respondents surveyed, 36 per cent indicated that they had used Facebook to access news at least once in the past week and 19 per cent had used YouTube at least once for news in the last week. For respondents identified as Generation Z (with a birth year of 1997 and after), these figures rise to 47 per cent for Facebook and 36 per cent for YouTube.⁶⁸³ These figures are not mutually exclusive and consumers often use more than one platform or website to access news.

Social media platforms supply hyperlinks to and/or snippets of news content, or an abbreviated or shortened form of news content made for the platform. For instance:

- News publishers are able to post news articles or links to news articles on Facebook, which then show up on the news feeds of users who have liked or subscribed to receive posts from the media business.
- Snapchat offers a product known as Snapchat Discover, through which news publishers can upload short clips of video news content to their followers on Snapchat.
- Any user, including news publishers and journalists, can post text, links, images, video, and news content using their Twitter accounts. Users can also create Twitter Moments, or curated stories comprised of Tweets, using the Twitter.com website.⁶⁸⁴

Social media services use algorithms to rank and present content, including hyperlinks to news content. For example:

- On Facebook, the make-up of a user's news feed will depend, among other things, on a mixture of 'signals', being data points that Facebook uses to determine the relevance of a particular post to a particular user at that particular time.⁶⁸⁵ The ACCC understands that Facebook's News Feed algorithms are focused on promoting 'meaningful social interactions' between users, and Facebook has indicated that this means users will see less public content, such as posts from media.⁶⁸⁶
- On Twitter, a user will see posts from users they follow on their home timeline.⁶⁸⁷ The default setting for this timeline is 'Show the best Tweets first'. Users will see Tweets from users they follow and Recommended Tweets (Tweets that Twitter believes the user will enjoy, based on their platform activity). If the 'Show the best Tweets first' setting is turned off, then users will see Tweets from users they follow in their home timeline view in reverse chronological order.⁶⁸⁸
- On Snapchat, a user is able to 'subscribe' to Snapchat Discover channels; the stories on these channels are then published at the top of the user's Discover feed. Snapchat also recommends Snapchat Discover channels for its users to follow, which includes stories with news media content. The ACCC understands that Snapchat uses a number of internal systems to process recommendations; one of these systems includes a system to rank specific content according to the likelihood that a certain user will like that content.⁶⁸⁹

682 C Fisher, S Park, JY Lee, G Fuller, Y Sang, *Digital news report: Australia 2019*, June 2019, p. 26.

683 C Fisher, S Park, JY Lee, G Fuller, Y Sang (2019), *Digital news report: Australia 2019*, June 2019, p. 95.

684 Information provided to the ACCC.

685 Information provided to the ACCC.

686 M. Zuckerberg, [Post](#), *Facebook*, 11 January 2018, accessed 12 November 2018.

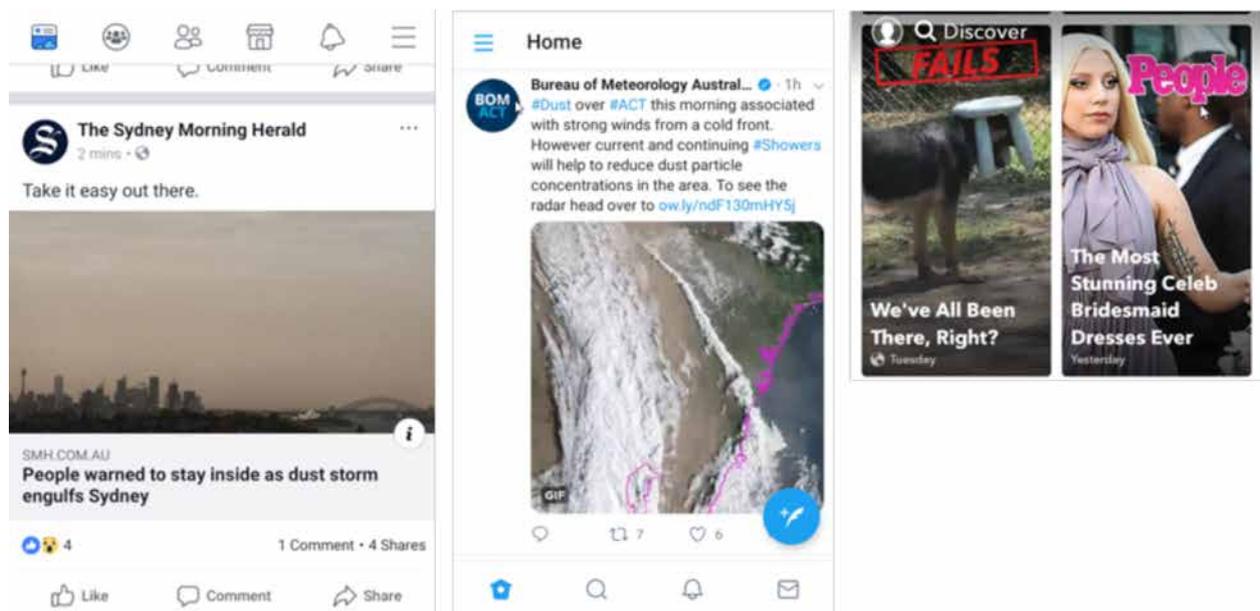
687 A home timeline is a stream of Tweets from accounts a user has chosen to follow on Twitter.

688 Information provided to the ACCC.

689 Information provided to the ACCC.

An example of each of these news feeds is provided below.

Figure 5.10: Examples of news articles in Facebook's News Feed, Twitter's news timeline and Snapchat Discovery



Source: Facebook app, Twitter app, Snapchat app, accessed 22 November 2018.

5.2 The role of digital platforms in the supply of news referral services

Key findings

- Google Search and Facebook are important channels through which consumers access news. Many news businesses are dependent on Google and Facebook as key sources of referral traffic, and Google and Facebook are unavoidable trading partners for a significant number of media businesses.
- Google's supply of search services and Facebook's supply of social media services influences their incentives and how they approach their role in referring audience to news media websites.
- The rapid increase in consumers' use of Apple News in Australia may result in Apple becoming a 'must have' platform for Australian media businesses. Some media businesses have had difficulties in monetising content on Apple News and in combining their business models with the use of Apple's app store.

Google and Facebook, in separate written submissions and during the ACCC's stakeholder forum, have criticised the ACCC's approach to the news referral services market in the Preliminary Report. Outside of market definition issues (discussed in chapter 2), Google and Facebook each stressed the need that the ACCC distinguish between the two platforms and their different business models.

The ACCC recognises the different roles that Google and Facebook perform in the supply of such services. In this Report, the ACCC has sought to identify the implications of their different activities for news media referral services. This section contains the ACCC's analysis of the business models of each of Google and Facebook, the incentives they face relative to those of media businesses and the effect of these business models and incentives on the supply of news referral services.

5.2.1 Google

As discussed above, the primary way in which consumers access news using Google's platforms is by searching for news content using Google Search, either by entering a search query in relation to a news topic (such as 'federal budget 2019') or the name of a media business (such as 'Sydney Morning Herald').

Based on information before the ACCC, we understand that approximately 8 per cent to 14 per cent of Google Search queries from devices in Australia led to the appearance of Top Stories on the Google Search results page.⁶⁹⁰ This is a relatively significant proportion of search queries and may indicate the value to Google of surfacing news content in response to user queries.

Google submits that its primary offering is the supply of search services for consumers:

Google provides search results to users and advertising to advertisers; any resulting "referrals" to third-party sites are the (valuable) by-product of Google seeking to provide services to its users... News referral traffic is incidental to the provision of high quality search results to users.⁶⁹¹

The ACCC recognises that the principal products of Google are its search services and advertising services. However, the supply of news-related search queries to consumers is a vital component of Google's overall supply of search services. Accordingly, the supply of news referral services to media businesses is also an important aspect of Google's business.

For the most part, Google Search does not display ads against search results for news queries and does not supply ads in relation to news stories on its news tab. The ACCC considers Google's ability to attract consumers to its platform relies on the provision of a high quality search service and the inclusion of hyperlinks to news content that is accurate, current and relevant to users' search queries (as well as snippets of that content) is part of this service. Consumers that use Google Search to access news would likely be inclined to use Google Search for non-news related search queries.

The ACCC notes that Google's incentive to provide a high quality search service to consumers (which includes responses to news-related queries) naturally affects the incentives of Google in its supply of news referral services to media businesses.

At times, Google's interests can conflict with those of media businesses. This is most clearly seen in Google's previous First Click Free (FCF) policy and its ongoing practice of offering snippets of news content to users in response to search results of news-related queries.

The FCF policy and the issue of snippets are explored in further detail in section 5.3

5.2.2 Facebook

Facebook's primary consumer facing offering is its supply of social media services, providing users with a platform to upload their content and to connect with their friends and family.

In contrast to Google Search, the principal objective of Facebook is to retain users on its platform.

Only a small proportion of content on Facebook's news feed is news content (estimated by Facebook to be four per cent⁶⁹²). The ACCC also notes that, as discussed in chapter 2, the proportion of referrals to print/online and online news media sites and apps, coming from Facebook decreased over the course of the 2017 calendar year. Data available to the ACCC suggests the proportion of referrals from Facebook stabilised after this period of time.

Nevertheless, the ACCC remains of the view that Facebook is an essential gateway for news for many consumers. It may be a less important distribution channel for some media businesses, relative to Google Search, but evidence suggests that Facebook is still a vital means for some media businesses to reach consumers and build brand awareness.

690 Information provided to the ACCC.

691 Google, [Submission to ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 30.

692 M Zuckerberg, [Post](#), Facebook, 20 January 2018, accessed 6 May 2019.

On the consumer side, there is survey evidence to suggest that Facebook remains an important source for news for consumers. The Digital News Report 2019 reports that in Australia, 46 per cent of consumers surveyed use social media for news and 18 per cent of consumers surveyed use social media as the main source of news. For those consumers who access news on social media, Facebook is reported as the most used social media for news (at 36 per cent of surveyed consumers).⁶⁹³

The ACCC notes that using Facebook for news has decreased by 9 per cent since 2016, but there have been increases in the use of YouTube, Snapchat and Instagram for news consumption.⁶⁹⁴ The survey also suggests there have been decreases in online engagement across sharing and liking activity.

However, the ACCC considers that Facebook remains a vital channel for media businesses reaching consumers of certain demographic groups (for example, younger consumers or potentially consumers in regional areas). The Digital News Report 2019 states that younger Australians, Generation Z (born after 1997) and Generation Y (defined as those born between the years of 1981 and 1996), are more likely to use social media as their main source of news, with 47 per cent of Generation Z consumers using Facebook for news.⁶⁹⁵ People who are part of WhatsApp or Facebook groups are more active news sharers than people outside those networks. This is also reflected in the referral traffic to websites the ACCC received from media businesses. For example, in FY17-18:

- Almost 40 per cent of referrals for one media business' website (with multiple publications) comes from Facebook.⁶⁹⁶ This is significantly higher than the 16 per cent of referrals from Facebook to the websites of traditional print and online media businesses from whom the ACCC had requested information. This suggests that for media businesses seeking to reach a certain demographic, they may be more inclined to use Facebook for news.
- Commercial radio stations rely heavily on Facebook for referral traffic, with 55 per cent of visits to radio websites coming from Facebook for a number of commercial radio stations.⁶⁹⁷
- Of the digital natives for which we received information, there is a significant variation in the extent to which their audience is sourced from Facebook. For one digital native, almost 45 per cent of referral traffic to its website comes from Facebook (in contrast to less than 10 per cent for other digital natives).⁶⁹⁸ For another digital native with a younger demographic of readers, approximately 65 per cent of referral traffic comes from Facebook.⁶⁹⁹ This is consistent with statements made to the ACCC about the importance of Facebook in reaching a younger audience. For digital natives seeking to access a younger audience or greater engagement with its audience, Facebook represents an important distribution channel.

In the ACCC's stakeholder forums, a number of media businesses emphasised the importance of their relationships with Facebook and their use of Facebook's platform to access consumers. This is also reflected in submissions to the Issues Paper and the Preliminary Report.⁷⁰⁰

The Reuters Institute's report into journalism trends, which covers 37 countries, suggests that media businesses are looking to diversify away from Facebook and towards other platforms. However, of the surveyed media businesses, 43 per cent still submit that Facebook is 'very' or 'extremely' important to its organisation. It also notes that 'local news providers still see social media as critical for traffic referral and engagement'.⁷⁰¹

The ACCC acknowledges that media businesses' reliance on Facebook may be changing, with some considering Facebook to be a less important distribution channel than other online platforms. The ACCC

693 C Fisher, S Park, JY Lee, G Fuller, Y Sang, [Digital news report: Australia 2019](#), June 2019, pp. 26-27, 95.

694 C Fisher, S Park, JY Lee, G Fuller, Y Sang, [Digital news report: Australia 2019](#), June 2019, p. 95.

695 C Fisher, S Park, JY Lee, G Fuller, Y Sang, [Digital news report: Australia 2019](#), June 2019, p. 95.

696 Information provided to the ACCC.

697 Information provided to the ACCC.

698 Information provided to the ACCC.

699 Information provided to the ACCC.

700 See, for example, News Corp Australia, [Submission to ACCC Issues Paper](#), April 2018; Free TV, [Submission to ACCC Issues Paper](#), April 2018; Nine, [Submission to ACCC Issues Paper](#), April 2018; SBS, [Submission to ACCC Preliminary Report](#), February 2019.

701 N Newman, [Digital News Project – Journalism, Media, and Technology Trends and Predictions 2019](#), January 2019, pp. 17-18.

remains of the view that Facebook is an unavoidable trading partner for many media businesses and in particular, for those seeking to engage with consumer groups that are of a specific demographic.

The ACCC also notes Facebook's expanding role in news media. News reports suggest that Facebook's founder and CEO Mark Zuckerberg had indicated that Facebook has been considering establishing a 'News' tab to its platform, which may be accompanied by Facebook paying media businesses a licence fee for the use of content.⁷⁰²

In addition, on 29 August 2018, Facebook made globally available Facebook Watch, a video-on-demand service, which showcases television shows.⁷⁰³ This includes news shows 'produced exclusively for Facebook by news publishers', including CNN and Fox News.⁷⁰⁴ Facebook Watch also offers an alternative monetisation model for news media businesses, through its Ad Breaks program. Ad Breaks allows businesses to insert ads (up to 15 seconds long) into a video, and can be inserted pre-roll, mid-roll or as an image ad directly below the video. However, only publishers that satisfy certain guidelines are qualified to participate in the Ad Breaks program – they must:⁷⁰⁵

- satisfy Facebook's Monetisation Eligibility Guidelines
- have posted three-minute videos which have generated more than 30 000 one-minute views in the past two months
- have over 10 000 Facebook followers are able to participate in the program.

In terms of the revenue sharing arrangements of Ad Breaks, Facebook keeps 55 per cent of the revenue, with news media businesses entitled to the remaining 44 per cent.

The extent to which Australia news media businesses will take part in Facebook Watch is unclear. The ACCC understands that in Australia, Facebook has agreements to showcase sports content of the National Rugby League, Australian Football League and Cricket Australia and had, in June 2019, signed a content agreement with Seven Studios.⁷⁰⁶ However, it is unknown whether news content produced by Seven will be available on Facebook Watch, or whether Facebook has commissioned the production of news content by Seven (in the same way as it has with CNN and Fox News).

The effect of Facebook Watch, as an alternative monetisation model for news media businesses, is also unclear. There have been mixed reports about the success of Facebook Watch, both as a platform and as a distribution channel for news media businesses. Two weeks after the launch of Ad Breaks in 21 new countries, Facebook stated that 'In just the first two weeks, more than 20 per cent of eligible publishers and creators in the initial five countries joined ad breaks and nearly 10 per cent of those Pages made over US\$1 000 in two weeks.'⁷⁰⁷ Fox News announced that its Facebook Watch show, 'Fox News Update' with Shepard Smith, is drawing significant audiences and that the program will be expanded.⁷⁰⁸ It also reported that 'a whopping 720 million people consume [Facebook] Watch on a monthly basis and 140 million people spend at least one minute per day using the service, according to data released by Facebook. The average daily visitor spends more than 26 minutes in Watch on a daily basis'.

Other media reports have been less positive, with DigiDay reporting that 'eligible creators tell Digiday that they aren't making any meaningful revenue from Facebook's Ad breaks, even if they have a large Facebook audience. A U.S.-based creator using Facebook Watch said an episodic-show made less than US\$100 per video when it was distributed on multiple pages that total nearly five million.

702 P Kafka, [Mark Zuckerberg says Facebook may pay publishers to put their stuff in a dedicated news section](#), *Vox*, 1 April 2019, accessed 1 May 2019.

703 F Simo, [Facebook Watch Is Going Global, Facebook Newsroom](#), 29 August 2018, accessed 15 June 2019.

704 C Brown, [Introducing the first funded news shows for Facebook Watch, Facebook for Media](#), 6 June 2018 (updated 12 June 2018), accessed 15 June 2019.

705 Z Samios, [Facebook starts roll out of Watch on-demand video platform and Ad Breaks program in Australia](#), *Mumbrella*, 29 August 2018, accessed 15 June 2019.

706 P Wallbank, [Facebook adds NRL and AFL content deals to its Watch streaming video platform](#), *Mumbrella*, 13 June 2019, accessed 15 June 2019; H Blackiston, [Seven Studios signs content deal with Facebook](#), *Mumbrella*, 11 June 2019, accessed 15 June 2019.

707 M Smith, [Launching ad breaks in 21 new countries](#), *Facebook for Media*, 24 September 2018, accessed 15 June 2019.

708 B Flood, [Facebook Watch thrives with breaking news, 'Fox News Update' with Shepard Smith](#), 13 June 2019, accessed 15 June 2019.

A UK-based creator said that from five recent videos, which have accumulated more than 6.4 million views, he's earned 'less than the price of a McDonald's happy meal — after currency conversion.'⁷⁰⁹

The ACCC recognises that Facebook Watch presents news media businesses with another way to monetise content on its platform. However, given the limited uptake of Facebook Watch by Australian media businesses, the ACCC does not have any views about the effect of Facebook Watch on news media businesses' abilities to monetise content on the Facebook platform, or on Facebook's relationships with news media businesses.

To the extent that Facebook's expansion into news media affects the balance of bargaining power it has with news media businesses, or raises competition concerns more broadly, the ACCC will monitor any developments through the specialist digital platforms branch proposed in recommendation 4.

5.2.3 Apple News

In the Preliminary Report, the ACCC noted the growth in users of Apple News but did not explore Apple News in detail. The purpose of this section is to further examine the position of Apple News, given the rapidly increasing uptake of Apple News by Australian consumers.

Apple News' business model

Apple News' business model is distinct from Google's and Facebook's business model in the supply of news referral services. While Google provides a search service through Google Search and Facebook provides a social media service through its Facebook platform, Apple News is a media aggregation service that collates and displays news content to consumers on its platform. Media businesses can monetise their content on Apple News through the display of advertising, or third party subscriptions. There are three types of advertising models offered on Apple News:⁷¹⁰

- Advertising on a direct sold basis – ads are sold directly by the media business and served on Apple News but Apple does not take part in the financial relationship between advertiser and media business. The media business retains 100 per cent of the advertising revenue.
- Advertising on a backfill basis – Apple serves ads to available inventory in publisher channels and within articles and takes a fee for its performance. The media business retains 70 per cent of the revenue and Apple retains 30 per cent.
- Pooled advertising basis – Apple serves ads to multi-publisher inventory within Apple News and shares its revenue with media businesses on an engagement basis. Apple pays 50 per cent of its earnings for sales of advertising in the pooled inventory into a pool, which it then splits out pro-rata to media businesses based on engagement time.

In Fiscal Year 2018, Apple Inc's total earned revenue from publishers' supply of advertising services on Apple News in Australia was less than AU\$500 000.⁷¹¹ This suggests that only a small number of media businesses are utilising the second and third advertising models, given the small amount of net revenue Apple gets. It is unknown how many media businesses sell advertising on a direct sold basis.

In terms of third party subscriptions, Apple employs an agency model, providing media businesses the ability to offer subscriptions through Apple News. There are two Australian media businesses that offer subscription services on Apple News (Nine, previously Fairfax, for *The Age* and the *Sydney Morning Herald*, and News Corp, for *The Daily Telegraph*, *Herald Sun*, *The Courier-Mail*, *The Advertiser* and *The Australian*). Apple retains between 15 per cent and 30 per cent of the revenue, depending on the length of the subscription.⁷¹² In Fiscal Year 2018, Apple had total billings of less than AU\$500 000 from the news publishers' supply of subscriptions on Apple News to Australian users.⁷¹³

43 K Flynn, '[Less than a McDonald's happy meal: Facebook's video ad breaks aren't working for creators](#)', 19 November 2018, accessed 15 June 2019.

710 Apple, '[Ad Guide for Publishers: Advertising on Apple News](#)', April 2019, accessed 6 May 2019.

711 Information provided to the ACCC. Apple's Fiscal Year 2018 ended on 29 September 2018 (Apple Inc, 2018 Form 10-K, p. 1).

712 Information provided to the ACCC.

713 Information provided to the ACCC.

There are a range of media businesses that publish content on Apple News, including News Corp (although only for some of its publications), ABC, SBS and Nine. The Guardian does not publish content on Apple News.

News Corp and The Guardian are the only media businesses that have expressed concerns about Apple News in this Inquiry. News Corp submitted that Apple News' strict layout and design guidelines reduces News Corp's brand equity, such that consumers associate its content with Apple instead. News Corp also noted that while Apple News has a subscription facility, subscriber content is not promoted in Top News or Trending Stories (which drives the vast majority of user engagement).⁷¹⁴

Both News Corp and The Guardian raised concerns about Apple's app store, and Apple's practice of tying payment methods (whether subscriptions to newspapers or donations to the newspaper) with its app store. That is, any payments through apps downloaded on Apple's app store have to be made through Apple's payment systems, rather than that of the media business or alternative suppliers of payment systems. This is discussed in further detail in the next section.

The limited revenue received by Apple for its pooled advertising and backfill advertising services also suggests that a small number of media businesses are choosing to advertise in this way and may instead prefer the direct advertising model. This is likely to be beneficial for media businesses, as they are able to retain more of their revenue.

Apple News' business model is clearly distinct from that of Google and Facebook, for the following reasons:

- Apple News provides a platform that specifically aggregates and supplies news content for Apple users. The news content is provided in the Apple News format, which maintains a certain aesthetic and consistency to the news articles available on Apple News. Consumers remain on the platform, as they view news content provided by different media businesses and also view ads alongside that content (with the share of the advertising revenue retained determined by the model chosen by the media business).
- In contrast, when users search for news content on Google Search, Google supplies its service through links to third party websites that are responsive to the user's search query. Rather than remaining on the platform (as a user does on Apple News), when a user clicks on a non-AMP link on Google Search, they are taken to the media business' website off the Google platform. The exception to this is where a user clicks on a link to news content on Google Search on a mobile device that is published in the AMP format. Because AMP pages are stored on, and served from, Google's cache, the user effectively remains in Google's ecosystem. This is discussed in more detail later in this chapter.
- Facebook supplies links to news content in its News Feed. The extent to which a user sees links to news content depends on their interactions with the media business' Facebook Page and other news related content, and what their friends and family post, amongst other factors. When a user clicks on a link, they are either directed away from the Facebook platform or remain on the platform (if the content is published by a media business in the Facebook Instant Articles format).

While media businesses can and do provide links to news and other content on their own websites in articles on Apple News, Apple News appears to have been designed to retain consumers on its platform and offers routes to monetisation directly on its platform. While media businesses may be able to monetise content on the Apple News' platform, this is likely to be less lucrative than monetisation on their own websites, due to the split in revenue in two of the advertising models described above and because consumers remain on the Apple News platform, rather than visiting the media business' website or app.

The concerns expressed by media businesses about the extent to which platforms such as Google Search and Facebook retain users on its ecosystem (discussed further in this chapter) apply equally to Apple News.

Media business apps supplied through Apple's app store

Another way in which consumers access news content is through a media business' app, which is available for download in app stores.

714 News Corp Australia, [Submission to ACCC issues paper](#), April 2018, p. 83.

App developers can supply their app on the Apple Store using a number of different revenue models. For media businesses, these apps can be supplied free of charge (such as The Guardian) or are free to download, but the content itself can be subject to a subscription fee (such as certain News Corp titles). Digital subscriptions offered on the Apple Store are subject to a 30 per cent commission, payable by the media business to Apple, on the subscription price in the first year, which then reduces to 15 per cent in subsequent years.

Media businesses seeking to make their app available on the App Store cannot bypass Apple's payment method, which enables Apple to take this commission. This commission effectively reduces the subscription and other revenue that a media business would otherwise receive for its own content. In its submission to the issues paper for this Inquiry, News Corp stated:

Apple prohibits publishers from offering or promoting subscriptions to iOS users via apps that are placed in the App Store. If a publisher offers a direct subscription, their app will be rejected by Apple for inclusion in the App Store or removed from the Store itself.⁷¹⁵

The Guardian makes a similar submission in its response to the Preliminary Report and contrasts to the situation with Google.

[W]hile Google also charges a fee for contributions payments made through its app store payment mechanism, it allows its users to exit Android apps to make a payment via a web browser. This enables GNMA to provide a range of alternative payment providers, meaning that readers can contribute via a browser through Stripe (with a payment fee of 0.1 per cent) or PayPal (with a fee of about 3.4 per cent).

As a result of Apple's decision to charge the 30 per cent, GNMA has turned off payment functionality within the Guardian app on iOS. This is not without cost. Internal modelling suggests that payments through the iOS app could drive a significant uplift in reader revenue, which would deliver a significant uplift in revenues which would be reinvested in high-quality journalism about and for Australians. However, due to this 30 per cent 'Apple Tax', and as a point of principle, we have decided not to allow that functionality with the current version of the Guardian iOS app.'

In Europe, Spotify has filed a complaint with the European Commission against Apple about this. Spotify claimed that Apple is dominant in the app store market, and that this conduct amounts to an abuse. Further information is set out in the box below.

Box 5.2: Spotify's EC antitrust complaint against Apple

On 13 March 2019, Spotify filed a complaint against Apple with the European Commission on the basis that Apple was abusing its dominance in the app store market, by giving its own music streaming service an unfair advantage over rivals.⁷¹⁶ Apple (through Apple Music) and Spotify compete in the supply of music streaming services. Apple also offers an app store, which is pre-installed on Apple devices and allow consumers to download apps onto their Apple devices.

In a statement published on its website, Spotify alleged that Apple 'has introduced rules to the App Store that purposely limit choice and stifle innovation at the expense of the user experience.' Specifically, it has been claimed that Apple is abusing its dominance in the app store market and giving itself an unfair advantage in the music streaming service market by:

- requiring Spotify to pay Apple a 30 per cent fee on all in-app purchases, including when consumers upgrade from the free Spotify service to the premium Spotify service; Spotify claims that paying this tax has forced Spotify to inflate the price of its premium membership to EUR€12.99, thereby preventing it from competing with Apple Music at the same price point of EUR€9.99
- not applying a similar fee to apps that do not directly rival its own downstream services, such as Uber and Deliveroo
- preventing Spotify from communicating with their customers who access Spotify via Apple platforms, both through the Spotify app and via email, meaning customers cannot access promotions and other relevant information

715 News Corp Australia, [Submission to ACCC issues paper](#) April 2018, p. 82 ; Guardian Australia, [Submission to the DPI Preliminary Report](#), February 2019, p. 20.

716 D EK, [Consumers and innovators win on a level playing field](#), *Spotify Newsroom*, 13 March 2019, accessed 10 April 2019.

- blocking upgrades to the Spotify app that improve its user experience and functionality, while not applying the same blockages to its own Apple Music app
- prohibiting access to Spotify on other Apple services including Siri, HomePod, and Apple Watch.

Spotify has requested the following changes to Apple's operations in order to allow them to compete on the same level as other apps on the App Store:⁷¹⁷

- all apps should be subject to the same set of rules and restrictions
- consumers should have a choice of payment systems and not be forced to use systems with 'discriminatory tariffs' such as Apple's
- app stores should not be allowed to control the communications between services and users as this places unfair restrictions on marketing and promotions that benefit consumers.

On 14 March 2019, Apple issued a statement in response to Spotify's claims, claiming that:⁷¹⁸

- its current revenue sharing model means that the 30 per cent fee only applies for the first year of an annual subscription, and decreases to 15 per cent every year thereafter
- apps that are free to consumers are not charged by Apple. As most of Spotify's customers use the free, ad supported Spotify product, only a small fraction of Spotify subscriptions fall under Apple's revenue sharing model
- Apple does not apply commission fees to apps that offer physical goods such as food, or apps that earn revenue exclusively through advertising
- Apple has approved and distributed nearly 200 app updates on behalf of Spotify, resulting in over 300 million Spotify downloads
- Apple has reached out to Spotify to bring their service on Siri and AirPlay 2, and are ready to assist where required
- Apple approved the Spotify app for Apple Watch in September 2018, and it is currently the highest rating app in the 'watch music' category.

The complaint has been received by the EC and is pending review.⁷¹⁹ Media reports suggest that an investigation by the European Commission is imminent.⁷²⁰

ACCC's views regarding Apple News

While the ACCC did not receive a significant number of complaints about Apple News in submissions to the issues paper or to the Preliminary Report, certain issues raised in relation to Apple's conduct has the potential to raise competition concerns. In particular, Apple's practice of tying payments on Apple News to its own payment methods (and not allowing media businesses to bypass Apple's payment methods) is of particular concern. The ACCC will, through its proposed functions in recommendation 4, monitor any developments in this area.

The ACCC considers that, similar to Google's and Facebook's positions as gateways to the access of news for many consumers, Apple News may hold this position in the future. While the business model of Apple News is different from Google and Facebook, and its role as an 'intermediator' between consumers and news companies is only limited to those consumers who use Apple products, a substantial proportion of the Australian population is exposed to Apple News. Apple could, in the future, also be considered to be an essential business partner for media businesses.

717 D EK, [Consumers and innovators win on a level playing field](#), *Spotify Newsroom*, 13 March 2019, accessed 10 April 2019.

718 Apple, [Addressing Spotify's claims](#), *Apple Newsroom*, 14 March 2019, accessed 10 April 2019.

719 C Connor, [Spotify's "misleading rhetoric" does not show antitrust violation](#), *Apple says*, *Global Competition Review*, 18 March 2019, accessed 10 April 2019.

720 D Boffey, [Apple braces for EU investigation after Spotify complaint](#), *The Guardian*, 7 May 2019, accessed 12 May 2019.

The ACCC considers that Apple News could present issues similar to AMP on Google, which is discussed in section 5.3.4. Like AMP, the design of Apple News reduces the incentives for consumers to click onto links to media businesses' websites or be referred to their websites. This could lead to similar monetisation problems that media businesses face on AMP.

Apple's arrangement with app developers, where Apple takes 30 per cent of revenue from subscription fees (then decreasing to 15 per cent after the first year), raises a broader issue about Apple's bargaining power. The Guardian's concerns about Apple, and Spotify's filing in the European Commission, suggest that Apple has a much stronger bargaining position relative to app developers. This is likely due to the fact that Apple's app store is the only platform through which consumers can download and purchase apps on iOS devices. The ACCC will, through recommendation 4, monitor this issue.

The introduction of Apple News+ to Australian consumers may further increase the importance of Apple's position in the supply of news referral services and consequently, its bargaining power relative to media businesses.

Apple News+, launched in the US and Canada on 25 March 2019, is a news subscription service offered by Apple. Recent media reports have raised strong concerns about Apple News+ and its long term adverse effects on media businesses. In particular, it has been reported that Apple would retain 50 per cent of revenue generated by media businesses on the app and that, similar to Facebook and Google News, media businesses would not get any control over the placement of their stories or direct relationship with their subscribers.⁷²¹ It has also been reported that media businesses will not get access to data about their readers on Apple News+ because Apple does not track users.⁷²²

Media reports have also raised concerns about brand attribution issues on Apple News+, similar to the concerns expressed by News Corp in relation to Apple News (outlined above). Mark Thompson, CEO of the New York Times, has 'warned that relying on third-party distribution can be dangerous for publishers who risk losing control over their own product'.⁷²³

Apple News+ is expected to launch in Australia later in 2019.⁷²⁴ It is not clear what Australian-specific newspapers and magazines would be featured in the Australian version, what commercial arrangements will be in place between Apple and media businesses or what the overall effect of Apple News+ will be on Australian media businesses. However, if the take up of Apple News continues to grow (and there is a similar take up of Apple News+), Apple may become a must have platform for media businesses in the same way that Google Search and Facebook currently are, and could face the monetisation and brand attribution issues discussed above.

721 C Newton, [Apple News Plus isn't a good deal for publishers, but it could have been worse](#), The Verge, 26 March 2019, accessed 11 May 2019.

722 G Sloane, [How publishers are eyeing Apple News Plus](#), AdAge, 29 March 2019, accessed 11 May 2019.

723 K Li and H Coster, [New York Times CEO warns publishers ahead of Apple news launch](#), Reuters, 22 March 2019, accessed 11 May 2019.

724 Apple, [Apple launches Apple News+, an immersive magazine and news reading experience](#), press release, 26 March 2019, accessed 1 May 2019.

5.3 How the substantial bargaining power of Google and Facebook affects the supply of news referral services

Key findings

- The ACCC considers that concerns expressed by media businesses are largely due to the imbalance of bargaining power between:
 - Google and media businesses
 - Facebook and media businesses.
- These concerns include Google’s use of media businesses’ content by way of snippets and Google’s former First Click Free policy; restrictive publication formats; a lack of access to user data; a lack of recognition for original content; and a lack of algorithmic transparency.
- The use of snippets in search results benefit consumers, search engines and media businesses. However, media businesses accept terms that are less favourable to them, in order to appear in Google Search results. Due to an imbalance of bargaining power with Google, they cannot negotiate to optimise the length and content of snippets (described in section 5.3.2) to maximise the number of users clicking through to their websites without diminishing the value of their content.
- The AMP format impedes the ability of media businesses to monetise content as effectively as on their own websites. It also creates difficulties with attribution, branding and the sharing of data. While AMP is not directly controlled by Google, the ACCC considers that Google has a strong influence over how AMP is implemented.
- Media businesses’ uptake of Facebook’s Instant Articles has been minimal. However, media businesses face broader monetisation issues related to Facebook referrals beyond Instant Articles.

5.3.1 Imbalance of bargaining power

In the Preliminary Report, the ACCC concluded that there was an imbalance of bargaining power between media businesses and each of Google and Facebook. The ACCC had noted that it received submissions from stakeholders that highlighted a lack of bargaining power on the part of media businesses, relative to each of Google and Facebook.⁷²⁵ In particular, media businesses had noted Google’s use of snippets and previous enforcement of its FCF policy, and Facebook changing its News Feed algorithm with limited notice to media businesses, as being indicative of the bargaining power imbalance between media businesses and the digital platforms.

The ACCC recognised that some of Google’s practices have led to consumer benefit for a number of users, at least in the short term. For instance, while Google’s FCF policy created concerns for media businesses, consumer access to premium content at zero cost was arguably beneficial for consumers. Similarly, Google’s practice of crawling news content and producing snippets in organic search results enhances consumer welfare by providing context of the results to the user’s query, and assisting the user in assessing the relevance of the results.

Submissions in response to Preliminary Report

Facebook disagrees with the ACCC’s conclusions that it has substantial market powers in the supply of news referral services and that there is an imbalance of bargaining power between Facebook and media businesses, submitting that the evidence cited in the Preliminary Report did not support such findings. It also submits that the Preliminary Report’s finding is undermined by the fact that media businesses have full control of how their news is accessed and that Facebook provides a number of products that enable media businesses to monetise, build their audience, and distribute content at no cost. Facebook concludes that neither of these two activities are indicative of an imbalance of bargaining power or substantial market power.⁷²⁶

⁷²⁵ See for example, Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p.33; Nine, [Submission to ACCC Issues Paper](#), April 2018, pp. 18-19.

⁷²⁶ Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 13.

Google does not discuss the ACCC's conclusion about the balance of bargaining power in its response to the Preliminary Report, or in its further public submissions, but disagrees with the ACCC's finding of a market for news referral services.

ACCC's views regarding the imbalance in bargaining power between each of Facebook and Google and news media businesses

The ACCC recognises that referral traffic for media companies from Facebook has been declining in recent years. However, as discussed in section 5.2.2, Facebook remains a vital distribution channel for reaching audiences of particular demographics for certain media businesses

Information obtained following the publication of the Preliminary Report supports the finding that there is an imbalance of bargaining power between Facebook and media businesses:

- A number of media businesses submitted that when Facebook implemented a change to its algorithm to reduce the proportion of news content available on its news feed, Facebook did not provide media businesses with sufficient notice or time to prepare for that change.⁷²⁷ Seven West Media indicated that traffic to some of its websites fell around 40 per cent from June 2017 to April 2018, likely due to Facebook's algorithm change in January 2018.⁷²⁸ SBS made a similar submission, noting that it had 'seen a marked drop in reach for its news content on the platform' since the algorithm change. It further stated that 'SBS's youth-focused nightly current affairs program, The Feed, has seen a 50 per cent drop in Facebook reach since the January 2018 algorithm changes'.⁷²⁹
- During its stakeholder forum in March 2019, the ACCC received feedback from media businesses about the difficulties they had in negotiating with Facebook. These media businesses highlighted that Facebook is an essential channel for referrals and reach for them, despite the lack of monetisation options on that platform. In addition, while Google had made some efforts to improve monetisation for media businesses, Facebook had not.⁷³⁰

As previously discussed, the incentives of each of Google and Facebook are likely different from those of media businesses, such that their supply of news referral services may be favourable for the digital platform, but not for the media businesses.

This section examines how this imbalance of bargaining power manifests in the conduct of each of Google and Facebook and the terms on which news referral services are supplied to media businesses. Media businesses have expressed concerns about the impact of this bargaining imbalance on their ability to monetise and produce news content. These concerns consist of:

- **News snippets and Google's former FCF policy:** allegations that Google extracts the value of content produced by media businesses by way of news snippets and its previous FCF policy, which it then uses to improve the quality of its own services and thereby profiting from this content.
- **Publication formats:** the restrictive nature of publishing formats offered by digital platforms, such as AMP and Facebook's Instant Articles, limits the amount of advertising that can be displayed, reducing opportunities for monetisation by media businesses. It also reduces the value of media businesses' brand names and consumer brand recognition.
- **Access to user data:** digital platforms collect and use individual data from consumers when consumers access and consume news on digital platforms. However, digital platforms do not share all data they gather with media businesses. Media businesses claim that this limits media businesses' ability to understand their audience and improve the quality of their advertising services and news content.
- **Recognition of original content:** digital platforms that offer search services do not reward media businesses that invest in and produce original content or break news stories with higher rankings, compared to media businesses that copy such content.

727 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 90; Free TV Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 34.

728 Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25.

729 SBS, [Submission to the ACCC Issues Paper](#), April 2018, p. 5.

730 ACCC, [Summary of Digital Platforms Inquiry Industry Stakeholder Forum](#), 18 March 2019, pp.3-4.

- **Algorithmic transparency:** a lack of transparency in relation to how digital platforms' algorithms rank and distribute news content to consumers, reducing the level of control a media business can exercise in relation to how their news content is distributed to consumers.

All of these concerns have been expressed in relation to both Google and Facebook. However, stakeholder submissions cited more examples in relation to Google, rather than Facebook. This may reflect the fact that Google is a larger source of referral traffic for media businesses than Facebook.

Each of these concerns regarding the imbalance of bargaining power are examined in turn below.

5.3.2 News snippets

Submissions assert that Google's practice of extracting content from news articles produced by a media business and republishing that content on its search results in the form of a snippet has the effect of reducing referral traffic to the media business' website.⁷³¹ Stakeholders submit that if a snippet is excessively long, a considerable amount of content is revealed to the consumer, which then reduces the consumer's incentive to click through to the media business' website or app.⁷³²

What is a snippet?

A snippet refers to the small amount of text, an image, or a short video that forms part of a link. When producing a list of hyperlinks in response to a search item (including news content), search engines often scrape websites that are the subject of the hyperlink for content and provide a snippet of content relevant to the website. The purpose of the snippet is to provide context to the hyperlink and an indication of the contents of the relevant website to the user, so that the user can evaluate the relevance of the website to their search query. While a snippet may be the first line or two of a news article, a snippet can also be extracted from the body of a news article if the search engine finds that information to be more relevant to answering the user's query.

If the owner of a website does not want a search engine to produce snippets, it can incorporate a piece of code onto the website to prevent a search engine from scraping content and producing snippets. Similarly, links to news content generated as a result of a news-related search term entered into a search engine are generally accompanied by a snippet of the news content. Snippets are generated automatically and search engines use a number of different points of information to produce snippets, including description information in the title of the website, content on the website itself and meta tags for each page.⁷³³

An example of news snippets that appear on Google Search, when searching for 'Sydney dust storm', is set out below. The blue text is the name of the news article and links to the news article itself, the green text sets out the website's address and the black text is the snippet.

Figure 5.11: Example of a news snippet on Google Search

Dust storms NSW: Aussie dust storm may hit Sydney - News.com.au
<https://www.news.com.au/.../natural...dust/.../9cbf590f521f8c9b8d49c449a3aa28dc>
 59 mins ago - Pub manager in remote NSW captures incredible **dust** ... In what looks like an out-take from Mad Max, an awe-struck pub owner has captured the moment an insane **dust storm** "blew away" her outback town. ... **Sydney** could find itself blanketed by a red haze later this week with the ...

Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

731 See for example, Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68.

732 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 34.

733 Information provided to the ACCC.

How does Google use snippets and who controls them?

Google only displays snippets on Google Search. It does not display snippets on Google News. The rest of this section focuses on Google's use of snippets in Google Search.

Google submits that the purpose of snippets is to describe each result and explain how it relates to a user's query, in order to help users quickly find pages that are likely to be relevant to their query.⁷³⁴ Google says that its generation of snippets is automated and takes into account both the content of a page as well as references to it that appear on the web. Google also uses a number of different sources to generate the snippet, including descriptive information in the title and meta tags for each page.⁷³⁵

As snippets are generated automatically, it is ultimately Google that controls the length and content of snippets. The only control media businesses have over snippets is the ability to opt out. Accordingly, media businesses can only choose whether they want snippets to appear in conjunction with a hyperlink to their news content and cannot control the length or substance of the snippet.

Media businesses that do not want Google to extract and post snippets of their content can use a 'nosnippet' tag. Hyperlinks to these publishers' news items may still surface in response to a Google search query (provided the publisher did not opt out of crawling)⁷³⁶, but such a media business' content may be demoted in search rankings.

While it appears that a media business' use of the 'nosnippet' tag does not directly factor into a site's ranking, consumer behaviour impacts the ranking of the site in Google's general search results. For instance, if consumers do not click on the link to a news article when no snippet is provided, Google's algorithm may consider that the content is less relevant to the search query.

How does Google's use of snippets affect media businesses?

There are two ways that Google's practice of using snippets can potentially affect media businesses:

- If a media business opts out of snippets (such that Google only provides a hyperlink to the relevant news content and no accompanying text), the publisher may be ranked lower in organic search results, reducing the media business' visibility to consumers and accordingly, click through rates. As such, there is little value for a media business to prevent Google producing snippets.
- If a media business does not opt out of Google producing snippets of their content, the relevant snippet may reveal the substance of the media business' content. For example, a snippet may be long enough for a consumer to understand the context of the media article, which may remove the need for the consumer to click on the link and navigate to the full content article.⁷³⁷ This would then have a direct impact on referral traffic by reducing click-through rates of organic search results.⁷³⁸

As a consequence of fewer consumers clicking on hyperlinks, media businesses are less likely to have consumers viewing the ads on their websites or apps, or considering subscribing to their news service.

The reduction in referral traffic can also affect the media business' future supply of advertising services as the level of traffic a website receives will likely be an important part of an advertiser's decision regarding where to invest their advertising budget.

Submissions and academic literature about the effect of snippets

News Corp expresses strong concerns about Google's practice of extracting content and producing snippets in responses to search queries. News Corp submits that while Google allows media businesses 'to opt out of their content being scraped, as Google is dominant in search, the lack of visibility on the

734 Information provided to the ACCC.

735 Information provided to the ACCC.

736 Crawling is a process undertaken by providers of search services. Google, How search works, [How search organizes information](#), accessed 12 November 2018. As Google explains, 'The web is like an ever-growing library with billions of books and no central filing system. We use software known as web crawlers to discover publicly available webpages. Crawlers look at webpages and follow links on those pages, much like you would if you were browsing content on the web. They go from link to link and bring data about those webpages back to Google's servers.'

737 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68.

738 See for example, Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19.

platform results in a substantial decline in traffic. Google therefore represents an unavoidable trading partner and media businesses are compelled to have their content scraped'.⁷³⁹ News Corp further submits that the use of snippets effectively provides users the ability to read the key points of a news story, without clicking through to the full article.⁷⁴⁰ As a result, users remain in the Google ecosystem.

News Corp cites the results of a survey commissioned by the European Commission into internet users' preferences for accessing content online. The survey results reported that when accessing news via news aggregators, social media or search engines, 47 per cent of respondents browsed and read the main news of the day without clicking on links to access the whole articles.⁷⁴¹ It also points to a similar survey in the US, which showed that 44 per cent of visitors to Google News can scan headlines without clicking and accessing media businesses' sites.⁷⁴² News Corp suggests that this means media businesses 'receive far less traffic than they otherwise would and are deprived of the opportunity to monetise content or build their own data profiles so as to attract advertisers'.⁷⁴³

While the headlines to news articles and associated snippets provided in search results may be sufficient for some consumers, who may choose not to click through to the relevant news website, headlines and snippets may actually assist consumers in deciding whether to read a news article. Data from the ACCC News Survey show that when consumers are presented with news articles on their social media feed, search results, or in a news aggregator, 69 per cent of respondents said that an 'interesting headline' was an important factor in their choice, while 74 per cent placed importance on the 'text explaining the article' in choosing which article to read.⁷⁴⁴

There have been a number of academic studies into the effect of news aggregators and their effect on referral traffic and news consumption habits. Notwithstanding the focus of these studies on news aggregators, the discussion in these studies in relation to the use of snippets in news aggregator services can also apply to the use of snippets in search query results. This is because, similar to news aggregator services, Google Search aggregates and presents hyperlinks and snippets of information to the user. The results of these studies show that snippets do have some effect on click-through rates; however, the nature of that effect is not clear.

News Corp's submission refers to a study on news aggregation and attention by Dellarocas, Sutanto, Calin and Palme (2015).⁷⁴⁵ That study found evidence for a substitution relationship between the amount of information that aggregators display about an article and the probability that readers will opt to read its full text at the content producer sites. In particular, the study concluded:

*Any additional information provided by aggregators, in the form of text snippets or images, apparently satiates the appetite of some readers and can only serve to decrease click-through rates. Interestingly, however, when several related articles compete for user attention, a longer snippet and the inclusion of an image increases the probability that an article will be chosen over its competitors.*⁷⁴⁶

In contrast, Chiou and Tucker (2015) considered whether the aggregation of content by a single platform encourages users to 'skim' content or to investigate that content in depth, by examining consumer behaviour in relation to links to content from the Associated Press. Links to content from the Associated Press were removed from Google News (but Google News still retained links to other news content) but were still available on Yahoo! News (where The Associated Press content was still available).⁷⁴⁷ Chiou and Tucker compared consumer behaviour on both media aggregation services and examined the extent to which consumers clicked through to news websites. Chiou and Tucker found that fewer users subsequently visited news sites after navigating to Google News (which did not contain links to the Associated Press content), relative to Yahoo! News (which did). This suggested

739 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68.

740 News Corp Australia, [Second Submission to the ACCC Issues Paper](#), August 2018, p. 6.

741 European Commission, [Internet users' preferences for accessing content online](#), September 2016, p. 32.

742 News Corp Australia, [Submission to the ACCC's Digital Platforms Inquiry Preliminary Report \(Remedies Paper\)](#), March 2019, p. 16.

743 News Corp Australia, [Second Submission to the ACCC Issues Paper](#), August 2018, p. 6.

744 Roy Morgan Research, [Consumer Use of News](#), prepared for the ACCC, November 2018, p. 16.

745 C Dellarocas, J Sutanto, M Calin and E Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, *Management Science*, vol. 62, issue. 9, 2015, pp. 2457-2764.

746 C Dellarocas, J Sutanto, M Calin and E Palme, *Attention Allocation in Information-Rich Environments: The Case of News Aggregators*, *Management Science*, vol. 62, issue. 9, 2015, p. 2544.

747 L Chiou and C Tucker, *Content Aggregation by Platforms: The Case of the News Media*, 17 July 2015.

that consumers do appear to use platforms to seek new and further content and that the removal of the Associated Press content on Google News resulted in a decline in navigation to other news sites. They also did not find any evidence of a scanning effect (where consumers scan articles at an aggregator and do not click through to news websites), with overall traffic to Google News and Yahoo! News remaining relatively comparable.

Athey, Mobius and Pal (2017) similarly examined the extent to which news aggregators act as substitutes for traditional news consumption or as complements, and the effect of snippets on consumer behaviour.⁷⁴⁸ They found that the shutdown of Google News reduces overall news consumption by about 20 per cent for Google News users, and it reduces page views on publishers other than Google News by 10 per cent. The effect of this was particularly concentrated around small media businesses, while large media businesses did not see any significant changes in overall traffic. They concluded that aggregators make it easier for consumers to search and consume products from small firms, increasing competition across media businesses for consumer attention. However, the same paper notes that:

At the same time, our findings also highlight that while large publishers may not see an effect in overall page views as a result of aggregators, they may lose traffic to their home pages, as well as their role in curating news, as readers read articles referred by Google News at the expense of articles referred by their own home pages (where newspapers monetize the home pages much better than articles). If readers do not pay attention to the identity of the publisher when they read articles on Google News, then the large publishers may lose their incentives to maintain a reputation for quality, and consumers may be less willing to subscribe to the publisher or use the publisher's mobile application.⁷⁴⁹

Axel Springer, one of the largest media businesses in Europe, has made public statements about the positive effect of snippets on its business. As a result of a German copyright law requiring Google to pay fees to publish snippets from news media websites, Google stopped showing snippets from their news articles. Axel Springer noted that the lack of snippets led to a nearly 40 per cent decline in referral traffic from Google Search and an almost 80 per cent decline in referral traffic from the Google News user interface.⁷⁵⁰

ACCC's views on the impact of snippets

The effect of the presence of snippets on click through rates

The presence of snippets *does* affect click-through rates. This is because snippets provide context to the associated hyperlink and an indication to consumers of the value of the linked content. Depending on the length of the snippet and the nature of news content the subject of the snippet, consumers may be more or less inclined to click on the hyperlink.

The effect of snippet length

It is not clear to the ACCC the extent to which the length of snippets on Google Search affects click-through rates, or that an optimum or fair snippet length can necessarily be determined. The ACCC does not agree that longer snippet lengths necessarily have a negative effect on referral traffic, with users remaining on an aggregator or search platform rather than clicking through to a news media business's website.

As noted above, academic studies into the effect of snippets and snippet length have been mixed. While there has been some indication that snippets may take away referral traffic from news media businesses, there is also some suggestion that snippets can provide benefits for news media businesses. In fact, one study discussed above suggested that longer snippets can make a news media business more competitive.

Although some concerns have been raised about the effect of snippets on referral traffic for media businesses, the ACCC has not received evidence that demonstrates a direct correlation or causation between the length of news snippets on Google Search and changes in referral traffic for an Australian media business or its click-through rates.

748 S Athey, M Mobius and J Pal, *The Impact of Aggregators on Internet News Consumption*, 11 January 2017.

749 S Athey, M Mobius and J Pal, *The Impact of Aggregators on Internet News Consumption*, 11 January 2017, p. 27.

750 Axel Springer, [Axel Springer concludes its data documentation: Major losses resulting from downgraded search notices on Google](#), press release, 5 November 2014, accessed 16 May 2019.

The effect of snippets on media businesses

In opting into snippets, profit-maximising media businesses face a trade-off between attracting consumers to their websites through indicating the value of their content; and potentially reducing their ability to monetise that content by offering its substance for free and reducing consumers' incentives to click on the hyperlink to their website. If media businesses had control over snippets, it would be expected that they would experiment to optimise the length and content of snippets to maximise the number of users clicking through to their websites without diminishing the value of that content.

Google offers media businesses a binary choice: the ability to opt in or out of snippets.

Google does not allow media businesses to negotiate any other terms in relation to the provision of snippets. As Google is a key source of traffic for media businesses, media businesses are unlikely to elect to prevent Google from extracting and publishing snippets of their news content.

The role of snippets in referral traffic is illustrated starkly by the natural experiment that occurred following the introduction of a licensing regime in Germany, referred to above, that required digital platforms to obtain a licence from content providers. Following this law change, which came into force in August 2013, Google removed the snippets of only the media businesses that refused to offer a free licence for the use of their content. The effect of this was a significant reduction in referral traffic for the media businesses who refused to provide Google with the free licence, as the example of Axel Springer noted above indicates.

This effect is intuitive: consumers were more likely to click on the links where there was additional context, meaning that media businesses that opted out lost significant referral traffic to rivals who opted in by offering a free licence to Google.

The outcome of the relationship between snippets and referral traffic is that media businesses end up accepting terms that are less favourable to them in order to maintain their level of referral traffic and opportunities for monetisation. This includes accepting the extent to which Google crawls media businesses' websites, extracts news content and publishes those extracts on its search engines in the form of a snippet. Google's ability to obtain benefits from snippets without negotiating with media businesses is evidence of its substantial bargaining power vis-à-vis media businesses.

Compensation for snippets

A number of media businesses submit that they should be compensated by digital platforms for the use of their news content to produce snippets:

- Free TV submits that 'greater control [should be given] to content owners to determine the length and usage of snippets and how the content owner is to be remunerated for this use of its content'.⁷⁵¹
- News Corp supports the concept of digital platforms paying media businesses for their use of news content through the reproduction of snippets and headlines, stating that 'a right to compensation in the form of licence fees is crucial...the licence fees should...reflect the financial benefit digital platforms derive from using snippets on platforms' sites (including to generate traffic and collect data)'.⁷⁵²
- The Copyright Agency proposes the introduction of an obligation on digital platforms to be licenced for their use of news content in headlines or snippets. 'Currently, the media companies are not properly rewarded for the value that the digital platforms extract from use of their content. Referrals to media web sites are simply not sufficient recompense. The solution is to link the value extracted by the digital platforms with the creation of content (including original content) with the production of that content by the news media companies'.⁷⁵³

News Corp, Free TV and the Copyright Agency have suggested that the ACCC recommend a licensing or other regime that requires digital platforms to pay media businesses for use of their content.

751 Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 17.

752 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report \(Remedies Paper\)](#), March 2019, p. 9.

753 Copyright Agency, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), May 2019, p. 4.

The ACCC is not recommending a mandatory licensing regime to apply to the use of snippets at this time because:

- the issues identified in relation to snippets stem from a wider set of issues regarding an imbalance in bargaining power, which the ACCC recommends be addressed at first instance through a code of conduct
- past experience in other countries suggests that the regime may not work; rather, the ACCC considers that it would be more appropriate for digital platforms and news media businesses to negotiate payments between themselves. This would provide flexibility to the payment model, which can be adjusted to the requirements of digital platforms and news media businesses.

Recommendation 7 is aimed at addressing the imbalance of bargaining power that is evident from the conduct described above by requiring certain digital platforms, including Google, to commit to negotiating with media businesses on particular topics and on specific terms. This may include the content and length of snippets. Further detail is set out in section 5.3.

5.3.3 Google's former First Click Free policy

A number of stakeholders have complained about Google's former FCF policy, which required media businesses to provide a certain amount of free content to Google users on a daily basis.

Google's FCF policy required media businesses to provide a number of subscription articles free of charge to consumers. The reasoning behind this policy was to ensure that 'sites provide some amount of free sampling of their content so that users can learn how valuable their content is.'⁷⁵⁴ The policy had been in place since 2008.⁷⁵⁵ In December 2009, Google updated the FCF policy so that media businesses could limit users to accessing no more than five pages per day without registering or subscribing.⁷⁵⁶ In September 2015, Google updated the policy again, reducing the limit of pages of premium content accessible by the public to three articles per day.⁷⁵⁷

In October 2017, Google discontinued its FCF policy and replaced it with its Flexible Sampling policy, which allows media businesses to choose the number of free news articles to provide to Google users. There are two types of sampling available:

- metering, which provides users with a quota of free articles to consume, after which paywalls will start appearing
- lead-in, which offers a portion of an article's content without it being shown in full.⁷⁵⁸

Despite the discontinuation of the FCF policy, a number of media businesses have provided Google's FCF policy as an example of Google exercising its bargaining power and the consequent anti-competitive effects of the policy in news media markets. For example:

- News Corp submits that if media businesses did not adhere to FCF, they would suffer a decline in visibility on Google Search, which would result in a loss of traffic and revenue from subscription conversions. The 'effect of the FCF policy was to make Google the central gateway to news content and to undermine publishers' efforts to create a direct relationship with customers via subscriptions'.⁷⁵⁹
- Seven West Media submits that FCF is a 'critical example of the way control over discoverability has been used to hinder traditional media businesses from being able to transition to a digital subscription model'.⁷⁶⁰
- Free TV submits that FCF 'circumvented paywalls and undermined the subscription-based news model'.⁷⁶¹

754 Google Webmaster Central Blog, [Enabling more high quality content for users](#), 1 October 2017, accessed 21 November 2018.

755 Google Webmaster Central Blog, [First Click Free for Web Search](#), 17 October 2008, accessed 21 November 2018.

756 Google News Blog, [Google and paid content](#), 1 December 2009, accessed 21 November 2018.

757 Google Webmaster Central Blog, [First Click Free Update](#), 29 September 2015, accessed 21 November 2018.

758 Google Search Console Help, [Flexible Sampling general guidance](#), accessed 21 November 2018.

759 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 69–70.

760 Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 24.

761 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 33.

In relation to the replacement of FCF with Flexible Sampling, Free TV submitted that:

*...rather than the fact that the first-click free policy was abandoned pointing to the responsiveness of Google, it highlights their complete indifference until the point that their reputation is drawn into question. This is not bilateral negotiation at work. This is a damaging, slow and inefficient process that at very best will take years to remove even the most egregious of terms and conditions.*⁷⁶²

In contrast, Fairfax (now owned by Nine) highlighted Google's replacement of its FCF policy with Flexible Sampling as an example of Google working 'proactively with the industry to help address challenges or create conditions for publishers to capitalise on market opportunities'.⁷⁶³

The effect of providing content at no cost

Subscription revenue is one of the key ways media businesses monetise their news content, with a number of news publications offering a subscription to their digital news offerings.

For news publications that offer news subscription content, some news publications allow consumers to access a number of news articles for free, so that consumers can get a sense of the value of the content provided. For example, *The Sydney Morning Herald* currently offers consumers access to 30 articles per month free of charge.⁷⁶⁴ Some news publications, such as *The Australian*, do not provide consumers with access to any articles without a subscription. The ACCC notes news websites themselves offer free access to the headline, and often short descriptions or extracts of stories so that consumers may get an idea of the news content without clicking on a story.

For most of the duration of Google's FCF policy, news publications offering subscription content were required to provide five articles per day for free. In a 30-day period, that equated to 150 articles provided to consumers for free. As noted above, media businesses may offer news content for free, whether because this is part of their business model or because they want to show consumers the value of their subscription content. However, the number of articles that Google required media businesses to make available on their search engine was significantly more than the number of news articles that media businesses of premium content provide to users for free, of their own volition. For consumers who wished to access this premium content without paying for that content, Google Search effectively allowed the consumers to bypass the media business and access that content for free.

Refusing to adhere to the FCF policy or removing themselves from Google Search would likely have affected the level of referral traffic, and consequently, subscription rates, for media businesses. For instance, News Corp Australia commissioned a study on Google's FCF policy. The study found that *The Wall Street Journal* would have obtained significantly more subscribers each year if it had been able to opt out of FCF and Google had not imposed its refusal to crawl policy. It also found that it was more costly for *The Times*, *The Sun*, *The Sunday Times* and *The Wall Street Journal* to 'opt-in' to the FCF policy in terms of foregone revenue from users that might otherwise have taken out a subscription.⁷⁶⁵

News Corp also provided the ACCC with evidence of the effect of FCF on their referral traffic and subscription numbers. News Corp Australia submits *The Daily Telegraph* received almost three times the amount of subscriptions in January and February 2018 combined compared with the same period for 2017.⁷⁶⁶

Because of the importance of search engines as a source of referral traffic, and the fact that Google Search has a significant market share in the supply of search services, media businesses are unable to refuse to accept referrals from Google, without incurring a substantial loss in referrals.

762 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 33.

763 Fairfax (now owned by Nine), [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

764 S Aylmer, [Sydney Morning Herald introduces digital subscriptions](#), *Sydney Morning Herald*, 2 July 2013, accessed 12 November 2018.

765 Information provided to the ACCC.

766 Information provided to the ACCC.

Google's incentives to offer free content to consumers

Google has an incentive to maintain or increase the quality of its search service to attract users (and advertisers) to its platform. This includes providing high quality search results to users, with information relevant to the search term. As previously noted, Google states that the FCF policy provided users with the opportunity to learn the value of the content offered by media businesses.

It is clear that the incentives Google faces on one side of the market (attracting users) influences its conduct in its supply of news referral services. These incentives have flow-on effects to media businesses in Google's supply of referral services. In this sense, Google is able to appropriate the value of content produced by media businesses, which it then uses to enhance its offering to advertisers.

ACCC's views on requiring free content

Media businesses offering premium content often provide some articles to consumers free of charge, before requiring consumers to sign up to an account, or to pay for content. However, the FCF policy effectively removed the ability for media businesses to choose how many articles they made available to consumers via Google Search. This is important, given that Google Search makes up a substantial proportion of traffic to a media business's website. Google's ability to enforce a policy that was detrimental to the interests of a significant number of media businesses was likely only possible because of the reliance of media businesses on Google.

Based on information provided by stakeholders to the ACCC, it appears Google's FCF policy had an effect on the subscription numbers of news publications that offer subscription content. It appears that Google had the ability to affect the subscription numbers and referral traffic that media businesses received, by requiring media businesses to provide news content at no cost.

The ACCC notes that FCF's replacement, Google's Flexible Sampling policy, appears to have made a meaningful difference to media businesses, as it allows media businesses to choose how many news articles they make available to consumers on Google Search on a zero cost basis.⁷⁶⁷ The ACCC will also be able to monitor any developments in this area by way of its additional functions, if recommendation 4 is implemented.

5.3.4 Publication formats

The focus of this section is on the publication formats available on Google (AMP) and Facebook (Instant Articles) for media businesses to publish news content. Both formats allow for the quick loading of content. While Instant Articles are only available on Facebook, AMP is available to any website that wants to publish its content in the AMP format. However, as explained further below, AMP pages clicked on from Google Search are served from the Google AMP cache.⁷⁶⁸

The effect of AMP

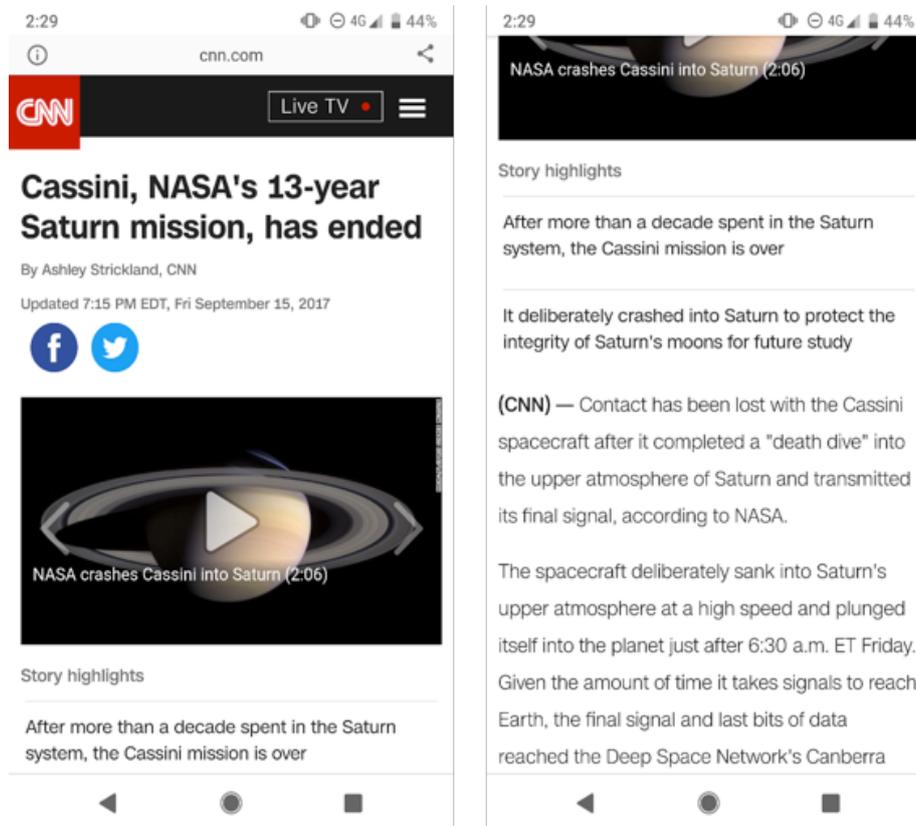
AMP is an open-source publishing format for mobile devices that enables the near-instant loading of content. In addition to publishing their websites in the AMP format, content creators can also publish their content in the AMP Stories format. The AMP Stories format is built on the technical infrastructure of AMP, with the aim of reducing text in a new story and providing a 'new, creative and visually rich ways of storytelling specifically designed for mobile'.⁷⁶⁹ The difference between AMP pages and AMP Stories can be seen in the figure below, illustrating a greater focus on visuals and interactivity on AMP Stories than on traditional AMP pages.

767 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 70.

768 AMP caches are designed to serve only valid AMP pages, allow AMP pages to be pre-loaded efficiently and safely, and perform additional user-beneficial performance optimisations to content. For more information, see [How AMP pages are cached](#) (AMP Project).

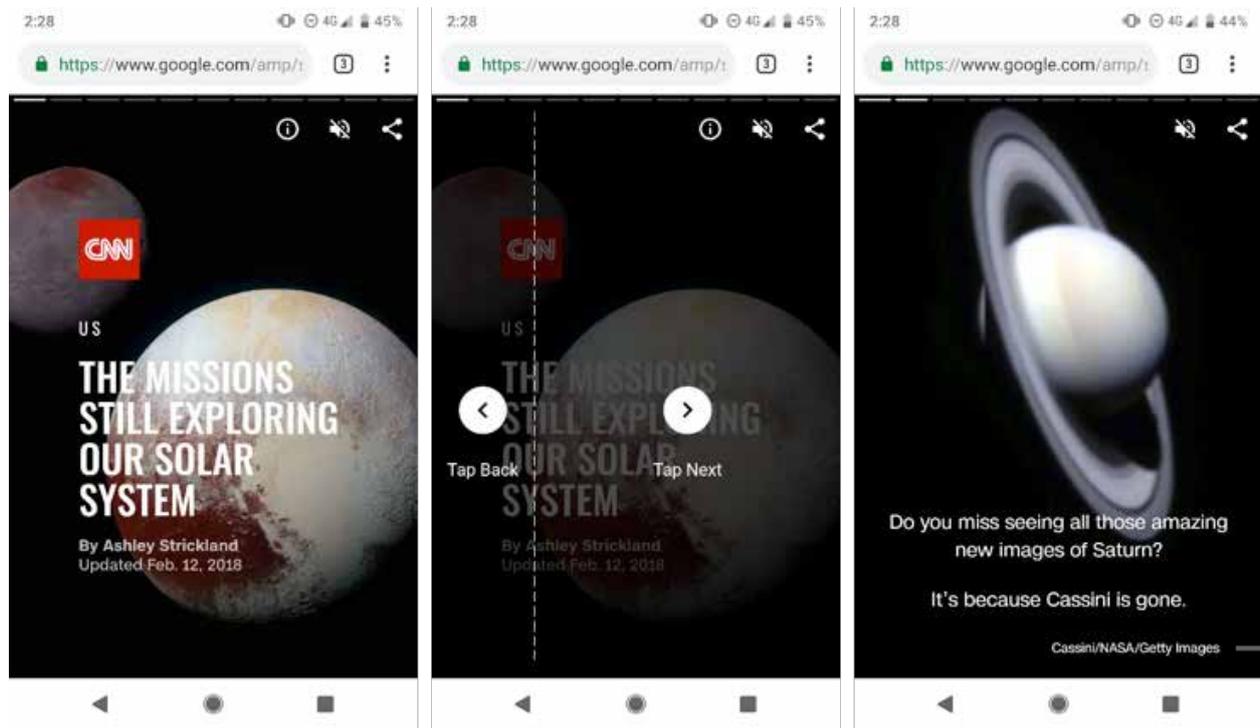
769 R Galfi, [AMP stories: Bringing visual storytelling to the open web](#), Google Developers, 13 February 2018, accessed 10 May 2019.

Figure 5.12: Example of an AMP page



Source: A Strickland, [Cassini, NASA's 13-year Saturn mission, has ended](#), *CNN*, 15 September 2017, accessed 9 May 2019 on an Android mobile device.

Figure 5.13: Example of an AMP Story



Source: A Strickland, [The missions still exploring our solar system](#), CNN, 12 February 2018, accessed 9 May 2019 on an Android mobile device.

References to AMP pages, websites and articles in this chapter include both AMP pages/websites and AMP Stories.

The AMP Project is not owned or controlled by Google. Originally, the AMP Project Tech Lead was a Google employee. But on 18 September 2018, AMP Project announced its new governance model. In particular, the announcement noted that the power to make significant decisions in the AMP Project will move from a single Tech Lead to a Technical Steering Committee (TSC)⁷⁷⁰. This includes representatives from companies that have committed resources to building AMP, with the end goal of not having any company hold more than a third of the seats.⁷⁷¹

On 30 November 2018, the AMP Project announced the initial membership of its two key committees, the TSC and the Advisory Committee. The Advisory Committee contains representatives from a mix of digital companies (such as Google, Cloudflare, eBay and Automattic) and media businesses (such as *The Washington Post*, *El Pais* and the *New York Times*). The TSC also contains representatives from a mix of digital companies, consisting of Pinterest, Pantheon, Twitter, Google and Microsoft. Of the seven representatives on the TSC, three are from Google.⁷⁷²

To enable the fast loading of AMP, the pages are cached. This means that AMP are preloaded so that when users click on a hyperlink to the AMP, the AMP loads quickly on the user's device. There are currently three AMP cache providers—Google, Bing and Cloudflare.⁷⁷³ Media businesses do not choose the AMP cache on which their pages are uploaded; instead, it is the platform that chooses the AMP cache to use.⁷⁷⁴ AMP pages on Google Search are cached by Google and sit on Google's servers. This provides Google with some level of control over content created by media businesses that it would otherwise not have, if the pages remained on the servers of media businesses.

770 Information provided to the ACCC.

771 M Ubl, [An open governance model for the AMP Project](#), *AMP Project*, 18 September 2018, accessed 10 May 2019.

772 M Ubl, [AMP Project's new governance model now in effect](#), *AMP Project*, 30 November 2018, accessed 10 May 2019.

773 *AMP project*, [How AMP pages are cached](#), accessed 11 May 2019.

774 *AMP project*, [How AMP pages are cached](#), accessed 21 November 2018.

From a practical perspective, Google appears to exert a significant degree of influence over how AMP is used and implemented. This is a concern that has been expressed in the tech industry.⁷⁷⁵ For example, an open letter published by a group of web developers expresses concerns they have about AMP (with 678 supporting signatories).⁷⁷⁶ These concerns do not relate to the AMP format but rather Google's implementation of the format which 'reinforces the position of Google as a de facto standard platform for content, as Google seeks to drive uptake of AMP with content creators'. According to web developers, Google exerts a significant degree of influence over how AMP is used and implemented when:

- content that opts in to AMP and the associated hosting within Google's domain is granted preferential search promotion, including (for news articles) a position above all other results
- a user navigates from Google to a piece of content Google has recommended, and, unwittingly, remains within Google's ecosystem.

There is some suggestion that most of the contributions to the AMP Project are from Google engineers, with some commentators estimating that 90 per cent of contributions are made by Google engineers.⁷⁷⁷ The ACCC has also examined the AMP Project's code repository.⁷⁷⁸ The top six contributors to the main repository by the number of commits (substantial changes to the code base) all work at Google, contributing around 4 800 of the 12 500 total commits, as at late April 2019. It may be the case that these contributions were made by the contributors in their spare time, but the ACCC notes that the number of commits made is not insubstantial.

Stakeholders have raised the following concerns about Google's use of AMP:

- attribution⁷⁷⁹
- monetisation⁷⁸⁰
- branding⁷⁸¹
- data⁷⁸²
- ranking.⁷⁸³

Each of these concerns are discussed below in detail.

Attribution to media businesses on AMP

One concern raised by stakeholders is that because media businesses' AMP pages are served from Google's cache, the traffic to those pages is attributable to Google rather than media businesses.

In the Preliminary Report, the ACCC noted that since April 2018, Nielsen's Digital Content Ratings (which is one of the ways media businesses measure audiences) now attributes readership on Google AMP to the media business rather than Google.⁷⁸⁴ This should provide a more accurate picture of referral traffic and attribution, which would help advertisers make more informed choices about their advertising decisions.

775 See, for example, D Buben, [Why AMP is bad for your site and for the Web](#), *Medium*, 28 February 2018, accessed 13 May 2019; D Wakabayashi, [Google helping mobile publishing? Some publishers are not so sure](#), *The New York Times*, 1 January 2017, accessed 13 May 2019.

776 [A letter about Google AMP, 9 January 2018](#), accessed 23 April 2019.

777 M Oberstein, [Has AMP hit a wall?](#), RankRanger, 31 October 2018, accessed 26 April 2019.

778 The ACCC examined the AMP project code repository on Github and the list of contributors at <http://github.com/ampproject/amphtml/graphs/contributors>.

779 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

780 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

781 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 74.

782 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 89-90.

783 See for example, Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 34.

784 Nielsen, [Digital measurement upgrade: Nielsen expands mobile coverage, adds off-platform measurement](#), 29 June 2018, accessed 12 November 2018.

However, problems regarding attribution of content in the AMP format appear to persist. News Corp submitted, in its response to the Preliminary Report:

Although publishers have been able to use a Nielsen Software Development Kit tag this is time consuming and although it attributes audience to the publisher, it is unable to prevent audiences being attributed to the platform as well, meaning there is double counting, thereby diluting publishers' figures relative to the platforms.

There are restrictions on the ability of publishers to obtain unique audience figures. Although there were recently changes to allow first party tracking, so that the behaviour of a consumer reading an article in AMP format and then non-AMP format can be tracked as a single user ID, a publisher must use Google-served tracking software, forcing use of Google Analytics, and Google does not allow the use of third party analytics software providers.

There is no ability to track ad performance at all. It is unclear why it is not possible to track users and ads on AMP given the technology required to do so is very similar to the analytics used for normal webpages. The reasons are likely to be that restricting such access improves Google's advertising business by reducing the relative attractiveness of competing direct advertising businesses.⁷⁸⁵

Monetisation on AMP

In the Preliminary Report, the ACCC noted that content published in the AMP format is loaded more quickly than standard web pages. To allow for faster load times, the AMP format necessarily reduces the amount of space or inventory for advertising opportunities. Media businesses submit that because of this reduced space for advertising inventory, the AMP format has the effect of reducing media businesses' opportunities to monetise their content.

The ACCC had accepted this submission in the Preliminary Report, and had suggested that compared to media businesses' websites, AMP pages contain less space for advertising, which was likely to have an impact on media businesses' advertising revenue.

In response to this finding, Google submits:

First, as the AMP Project has publicly stated, "There are no restrictions in AMP that would make a publisher have fewer ads on AMP pages than on non-AMP Pages." The AMP Project provides tips to help publishers, such as to "Place the same number of ads on AMP Pages as your non-AMP pages to generate maximum revenue per page."

Second, focusing narrowly on the number of ads on a single page ignores the fact that AMP leads to improved page load times, increased site traffic, superior ad engagement, and thus typically increases advertising revenue overall. The AMP Project has implemented new innovations to allow publishers to use yield-maximisation techniques while also supporting quick load times.

Finally, as the Preliminary Report acknowledges, "content is not penalised in organic Google Search results for being non-AMP," and non-AMP web pages can still rank highly in Google Search results if they offer relevant content.⁷⁸⁶

The ACCC acknowledges Google's submission. Websites are able to retain the same amount of advertising when publishing news stories in the AMP format as on their own websites. Rather than reducing the amount of space or inventory for advertising opportunities, AMP pages restrict certain types of advertising such that there are certain types of ads that are not supported on AMP.⁷⁸⁷ Accordingly, websites publishing content in the AMP format cannot monetise advertising revenue in the same way as on their own websites.

785 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 19.

786 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 45-46.

787 Google Ad Manager Help, [AMP pages and AMPHTML ads](#), accessed 26 April 2019.

However, there is a broader issue about the extent to which Google, by way of AMP, retains users within its ecosystem and reduces monetisation opportunities for media businesses outside of AMP. That is, rather than directing users to the websites of media businesses, AMP's design encourages users to stay within the Google ecosystem. As a result, media businesses are less likely to monetise content on their own properties, either through advertising or subscription revenue.

For example, in a submission to the Federal Trade Commission, the European Publishers Council (EPC) submitted that 'online platforms seek to attract and retain consumers on their platform, so they can collect highly personalised data they can use for advertising purposes. In this context, the algorithms used by digital platforms are designed to optimise engagement by showing content consumers are more likely to interact with'.⁷⁸⁸ In particular, the EPC submitted, 'unlike traditional mobile pages, AMP pages are loaded on and served from Google servers, Google can maintain readers in its environment, as well as collect all the data generated on such pages'.⁷⁸⁹

News Corp makes a similar submission in its response to the ACCC's issues paper.⁷⁹⁰ In support of its submission, News Corp provided information about bounce rates on AMP, relative to articles published in other formats. That information showed that the percentage of people who click on an article in AMP and 'bounce' back to their starting position is much higher than for non-AMP articles accessed through Google News, Google Search or directly.⁷⁹¹

Based on the information provided, it appears that AMP may have the effect of encouraging users to look through articles by different media businesses on their mobile and/or switch back to Google Search, rather than directing consumers to the websites of media businesses. This in turn can reduce opportunities for monetisation for media businesses. For media businesses, the ideal situation would be for a user to:

- enter a search query into a search engine
- click on an article produced by the media business
- browse the media business's websites and read all kinds of articles
- be exposed to advertising on the media business's website
- develop a direct relationship with the media business.

In this respect, the ACCC again notes the different incentives of media businesses, in producing and monetising content, and Google, in offering its search service. As previously discussed, the primary purpose of Google Search is to provide results to user queries that are timely, accurate and responsive to a user's query. Because of the quick-loading nature of the AMP format, it allows Google to achieve its objective of supplying results in a timely manner. If a user does not find that the link that they have clicked on responds to their query, they will naturally return to Google Search to conduct another search. In the context of AMP articles, they may swipe through to another news article that may contain more information or information that better responds to their query.

News Corp has a higher bounce rate on AMP articles, relative to non-AMP content.⁷⁹² The description above about user behaviour in relation to AMP may explain why News Corp has a higher bounce rate on AMP articles. Alternatively, the consumer may have hit a paywall on News Corp titles, which would then prompt the consumer to return to Google Search and find a news article that is offered for free. Either way, the bounce rate for news content in AMP format will likely be higher than the bounce rate for news content in non-AMP formats because of the way AMP pages are designed and presented on Google Search.

While it may seem to media businesses that consumers are being retained within the Google ecosystem, what is happening could simply be a function of Google providing its search services. While this experience may be beneficial for consumers, given that content is loaded more quickly

788 European Publishers Council, [Public Comments of the European Publishers Council submitted in the context of the FTC "Hearings on Competition and Consumer Protection in the 21st Century"](#), 20 August 2018, p. 5.

789 European Publishers Council, [Public Comments of the European Publishers Council submitted in the context of the FTC "Hearings on Competition and Consumer Protection in the 21st Century"](#), 20 August 2018, p. 7.

790 News Corp Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 72.

791 Information provided to the ACCC.

792 Information provided to the ACCC.

than on regular websites and consumers are able to easily look through multiple sources responsive to their search queries, the effect of AMP appears to be detrimental to media businesses and their opportunities for monetisation.

Impact of AMP on media businesses' brand awareness

Some stakeholders submit that publishing news content in the AMP format has the effect of diluting a media business's brand.⁷⁹³ This then reduces consumer awareness of, and engagement with, the brand. This has an adverse effect on a media business's position in the market for the supply of news media content more broadly.

For instance, News Corp submits that the AMP format presents 'little scope for publishers to differentiate the "look and feel" of their content from other publishers. This undermines the brand value of publishers.'⁷⁹⁴

Brand attribution is important for media businesses. It helps the media business build and improve its reputation and relationship with its audience. Accordingly, media businesses have expressed some hesitancy in providing their content on third party platforms or via third party distribution channels. This was previously discussed in section 5.2.4.

The issues regarding consumer awareness of brands and brand attribution was explored in a report published by the Reuters Institute for the Study of Journalism. This report noted a consumer study that found, of the news stories accessed:

- directly, 81 per cent of surveyed consumers could correctly attribute the news brand that produced the story
- via search, 37 per cent of surveyed consumers could correctly attribute the news brand that produced the story
- via social media, 47 per cent of surveyed consumers could correctly attribute the news brand that produced the story
- via Facebook, 44 per cent of surveyed consumers could correctly attribute the news brand that produced the story.⁷⁹⁵

The differences in brand attribution change significantly for users that are already regular readers of a news brand. The report notes:

For those who were exposed to a news story from their main source of news, correct brand attributions are 92 per cent for those who access news directly, 72 per cent for those who accessed news via a search engine, and 80 per cent for those who accessed news via social media...This suggests that low attribution in distributed platforms could be more closely related to weak levels of pre-existing engagement than the impact of the platform itself. Having said that, it could be argued that the weakness of many existing publisher relationships with consumers is partly a consequence of the shift to the discovery of content via third parties and the amount of time spent with platforms like Facebook.⁷⁹⁶

Digital platforms, in their role as intermediary, between media businesses and consumers, are not solely responsible for losses in brand awareness or breaks in relationships between media businesses and their audiences. It is likely that the amount of time that users spend on digital platforms, the design of publication formats and the degree to which a platform encourages consumers to remain on the platform, all have some effect on the relationship between media businesses and its readers.

The extent of AMP's influence on consumer perceptions of a media business' brand is unclear and difficult to quantify. While AMP does facilitate swiping between news articles, the ACCC understands that media businesses still retain their branding in the actual news article and in the Top Stories carousel that links to the media business' content, even though this content is hosted on Google's servers. This is shown in the examples on the following pages.

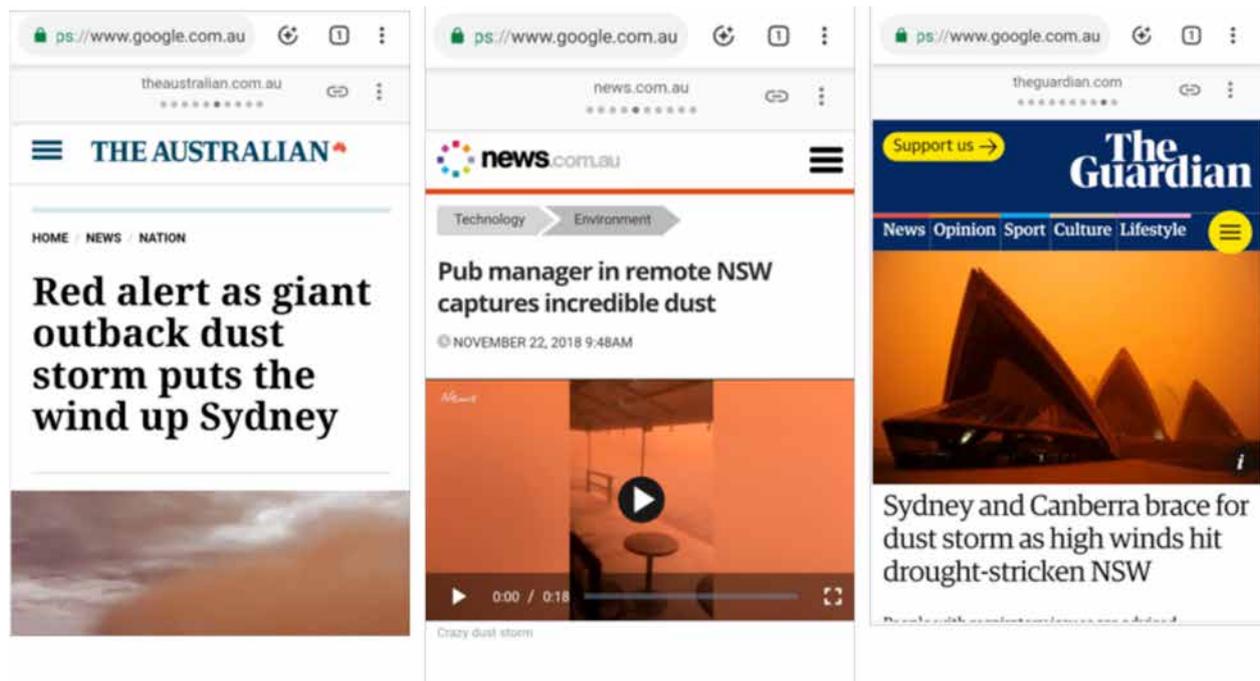
793 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 71.

794 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 71.

795 A Kalogeropoulos and N Newman, [I saw the news on Facebook': Brand attribution when accessing news from distributed environments](#), Digital News Project, 19 July 2017, p. 10.

796 A Kalogeropoulos and N Newman, [I saw the news on Facebook': Brand attribution when accessing news from distributed environments](#), Digital News Project, 19 July 2017, p. 10.

Figure 5.14: Examples of AMP pages featured on Google's Top Stories carousel



Source: E Visontay, [Red alert as giant outback dust storm puts the wind up Sydney](#), *Sydney Morning Herald*, 21 November 2018, accessed 22 November 2018; B Graham, [Pub manager in remote NSW captures incredible dust storm](#), *news.com.au*, 22 November 2018, accessed 22 November 2019; N Zhou, [Sydney and Canberra brace for dust storms as high winds hit drought-stricken NSW](#), *The Guardian*, 20 November 2018, accessed 22 November 2018

The ACCC notes that Google has recently introduced a feature to Google Search, which allows AMP web results to link to signed exchanges. Signed exchanges allow a media business's domain to be displayed when content is instantly loaded via Google Search, rather than Google's.⁷⁹⁷ While this is only available in Google Chrome (as it is the only browser that supports the necessary web platform feature), it will expand to other browsers once those browsers provide support for this feature. This may assist media businesses to retain or improve brand awareness on AMP articles.

Data collection on AMP

Some stakeholders have submitted that media businesses require access to data that digital platforms gather about their audience to better understand their audience and provide higher quality news content and advertising services (via more targeted or defined audience segments).⁷⁹⁸ Some stakeholders also submitted that media businesses are effectively required to use Google Analytics to obtain such data on consumers who access their content via AMP.⁷⁹⁹ However, the ACCC understands that media businesses using AMP can track and collect data on their users without using Google Analytics.

Publishers publishing in AMP can utilise two components to track and collect data on users that access their AMP pages, known as amp-pixel (which provides basic page view tracking) and amp-analytics (which provides more advanced page view tracking, as well as a range of other metrics).

Publishers can use either or both components on a given AMP page. The chosen components then report data to the publisher-specified recipient each time an AMP page is located, delivering data to either the publisher's in-house or third party software analysis, without participation from any other third party (including Google).⁸⁰⁰ There are a number of third party analytics firms that a media business can use to track AMP data outside of Google Analytics.⁸⁰¹

797 D Mullins and G Rogers, [Instant-loading AMP pages from your own domain](#), Google Webmaster Central Blog, 16 April 2019, accessed 23 April 2019.

798 See for example, Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 32.

799 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

800 Information provided to the ACCC.

801 *AMP Project*, [Analytics vendors](#), accessed 12 November 2018.

The ACCC therefore does not consider that publishing content in AMP restricts media businesses' access to metrics. It appears that Google provides media businesses with this information.

However, there may be broader issues about the type of information or data that media businesses believe Google (and also Facebook) is extracting from media businesses and not providing to media businesses, beyond metrics regarding the performance of news content. This is a particular concern in relation to content that is published in the specific publication formats, such as AMP or Instant Articles. While metrics regarding the performance of news content on a platform is useful information to news media businesses, the broader type of information or data collected by platforms beyond metrics (such as user behaviour) can help media businesses better monetise their content. This type of information or data can be extremely desirable for news media businesses.

As discussed in chapter 2, a substantial amount of users access news via Google Search, with media businesses dependent on Google Search for that referral traffic. As a result of the high referral rate, the widespread use of mobile devices and Google's practice of displaying AMP articles in its Top Stories box and carousel on mobile devices, media businesses have strong incentives to publish their news content in the AMP format. These same AMP pages are hosted on Google's cache, such that Google may be able to extract data that it may not otherwise have access to if the content was published on the media business's own website, beyond performance metrics.

A material gap between the type of information obtained by the digital platform based on news content produced by a media business, and the type of information it shares with the media business, may be evidence of an imbalance in bargaining power between the digital platform and the media business. Despite this gap, media businesses continue to supply content in the AMP format, due to the benefit to the media business of the referral rates offered by the platform, which outweigh other concerns.

The separate claims about digital platforms' refusal to supply data more generally, outside of AMP and other proprietary formats, are discussed in the next section.

Ranking based on format

The key stakeholder complaint about search rankings is that Google prioritises news content published in the AMP format in the results surfaced in response to search queries on mobile devices. As such, media businesses are effectively required to publish content in AMP to reach their users through Google Search. As discussed above, these may result in a loss of monetisation opportunities, a break in the relationship between the media business and its audience, and reduced consumer awareness of its news brand.

The speed with which a page loads is a signal that Google Search considers in ranking and displaying content. Therefore, publishing content in the AMP format may have some influence on search rankings as it likely reduces page load times.

As regards the ranking of results in response to Google search stories, the ACCC understands the following principles apply:⁸⁰²

- The speed signal only affects pages that deliver the slowest experience to users and affects a small percentage of queries.
- The intent of the search query is still a very strong signal, so a slow page may still rank highly if it has relevant content.
- Content does not receive any ranking advantages in general Google Search results merely because it is AMP, as distinct from being accelerated or instant loading content (whether AMP or otherwise). Content is not penalised in organic Google Search results for being non-AMP.

In producing search rankings, Google utilises generalist search algorithms and specialised content-specific algorithms, which are designed to provide relevant results for a particular content category, such as images, videos, maps and news.⁸⁰³

802 Information provided to the ACCC.

803 Information provided to the ACCC.

In terms of its general search algorithm, Google states that its ranking is based solely on the objective of providing users with the most relevant and useful results for their query, with its algorithms analysing and weighing a series of different signals in producing search results⁸⁰⁴. Google asserts that its algorithms take account of more than 200 signals.⁸⁰⁵

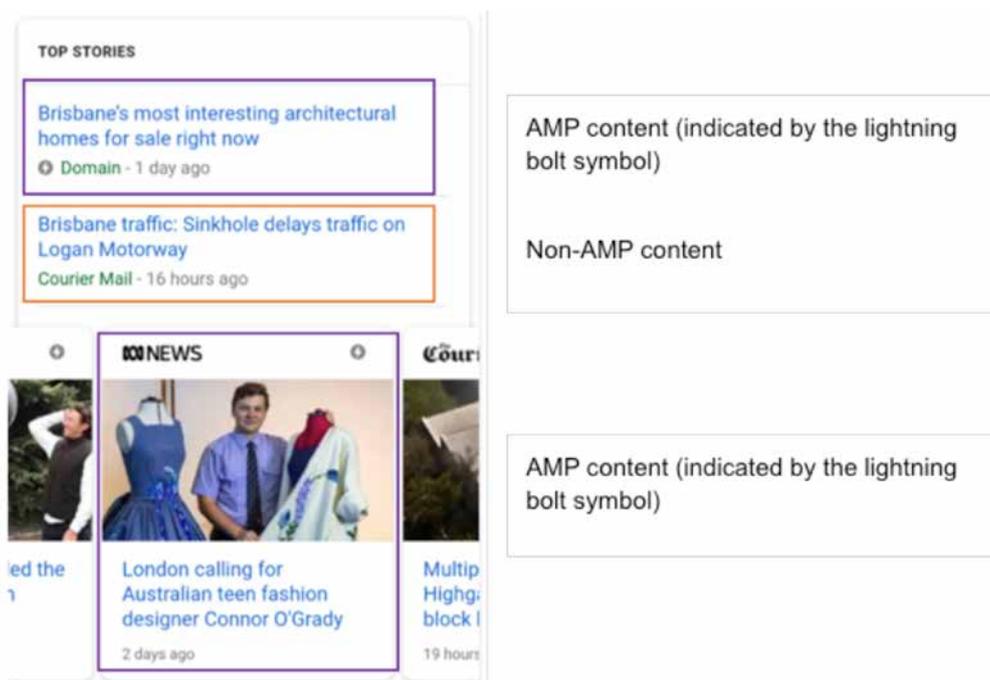
In terms of Google's specialised algorithm, this algorithm produces a grouped display of results known as Universal Search. This algorithm considers two main criteria to display and rank specialised search results—user intent and the quality and relevance of potential results. Google's Top Stories is a type of Universal Search result, designed to respond to user queries with news content. In this respect, signals such as when the article was published will be relevant to this algorithm.

However, there are a number of other signals Google Search takes into account in ranking search results.⁸⁰⁶

News publishers can add a mark-up to their websites to promote content. One type of mark-up allows publishers to identify a page as an article, which helps Google to recognise that the article is eligible for inclusion in the 'Top Stories' block on Google Search. This applies to AMP and non-AMP content.⁸⁰⁷

The Top Stories carousel on mobile devices only shows news content published in AMP. Google submits that non-AMP content can appear as one of the links in the Top Stories block above the carousel itself (such that non-AMP content may still be shown before AMP content).⁸⁰⁸ The screenshot below provides an example of the Top Stories carousel (which contains AMP content) and non-AMP news content, which is placed above the Top Stories carousel.

Figure 5.15: Example of AMP content and non-AMP content featured in Google's Top Stories carousel on a mobile device



Source: Google Search, Results for 'Brisbane news' search term, accessed 22 November 2018.

804 Google, [How Search algorithms work](#), *How Search Works*, accessed 12 November 2018.

805 Information provided to the ACCC.

806 Information provided to the ACCC.

807 Information provided to the ACCC.

808 Information provided to the ACCC.

Conclusions on the effect of AMP

AMP offers clear benefits to consumers, mostly in the speed at which content is loaded and the ability for consumers to easily swipe between news articles. The benefits for media businesses are less clear; in particular, some media businesses still retain their views about issues regarding attribution, branding and sharing of user data outside of page metrics (discussed in the next section). It appears that steps are being taken to address some of these issues, such as providing the ability for media businesses to use their own domain name in the URL, rather than Google's. However, it is unclear whether this is enough to address media businesses' concerns.

The ACCC understands that most media businesses in Australia publish their articles in the AMP format, including News Corp, Fairfax (now owned by Nine), ABC and The Guardian.

The ACCC considers that there is a significant imbalance between Google and media businesses in the distribution of benefits flowing from the publication of news in AMP format. While media businesses to some extent benefit from consumers experiencing faster loading content, they also face real issues in terms of monetisation, brand attribution and access to data that are not being fully addressed or resolved by digital platforms or by AMP. The ACCC's recommendation for a code of conduct to govern the relationship between media businesses and digital platforms seeks, among other things, to address this imbalance.

The effect of Instant Articles

The ACCC has received similar concerns about Facebook Instant Articles as about AMP. For example:

- News Corp submits that Facebook Instant Articles:

'...impose a number of restrictions on publishers. Although paywalls are supported, they face limitations: for publishers with metered models, that meter is set at 10 articles,⁸⁰⁹ while for publishers with a freemium model, the publisher determines what content is locked. It is important to highlight that publishers cannot offer direct subscriptions to consumers in Instant Articles. Additionally, similar to AMP, Instant Articles limit the type of ad formats available to content creators in order to facilitate quick loading.'⁸¹⁰

- Fairfax (now owned by Nine) submits that Instant Articles represents 'an unclear path to commercialisation' and that, following the release of Instant Articles [Facebook's] News Feed began to prioritise articles in that format over links to publishers' owned and operated channels'.⁸¹¹

Facebook's Instant Articles are designed to allow pages to load faster on the Facebook app and are only available on mobile devices. Facebook states that Instant Articles load 10 times faster than standard mobile web articles and that users read 20 per cent more Instant Articles on average and are 70 per cent less likely to abandon an Instant Article than a standard mobile web article.⁸¹² An example of an Instant Article is set out on the next page.

809 The ACCC understands that this is set at 10 articles per month (See for example, F Tepper, '[Facebook is now testing paywalls and subscriptions for Instant Articles](#)', TechCrunch, accessed 15 November 2018; News Corp Australia, [Submission to the ACCC Issues Paper](#), May 2018, p. 81.).

810 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 81.

811 Fairfax (now owned by Nine), [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

812 Facebook, [Instant Articles](#), accessed 12 November 2012.

Figure 5.16: Example of a Facebook Instant Article



Source: S Delibasic, [New 'son of Concorde' supersonic jet could hit Australia within five years](#), *The New Daily*, 20 November 2018, accessed 22 November 2018.

Fairfax (now owned by Nine) submits that Facebook's News Feed prioritises articles in the Instant Articles format over links to media businesses' owned and operated channels.⁸¹³ Based on information provided by Facebook, there does not appear to be any correlation between use of Instant Articles and ranking of news content. Instant Articles are ranked by the same criteria used to rank standard articles on the mobile web. The News Feed on Facebook is personalised according to each user, with Facebook ranking in order of content based on what it predicts will matter most to users. In particular, Facebook takes into account signals, which are used to train models that make predictions about the relevance of a particular post to a particular person. These predictions are then weighted using a set of models to determine a post's relevancy scores. The posts on a user's News Feed are then ordered by relevancy scores. Users can further customise their feeds by, for example, choosing to see posts from a particular person or Page at the top of their News Feed, or by choosing to see posts in chronological order.⁸¹⁴

Facebook provides information to media businesses that utilise Instant Articles, using the same advertising measurement tools and metrics as it does for other advertisers. In addition, Facebook's Instant Articles Insights provides media businesses with information on consumer readership of Instant Articles. This includes the total number of times an Instant Article is opened, the time a user spends reading the article and how far into an article a user scrolls. Facebook offers an application program interface, which allows media businesses to import data from Instant Article Insights into their own data management platform.⁸¹⁵

813 Fairfax (now owned by Nine), [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

814 Information provided to the ACCC.

815 Facebook, [Analytics for Instant Articles](#), accessed 21 November 2018.

In a submission to the ACCC on behalf of Facebook, Dr Catherine Tucker makes the following observation about Instant Articles:

[T]he experience of Instant Articles has proven that Facebook's position as a social media platform does not give it any particular advantage as a news intermediary. Early users such as The Guardian have abandoned the service, as have other news publishers. If Facebook could indeed coerce news publishers to accept its terms for so-called "referral services," one would have expected the product to have more take-up; for Facebook not to have struggled to launch this product successfully; and for news publishers not to have demanded, or been granted, the number of concessions Facebook has made in order for publishers to adopt this service.⁸¹⁶

The ACCC acknowledges Dr Tucker's submission and recognises that very few media businesses in Australia use Instant Articles.

In contrast to AMP, the fact that media businesses elect *not* to use Instant Articles, due to poor monetisation and other concerns, suggests that Instant Articles are not a 'must have' product in the same way that AMP appears to be. This is despite the fact that Instant Articles provides media businesses with the ability to retain 100 per cent of their advertising revenue.⁸¹⁷ This may be because unlike AMP, use of Instant Articles does not affect the placement of a media business's news content in the Facebook News Feed. Accordingly, media businesses do not have the same incentive to publish their content in a particular format and gain eyeballs with Instant Articles as they do with AMP.

However, this does not undermine the conclusion in chapter 2 that referrals from Facebook to media businesses' websites are a 'must-have product'. For other reasons previously detailed in chapter 2, the ACCC remains of the view that Facebook referrals are essential for a number of media businesses.

Facebook is not used as extensively for news in the same way that Google Search seems to be, and is therefore a less important distribution channel for news than Google Search. However, there are broader issues media businesses face in relation to their monetisation of content on Facebook, outside of Instant Articles. As discussed above, this arises from the different incentives Facebook and media businesses have.

5.3.5 Access to user data

As discussed in chapter 3, user or audience data is a key input into the supply of online advertising services. User data enables advertisers to target their ads with greater precision so suppliers of advertising services can provide a higher quality of service.

A number of media businesses submit that Google and Facebook provide limited data about users who have clicked on news media links on Google Search or the Facebook platform, or users who access their news content published on AMP pages, or Instant Articles,⁸¹⁸ affecting their ability to target their advertising services to readers.

Media businesses can access a range of data on their own users/audience. For instance, most media businesses allow users to register for an account on their websites or apps or for email updates. The media business can then track readership metrics, such as time spent by the user on the media business's website and the number and types of articles they clicked on.

Media businesses can use specific components on AMP to track and collect data on users that accessed AMP pages. Facebook provides media businesses with information on user engagement with the media business's Facebook Page.

Accordingly, it appears that Google and Facebook provide media businesses with some data that media businesses are likely to consider valuable. However, media businesses' submissions about access to data relates to the richer datasets that Google and Facebook have access to, beyond the types of data (such as readership or audience metrics) that the platforms may supply to media businesses.

816 C Tucker (on behalf of Facebook), [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 17.

817 Facebook, [Submission to the Preliminary Report](#), March 2019, p. 2.

818 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 73, 89-90; Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 32.

Media businesses are unlikely to have, or have access to, the same kind of information on individual users as large digital platforms, such as demographic information, information based on the individual's use of their other products, and information obtained from their ability to track the user's browsing history. While in theory some of this data could be captured if an individual signed up to an account, consumers sign up or register with media businesses on a relatively infrequent basis.

As discussed in chapter 2, both Google and Facebook are able to collect user data on and off their platforms (including via third party websites) and attach that data to a user's account. This data is far more extensive than media businesses can ever acquire. For example, media businesses can acquire information about users if users are registered with the media business and signed into their account as they peruse the media business' website. Facebook, on the other hand, can collect the same data about its users across a number of different platforms owned by Facebook, as well as off platform. If a media business has a Facebook Pixel on their website, Facebook can also track data from the media business's website.

Data can help media businesses better understand user behaviour and help improve its supply of advertising services and/or news offering. As discussed in the example below, News Corp submits that an issue arises where digital platforms use the voluminous data they collect, including from a media business, to supply advertising or other services to the media business's competitors. News Corp submits that, because this data is generated from consumers visiting a media business' website, the media business should retain control of that data.

The concerns with a digital platform using such data to supply its other services, are distinguishable from the concerns discussed above about the data generated by a digital platform from content published by the media business, in the digital platform's publication format (such as AMP).

Media businesses are concerned that use of Google products (such as Google Analytics) on their website enables Google to use the data obtained from media businesses' users for other purposes. For example, News Corp submits:

[W]hen a user visits a website that uses Google's services such as Google Analytics or AdSense, or displays a video from YouTube, the web browser sends certain information to Google, including the user's IP address, together with very rich data about what the user has viewed and clicked on...

Publishers should be given the legal right to retain control of the data that is generated from consumers visiting their websites, even where it chooses to use Google Ads or Facebook Audience Network, without having to share or agree to share this information for use by these platforms to display advertising on any third-party site, which include a publisher's competitors. Publishers have sustained severe losses in revenues from advertising, and publishers' inability to control the use of data on users visiting publishers' own websites hampers publishers' financial positions further.⁸¹⁹

ACCC's views on platforms' access to user data

The ACCC recognises that greater and higher quality data could improve the quality of media businesses' advertising services, which could make media businesses more competitive in the supply of advertising services. However, it is likely to be contrary to consumers expectations that media businesses should be *entitled* to any or all data gathered by a digital platform on that consumer.

Consumers would not expect media businesses to have access to their browsing history, search queries or navigational history from a visit to the website of a news media business.

It is reasonable for media businesses to expect a digital platform to provide data they gather about users based on news content published in the platform's format. It is also reasonable to expect that media businesses may have some ability to negotiate the terms and conditions on which they acquire products and services from Google and Facebook, including any restriction on how this data may be used by the platforms.

The indication that this does not occur suggests that each of Google and Facebook are in stronger bargaining positions than media businesses.

819 News Corp Australia, [Submission to the ACCC's Digital Platforms Inquiry Preliminary Report \(Remedies Paper\)](#), March 2019, pp. 12-13.

The ACCC recommends that, as part of the proposed code of conduct outlined in recommendation 7, designated digital platforms would be required to commit to sharing data on users' consumption of the media business' news content on the digital platform the subject of the code, and to negotiate in good faith about other issues (including the terms on which Google products are offered to media businesses and, in particular, Google's right to use and/or share that data).

5.3.6 Recognition

Digital platforms that offer search services do not reward media businesses that produce original content or break news stories with higher rankings, compared to media businesses that copy such content.

In the past five years, both digital natives and established media organisations have raised concerns with the publication of re-written material, generally noting the increasing incidence in online media.⁸²⁰ The ABC notes that while 'all the media steal stories from time to time', the issue facing journalism in the present day is that it can be done online on an 'industrial scale', where digital natives allegedly produce high volumes of re-written material from other publications.⁸²¹

Examples given include news stories being re-published within hours of the original article, including instances of relatively resource-intensive journalism such as court reporting and international investigations.

While digital platforms have not been the driving cause of issues arising from republication without attribution, they have a significant role affecting in the commercial incentives that impact on modern media business models, including how they rank and display such articles.

When consumers are exposed to links to news articles on social media platforms, search engines, or news aggregators, they are unlikely to know which article was the original. As such, media organisations that republish articles are able to compete effectively for online audiences with the content originators who may have invested significantly in uncovering and/or producing the story. This may potentially reduce the incentives for news media businesses to invest in investigative journalism and other news content that is costly to produce.

Stakeholders such as News Corp have claimed that original content is not rewarded with a higher ranking on Google Search results and that this reduces the incentives for media businesses to invest in original and diverse content.⁸²² Instead, ad-funded publishers of reproduced content (which do not place content behind a paywall) can invest in search engine optimisation and re-write stories to accommodate the algorithms used by digital platforms in order to feature higher in search results than publishers of original content hosted behind a paywall.⁸²³ Chapter 6 discusses issues around the commercial incentives for production of news content in more detail.

As previously discussed, search engines use a number of signals as inputs to algorithms in order to select and prioritise results. Information on algorithms published by the digital platforms does not make it clear whether the status as 'originator' or source of a story is a variable that promotes a higher ranking.⁸²⁴ However, media industry stakeholders strongly believe such provenance is not given weight in the ranking algorithms currently used by search engines such as Google. They have also expressed the opinion that these algorithms even favour free 're-writes' of content above the original content, particularly when the original content is behind a publication's paywall.⁸²⁵

820 N Christensen, [Daily mail fires back at News Corp as copy theft row heats up](#), Mumbrella, 16 June 2014; E Watkins, [Casting the first stone ... more media gender pay gaps revealed ... recycling \(and recycling\) TV ...](#), *Crikey*, 15 March 2018; ABC, [Media Watch Episode 39](#), 5 November 2018.

821 Media Watch, [Media Watch Episode 39](#), 5 November 2018.

822 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p. 68; [ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 7.

823 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 87.

824 Google, [How Search algorithms work](#), accessed 14 October 2018.

825 See for example, News Corp Australia, [Submission in response to the Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 34; [ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 7.

Again, this may be symptomatic of the different incentives faced by digital platforms such as Google, and media businesses. For Google Search, the incentive is to provide search results responsive to a user's query; whether the content provided is original or a re-write is unlikely to be an important signal in determining search results. This has adverse flow-on effects for media businesses, as it affects their chances to monetise original content. While it would appear reasonable for the original source of a news story to be a factor considered by a digital platform's algorithm, the ACCC recognises that:

- digital platforms would need clear signals as to which article is 'original', and these signals may not always exist
- originality may be difficult to establish in some cases, given that stories can develop and evolve, and may include a mix of original and attributed content and original analysis
- if originality were used as a signal for the algorithm for the purposes of ranking items of journalistic content, it may be considered alongside other factors, and may not necessarily be the deciding factor.

In the absence of signals from media outlets as to which content was 'original', and in the absence of an agreed basis for defining and identifying 'original' news content, any attempts by digital platforms to unilaterally determine the originality of journalistic content for the purposes of ranking could be problematic. The ACCC does not consider it appropriate to require a digital platform to include such a signal in its algorithmic determinations.

Instead, the treatment and recognition of original content is better addressed through bilateral negotiations between digital platforms and media businesses. The ACCC recognises the stronger bargaining position of digital platforms relative to media businesses, as previously discussed. The proposed code of conduct will set out commitments and key principles by which these negotiations will occur. This is discussed further below.

5.3.7 Algorithmic transparency

A key complaint from stakeholders is that Google and Facebook are not sufficiently transparent about their algorithms, how results are displayed on their platforms, or when changes to their algorithms will take place.⁸²⁶ This is an issue for media businesses because a significant proportion of their referral traffic is derived from Google and Facebook.

Media businesses submit that to maximise their ability to monetise news content, they need to be aware of how their content is being presented to consumers and any changes that may affect referral traffic.⁸²⁷ Broadly, stakeholder concerns about the digital platforms' algorithms can be grouped into two issues:

- a lack of transparency about how news content is ranked and displayed on digital platforms
- insufficient notice provided by digital platforms about changes to their algorithms that are likely to affect referral traffic to media business websites.

Media businesses desire greater algorithmic transparency and advance notice of changes to algorithms to:

- provide greater certainty for media businesses to make business decisions
- reduce the current level of investment in terms of the time and resources allocated to understanding algorithms, which represents an inefficient allocation of resources
- better understand consumer preferences.

826 See for example, Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 82, 90.

827 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 90; Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25.

Effect on referral traffic

As noted above, Google and Facebook are incentivised to maintain or increase the quality of their supply of search services or social media services to attract and retain users. Their algorithms are a key part of their services and digital platforms change their algorithms to optimise the consumer's experience, acting in accordance with these incentives. However, changes to digital platform algorithms without adequate notice or reason may have unintended consequences for media businesses.

Algorithm changes implemented with little notice can impact on media businesses' referral traffic, with little time for media businesses to consider and implement strategies to accommodate these changes. For example, a number of media businesses submit that Facebook's change to its News Feed algorithm in early 2018 (increasing the proportion of content from friends and family and consequently reducing the proportion of news-related content available on the News Feed) adversely affected their business.⁸²⁸

Some media businesses submitted that Facebook did not provide sufficient time for them to adjust their businesses and implement strategies to deal with the algorithm change.⁸²⁹ In particular, the ACCC has received the following information about the effect of Facebook's change to its algorithms on news referral traffic:

- Seven West Media indicated that traffic to some of its websites fell around 40 per cent from June 2017 to April 2018, which it submits is likely due to Facebook's algorithm change.⁸³⁰ To reach the same audience they had prior to the algorithm change, news publishers would need to invest significantly more money than they previously had.⁸³¹
- SBS made a similar submission, noting that 'SBS has seen a marked drop in reach for its news content on the platform' since the algorithm change. It further stated that 'SBS's youth-focused nightly current affairs program, *The Feed*, has seen a 50 per cent drop in Facebook reach since the January 2018 algorithm changes'.⁸³²

Stakeholders have also raised concerns about the lack of transparency about Google's and Facebook's algorithms.

While there is some publicly available information on Google's algorithm, this information appears to be quite broad in nature and does not provide the specific factors Google considers in its algorithm or the weighting accorded to each factor.⁸³³ For example, the information does not identify how Google selects and displays news content for its Top Stories carousel. It also does not identify how a user's search history or use of Google's other services contributes to organic search results.

Similarly, while Facebook provides some information on the factors it takes into account in ranking and displaying content on the Facebook News Feed⁸³⁴, the ACCC considers that it could provide more detailed information about how news content is displayed and ranked. For example, while Facebook provides information on the signals it takes into account in providing items on a user's News Feed, it does not provide any information about how its algorithm weighs those signals or whether there are particular signals that may be more important than others.

Media businesses invest time, money and resources into understanding the algorithms of digital platforms and how they affect referral traffic. This may represent an inefficient allocation of resources that could otherwise be used to fund the production of news content. For instance, Nine submits that it is investing in search engine optimisation expertise to ensure that its news content is discoverable on Google. This represents a transaction cost of dealing with Google and Facebook and participating on their platforms.⁸³⁵

828 See for example, Free TV Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 34; Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25; SBS, [Submission to the ACCC Issues Paper](#), April 2018, p. 5.

829 See for example, News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 90; Free TV Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 34.

830 The ACCC notes that Facebook's algorithm change occurred in January 2018.

831 Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25.

832 SBS, [Submission to the ACCC Issues Paper](#), April 2018, p. 5.

833 See for example, Google, [How Search Works](#), accessed 9 November 2018.

834 Facebook, [News Feed](#), accessed 9 November 2018.

835 Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 24.

ACCC's views on the algorithmic transparency of digital platforms

News media businesses appear to have little choice but to accept the degree of transparency and notice of changes offered by Google and Facebook in their algorithms (which ultimately determine a substantial proportion of their referral traffic).

The ACCC considers that the lack of transparency on the part of Google and Facebook has some effect on media businesses' ability to monetise their news content and consequently, their ability to compete more broadly in the supply of news media. As discussed above, Facebook's changes to its algorithms have significantly affected the referral traffic of certain media businesses. This appears to have had the effect of reducing audience numbers for these media businesses and/or requiring media businesses to invest more money into understanding the algorithm changes to reach the same level of referral traffic as prior to the algorithm change. In this respect, media businesses could benefit from greater transparency from Google and Facebook on algorithm changes, or advance notification of such changes.

The ACCC recognises that this lack of transparency likely stems from the different incentives digital platforms face in comparison to the incentives of media businesses.

As previously discussed, the ACCC considers there to be an imbalance of bargaining power between digital platforms and media businesses, and the lack of algorithmic transparency is likely a manifestation of this imbalance. The code of conduct proposed below seeks to address this imbalance of bargaining power and ensure that media businesses are provided with appropriate notice of significant algorithmic changes that are likely to affect their operations.

The ACCC recognises that there are issues with a digital platform providing detailed information on its algorithm, given that algorithms are a core part of a digital platform's business model. Providing such information may also allow businesses to effectively 'game' the algorithm by knowingly drafting or changing content to increase their ranking on the platform.

In the Preliminary Report, the ACCC had considered recommending that a regulatory authority have the power to monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses. This recommendation was intended to address issues of algorithmic transparency and ranking of content.

The ACCC's new functions set out in recommendation 4 will provide the ACCC with the ability to investigate and report on whether a lack of transparency on the part of digital platforms is creating or contributing to a market failure. Recommendation 4 is not limited to examining market failures or transparency issues in particular markets or industries and the ACCC envisages that the digital platforms branch proposed under recommendation 4 could also include consideration of the consequences of any market failures in the supply of news referral services.

Separate from issues arising from monetisation, lack of transparency also raises broader public policy issues, such as:

- consumer access to news – because of the lack of transparency in the algorithms of Google and Facebook, it is not clear how news content is ranked and displayed to consumers
- investment in the production of news content such as investigative journalism – the level of investment and resources media businesses allocate to understanding and meeting changes to algorithms is likely taking away resources that may be better utilised in the production of high quality news content
- type of news content produced – in order to monetise media businesses' content and maximise referral traffic to their websites, they may be producing content to satisfy the demands of an algorithm, rather than producing content that is in the public interest.

These issues are discussed further in chapter 6.

5.3.8 How to address the bargaining imbalance

Central to many of the issues in this chapter is an imbalance of bargaining power between Google and media businesses, and between Facebook and media businesses, in relation to news referral services. The critical factor creating this imbalance is that for many media businesses, Google and Facebook are ‘must have’ platforms. As discussed in chapter 2, media businesses cannot afford *not* to be on the Google and Facebook platforms and therefore, Google and Facebook have become unavoidable trading partners for many media businesses.

Stakeholder submissions

Free TV proposes the creation of a new access regime under the CCA. Under the regime, digital platforms could be subject to ‘declaration’ if they satisfy certain market power thresholds and particular revenue thresholds. The access regime would provide content owners with greater control over their content on digital platforms, including the technical aspects of how content is monetised (for example, how advertising would be displayed on video clips), the length and usage of snippets and how the content owner is remunerated for use of snippets. The ACCC would also be given the power to act as the arbitral body if platform owners and content creators are unable to agree reasonable commercial terms for the licensing of content, including snippets.

The ACCC gave consideration to Free TV’s proposed access regime but did not adopt the proposal. This is because:

- Free TV’s proposal would require the creation of a new bespoke access regime, incorporating elements of Part IIIA and Part XIC of the CCA, and implementation would require significant legislative change. Once legislated, it would be difficult to change elements of the access regime if it presented problems or does not address the issues that arise.
- It is unclear what bottleneck products or services should be the subject of the access regime. To determine the price of access to any such product or service would be extremely difficult, with a risk of determining an inappropriate price and potentially negatively affecting on competition in the relevant markets.
- It is unclear how the regime would work in practice and whether the access regime would improve the bargaining imbalance between digital platforms and media businesses.

The ACCC also considered the proposal from News Corp calling for an algorithm review board and/or to establish a register of algorithm changes. The ACCC did not consider this to be a better mechanism because:

- The focus of an algorithm review board and the register of algorithm changes would be to increase transparency of digital platforms’ algorithms, and would not address the broader bargaining imbalance issues between digital platforms and media businesses discussed in this chapter.
- The algorithm review board would not be able to identify and address market failures or competition concerns in the supply of news referral services, or in broader news media markets. While it would improve transparency of digital platforms’ algorithms, it is unlikely to have any effect on barriers to entry and expansion, or the substantial bargaining power of Google and Facebook.

There are significant risks and dangers in giving a review board the power to review algorithms of digital platforms and publish algorithmic changes. In particular, there is a risk that media businesses could game the algorithms, which could also skew investment in and promotion of journalism. It is also unclear how the review board would determine what constitutes a ‘fair’ algorithmic change or ranking.

The Copyright Agency proposed a licensing arrangement, under which a digital platform must pay a news media business for use of content (including via snippets), with payments made to a collecting society (such as the Copyright Agency) and distributed to media businesses. The ACCC does not propose to adopt this type of arrangement, for the following reasons:

- There would likely be implementation problems in relation to determining which media businesses and digital platforms would be subject to the scheme and the amount of revenue to be distributed. This could lead to distortions in the digital and news markets.

- It is unclear why digital platforms should compensate media businesses for use of content while not offering compensation to other content creators and websites.
- The requirement to pay for content could create incentive problems and negative consequences. For example, if Facebook is forced to pay based on users posting content, one response may be to further limit the amount of news in a user's feed (for example, I demote any type of news article, or at an extreme, ban users from sharing links to news content).

The ACCC's proposal for codes of conduct aims to provide transparency and address the bargaining imbalance in the commercial relationships between digital platforms and media businesses, without the risks identified above. In the event that the codes of conduct do not improve the bargaining imbalance between digital platforms and news media businesses, it may be appropriate for Government to consider further intervention, which could include consideration of the alternative proposals set out above.

Related international developments

The ACCC notes that the European Union has recently adopted the Directive on Copyright in the Digital Single Market (Copyright Directive). However, the Copyright Directive does not create an obligation on digital platforms to compensate media businesses for the use of their content. While Article 15(1) of this Directive provides that relevant media businesses would be provided with rights to the online use of their press publications by, information society service providers, (which would include digital platforms), the Copyright Directive explicitly states that this right shall not apply to the 'acts of hyperlinking' and 'in respect of the use of individual words or very short extracts of a press publication'.

The member states of the European Union have two years to implement this Directive. It is difficult to determine, at this point, the likely effect of Article 15, and also the other provisions of the Directive which aim to address the imbalance in bargaining power. The ACCC will monitor the effect of the Copyright Directive in EU member states, and any other developments.

In February 2019, the UK Department for Digital, Culture, Media and Sport published the report of the Cairncross Review. This Review, led by Dame Frances Cairncross, considered the sustainability of production and distribution of high quality journalism and, in particular, the future of the press. Relevantly, the Cairncross review found that:

...the unbalanced relationship between parties has allowed the platforms to make decisions with a significant impact on publishers, with little need for consultation. This has further added to publishers' difficulties in building business strategies which will generate sustainable revenues online. It is particularly notable in two areas: in Google's and Facebook's foray into hosting articles through AMP and Instant Articles, and in the ways in which platforms choose to rank publishers' content.⁸³⁶

To address this unbalanced relationship, the Cairncross Review considered two options: industry-wide negotiations or a code of conduct for the larger platforms.⁸³⁷ The Cairncross Review considered the latter option to be more preferable and recommended that 'those platforms on which publishers increasingly depend should be required to each set out codes of conduct to govern their actions towards media businesses'.⁸³⁸

This review proposed a code of conduct that would set out what should and should not be included in individual negotiations with a publisher.⁸³⁹ The ACCC's codes of conduct proposal shares many features with the code proposed by the Cairncross Review and similarly seeks to address the unbalanced relationship between digital platforms and media businesses.

836 Department for Digital, Culture, Media & Sport, [The Cairncross Review: A Sustainable Future for Journalism](#), London, 12 February 2019, p. 71.

837 Department for Digital, Culture, Media & Sport, [The Cairncross Review: A Sustainable Future for Journalism](#), London, 12 February 2019, p. 73.

838 Department for Digital, Culture, Media & Sport, [The Cairncross Review: A Sustainable Future for Journalism](#), London, 12 February 2019, p. 92.

839 Department for Digital, Culture, Media & Sport, [The Cairncross Review: A Sustainable Future for Journalism](#), London, 12 February 2019, p. 74.

The ACCC and the ACMA will engage with the regulator responsible for overseeing the code of conduct proposed in the Cairncross Review, to ensure that experiences and key learnings are shared. This will further enhance international co-operation and allow the ACCC and the relevant regulator to learn from each other and, where appropriate, align their approach to the codes of conduct to achieve the same objectives.

Industry self-regulation

While the ACCC has observed some evidence of Google and Facebook working to change products or services or implement new products and services in order to address concerns raised by media businesses, the ACCC does not consider it likely that digital platforms and media businesses will resolve these issues in a timely fashion absent any form of intervention. This is for three reasons.

First, past evidence suggests that Google and Facebook have been slow to react to the issues that affect news businesses.

Second, the current impact of Google and Facebook on journalism is the focus of regulatory authorities in a number of jurisdictions. For the duration of this regulatory focus, there are incentives for Google and Facebook to take steps to address the imbalance of bargaining power between digital platforms and media businesses. When these reviews conclude, the ACCC is concerned that these incentives will diminish.

Finally, because of the significant imbalance of bargaining power, it is unlikely in the absence of some form of intervention that either Google or Facebook would reach an agreement with news media businesses that optimises outcomes for media businesses, platforms and consumers. Accordingly, the ACCC considers that intervention is necessary to equalise the bargaining imbalance between digital platforms and news media businesses.

5.3.9 ACCC recommends codes of conduct to address the imbalance of bargaining power between digital platforms and media businesses

The ACCC considers that designated digital platforms supplying news referral services in Australia should each be required to implement a code of conduct to govern their relationships with media businesses and to address the bargaining power imbalance between platforms and media businesses. These codes of conduct would be reviewed, registered and monitored by the ACMA.

While this Report has identified that each of Google and Facebook have substantial bargaining power compared with news media businesses, there may be other suppliers of new referral services that in the future occupy a strong bargaining position relative to media businesses, such that they should also be subject to a code of conduct.

Given the expertise and experience of the ACMA in media markets, the ACCC considers that it should be empowered to designate which digital platforms should implement a code of conduct. As the codes are aimed at addressing the imbalance in bargaining power between digital platforms and news media businesses, the ACCC considers it appropriate for the ACMA to closely consult with the ACCC in performing its role under this recommendation, including in relation to the designation of digital platforms. The most likely candidates to be designated platforms would be Google and Facebook. Apple may also be a possible candidate to be a designated platform in the future, given the continued growth in use of Apple News and the issues surrounding Apple presented in this chapter.

Each designated digital platform would be responsible for drafting its own code, given that platforms have differing business models, incentives and consequently, relationships with media businesses. Codes specific to individual businesses are not without precedent. For example, energy businesses have individual hardship policies which are approved by the Australian Energy Regulator.⁸⁴⁰ Due to the differences between the various digital platforms and the dynamics between the platforms and media businesses, separate individual codes would be more appropriate than an industry-wide code.

840 AER, [AER approved hardship policies](#), accessed 11 May 2019.

To assist with the drafting of the code, the ACMA should develop guidelines regarding how the code should be developed and what should be included in the code. In particular, digital platforms will be required to demonstrate to the ACMA how they had consulted with news media businesses and taken the feedback of news media businesses into account in drafting their code. To ensure that the codes would have the effect of addressing the bargaining power issues described in this chapter, the ACMA will consult with news media businesses, and also the ACCC, in reviewing and approving the codes.

Each code of conduct would contain a framework with objective criteria for negotiations between the platform and media businesses, and commitments by the platform in relation to certain principles. Each platform's code should contain minimum commitments to:

- Within the limits of data protection and privacy laws, share data with media businesses about users' consumption of the media business' news content on the digital platform's service(s). For example, data collected by Facebook on its platform, or Google on news content published in the AMP format and served from Google's cache, derived from news content provided by media businesses.
- Give media businesses early warning of significant changes to the ranking or display of news that would be reasonably likely to affect the referral traffic of media businesses.
- Ensure that the digital platform's actions will not impede news media businesses' opportunities to appropriately monetise their content on the digital platform's sites or apps, or on the media businesses' own sites or apps.
- Where the digital platform obtains value directly or indirectly from content produced by news media businesses, fairly negotiate with news media businesses as to how that revenue should be shared, or how the news media businesses should be compensated.

The codes could also contain other commitments to further improve the relationships between the digital platforms and news media businesses, and enhance communication, such as commitments to:

- Work collaboratively with media businesses as to how content is presented on platforms
- Provide media businesses with access to platforms on a fair, consistent and transparent basis
- Provide media businesses with information on prominence, rankings and reviews on platforms.

The ACCC considers that determining such issues by commercial negotiation, taking into account the unique nature of each commercial relationship, is more appropriate than having a regulator determine aspects of the relationship such as an appropriate price or snippet length.

Designated digital platforms should each submit a code of conduct to the ACMA within nine months of designation. The ACMA would be responsible for reviewing each code, including being empowered to require that the designated digital platform amend a code for improvements prior to approval, or to approve subject to amendments being made. The ACMA would also approve the duration of time that each code will be in effect. As discussed above, the ACMA would consult with the ACCC and news media businesses in reviewing the codes.

Each code would also be registered with the ACMA and be made publicly available. If digital platforms are unable to submit an acceptable code to the ACMA within nine months, the ACMA would create a mandatory standard to apply to the designated digital platform. To ensure that the codes achieve their objectives and operate as intended, the ACMA would also have the ability to require digital platforms to amend their codes.

Breaches of the codes would be dealt with by the ACMA, which would 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.

After considering the likely benefits and costs of the various mechanisms to address the imbalance of bargaining power (including submissions by stakeholders, as set out in section 5.3.8 above), the ACCC considers that a code of conduct approach is most appropriate, because it provides some flexibility for different arrangements to be reached between each digital platform and media businesses. It also allows platforms to balance their own interests with those of media businesses in drafting the codes of conduct, and flexibility for the codes to be changed if they do not achieve their initial objectives. Given the fast moving nature of digital markets, it critical that there is scope for these codes to also evolve quickly.

The ACCC and the ACMA would monitor the effectiveness of the codes. In the event that the codes of conduct (or the standard(s)) do not improve the bargaining imbalance between digital platforms and news media businesses, it may be appropriate for the ACCC or the ACMA to recommend that the Government consider further intervention. This could include consideration of alternative proposals submitted by stakeholders to the Inquiry set out in section 5.3.8 of the Report.

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

Designated digital platforms to each implement a code of conduct to govern their relationships with news media businesses. Each platform's code of conduct should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them, and contain at least the following commitments:

- the sharing of data with news media businesses
- the early notification of changes to the ranking or display of news content
- that the digital platform's actions will not impede news media businesses' opportunities to monetise their content appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps
- where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to the how that revenue should be shared, or how the news media businesses should be compensated.

The ACMA will publish guidelines regarding how the code should be developed and what should be included in the code. In performing its role under this recommendation, the ACMA shall closely consult with the ACCC.

The ACMA will also designate the digital platforms that will be required to implement a code; review and approve the content of the codes; and enforce the codes (after consulting news media businesses). The ACMA will have appropriate investigative and information gathering powers and the capacity to impose sufficiently large sanctions for breaches to act as an effective deterrent. The ACMA will also have the ability to require digital platforms to amend their codes in specific ways, if it considers that the objectives of the code are not being achieved.

Digital platforms will have nine months to develop a code, and will be required to demonstrate that they have consulted fully with news media businesses in drafting their code, and carefully assessed the issues raised by them. The duration of the code will be proposed by the digital platform and subject to approval by the ACMA.

If a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform.

5.4 Regulation of digital platforms under copyright law

Key findings

- Digital platforms are regulated by Australian copyright law in a broadly similar way as media businesses performing comparable roles. However, the uncertainties in the operation of authorisation liability create challenges for rightsholders seeking to enforce their copyright protections against secondary publishers such as digital platforms.
- Digital platforms use a variety of notice-and-takedown processes for rightsholders to request the removal of copyright-infringing content, which do not always provide for the timely take-down of Australian copyright-protected content.

The regulation and enforcement of copyright laws in Australia impact the ability of content creators and media businesses to generate revenue from copyright-protected content. Copyright law establishes incentives to create works by giving rightsholders a limited monopoly over the use of their material, with certain exceptions to enable appropriate use of those works to encourage competition and stimulate innovation.⁸⁴¹

Digitalisation has made access to copyright material easier than ever, which also amplifies existing policy issues in copyright regulation and enforcement.⁸⁴² This section considers how digital platforms are regulated under Australian copyright law, given the impact of these laws on competition in Australian media markets, and the implications of this for media businesses and content creators.

5.4.1 Overview of Australian copyright law

In Australia, copyright is regulated under the *Copyright Act 1968* (Cth) (the Copyright Act). Copyright is a complex and technical area of law. This section sets out a high-level overview of key provisions of the Copyright Act of particular relevance to this Inquiry, but is not intended to provide a comprehensive overview of copyright law in Australia.

Establishing the subsistence of copyright

Australian copyright law protects the material expression of original works as well as published editions, sound recordings, films and broadcasts.⁸⁴³ Copyright can be denied on the basis that works are insufficiently original or that there is an insufficient amount of input contributed by a human.⁸⁴⁴ For example, Australian courts have expressly found that specific headlines of newspaper articles were not original literary works in which copyright subsists.⁸⁴⁵ On the other hand, it is likely that a photograph will meet the originality requirement by the mere fact that it was taken.⁸⁴⁶

Copyright protection does not require registration of any intellectual property right but is triggered when an original work is *published* in a material form.⁸⁴⁷ When an original work is ‘published’ is broadly defined to occur when reproductions of literary, dramatic, musical or artistic works are supplied, whether by sale or otherwise, to the public.⁸⁴⁸ Given the broad definition of when a work is ‘published’, content on digital platforms is ‘published’ work that is eligible for copyright protection if it meets the other criteria for subsistence of copyright.⁸⁴⁹

841 ALRC, [Copyright and the Digital Economy \(ALRC Report 122\)](#), 2014, p. 59.

842 See for example, Department of Communications and the Arts, [Copyright modernisation consultation paper](#), 19 March 2018, p. 4.

843 *Copyright Act 1968* (Cth), s32; see also Productivity Commission, [Report of the Review into Intellectual Property arrangements](#), 2016, p. 104.

844 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547, 561.

845 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547.

846 *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, 55.

847 *Copyright Act 1968* (Cth), s31 (b) (i), (ii); see also Productivity Commission, [Report of the Review into Intellectual Property arrangements](#), 2016, p. 104.

848 *Copyright Act 1968* (Cth), s29. See also C Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press, 2018), p. 35, 40.

849 C Tan, [Regulating Content on Social Media: Copyright, Terms of Service and Technological Features](#), (UCL Press, 2018), p. 40.

Protections for copyright content

Once it is established that copyright subsists in material, the Copyright Act grants the holder of the copyright (the rightsholder) exclusive rights to copy, reproduce, publish and communicate the copyrighted work to the public.⁸⁵⁰

Copyrighted content may only be used by third parties on the grant of a licence by the rightsholder (often in exchange for royalty payments) or if the use fits within an established exception. Such exceptions include fair dealing for reporting the news,⁸⁵¹ parody or satire⁸⁵² or for research or study.⁸⁵³

Unauthorised use of copyright material that infringes on the copyright holder's exclusive rights is a civil infringement under the Copyright Act.

Authorisation liability

Copyright can be infringed where someone:

- directly uses the copyright-protected content in an unauthorised way
- authorises someone else's unauthorised use of the copyright-protected content (for example, an intermediary distributing the copyright-protected content in an unauthorised way).⁸⁵⁴

However, the mere 'provision of facilities' that enables a copyright infringement to occur does not constitute an authorisation in itself. Therefore, a digital platform that only provides facilities for copyright-infringing content would not be liable for the copyright-infringing acts of its users, unless there is something more to show that the digital platform authorised the infringement.⁸⁵⁵

To assess whether there is 'something more' to trigger authorisation liability, courts must consider the following three factors, which are non-exhaustive.⁸⁵⁶

- the extent (if any) of the person's power to prevent the doing of the act concerned
- the nature of any relationship existing between the person and the person who did the act concerned
- whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Generally, an entity may only be found to have authorised an infringement of copyright if that entity has some power to prevent it, although express or formal permission or encouragement is not essential to constitute an authorisation.⁸⁵⁷ For example, in *Roadshow Films v iiNet Limited*,⁸⁵⁸ a group of 34 film companies commenced proceedings against iiNet Limited (iiNet) for authorising the copyright-infringing acts of its customers who were using the peer-to-peer file-sharing network BitTorrent.⁸⁵⁹ In this case, the High Court held that iiNet had no direct ability to prevent its customers from using BitTorrent to infringe copyright; as an ISP, iiNet's only power was to terminate user accounts, which is not likely to have the effect of preventing the copyright-infringing conduct, as its customers could switch to another ISP to continue engaging in the conduct.⁸⁶⁰

850 *Copyright Act 1968* (Cth), s 31.

851 *Copyright Act 1968* (Cth), s 42.

852 *Copyright Act 1968* (Cth), s 41A.

853 *Copyright Act 1968* (Cth), s 40.

854 *Copyright Act 1968* (Cth) ss 31, 36, 101.

855 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [401].

856 *Copyright Act 1968* (Cth), ss 36(1A) and 101(1A).

857 *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 497.

858 *Roadshow Films v iiNet Limited* [2012] HCA 16.

859 *Roadshow Films v iiNet Limited* [2012] HCA 16 at 2 and 71.

860 *Roadshow Films v iiNet Limited* [2012] HCA 16 at 70 and 73.

Enforcement and remedies

Rightsholders must apply to the courts to enforce their rights under the Copyright Act. The potential remedies that a court may order for infringement of copyright include civil damages or an account of profits, together with an injunction and the ability to seek an order requiring an ISP to block access to an overseas website that facilitates online copyright infringement.⁸⁶¹

Civil damages for copyright infringement are calculated on the basis of loss suffered along with other factors set out under s 115(4) of the Copyright Act. This can result in low or nominal damages being awarded for copyright infringement.⁸⁶²

For example, in *Pokémon Company International v Redbubble*,⁸⁶³ the Federal Court held that Redbubble had infringed the copyright of Pokémon Company International (Pokémon) by authorising the infringement of copyright protected works because, although the images were communicated by the artists using the site, Redbubble was 'responsible for determining the content of the communication through its processes, protocols and arrangements with the artists'.⁸⁶⁴ However, Pokémon could not provide evidence of revenue lost through the infringement and Redbubble was ordered to pay Pokémon \$1 of nominal damages along with 70 per cent of Pokémon's legal costs.⁸⁶⁵

5.4.2 Digital platforms' use of copyright-protected content

The application of copyright laws significantly impacts on content creators' and media businesses' ability to monetise original content on digital platforms. As discussed above, digital platforms are regulated by Australian copyright law in a broadly similar way as media businesses performing comparable roles.

However, there are some common ways in which digital platforms providing social media, online search, and content aggregation services use copyright-protected content that warrant further discussion.

This section considers how Australian copyright law applies to common digital platforms' practices of reproducing news headlines, snippets of news articles and photographs.

News headlines and snippets

Digital platforms often reproduce headlines and snippets of content from original news media articles created by journalists and media businesses (see discussion on digital platforms' use of snippets in section 5.3.1). Generally, digital platforms' use of article headlines is unlikely to infringe copyright protections in Australia. This is because many headlines are concise statements of facts and therefore headlines alone are unlikely to be copyright protected.⁸⁶⁶

Digital platforms reproducing a snippet of a copyright-protected news article does not infringe copyright protections if the snippet does not reproduce a substantial part of the article.⁸⁶⁷ Only courts may determine whether a snippet reproduces enough of a copyrighted work to constitute copyright infringement, which means rightsholders must engage in litigation to seek a court's decision whether infringement has occurred in each instance where a snippet is reproduced.

861 Productivity Commission, [Report of the Review into Intellectual Property arrangements](#) (2016), p. 105, *Copyright Act 1968* (Cth) s 115A.

862 *Copyright Act 1968* (Cth) s 115(4).

863 [2017] FCA 1541.

864 *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 at [48]. The Court also held that the communication occurred in Australia despite Redbubble's servers being located outside Australia.

865 *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 at [4]-[5].

866 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547.

867 See *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 61 ALR 251 and *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386 at [37].

Even if copyright was found to subsist in a headline or if it was found that a snippet reproduced a substantial part of a news article, the digital platform copying the headline or snippet may be able to claim a fair dealing exception, such as fair dealing for the purposes of reporting of news.⁸⁶⁸ To make out a defence of fair dealing for the purposes of reporting the news, there must be ‘sufficient acknowledgment’ of the author and the title,⁸⁶⁹ the main purpose of the work must be for the purpose of reporting the news (or associated with reporting the news), and the use of the material must be ‘fair’, which will depend on the factual circumstances of each individual case.⁸⁷⁰

Original photographs

Copyright is more likely to subsist in original photographs than in headlines or snippets. Therefore, digital platforms which reproduce any of the photographs published with a news article in an unauthorised way are likely to be infringing the copyright in that photograph, unless the ‘fair dealing’ exception (for example, for the reporting of news) applies to the digital platform’s use of the specific photograph in question.

5.4.3 Digital platforms and authorisation liability

As discussed earlier, digital platforms merely providing facilities for copyright-infringing communications would not have authorisation liability for the copyright-infringing acts of its users, unless there is something more to trigger authorisation liability.⁸⁷¹

Uncertainty in application to digital platforms

The decision in *Roadshow Films v iiNet Limited*⁸⁷² found that the ISP, iiNet, had no direct ability to prevent its customers from using BitTorrent to infringe copyright and therefore was not liable for authorising the infringements.⁸⁷³ However, the impact of this decision on authorisation liability of digital platforms is not clear, because digital platforms are likely to have a greater ability than ISPs to identify and prevent copyright-infringing behaviour of their users.

For instance, YouTube has a tool called Content ID that allows it to identify copyright-infringing material by matching user-uploaded content to content provided by copyright owners such as film studios and record labels. YouTube Terms of Service expressly state that ‘YouTube will terminate a user’s access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer’,⁸⁷⁴ which gives it the power to prevent the infringements of its users if they were identified to infringe copyright.

Proposals to clarify authorisation liability

Stakeholder submissions to the Inquiry have noted the importance of clear rules on authorisation liability to ensure that online content hosts, such as digital platforms, have appropriate incentives to remove copyright-infringing content.⁸⁷⁵ The Australian Copyright Council submits that the ‘root’ problem faced by rightsholders relates to uncertainty in the operation of authorisation liability.⁸⁷⁶ This submission is echoed by Music Rights Australia, which submits that this uncertainty ‘remains the underlying impediment to market-driven technological solutions for the removal of unlicensed copyright material on digital platforms and that clarity regarding authorisation liability would incentivise the parties to come together to develop effective, technology-based solutions which reflect the current and future digital environment’.⁸⁷⁷

868 *Copyright Act 1968* (Cth), s 42(1)(b).

869 *Copyright Act 1968* (Cth), ss 42(1)(a), 10.

870 See ALRC, [Copyright and the Digital Economy \(Discussion Paper\)](#), May 2013, p. 133.

871 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [401].

872 [201] HCA 16.

873 *Roadshow Films v iiNet Limited* [2012] HCA 16 at [70].

874 YouTube, [Terms of Service](#), accessed 5 May 2019.

875 See, for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 14 -15; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 129-130.

876 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3. Endorsed by the Australian Publishers’ Association, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

877 Music Rights Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4.

Multiple stakeholders including the Australian Society of Authors, Music Rights Australia, Nine, Foxtel, Free TV, and the Coalition of Major Professional & Participation Sports each submit that the Government should reform the authorisation provisions under the Copyright Act to clarify the nature and extent of digital platforms' liability under those provisions.⁸⁷⁸ Free TV submits that 'clear and effective authorisation provisions are fundamental to the operation of any takedown notice processes' to create the incentives for digital platforms to promptly take down copyright-infringing content.⁸⁷⁹

Conversely, submissions from some digital platforms and digital platform industry groups propose extending the Copyright Act's safe harbour scheme to digital platforms, which would protect digital platforms which comply with the scheme from authorisation liability.⁸⁸⁰ Google, the Digital Industry Group Inc. (DIGI), and the Australian Digital Alliance each note that the Productivity Commission has recommended that the Australian Government 'should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services'.⁸⁸¹ Google submits that '[r]obust safe harbours provide legal certainty and minimise compliance costs'.⁸⁸²

Stakeholders at the Industry Stakeholders Forum expressed mixed views regarding the exclusion of digital platforms from safe harbour protections in Australia, with some stakeholders noting that it was an issue for digital platforms who were protected under safe harbour in the US, whilst others argued that safe harbour was 'never meant' to apply to commercial entities.⁸⁸³

ACCC views on proposed amendments

The ACCC notes that, as discussed in the section on 'Authorisation Liability' above, there are three non-exhaustive factors used to assess authorisation liability. These factors include the extent of the person's power to prevent the infringing act, the nature of any relationship between the person and the person who did the infringing act, and whether the person took any other reasonable steps to prevent or avoid the doing of the act, including compliance with any relevant codes of conduct.⁸⁸⁴ These appear to be platform-neutral factors that are equally relevant, and capable of applying to conduct both online and offline. The ACCC is also not aware of any case law suggesting that authorisation liability is not capable of applying to digital platforms.

In addition, the Department of Communications and the Arts recently conducted a copyright modernisation consultation to consider broad stakeholder views on reform options for the Copyright Act. The consultation included discussion of reform options to modernise copyright law but did not propose any amendments to the authorisation liability provisions of the Copyright Act.⁸⁸⁵

Therefore, in the absence of a clear regulatory disparity in the authorisation provisions that distorts competition in the relevant markets, the ACCC does not consider it appropriate to propose broad amendments altering the operation of the Copyright Act as part of this Inquiry.

878 Australian Society of Authors, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2; Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 4; Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 26; Music Rights Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5; Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 33.

879 Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 33.

880 DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11; Redbubble, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3; StartupAus, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Australian Digital Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

881 Productivity Commission, [Report of the Review into Intellectual Property arrangements](#), 2016, Recommendation 19.1. See also DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11-12; and Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 56; Australian Digital Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4.

882 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 57.

883 [ACCC, industry stakeholder forum summary](#), March 2019, p. 7.

884 *Copyright Act 1968* (Cth), ss 36(1A) and 101(1A).

885 Department of Communications and the Arts, [Copyright modernisation consultation](#), accessed 6 May 2019. See further Department of Communications and the Arts, [Copyright modernisation consultation paper](#), 19 March 2018.

Nevertheless, the ACCC recognises that uncertainty in authorisation liability can harm the ability of rightsholders who rely on authorisation liability to prevent the unauthorised use of their works and to protect their ability to generate revenue from copyright-protected works. The ACCC considers that this uncertainty may be mitigated by implementing a mandatory code of practice as recommended below at section 5.5.4. This is because compliance with any relevant codes of conduct is a factor that must be considered by the courts in assessing whether a digital platform has authorised an infringement of copyright (see discussion in recommendation 8 below).

5.4.4 Digital platforms and site-blocking obligations

Under the Copyright Act, rightsholders can apply to the Federal Court for a court order directing ISPs to block access to websites that have the ‘primary purpose’ of infringing copyright.⁸⁸⁶

On 28 November 2018, the *Copyright Amendment (Online Infringement) Bill 2018* (Cth) (the Online Infringement Bill) was passed by Parliament and took effect on 11 December 2018. The new amendments expand the site-blocking scheme under the Copyright Act in key ways:

- Search engines - rightsholders can now apply for a court order directing online search engine providers to take such steps as the Court considers reasonable so as not to provide a search result that includes copyright-infringing sites.⁸⁸⁷
- Primary effect - the sites that may be subject to a blocking order previously must have the ‘primary purpose’ of infringing copyright. This has been expanded to include sites that have the ‘primary purpose or the primary effect’ of infringing copyright.⁸⁸⁸
- Adaptive court orders - the Court may now grant injunctions that could be extended to domain names, URLs and IP addresses that start to provide access to the blocked sites after the injunction is granted.⁸⁸⁹

Where site-blocking remedies were previously only available to be made against ISPs, rightsholders may now also seek court orders that require digital platforms providing online search engine services to block copyright-infringing sites (though other types of digital platforms remain outside the scheme). Expanding the site-blocking scheme to include a ‘primary effect’ test and to allow for adaptive court orders may also increase the efficacy of the scheme in reducing access to copyright-infringing content online.

The Australian Copyright Council submits that the site-blocking scheme provides some support to rightsholders in Australia regarding copyright-infringing content hosted on international online locations, but that it ‘is essentially prohibitive from a costs perspective for individuals’.⁸⁹⁰

5.5 Enforcing copyright protections against digital platforms

Key findings

- Rightsholders can face particular challenges in enforcing copyright against digital platforms because of the cost, delay, uncertainties regarding authorisation liability, and potentially low value of remedies associated with bringing court proceedings against overseas-based defendants hosting content outside Australia.
- The challenges in enforcing copyright against digital platforms create detriments for rightsholders because they lower the incentives for digital platforms to respond promptly to take-down requests and erode the value of their copyrighted content.

886 *Copyright Act 1968* (Cth), s 115A(1).

887 *Copyright Act 1968* (Cth), s 115A(2).

888 *Copyright Act 1968* (Cth), s 115A(1)(b).

889 *Copyright Act 1968* (Cth), s 115A(2B)(b).

890 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

The emergence of digital platforms and new business models have reinforced the role of the internet as a key marketplace for the distribution and access to copyright-protected materials. However, there is also a perceived proliferation in unauthorised uses of copyright protected materials in the online marketplace and particular difficulties in enforcing copyright protections against digital platforms which have distributed or assisted access to copyright-infringing content.

This section will discuss some key challenges facing rightsholders in enforcing copyright protections from unauthorised distribution on digital platforms.

5.5.1 Digital platforms' compliance with copyright protections

The US Digital Millennium Copyright Act

In addition to being regulated under the Copyright Act, many digital platforms are based in the United States and are also regulated under the US *Digital Millennium Copyright Act* (the DMCA). Section 512 of the DMCA limits the liability of service providers for copyright-infringement if certain conditions are met, including the requirement that - 'upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material'.⁸⁹¹ The definition of 'service providers' in the DMCA includes digital platforms.⁸⁹² Procedures for proper notification of an infringement are also set out under the DMCA and require rightsholders to submit a notification to the service provider's designated agent for identified infringements.⁸⁹³

Although digital platforms do not have the same safe harbour protections under the DMCA in Australia, there is evidence to suggest that digital platforms nevertheless apply the same take-down procedures from the DMCA's safe harbour regime to their dealings with Australian rightsholders. For example, Twitter submits that it respects copyright and 'expeditiously complies with valid and complete copyright removal notices submitted by content owners or their authorised representatives' in accordance with the DMCA.⁸⁹⁴ Redbubble submits that its current policies and processes are 'shaped around the 'standards prescribed by the US Digital Millennium Copyright Act'.⁸⁹⁵ The Digital Industry Group Inc. DIGI submits that its members apply the DMCA requirement for 'expeditious' removal of infringing material upon notice as 'a globally accepted standard for issuing takedown notices that is relied upon by online service providers and content creators around the world'.⁸⁹⁶

The application of take-down processes from the US-based DMCA results in numerous practical difficulties for Australian rightsholders requesting removal of copyright-infringing content from digital platforms. These are discussed below.

Variety of takedown processes

As there are no express take-down mechanisms under Australian copyright law, digital platforms have implemented a variety of takedown processes for rightsholders to request the removal of copyright-infringing content.

Digital platforms and industry groups submit that many digital platforms have already implemented comprehensive take-down processes. DIGI submits that its members dedicate significant resources to processing copyright removal requests.⁸⁹⁷ Twitter submits that it employs 'teams operating around the world, 24 hours a day, 7 days a week' to comply with valid and complete copyright removal notices.⁸⁹⁸ Google also submits that it 'responds promptly to voluminous take-down requests' and that it removed more than 99 per cent of URLs and nearly 94 per cent of videos requested by Australian rightsholders in a little over 18 hours on average in 2018.⁸⁹⁹ Facebook also submits that it has 'a robust notice-and-takedown

891 The Digital Millennium Copyright Act of 1998, ss 512(g)(1), 512(c)(1)(c).

892 The Digital Millennium Copyright Act of 1998, s 512(k)(1)(A).

893 The Digital Millennium Copyright Act of 1998, s 512(c)(3).

894 Twitter, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

895 Redbubble, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

896 DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11.

897 DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11.

898 Twitter, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

899 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 11 and 55.

program', under which its global IP Operations team promptly removes IP infringing content reported through Facebook's publicly-accessible reporting channels.⁹⁰⁰ Stakeholders at the industry forum also noted that digital platforms have already spent significant resources in developing content identification systems that could identify and remove copyright infringing content and that not all take downs are straight-forward and can be easily processed and identified.⁹⁰¹

However, rightsholder submissions to the Inquiry indicated that they generally do not consider that digital platforms' existing processes enable adequate reporting or removal of infringing material.⁹⁰² For instance, Australian Film & TV Bodies considers that 'digital platforms have been slow to protect the integrity of content from widespread user misuse'.⁹⁰³ News Corp submits that 'content-sharing platforms like YouTube and Facebook that are rife with unauthorised copyright material are currently doing very little to prevent this activity'.⁹⁰⁴ Of particular concern appears to be the lack of consistency in the range of take-down processes used by digital platforms. For instance, Free TV submits that there is 'no streamlined take-down notice system or procedure in Australia that applies to the platforms and the ad hoc processes that exist or are negotiated between platforms and content owners are inadequate'.⁹⁰⁵ Getty Images similarly submits that 'different platforms have different policies, each offering varying degrees of success to content owners'.⁹⁰⁶

Rightsholders also submit that there can be significant delays and costs associated with requesting take-down of infringing content from digital platforms under their existing processes. For instance, Free TV submits that the process of engaging with Google and Facebook staff to access their rights management tools can take up to four weeks and that rightsholders must issue individual notices for each infringing act.⁹⁰⁷

Lack of clear takedown policies

Rightsholders have also raised concerns that digital platforms do not all have clear policies or consistent timeframes for the removal of content that may infringe copyright. For example, while Facebook's Terms of Service enable it to remove content and disable accounts, there are no obligations on Facebook to do so. Facebook submits that its Terms of Service and Community Standards 'prohibit users from posting content that infringes third parties' IP rights or that is otherwise unlawful'.⁹⁰⁸ However, the ACCC notes that while the terms referred to in Facebook's submission place clear obligations on users not to infringe copyright, they do not appear to place obligations on Facebook to prevent or remove copyright-infringing content. Free TV submits that there are a number of Facebook groups set up to discuss, share and support access to copyright-infringing content and Facebook has reviewed one such group Free TV reported but found that it 'doesn't go against one of our specific Community Standards'.⁹⁰⁹ Foxtel submits that it has sent numerous notices to YouTube to take down copyright-infringing videos on a single user's channel, but these have not resulted in YouTube terminating the infringing user's channel, which appears inconsistent with YouTube's Terms of Services.⁹¹⁰

900 Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 2.

901 [ACCC, Industry Stakeholder Forum Summary](#), March 2019, p. 6.

902 See for example, submissions from Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2; Australian Film & TV Bodies, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 7; Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 4; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 32; Getty Images, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

903 Australian Film & TV Bodies, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

904 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 41.

905 Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 8.

906 Getty Images, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

907 See, for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 10.

908 Facebook Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report: Facebook and IP Protection – Response to issues raised in the Preliminary Report](#), April 2019, pp. 2-3.

909 Free TV, [Second submission to ACCC Issues Paper](#), September 2018, pp. 9-10.

910 Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, pp. 8.

Volume of infringement notices

Rightsholders submit that the volume of infringing content available on digital platforms means that it can require a substantial investment in time and resources to send take-down notices to digital platforms on a regular basis targeting the infringing content.⁹¹¹

The ACCC has sought information from Google regarding the number of copyright infringement notices Google receives by a rightsholder in Australia. Table 5.1 sets out Google's estimate of the number of copyright infringement notices it has received regarding YouTube and its other products and services in 2016, 2017, and 2018 that may be relevant to Australia.⁹¹² Based on these estimates, Google receives an average of 297 infringement notices each week regarding material on YouTube in which copyright subsists under Australian Copyright Law or by a rightsholder located in Australia. This supports rightsholders' submissions regarding the significant burden imposed by the use of individual takedown notices on both rightsholders and on digital platforms.⁹¹³

Table 5.1 Number of copyright infringement notices received by Google⁹¹⁴

Period	No. notices issued regarding YouTube in Australia	No. notices issued regarding other product/services in Australia
1 Jan 2016–31 Dec 2016	13 392	23 377
1 Jan 2017–31 Dec 2017	16 946	16 901
1 Jan 2018–31 Dec 2018	15 986	10 017

Source: Information provided to the ACCC.

Other inefficiencies in existing takedown processes

In addition to the variety and volume of take-down notices and the lack of clear policies, stakeholders have highlighted a number of other inefficiencies in the existing take-down processes of digital platforms based on DMCA requirements.⁹¹⁵

A key inefficiency for rightsholders is the overseas management of takedown processes means that digital platforms often designate an agent in the United States for receiving infringement notices. This can lead to significant delays in processing infringement notices filed from Australia that can particularly harm rightsholders during any unauthorised streaming of sporting events and other live broadcasts. As noted above, digital platforms submit that considerable resources have been dedicated to implement comprehensive take-down processes.⁹¹⁶ For instance, Facebook submits that it employs a 'global team of approximately 200 trained professionals who provide around-the-clock coverage

911 See for example, e.g., Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

912 Information provided to the ACCC.

913 See for example, Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, pp. 6–8.

914 The figures in the table are estimates only, as it is not possible in all cases to ascertain whether a copyright infringement notice is in fact relevant to Australia. The figures in the table represent: (a) For YouTube during the period of 1 January 2016 - 31 December 2017: the number of 'takedown requests' received through Google's public webform or email address copyright@youtube.com, for which the complainant submitting the request listed their Country/Region as Australia, or which came from a ".au" domain; (b) For YouTube during the period of 1 January 2018 - 31 December 2018: the number of 'takedown requests' received through Google's public webform or email address copyright@youtube.com, for which the complainant submitting the request disclosed a link to Australia; (c) For YouTube during the period of 1 January 2018 - 31 December 2018: the number of 'takedown requests' received through Google's public webform or email address copyright@youtube.com, for which the complainant submitting the request disclosed a link to Australia; and (d) For products / services other than YouTube: the number of copyright infringement notices received through Google's public webform, for which the complainant submitting the form listed their Country/Region as Australia. Furthermore: an infringement notice may be made in respect of multiple copyrighted works or in respect of multiple URLs for the same copyrighted work; may be submitted by an overseas representative or representative organisation on behalf of a copyright owner; may relate to more than one allegation of copyright infringement; and may relate to allegations of copyright infringement with respect to content outside of Australia.

915 See for example, Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, p. 9; Getty Images, [Submission to ACCC Issues Paper](#), April 2018, p. 7; Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 10; Foxtel & Fox Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 19–20.

916 See for example, Twitter, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5; Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 52; Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 1.

from several offices around the world'.⁹¹⁷ However although Facebook's reporting channels are 'globally available',⁹¹⁸ Free TV notes that Facebook's website refers rightsholders to submit an online form or, in the alternative, provides contact details for a designated agent located in the United States.⁹¹⁹ The ACCC considers that digital platforms and rightsholders would benefit from channels, contacts and processes dedicated to ensuring the timely consideration of Australian copyright-protected content.

A second key issue is the significant time and resources that rightsholders must expend in monitoring content online to protect their copyright and to meet the evidentiary burden of proving copyright ownership.⁹²⁰ Some digital platforms have already developed tools that allow the proactive identification of copyright content at scale, such as Google's Content ID and Facebook's Rights Manager.⁹²¹ Facebook submits that it has collaborated with rightsholders to develop tools such as Rights Manager, the Commerce & Ads IP Tool, and Audible Magic to help rightsholders manage and protect their content and 'in some instances, to eliminate the need for them to report any content at all'.⁹²² Google submits that it provides rightsholders with bulk removal notices as well as more sophisticated tools like the Content Verification Program, Copyright Match Tool, and Content ID and that over 98 per cent of copyright issues on YouTube are handled through Content ID system.⁹²³

However, concerns remain regarding the assistance provided by these tools to rightsholders of different sizes, as some of them may not be available to smaller rightsholders who do not meet the selection criteria.⁹²⁴ Further, the options provided by Content ID to block, monetise, or track copyright-protected content are country-specific and therefore not always available in all countries.⁹²⁵ Information provided by Google to the ACCC indicates that rightsholders in Australia with Content ID access 'have the option of blocking a whole video from being viewed, monetising the video by running ads against it (in some cases sharing revenue with the uploader) or tracking the video's viewership statistics'.⁹²⁶ Facebook's Rights Manager video-matching tool provides similar options for rightsholders to block, monetise, monitor, or report video content, though Rights Manager is also limited to eligible rightsholders who submit a successful application to use this tool.⁹²⁷ The ACCC welcomes the development of new tools to assist rightsholders to manage the large-scale distribution of copyright-protected content on digital platforms. The ACCC considers there is scope for greater collaboration and consultation between digital platforms and rightsholders on this issue, particularly in relation to the utility of these tools for smaller rightsholders.

A third issue on which rightsholders and digital platforms have diverging views is the resurfacing of the same or similar infringing content. This is sometimes from the same user, immediately after rightsholders have successfully sought its removal following the existing takedown processes. Facebook submits that it has a 'repeat infringer policy' that applies to 'IP violations committed via Facebook profiles and Instagram accounts, including copyright, trademark and counterfeit' and that it will 'disable the accounts of repeat infringers in appropriate circumstances'.⁹²⁸ But rightsholders such as Foxtel submit that even if a user's account is terminated, there are no processes to prevent a terminated user from immediately creating a new account and continuing to host unauthorised content.⁹²⁹ The ACCC again considers that this is an area where consultation between rightsholders and digital platforms may achieve significant efficiencies by enabling the parties to develop consistent and mutually-acceptable processes.

917 Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 5.

918 Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 4.

919 Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 9.

920 See for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, pp. 11-12; Free TV, [Supplementary Submission to ACCC Issues Paper](#), September 2018, p. 10

921 See for example, Facebook for media, [Rights Manager](#), accessed 6 May 2019; YouTube Help, [How Content ID works](#), accessed 6 May 2019.

922 Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, pp. 6-8.

923 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 11 and 52.

924 For example, Content ID is only available to some rightsholders. See YouTube Help, [Qualifying for Content ID](#), accessed 6 May 2019.

925 YouTube Help, [How Content ID works](#), accessed 6 May 2019.

926 Information provided to the ACCC.

927 Facebook Business, [Get started with Rights Manager](#); See also Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 7.

928 Facebook, [Second submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), April 2019, p. 6.

929 Foxtel & Fox Sports, submission to ACCC Issues Paper, April 2018, p. 8.

5.5.2 Challenges in prosecuting digital platforms

In addition to challenges arising under the variety of take-down processes used by digital platforms, rightsholders wishing to enforce copyright protections against digital platforms face added difficulties in prosecuting overseas-based multi-national digital platforms in the Australian courts.

These challenges were identified in the Preliminary Report and are noted in submissions from rightsholders such as Getty Images, Foxtel, Free TV, Nine, Village Roadshow as well as industry organisations such as the Australian Copyright Council, the Australian Society of Authors and the Australian Publishers' Association.⁹³⁰ Moreover, they are increasingly faced by content creators in an environment where journalists are often engaged as freelancers rather than employees with the financial backing of a media company.⁹³¹ The Australian Copyright Council outlined its experiences in providing a legal advice service to journalists:

'many of those individuals feel powerless to pursue legal claims and rarely do so – beyond a take-down request which may or may not be successful – due to the expense and complexity involved with pursuing unauthorised copyright use especially where a large digital platform located overseas is involved'.⁹³²

The following sections will briefly outline several key challenges faced by rightsholders seeking to enforce copyright protections against digital platforms in Australia.

High costs of prosecution

Cost and time are significant deterrents in commencing proceedings in court.⁹³³ Some estimates suggest that the average cost for Federal Court action to enforce copyright is between AU\$80 000 and AU\$100 000, though the expense of copyright litigation varies significantly depending on the nature of the infringement and the evidence brought before the court. That is, whilst an uncontested claim may cost around AU\$80 000, contested claims requiring expert evidence at trial may cost significantly more, in between AU\$500 000 to AU\$1 million.

Particular difficulties in pursuing overseas-based defendants

In addition to the cost and delay associated with copyright litigation, there are three additional challenges in enforcing copyright against overseas-based defendants such as the key digital platforms operating in Australia.

First, rightsholders face challenges serving a foreign defendant outside of Australia.

To launch legal proceedings, rights holders must first serve the digital platform with an originating motion or other document instituting proceedings. In order to serve an entity outside Australia and without a physical presence in Australia, the rules for 'service out of jurisdiction' must be followed.

Second, rightsholders face difficulties in establishing that there is copyright-infringing conduct occurring within Australia, as the rightsholder must prove that:

- there is a work in which copyright subsists
- the alleged infringer has copied a substantial part of the copyright work
- the alleged infringing conduct occurred in Australia.

930 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3; Australian Publishers' Association, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 1; Australian Society of Authors, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Getty Images, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1, Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 4-5; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 30-33; Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp 24- 26.; Village Roadshow, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

931 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

932 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

933 Attorney General, [A Strategic Framework for Access to Justice in the Federal Civil Justice System](#), September 2009, p. 27

The mere fact that the digital platform is available in or accessible from Australia is unlikely to be sufficient to prove that there is copyright-infringing conduct occurring in Australia.⁹³⁴ It will be a question of fact in each case, but the court's assessment will turn on factors such as whether the infringing conduct (for example, publishing or downloading) is directed or targeted at persons or subscribers in Australia,⁹³⁵ where the infringing content was uploaded and where the infringing content is stored.⁹³⁶

Third, even if a rightsholder is successful in court, the rightsholder must face an additional challenge of enforcing the judgment against a foreign defendant. That is, the rightsholder must apply for the Australian court's judgment to be enforced in the digital platform's home jurisdiction. Each country may have its own individual rules for recognising an Australian judgment and overseas enforcement can be a costly and time consuming process—the cost of enforcing a judgment overseas may exceed the value of the judgment. The Australian Copyright Council submits that, in its experience, rightsholders face 'a total inability to pursue copyright claims in countries where Australia has not entered into a reciprocal agreement of judgement enforcement'.⁹³⁷

The ACCC notes that not all digital platforms which are headquartered overseas will require a rightsholder to bring actions in an overseas jurisdiction. Google submits that its take-down processes 'do not require a rightsholder to bring court proceedings in far-flung jurisdictions' and that 'Australian rightsholders are free to bring lawsuits in Australia and our practice is to keep disputed content down while such litigation is pending'.⁹³⁸

Where a rightsholder is required to bring an overseas action, however, each of the challenges discussed above is likely to add significant cost and delay to the already expensive and time consuming process of establishing copyright infringement. These are likely to present particular challenges for enforcing copyright in cases of time-sensitive content such as live-streamed content.⁹³⁹

Uncertainty regarding the authorisation liability of digital platforms

As discussed above, rightsholders have made numerous submissions noting the uncertainty in the operation of authorisation liability as a critical problem that impedes enforcement of copyright and undermines the incentives of digital platforms to ensure that copyright-infringing content is removed.⁹⁴⁰

Ultimately, authorisation is a question of fact and degree to be determined by a court on the facts of each case. The perceived uncertainty in how this provision operates could discourage rightsholders from litigating cases where authorisation liability of a digital platform must be established.

Low value of likely remedies

The basis for calculating civil damages for copyright infringement under the Copyright Act can result in low or nominal damages. For example, in *Pokémon Company International v Redbubble*,⁹⁴¹ the Federal Court awarded Pokémon AU\$1 in nominal damages for successfully establishing authorisation liability and ordered Redbubble to pay 70 per cent of Pokémon's legal costs, leading to a substantial net financial loss for the plaintiff.⁹⁴² The ACCC notes the submission from StartupAus that, although this decision led to a loss for the plaintiff, there was also a substantial cost for the digital platform in defending the claim and in paying part of the plaintiff's legal costs.⁹⁴³

934 *Ward Group Pty Ltd v Brodie & Stone Plc* (2005) 215 ALR 716, 717.

935 *Ward Group Pty Ltd v Brodie & Stone Plc* (2005) 215 ALR 716, 717 at [40].

936 *Ward Group Pty Ltd v Brodie & Stone Plc* (2005) 215 ALR 716 at [43].

937 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

938 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 55.

939 See for example, Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, pp. 6-8.

940 See for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, pp. 10-14; Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, p. 6-8.

941 [2017] FCA 1541.

942 *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 at [4]-[5].

943 StartupAus, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

The ACCC notes the high costs of copyright proceedings and the uncertainties surrounding authorisation liability which can cause significant detriments to both rightsholders and to digital platforms. The ACCC considers that the possibility of only nominal damages being awarded for a successful action compounds the uncertainties in establishing authorisation liability and is likely to decrease the incentives for rightsholders to commence court action to enforce copyright against digital platforms.

5.5.3 Impact of enforcement difficulties on media markets

Lower incentives for digital platforms to respond promptly to take-down requests

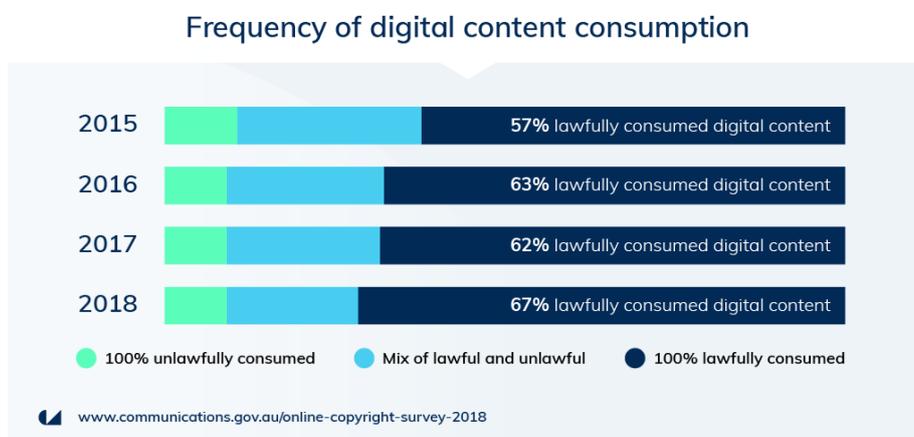
As a result of the difficulties in enforcement, digital platforms have lower incentives to respond promptly to requests to takedown infringing material and to refrain from engaging in conduct that may infringe copyright than media businesses that may also host content online.

The following issues relating to potential infringement of copyright protections and other intellectual property rights that have been reported by digital platform users:

- Use of copyrighted images - Digital platforms often link to or display photographs, which may be copyright protected works.⁹⁴⁴ Reproduction of photographs used in news articles, in particular, is likely to infringe the copyright in those photographs held by media businesses (unless the limited 'fair dealing' exception applies, or unless consent or a licence has been granted for use).
- Text and data mining - Digital platforms produce indices, snippets and listings via the background caching of internet content. Where the data or text mining processes involve the copying of copyrighted content, this may give rise to a copyright infringement in Australia.⁹⁴⁵

However, the ACCC notes that a 2018 annual consumer survey by DOCA on online copyright infringement found that copyright infringement among consumers has been decreasing over the past four years, as shown in figure 5.17 below.⁹⁴⁶

Figure 5.17 Frequency of digital content consumption



Source: Department of Communications and the Arts '[New online copyright research released](#)', 7 August 2018.

944 In 2017, Getty Images made a complaint to the European Commission accusing Google of anti-competitive practices relating to Google's reproduction of copyrighted images. Google and Getty Images reached a confidential licencing deal in February 2018 and, as part of the deal, Google removed some features from image search, including the 'view image' button that opened an individual picture in the web browser and made it easy to download; See BBC, [Anger at Google image search 'peace deal'](#), 16 February 2018, accessed 23 September 2018.

945 ALRC, [Copyright and the Digital Economy \(ALRC Report 122\)](#), 2014, p. 262; Report commissioned by the Department of Communications and the Arts by PwC, [Cost benefit analysis of changes to the Copyright Act 1968 \(Cth\)](#), 2016, pp. 39-40.

946 See Department of Communications and the Arts, [New online copyright research released](#), 7 August 2018.

Detriments to content creators and media businesses which own copyright

Difficulties in enforcing copyright can result in substantial detriments to rightsholders, including content creators and media businesses, by decreasing their ability to generate revenue from copyright-protected content. The size of the market for copyrighted content in Australia has been estimated by the Productivity Commission and experts commissioned by the Australian Copyright Council. The Productivity Commission found that the capital expenditure on ‘artistic originals’ (the category of goods covered by copyright) was estimated at AU\$ \$2.7 billion in the year ending June 2015—this equates to about 0.16 per cent of Australia’s gross domestic product.⁹⁴⁷ Another report from PwC (commissioned by the Australian Copyright Council) valued the contribution of copyright industries at more than seven per cent of gross domestic product per year.⁹⁴⁸

It is difficult to estimate the size of the detriment caused by copyright-infringement, as useful data on the potential revenue lost through copyright infringement is lacking.⁹⁴⁹ Nevertheless, research has found that users are more likely to choose a link to pirated content when those links are promoted in search results.⁹⁵⁰ The Government has stated that online copyright infringement can result in detriment to Australian content creators and creative industries, particularly industries where copyright material can be copied and shared through digital means.⁹⁵¹

Despite digital platforms dedicating significant resources to deal with copyright-infringing content on their platforms,⁹⁵² rightsholders nevertheless submit that content creators incur significant losses from copyright-infringing content being hosted on digital platforms because the availability of free, unauthorised content on digital platforms is likely to lead to fewer users paying to legally access copyrighted content, leading to potential detriments in lost revenue and less access to valuable user data.⁹⁵³

For example, Nine submits that its content businesses require copyright protection ‘to ensure the optimal monetisation of its intellectual property rights’ and that protecting ‘the rights of the owners and licensees’ of premium content is central to the sustainability of the creative industries.⁹⁵⁴

The Coalition of Major Professional & Participation Sports (COMPPS) submits that copyright is crucial to the exploitation and licensing of media rights by its members across a range of platforms.⁹⁵⁵ COMPPS further submits that the ‘revenue derived from the licensing of these rights is the single most important revenue stream’ for most of its members and that ‘maintaining and growing media rights revenue is critical to the operation, survival and growth’ of its members.⁹⁵⁶

Music Rights Australia submits that ‘[c]reators are unable to sustain meaningful careers if their capacity to earn is undercut and undermined over the long term by unlicensed use of their music’.⁹⁵⁷

947 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 105.

948 PwC, [The Economic Contribution of Australia’s Copyright Industries- 2002-2016](#), prepared for the Australian Copyright Council, September 2017, p. 10. Also citing WIPO 2015a. The estimate was derived by taking into account the costs of labour, advertising, distribution and collecting royalties as well as the contributions of industries related to copyright, such as manufacturing, wholesaling, retailing, renting, etc.

949 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 552.

950 L Sivan, M D Smith, and R. Telang, [Do Search Engines Influence Media Piracy? Evidence from a Randomized Field Study](#), Carnegie Mellon University, September 2014, pp. 25-27.

951 Regulation Impact Statement, [Copyright Amendment \(Online Infringement\) Amendment Bill](#), October 2018, para 6.

952 DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11; Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 52; Redbubble, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 2-3; Twitter, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

953 Free TV, [Submission to the ACCC Issues Paper](#), April 2018, pp. 40-42; Foxtel & Fox Sports, [Submission to the ACCC Issues Paper](#), April 2018, p.2; Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 16-17; Getty Images, [Submission to the ACCC Issues Paper](#), April 2018, p. 7.

954 Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 25.

955 Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

956 Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

957 Music Rights Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

The ACCC accepts that the particular difficulties in enforcing copyright against digital platforms are likely to cause detriment to rightsholders by eroding the value of their copyright-protected content. This is also likely to harm content creators, who may receive less attribution and less revenue for their copyrighted content. These detriments could also become increasingly significant as digital sources of revenue become a greater proportion of the revenue received for copyrighted content by rightsholders and content creators.⁹⁵⁸ The ACCC is concerned that these detriments may disproportionately impact smaller content creators, who are less able to bear the costs of monitoring and enforcing infringing conduct on digital platforms and who are likely to have less direct access to digital platforms for the purposes of requesting take-downs.⁹⁵⁹

Detriments for media businesses hosting content online

The difficulties with enforcing copyright against digital platforms and the comparative ease of enforcing copyright against media businesses adds another layer to the regulatory imbalance between the media businesses and digital platforms, again giving digital platforms an unfair competitive advantage. This is because media businesses which host content online will face greater constraints from copyright regulation because the regulation is more readily enforced against the media businesses.

On this issue, media submissions to a state government review have raised concerns regarding the realistic level of editorial control over content hosted by their websites, which include not only content prepared by the media businesses themselves, but also content from third party affiliates and comments from their readers.⁹⁶⁰ Stakeholders such as the Communications Alliance and Ninemsn have made submissions in that review that a:

*..lack of clarity around the scope of liability for digital content hosts and online intermediaries in relation to content posted by third parties has led to Australian media and online hosts taking a conservative approach to third party content.*⁹⁶¹

Overseas approaches to facilitating enforcement

The enforcement of copyright in increasingly digital markets is a challenge facing rightsholders in a range of jurisdictions. The Productivity Commission's 2016 report on 'Intellectual Property Arrangements'⁹⁶² proposed the introduction of a specialist IP list in the Federal Circuit Court with features similar to those of the UK Intellectual Property Enterprise Court (IPEC).

The Department of Industry, Innovation and Science (DIIS) currently has carriage of implementing this recommendation from the Productivity Commission and has established an enforcement working group that includes representatives from DIIS, DOCA, Department of Home Affairs, IP Australia, Treasury and the Attorney General's Department.

958 In the 2017-18 financial year, APRA AMCOS collected revenue of \$134.5 million from digital sources, up 21.9 per cent from the previous financial year and higher than the revenue collected from television (\$85.7 million) and radio (\$46.9 million) combined: see Michael Bailey, [APRA AMCOS pay songwriters record \\$362m as digital revenue eclipses broadcast](#), *Australian Financial Review* 17 October 2018, accessed 9 November 2018.

959 Survey by CEG TEK, [Top 100 pirated Movies of the Festival Report](#), accessed 24 October 2018. Independent Australian film 100 Blood Acres was the 95th most illegally downloaded film in 2013. "About 50 per cent more people illegally downloaded 100 Bloody Acres every single day, than saw it in the cinema. And compared to gross Australian and US revenues of A\$24 744, the illegal downloads were worth perhaps A\$434 000 in box office sales." V. O'Donnell, [A real victim of online piracy is Australian indie cinema](#), *The Conversation*, November 2016, accessed 24 October 2018.

960 NSW Department of Justice, [NSW Statutory Review of the Defamation Act 2005](#), June 2018, p. 32. ACCC v *Allergy Pathway* (No. 2) [2011] FCA 74

961 NSW Department of Justice, [NSW Statutory Review of the Defamation Act 2005](#), June 2018, reproduced at page, p. 32 at 5.54 and 5.60 Submission of ninemsn, p. 3-4. Submissions from Communications Alliance, at p. 8.

962 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 579.

Case study: New enforcement approaches in media markets—IPEC in the UK

In 2010, the IPEC was established in the UK to lower the costs of enforcing IP rights for rightsholders. The key features of the IPEC are:

- a cap on recoverable costs of GBP£50 000 and a cap on damages of GBP£500 000, which addresses key concerns of small and medium-sized enterprises (SMEs) regarding the risks of paying a defendant's costs and the amount of potential damages payable
- an active case management system that limits the amount of discovery and expert evidence, endeavouring to hear trials in under two days (with many cases heard in a single day), and
- a small claims procedure with a cap on damages of GBP£10 000, with case management done on the papers and trials completed in hours.

This new court has been a successful way of improving access to justice for rightsholders in the UK, particularly for lower-value IP matters. In particular, active case management, particularly regarding the use of discovery and expert witnesses, has been an effective way of making cases much quicker and cheaper.⁹⁶³ The small claims procedure has also become a popular forum for professional photographers to enforce their rights.

While there appears to have been an increase in the number of cases filed in the IPEC from 110 cases in 2010 to 272 cases in 2013⁹⁶⁴, initial concerns that the UK IPEC would encourage inappropriate cases do not appear to have eventuated.⁹⁶⁵

963 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 576.

964 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 560.

965 C Helmers, Y Lefouli and L McDonagh, [Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010-2013](#), City Research online, University of London, June 2015, p. 34; Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 577.

Recommendation 8 – Mandatory ACMA digital platforms take-down code to assist copyright enforcement

A mandatory industry code be implemented to govern the take-down processes of digital platforms operating in Australia. The code will enable rights holders to ensure the effective and timely removal of copyright-protected content from digital platforms.

The mandatory code should be enforced by the ACMA and have appropriate sanctions and penalty provisions. The content of the code should be developed by the ACMA in consultation with industry including rights holders and digital platforms, and include a framework for cooperation between rights holders and digital platforms which provides guidance regarding key issues of concern for stakeholders including:

- **Cooperation framework:** a framework for cooperation between rightsholders and digital platforms to proactively identify and prevent the distribution of copyright-infringing content online, including an appropriate division of the responsibility for monitoring online content for copyright-infringement.
- **Communication:** measures to improve the ease of communications between rightsholders and digital platforms, including requirements for designated agents of digital platforms to be available during Australian business hours as well as appropriate periods where key Australian live events are broadcasted.
- **Timeframes:** reasonable timeframes for the removal of infringing content and processes targeted at the timely removal of particularly time-sensitive content such as live commercial broadcasts.
- **Bulk notifications:** mechanisms for rightsholders to make bulk notifications to address repeated infringements of the same content and to sanction users who commit multiple or regular infringements.
- **Proof of copyright:** measures to streamline the process by which rightsholders may prove copyright ownership, particularly in cases where there is joint-authorship.

Overview

The ACCC recommends that the development of take-down procedures for copyright infringing content should be set out in an industry code determined by the ACMA, following consultation with industry. This recommendation targets the challenges faced by rightsholders in enforcing copyright against digital platforms and clarifying the obligations of digital platforms under the authorisation liability provisions of the Copyright Act.

The ACCC recommends that improved take-down procedures could be implemented by legislative amendments to enable the ACMA to develop and enforce a Mandatory Standard under the Telecommunications Act (as recommended in the Preliminary Report) or by any other appropriate legislative amendments to enable the ACMA to develop and enforce a mandatory code overseeing digital platforms' take-down processes.

The ACCC views that the industry code should be enforceable by the ACMA and accompanied by penalties. The code could also assist rights holders in establishing authorisation liability under Copyright Law as one of the factors in assessing authorisation liability is compliance with a relevant industry code of practice.⁹⁶⁶

Development by the ACMA

The ACCC recommends that the industry code should be developed by the ACMA with active participation from stakeholders including digital platforms, content creators, media businesses and other relevant rightsholders.

⁹⁶⁶ *Copyright Act 1968* (Cth), ss 36(1A) and 101(1A).

The ACCC notes that the ACMA already has jurisdiction to set mandatory standards in the telecommunications industry.⁹⁶⁷ The ACMA submits that it 'has considerable experience in developing and implementing similar risk-informed regulatory approaches in existing areas of regulation'.⁹⁶⁸ The ACCC recognises that rightsholders and digital platforms each have strong and often conflicting views on what constitutes an effective and reasonable take-down process. In this regard, the ACMA would have a critical role in assisting the different stakeholders achieve consensus and codifying this into a take-down code.

It would be appropriate for the ACMA to consult broadly with stakeholders, including digital platforms, content creators and media businesses regarding the contents of the proposed code. Each of the different groups of stakeholders is likely to have valuable (and potentially conflicting) insights regarding key features of an effective and practicable take-down process to enable the efficient removal of copyright-infringing content in a way that does not impose undue financial or administrative burdens on digital platforms.

Depending on the legislative amendments necessary to develop this code of conduct, the ACMA could follow a similar consultation process as is currently set out under the Telecommunications Act for the ACMA's development of other mandatory industry codes. The consultation process under the Telecommunications Act requires the ACMA to consult publicly with interested parties by publishing details of a proposed mandatory standard in a newspaper circulating in each state and territory, as well as require the ACMA to consult specifically with:

- any industry body or association representing digital platforms⁹⁶⁹
- the ACCC⁹⁷⁰
- the Telecommunications Industry Ombudsman⁹⁷¹
- the Office of the Australian Information Commissioner (if the mandatory standard raises any privacy issues)⁹⁷²
- at least one body or association representing consumer interests.⁹⁷³

The ACCC considers broad industry consultation by ACMA should be conducted. Relevant stakeholders include (but not be limited to) those who addressed this recommendation in their submissions to this Inquiry, such as the Australian Copyright Council, the Media Entertainment and Arts Alliance and the Australian Digital Alliance.

Enforcement by the ACMA

The ACCC recommends the code be accompanied by penalties for breaches which are enforced by the ACMA.

Rightsholders have submitted that a mandatory code, unlike a voluntary regime, is more likely to incentivise compliance by digital platforms, as it would be supported by meaningful sanctions and be subject to enforcement by the ACMA.⁹⁷⁴ For example, an industry code could be supported by a similar penalty regime as that applicable to mandatory industry codes registered under Part 6 of the Telecommunications Act, where contravention of a code may be met with a formal warning issued by the ACMA⁹⁷⁵ and civil penalties of up to AU\$250 000 for each contravention.⁹⁷⁶

967 *Telecommunications Act 1997* (Cth), ss 123, 124 and 125.

968 Australian Communications and Media Authority, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

969 *Telecommunications Act 1997* (Cth), s 125(4).

970 *Telecommunications Act 1997* (Cth), s 133(1).

971 *Telecommunications Act 1997* (Cth), s 133(2).

972 *Telecommunications Act 1997* (Cth), s 134.

973 *Telecommunications Act 1997* (Cth), s 135(1).

974 Australian Society of Authors, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2; Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 30.

975 *Telecommunications Act 1997* (Cth), s 129.

976 Pecuniary penalties are ordered by the Federal Court. See further *Telecommunications Act 1997* (Cth), s 570.

The ACMA submits that it would be feasible for it to implement an effective monitoring, investigation and enforcement regime aimed at achieving outcomes such as effective and timely take-down of copyright-infringing content.⁹⁷⁷

The ACCC notes that some submissions, such as the submission from DIGI, have cautioned that high fines for errors will make it too risky for platforms to 'attempt to protect the legitimate speech interests of ordinary Australians, at the expense of Australians' public dialogue and free expression'.⁹⁷⁸

However, the ACCC views that consultation between digital platforms and rightsholders in the process of developing the mandatory code should be sufficient to streamline digital platforms' existing take-down tools to enable more effective and timely take-down processes and increased certainty for rightsholders in Australia. The role of the ACMA to monitor, investigate and enforce the code would provide smaller rightsholders with a cost effective mechanism to address immediate takedown issues without the expense of pursuing individual court action.

An industry code on take-downs would improve rightsholders' ability to enforce copyright in court under the authorisation liability provisions of the Copyright Act (see discussion on 'Improving the clarity of authorisation liability' below).

The ACCC considers that the Government and the ACMA should consult closely with industry in determining the optimal enforcement mechanism for the take-down code, to strike a balance between incentivising compliance and avoiding excessive regulatory burden.

Key benefits of an industry code

Effective and timely removal of copyright-infringing content

An industry code that enables faster and more efficient take-downs would address the significant detriments to content creators and media businesses caused by the difficulty, cost, and delay in enforcing intellectual property rights against overseas-based digital platforms. Alleviating these difficulties would facilitate existing copyright protections and has the potential to increase the attribution and the revenue flowing to rightsholders from use of copyright-protected content in Australia.

Many rightsholders expressed support for the implementation of an industry code to regulate take-downs, including Free TV, SBS, Village Roadshow, Getty Images, Australian Film & TV Bodies, and Nine. Australian Film & TV Bodies submits that copyright infringement, attribution, and other moral rights infringement issues are substantial issues of concern for creators and rightsholders' and supports 'a mandatory standard to reform digital platforms' take-down procedures and create appropriate incentives for the prompt and efficient removal of infringing content'.⁹⁷⁹ Australian Society of Authors submits that the significant challenges in copyright enforcement 'is a concern regularly conveyed to us by our members' and supports 'any improvements to a copyright owner's ability to efficiently remove infringing content from digital platforms' that may be introduced in an industry code.⁹⁸⁰

Some other rightsholders oppose an industry code as an inadequate solution for addressing difficulties with copyright enforcement.⁹⁸¹ COMPPS submits that it is concerned that a code would not materially assist with the protection of its members' copyright because it does not adequately address long-standing issues with the operation of authorisation liability in the Copyright Act.⁹⁸² Similarly, Foxtel is concerned that an industry code does not address the core issue of authorisation

977 Australian Communications and Media Authority, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

978 DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11.

979 Australian Film & TV Bodies, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 8.

980 Australian Society of Authors, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

981 See for example, Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 3; Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 40; Music Rights Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

982 Coalition of Major Professional & Participation Sports, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 3.

liability and ‘will have the effect of normalising infringement’.⁹⁸³ The ACCC acknowledges these concerns and considers that they can be addressed through the development of clear and robust rules for take-downs.

Improving the clarity of authorisation liability

Numerous stakeholders have argued that a core problem in Australian copyright law is the lack of clarity in authorisation liability (see discussion in ‘Digital platforms and authorisation liability’ above).

The ACCC considers that incorporating clear take-down procedures in an industry code of practice is likely to benefit both rightsholders and digital platforms by increasing the clarity of the operation of authorisation liability under the Copyright Act. This is because one of the relevant factors in assessing authorisation liability is ‘whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice’ (emphasis added).⁹⁸⁴

Implementing a mandatory take-down industry code would incentivise digital platforms to comply with the code, as compliance would become a relevant factor for the court’s consideration that could assist the digital platform in avoiding authorisation liability. Conversely, if a digital platform did not comply with the rules set out in the industry code, this would assist the rightsholder in establishing authorisation liability.

Some stakeholders have raised concerns about developing an industry code where compliance with the code could make a finding of authorisation infringement less likely. For example, the Australian Copyright Council submits that ‘compliance with the mandatory code cannot be taken by a court as supporting a conclusion that there has not been an authorisation infringement on the part of a digital platform’.⁹⁸⁵

The ACCC notes Free TV’s submission that compliance with an industry code is only one of the factors that a court must consider when determining whether a platform has authorised copyright infringement and that the utility of a code would depend entirely on the terms of the code.⁹⁸⁶

The ACCC recognises that it is critical for the industry code to set out an effective method for removing copyright-infringing content from digital platforms. That is, the code must set out clear rules that address the current challenges in enforcing copyright on digital platforms for its flow-on impact on a court’s assessment of authorisation liability to be of any value to rightsholders.

The ACCC considers that an industry code with clear and effective rules on take-down processes is likely to improve the clarity of the authorisation liability provisions in the Copyright Act. This increased clarity will benefit both rightsholders, who wish to hold digital platforms accountable for publishing copyright-infringing content, as well as digital platforms, which do not have safe harbour from hosting copyright-infringing content online.

Potential risks of an industry code

Departure from global standards

Stakeholders including StartupAus, Google, DIGI, and Twitter note concerns that a take-down code could represent a departure from global best practices for processing take-down notices.⁹⁸⁷ Google submits that digital platforms rely on a globally accepted standard for issuing take-down notices and that a ‘more rigid standard with high fines for errors could incentivise automated censorship on an unacceptable scale and a curtailment of innovation and investment in alternative rights management approaches’.⁹⁸⁸

983 Foxtel, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

984 *Copyright Act 1968* (Cth), ss 36(1A) and 101(1A).

985 Australian Copyright Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4. See also Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 15.

986 Free TV, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 30.

987 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 56; DIGI, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 11; StartupAus, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#); February 2019, p. 2; Twitter, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

988 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 56-57.

The notice-and-takedown processes under the DMCA are widely used. The ACCC considers that current established practices may be incorporated into the take-down code, to the extent they provide for effective and timely take-downs of copyright-protected content in Australia. However, Australian rightsholders should not be compelled to apply overseas processes if they do not provide rightsholders with effective ways of dealing with local copyright-protected content.

Unnecessary regulatory burden and unintended consequences

Some stakeholders have opposed a take-down code as unnecessary because they consider that existing take-down processes are adequate. Communications Alliance submits that ISPs and search engines are already required to comply with the site-blocking scheme and that it considers ‘no changes nor additional regulations are required’.⁹⁸⁹ StartupAUS submits that the existing take-down processes are ‘carefully balanced so as to incentivise service providers to quickly remove allegedly infringing content from their networks on receipt of a take-down notice’.⁹⁹⁰

Google submits that Australian Copyright Law has been subject to extensive previous inquiries and proposals, which should be taken into account in any recommendations to amend Australia’s take-down system.⁹⁹¹ Google submits that that Australia’s existing take-down system has been the subject of extensive consideration and review and that changes to Australia’s take-down system should take into account previous inquiries into the area of online copyright infringement, alternative proposals, and the potential consequences and broader implications of any amendments.⁹⁹²

The ACCC considers that the challenges and uncertainties regarding existing take-down processes discussed earlier in this section indicate that there are some improvements that can be made to existing processes.

Matters determined in the take-down code

The specific rules to be set out in the take-down code should be determined following extensive consultation with stakeholders. The take-down code should provide guidance on the following key issues of concern raised by stakeholders in this Inquiry:

- a framework for cooperation between rightsholders and digital platforms to proactively identify and prevent the distribution of copyright-infringing content online, including an appropriate division of the responsibility for monitoring online content for copyright-infringement
- measures to improve the ease of communications between rightsholders and digital platforms, including requirements for designated agents of digital platforms to be available during Australian business hours as well as appropriate periods where key Australian live events are broadcast
- reasonable timeframes for the removal of infringing content and processes targeted at the timely removal of particularly time-sensitive content such as live broadcasts
- mechanisms for rightsholders to make bulk notifications to address repeated infringements of the same content and to sanction users who commit multiple or regular infringements
- measures to develop or improve content-matching or unauthorised content identification software procedures,
- measures to streamline the process by which rightsholders may prove copyright ownership, particularly in cases where there is joint-authorship.

989 Communications Alliance, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 2.

990 StartupAUS, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#); February 2019, p. 2.

991 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 57.

992 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 56.



06

6. Choice and quality of news and journalism



Key Findings

- The availability of a wide range of high quality news and journalism provides significant benefits to Australian society and is important for the healthy functioning of democracy.
- News and journalism risk under-provision for a number of reasons, including the general inability of commercial news media businesses to capture the broader social benefits of journalism.
- Media businesses, particularly traditional print (now print/online) publishers, have experienced a significant fall in advertising revenue as advertisers follow audiences who have migrated online to access news and other content. This has coincided with strong growth in online advertising, which now accounts for half of all advertising expenditure. Google and Facebook together account for nearly two-thirds of online advertising expenditure.
- Census data from 2006 to 2016 show that the total number of people in journalism-related occupations fell by 9 per cent, but that the fall in traditional print (now print/online) journalist numbers was 26 per cent. Data provided by media companies show the number of journalists in the traditional print (now print/online) sector fell by 20 per cent from 2014 to 2018.
- The influence of digital platforms is likely to have increased the number of media voices available to Australians by facilitating the entrance of digital native publishers. While these publishers have varied in their journalistic focus, they have all tended to employ relatively small newsrooms, making only modest contributions to overall employment of journalists in Australia.
- Digital platforms have significantly altered the incentives for the production of different types of journalism. The online media environment provides relatively poor incentives for news media businesses to produce journalism that may attract smaller audiences, regardless of such coverage's contributions to the public interest.
- Since the mid-2000s, Australia's major metropolitan and national daily newspapers have significantly decreased their provision of a number of news topics relevant to public interest journalism. In 2018, they published:
 - 26 per cent fewer articles on local government issues than at the peak of local government coverage in 2005
 - 40 per cent fewer articles on local court matters than at the peak of local court reporting in 2005
 - 30 per cent fewer articles on health issues than at the peak of health reporting in 2004
 - 42 per cent fewer articles on science issues than at the peak of science reporting in 2006.
- More than 100 local and regional newspapers have closed throughout Australia in the past 10 years, and the total number of these publications declined by 15 per cent. As a result, 21 local government areas have been left without coverage by a local newspaper, including 16 local government areas in regional Australia.
- The ABC and SBS perform an important role in the production of public interest journalism.
- Consumers accessing news through digital platforms potentially risk exposure to unreliable news through 'filter bubbles' and the spread of disinformation, malinformation and misinformation ('fake news') online.

The Terms of Reference require the Inquiry to consider the impact that digital platforms have had on the level of choice and quality of 'news' and 'journalistic content' (more commonly described as 'journalism') to consumers.

This chapter sets out the ACCC's findings, and is structured as follows:

- **section 6.1** notes this chapter's relationship to the Terms of Reference for this Inquiry, including the interpretation of important terminology
- **section 6.2** discusses the public interest nature of journalism, and sets out a working definition of 'public interest journalism' for the purpose of this Report
- **section 6.3** sets out this Inquiry's framework for assessing the effects of digital platforms on the quality and choice of journalism in Australia
- **section 6.4** discusses the reasons that public interest journalism may be under-produced by commercial media businesses

- **section 6.5** provides a brief history of journalism production in Australia, canvassing significant changes that technological advancement has caused to the news media industry
- **section 6.6** focusses on the disruption that digital platforms have caused for Australian media businesses, including their contribution to the loss of advertising revenue that previously supported the production of journalism by these businesses
- **section 6.7** examines the flow-on effects of the news media industry's loss of advertising revenue and identifies potential threats to the commercial provision of public interest journalism in Australia, particularly at a local and regional level
- **section 6.8** discusses the contributions to news media plurality made by the publicly-funded broadcasters ABC and SBS, noting their crucial role in ensuring the continued provision of public interest journalism
- **section 6.9** assesses the appropriateness and effectiveness of various mechanisms to provide Government support for commercial news media businesses, and sets out the ACCC's recommendations for Government support of local and regional journalism and philanthropic funding of public interest journalism
- **section 6.10** outlines how the curation and presentation of news and journalism on digital platforms has affected the nature of journalism produced in Australia
- **section 6.11** discusses how digital platforms have affected the consumption of journalism by Australians, including potential harms associated with 'filter bubbles' and 'information disorder' online
- **section 6.12** discusses various initiatives being introduced by the digital platforms to address issues with low-quality news and journalism on their services, and sets out the ACCC's recommendations to address these issues.

6.1 Defining ‘news’ and ‘journalism’

Both ‘news’ and ‘journalism’ are terms that have been the subject of a wide range of definitions through various academic disciplines. These concepts have variously been described as profession, literary genre, industry, social system, and ideology.⁹⁹³

For the purpose of this report, the ACCC considers that definitions of these terms should capture aspects of news and journalism most relevant to public policy. Such definitions should:

- distinguish news and journalism from other forms of media content, such as entertainment and advertising
- capture the breadth of news and journalism as they currently exist in contemporary Australia
- allow economic consideration of production and consumption
- lend themselves to an analysis of choice and quality.

In developing definitions, the ACCC has been mindful of the distinctions between ‘news’ and ‘journalism’⁹⁹⁴, the nature of ‘journalism’ as both a process and a product⁹⁹⁵, and the need to maintain flexibility in defining these concepts due to the shifting nature of these categories.⁹⁹⁶

For the purposes of this Report, the ACCC refers to the following concepts:

- **News:** information and commentary on contemporary affairs that may or may not be produced and presented by journalists.
- **Journalism:** the activity of discovering, gathering, assessing, producing, and publicly presenting the reporting, analysis, and commentary on **news**. It is a process undertaken by journalists acting in accordance with their interpretations of professional ethics. **Journalism** also refers to the product of this activity, presented as the work of journalists.

In this context, the term *journalism* refers to information that has been processed and presented by journalists. It may be based on information sourced from businesses, governments, and other organisations, but has undergone specifically journalistic processes and is seen as the work of a journalist. In these ways, journalism can provide a different perspective for consumers compared to other sources of news, even when covering the same information.

The concepts of news and journalism encompass all forms of this content. However, in examining issues of ‘quality’ and ‘choice’, it is important to go a step further and consider how journalism can contribute to the public interest.

993 M Deuze, ‘[What is journalism? Professional identity and ideology of journalists reconsidered](#)’, *Journalism*, 6(4) (2005), pp. 442-464; D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 15-18.

994 M Schudson, *The Sociology of News*, New York, W.W. Norton & Company, 2003, p. 11.

995 American Press Association, ‘[What is Journalism?](#)’, accessed 22 April 2019. The American Press Association defines ‘journalism’ as ‘the activity of gathering, assessing, creating and presenting news and information .. [and] also the product of these activities’.

996 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 18.

6.2 The public interest value of journalism

Key findings

- Journalism provides significant and unique benefits to individuals who consume it, and to society more broadly.
- ‘Public interest journalism’ is journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.
- While there is value in a wide range of journalism, the reduced provision of ‘public interest journalism’ threatens to cause a more significant detriment to society than reduced provision of other forms of a journalism.

6.2.1 The benefits of journalism

Journalism provides benefits to individuals who consume it by improving their knowledge and understanding of issues and events that affect them. However, the benefits of journalism are not confined to these individuals. Journalism provides broader benefits to society, including to individuals who do not consume it.

Commonly-cited journalistic functions that provide broader benefits to society (or contribute to the public interest) include:

- **Holding the powerful to account** – investigative journalism may uncover examples of institutional corruption, abuse, or mismanagement.⁹⁹⁷ For example, Joanne McCarthy at *The Newcastle Herald*, wrote more than 350 articles between 2006 and 2013 on the topic of institutional sexual abuse that helped to spark the Royal Commission into Institutional Responses to Child Sexual Abuse.⁹⁹⁸
- **Campaigning for social goals** – journalism can play a role in campaigning for social or policy changes and can contribute to setting political agendas. For example, *The Melbourne Herald Sun’s* 2013–2014 ‘Take a Stand’ campaign helped to raise the profile of domestic violence as a policy issue and put it on the agenda at the next state election.⁹⁹⁹
- **Keeping a journal of record** – reporting on public forums, such as courts, public meetings, and Parliamentary sittings of the various levels of government.¹⁰⁰⁰
- **Providing a forum of ideas** – the Civic Impact of Journalism Project at Melbourne University notes that journalism plays a role in providing a forum for debate and the exchange of ideas and opinions, enabling discourse, as well as providing material to serve as a basis for a ‘common conversation’. While this may relate to discussion and debate of issues of the day, it may also relate to information that forms the basis for community, such as local or regional news.¹⁰⁰¹

997 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 19; The Civic Impact of Journalism Project, [Submission to the Senate Select Committee on the Future of Public Interest Journalism](#), June 2017, p. 2.

998 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 19.

999 M Simons, R Tiffen, D Hendrie, A Carson, H Sullivan, D Muller, B McNair, ‘[Understanding the civic impact of journalism: A realistic evaluation perspective](#)’, *Journalism Studies*, vol. 18, no. 11, 2017, pp. 1400-1414.

1000 M Simons, B Buller, ‘[Dead Trees and Live Links — What Good Are Newspapers?](#)’, A paper submitted for publication in the proceedings of the Australian and New Zealand Communication Association Annual Conference, Swinburne University, Victoria, 9-11 July, 2014. Simons and Buller highlight the importance ‘journal of record’ reporting has by simply disseminating information.

1001 The Civic Impact of Journalism Project, [Submission to the Select Committee on the Future of Public Interest Journalism](#), June 2017, pp. 2-3.

In promoting the public interest, journalism is an important contributor to the 'public sphere'¹⁰⁰², democracy¹⁰⁰³ and the economy¹⁰⁰⁴, and has a place within much broader constructs of societal communication and debate. Journalism also exists alongside more formal institutions with similar purposes. For example, law enforcement, and Government processes of public transparency, accountability and administrative review are all designed to 'hold the powerful to account'. Public institutions are also able to 'keep a journal of public record' by publishing transcripts, judgments, and other documentation of proceedings. Due to its independence from these institutions and the professional expertise exercised in its production, journalism can fulfil these public interest functions in a unique and significant way.¹⁰⁰⁵

Ultimately, journalism can promote public interest by providing a volume, range and depth of information and analysis that would not otherwise be readily available. Therefore, the public also has an interest in upholding professional journalistic standards of accountability, accuracy and ethical conduct, both internal and external to media organisations. The continued protection of these standards is explored further in section 6.3.

6.2.2 Defining 'public interest journalism'

Having discussed how journalism contributes to the public interest, it is also useful to consider the specific types of journalism that do so. Recent attempts to define 'public interest journalism' include the Report of the Senate Select Committee on the Future of Public Interest Journalism. The Senate Committee canvasses a broad range of definitions, finding that:

*even if there is no unanimously accepted single definition of public interest journalism, there are certain behaviours, institutions and principles that have been commonly cited when discussing its role and importance in healthy democracies.*¹⁰⁰⁶

This Senate Committee report notes a useful distinction made in the submission of the Australian Broadcasting Corporation (ABC), which was restated in the ABC's submission to this Inquiry:

*there is a crucial difference between journalism that serves the public good, and journalism that seeks solely to entertain ...not all journalism is designed to provide a community benefit. Certainly, it is commonly understood that what is in the public interest does not always correlate with that in which the public is interested.*¹⁰⁰⁷

This analysis is useful in identifying that public interest journalism distinguishes itself from other types of journalism, including other high-quality journalism that is popular with audiences, by contributing to the effective functioning of democracy.

1002 J Habermas, [The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society](#), MIT Press, Cambridge, 1962, p. 182. Habermas defined the 'public sphere' as a societal construct that encapsulates how society considers, debates, and communicates information and ideas, and which is broader in scope than news and media. Within this context, the 'mass media' has played various roles throughout history, including informing and manipulating public opinion, and acting as a vehicle for public and private interests.

1003 As per the examples discussed above, this may include its role in cultivating and informing public discourse; providing perspectives and opinions; holding government institutions to account; and generally allowing citizens to make more informed decisions.

1004 Some aspects of journalism that are beneficial to the functioning of a democracy are also likely to be beneficial to the economy. This may include, for example, allowing consumers to make better and more informed commercial decisions; or exposing corruption or incompetence within public and commercial institutions.

1005 J Habermas, [The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society](#), MIT Press, Cambridge, 1962, p. 182. Karl Bücher is cited as stating that the editorial function itself transforms media companies 'from mere institutions for the publication of news' into 'carriers', 'leaders', and 'dealer[s] in public opinion.'

1006 Senate Select Committee on the Future of Public Interest Journalism, [Report](#), 5 February 2018, p 2.

1007 Senate Select Committee on the Future of Public Interest Journalism, [Report](#), 5 February 2018, p. 3; Australian Broadcasting Corporation, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018, p. 12.

In the United Kingdom, *The Cairncross Review: a sustainable future for journalism* (the Cairncross Review) attempts to define ‘public interest news’, finding that:

*there are two areas of public-interest news that matter greatly... One is investigative and campaigning journalism, and especially investigations into abuses of power in both the public and the private sphere... The second is the humdrum task of reporting on the daily activities of public institutions, particularly those at local level, such as the discussions of local councils or the proceedings in a local Magistrates Court.*¹⁰⁰⁸

In addition to outlining the breadth of journalism that can be considered ‘public interest’ (both high-profile investigative journalism and more routine ‘journal of record’ reporting), this definition helpfully emphasises the importance of public interest journalism at the local community level.

The Australian Government’s Regional and Small Publishers Innovation Fund incorporates a definition of ‘civic journalism’ as a criterion for assessing grant applications¹⁰⁰⁹, which has been adopted and slightly refined by the Public Interest Journalism Initiative as:

*Public interest journalism has the primary purpose of recording, investigating and explaining public policy and issues of public interest or significance with the aim of engaging citizens in public debate and informing democratic decision making.*¹⁰¹⁰

This version of the definition incorporates many characteristics of previous definitions of public interest journalism, and goes a step further by focusing on the intent of the relevant journalists (through use of the term ‘primary purpose’).

The ACCC considers it to be the most useful encapsulation of public interest journalism for the purposes of this Report, and propose the following minor modification to reintroduce the Cairncross Review’s emphasis on local reporting:

Journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.

This definition should not be construed too narrowly in terms of subject matter, as many different topics may be considered ‘issues of public significance’. Survey evidence from the ACCC News Survey suggests that Australians consider many different news genres to be ‘important in allowing people to participate and engage in Australian society’.¹⁰¹¹ The majority of respondents considered this to include local, national, and international news (71, 70, and 58 per cent respectively); news of the day (65 per cent); as well as news on Australian politics (65 per cent); the environment (58 per cent); health (54 per cent); and crime, justice, and security (55 per cent).

The definition should also be read broadly in terms of the format of journalism. It does not limit ‘public interest journalism’ to high-profile investigative reporting, and explicitly includes commentary and analysis (‘investigating and explaining issues’) as well as more routine reporting (‘recording’).

Examples of public interest journalism could therefore include commentary and analysis relating to Government policy, reporting on corruption or criminal behaviour in sport, and investigations into the labour practices of companies.

Conversely, commentary and analysis relating to celebrity gossip, opinion pieces detailing personal experience of a new diet or car, coverage of fashion launches and reporting of sport results are not likely to be considered public interest journalism under this definition.

1008 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 17.

1009 [Explanatory Memorandum to the Communications Legislation Amendment \(Regional and small publishers innovation fund\) Bill 2017](#), p. 2; later incorporated into [Regional and Small Publishers Innovation Fund – Regional Grant Opportunity Guidelines](#), 5 April 2019, pp. 10-11.

1010 Public Interest Journalism Initiative, [Submission to the Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

1011 Roy Morgan Research, [Consumer Use of News](#), November 2018, p. 27.

The use of this specific definition is not intended to suggest that forms of journalism falling outside these parameters are not worthwhile or valuable to Australians — as discussed in section 6.3 below, high-quality journalism can include coverage of a wide range of topics.

However, this definition will help identify where the reduced provision of particular types of journalism may present the most significant detriment to society. It has also allowed the ACCC to develop recommendations that most efficiently and effectively address this detriment.

6.3 Framework for assessing ‘quality’ and ‘choice’

Key finding

- While it is difficult to categorically define ‘high quality journalism’, such material must at least meet minimum standards of accuracy, objectivity and transparency. Not all of this content will meet the definition of ‘public interest journalism’.

The Terms of Reference for this Inquiry include the impacts that digital platforms may have had on the level of quality and choice of news and journalism for consumers. This section clarifies how concepts like ‘quality’ and ‘choice’ will be considered.

6.3.1 Approach to ‘quality’

The concept of ‘high quality journalism’ is not easily defined, and has been the subject of debate among academic researchers and professional journalists.¹⁰¹² The Centre for Media Transition’s report ‘The Impact of Digital Platforms on News and Journalistic Content’, prepared for this Inquiry, provides a comprehensive list of quality indicators, ranging from accuracy to presentation.¹⁰¹³ The Cairncross Review emphasises this definitional difficulty, ultimately determining that:

*‘high-quality journalism’ is a subjective concept that depends neither solely on the audience nor the news provider. It must be truthful and comprehensible and should ideally - but not necessarily - be edited. You know it when you see it; but this is not a definition that justifies direct public support.*¹⁰¹⁴

While the concept of ‘high quality journalism’ may be extremely subjective and difficult to define, it is clear that journalism must meet at least minimum levels of quality to be valuable to the public. In Australia, some consensus about these minimum levels of quality can be found in the formalised co-regulatory media industry codes and standards administered by the Australian Communications and Media Authority (ACMA), including those outlined in chapter 4’s summary of Australian media regulation. These codes and standards almost universally require that journalism:

- presents factual material accurately
- corrects significant or material factual errors
- presents news fairly and impartially
- clearly distinguishes reporting from commentary and analysis.¹⁰¹⁵

1012 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 7397.

1013 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 86-87.

1014 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 16.

1015 Most or all of these requirements are present in: the Free TV [Commercial Television Industry Code of Practice](#), the Commercial Radio Australia [Commercial Radio Code of Practice](#), the Australian Subscription Television and Radio Association (ASTRA) [Subscription Broadcast Television Codes of Practice](#), the [ABC Code of Practice 2016](#), the [SBS Code of Practice 2014](#), the [MEAA Journalist Code of Ethics](#), the [Australian Press Council Standards of Practice](#), and the [Independent Media Council Code of Conduct](#).

On this basis, this Report considers the impacts of digital platforms on the provision and consumption of journalism that meets these minimum standards, referring to such material as ‘high quality journalism’.

It is important to distinguish ‘high quality journalism’ from ‘public interest journalism’ defined in section 6.2. A broad range of journalism can be considered ‘high quality’, and provide value to consumers, and hence society, without meeting the specific definition of ‘public interest journalism’ used in this Report. Conversely, journalism may be produced with the purpose of examining matters of public significance, meeting the definition of ‘public interest journalism’, without meeting minimum quality standards – for example by failing to be accurate or failing to clearly distinguish reporting from the presentation of opinion.

In consideration of these issues, this Report assesses the impacts of digital platforms on:

- the ability of and incentives for media businesses to produce journalism that meets minimum standards of quality, and particularly public interest journalism
- the exposure to and consumption of journalism that meets minimum standards of quality, and particularly public interest journalism.

6.3.2 Approach to ‘choice’

Australian media regulation has historically considered ‘choice’ of media content in terms of diversity of ownership.¹⁰¹⁶ For example, ‘diversity’ as it is used within the *Broadcasting Services Act 1992* (Cth) relates only to quantitative analysis of media ownership and control, and is not used to refer directly to diversity of perspectives, sources, or any other factors.¹⁰¹⁷

However, academics, journalists and international regulators have adopted broader definitions of diversity and the related concept of ‘plurality’. For example, a 2001 survey of Australian journalists found that:

*The notion of ‘diversity’ was interpreted variously by news producers. Some linked it with ownership and control, and viewed it as an indication of the number of voices expressed through the news and current affairs media. Others linked it with multiculturalism, and the extent to which different ethnic sectors of society had expression through the media.*¹⁰¹⁸

International regulators such as the United Kingdom’s Ofcom use the term plurality to mean:

Ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises. There should be a diverse range of independent news media voices across all platforms, a high overall consumption across demographics and consumers and active use of a range of different news sources.

*Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda. This can be achieved by ensuring that no organisation or news source has a share of consumption that is so high that there is a risk that people are exposed to a narrow set of viewpoints.*¹⁰¹⁹

The ACCC notes that many related factors are important in assessing ‘choice’ of journalism available to consumers. For example, diversity of media ownership may contribute to (but does not guarantee) the availability of a higher number of independent editorial voices. In turn, editorial voice influences not only how things are reported, but which stories are covered, and these decisions play an important role in determining what is ‘newsworthy’.¹⁰²⁰ Providing news consumers access to a wide range of editorial voices contributes to the public interest by providing competing views on issues of public policy or interest.¹⁰²¹

1016 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 102.

1017 *Broadcasting Services Act 1992* (Cth), pt. 5, div. 5A.

1018 M Pearson, JE Brand, D Archbold, H Rane, [Sources of News and Current Affairs](#), Bond University, Gold Coast, 2001, p. 213.

1019 Ofcom, [Measurement framework for media plurality: Ofcom’s advice to the Secretary of State for Culture, Media and Sport](#), 5 November 2015, p. 5.

1020 T Bettag, ‘[What’s News? Evolving Definitions of News](#)’, *The Harvard International Journal of Press/Politics*, vol. 5, no. 3, 2000, pp. 105-107.

1021 D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 44-45.

Therefore, this Report focuses on any effects that digital platforms may have on aspects of *plurality* of journalism, where the term plurality is used to describe various aspects of journalism broader than the ownership of media businesses, including:

- the number of independent editorial voices
- the variety of coverage as it relates to topic, format, and geographic focus
- the range of perspectives represented.

The ACCC interprets 'choice' for the purpose of this Inquiry as covering aspects of plurality in terms of what is available in the market; what is distributed or made accessible to consumers; and what is consumed.

6.4 Risks that public interest journalism may be under-produced

Key findings

- Commercial media businesses producing public interest journalism face difficulties in capturing the value of their content to individuals and society.
- Over-reliance on commercial media businesses may lead to a substantial risk of under-provision of public interest journalism.
- This risk has increased with the commercial pressures on advertising-funded media businesses caused by the growth in popularity of digital platforms.

6.4.1 Difficulties in capturing the value of public interest journalism

Commercial media businesses that produce public interest journalism face two difficulties in capturing the value of their content to individuals and society more broadly.

First, it can be difficult to exclude consumers who do not pay for news and journalism from accessing it.

If a news bulletin is broadcast on free-to-air television, each additional consumer of that broadcast does not reduce the amount of content available to others. Further, free-to-air broadcasters cannot exclude consumers from accessing their content. As a result, rather than being subject to a traditional pricing mechanism where consumers pay per unit of the product, consumers pay indirectly through their consumption of advertising.¹⁰²²

While print news media businesses can, to a degree, exclude non-paying consumers, they cannot do so perfectly. Newspapers can be passed on by paying consumers to others, or read as public copies in areas such as libraries, airports and cafes. The content itself can be shared between individuals. As a result, some people may not feel the need to pay for a newspaper because they are able to obtain the information second-hand.

Second, as noted above, the benefits of public interest journalism accrue to many in society who do not access the information. These benefits are diffuse and, in general, cannot be captured by the producers of journalism, or can only be done so imperfectly.¹⁰²³

1022 V Pickard, [Confronting Market Failure: Past Lessons Toward Public Policy Interventions](#), published in M Lloyd and LA Friedland, [The Communications Crisis in America \(and How to Fix It\)](#), Palgrave Macmillan, New York, 2016, p. 128.

1023 One way this may occur is if news media can attract private contributions from members of the public who recognise these broader benefits of public interest journalism.

6.4.2. Incentives for commercial media businesses to produce public interest journalism

As commercial media businesses face difficulties in capturing the value of public interest journalism, there is a risk that it will be under-provided. At the margin, the benefits to society of public interest journalism may exceed the costs of producing it. This means that there may be insufficient commercial incentives for media organisations to invest in more public interest journalism.

Some forms of journalism may be at greater risk of under-provision than others. Due to the issues with capturing the value of public interest journalism, this may be particularly the case for journalism that provides the largest potential benefits to society more broadly.

However, the extent of any such under-provision is unclear. Advertising revenues have traditionally funded the majority of commercial investment in journalism. Many governments (including the Australian Government) fund public broadcasters, as discussed in section 6.8. This adds to the diversity of voices and reduces the risk of under provision of public interest journalism. Other countries such as the United States place less emphasis on public funding and more on donations and philanthropy from individuals, as explored in section 6.9.

As discussed further below, the growth of digital platforms has placed advertising-funded media organisations under financial stress and has reduced their ability and incentive to invest in journalism, including public interest journalism. This has encouraged news media businesses to explore other business models. It has also caused traditional news media businesses to reduce their investment in journalism. Given the substantial reliance on advertising-funded media organisations for public interest journalism, the risks of it being under-provided have increased.

6.5 A brief history of journalism production in Australia

Key findings

- Australia's media landscape is characterised by a number of long-established print, radio, and television businesses.
- Local news has historically represented a significant part of Australia's media landscape, particularly in regional and suburban areas. Local newspapers, regional broadcasters and services provided by the Australian Broadcasting Corporation (ABC) play an important role in providing news in these areas.
- The most recent additions to the Australian news environment are digital native publications. These outlets only publish content online, tend to employ relatively few journalists and operate under a range of business models.

Historically, media businesses and public broadcasters have been responsible for the production and distribution of journalism in Australia, and this continues to be the case. At the time of this Report, social media platforms and other digital platforms that are the subject of this Inquiry have not ventured into the production of journalism in Australia.

6.5.1 Print and broadcast formats

Australia's media landscape is characterised by a number of long-established media businesses with large scale production in print, radio, and television. This includes the nation-wide presence of public broadcasters, the ABC and Special Broadcasting Service Corporation (SBS).

The print news sector, now the print/online news sector, is particularly concentrated. Market share analysis published by IbisWorld suggests that News Corp Australia (News Corp) and Nine Entertainment Co.¹⁰²⁴ (Nine) control 56.5 per cent and 18.7 per cent of the newspaper publishing market respectively.¹⁰²⁵ This data shows that Seven West Media is the next largest publisher, with 6.7 per cent.¹⁰²⁶

Relaxation of cross-media ownership laws in 2017, including the repeal of the 'two-out-of-three rule', has allowed an increased degree of concentrated ownership in the print and broadcast media sectors. These changes facilitated Nine's acquisition of newspaper publisher Fairfax in December 2018.¹⁰²⁷

The advent of the internet has also allowed both commercial and public broadcasters to develop significant online news presences that add to the text-format journalism previously only produced by print newspaper publishers. Alongside the introduction of the 'digital native' news sources discussed below, this has increased the plurality of journalism available online, reducing the impact of the high concentration in the traditional print (now print/online) sector.

Print and broadcast media remain significant in the consumption of news: survey evidence suggests that around 66 per cent of Australians had accessed news on television in the past week, and 37 per cent had accessed news on radio.¹⁰²⁸ Around 55 per cent of Australians still use print or broadcast formats as their main source of news.¹⁰²⁹

While print and broadcast formats are currently well-established, they were the subject (and agent) of technological disruption in the twentieth century. Globally, the introduction of television was associated with the reduction in newspaper readership.¹⁰³⁰

6.5.2 Regional and local news

A significant part of Australia's media landscape relates to local news, particularly in regional and suburban areas. Each of the predominantly metropolitan broadcast television networks (Seven, Nine and Ten) has program affiliation agreements with one or more of the predominantly regional networks (Prime, WIN and Southern Cross Austereo (SCA)). The programming available to regional and remote audiences is essentially the same as that transmitted to metropolitan audiences, with the exception of some localised news and advertising.

Data provided to the ACCC indicate that there were around 435 regional and community newspapers operating in Australia in 2017-18, many of which are under the ownership of three large commercial media companies: News Corp, Australian Community Media¹⁰³¹, and Seven West Media.¹⁰³²

1024 Formerly Fairfax. Nine acquired Fairfax in December 2018.

1025 IbisWorld, [Newspaper Publishing in Australia](#), March 2019, p. 25. The ACCC notes that these are the latest figures available at the time of drafting, but are likely have been affected by Nine's sale of Australian Community Media to private investors on 1 May 2019.

1026 IbisWorld, [Newspaper Publishing in Australia](#), March 2019, p. 25. The ACCC notes that these are the latest figures available at the time of drafting, but are likely have been affected by Nine's sale of Australian Community Media to private investors on 1 May 2019.

1027 R Sims (ACCC Chair), [ACCC will not oppose Nine-Fairfax merger](#), media release, ACCC, 8 November 2018. The ACCC approved this transaction, but noted speculation about future media mergers, given the current high level of concentration in print media.

1028 Roy Morgan Research, '[Consumer Use of News](#)', prepared for the ACCC, November 2018, p. 12; C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, pp. 26, 27. While the ACCC News Survey 2018 found that 60 per cent of respondents had accessed news via radio in the past week, the Digital News Report: Australia 2019 found that 37 per cent of respondents had done so. It is unclear why these results differ. The two surveys asked respondents about the news sources used in the past week. The sampling approach for both surveys use quotas for age group and region, which are factors likely to affect radio usage. Both samples are weighted according to Australian population demographics, and contained around 2000 respondents. (See Roy Morgan, [Consumer Use of News](#), November 2018 p. 6; C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, pp. 26, 27).

1029 Roy Morgan Research, '[Consumer Use of News](#)', prepared for the ACCC, November 2018, p. 14. In the ACCC News Survey 2018, around 32 per cent of Australians used television as their main source of news, compared to 15 per cent for radio, and 8 per cent for print sources.

1030 Communications Management Inc., [Sixty years of daily newspaper circulation trends](#), May 2011, p. 4.

1031 Australian Community Media was sold by Nine Entertainment Co to private investors on 1 May 2019.

1032 Appendix F - Local and regional newspaper closures: 2008-09 to 2017-18, p. 2.

Many regional areas are serviced by a single local newspaper while suburban areas are often serviced by a local publication and a metropolitan publication. As shown in section 6.7, the local coverage being provided by such publications has significantly decreased over the past 10 years.

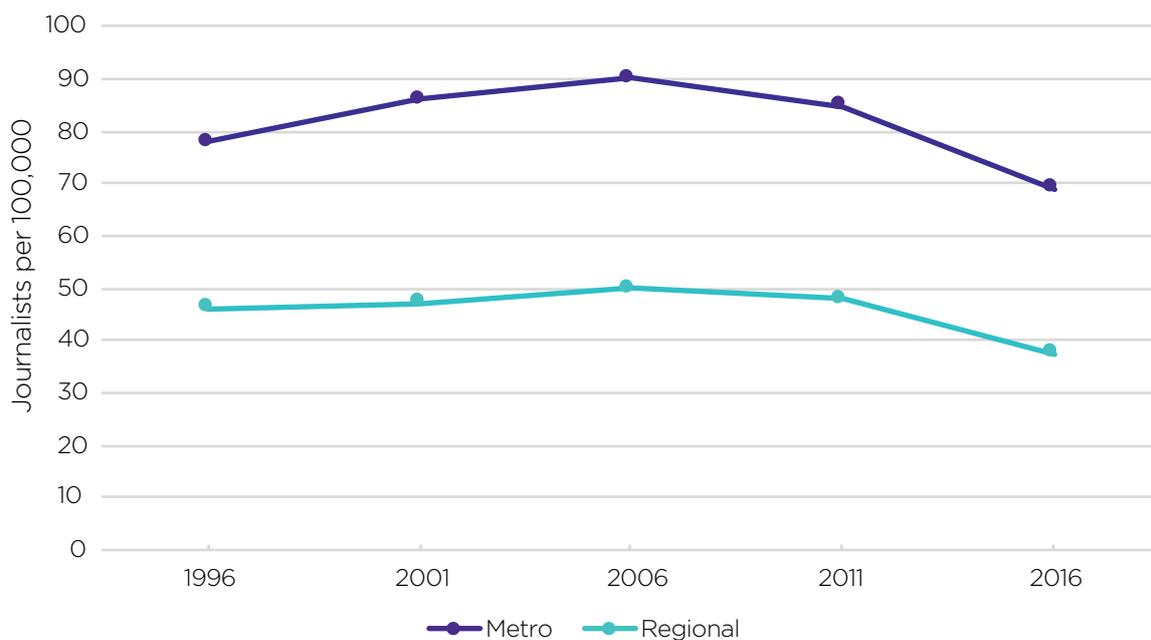
Broadcast radio also plays an important role in providing news in regional areas, and production of local radio news forms part of regional commercial radio broadcasters' licence conditions.¹⁰³³ These broadcasters are required to put to air either half an hour or three hours of 'material of local significance' each day (depending on the size of the broadcaster) in order to encourage the provision of local news.¹⁰³⁴

Again, the public broadcasters supplement the commercial sector with the ABC providing local radio services to 96.5 per cent of the population.¹⁰³⁵

A 2017 ACMA study found that regional Australians exhibit distinct preferences in their consumption of local news, favouring traditional media formats. The most trusted source of local news in regional areas was commercial television (21 per cent of respondents) followed by local print newspapers (19 per cent), local ABC radio (15 per cent), 'any website' (9 per cent)¹⁰³⁶, commercial radio (7 per cent) and social media (4 per cent).

The provision of news and journalism in areas of smaller population is difficult, given the importance of scale in both production and advertising. Consequently, the number of working journalists per person in regional areas has been lower historically than in metropolitan areas (figure 6.1).

Figure 6.1 Journalists per 100,000 Australians by Metro/Regional



Source: ABS Census

6.5.3 Subscription television and video-on-demand formats

Subscription television broadcasters give consumers access to dedicated Australian and international news channels, including Sky News Australia. However, take-up of subscription television has always remained well below the combined audiences for free-to-air television networks. In September 2018,

1033 *Broadcasting Services Act 1992* (Cth), pt. 4, div. 3, s 43C.

1034 Australian Communication and Media Authority, [Local content and local presence requirements for regional commercial radio broadcasting services](#), accessed 16 May 2019.

1035 Australian Broadcasting Corporation, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), April 2018, p. 14.

1036 Australian Communication and Media Authority, [Regional Australian's access to local content, Community Research](#), May 2017, p. 25.

Sky News Australia entered an agreement with WIN for Sky News Australia programming to be broadcast on some of WIN's free-to-air channels, increasing the reach of this previously subscription-only service.¹⁰³⁷

The ABC was the first Australian broadcaster to offer catch-up content (including news content) online, launching its iView service in 2008. Metropolitan commercial television networks and SBS launched similar catch-up services in the following four years, although iView remains among the most popular of these services, with 3.3 million unique visitors a month in 2017-18.¹⁰³⁸ In recent years, online-only streaming services have also launched within Australia, including Netflix (2015), Stan (2015) and Amazon Prime (2018). These streaming services had a significant impact on entertainment viewing habits, but do not currently produce journalism covering Australian issues.¹⁰³⁹

6.5.4 Digitalisation and moving the news online

The media industry has experienced several waves of disruption since the 1990s, including significant changes within the television and radio industries, the digitalisation of the media landscape in the 1990s and the growth of the internet since 2000. These are trends that have occurred globally, although not always on the same timeline.

In the mid-1990s, news publication in Australia began to move online. In 1995, Fairfax launched smh.com.au which evolved into a daily news site by 1996. Fairfax's online offering expanded over time, and in 2012 the company announced it would move to a 'digital-first editorial model', integrating its print and digital platforms.

The most recent additions to the Australian news landscape are the digital natives: publications that, in Australia, only have an online presence. Most major digital natives in Australia are less than 10 years old (table 6.1). Digital natives generally have a broad national or international focus, but there are also a range of niche digital natives covering specialist topics such as *Croakey Health Media*, which covers health news, and *Mumbrella*, which covers advertising and marketing.

Digital natives employ a number of different business models. Some follow the lead of traditional print media companies and offer subscription-based access to their publications (such as *Crikey*). Others are free but have subscription/membership options, asking readers for donations, and also generating some revenue from advertising (such as *The Guardian Australia*). Others do not impose any monetary charge on audiences, and generate revenue solely from advertising (such as *The Daily Mail Australia* and *BuzzFeed*).

Table 6.1 Major digital native publishers in Australia

Media outlet	Founding date
Crikey	2000
PedestrianTV	2005
Politico	2007
The Conversation	2011
Vox	2011
The Guardian Australia	2013
Vice News	2013
The New Daily	2013
BuzzFeed News / BuzzFeed News Australia	2011 / 2014
The Daily Mail Australia	2014
Huffington Post Australia	2015
The New York Times Australia	2017

1037 A Meade, '[Sky News reach to grow with broadcast on free-to-air across regional Australia](#)', *The Guardian*, 6 August 2018, accessed 23 April 2019.

1038 Australian Broadcasting Corporation, [2017-18 Annual Report](#), October 2018, p. 71.

1039 Screen Australia, [Online & on demand 2017](#), February 2018, p. 17.

Editorial jobs at Australian digital native publishers tend to be small in number. *The Guardian Australia* lists 49 editorial staff in its Australian team, *The Conversation* has around 27, and the *New Daily* around 18.¹⁰⁴⁰ Staff numbers for many digital natives have fallen recently as these companies grapple with similar financial challenges to those facing traditional media businesses. In January 2019, *BuzzFeed Australia* cut 11 of its 40 staff as part of an attempt to ‘reduce its overall news footprint’.¹⁰⁴¹ This was part of a global round of job cuts that affected BuzzFeed and other digital natives including *The Huffington Post*.¹⁰⁴²

By contrast, at least one Australian digital native publisher is growing in both staff and scope. In February 2019, *Crikey* announced it was hiring close to a dozen journalists to establish a dedicated investigative journalism team. This project, branded as *INQ*, is philanthropically funded by media figures John B Fairfax and Cameron O’Reilly, and published its first story on 24 June 2019.¹⁰⁴³

6.6 How the internet and digital platforms disrupted the commercial media business model

Key findings

- Advances in technology, particularly the rapid growth and uptake of the internet, have significantly reduced the cost of publishing and distributing journalism for media businesses. In this environment, digital platforms provide new ways for media businesses to reach audiences.
- As audiences moved online, Australian print publishers lost significant amounts of classified advertising revenue, largely due to the emergence of specialised online marketplaces such as Seek and CarSales.com.au.
- The advertising revenue of Australian print publishers (now print/online publishers) continued to decline after the vast majority of classified revenue had shifted online. At the same time, major digital platforms significantly increased their share of Australian online advertising revenue.
- News and journalism accessed on digital platforms is ‘atomised’, a term used to describe the effect where consumers access journalism on a story-by-story basis. News media businesses incentivised to optimise their content for algorithm ranking and, in the case of social media, to ensure ‘sharing’ behaviour among users, are likely to have a preference for emotional or sensationalised content to act as ‘click bait’ to attract consumer attention.
- The changes to the production and distribution of journalism caused by digital platforms have created a state of flux for media businesses around the world. While news media businesses are experimenting with innovative business models in the digital environment, a single universally effective solution for monetising journalism online has not yet emerged.

This section looks at how the move to an online world is affecting traditional media businesses. It first considers the broader effects of the internet before turning to the specific impacts of the digital platforms. As discussed in chapter 1, technological changes and, in particular, the growth of the internet have had implications for media businesses. The most relevant to this Report include:

- significant changes to production and distribution costs
- the loss of classified advertising from print publications to online marketplaces
- transformation of the online media model due to the role of digital platforms, including the continued reduction in advertising revenue, particularly for the traditional print and online news publishers.

1040 The Guardian Australia, [Guardian Australia – Meet the Team](#), accessed 14 May 2019; The Conversation, [‘Our Team and Boards’](#), accessed 13 November 2018; New Daily, [‘About’](#), accessed 14 May 2019.

1041 A Meade, [‘BuzzFeed loses 11 staff in Australia amid global job cuts’](#), *The Guardian*, 29 January 2019, accessed 23 April 2019.

1042 A Meade, [‘BuzzFeed loses 11 staff in Australia amid global job cuts’](#), *The Guardian*, 29 January 2019, accessed 23 April 2019.

1043 E Beecher, [‘Crikey is assembling a team of a dozen ‘inquiry journalists’](#), *Crikey*, 11 February 2019, accessed 16 May 2019; S Smith, [‘Inside the mind of the paedophile priest’](#), *INQ*, 24 June 2019, accessed 25 June 2019.

6.6.1 Changes to production and distribution costs

When newsrooms embraced digital technologies, this drastically altered the way news was sourced and produced. The use of computers, the development of digital photography and the evolution of mobile phones turned the newsroom into a digital environment. In a relatively short space of time, the newsroom completely transformed from the pen and typewriter to the monitor and keyboard. Section 4.1 of chapter 4 provides more detail about the broader business model implications of the shift to digital journalism production.

Costs of production and distribution are significantly lower for digital news than for print newspapers, given their high costs of printing and distribution. Lower online costs have led some publishers to drop physical print altogether, or at least to move special supplements and magazines sections online.¹⁰⁴⁴

Several business decisions taken by traditional news media businesses over recent years demonstrate the burden of physical printing costs. For example, in 2012 Fairfax (acquired by Nine Entertainment Co. in December 2018) reduced the print editions of *The Age* and *The Sydney Morning Herald* to 'compact formats', and closed its printing facilities in Chullora and Tullamarine. In 2018, Fairfax and News Corp reached a deal to share printing facilities, reportedly saving AU\$30 million a year.¹⁰⁴⁵

For established media businesses that maintain their traditional format, online news represented an additional form of distribution that had the advantages of extensive geographic reach and very low marginal cost after initial investments into online infrastructure.

While this shift to digital formats reduced costs for Australian media businesses, it also exposed media businesses to increased competition from a wide range of new sources. These include overseas media businesses now easily accessible to Australian audiences, and also non-professional sources of news such as bloggers and citizen journalists.

6.6.2 The loss of classified advertising from print to online marketplaces

One of the most significantly disruptive aspects of the internet was the movement of advertising revenue from print classified advertisements to online competitors. Speaking about global trends in advertising in 2005, then Chairman and CEO of News Corporation, Rupert Murdoch said:

*This is a generational thing; we've been talking a 15- or 20-year slide on this. Certainly I don't know anybody under 30 who has ever looked at a classified advertisement in a newspaper. With broadband, they do more and more transactions and job-seeking online.*¹⁰⁴⁶

In 2002 classified advertising spend represented 54 per cent of the total print advertising spend in Australia.¹⁰⁴⁷ Classifieds provided the potential for a large number of small advertisements to be placed, often with a geographic focus (such as ads for second-hand cars and other goods, real estate, tradespeople and other service providers, or jobs available in a particular area). Newspapers with a local or metropolitan distribution were particularly suited to this sort of advertising.

As discussed in chapter 1, in the 2000s, Australians rapidly adopted both fixed and then mobile internet services. With the rise of the internet, specialist platforms (such as eBay, Gumtree, carsguide.com.au, Seek and realestate.com.au) provided classified advertising with the benefits of digital searching, at much lower costs to users. This coincided with a rapid decline in print classified revenue, which occurred across the 2000s for various publishers, but continued into the 2010s (figure 6.2).¹⁰⁴⁸

1044 KPMG, [Stop the presses!](#), 2016, p. 6. By 2016, both the *Pittsburgh Times* and the *Seattle Post-Intelligencer* had moved to all-digital publishing.

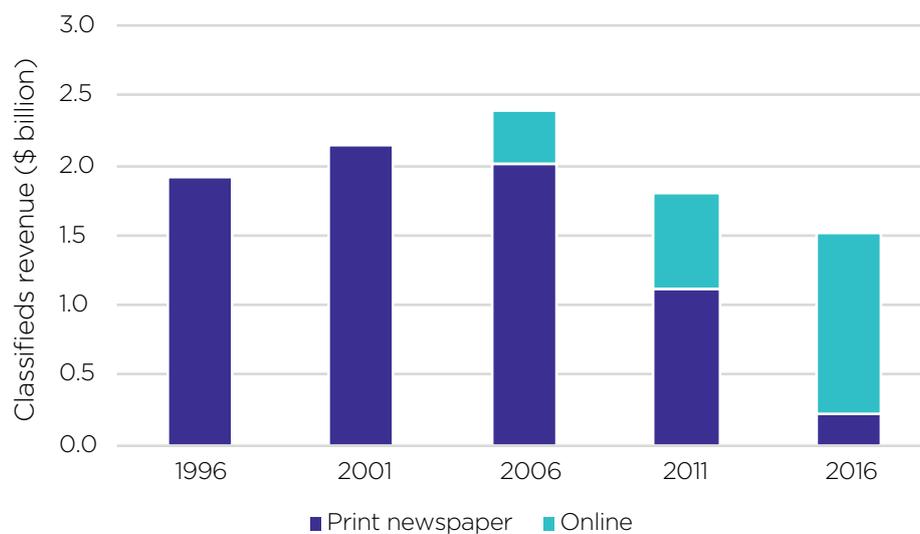
1045 P Ryan, '[Fairfax Media and News Corporation agree to share printing facilities to offset newspaper decline](#)', ABC News, 18 July 2018, accessed 1 November 2018.

1046 I Reeves, '[Press Gazette archive interview: Rupert Murdoch tells all](#)', *PressGazette*, 2 December 2005, accessed 21 November 2018.

1047 Based on ACCC analysis of classified advertising revenue data from CEASA.

1048 Based on ACCC analysis of classified advertising revenue data from CEASA.

Figure 6.2 Changes in print and online classified revenue in Australia



Source: ACCC analysis of CEASA data.¹⁰⁴⁹

Technological change resulted in the unbundling of classified advertising from print news. Newspapers, which were traditionally some of the largest producers of journalism, progressively lost a significant revenue stream. Even though some newspaper publishers successfully invested in specialist classified advertising platforms online (News Corp with realestate.com.au and Cars Guide and Fairfax with Domain), the unbundling of classified advertising from print news limited the ability of classified advertising revenue to cross subsidise the production of news.

At the same time, newspaper readership for metropolitan publications fell across the 2000s, particularly in the latter part of the decade, compounding the impact on classified revenue by reducing the number of potential customers of print classified advertising.¹⁰⁵⁰

6.6.3 How digital platforms changed the online media business model

As discussed earlier, digital platforms play a significant role in both advertising and media (see chapters 1,3,4 and 5). This sub-section considers the various ways in which digital platforms have changed commercial incentives for media businesses, disrupting core elements of the established business models and becoming:

- significant rivals for advertising spend
- key providers in the advertising supply chain
- facilitators in the 'atomisation' of journalism and dilution of brand value
- providers of new opportunities for low-cost production.

Digital platforms capture a significant share of online attention and advertising spend

As noted earlier, advertising has historically played a significant role as a revenue stream to media businesses in Australia.

However, there are now more options for consumers' attention: the internet in general, and digital platforms specifically (see chapter 2). For instance, in the 12 months to March 2018, Australians are estimated to have spent 21.9 billion hours online, 18.6 billion hours watching television, 14.6 billion hours listening to the radio, and 1.8 billion hours reading newspapers.

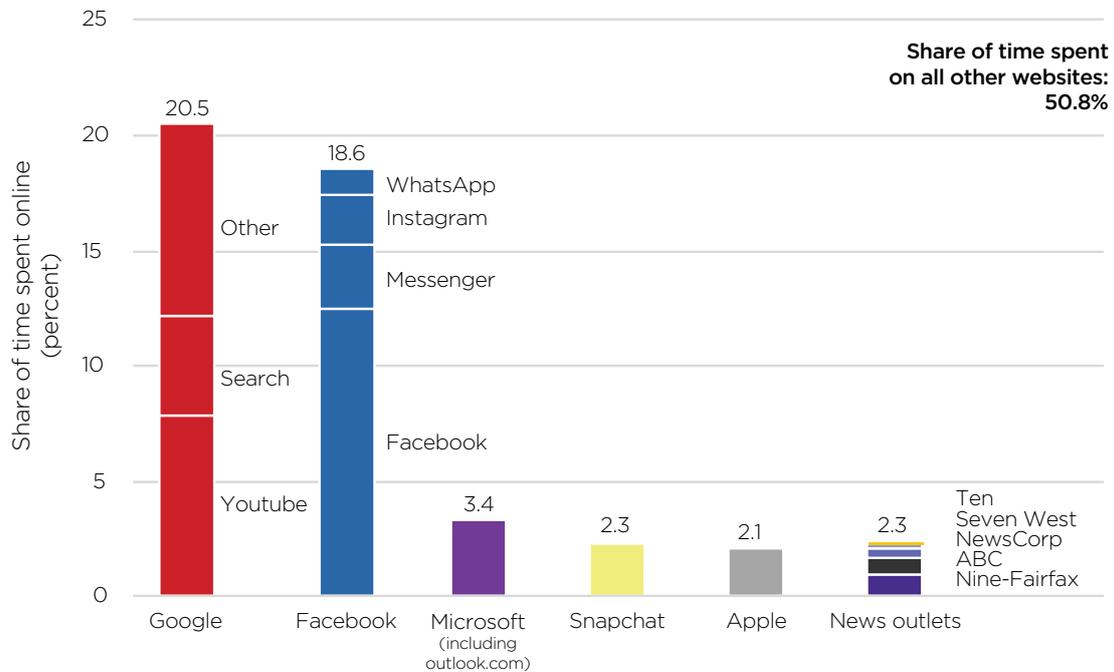
¹⁰⁴⁹ Data are adjusted for inflation.

¹⁰⁵⁰ Analysis of Roy Morgan Single Source Australia shows that readership for most metro newspapers fell between 2003 and 2010.

By comparison, they spent 20.5 billion hours in paid work.¹⁰⁵¹ This demonstrates the considerable reach that the internet can provide to advertisers.

Evidence suggests that when Australians are online, they spend much of their time using the major digital platforms (figure 6.3). And while media businesses have a significant online presence, their value as platforms for advertising is likely to be lower than that of search and social media platforms, due to the relative amount of contact time they have with consumers.

Figure 6.3 Share of online time spent on selected websites, February 2019



Source: Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Time Spent Share.

Further, as discussed in chapters 2 and 3, the main digital platforms (Google and Facebook) are able to collect and harness greater volumes of user data, which can be used for highly targeted advertising. This significantly differentiates their advertising offering. It also means that the more time consumers spend on digital platforms, the more user data the platforms are able to collect, improving their ability to offer targeted advertising opportunities. This means that to effectively compete with major digital platforms for advertising revenue, media businesses would require greater audience attention and more user data.

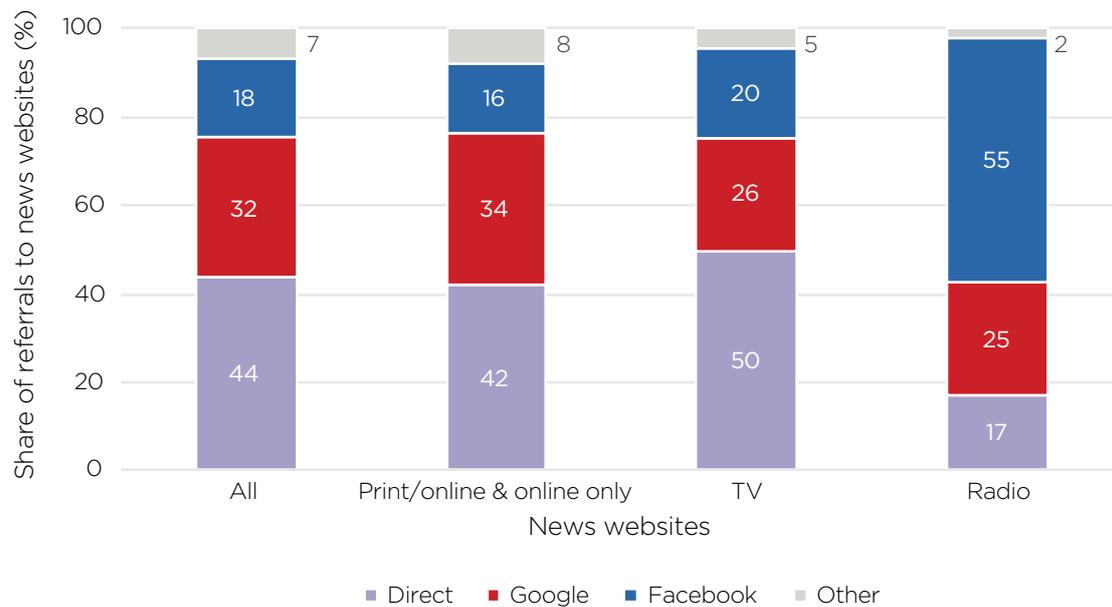
A gateway for a large proportion of traffic to news websites

As described in chapters 1, 2, and 5, even where consumers spend their time on news websites, they often arrive via a digital platform. In particular, referrals from Google and Facebook account for a significant proportion of visits to Australian news websites (figure 6.4).

This, and other reasons discussed in chapters 2 and 5, suggest that Google and Facebook are the gateways to online news media for many consumers. The amount of referral traffic that a news media website receives is influenced by the way in which Google and Facebook rank and display news content.

1051 Roy Morgan 2018, Single Source Research.

Figure 6.4 Means of accessing news media websites in Australia in 2017-18



Source: ACCC analysis based on data provided to the Inquiry.

The ‘atomisation’ of journalism and dilution of brand value

News content accessed through search engines, social media platforms and news aggregators is served to consumers as a mixture of content from different online media sources. For example, search engines and news aggregators tend to serve links to news content from different media businesses, curated according to topic. Social media platforms serve news articles from media businesses one post at a time, as part of a curated newsfeed, mixed with user-generated content.

This presentation of news content inherently involves the ‘atomisation’ of this content: the process by which news is ‘decoupled from its source’ and consumed on a ‘story-by-story basis’.¹⁰⁵²

As discussed in section 4.2.1 of chapter 4, the curation processes used by digital platforms when presenting ‘atomised’ content are increasingly similar to those undertaken by news editors employed by media businesses. In the case of digital platforms, decisions are being made by humans, by algorithms, or by a combination of both, about the content seen by consumers.

However, an important difference is that atomised content curated by platforms comes from multiple sources and may be viewed alongside different combinations of other atomised content and can be personalised based on user data; whereas content curated by media businesses is intended to remain part of a single news package. While both forms of curation may ultimately serve a commercial interest, the differences in the business models of digital platforms and media businesses mean they face different incentives. Media businesses attract readers by curating noteworthy, interesting and/or entertaining news stories, with the trustworthiness of each story linked to the media business’s brand reputation and reader retention. Digital platforms also curate content in order to attract users and keep them engaged, but do so by drawing from and displaying a much broader range of content, and providing the user with a range of services unconnected to news content. The quality of any single link or item has far less impact on the retention of users. As reflected in the findings of substantial market power in chapter 2, there is a relatively low risk of users switching away from the leading digital platforms in response to dissatisfaction with particular news stories.

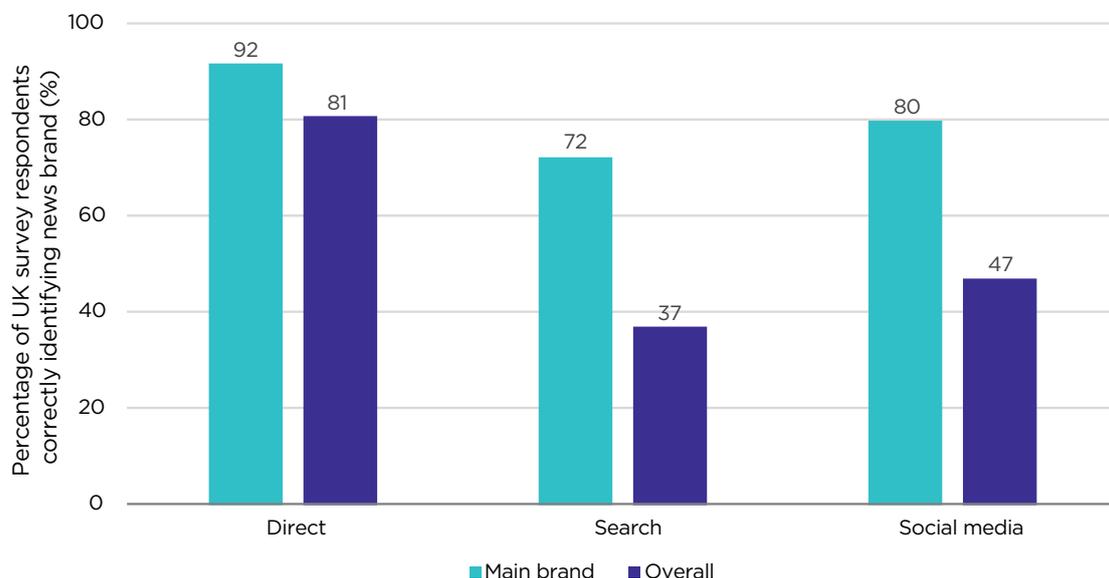
¹⁰⁵² D Wilding, P Fray, S Molitorisz, E McKewon, ‘[The Impact of Digital Platforms on News and Journalistic Content](#)’, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 37.

Curation by platforms and subsequent atomisation may be having the effect of distancing news content from its producer, potentially limiting consumers' ability to obtain information they consider important when choosing which articles to read. Survey evidence from the United Kingdom suggests that consuming news content in the atomised environments of social media or search platforms effectively reduces the recognition of brands, compared to when news websites are visited directly (figure 6.5).

Around 1 600 news consumers were asked to recall which news brand they had used to access a particular online news article. Where consumers had used the news websites of their preferred 'main brand' of news publisher, they were able to recall the publisher's brand 92 per cent of the time. This fell to 80 and 72 per cent respectively when accessing articles from the same publisher's brand via search and social media platforms.

However, where consumers had accessed news articles via search and social media platforms from news publishers other than their 'main brand', the majority could not correctly recall the publisher's brand. In each case, consumers were less likely to recall the publisher's brand if the article was accessed via search or social media platforms than directly from the publisher's website.

Figure 6.5: Brand attribution for online news, by method of access



Source: A Kalogeropoulos, R Fletcher and N Newman, 'Brand Attribution when Accessing News from Distributed Environments'.¹⁰⁵³

The effect of atomisation may be increasingly prevalent among younger generations. Data from the ACCC news survey show that when adult consumers are presented with news articles on their social media feed, in search engine results, or through a news aggregator, 66 per cent of respondents said that recognising and trusting the provider is 'very important' (35 per cent) or 'important' (31 per cent) as a factor in their decision.¹⁰⁵⁴ By contrast, a separate survey of 1 000 school-aged students in 2017 found that around 45 per cent of respondents paid 'very little' and 14 per cent of respondents paid 'no' attention to the source of news stories found online.¹⁰⁵⁵

Digital platforms may reduce the commercial value of having an established, familiar brand, as other sources of journalism – less familiar media businesses, bloggers or even citizen journalists – are able to compete for new audiences on the basis of a single article. Digital platforms may lower barriers to entry, allowing a greater variety of sources of journalism to compete for audiences and providing audiences

¹⁰⁵³ A Kalogeropoulos, R Fletcher and N Newman, '[Brand Attribution when Accessing News from Distributed Environments](#)', Digital News Project 2017, Reuters Institute for the Study of Journalism, Oxford University 2017.

¹⁰⁵⁴ Roy Morgan Research, '[Consumer Use of News](#)', prepared for the ACCC, November 2018, p. 16.

¹⁰⁵⁵ T Notley, M Dezuanni, HF Zhong, and S Howden, '[News and Australia's Children: How Young People Access, Perceive and Are Affected by the News](#)', *Crinkling News*, Western Sydney University and Queensland University of Technology, Sydney 2017, p. 9. This includes 44 per cent of respondents aged 13–16 years, and 49 per cent of students aged 8–12 years.

with greater choice. However, diluted brand value may lower revenues earned by media businesses from advertising and converting readers to subscribers, which may subsequently affect their journalistic output (this is explored in section 6.7).

As this is a direct result of the content presentation and curation processes adopted by digital platforms to attract and retain users, it demonstrates an instance in which the commercial interests of digital platforms do not align with those of the news media businesses distributing content on their services.

Under this atomised model, the success of a particular piece of news content depends on both the operation of digital platforms' algorithms and, in the case of social media, the 'sharing' behaviour among users (box 6.1). This creates an incentive for media businesses to optimise their content for these factors on an article-by-article basis. This may manifest as a preference for emotional or sensationalised content to act as 'click bait' to attract consumer attention.¹⁰⁵⁶

Box 6.1: Social media users and unfamiliar news sources¹⁰⁵⁷

On Twitter:

Additionally, when we identify a Tweet, an account to follow, or other content that's popular or relevant, we may add it to your timeline. This means you will sometimes see Tweets from accounts you don't follow. We select each Tweet using a variety of signals, including how popular it is and how people in your network are interacting with it. Our goal is to show you content on your Home timeline that you're most interested in and contributes to the conversation in a meaningful way, such as content that is relevant, credible, and safe.

On Facebook:

Posts that you might see first include:

- *A friend or family member commenting on or liking another friend's photo or status update.*
- *A person reacting to a post from a publisher that a friend has shared.*
- *Multiple people replying to each other's comments on a video they watched or an article they read in News Feed.*

Keep in mind that if you feel you're missing posts you'd like to see, or seeing posts in your News Feed that you don't want to see, you can adjust your settings.

Broadening sources of news beyond professional journalists

Governments, corporations and other non-news organisations have used digital platforms to bypass journalists and traditional modes of reporting. Individuals and organisations have communicated their message directly to mass audiences, creating more sources of news that are not the product of journalistic processes. An example is the United States Government's use of the Twitter platform. Twitter audiences for The White House (18.4 million), the official POTUS account (26 million), and the President's personal Twitter account (61 million) are comparable to the reach of large news outlets (*The New York Times* has 43.6 million Twitter followers and 79 million¹⁰⁵⁸ unique visitors a month).¹⁰⁵⁹

Digital platforms have also allowed individuals to effectively act as journalists, giving rise to online 'citizen journalism'. Through digital platforms, news content can be produced, disseminated, analysed and commented upon outside traditional media businesses and publications. Numerous stories have

1056 D Wilding, P Fray, S Molitorisz, E McKewon, '[The Impact of Digital Platforms on News and Journalistic Content](#)', Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 38.

1057 Facebook, '[Help Centre: What kinds of posts will I see in News Feed](#)', accessed 26 November 2018; Twitter, '[About your Twitter timeline](#)', accessed 26 November 2018.

1058 Refers to data for July 2018, '[CNN Remains Dominant in Digital: #1 in All Key Metrics](#)', *CNN Digital Press Releases*, accessed 21 November 2018.

1059 As at 13 June 2019.

been reported first by individuals on Twitter before being reported by professional journalists.¹⁰⁶⁰ This means that journalists face some competition from the broader public discourse, even in their core function of reporting news.

New possibilities for low-cost production and distribution

Digital platforms have also clearly had positive influences, including lowering certain costs for the production and distribution of journalism. Search engines and social media services (particularly Facebook and Twitter) have become tools for journalists in the news-gathering and reporting process. Journalists use these services as sources for leads, stories, comments and quotes, or photo and video content. Journalists also make use of social media to monitor traditional sources, such as governments and public institutions; to stay current with the stories being published by competing outlets; and to gauge public opinion on various issues. Additionally, publishing content online has allowed news media businesses to distribute journalism at a much lower costs than are involved in traditional print production.¹⁰⁶¹

Some international media businesses have significantly adjusted business models to take advantage of the scalable opportunities provided by the internet and digital platforms (box 6.2). However, there is likely to be less scope for international scale to consistently apply to Australian news.

Box 6.2: One example of how digital platforms have impacted business models¹⁰⁶²

Daily Mail and General Trust proprietor, Lord Rothermere, described to the Shift Conference in London how the use of digital platforms played a role in the choice of business model and expansion for the *Mail Online*:

We're the most shared site on Facebook in the UK, and growing to become the same in the US. Twitter could be a big marketing tool if we used it more effectively, but I don't think we do that yet. But as a primary source material, we are finding it is one of the major sources of new stories. So I think we are co-dependent...

If we were looking at just a UK environment we would be absolutely forced down the road of charging for content, because there would be no other way of replacing our total revenue. But I think the opportunity of reaching an English speaking audience globally with a pretty fixed cost base, so that it's not going to grow in line with the number of audience, means that there is potentially a much larger ad cake out there...

And if you keep your fixed cost base tight and you start growing your traffic and you get your advertising in then eventually you'll start becoming quite profitable quite quickly. With newspapers you grow your audience and you have a higher marginal cost. So it's a different kind of business model. That's the game we're trying to play at the moment...

If we don't get to the right size then that will be the issue and we'll have to start becoming more focused on charging for content.

6.6.4 Exploring different business models

Digital platforms have significantly changed the incentives facing media businesses.

- Advertising revenue is no longer tied to print and broadcast infrastructure, and most online advertising revenue flows to digital platforms as opposed to the websites of news media businesses.
- Many media businesses cannot avoid partnering with digital platforms, in relationships where they are unlikely to have bargaining power regarding terms.

1060 M Shanahan, *Journalism, Online Comments, and the Future of Public Discourse*, Routledge, New York, 2018, p. 28; D Wilding, P Fray, S Molitorisz, E McKewon, 'The Impact of Digital Platforms on News and Journalistic Content', Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 14. Journalist and media academic Marie K Shanahan provides numerous examples of stories that were first reported on Twitter by non-journalists, from the crash of US Airways Flight 1549 into the Hudson River in 2009, to the police shooting of Michael Brown in Ferguson, Missouri in 2014. Wilding et al describe the more recent example of the rescue of a boys' soccer team and its coach in Thailand on 12 July 2018.

1061 Queensland University of Technology, 'Digital Platforms and Australian News Media: Report', Creative Industries Faculty, April 2018, p. 5.

1062 Press Gazette, 'How the Guardian inspired Mail Online to become a global brand', 23 April 2013, accessed 21 November 2018.

- The competition among producers of news content is now on a story-by-story basis, as media businesses are less able to rely on their established brands.

Box 6.3 explains how media businesses generate revenue online, either via their own websites or via key digital platforms.

Box 6.3: Media businesses advertising on online content

News websites:

- Advertising revenue on news websites is generated through display advertising. These ads are priced in one of the following ways:
 - Cost-per-click (CPC) – the advertiser pays every time the ad is clicked.
 - Cost-per-mille (CPM) – the advertiser pays each time their ad is displayed and the price is per one thousand impressions.
 - Cost-per-acquisition (CPA) – the advertiser pays when an ad leads to a sale/conversion. This is also referred to as cost-per-conversion.

Facebook:

- Where content is posted by media businesses on Facebook, users who click on a given article are referred to that media business's website. Media businesses are paid according to the advertising on their own news websites.
- Where content is hosted directly on Facebook as Instant Articles, media businesses can sell direct ads where they keep 100 per cent of the revenue. Alternatively, media businesses that sell their advertising space via the Facebook Audience Network service receive the majority of the revenue collected from the advertiser, and the remainder is kept by Facebook. Direct sold and Audience Network ads can be priced using any of the above methods.¹⁰⁶³
- Where media businesses post videos on Facebook, ads can be served before the video and are priced based on the number of ten-second views of the video or on a CPM basis.¹⁰⁶⁴

Google:

- Where users of Google Search or Google News click on a given article, they are referred to that media business's website. Media businesses are paid according to the advertising on their own news websites.
- Where video content is hosted on YouTube, ads can be served before the video and revenue is split between Google and the publisher (the details of the split are not public)¹⁰⁶⁵. Ads are priced on a number of views and CPM basis.¹⁰⁶⁶

Apple News:

- Some content in Apple News refers users to a publisher's website. Media businesses are paid according to the advertising on their own news websites.
- Other content in Apple News keeps users in the Apple News Environment. Media businesses can generate revenue by selling advertising in Apple News. Ads can be direct-sold by the news publisher (retaining 100 per cent of the revenue) or sold by Apple on the media business's channel and articles (with media businesses retaining 70 per cent of the revenue). Ads appearing between articles in Apple-curated feeds (e.g. For You; Today; Technology etc.) draw a 50 per cent revenue split.¹⁰⁶⁷ Ads are sold on a CPM basis.¹⁰⁶⁸

1063 Facebook for Developers, '[FAQ Monetization](#)', accessed 21 November 2018.

1064 Facebook Business, '[About video ad bit types](#)', accessed 21 November 2018.

1065 YouTube Help, '[YouTube partner earnings overview](#)', accessed 21 November 2018.

1066 Google Ads Help, '[About video ad formats](#)', accessed 21 November 2018.

1067 Apple, '[Advertising platforms: Apple News for publishers](#)', October 2018, accessed 21 November 2018, p. 6.

1068 Apple, '[Advertising platforms: Apple News for publishers](#)', October 2018, accessed 21 November 2018, p. 40.

Given the changes to the incentives facing news media businesses, these businesses have adopted a range of business models in order to monetise their products online. Particularly in the case of news media businesses with smaller audiences, this has included experimenting with a number of innovative business models and content structures that would not have been possible in the preinternet media environment.

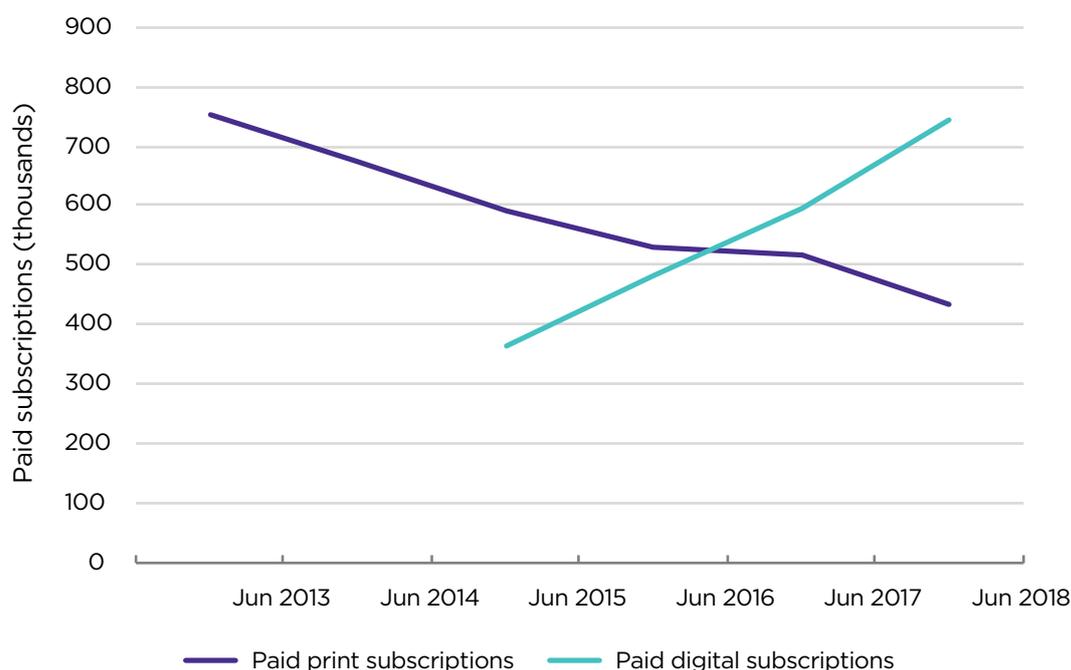
Subscriptions

Offering subscriptions for access to digital content is one of the most common media business models online, and has been in use for over two decades.¹⁰⁶⁹ This model is viewed by the large news media businesses as important to success in the digital environment and these businesses are seeking to increase consumer acceptance of paywalls.¹⁰⁷⁰

The online subscription business model is extremely prevalent overseas. Of 98 newspapers surveyed by American Press Institute in 2016, 62 used ‘metered’ paywalls for digital content (allowing a limited number of free articles before requiring payment), 12 used ‘freemium’ paywalls (providing most content for free but requiring readers to pay for certain ‘premium’ articles), and 21 relied on ad-funding.¹⁰⁷¹ Of 171 European news publishers surveyed by the Reuters Institute in 2017, around two-thirds were adopting digital subscription models.¹⁰⁷²

Online subscriptions are also of increasing significance to Australian news media businesses (figure 6.6). Data obtained by the ACCC from the major print news publishers (Nine, News Corp and Seven West Media) show that subscriptions for their print newspapers alone have fallen by around 45 per cent in the past five and a half years. However, this data suggests these same publishers have increased subscriptions to digital editions (or combinations of digital and print editions) by around 450 000 subscriptions since late 2014. On balance, there has been a net increase in total paid subscriptions for the three major print publishers in the past four years, with most subscriptions having some digital element.

Figure 6.6 Paid print and digital subscriptions for major print publishers



Source: ACCC analysis based on data provided to the Inquiry.

1069 MB Salwen, B Garrison and PD Driscoll, *Online News and the Public*, Routledge, New Jersey, 2004, p. 136.

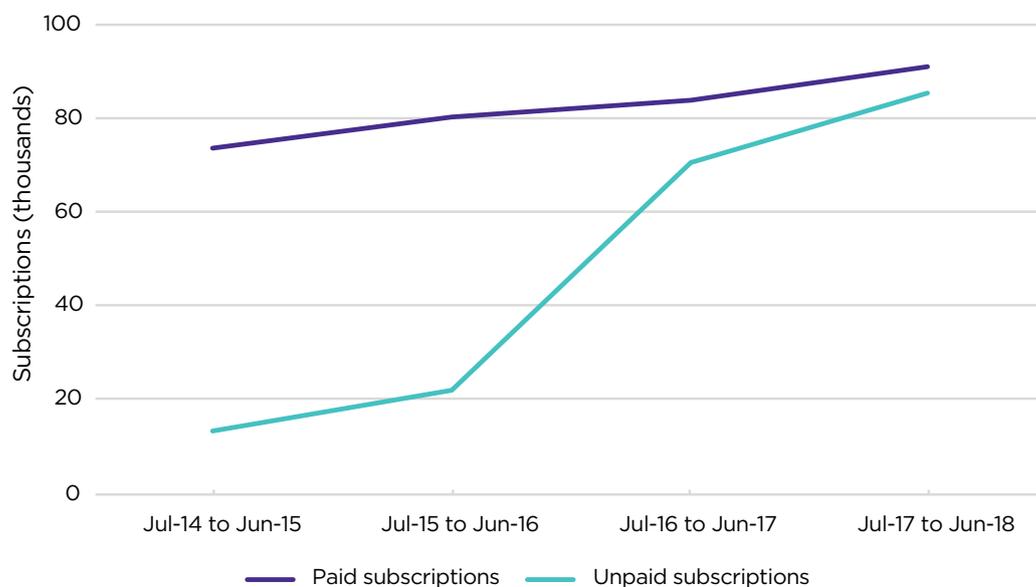
1070 Nine, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 23.

1071 A Williams, ‘[How digital subscriptions work at newspapers today](#)’, *American Press Institute*, 29 February 2016, accessed 3 December 2018.

1072 A Sehl, A Cornia, RK Nielsen, and F Simon, ‘[Pay Models in European News](#)’, Reuters Institute, 2017, accessed 3 December 2018.

In the past four years, a small group of relatively small digital native publishers has accounted for increasing numbers of subscriptions (figure 6.7). Data obtained by the ACCC show that for three such businesses, their total paid subscriptions grew by 23 per cent in four years, but remained under 100 000 in number. Subscription growth for these businesses has been much stronger for unpaid subscriptions (which require users to sign up and log in, potentially providing personal details but not monetary payment). This suggests that these digital native publishers are using subscriptions to build an audience more than as an immediate additional source of revenue.

Figure 6.7 Paid and unpaid digital subscriptions for three smaller digital news businesses



Source: ACCC analysis of information provided to the inquiry.

The overall relatively low level of subscription across both traditional print (now print/online) and smaller digital media businesses evident in figures 6.6 and 6.7 is consistent with surveys of consumer habits and attitudes. Survey results suggest that relatively few Australians are in the habit of paying for journalism. The 2019 Digital News Report found that only 14 per cent of Australians paid for online news in 2019.¹⁰⁷³

While there is a relative unwillingness to pay for news in Australia, the provision of digital subscriptions is allowing some media businesses to successfully manage the transition away from traditional advertising-based business models. By eliminating the costs of physical production and distribution such as the mass circulation of hard-copy newspapers, online news media businesses are better able to rely on subscriptions for a larger proportion of their revenue.

For example, in the early 2000s, *Crikey* reportedly relied on relatively low subscription proceeds of AU\$30,000 per month for 90 per cent of its revenue¹⁰⁷⁴, which allowed it to operate at a scale and staff level that would not have been possible in the pre-internet era.¹⁰⁷⁵

At the other end of the spectrum, in August 2018 *The New York Times* reported that subscriptions accounted for 'nearly two-thirds' of its revenue, with 2.9 million of its 3.8 million subscribers being 'digital-only'.¹⁰⁷⁶ This example also demonstrates that the negligible marginal cost and absence of geographic boundaries of news distribution online has allowed certain outlets to build audiences world-wide,

1073 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 19.

1074 *New Matilda*, '[How Crikey Kept on Trucking](#)', 22 June 2010, accessed 20 November 2018.

1075 *Crikey*, '[About Crikey](#)', accessed 21 November 2018. While *Crikey* does not publicly release revenue information, its website states that its primary sources of revenue are now subscriptions and advertising.

1076 J Peiser, '[New York Times Co. Reports \\$24 Million Profit, Thanks to Digital Subscribers](#)', *The New York Times*, 8 August 2018, accessed 20 November 2018.

with 15 per cent of *The New York Times*'s subscribers based outside of the United States.¹⁰⁷⁷ Notably, the number of the publication's Australian subscribers reportedly doubled in the 2017-18 financial year.¹⁰⁷⁸

Crowdfunding

Over the last decade, online services such as Kickstarter and Australian service Pozible have popularised the 'crowdfunding' of products, including news content. These platforms allow creators of products and services to elicit large numbers of small contributions. Contributors are able to choose how much monetary support to pledge towards a crowdfunding campaign, and are usually offered varying levels of 'reward' based on how much they contribute.

A number of high-profile media businesses have successfully used crowdfunding to support public interest journalism projects, including:

- *The Guardian Australia* raised AU\$150 000 in early 2018 to support a series of environmental stories entitled *Our Wide Brown Land*¹⁰⁷⁹
- *Crikey* raised AU\$21 415 through Pozible in April 2018 for 'Crikey Dig', a 10 to 15-part series of 'deep-dive civic journalism' stories that it could not produce within the budget of its regular publication.¹⁰⁸⁰

This crowdfunding model appears to be most suitable for distinct one-off projects or limited series.

Direct support

Services such as Patreon (launched in 2013) and Drip (launched in 2012, acquired by Kickstarter in 2016 and relaunched in 2017) allow small, highly-engaged audiences to directly support artists and content creators through regular monthly contributions. This model combines crowdfunding with the traditional subscription model. Content creators offer contributors various tiers of exclusive material based on their level of support and often leverage already-popular work that is released for free.

Both individual independent journalists and smaller media businesses have used this approach. *The Guardian Australia* has used its online infrastructure rather than an intermediary to directly fund some journalism projects.

Microtransactions

There are a number of intermediary services that allow consumers to make small payments for access to single articles published by media businesses. Dutch online news platform Blendle, which launched in 2013, is one such intermediary. However, this business model has yet to become widespread, and commentators have noted that obstacles include a general unwillingness to pay for news content due to availability of competing content online, and some degree of friction raised by the requirement for users to make a conscious decision to pay before reading every article.¹⁰⁸¹

Philanthropy

A number of media businesses ask their audiences for philanthropic donations. These can range in size from a single donation of \$1 to recurring donations of a few dollars to significant contributions from philanthropic foundations. This model is particularly prevalent in the United States where it is estimated that philanthropy contributed around US\$100 million a year between 2010 and 2015 to the production of news content.¹⁰⁸² In Australia, philanthropy is less common but still present. *The Guardian Australia* uses this business model and asks readers to donate on its homepage and at the end of most articles.

1077 S Wang, '[As The New York Times extends its reach across countries \(and languages and cultures\), it looks to locals for guidance](#)', *Nieman Lab*, 2 July 2018, accessed 20 November 2018.

1078 S Wang, '[As The New York Times extends its reach across countries \(and languages and cultures\), it looks to locals for guidance](#)', *Nieman Lab*, 2 July 2018, accessed 20 November 2018.

1079 *The Guardian*, '[Our wide brown land](#)', accessed 20 November 2018; P Wallbank, '[Guardian Australia crowdfunds environmental journalism project](#)', *Mumbrella*, 30 January 2018, accessed 20 November 2018.

1080 P Wallbank, '[Crikey successfully completes journalism crowdfunding campaign](#)', *Mumbrella*, 11 April 2018, accessed 20 November 2018; P Wallbank, '[Crikey launches crowdfunding campaign to finance investigative journalism project](#)', *Mumbrella*, 7 March 2018, accessed 20 November 2018.

1081 For example, R Bilton, '[Why micropayments for news schemes struggle to take off](#)', *DigiDay*, 15 April 2018, accessed 20 November 2018.

1082 R Foster and M Bunting, 'Public funding of high-quality journalism', 10 April 2019, p. 30.

Philanthropy differs to the business models discussed above as contributions are made with no expectation of receiving a direct benefit as consideration for the contribution. This business model is discussed further in section 6.9.

Collective subscriptions

Magazine aggregation platform Texture has adopted a collective subscription model, providing smartphone and tablet apps that allow access to full issues of over 200 magazines for a single monthly subscription price. Apple acquired Texture in March 2018 and in March 2019 converted it into Apple News+, a subscription service that provides access to over 300 publications within the Apple News application. Users can access content from *The Wall Street Journal* and the *Los Angeles Times* as well as magazines such as *The Atlantic* and *The New Yorker* for US\$9.99 a month. Apple News+ is expected to launch in Australia in the second half of 2019.¹⁰⁸³

The success of the collective subscription model and its value to subscribers depend on the participation of a wide variety of media businesses. There has been a degree of public concern about the benefit of this business model for content producers when it is applied in the music industry; for example, Spotify reportedly generates very low royalty payments, even for extremely popular musicians.¹⁰⁸⁴ However, given the very recent introduction of collective subscription services such as Apple News+, it is too early to determine whether this business model will begin to provide sustainable revenues to individual news media businesses.

Live events as a revenue stream

Some media businesses also seek to support the production of journalism by leveraging a popular brand into the promotion and management of live events and conferences. While media businesses have historically held such events to incentivise increased print advertising, many businesses now successfully generate profit through events themselves, combining revenue from highly-integrated corporate sponsorship and ticket prices.¹⁰⁸⁵

This business model is particularly popular in the United States, where media businesses of all sizes are increasingly turning to live events to diversify their revenue streams. For example, in 2015 *The New York Times* reported that it expected to earn US\$20 million a year through conferences.¹⁰⁸⁶

In Australia, Nine Entertainment Co. is testing this model through the launch of its new Future Women brand, which will focus on live events.¹⁰⁸⁷ *The Australian Financial Review* holds a number of branded events each year¹⁰⁸⁸, and some Australian industry publications already generate revenue through live conferences and events, such as the CommsDay Summit¹⁰⁸⁹ and the Retail Week held by *Inside Retail* magazine.¹⁰⁹⁰

While this model may provide an important new revenue stream to support journalism, commentators have questioned the lack of actual journalism featured in live events¹⁰⁹¹, the potential for heavy sponsorship to compromise journalistic integrity¹⁰⁹², and potential long-term issues with this revenue model due to difficulties in building scale.¹⁰⁹³

1083 Apple, '[Apple launches Apple News+, an immersive magazine and news reading experience](#)', accessed 23 April 2019.

1084 For example, L Marshall, '[Let's keep music special. F-Spotify: On demand streaming and the controversy over artist royalties](#)', *Creative Industries Journal*, vol. 8, no. 2, 2015, p. 177.

1085 C Kaydo, '[Why The New Yorker Festival is the model of a modern magazine event](#)', *BizBash*, 15 October 2014, accessed 20 November 2018; E Bazilian, '[How The New Yorker Festival has become a magnet for brands](#)', *AdWeek*, 6 October 2014, accessed 20 November 2018.

1086 M Sullivan, '[As print fades, part 1: 'live journalism' at The Times](#)', *The New York Times*, 10 August 2015, accessed 20 November 2018.

1087 M Mason, '[Nine's Helen McCabe readies Future Women for launch](#)', *Australian Financial Review*, 15 July 2018, accessed 20 November 2018.

1088 *Australian Financial Review*, '[Our Events](#)', accessed 20 November 2018.

1089 *CommsDay*, '[CommsDay Summit 2019](#)', accessed 20 November 2018.

1090 *Retail Week*, '[Join the movement: Raising the Retail Industry across Australia through events, collaboration, networking & ideas](#)', accessed 20 November 2018.

1091 C Hu, '[Rushing for revenue, magazines are spending millions on their own pop culture festivals](#)', *Forbes*, 9 August 2016, accessed 20 November 2018.

1092 S Lacy, '[The events business won't save American journalism](#)', *Pando*, 12 August 2015, accessed 20 November 2018.

1093 S Lacy, '[The events business won't save American journalism](#)', *Pando*, 12 August 2015, accessed 20 November 2018.

6.7 Impacts of digital platforms on the resourcing of journalism in Australia

Key findings

- While experiences vary between businesses, the general trend in advertising revenue has been negative for print (now print/online) publishers, with an increasing proportion of online advertising expenditure captured by Google and Facebook.
- Regional print publishers and broadcasters have suffered a decline in advertising revenue. This may be partly due to a decline in audience numbers for these businesses.
- The number of journalists employed in Australia has decreased over the past 12 years, with significant reductions in the past five years.
 - The loss of Australian journalists has been most significant for traditional print (now print/online) news publishers.
 - As new market entrants, digital native media businesses have provided a modest increase to numbers of journalists.
- Since the mid-2000s, Australia's major metropolitan and national daily newspapers have published significantly fewer articles relevant to certain categories of public interest journalism, including reporting on local government, local courts, health and science. These broad trends coincide with reductions to numbers of Australian journalists and declining print media revenue.
- Since 2008, Australian news media businesses have closed a number of local and regional newspapers.
 - Over the past 10 years, 106 local and regional newspapers have closed, reducing the total number of these publications in Australia by 15 per cent.
 - These closures have left 21 local government areas without coverage by a single local newspaper, including 16 local government areas in regional Australia.
 - The trend of local and regional newspaper closures is likely to continue.
- Digital platforms have made a positive contribution to plurality of journalism by enabling the entry of 'digital natives', which typically cover issues of international and national significance. However, the online provision of news involves poor incentives for producing journalism for smaller audiences, such as coverage of local issues.
- The decreasing provision of public interest journalism in print publications is concerning, as new market entrants such as digital natives are unlikely to fully replace this coverage, particularly as it relates to local reporting.

Changes to the media business model have had significant implications for producing news and journalism in recent years, particularly through:

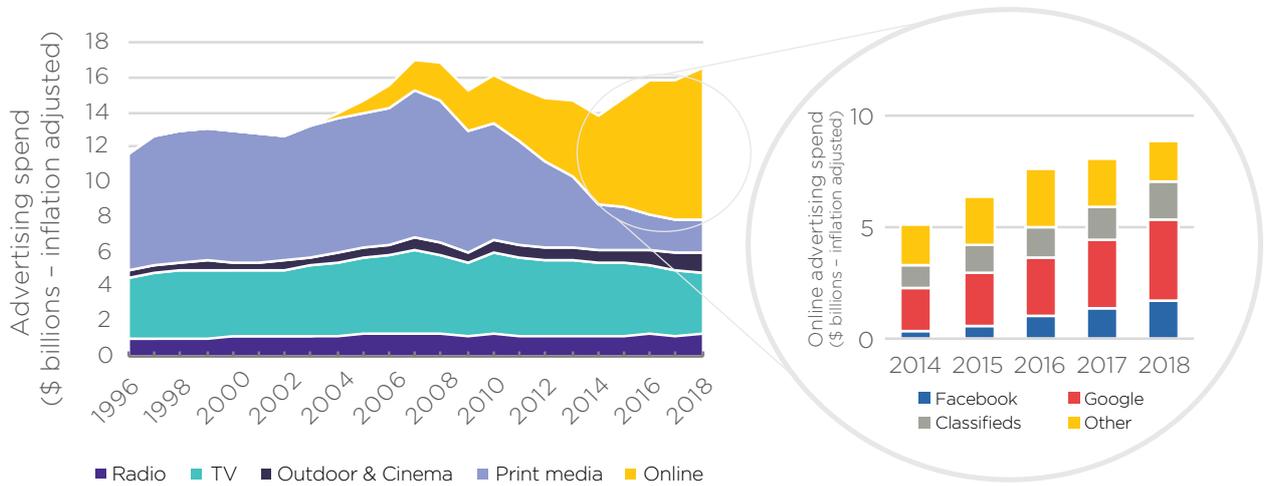
- the impacts on advertising revenue of established outlets, and the subsequent effects on resources available for the production of journalism
- the impacts on the entrance and growth of new competitors, particularly digital natives, and their contribution to the production of journalism.

6.7.1 Impact on media businesses' advertising revenue

As discussed earlier in this Report, print advertising revenues have decreased in the past decade as online advertising spend has increased. Recently, a significant portion of online advertising spend has been captured by Google and Facebook (figure 6.8.).The ACCC has sought to isolate causes for the fall in the advertising revenue of large media businesses, and to establish whether the reduction in advertising revenue may reflect a potential reduction in overall consumption (that is, fewer eyeballs to sell) rather than increased difficulty in monetising the publisher's or broadcaster's audience.

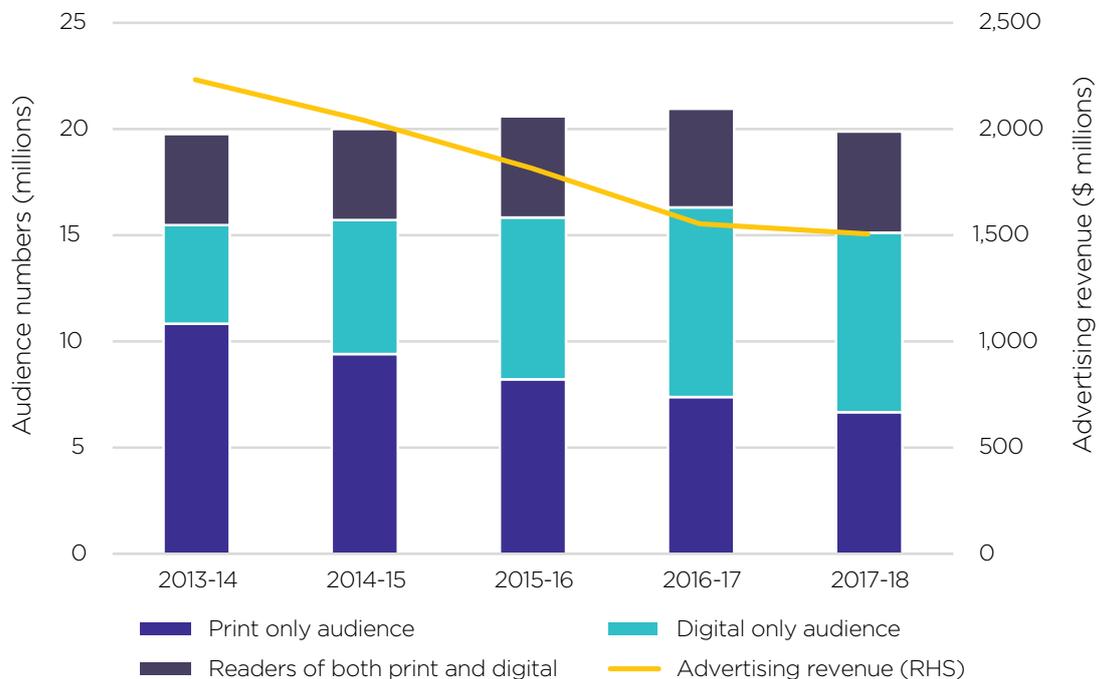
The ACCC's analysis suggests that in the past five years, the three largest print/online publishers have collectively experienced an increase in total cross-platform audiences, driven by increases to website and app usage (figure 6.9). This suggests that reductions in advertising revenue are not due to an overall decrease in audience numbers, but to changes in media businesses' ability to monetise an increasingly digital product mix.

Figure 6.8 Australian advertising expenditure by media format and digital platform



Source: ACCC analysis based on CEASA data, Google Australia Pty Ltd. Financial statements and reports for the year ending 31 December 2018 lodged with ASIC and information provided to the inquiry.¹⁰⁹⁴

Figure 6.9 Advertising revenue and readership for selected print mastheads

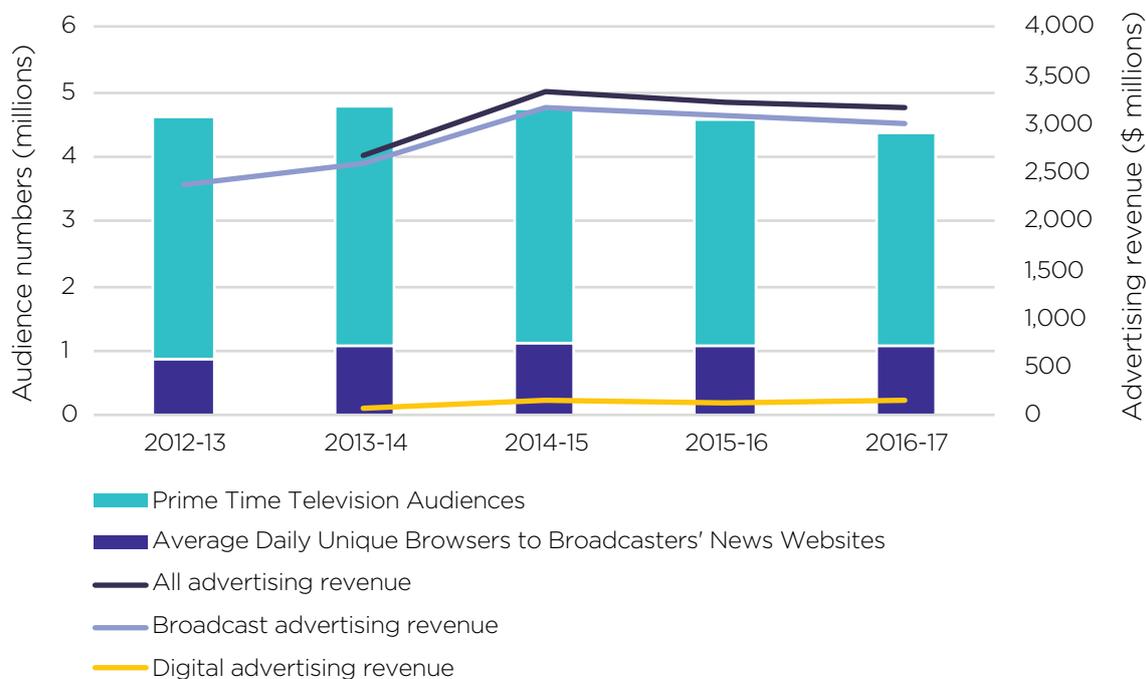


Source: ACCC estimates based on information provided to the inquiry and Roy Morgan Single Source Australia: Jan 2010 - Dec 2018.

1094 Data are adjusted for inflation.

Trends for other media formats have differed from those of print (now print/online) news publishers. For example, television broadcasters have not experienced shifts in their audience from their television offerings to their news websites. This may reflect the fact that news accounts for a small part of the overall television offering and also because of the ways, and the time of day, in which television is typically consumed, which remains different to print and online news sources. Advertising revenue for metropolitan television broadcasters remains largely tied to broadcast audience numbers (figure 6.10).

Figure 6.10 Advertising revenue and audience figures for commercial broadcasters



Source: ACCC estimates based on data provided to the inquiry and OzTAM, Regional TAM, Nielsen Digital Panel, February 2019, All demographics, PC, Smartphone and Tablet, Unique Audience.

Radio use in Australia remains high with 86 per cent of Australian adults listening to some radio during an average seven-day period in the 12 months to June 2018.¹⁰⁹⁵

Regional advertising revenue

Advertising revenue for most regional newspapers and broadcasters fell over the past five years (figure 6.11). However, unlike publishers and broadcasters with a metropolitan or national focus, regional outlets have experienced reductions both in readership for newspapers, and viewership for television. The combined readership for community newspapers under Fairfax¹⁰⁹⁶ and News Corp (many of which are in regional areas), fell by 37 per cent between 2010 and 2017.¹⁰⁹⁷ During that period, the combined prime time daily audiences for regional television fell by 38 per cent.¹⁰⁹⁸ Unlike metropolitan television broadcasters, regional television broadcasters have been less likely to have expanded into running text-based news websites.¹⁰⁹⁹

1095 Australian Communications and Media Authority, *Communications Report 2017-2018*, 2017, p. 71.

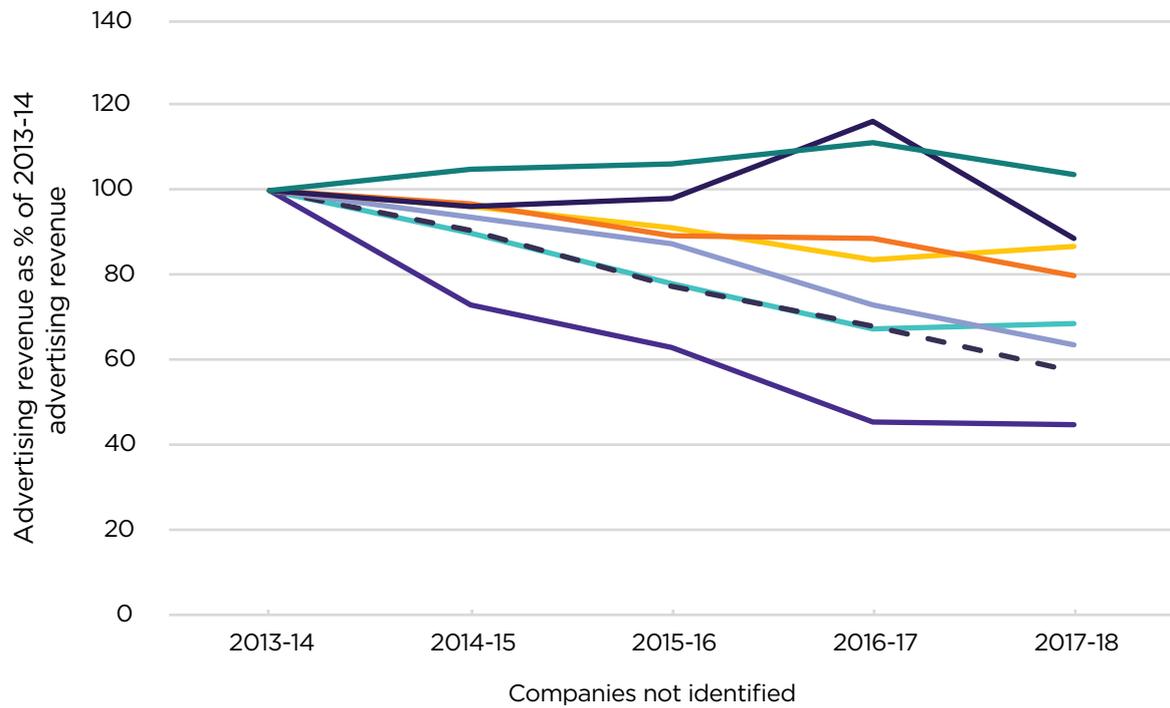
1096 Fairfax was subsequently acquired by Nine Entertainment Co in 2018, with the community and regional newspaper arm of the business acquired by private investors in 2019.

1097 Roy Morgan Single Source Australia: Jan 2010 - Dec 2017.

1098 Regional TAM database.

1099 For example, at the time of writing, WIN does not operate a dedicated news website. Southern Cross Australia's news is an embedded catch-up of the previous televised bulletin. By contrast, Nine Entertainment Co. and Seven West Media run several dedicated news websites.

Figure 6.11 Reductions in advertising revenue for regional newspaper publishers and television broadcasters



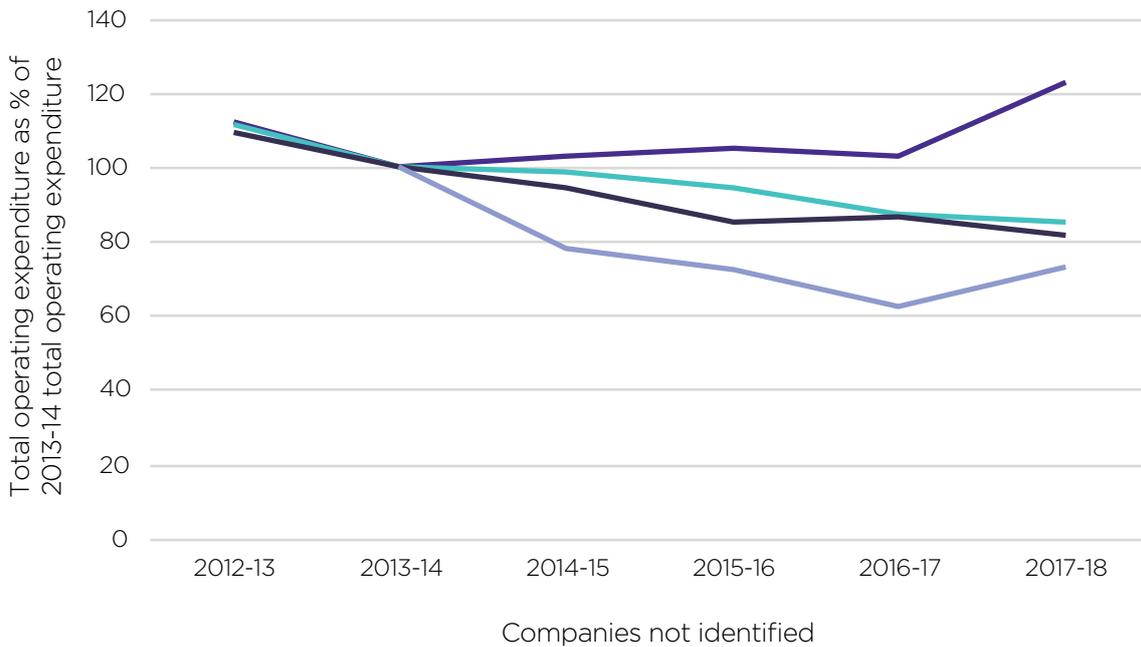
Indices of advertising revenue for selected regional newspaper groups and television broadcasters (not identified); 2013-14 = 100

Source: ACCC analysis of data provided to the Inquiry.

6.7.2 Cuts to costs and employment

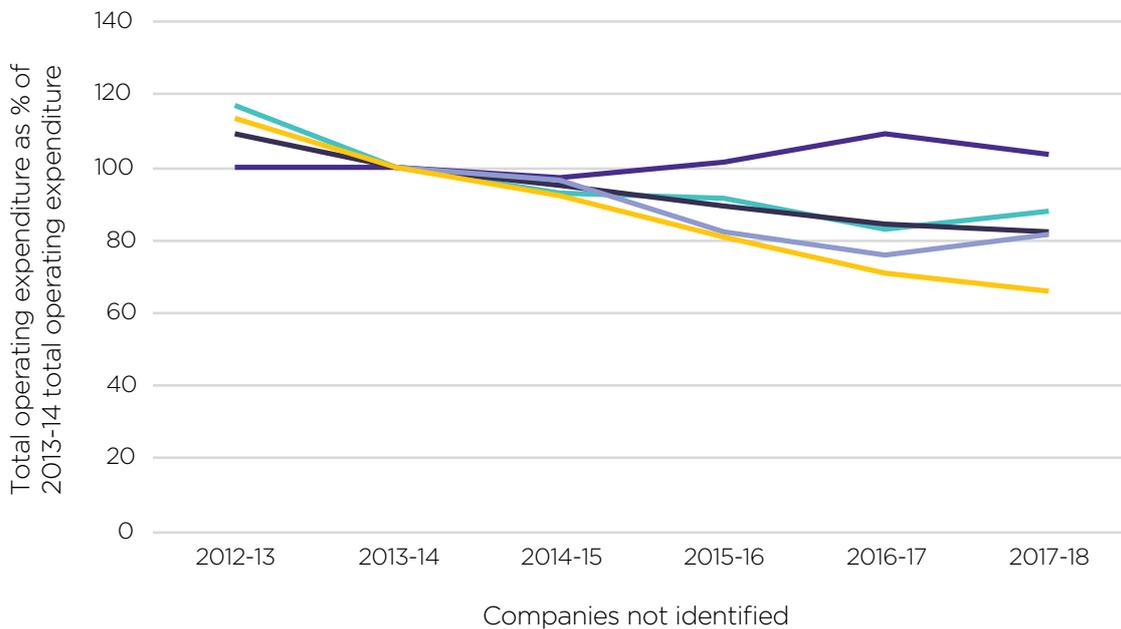
Declining advertising revenue earned by media businesses have been a major cause of cuts to both operational expenditure and employment of editorial staff. Available data indicates that reductions in expenditure generally reflect cuts to both staffing and non-staffing costs. Major metropolitan and national newspaper mastheads made significant cuts to operational expenditure in the past five years (figure 6.12). Regional newspapers and television broadcasters also implemented significant reductions in operational expenditure (figure 6.13).

Figure 6.12 Cuts to expenditure in major metro and national newspapers



Indices of operational expenditure for selected metro and national newspapers (not identified); 2013-14 = 100
 Source: ACCC analysis of data provided to the inquiry.

Figure 6.13 Cuts to expenditure in regional newspaper and television



Indices of operational expenditure for selected regional newspaper groups and television broadcasters (not identified); 2013-14 = 100
 Source: ACCC analysis of data provided to the Inquiry.

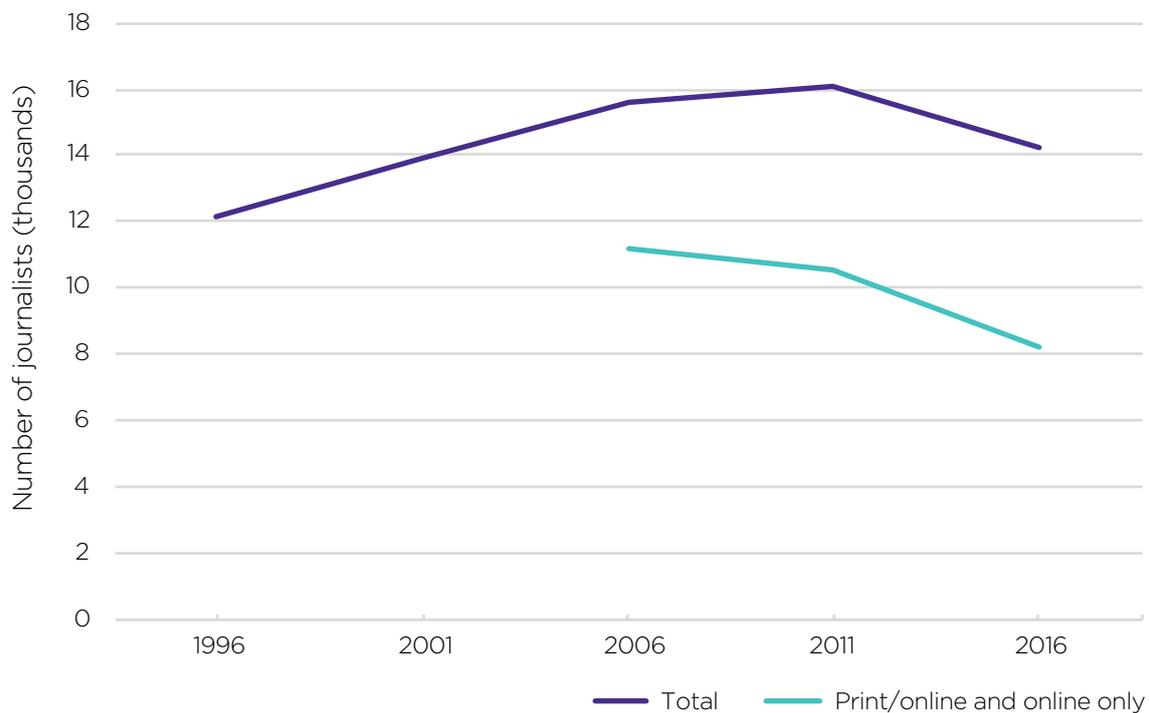
Reductions in the number of journalists

Evidence suggests that one of the main ways that media businesses have cut costs has been through reducing the employment of editorial staff (box 6.4). Data from the ABS Census show that the number of journalists employed in 2016 was lower than five and ten years prior, with the decline occurring largely in print/online journalists (figure 6.14). From 2006 to 2016 the number of people in journalism-related occupations fell by nine per cent, and by 26 per cent for traditional print journalists.

While these ABS estimates are based on large samples, they rely on individuals self-identifying as journalists, and include those employed part-time, full-time, as well as freelance journalists.¹¹⁰⁰ This decline in journalist jobs occurred at a time when Australia's population and economy were growing strongly.

Data on full-time equivalent journalist jobs, provided to the ACCC by Australian media businesses confirms that the reductions in the employment of journalists have largely occurred in print media (figure 6.15). Data provided by media businesses themselves show the number of journalists employed by traditional print (now print/online) media businesses fell by 20 per cent from 2014 to 2018. While experiences vary between individual companies, there has been less change in the numbers of journalists employed within radio¹¹⁰¹ and television, both commercial and public broadcasters. The reductions in print and online journalist numbers are also consistent with reported information (box 6.4).

Figure 6.14 Employment of journalists in Australia, 1996 to 2016



Source: ABS Census data.

The number of journalists in the Census data is substantially higher than the full-time equivalent journalist numbers obtained from media companies. This is partly because Census numbers include freelance journalists, do not distinguish between part-time, full time and casual employees, and rely on self-identification by citizens. Census data also includes magazine journalists, periodical editors and other journalists working for companies from which the ACCC did not receive data. While the two data sets show significantly different absolute numbers and are not directly comparable, they are consistent in showing a downward trend in the number of print journalists over the past five to ten years.

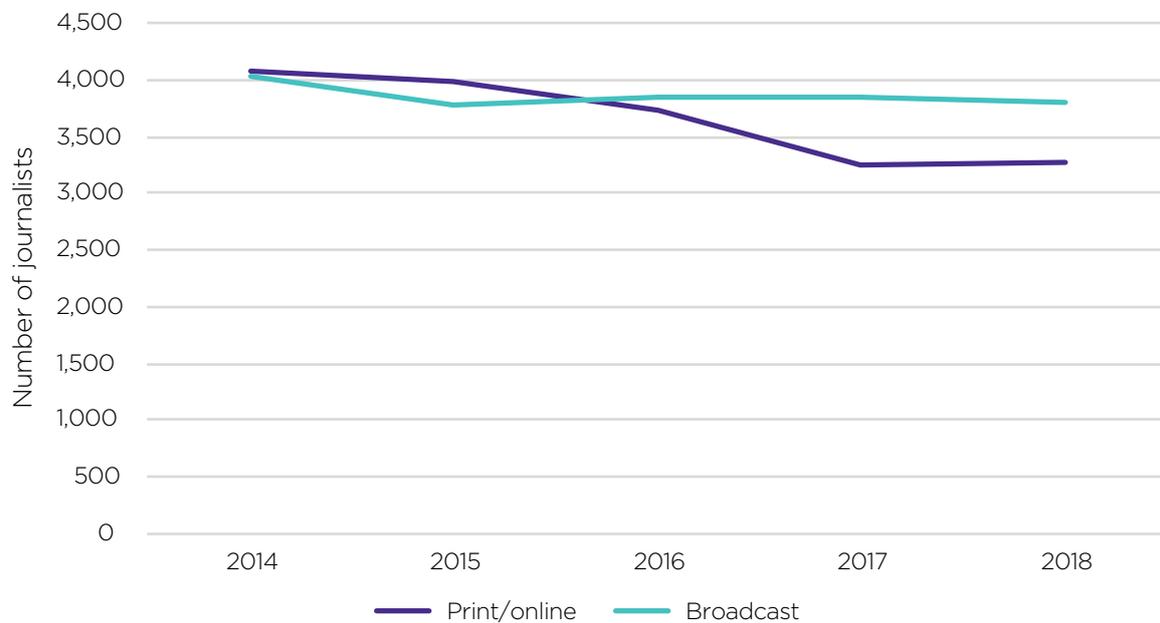
The fall in numbers of print/online journalists is consistent with observations that advertising revenue has reduced more sharply for print (now print/online) media businesses than for businesses in other media formats. Neither the Census nor other data suggest that the journalist jobs lost in print media companies have been counteracted by corresponding increases in jobs in other media formats.

¹¹⁰⁰ Due to these characteristics, Census data will not be comparable to data collected by the ACCC from media companies on the full-time equivalent number of journalists employed.

¹¹⁰¹ J Waterson, 'Scores of UK radio stations to lose local programmes', *The Guardian*, 27 February 2019, accessed 26 April 2019. The number of radio journalists in the UK has decreased significantly in recent years. Licence conditions imposed on commercial radio broadcasters somewhat protect against this occurring in Australia.

Cost reductions have not been limited to staffing expenses, and have taken different forms for different media businesses. For metropolitan print media businesses, cost reductions coincide with a decline in coverage of certain areas of news content, as explored in section 6.7.3. For regional and local print publishers, cost reductions have often involved to the closure of entire publications, as explored in section 6.7.4.

Figure 6.15 Full time equivalent employment of journalists in Australia by media format



Source: ACCC analysis of data provided to the inquiry.

Note: Print/online figure relates only to traditional news media publishers. It does not include figures from 'digital native' publishers that publish only online.

Box 6.4: Examples of reported job cuts by Australian print (now print/online) media businesses

News Corp has sought to rationalise its operations over recent years, including in Australia.

- On 20 June 2012, News Limited (News Corp's former branding) announced a restructure with an unspecified number of redundancies.¹¹⁰²
- Leaked financial documents in August 2014 revealed that approximately 1 000 jobs were cut from 2012-13.¹¹⁰³
- On 28 May 2015, 30 further jobs were cut through News Corp's decision to close *MX*, the free newspaper in Melbourne, Sydney and Brisbane.¹¹⁰⁴
- In September 2016, *The Australian* announced that News Corp's planned acquisition of APN's Australian Regional Media would result in up to 300 job losses through 'back office synergies'.¹¹⁰⁵ In December it was announced that another 42 editorial positions would be cut due to measures to save \$40 million.¹¹⁰⁶
- In May 2017, 70 News Corp photographers were reportedly made redundant, with five photographers to remain in Queensland (down from 20) and 20 to remain in New South Wales (down from at least 55), with further cuts to production staff to be implemented.¹¹⁰⁷
- In September 2018, News Corp was reported to eliminate 30 editorial positions through a mix of voluntary and forced redundancies.¹¹⁰⁸
- In June 2019, News Corp reportedly made 50 staff redundant, including staff in both editorial and non-editorial positions.¹¹⁰⁹

Fairfax (acquired by Nine Entertainment Co. in December 2018) has frequently reduced staff over recent years.

- On 17 March 2016, Fairfax announced that it proposed to reduce costs across its News and Business units in Sydney and Melbourne newsrooms by the equivalent of 120 full-time employees through a combination of redundancies, tightened budgets and reduced travel expenses.¹¹¹⁰
- This marked the latest in a series of rationalisation and staffing cuts following an announcement on 18 June 2012 that the company would cut 1 900 jobs.¹¹¹¹
- On 5 April 2017, Fairfax announced a further 125 editorial staff job losses, representing a quarter of its editorial staff, and its intention to reduce its editorial budget by \$30 million.¹¹¹²
- Following Fairfax's acquisition by Nine Entertainment Co. in 2018, 144 positions were reportedly made redundant in the merged entity, affecting 92 staff members – although it is not clear how many of these redundancies affected editorial staff.¹¹¹³

1102 K Williams (News Australia Chief Executive), '[News Limited announces new strategic actions for growth](#)', media release, News Limited, 20 June 2012.

1103 A Meade, '[News Corp Australian leaked accounts show 1,000 jobs cut across mastheads](#)', *The Guardian Australia*, 20 August 2014, accessed 30 October 2018.

1104 J Rolfe, '[MX commuter newspaper closes](#)', news.com.au, 28 May 2016, accessed 30 October 2018.

1105 M Ward, '[News Corp to axe 300 jobs in ARM acquisition, suggests report](#)', *Mumbrella*, 12 September 2019 accessed 20 May 2019.

1106 A Meade, '[News Corp Australia announces redundancies and \\$40m cost-cutting](#)', *The Guardian Australia*, 7 December 2016, accessed 16 May 2019.

1107 A Meade, '[Up to 70 News Corp Australian photographers made redundant](#)', *The Guardian Australia*, 15 May 2017, accessed 30 October 2018.

1108 M Mason, '[News Corp cuts jobs at major Australian mastheads](#)', *The Australian Financial Review*, 13 September 2018, accessed 20 May 2019.

1109 J Duke, '[News Corp to cut 50 jobs](#)', *The Sydney Morning Herald*, 3 June 2019, accessed 4 June 2019.

1110 G Hywood (Fairfax Media Chief Executive), '[Statement relating to unprotected industrial action](#)', Fairfax Media, media release, 17 March 2016.

1111 G Hywood (Fairfax Media Chief Executive), '[Fairfax of the future](#)', Fairfax Media, media release, 18 June 2012.

1112 A Meade, '[Fairfax Media to cut a quarter of journalists at SMH, the Age and AFR](#)', *The Guardian Australia*, 3 May 2017, accessed 30 October 2018.

1113 SBS News, '[Merged Nine-Fairfax to cut 144 positions](#)', 3 December 2018, accessed 20 May 2019.

Seven West Media staff reductions:

- On 11 June 2013 West Australian Newspapers (WAN) announced a reduction of 100 jobs.¹¹¹⁴ This was reported to be the company's third round of redundancies in the previous six years.¹¹¹⁵
- In June 2016, Seven West Media purchased *The Sunday Times* from News Corp. Thirty editorial positions were cut from *The West Australian* in preparation of the takeover, and 20 positions were expected to be cut from *The Sunday Times*.¹¹¹⁶
- In April 2019, around 30 staff, including senior editorial staff, were reported to have accepted voluntary redundancy offers from *The West Australian* following the integration of newsrooms from several publications in Western Australia.¹¹¹⁷

Consolidation of broadcast journalism in regional areas

While Australia's broadcast journalism sector does not appear to have experienced staff reductions as severe as in the print (now print/online) sector, regional broadcasters have also achieved production efficiencies in ways that have materially affected the number of journalists present in local areas.

Television broadcasters in regional areas have recently significantly consolidated local newsrooms into large regional 'hubs'. In 2017, Nine restructured its Darwin newsroom and consolidated it with its Queensland news production division. The local Darwin bulletin was integrated as part of the broader state-wide Queensland regional bulletin.¹¹¹⁸ In 2018, WIN Television moved the presentation and broadcast of its Tasmanian news bulletin to studio facilities in Wollongong, NSW, halving its Tasmanian newsroom from 18 to nine staff.¹¹¹⁹ This followed consolidation of regional Victorian newsrooms into WIN's Wollongong facilities in 2015¹¹²⁰ and consolidation of its Canberra newsroom to Wollongong in 2013.¹¹²¹

6.7.3 Consequences of cost-cutting: metropolitan and national print media

Having found evidence of significantly declining resources of print (now print/online) news media businesses, the ACCC undertook a quantitative data analysis exercise to examine the potential impact of this resource decline on the kind of journalism these businesses were producing.

This study analysed articles from 2001 to 2018 published in the print editions of 12 major metropolitan and national daily newspapers from Australia's three largest publishers: News Corp Australia (formerly News Limited), Nine Entertainment Co. (formerly Fairfax) and Seven West Media (owner of Western Australian Newspapers Holdings Limited).¹¹²² In analysing these articles, this exercise used keyword searches in the Factiva Global News Database to identify and track the representation of the various news topics. The methodology and full findings from this exercise can be found at Appendix E to this Report.

1114 R Greenslade, '[More Australian journalists set to lose their jobs](#)', *The Guardian Australia*, 11 June 2013, accessed 30 October 2018.

1115 P Cai, '[Seven West cuts jobs](#)', *Sydney Morning Herald*, 12 June 2013, accessed 30 October 2018.

1116 ABC News, '[The West Australian newspaper to cut 30 editorial jobs ahead of Sunday Times takeover](#)', 30 June 2016, accessed 30 October 2018.

1117 N Perpetch, '[Wave of redundancies at The West Australian newspaper raises fears of a 'denuded' newsroom](#)', ABC News, 18 April 2019, accessed 20 May 2019.

1118 N Vanovac and A Betts, '[Nine News Darwin set to lose local bulletin, a dozen jobs cut](#)', ABC News, 11 July 2017, accessed 16 May 2019.

1119 R Shine, '[WIN Television's local news bulletin signs off in Tasmania, audience decline feared](#)', ABC News, 18 August 2018, accessed 30 October 2018.

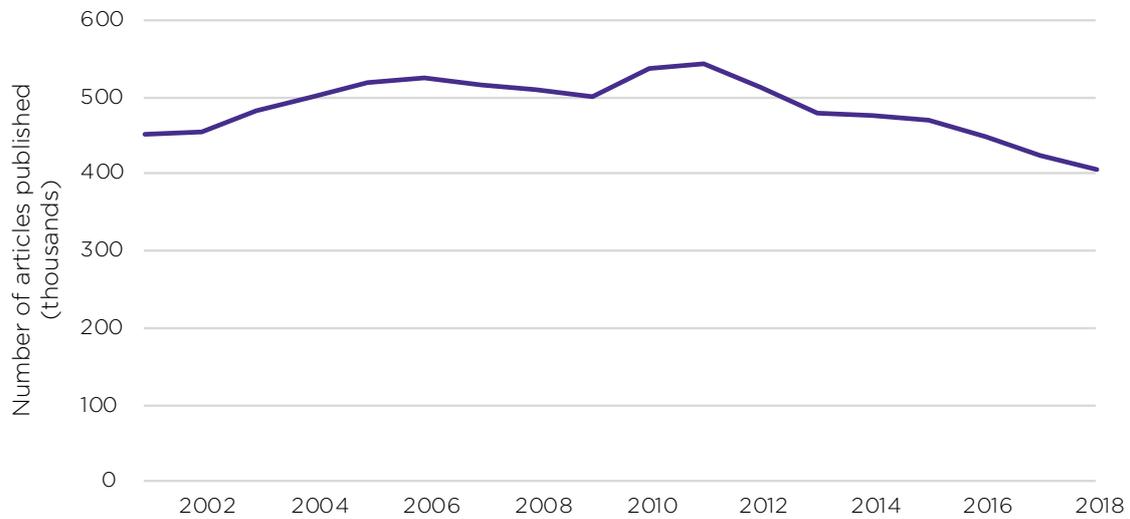
1120 M Dixon and K McIllwain, '[WIN TV moves Victorian news bulletin to Wollongong](#)', *Illawarra Mercury*, 28 October 2015, accessed 19 May 2019.

1121 H Boland-Rudder and J Clarke, '[Win TV to move Canberra news bulletin to Wollongong](#)', *The Sydney Morning Herald*, 26 June 2013, accessed 16 May 2019.

1122 These included: *The Advertiser* (Adelaide), *The Herald Sun* (Melbourne), *The Age* (Melbourne), *The Courier Mail* (Brisbane), *The West Australian* (Perth), *The Daily Telegraph* (Sydney), *The Sydney Morning Herald* (Sydney), *The NT News* (Darwin), *The Mercury* (Hobart), *The Canberra Times* (Canberra), *The Australian Financial Review* (national), *The Australian* (national).

During the period surveyed, the total number of articles published by the 12 selected publications varied, with total articles peaking in 2010 and steadily reducing from 2011 to 2018.

Figure 6.16 Total articles published 2001 to 2018



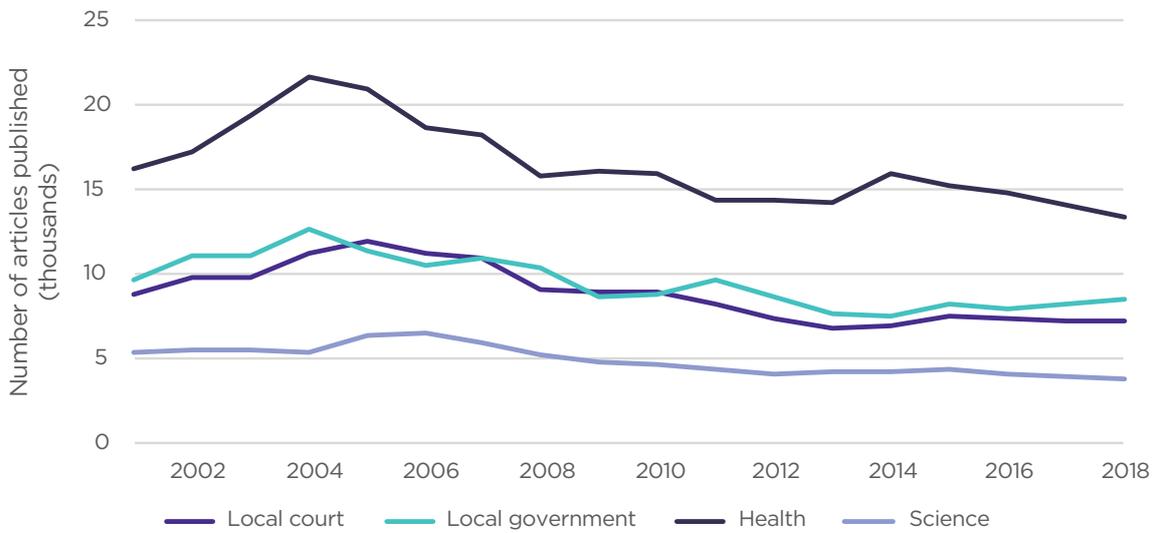
Source: ACCC analysis of data sourced from the Factiva Global News Database

However, a number of topics of journalism did not follow this broad trend. The study identified a distinct reduction in the coverage of four topics that can be considered 'public interest journalism': local government, local courts, science and health.

This ACCC analysis found that the publications:

- published 26 per cent fewer articles on local government issues in 2018 than at the peak of local government coverage in 2005 (a drop from around 11 400 articles a year to around 8 400 articles a year)
- published 40 per cent fewer articles on local court matters in 2018 than at the peak of local court reporting in 2005 (a drop from around 11 900 articles a year to around 7 200 articles a year)
- published 30 per cent fewer articles on health issues in 2018 than at the peak of health reporting in 2004 (a drop from around 21 600 articles a year to around 13 300 articles a year)
- published 42 per cent fewer articles on science in 2018 than at the peak of science reporting in 2006 (a drop from around 6 400 articles a year to around 3 700 articles a year).

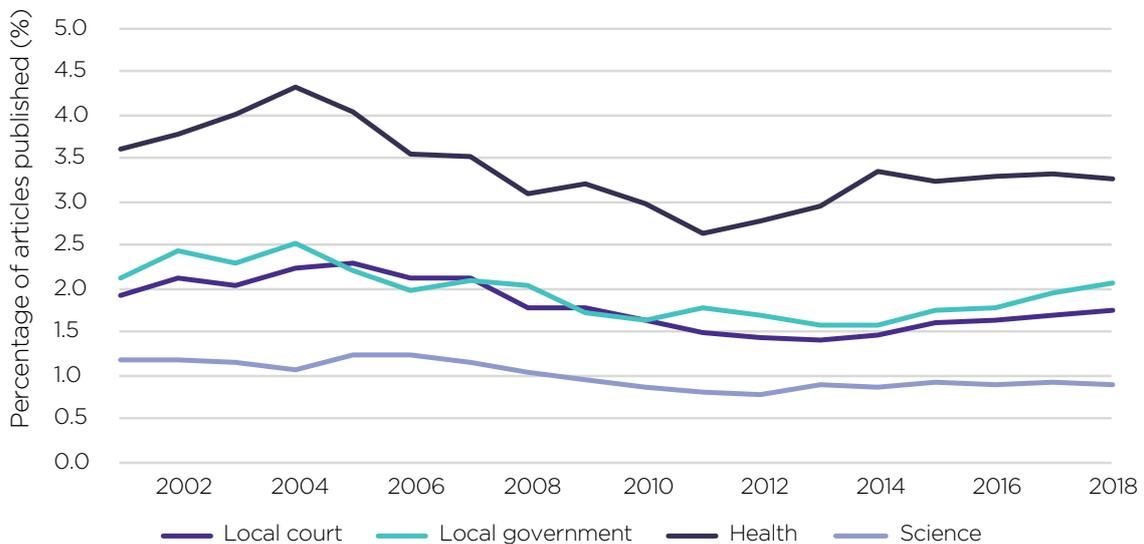
Figure 6.17 Reduced provision of specialist reporting – articles published per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

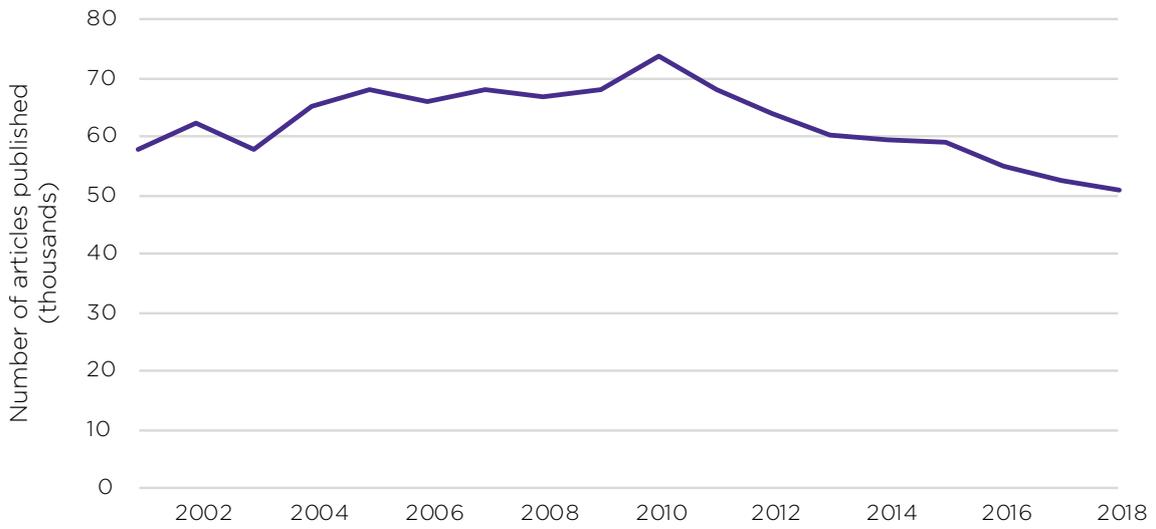
Coverage of these four topics decreased as a percentage of total journalism produced by the selected publications between 2004 and 2013 (varying by topic). While the proportion of coverage provided to these topics appears to have stabilised over recent years, the continued overall decrease in articles raises concerns that these topics may be at risk, and possibly at increasing risk, of under-provision.

Figure 6.18 Reduced provision of specialist reporting – percentage of all articles per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

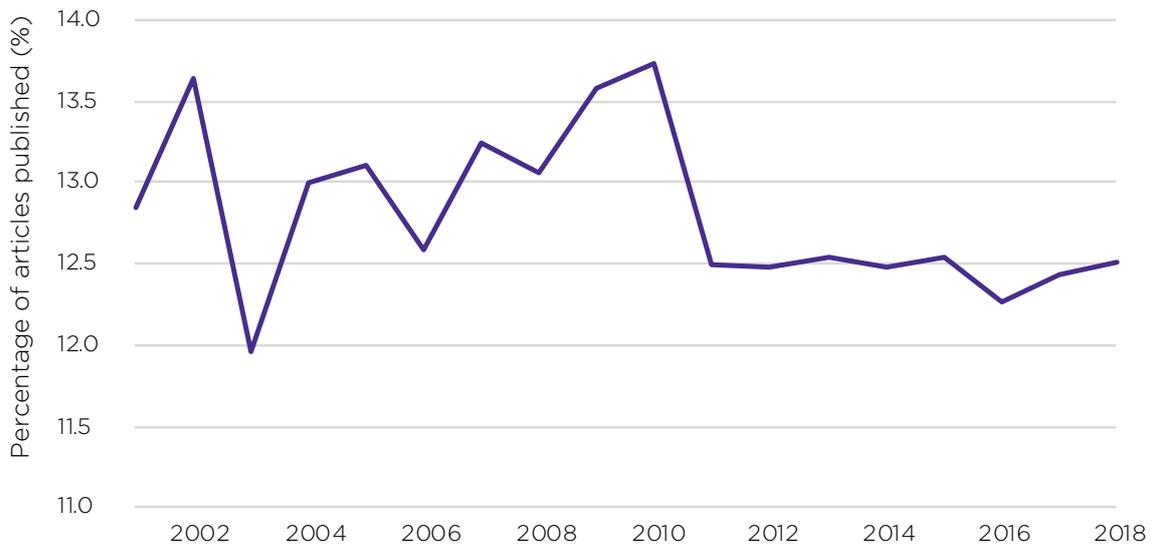
Figure 6.19 Public policy reporting – articles published per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

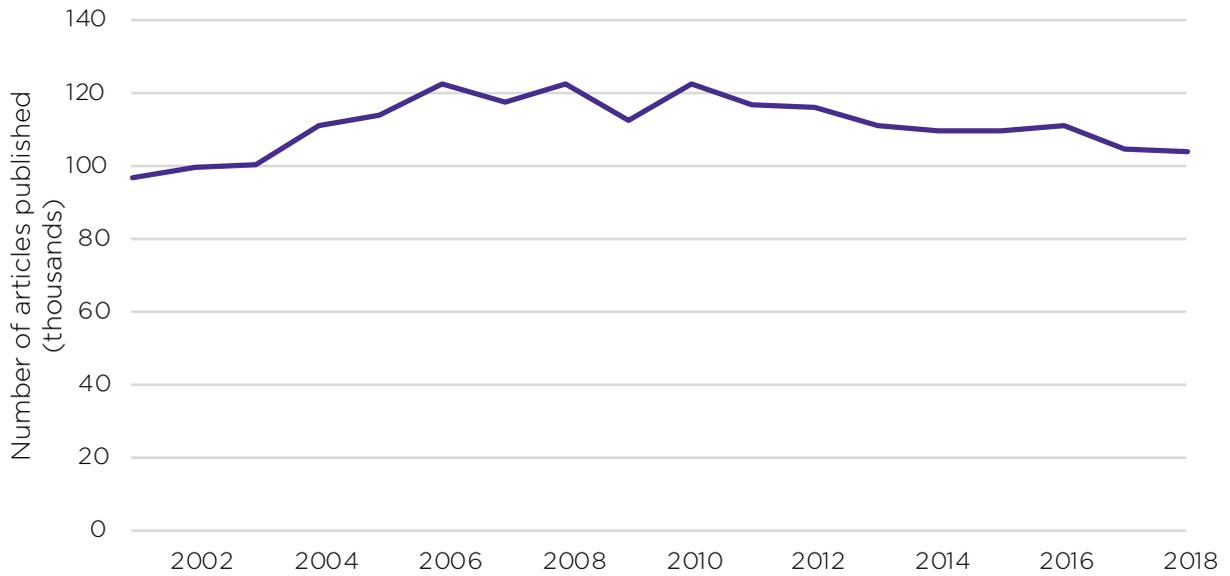
This analysis identified a reduction in coverage of public policy issues on a per-article basis since a peak in 2010 on both a total article and proportional basis.

Figure 6.20 Public policy reporting – percentage of all articles per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

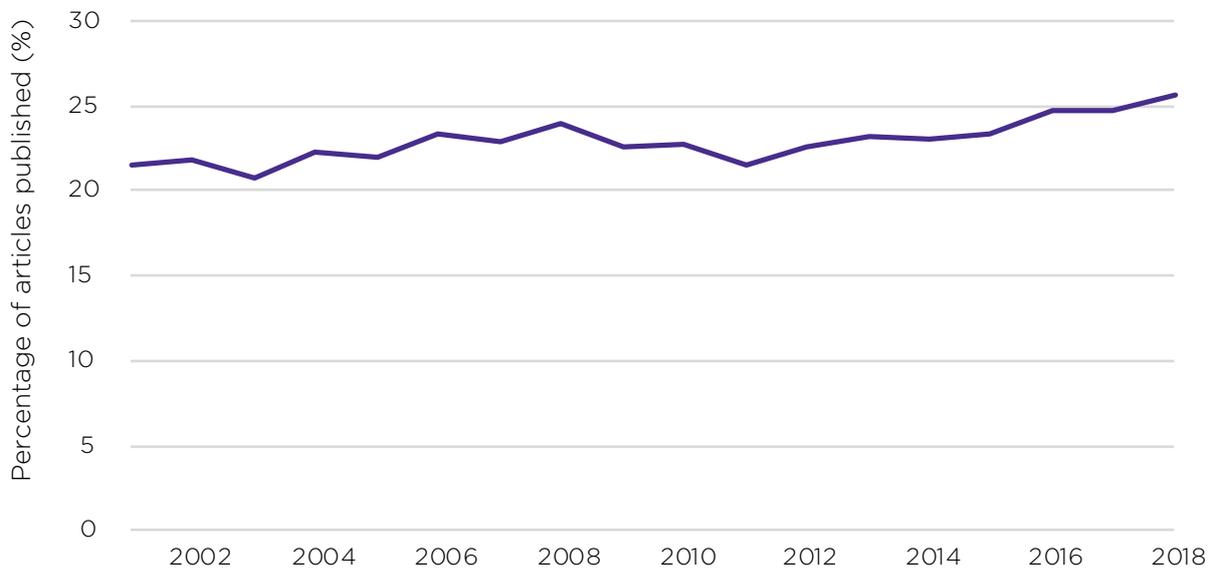
Figure 6.21 Sports reporting - total articles per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

In contrast, provision of articles reporting on sport remained strong during the period surveyed. Since 2001, the percentage of all published articles comprising sports coverage has significantly increased.

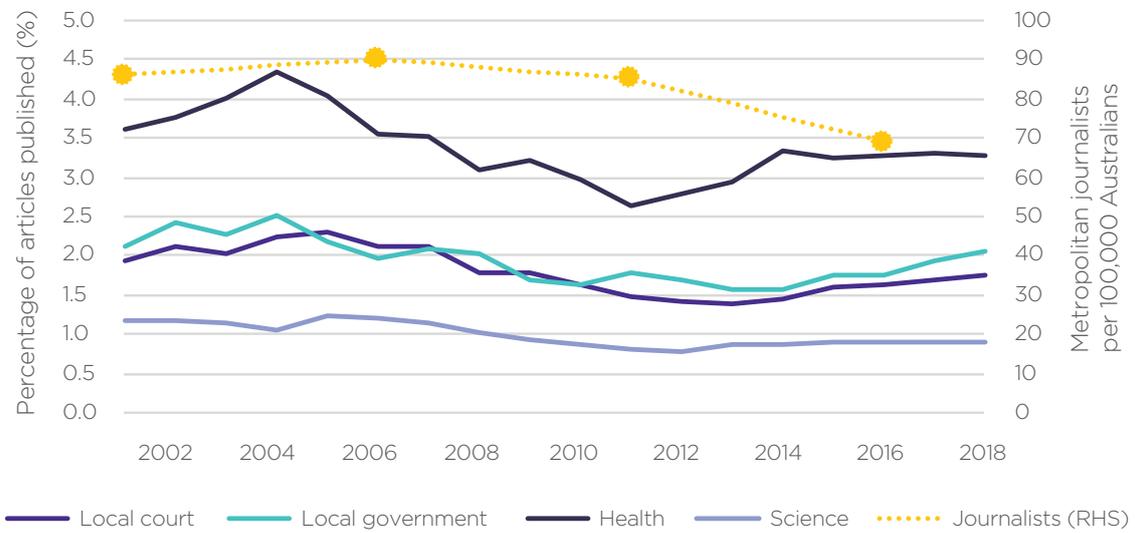
Figure 6.22 Sports reporting - percentage of total articles per year



Source: ACCC analysis of data sourced from the Factiva Global News Database

The trends in topics of reduced provision appear similar to trends in the employment of print media journalists in Australia.

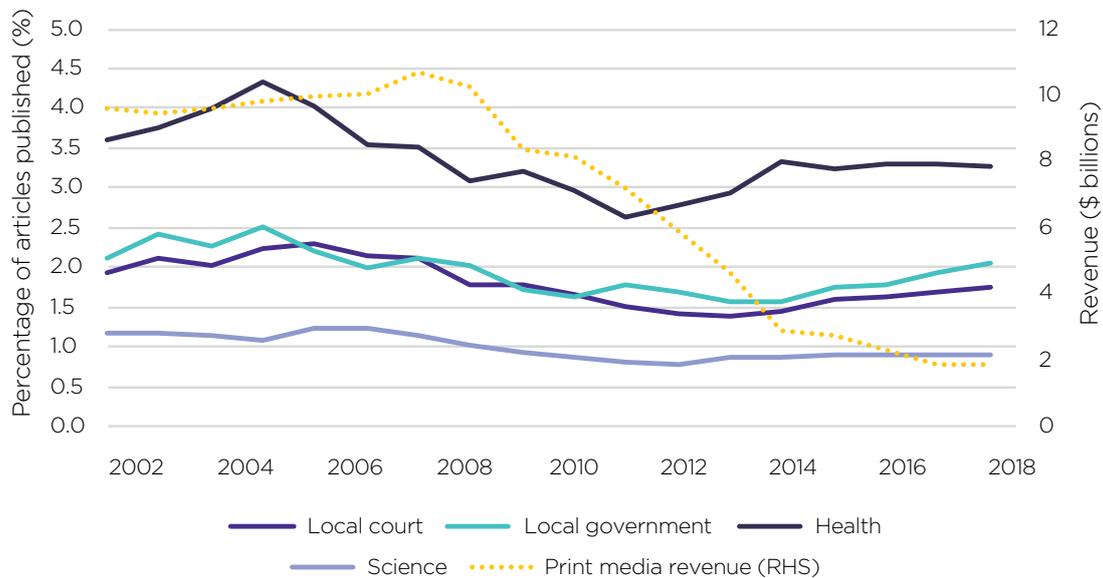
Figure 6.23 Reduced provision of public interest topics and the employment of print journalists in Australia



Source: ABS Census data. Print journalist numbers in 2001 represent an ACCC estimate based on traditional news publishers' proportion of 'total journalists' in 2006; ACCC analysis of data sourced from the Factiva Global News Database

The trend of reduced provision also broadly coincides with reductions in print media revenue. However, the ACCC notes that some caution must be taken in comparing the two different sets of data presented in figure 6.24 as the data on print media revenue also includes revenue for magazines and print classified directories, while data on the proportion of articles published by topic only relates to newspapers.

Figure 6.24 Reduced provision of public interest topics and print media revenue in Australia, inflation adjusted



Note: 'Print media revenue' combines advertising and classified revenue; it does not include revenue through sales and subscriptions.

Source: ACCC analysis of CEASA data¹¹²³; ACCC analysis of data sourced from the Factiva Global News Database.

¹¹²³ Data are adjusted for inflation.

The ACCC notes that coverage of several news topics identified in this analysis stabilises on a total-articles basis (and recovers on a percentage basis) in recent years while revenue continues to decline. One explanation for this may be the stabilisation and increase in operating expenditure of metropolitan and national newspapers from 2014-15 and 2015-16 shown in figure 6.12 above. This may suggest a willingness by publishers and editorial decision-makers to ensure at least minimum levels of these public interest topics despite reducing revenues.¹¹²⁴ However, the continued severe decline in advertising and classified revenues available to these publications calls into question the future sustainability of this approach.

These findings suggest that major metropolitan and national newspapers have significantly reduced their provision of several categories of news relevant to public interest journalism since the mid-2000s. This is likely to be driven by a number of different factors. One potential factor is the reduction in the number of journalists employed by the traditional print (now print/online) media businesses, which is itself a reflection of lower advertising revenues. Feedback from stakeholders supports this quantitative research, with concerns expressed about declines in local coverage and specialist ‘beat’ reporting, resulting from reduced resources available to commercial media newsrooms.¹¹²⁵ The available data shows some correlations between numbers of Australian journalists, print media revenue and particular categories of public interest journalism.

Given that this exercise focused only on traditional print businesses (now print/online businesses), the reduced provision of some types of coverage by these publications may be offset to some extent by increased coverage by other sources now available to Australian news consumers. As discussed in section 6.5 above, digital platforms have facilitated the emergence of ‘digital native’ news providers, such as *Crikey*, *The Guardian Australia* and *BuzzFeed News Australia*, which cover issues of national importance. Some of these digital natives, such as *Croakey Health Media*, also provide coverage of specialist topics like health. Additionally, Australians now have easy online access to international news sources that provide both specialist and generalist coverage of worldwide issues, such as new developments in science.

However, as the business models employed by digital natives require large national audiences, it is unlikely that these newer sources of Australian journalism will compensate for reduced provision of local court and local government coverage by traditional print (now print/online) media businesses.

On this basis, the ACCC considers that local court reporting and local government reporting represent the most immediately concerning topics where under-provision is likely to be an issue. It is possible that other sources of local court and local government reporting will emerge in the future. The provision of these forms of journalism should continue to be monitored, and if they continue to be under-provided the Government should reconsider this issue.

1124 As stated by media academic Andrea Carson ‘watchdog reporting endures in the digital age notwithstanding deep cutbacks to the newsrooms of mainstream media.’ See A Carson, *Investigative Journalism, Democracy and the Digital Age*, Routledge, 2019 p. 22; Additionally, one participant at the ACCC’s Future of Journalism Roundtable stated that when faced with declining resources, newsrooms would do their best to retain coverage of issues of significant and national importance. See ACCC, [Summary of ACCC Future of Journalism Roundtable, 15 March 2019](#), p. 3

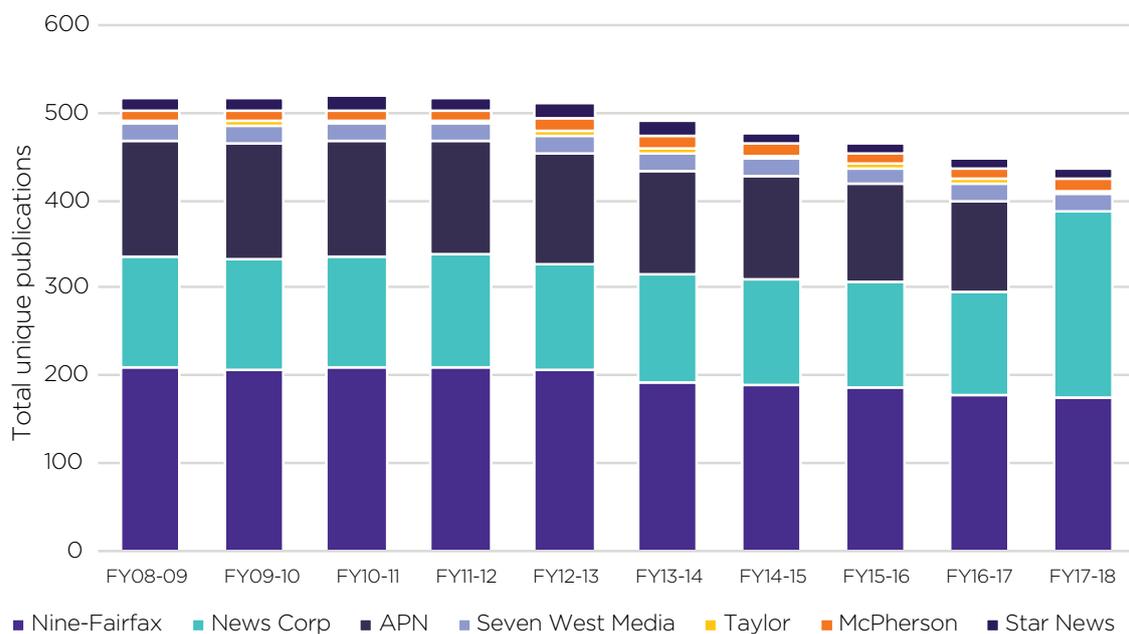
1125 Media, Entertainment and Arts Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 4; Australian Associated Press, [Submission to the ACCC Digital Platforms Inquiry](#), May 2018, pp. 3-4; Australian Press Council, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 6; Walkley Foundation, [Submission to the ACCC Digital Platform Inquiry](#), April 2018, pp. 4, 7-8; Country Press Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), January 2019, p. 2; Queensland Country Press, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Provincial Press Group, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1; Public Interest Journalism Initiative, [Submission to the ACCC Digital Platform Inquiry Preliminary Report](#), February 2019, pp. 2-3; ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 1; Numerous submissions to the Inquiry and participants at the Future of Journalism Roundtable expressed concern about the decline of specialist ‘rounds’ of ‘beat’ reporting caused by declines to employment of journalists.

6.7.4 Consequences of cost-cutting: local and regional print media

A number of traditional print (now print/online) media businesses have responded to the commercial pressures facing the media sector by closing publications. The ACCC analysed the number and location of local and regional newspapers published in Australia between 2008-09 and 2017-18. Data show that over this period, as advertising revenues have declined, the net total of unique local and regional newspaper titles published in Australia declined by 15 per cent between 2008-09 and 2017-18. This represents the closure of 106 newspapers over the period (figure 6.25).¹¹²⁶

The ACCC notes that newspapers have been considered to be effectively closed when both print and online circulation cease. None of the publications identified as ‘closures’ in this exercise have continued providing local coverage as online-only publications. The methodology and full findings of this analysis can be found at Appendix F to this Report.

Figure 6.25 Total number of unique publications from 2008-09 to 2017-18, by major media company



Note: APN was acquired by News Corp in December 2016.¹¹²⁷ Data shown in this chart for that business is based on the ACCC’s assumption that acquired publications were active between 2008-09 and 2016-17.

Source: ACCC analysis of data provided to the Inquiry

Most of these closures occurred in suburban metropolitan areas that are likely also serviced by large metropolitan publications.¹¹²⁸ However, the closure of a local publication in these areas still represents the loss of an important source of local news, particularly as the provision of local news is also declining in metropolitan publications, as discussed in section 6.7.3.

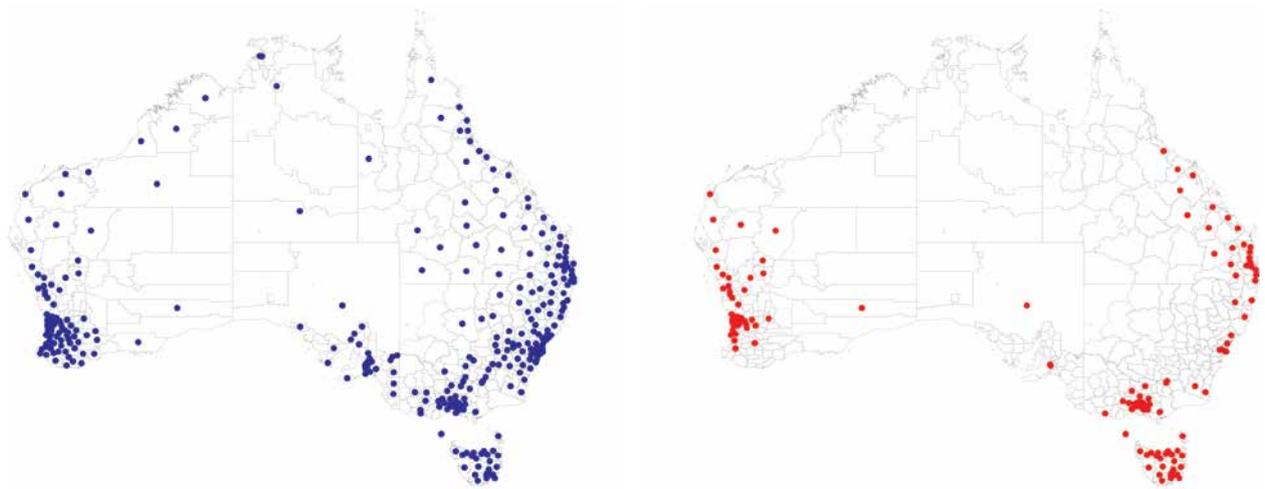
Further, 21 local government areas were left without any coverage from a single local newspaper by the end of the period surveyed, including 16 local government areas in regional Australia. This indicates a significant under-provision of local news in some suburban and regional areas of Australia. Figure 6.26 shows the geographic locations of local and regional newspaper coverage, and locations of closures identified as occurring from 2008-09 to 2017-18.

¹¹²⁶ A number of newspaper titles launched during the 10 year period, some of which also closed by the end of the period. These dynamics are accounted for in the sample, such that ‘closures’ should be read as *net* closures.

¹¹²⁷ ACCC, ‘[News Corporation - proposed acquisition of APN News & Media Limited’s Australian Regional Media division - ARM](#)’, 8 December 2016.

¹¹²⁸ See Appendix F - Local and regional newspaper closures: 2008-09 to 2017-18.

Figure 6.26 Geographical coverage and closure of regional and community publications (2008-2018)



Blue dots indicate local government areas where a local or regional publications was published between 2008-09 and 2017-18. Red dots indicate local government areas where a local or regional publication ended circulation between 2008 and 2018. Closure of a single publication can affect multiple local government areas.

Source: ACCC analysis of data provided to the Inquiry.

The trend of local and regional publication closures is expected to continue, and it has been indicated to the ACCC that more local and regional publications are earmarked to either reduce frequency of circulation or close entirely in 2019.¹¹²⁹

A recent study of local reporting conducted by the Public Interest Journalism Institute also found evidence of reductions to local reporting throughout Australia. This study found that 61 per cent of media managers employed by local governments had noticed a decline in coverage of their local government area over the last five years, with 32 per cent of respondents describing this decline as 'significant'.¹¹³⁰

6.7.5 Impact of new market entrants

Evidence suggests that digital platforms have played an influential role in enabling the entry of new competitors, increasing the diversity of news sources available to Australians. A range of digital natives have entered in the past five to ten years (see table 6.1).

In Australia, the digital natives typically rely significantly on digital platforms for website referrals, (particularly from Google and Facebook).¹¹³¹ However, this reliance varies. For example *BuzzFeed News Australia* uses social media posts extensively as a means of reaching audiences, and has over 2.5 million Facebook 'likes'.¹¹³² Conversely, the digital native publication *Crikey* focusses more on its email newsletter to reach audiences and has a relatively small Facebook presence, with just over 77 000 'likes'.¹¹³³

As discussed in section 6.5, most digital natives have operated with relatively small newsrooms, which have been getting smaller through recent widespread redundancies in Australia and overseas. Collectively, the number of journalists employed by digital natives appears to be much smaller than the number of editorial job losses among print publishers.

1129 Information provided to the ACCC.

1130 M Simons and G Dickson, [Availability of Local News and Information - 2019 State of the Regions Report](#), Australian Local Government Association, 16 June 2019, p. 5.

1131 Information provided to the ACCC.

1132 J McKinnell, ['The BuzzFeed model makes news for millennials, but why didn't it make money?'](#) *ABC News*, 30 January 2019, accessed 16 May 2019; Facebook, [BuzzFeed Oz](#), accessed 13 May 2019.

1133 *Crikey*, ['About'](#), accessed 16 May 2019; Facebook, [Crikey](#), accessed 16 May 2019.

As online news coverage is likely to be most commercially viable with large audiences, digital natives have relatively poor incentives to provide forms of journalism like local court and local government reporting that may have limited audiences, regardless of their contributions to the public interest. Due to this, Australian digital native news media businesses typically focus on issues of national or international significance. The ACCC is not aware of any digital natives that have sought to focus their coverage on a particular region of Australia.

Therefore, the emergence of digital native publishers has had mixed effects on the quality and choice of journalism available to Australian consumers. They are likely to have contributed to the plurality of voices on a number of issues that are relevant to audiences Australia-wide, such as matters relevant to democratic processes at the federal level. However, given the smaller size of these outlets' newsrooms, they are unlikely to fully compensate for reductions in journalism provided by more traditional media formats, and are particularly unlikely to focus on local and regional issues.

6.7.6 Overall impact and societal implications

Media businesses are in a period of transition as they seek ways to respond to the loss of traditional revenue sources, largely to the digital platforms, and to changing consumer preferences and habits.

Traditional print (now print/online) media businesses have been most significantly affected by these changes. While they are moving to online business models and seeking to reduce costs through administrative efficiencies, their journalistic output has been affected, notably through apparent reductions to provision of several news topics relevant to public interest journalism and through the closure of a large number of local and regional publications.

Television and radio broadcasters have continued to rely more heavily on their traditional media formats for advertising revenue. While they are involved in online media, and have been exposed to the same elements as online newspapers, they are currently less reliant on their online presence to generate income, and so have been somewhat insulated from decreases in revenue. However, these media formats are also seeking operational efficiencies in a way that has negatively affected levels of local journalism coverage, particularly in regional Australia. Some commentators believe that major digital platforms will look to broadcasting advertising revenue as an area for potential growth.¹¹³⁴ As such, the existing degree of revenue stability enjoyed by broadcast media businesses may not persist in the medium to long term.

However, digital platforms have made some positive contributions to the provision of journalism in Australia, particularly through enabling the entry of new media businesses and increasing the diversity of news sources available to Australians. However, these new sources of journalism are unlikely to compensate for the loss of journalists in the traditional media sectors or for the reductions to provision of particular types of public interest journalism, particularly local and regional reporting.

The digital platforms have also provided some more direct benefits to the production of journalism. As outlined in section 6.6, through the availability of vast amounts of information and networks of sources, digital platforms have decreased cost and increased efficiency of news-gathering and reporting. Some major digital platforms are also working with news media businesses to provide resources, training and funding to help address the challenges of the current commercial media environment. For example, the Google News Initiative is a US\$300 million global project that provides technical support and training to help publishers generate increase revenue in the online environment.¹¹³⁵ The Facebook Journalism Project Local News Accelerator involves a \$AU5 million commitment from Facebook to provide training and grants to media businesses to connect with and monetise audiences on Facebook and more broadly.¹¹³⁶ However, taken as a whole, it is unlikely these benefits will outweigh the negative resourcing impact caused by the loss of traditional sources of revenue available to Australia's news media businesses.

1134 *B&T Magazine*, [Ritson Warns TV: Facebook & Google Are Coming For You](#), 17 September 2018, accessed 22 May 2019.

1135 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

1136 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 17.

The changes to Australia's news media businesses identified in this section have the potential to be extremely significant for Australian society. International research highlights the crucial role that local news coverage, especially reporting carried out by local publications, has in providing oversight over civic institutions and promoting civic engagement. This includes:

- a 2019 study linking closure of local print newspapers with increased borrowing costs and decreased administrative efficiency for local governments¹¹³⁷
- a 2019 study that found reduced political competition for local government offices in cities where local newspaper staffing had declined¹¹³⁸
- a 2018 study that found areas served by a local newspaper have higher voter turnout in municipal elections¹¹³⁹
- a 2014 study showing a significant decrease in civic engagement in cities where local newspapers have closed.¹¹⁴⁰

On this basis, the ACCC considers that the declining provision of public interest journalism, and particularly the reduction in sources providing local reporting, justifies a degree of Government intervention.

6.8 Publicly funded journalism provided by the ABC and SBS

Key finding

- Australia's public broadcasters are important sources of journalism, and the value of the journalism they produce depends on stable and adequate Government funding.

In Australia, the publicly-funded national broadcasters, the Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS) are the predominant means by which under-provision of journalism has been addressed.

The ABC and SBS are valuable cultural institutions that use public funding to provide a broad range of functions, including the provision of public interest journalism that supplements journalism provided by Australia's commercial news media businesses. The 2019 Digital News Report found that ABC News and SBS News are the two most trusted news brands in Australia.¹¹⁴¹

The ABC spends 20 per cent of its annual funding on the production of news, and employs 855 journalists to provide high-quality news content on television, radio and online. It also demonstrates a strong commitment to news coverage in areas of regional and rural Australia that would not otherwise receive significant coverage through commercial media alone.¹¹⁴²

In recent years, investigative journalism by the ABC has regularly contributed to a number of important public policy outcomes.

1137 V Lee and D Wessel, '[How closures of local newspapers increase local government borrowing costs](#)', Brookings Institute, 16 July 2018, accessed 15 April 2019; P Gao, C Lee, D Murphy, '[Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance](#)', Brookings Institute, 24 September 2018.

1138 ME Rubado and JT Jennings, '[Political consequences of the endangered local watchdog: Newspaper decline and mayoral elections in the United States](#)', *Urban Affairs Review*, 2019.

1139 D Kubler and C Goodman, '[Newspaper markets and municipal politics: How audience and congruence increase turnout in local elections](#)', 2019, *Journal of Elections, Public Opinion and Parties*, vol. 29, no. 1, 2019, p. 1.

1140 L Shaker, '[Dead Newspapers and Citizen's Civic Engagement](#)', 2014 *Journal of Political Communication* vol. 31, no. 1, p. 131.

1141 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 78.

1142 Australian Broadcasting Corporation, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), April 2018, p. 14.

- Advocates for the conduct of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which was announced on 5 April 2019, cited investigations by the ABC's *Four Corners* and *Lateline* as important evidence in exposing abuse in Australian institutions.¹¹⁴³
- On 25 July 2016, the ABC's *Four Corners* aired an investigation into the Northern Territory's juvenile justice system, leading to the Prime Minister announcing the Royal Commission into the Detention and Protection of Children in the Northern Territory on ABC Radio the next day.¹¹⁴⁴

SBS provides a broad range of news and current affairs on its television, radio and online services. SBS has a particular focus on culturally and linguistically diverse content, and also provides news and current affairs from the perspective of Aboriginal and Torres Strait Islander Australians, including through its NITV service.¹¹⁴⁵ SBS's news radio services focus on foreign-language broadcasting and produce almost 70 radio programs in languages other than English.¹¹⁴⁶

As well as providing journalism that caters to sections of the Australian community not specifically served by other news media businesses, SBS contributes to the plurality of the Australian news media landscape by providing an independent source of journalism. In doing so, SBS regularly produces public interest journalism that sheds light on significant Australian and global issues.

- The 2018 SBS Dateline program *Myanmar's Killing Fields* investigated the mass exodus of Rohingya Muslims, and won the 2018 Walkley Documentary Award. This program presented evidence that the Myanmar Army was conducting a long-standing campaign to force Rohingya people out of the country. It is now being used as a reference point in investigations into the issue by the United States State Department and a United Nations Fact Finding Mission.¹¹⁴⁷
- In 2017, a months-long joint investigation between Fairfax (since acquired by Nine) and SBS revealed a multi-million dollar visa scam targeting hopeful migrants to Australia.¹¹⁴⁸ This story was made possible by 'drawing upon the knowledge and contacts of SBS programs that broadcast in other languages, including Mandarin, Vietnamese, Indian and Punjabi'.¹¹⁴⁹

In order for the ABC and SBS to continue providing public interest journalism, it is important that they maintain both independence from the Australian Government and access to adequate Government resources.

Independence and governance

The ABC and SBS are both governed by Charters and Codes of Conduct designed to ensure that their business and editorial decisions are made at arm's length from the Government. The ACCC notes that there have been several recent public recommendations to reform the governance of the ABC to increase its independence from Government.

For example, the recent Senate Environment and Communications References Committee Inquiry into Allegations of Political Interference in the Australian Broadcasting Corporation (the Political Interference Inquiry) recommended:

- strengthening legislation underpinning ABC Board appointments to ensure proper consultation with the Leader of the Opposition on the appointment of an ABC Chair

1143 E Gibbs, '[Time for justice - disabled people have waited long enough](#)', *Croakey*, 25 February 2019, accessed 19 April 2019; T Sands (DPO Australia Spokesperson), '[Royal Commission Welcome, But Must Include People With Disability](#)', media release, People With Disability Australia, 18 September 2018.

1144 ABC Backstory, '[How Four Corners exposed mistreatment within the NT juvenile justice system](#)', *ABC News*, 7 July 2017, accessed 19 April 2019; P Karp, '[Malcolm Turnbull announces royal commission into Northern Territory detention](#)', *The Guardian*, 26 July 2016, accessed 19 April 2019.

1145 Special Broadcasting Services Corporation, '[Submission to the ACCC Digital Platforms Inquiry Issues Paper](#)', April 2018, p. 9.

1146 Special Broadcasting Services Corporation, '[Submission to the ACCC Digital Platforms Inquiry Issues Paper](#)', April 2018, p. 3.

1147 The Walkley Foundation, '[The Walkley Documentary Award](#)', accessed 22 April 2019.

1148 E Potaka and M Christodoulou, '[Million-dollar visa scam leaves migrants \\$50,000 out of pocket, boss drives Porsche](#)', *Sydney Morning Herald*, 14 November 2017, accessed 22 April 2019; *The Feed* (SBS), '[Visa Scams: Desperation and exploitation](#)', 14 November 2017, accessed 22 April 2019.

1149 E Potaka, '[Visa scam victims come forward in response to SBS-Fairfax joint investigation](#)', *The Feed* (SBS), 23 February 2018, accessed 22 April 2019.

- amending selection processes of ABC Board members to ensure that appointees have substantial experience in the field of education; understand the role of independent media in democracy; and demonstrate substantial experience in the media industry
- setting stricter selection criteria to enhance transparency and accountability of the independent Nomination Panel that selects and nominates candidates for appointment to the ABC and SBS Boards.¹¹⁵⁰

At the Future of Journalism Roundtable held as part of this Inquiry, Professor Ross Garnaut presented a proposal to increase the ABC's independence through significant changes to its governance, including:

- introducing a stronger ABC Charter that would require ABC Board members to be independent from political and vested interests, to represent a balanced range of political views and to possess professional experience and skills relevant to the interest of Australians
- introducing a new independent 'external authority' to oversee the ABC Board in place of the government, with the power to dismiss and replace board members for non-compliance with the ABC Charter
- setting reasonable time limits on the duration of each ABC Board member's appointment
- making existing ABC Board members responsible for appointing new board members when there are vacancies, rather than allowing the government of the day to make new appointments.¹¹⁵¹

However, apart from Professor Garnaut's proposal, the ACCC notes that stakeholders did not raise the independence of the national broadcasters as a significant issue in the context of this Inquiry. While there may be merit in revisiting ABC and SBS governance arrangements in the future, including proposals such as Professor Garnaut's, this should be a matter for the Government to consider in the context of its response to the recommendations of the Political Interference Inquiry.¹¹⁵²

Ensuring adequate funding

The ABC and SBS receive public funding on a 'triennial' basis, allowing them to negotiate with the Government on their levels of funding once every three years. The triennial funding process is intended to provide the public broadcasters with funding certainty, enabling them to better plan production schedules over several years, and insulating them from the potential threat of political interference through unexpected changes to funding.

This process provides the ABC and SBS the opportunity to bid for additional funding to support particular projects over the next three years. The 2019-20 Budget announced the latest round of triennial funding, including base funding of approximately \$1.1 billion per annum for the ABC and \$283.9 million per annum for SBS from 2019-20 to 2021-22.¹¹⁵³ This triennial funding announcement also included:

- additional terminating funding of \$43.7 million over three years to allow ABC to continue its 'Enhanced News Program' for a further three years, maintaining the organisation's support for high-quality investigative journalism and news coverage of regional and local communities throughout Australia¹¹⁵⁴
- additional terminating funding of \$29.6 million over three years to allow SBS to guarantee the ongoing quality of its television, radio and online services.¹¹⁵⁵

1150 Senate Environment and Communications References Committee Inquiry into Allegations of political interference in the Australian Broadcasting Corporation, [Report](#), 1 April 2019, pp. 7-24.

1151 Full text of Professor Garnaut's proposal is available as part of the ACCC's summary of the Future of Journalism Roundtable. See ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 17.

1152 Senate Environment and Communications References Committee Inquiry into Allegations of political interference in the Australian Broadcasting Corporation, [Report](#), 1 April 2019.

1153 Australian Government Budget 2019-20, Budget measure '[Guaranteeing Australia's Public Broadcasters - funding for the ABC and SBS](#)', Budget Paper 2, p. 57.

1154 D Anderson (ABC Acting Managing Director), '[Message from David Anderson on the Federal Budget](#)', media release, ABC, 3 April 2019.

1155 Australian Government Budget 2019-20, Budget measure '[Guaranteeing Australia's Public Broadcasters - funding for the ABC and SBS](#)', Budget Paper 2, p. 57.

In recent years, the ABC and SBS have been subject to funding changes within triennial funding periods, including substantial efficiency savings for both public broadcasters in 2014¹¹⁵⁶ and an indexation pause for the ABC in 2018.¹¹⁵⁷ Additionally, recent triennial funding announcements have not funded any new ABC or SBS projects. Instead, recent rounds have extended funding for projects that would otherwise terminate (such as the ABC Enhanced News Project and SBS 'ongoing quality' funding) or partially restored previous funding reductions on a temporary basis (restoration of SBS advertising revenue that could not be raised through anticipated changes to advertising restrictions).¹¹⁵⁸

Due to the threats to the commercial media sector's production of public interest journalism discussed earlier in this chapter, the ACCC considers that the ABC and SBS perform a critical role in addressing the risk that public interest journalism is under-produced and in contributing to the plurality of journalism in Australia.

Recommendation 9: Stable and adequate funding for the public broadcasters

Stable and adequate funding should be provided to the ABC and SBS in recognition of their role in addressing the risk of under-provision of public interest journalism that generates broad benefits to society.

This recommendation is consistent with the recommendations on ABC and SBS funding made in two recent Senate inquiries. The Senate Select Committee on the Future of Public Interest Journalism, which recommended 'that the ABC and SBS be funded adequately, so that they can deliver on their charter obligations, support rural and regional service provision and have a strong fact-checking capacity.'¹¹⁵⁹

Similarly, the Political Interference Inquiry recommended the Government 'acknowledge the benefit and desirability of stable funding for the Australian Broadcasting Corporation, not only for Australian Broadcasting Corporation planning purposes but also as a guard against political interference, and commit to stable funding for the Australian Broadcasting Corporation over each budget cycle'.¹¹⁶⁰

The ACCC notes that public broadcasters overseas have been taking a more active role in addressing the under-provision of local journalism by the commercial media sector. Notably, the United Kingdom Government's Local News Partnerships program involves the placement of up to 150 British Broadcasting Corporation (BBC) journalists in local commercial media newsrooms to provide additional resources, training and content-sharing between these newsrooms and the BBC.¹¹⁶¹ The ACCC has not recommended the implementation of an equivalent program in Australia, as a number of features of the Australian media market suggest that a comparable scale may be difficult to implement.

The ACCC notes that stable and adequate funding will allow the ABC and SBS to consider increasing their provision of journalism in local and regional areas, including through investigating opportunities to further support and collaborate with commercial media businesses and local communities throughout Australia.

While the recommendation above is focused on the support provided to the publicly-funded broadcasters, the ACCC recognises that the sustainability of commercial news organisations is also important to ensure both quality and plurality of Australia's news media landscape.

1156 [ABC funding to be cut by \\$254 million over five years, Communications Minister Malcolm Turnbull says](#), *ABC News*, 20 November 2014, accessed 16 May 2019; Australian Government Budget 2014-15, Budget measure '[Australian Broadcasting Corporation and Special Broadcasting Service Corporation – efficiency savings](#)', Budget Paper 2, p. 66; 2014-15 Mid-Year Economic and Fiscal Outlook, [Australian Broadcasting Corporation and Special Broadcasting Service Corporation – additional efficiency savings](#)', p. 141.

1157 [Budget 2018: ABC funding frozen in \\$84 million hit to bottom line](#), *ABC News*, 8 May 2018, accessed 16 May 2019.

1158 [Budget 2018: Funding freeze for ABC, boost for SBS](#), *SBS News*, 8 May 2018, accessed 16 May 2019.

1159 Senate Select Committee into the Future of Public Interest Journalism, [Report](#), 5 February 2018, p. 112.

1160 Senate Environment and Communications References Committee Inquiry into Allegations of political interference in the Australian Broadcasting Corporation, [Report](#), 1 April 2019, p. 52.

1161 More information about this program is available in R Foster and M Bunting, 'Public funding of high-quality journalism', 10 April 2019.

6.9 Public support for private sector journalism

Key findings

- Targeted Government assistance may be necessary to support forms of public interest journalism that are at risk of under-provision.
- Any Government assistance for public interest journalism should be appropriately targeted and designed to ensure the efficient and effective use of Government resources, and to protect the independence of the journalism it supports.
- There is scope to change Australia's current framework for charitable status and the tax deductibility of philanthropic donations to encourage increased philanthropic funding of public interest journalism.

6.9.1 Framework for assessment

As discussed in sections 6.4 and 6.7, leaving the production of journalism entirely to the private sector risks an under-provision of public interest journalism in national, regional and local communities. That risk has increased with the growth of digital platforms and the financial stress this has placed on advertising-funded media organisations.

Most Western democracies address the risk of the under-provision of public interest journalism through policies that provide public support for journalism. Support can be through funding public service media providers (as discussed in section 6.8), by directly subsidising private media businesses or by concessional tax arrangements for producers or consumers of journalism. There is significant variation in the use of these mechanisms internationally, as outlined in a report prepared for the ACCC.¹¹⁶²

Since the arrival of the internet and the rise of digital platforms, the revenue and resourcing available to private sector journalism have declined significantly. This has increased the risk of under-provision of public interest journalism. It is not possible to determine the socially optimal level of public interest journalism. However, the analysis reported in section 6.7 does identify journalistic activities contributing to public interest journalism that may be at particular risk of under-provision.

One such area is local and regional journalism. This area of journalism has also been identified as at risk in other countries, including in the United Kingdom by the Cairncross Review.¹¹⁶³ Section 6.7 also identifies areas of media coverage that have declined, including health, science, local court and local government reporting in metropolitan and national newspapers. Similar considerations underpin recent policy initiatives by the Canadian Government to support the provision of journalism.¹¹⁶⁴

The Preliminary Report identified, as an area for further assessment, options to improve the ability of news media businesses to fund the production of news and journalism. The ACCC's assessment of policy options in this section is guided by the findings in section 6.7 about areas in which the risk of under-provision may be most severe. This analysis also uses the following criteria to evaluate the appropriateness of potential measures to provide support:

- **Effectiveness** – How comprehensively and quickly will the measure increase the provision of public interest journalism above current levels – or at least arrest a current decline in provision?
- **Efficiency** – How efficiently will the measure make use of Government resources in promoting the provision of public interest journalism?
- **Independence** – Does the measure threaten the independence of journalism, and how well does it manage any risk of political interference in journalism?
- **Risk of market distortion** – Does the measure risk distorting the competitive process in the provision of journalism by favouring particular media business models over others?

1162 R Foster and M Bunting, 'Public funding of high-quality journalism', 10 April 2019.

1163 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 17.

1164 R Foster and M Bunting, 'Public funding of high-quality journalism', 10 April 2019.

- **Potential for adverse effects on incentives**– Even if the measure is successful in increasing the provision of journalism in the short- or medium-term, will it threaten the long-term sustainability of the media industry? To what extent does the measure encourage media businesses to continue to seek and pursue new ways of funding their activities? Does it create a risk of long-term dependence on the Government?
- **Transparency** – How publicly transparent are the costs and benefits of the measure?

In the following analysis, the ACCC considered submissions made in response to the Preliminary Report and the views of stakeholders at the Future of Journalism Roundtable held on 15 March 2019.¹¹⁶⁵

6.9.2 Tax incentives for the consumption of journalism

As is noted in section 6.6 above, many media businesses are seeking to grow direct consumer payments as a revenue source to offset the loss of advertising revenue and fund production of news and journalism. However, Australian consumers are generally reluctant to pay for journalism, as is evident in the ACCC News Survey. This survey showed that only 43 per cent of respondents had paid for news in any form over the preceding year.¹¹⁶⁶ Of those who had not paid for news within the past year, nine out of 10 stated that it was unlikely that they would start to pay for news in the next year.

The Preliminary Report identified personal income tax changes to improve the incentives for consumers to pay directly for journalism as an area for further assessment. This proposal received in-principle support from a number of stakeholders. In its response to the Preliminary Report, Nine stated ‘tax deductibility could make a material difference to the ability of publishers with distinctive journalism to scale up their subscription revenue and fund public-interest journalism’.¹¹⁶⁷ The Guardian, the Australian Press Council and Free TV Australia all expressed support for this proposal in their submissions.¹¹⁶⁸

In assessing the merits of the proposal, the ACCC considered the following:

- the implications for the employment of journalists and the production of public interest journalism
- potential distortion of competition between media businesses
- the criteria of media independence, longer term adverse effects and transparency as set out in section 6.9.1.

The ACCC considered tax deductibility of subscriptions as the specific mechanism by which to stimulate the production of public interest journalism. This included assessment of three linkages:

- the impact of the measure on the number of subscriptions
- the extent to which increased subscriptions leads to higher industry revenues
- the extent to which higher industry revenues would directly affect employment of journalists and production of journalism, and particularly production of public interest journalism.

The ACCC concluded that tax deductibility of subscriptions is unlikely to be very effective in supporting the provision of public interest journalism. Specifically:

- the impact of tax deductibility of subscriptions on the number of subscriptions is unclear and may be small
- the extent to which increases in subscriptions affect expenditure on journalism is unclear and may be small as media businesses are able to service additional subscribers without increasing the number of journalists employed or the amount of journalism produced
- to the extent that expenditure on journalism increases, the fraction of this that would support production of public interest journalism is unclear.

1165 ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 4.

1166 Roy Morgan Research, [Consumer Use of News](#), November 2018, p. 8.

1167 Nine, [Submission to the Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 23.

1168 The Guardian, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 23; Australian Press Council, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3; Free TV Australia, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 24.

In addition to the potential ineffectiveness of this proposal in directly supporting public interest journalism, the policy does not appear to measure well against other criteria:

- the measure is unlikely to be very efficient – as the tax deduction would be provided to both existing and new subscribers, this proposal will effectively involve a transfer of resources from taxpayers to news subscribers, and may have a relatively limited effect on the provision of public interest journalism
- the outcomes of tax deductibility of subscriptions are difficult to measure and assess
- by favouring subscription-based media businesses over other media businesses, the measure could be distortionary and may discourage media businesses from pursuing new business models or innovative revenue streams.

However, one potential advantage of the tax deductibility of subscriptions would be the low risk of Government interference in the independence of media businesses.

Given the limitations identified with the use of personal income tax deductibility of subscriptions to support public interest journalism, the ACCC has decided not to recommend such a measure. The ACCC notes that few other jurisdictions provide tax deductions for media subscriptions.¹¹⁶⁹ Consequently, issues related to implementation are not discussed in this Report.

6.9.3 Tax incentives for the production of journalism

An alternative tax measure identified for further assessment in the Preliminary Report is the provision of tax offsets for costs incurred by news media businesses in producing particular types of journalism that have high public benefits and are at risk of under-production.

In undertaking this assessment, the ACCC focused on the most significant direct cost in the production of news and journalism, namely the employment of journalists. This focus was supported by submissions responding to the Preliminary Report. The Public Interest Journalism Initiative stated ‘tax offset against the employment of journalists directly engaged in public interest journalism would immediately be translated into the employment of more journalists’.¹¹⁷⁰

The measure considered was a refundable tax rebate on expenditure incurred in employing journalists producing journalism. By making the rebate refundable, media businesses could obtain the benefit irrespective of the level of profitability or ‘for-profit’ or ‘not-for-profit’ status.

Under this mechanism, the benefit of the rebate to media businesses and the cost to the Budget could be controlled to a reasonable extent by the level at which the rebate is set. Data provided to the ACCC by commercial news media businesses indicates that total investment in full time equivalent employees producing journalism in Australia is approximately AU\$600 million a year. On this basis, a 25 per cent rebate on current levels of expenditure would provide a benefit to media businesses, and a cost to the Budget, in the order of AU\$150 million a year. This expenditure would increase if the tax rebate had the intended effect of increasing the employment of journalists engaged in public interest journalism. The cost of the measure could be limited by imposing a cap on the benefit accruing to an individual media business or limiting eligible businesses.

However, the ACCC is of the view that tax rebates are unlikely to be particularly effective in promoting public interest journalism. Nor are they likely to be an efficient use of Government funds.

While tax rebates would directly support the employment of journalists, it is not clear whether tax rebates would increase the employment of journalists producing public interest journalism. In this respect, tax rebates for the ongoing employment of journalists differ from the tax assistance provided to the Australian film industry through the Australian Screen Production Incentive, which helps to fund discrete projects, or the Offshore Banking Unit Tax Concession, where payments specifically assist banks in attracting new business from overseas.

¹¹⁶⁹ R Foster and M Bunting, ‘Public funding of high-quality journalism’, 10 April 2019, p. 4.

¹¹⁷⁰ Public Interest Journalism Initiative, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

The effectiveness of tax rebates could be improved by imposing conditions on eligibility criteria. However, such an approach would involve increased complexity and would likely increase administration costs and the risks of ‘gaming’ these arrangements. This is because it is difficult to directly associate the rebate with increases in journalistic output in general or public interest journalism in particular, particularly where the rebate would support ongoing employment of staff rather than the production of identifiable and quantifiable content.

As the ACCC considers that a tax rebate on employment of journalists would not be a particularly effective or efficient measure to support production of public interest journalism that is at risk of under-provision, the policy was not assessed further against other factors set out in section 6.9.1.

Based on this analysis, the ACCC concluded that the introduction of a tax rebate would not be a preferred policy to stimulate production of public interest journalism either on a continuing basis or as a transitional measure.

6.9.3 Direct government funding for private production of journalism

The third funding option identified for further assessment in the Preliminary Report was the use of direct funding in the form of grants to support the production of public interest journalism that is at significant risk of under-provision.

The types of journalism identified as being at the highest risk of under-provision are:

- reporting on local and regional affairs, courts and government
 - by both print and broadcast media
 - in urban as well as rural and regional areas
- reporting on certain topics of particular public interest, including health and science.

The ACCC heard feedback from stakeholders at the Future of Journalism Roundtable about the challenges faced by news media businesses. A number of participants claimed large businesses with diversified outputs may be more resilient to the decline in revenues than businesses serving smaller communities and with smaller audiences.¹¹⁷¹

While the ACCC has undertaken indicative research to identify the types of public interest journalism most significantly affected by declining resources, further research may potentially indicate other types of public interest journalism that may be at risk of under-provision. For example, with the data available to it, the ACCC was not able to undertake research into whether production of detailed investigative reporting and analysis of complex issues is at risk of under-provision.

The following is an assessment of grant schemes to support production of public interest journalism against the criteria set out in section 6.9.1:

- **Effectiveness** – Grants can be tailored to directly address specific types of journalism that are identified as a priority to address. Subject to careful design, grants can be an effective means by which to address the problem. Grants programs can also maintain their efficacy over time through regular review and revision to identify and address any shortcomings or changing circumstances.
- **Efficiency** – As with other forms of assistance, it can be difficult to design grants that target incremental investment in public interest journalism. This can be addressed to some degree by assessing the expenditures supported by the grant and targeting new expenditure accordingly.
- **Independence** – Government grants programs targeting specific industry participants always present the risk of political influence or interference, or at least the perception of such potential influence or interference. This is a particularly sensitive issue for news media businesses, which are rightly protective of their editorial independence, as raised in response to the Preliminary Report.¹¹⁷² An important part of the design of a grants program would be to ensure both the fact and the perception of editorial independence. In the case of grants supporting public interest journalism,

¹¹⁷¹ ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 2, 4, 11-12.

¹¹⁷² Media, Entertainment and Arts Alliance, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 11; Croakey Health Media, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 12; Public Interest Journalism Initiative, [Submission in response to the Preliminary Report](#), February 2019, p. 7.

the administration and provision of grants should occur at arm's length from Government – potentially involving an independent body – in order to maintain the editorial integrity of the journalism they support.

- **Risk of market distortion** – This risk will depend on how well a grants program is designed and implemented. For example, eligibility criteria should not exclude businesses on the basis of business model or ownership.
- **Potential for adverse effects on incentives of media organisations** – Grants may act as a disincentive for media businesses to continue to seek and pursue other ways of funding their activities, depending on the size of grants relative to the size of the relevant businesses. This risk is considerable, even if it is not as substantial as would be the case if the Government provided support without imposing any requirement to increase investment in journalism. However, the ACCC acknowledges that some news media businesses with small, localised audiences may not survive without continuing assistance.
- **Transparency** – Regular reporting by Government on the costs and outcomes of grants programs can ensure the public transparency of these programs. Such requirements are contained in the existing Commonwealth Grants Rules and Guidelines 2017 that apply to all grants provided by the Australian Government.¹¹⁷³

In contrast to tax measures, targeted grants are likely to be more effective, efficient, flexible and transparent in achieving the objective of supporting the production of the types of public interest journalism at risk of under-provision. However, there are possible risks that must be guarded against. It will be important to ensure that grants funding does not create an uneven playing field by favouring particular business models or ownership structures, and that there is no threat or perception of threat to media independence. Careful design of a grants program can appropriately mitigate these risks.

Existing Australian Government grants to support private provision of journalism

On 14 September 2017, the Australian Government announced an AU\$60.4 million investment in journalism through the Regional and Small Publishers Jobs and Innovation Package. As announced, this package includes three separate grant programs:

- the Regional and Small Publishers Innovation Fund (providing AU\$50 million in grants over three years)
- the Regional and Small Publishers Cadetship Program (providing AU\$8 million to support 200 cadetships over two years)
- the Regional Journalism Scholarship Program (providing AU\$2.4 million to fund 60 scholarships over two years).

To be eligible for these grants, media businesses must be majority-owned by Australians, must not be affiliated with a political organisation such as a political party, trade union or lobby group, and must adhere to a robust editorial code of conduct.

Despite the presence of the Advisory Committee, many stakeholders were unsatisfied with Round 1 of the Innovation Fund grants, which allocated only AU\$3.6 million of the AU\$12.4 million available for the round. Publishers expressed concerns that:

- the eligibility criteria were politicised and designed to exclude certain publishers¹¹⁷⁴
- the application and assessment process was too complex and not suitably targeted to small and regional publishers without the organisational expertise and resources to successfully apply¹¹⁷⁵
- the grants focused on 'innovative' technology-based projects rather than on securing the sustainability of struggling small and regional publishers.¹¹⁷⁶

1173 Australian Government, [Commonwealth Grants Rules and Guidelines](#), Department of Finance, 2017.

1174 The Guardian, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 22.

1175 McPherson Media Group, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

1176 ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 4.

Responding to many of these concerns, the Government announced on 5 April 2019 that Round 2 of the Innovation Fund would include a 'Regional Grant Opportunity' that will make available unallocated funding from Round 1 to regional news outlets. This new regional grant opportunity will not be limited to funding 'innovative' projects as in Round 1, but will provide 'sustainability funding' to allow regional media businesses to meet ongoing costs in the short term. The new grant has fewer eligibility criteria than Round 1, will provide a longer application period, and will assess applicants based on:

- their provision of public interest journalism
- the scope and quality of their editorial and complaints handling policies
- a business case that demonstrates how receipt of grant funding would increase the sustainability of an applicant's business.

It is too early to meaningfully assess the impact or effectiveness of either the recent changes to the Innovation Fund or the Regional and Small Publishers Jobs and Innovation Package as a whole. However, the ACCC notes that the new Regional Grant Opportunity is limited to news media businesses in regional areas and is unlikely to address the sustainability issues being experienced by local news media businesses in metropolitan and suburban areas. Additionally, the whole package only provides a relatively limited amount of funding, and is due to terminate in 2020-21.

Other relevant Australian Government grant programs

In the context of providing public funding for the private sector's production of journalism, it is worth considering the levels of funding that the Australian Government already provides to the country's media and arts industries. This includes:

- providing Screen Australia with around AU\$89 million a year to fund grants and investments in Australian film, television and online video content¹¹⁷⁷
- providing the Australia Council with around AU\$216 million a year to fund grants to artists and organisations across a range of art-forms.¹¹⁷⁸

Both these major funding commitments are administered through independent statutory bodies, which allocate grants to industry participants based on guidelines agreed by the Government. This allows decisions about awarding particular grants to be made at 'arm's length' from the Government, and without Ministerial influence.

International grant funding to support journalism

A number of international governments provide direct funding support for various types of journalism. For example:

- Since 2009, the Canadian Government has provided around CAN\$80 million (AU\$84 million) a year through a fund to support print magazines, non-daily community newspapers and digital periodicals. This fund supports around 800 publications a year, and provides around CAN\$19 million (AU\$20 million) a year specifically to community newspapers. In 2018, the Canadian Government announced new funding of CAN\$10 million (AU\$10.5 million) a year for five years to fund local journalism in under-served communities.
- As at 2015, the French Government provided €77 million (AU\$122 million) a year in direct grants to news organisations. This includes both direct subsidies for newspapers that are not in market-leading positions, and grants for modernisation, innovation and emergency support for news organisations.
- While not a grants scheme, the UK Government essentially provides direct support for local journalism through the BBC's Local News Partnership, as noted in section 6.8 above. This initiative provides £8 million (AU\$14.8 million) a year over 11 years to fund the placement of up to 150 journalists in regional newsrooms around the United Kingdom. The Cairncross Review recommended increasing funding for this program, and moving administration to a body independent of the UK Government.

1177 Australian Government, [Communication and the Arts Portfolio - Full Budget Document 2017-18](#), Department of Communication and the Arts, p. 273.

1178 Australian Government, [Australia Council Budget Statement 2017-18](#), Department of Communication and the Arts, p. 54.

- The New Zealand Government's 'NZ on Air' grants program provides four funding streams, including around NZ\$38 million a year for a platform-neutral 'factual' funding stream that focuses on documentaries, news and current affairs for diverse audiences. This operates as a contestable fund providing grants for projects that investigate significant topics of current or historic interest to New Zealand, involve specialist journalism, or cover an event or issue important to New Zealand's culture and identity.

The paper *Case studies for funding high quality journalism* published alongside this Report provides much more detail on approaches to direct funding and other mechanisms to support journalism by various international governments.¹¹⁷⁹

Direct funding for local journalism

Evidence provided in section 6.7 above suggests that reporting on local issues by metropolitan, local and regional publications is at significant risk of under-provision, and that this risk is tied to decreasing resources available to these publications. Such under-provision may have strong effects on communities, as these publications appear to be the only major private-sector source for this kind of reporting. Commercial broadcasters do not generally have the granularity of local newspapers and are increasingly consolidating news provision into regional centres,¹¹⁸⁰ while the business models of online 'digital native' news media businesses do not incentivise the production of this kind of material.

The ACCC considers that the loss of these services would represent a significant loss of public interest journalism and would seriously undermine accountability of local government and public institutions in localities affected. Recent international research has demonstrated that declines in local media coverage directly contribute to less-efficient administration of local government¹¹⁸¹, less active civic engagement¹¹⁸² and reduced competition for local government office.¹¹⁸³

The ACCC considers that it is in the public interest for media businesses with a local focus to continue to provide public interest journalism, and that doing so will likely require ongoing support.

Recommendation 10: Grants for local journalism

The Regional and Small Publishers Jobs and Innovation Package should be replaced with a targeted grants program that supports the production of original local and regional journalism, including that related to local government and local courts.

The program should be platform-neutral and administered at arm's length from Government, with eligibility criteria designed by an independent expert advisory panel. Due to its broader scope than the Regional and Small Publishers Jobs and Innovation Package, which provided AU\$20 million per year, the program should provide a greater amount of funding – totalling in the order of AU\$50 million a year.

The Government should review this program after three years of operation to assess its effectiveness and to determine whether it should be expanded to other areas of public interest journalism at risk of under-provision by the Australian commercial media market.

1179 R Foster and M Bunting, 'Case studies of schemes for funding high quality journalism Phase 2 report for the ACCC', April 2019.

1180 Government of the United Kingdom, *The Cairncross Review: A Sustainable Future for Journalism*, Department for Digital, Culture, Media & Sport, 12 February 2019, p. 18.

1181 L Shaker, 'Dead Newspapers and Citizen's Civic Engagement', *Political Communication* vol. 31, no. 1, 2014, p. 131.

1182 L Shaker, 'Dead Newspapers and Citizen's Civic Engagement', *Political Communication* vol. 31, no. 1, 2014, p. 139.

1183 ME Rubado and JT Jennings, 'Political consequences of the endangered local watchdog: Newspaper decline and mayoral elections in the United States', *Urban Affairs Review*, 2019.

A number of important design elements should be considered when implementing this recommendation.

- The effectiveness of a grants scheme will require a clear articulation of the objectives and outcomes being sought. These should be expressed in terms of the journalistic activities identified as needing support.
- Eligibility for grants should be determined by the coverage applicants can provide to Australian local and regional communities, rather than the business structure of applicants. On this basis, the recommended scheme should not exclude media businesses that are not incorporated entities in Australia, are not registered for GST or do not have their primary business operations within a regional commercial broadcasting licence area.
- To ensure independence from the Government, the assessment criteria for these grants should be designed by an independent expert committee made up of journalism industry representatives and other independent experts such as academics and former industry participants. The committee should also make decisions on the allocation of grants.
- This expert committee could form the board of a new independent statutory entity in the model of Screen Australia (for example, 'Journalism Australia'). Alternatively, if the Government is not inclined to create a new independent statutory entity for this purpose, the secretariat and support functions for the committee could be administered by an existing Government entity such as the Australian Communications and Media Authority (ACMA) or the Department of Communications and the Arts.
- In designing grant guidelines and assessment criteria, Journalism Australia should give weight to proposals that would provide dedicated local coverage in geographical areas that are currently underserved, and proposals that will fund entirely new local coverage that would not otherwise exist. Consideration should also be given to program elements designed to address both short-term and longer-term objectives, with the latter potentially including continuing funding for types of journalism that may not continue without support.
- The allocation of grants should be platform-neutral, with print, online and broadcast news providers all eligible to apply.

It would be appropriate to review this grant scheme after three years of operation to ensure that it is having the intended effect of supporting the continued provision of local reporting. Given the rapid developments in news media markets, this review should also consider whether it would be appropriate to expand this grant scheme to cover other forms of public interest journalism that are at risk of under-provision, either through a redirection or supplementation of the annual funding initially provided to this program.

The ACCC considers that this proposed grants scheme for local journalism should replace terminating funding for the Regional and Small Publishers Jobs and Innovation Package. The ACCC notes that first stage of the Innovation Fund component of the package was significantly under-subscribed, likely due to concerns expressed by stakeholders about its narrow eligibility criteria and the complexity of its application process.¹¹⁸⁴

While the Government review of the Innovation Fund has addressed some of these concerns, the legislative provisions enabling this program exclude media businesses that are not an incorporated entity in Australia, are not registered for GST or do not have their primary business operations within a regional commercial broadcasting licence area. This excludes a number of relevant news media businesses that may wish to apply for funding – such as local news outlets operating in urban and peri-urban areas and digital natives owned by entities incorporated overseas. Therefore, the scheme is limited in its ability to fully address the problems identified and to do so without introducing distortions into the market.

1184 ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p.4; Public Interest Journalism Initiative, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4; Guardian Australia, [Submission to the Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 22-23.

6.9.4 Philanthropic funding of journalism

In many countries, and particularly the United States¹¹⁸⁵, private philanthropists have responded to the declining resources available to news media businesses. In these countries, philanthropy provides a growing source of funding for public interest journalism through direct contributions to producers of journalism and ancillary organisations supporting journalism through grants, training, education and advocacy.¹¹⁸⁶ The ACCC notes that:

- The United States has an extensive, well-funded not-for-profit news environment in which media businesses have become eligible for tax-deductible donations more frequently than in other jurisdictions.
- The United Kingdom has a smaller but active not-for-profit news environment in which media businesses struggle to become eligible for tax-deductible donations.
- The Canadian Government has recently introduced reforms to encourage philanthropic support for journalism.

More detail on international examples of philanthropically funded journalism can be found in appendix G.

Since the publication of the Preliminary Report, the ACCC has further considered the role that philanthropy in this sector might play in Australia, based on submissions from multiple stakeholders to the Inquiry.¹¹⁸⁷

Philanthropy and journalism in Australia

Philanthropic support for journalism in Australia has been modest, but has grown in recent years.

In 2011, Graham Wood contributed AU\$11 million to establish *The Global Mail*, which was designed to provide free long-form investigative journalism without advertising. At its peak, *The Global Mail* employed 21 journalists, but it failed to gain traction and audience and ceased operations in 2014.¹¹⁸⁸

In March 2018, Guardian News & Media partnered with the University of Melbourne to launch the Guardian Civic Journalism Trust. This trust received two contributions worth AU\$700 000 to fund reporting of Indigenous affairs and political accountability in *The Guardian Australia*.

The Walkley Foundation manages the Walkley Awards, administers grants and funds journalism scholarships. In 2018, the Walkley Foundation launched its Public Fund for Journalism to increase philanthropic donations, and announced it would provide AU\$50 000 in grants for Australian journalists in the first half of 2019.¹¹⁸⁹

Most recently, in November 2018 Judith Neilson committed AU\$100 million to establish the Sydney-based Judith Neilson Institute for Journalism & Ideas. This institute aims to encourage quality journalism in Australia and the world through education, grants and collaboration with journalism schools and news organisations.¹¹⁹⁰

1185 B Birnbauer, '[Philanthropy is funding serious journalism in the US, it could work for Australia too](#)', *The Conversation*, 16 June 2017, accessed 14 March 2019.

1186 B Birnbauer, *The Rise of NonProfit Investigative Journalism in the United States*, Routledge, 2018, p. 2.

1187 See, for example, Public Interest Journalism Initiative, [Submission to the Digital Platforms Inquiry Preliminary Report](#), March 2019; Croakey Health Media, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

1188 A Meade, '[Global Mail website to close less than two years after its launch](#)', *The Guardian*, 30 January 2014, accessed 18 March 2019.

1189 Z Samos, '[Walkley Foundation announces first round of journalism grants, appoints new chair](#)', *Mumbrella*, 23 November 2018, accessed 16 May 2019.

1190 J Neilson, '[Philanthropist Judith Neilson Commits \\$100m to Journalism Initiative](#)', media release, Judith Neilson Institute for Journalism & Ideas, accessed 15 March 2019.

Academics and industry stakeholders have argued that the relative scarcity of philanthropic assistance for journalism in Australia is due to regulatory settings that do not promote or incentivise such activity.¹¹⁹¹ In particular, Australia's tax system does not reward philanthropy supporting journalism to the same degree as other types of charitable giving.

Registered charity status

Under the *Charities Act 2013* (Cth), not-for-profit organisations can seek registered charity status if their activities fall within the definition of one of a limited list of 'charitable purposes', which include:

- advancing health, education, religion, culture or social or public welfare
- promoting or protecting human rights
- promoting reconciliation, mutual respect and tolerance
- advancing the security or safety of Australians
- preventing or relieving the suffering of animals
- advancing the natural environment
- any other purpose beneficial to the general public analogous to, or within the spirit of, the purposes above.

As public interest journalism does not fit directly into any of these purposes, it has traditionally been very difficult for outlets producing journalism to receive charitable status. A handful of Australian journalism outlets have successfully become registered charities, generally under the 'any other purpose' category, but these examples are rare, and apply to very small publications such as the *Churchill & District News* and *The Epoch Times*.

A number of organisations that assist the production of journalism, such as the Walkley Foundation, the Alliance for Journalists' Freedom and the Asia Pacific Journalism Centre, are registered charities. This suggests it is easier for philanthropic bodies assisting journalism to achieve charity status under current regulatory settings than it is for bodies that directly produce journalism.

Registration as a charity provides organisations with access to a range of tax benefits, including income tax exemptions¹¹⁹², franking credits, GST concessions¹¹⁹³ and fringe benefits tax rebates.¹¹⁹⁴ However, to achieve charitable status organisations must adhere to strict requirements ensuring that they are not-for-profit, only operate to achieve their charitable purpose and meet the Australian Charities and Not-for-profits Commission's (ACNC) governance standards which contain various accountability measures.¹¹⁹⁵

Deductible gift recipient (DGR) status

Donors to organisations with DGR status can claim personal income tax deductions based on their contributions. This is greatly beneficial for organisations as it incentivises donations.

DGR status is granted either through endorsement by the Australian Tax Office (ATO) based on a number of prescribed categories, or through individually listing an organisation in the *Income Tax Assessment Act 1997* (Cth) (the Tax Act).

1191 The Reuters Institute for the Study of Journalism and the Information Society Project, '[The impact of charity and tax regulation on not for profit news organisations](#)', March 2016, p. 32; Judith Neilson Institute for Journalism & Ideas, '[Submission to the Digital Platforms Inquiry Preliminary Report](#)', February 2019, p. 4; Public Interest Journalism Initiative, '[Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#)', February 2019, p. 8.

1192 Not-for-profit organisations without registered charity status are still subject to income tax. Registration as a charity exempts not-for-profit organisations from paying tax on all income, including donations.

1193 Not-for-profit organisations with annual revenues exceeding AU\$75,000 must pay GST on their sales. The threshold for registered charities is AU\$150,000 per year. Gifts to registered charities are also exempt from GST.

1194 Registered charities can receive up to AU\$30,000 in fringe benefit tax rebates.

1195 Australian Charities and Not-for-profits Commission, '[Who can apply to be registered?](#)', accessed 16 May 2019.

Similar to applying for charitable status, organisations seeking ATO endorsement for DGR status must show that their purpose fits within at least one of a limited number of DGR categories, which include education, research and cultural organisations. Organisations producing and supporting journalism do not fall neatly into any of these categories.

Individual listing in the Tax Act requires Parliament to make a legislative amendment to include an organisation by name which is a very high threshold. Organisations listed individually in this way are still required to fall within one of the prescribed DGR categories, but the decision is made by the Treasurer or a relevant Government Minister, and organisations do not have a positive obligation to prove to the ATO that their purpose fits within one of the categories.

These regulatory hurdles mean that very few journalism-focussed organisations in Australia have DGR status. Notable exceptions include the Walkley Foundation, which received DGR status under the education and culture categories, and the Conversation Trust, publishers of *The Conversation*, which received DGR status via individual listing in the Tax Act after significant campaigning.¹¹⁹⁶ While the Guardian Civic Journalism Trust also has DGR status under the education category, this arrangements limits philanthropic funding to supporting projects that are produced in direct collaboration with its partner, Melbourne University.

DGR status is distinct from ‘registered charity’ status and many registered charities cannot receive tax-deductible donations. Similarly, an organisation can have DGR status without being registered as a charity, although the ACCC understands this is very rare. However, the Government has announced that from 1 July 2020, all non-government organisations must be registered as charities in order to receive DGR status.¹¹⁹⁷ This change is intended to strengthen governance and integrity of DGR status by providing consistent oversight of DGR entities by the Australian Charities and Not-for-profits Commission (ACNC).

Recommendation 11: Tax settings to encourage philanthropic support for journalism

Tax settings should be amended to establish new categories of charitable purpose and deductible gift recipient (DGR) status for not-for-profit organisations that create, promote or assist the production of public interest journalism.

To be eligible for ‘registered charity’ and DGR status through these new categories, organisations will need to comply with existing accountability measures overseen by the Australian Charities and Not-for-profits Commission (ACNC). The new charitable purpose and DGR categories should require minimum levels of transparency, impartiality and independence.

For organisations that produce journalism, this should include compliance with existing industry codes such as the Australian Press Council Standards of Practice. In assessing applications for registered charity and DGR status under the new categories, the ACNC and ATO should consider the advice of an independent expert committee.

Recommendation 11 will make it easier for organisations that produce, promote or assist the production of public interest journalism to obtain charitable and DGR status. This will encourage philanthropic contributions to these organisations, promoting the production of more public interest journalism in Australia.

1196 The Reuters Institute for the Study of Journalism and the Information Society Project, ‘[The impact of charity and tax regulation on not for profit news organisations](#)’, March 2016, p. 20.

1197 This policy was announced in Australian Government, [Mid-Year Economic and Fiscal Outlook 2018-19 - Revenue Measures](#), p. 110, with implementation date delayed to 1 July 2020 in the Australian Government, [Mid-Year Economic and Fiscal Outlook 2018-19 - Revenue Measures](#), p. 127.

This recommendation closely mirrors approaches taken in both the United Kingdom and Canada to encourage philanthropic donations to journalism.¹¹⁹⁸ These jurisdictions identified the importance of granting charitable status and the ability to receive tax-deductible donations in encouraging sustainable philanthropic funding for public interest journalism.

This proposal was supported by several industry stakeholders including The Judith Nielson Institute for Journalism and Ideas¹¹⁹⁹ and not-for-profit media business Croakey Health Media, with the latter stating 'pathways are needed to enable the development of innovative non-profit models for journalism in Australia, supported by measures such as enabling access to Deductible Gift Recipient status, and providing incentives for philanthropists'.¹²⁰⁰ The Public Interest Journalism Initiative and The Guardian Australia also supported regulatory change in this area.¹²⁰¹

Requiring media businesses to register as charities

Organisations must meet strict requirements in order to become registered charities. This has multiple benefits. It adds an additional level of screening to ensure that only organisations with the 'primary purpose' of producing or assisting the production of public interest journalism have access to tax benefits. Journalism outlets with a broader scope would not be able to use this mechanism to fund their production of other material, leading to an appropriate degree of self-selection from media businesses seeking to access registered charity and DGR status.

Requiring registration with the ACNC would prevent journalism producers that advocate for particular political parties or candidates from obtaining charitable and DGR status, as registered charities cannot have a 'disqualifying purpose'. One such disqualifying purpose is defined as 'promoting or opposing a political party or candidate for political office'; but does not include 'distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies)'.¹²⁰²

ACNC registration also provides additional regulatory oversight of eligible organisations, minimising the risk of improper use of DGR status that may occur if journalism organisations could receive DGR status alone.

DGR and registered charity category design

Implementing new DGR and registered charity categories for public interest journalism would require careful design.

This recommendation would require the Government to amend the *Charities Act 2013* (Cth) and the *Tax Act* to create the new recommended categories. The main consideration in doing so would be creating a suitable legislative definition of 'public interest journalism' to place appropriate limitations on the type of organisations that can achieve charitable and DGR status. The ACCC submits that the definition set out in section 6.2 of this Report (itself based on the definition already used in the Australian Government's Regional and Small Publishers Innovation Fund¹²⁰³ and endorsed by the Public Interest Journalism Initiative¹²⁰⁴) may be a suitable starting point.

To ensure minimum levels of transparency, impartiality and accountability, organisations that produce journalism should be required to impose a level of separation and independence between donors and editorial decision makers and abide by codes of conduct or ethics.

1198 See Appendix G – Philanthropic support for journalism in international jurisdictions.

1199 Judith Neilson Institute for journalism and Ideas, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 4.

1200 Croakey Health Media, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 9.

1201 Public Interest Journalism Initiative, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8.

1202 *Charities Act 2013* (Cth), s. 11.

1203 [Explanatory Memorandum to the Communications Legislation Amendment \(Regional and Small Publishers Innovation Fund\) Bill 2017](#), p. 2; later incorporated into [Regional and Small Publishers Innovation Fund – Regional Grant Opportunity Guidelines](#), 5 April 2019, pp. 10-11.

1204 Public Interest Journalism Initiative, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2; The Guardian Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 24 proposes a similar definition of 'civic journalism'.

Ensuring a separation and independence between donors and editorial decision makers is necessary to avoid donors gaining undue influence over the editorial direction of an organisation.¹²⁰⁵ To ensure appropriate separation, eligible organisations should be required to include separation mechanisms in their governing documents. These mechanisms could be assessed by the ACNC and the ATO when considering applications for charitable and DGR status.

The governing documents of eligible journalism-producing organisations should also require adherence to existing journalistic codes of conduct such as the Australian Press Council's Standards of Practice. This will ensure these organisations follow appropriate journalistic practices and that their journalism is balanced and impartial.

In addition, all eligible organisations – both those that produce journalism and those that promote or assist its production – should be required to disclose the source of donations above a set threshold.

Further, the implementation of this recommendation should require the ACNC and the ATO to consider advice on applications provided by the new independent expert committee (Journalism Australia) referred to in Recommendation 10 in making assessments relevant to the new categories.

Suitability of Government action to encourage philanthropic support for journalism

Amending current regulatory settings for charitable status and DGR status is likely to encourage increased philanthropic funding for public interest journalism in Australia. As was the case for other potential government assistance mechanisms assessed above, the ACCC considered the suitability of such a policy against the framework set out in section 6.9.1.

Effectiveness

International experience has demonstrated that philanthropic funding has the potential to provide a meaningful source of funding for the provision of public interest journalism in the wake of declining provision by commercial news media businesses. However, philanthropic contributions for public interest journalism in Australia remain comparatively modest. Making it easier for organisations producing public interest journalism to register as charities, and for organisations producing or supporting public interest journalism to receive DGR status, is likely to effectively increase these levels. A significant advantage of this approach to supporting public interest journalism is that it can be targeted to organisations that provide this type of journalism.

Efficiency

Expanding eligibility criteria for registered charity and DGR status will have an impact on Government revenue. The extent of this impact will be determined by the levels of philanthropic activity directly supporting journalism.

The success of this approach in promoting public interest journalism depends on, among other matters, the extent to which DGR and registered charity status encourages greater philanthropic support for public interest journalism. To the extent that philanthropic support does not increase substantially, tax deductible and registered charity status will simply involve a transfer from the Government to those currently providing such support.

However, to the extent that DGR status encourages greater philanthropic support for public interest journalism, the effective cost to the Australian Budget would be a maximum of 45 cents for every dollar supporting public interest journalism.¹²⁰⁶

Independence

Unlike other policy mechanisms assessed in this chapter, encouraging philanthropic support for public interest journalism distances the Government from actual decisions about the provision of funding, which would be made by private individuals and organisations. The independence of journalism

¹²⁰⁵ B Birnbauer, *The Rise of NonProfit Investigative Journalism in the United States*, Routledge, 2018, p. 177.

¹²⁰⁶ Based on the highest personal income tax rate of 45 per cent.

produced using philanthropic funding can be further ensured by requiring a separation between donors and editorial staff, and by requiring adherence to existing media codes of practice, as part of eligibility criteria for new categories of DGR and registered charity status outlined above.

Risk of market distortion

As registered charity and DGR status can only be granted to not-for-profit organisations, this proposal would not disproportionately benefit any business models already employed by Australia's major media businesses, all of which operate as for-profit companies.¹²⁰⁷ Any existing for-profit news media business would equally be able to establish a not-for-profit organisation under its auspices and apply for registered charity and DGR status, provided that this new entity met the eligibility criteria for these new categories, including having the sole purpose of producing public interest journalism. A low number of small media businesses already operate as not-for-profit organisations, and could immediately apply for registered charity and DGR status when this proposal is implemented.¹²⁰⁸ However, the distortionary effects of this are likely to be low.

Potential for adverse effects on incentives of media businesses

The ACCC considers that this mechanism would pose a low risk to the future sustainability of news media businesses producing public interest journalism. Increased philanthropic funding is likely to incentivise the production of public interest journalism, and to support and safeguard the financial sustainability of organisations that promote and produce this material. As news media businesses seeking philanthropic funding will still need to compete to attract this support from donors, they will retain an incentive to produce high quality public interest journalism. On this basis, this proposal involves a low risk of potential adverse effects on incentives in the medium- and long-term.

Transparency

Organisations that receive registered charity and DGR status under this proposal would be subject to the ACNC reporting regimes. This involves providing financial reports and annual reports of activities to the ACNC, which publishes this information on its Charity Register.¹²⁰⁹

1207 Even digital natives that have experience seeking direct contributions from readers such as *The Guardian Australia* and *Crikey* operate as for-profit businesses.

1208 *Croakey Health Media* and *The Conversation* are examples of not-for-profit businesses producing content that may be deemed public interest journalism under this proposal. As noted above, *The Conversation* is already a registered charity with DGR status.

1209 Australian Charities and Not-for-profits Commission, '[About the ACNC Charity Register](#)', accessed 28 May 2019.

6.10 Impacts of digital platforms on the nature of journalism in Australia

Key findings

- Digital platforms have significantly altered the incentives for the production of different aspects of journalism.
 - The ‘atomisation’ of news exposes individual topics of journalistic coverage to commercial forces, creating genre-specific risks of under-provision.
 - News media businesses are increasingly basing editorial and business decisions on the operation of algorithms used by digital platforms. The prioritisation of ‘engagement’ by certain algorithms has increased incentives to produce journalism that incites strong responses, regardless of its public interest value.
 - The commercial importance of scale in the online environment and the ability of journalists to make use of audience metrics and feedback has also influenced the production of journalism towards the preferences of digital platform users.
- The online discourse enabled by social media includes significant incidence of abuse towards journalists. This risks having a ‘chilling effect’ on the practice of journalism.
- Pre-existing issues around the ‘fair use’ provisions in copyright law that apply to journalism, and their implications for journalism production, have been exacerbated by the commercial incentives and structures of the digital platform era.

In addition to the changes to journalism production resulting from declining resources described in section 6.7, digital platforms have directly influenced the nature of journalism in Australia. Digital platforms have significantly changed the operating environment and commercial incentives faced by media businesses. Such changes may affect the tone, content, breadth and depth of journalism that media businesses choose to produce.

Different types of coverage now compete with each other

As noted above, the journalism that consumers access via digital platforms has been ‘atomised’. That is, while consumers of newspapers, broadcast journalism or news websites are exposed to a bundle of journalism produced and curated by a single media business (and which would typically involve a variety of different types of journalism), when curation roles are performed by digital platforms, media companies compete for audiences on a story-by-story basis.

This effectively exposes individual articles to the commercial incentives of online news distribution, which has implications for how media organisations allocate limited resources and prioritise their coverage across the news spectrum. This provides commercial tension between different forms of coverage in terms of topic, depth and presentation.

In assessing the impact of digital platforms on journalism production, it is important to consider the incentives for news media businesses to maximise their revenue, such as by referral traffic to their websites. This reflects the overriding commercial imperative that has always been the main driver of editorial and business decisions for media businesses. Based on these incentives, such decisions may lead to the production of varying amounts of high quality public interest journalism.

6.10.1 Giving the people (and algorithms) what they want

Given the commercial importance of reach and scale in online media, news media businesses have a commercial incentive to optimise their content for the algorithms used by digital platforms to select, rank and serve content to users. This has implications for how articles are chosen, produced and presented, as media companies increasingly base editorial and business decisions on the operation of algorithms and certain types of audience behaviour rather than on traditional news values.

Journalists today are able to use a number of digital metrics to guide their content production, in an attempt to optimise for both audience and algorithm interaction. For example, News Corp

submits that publishers that invest heavily in search engine optimisation can feature higher in search results, even where this content has been reproduced from other news media businesses.¹²¹⁰

Several digital tools have been developed to inform news media businesses of readership, interaction, and what is 'trending' across different digital platforms in real time. These include various services describing themselves as tools for 'content discovery'; 'research and monitoring'; 'content intelligence'; and 'social monitoring'.¹²¹¹ These tools identify trends, measure audiences and, ultimately, assist news producers and distributors to optimise engagement.

Stakeholders participating in the ACCC's Journalists Forum held on 15 August 2018 noted that while journalists may have always aimed to produce popular content, they now optimise for audience and algorithm behaviour with unprecedented amounts of information, in great detail, and in real-time.¹²¹²

The algorithms used by social media platforms such as Facebook tend to prioritise content that receives engagement from users such as leaving comments and 'sharing' with other users. As noted by a representative of *BuzzFeed News Australia* in 2014:

*the thing that has really worked well for us on social media is ... focusing on what it is that people share. Why they share things. What core emotions are engaged when people share things online.*¹²¹³

This point was reiterated by participants in the ACCC Future of Journalism Roundtable on 15 March 2019. Participants noted that the prioritisation of engagement by Facebook's current content algorithm encourages news media businesses to frame stories in ways that elicit a strong response, rather than publishing objective, impartial information in a neutral tone.¹²¹⁴ As engagement and 'sharing' behaviour is determined by any kind of strong audience interaction with the content – including negative responses – this creates and compounds commercial incentives for the production of more sensationalised reporting, such as 'click-bait' or 'outrage journalism'.

In addition to the impact this may have on the framing of individual pieces of journalism, these commercial incentives may draw resources away from the production of public interest journalism. Several stakeholders have noted that the commercial importance of audience numbers and interactions for individual pieces of journalism has likely reduced the viability of some forms of public interest journalism with relatively small potential readership, such as local court reporting.¹²¹⁵ These views are consistent with the findings of the exercise conducted by the ACCC discussed in section 6.7.3.

Bundling news and entertainment to target incidental consumption on digital platforms

The methods used by news media businesses to expand their audiences have also been affected by the incidental nature of news consumption on social media platforms. While many Australians make use of digital platforms with the intention of accessing news, many use social media platforms for non-news purposes, but are exposed to journalism incidentally. For example, a 2017 study found that consumers incidentally exposed to news on social media are likely to use significantly more online news sources than those who do not use social media at all.¹²¹⁶ In this way, media businesses may compete for audiences who are not necessarily looking for their product.

On social media, users are generally only incidentally exposed to journalism posted or shared by a person or organisation within their network (for example, someone they have connected with as a 'friend' or 'follower'). Those posts would also be subject to any curating algorithms in place on the platform. On Twitter, it may be possible for a user to be served content from sources that they are not following; on Facebook, an article or video may be presented to a user if 'multiple people reply to each

1210 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p. 90.

1211 Websites for [NewsWhip](#); [BuzzSumo](#); [Chartbeat](#) and [CrowdTangle](#); accessed 21 November 2018.

1212 ACCC, [Summary of Digital Platforms Inquiry Journalism Forum](#), 15 August 2018, pp. 2-3.

1213 L Champness, '[BuzzFeed in Australia- What they plan to do here, tips on making great social content, the evolving media landscape, audio and.... Quokkas](#)', *ABC Radio*, 3 February 2018, accessed 21 November 2018.

1214 ACCC, [Summary of Future of Journalism Roundtable](#), 15 March 2019, p. 7.

1215 Australian Associated Press, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018, p. 1; M Simons, R Tiffen, D Hendrie, A Carson, H Sullivan, D Muller, and B McNair, '[Understanding the civic impact of journalism: A realistic evaluation perspective](#)', *Journalism Studies*, 18(11) (2017), pp. 1400-1411.

1216 R Fletcher and RK Nielsen, '[Are People Incidentally Exposed to News on Social Media? A Comparative Analysis](#)', *New Media and Society*, 2017, p. 20.

other's comments' (see box 6.1). While users have some control over the sources of news they see on social media, this control is subject to (and to a degree limited by) the operation of algorithms.

For news media businesses, building a network of followers can increase their reach, and they have an incentive to leverage off more popular non-news content to do so. Among all English-language publishers on Facebook, non-news publisher *BoredPanda* averaged over 42 000 engagements per post, compared to 4 599 for *The New York Times*, 643 for *bbc.co.uk*, 398 for *The Daily Mail* and 526 for *Fox News*.¹²¹⁷

BuzzFeed News Australia launched as a separate news website based on the popularity of the *BuzzFeed Australia* page, which specialises in non-news entertainment content. In other cases, news media businesses use social media to post both news and non-news content on the same page, potentially building a following based on non-news content in order to extend the reach of intermittent news content.

The bundling of news and 'viral' content has implications for the levels of trust that consumers place in a news brand. For example, in the United States, while *BuzzFeed News* was a finalist for Pulitzer prizes in both 2017 and 2018, it was rated lowest of 36 agencies in terms of trust, by respondents across the political spectrum.¹²¹⁸ This demonstrates the potential disconnect between the perceived trustworthiness and popularity of journalism on digital platforms.

Impact of audience feedback on the news and journalism produced

There is also potential for the online public discourse to have a feedback effect that influences the production of journalism. Digital platforms play a major role in this interaction, with discussion about, commentary on, and sharing of news content frequently occurring on social media services such as Facebook, Twitter and Reddit.

While this audience engagement with journalism can often be positive, there is also a potential for it to have negative effects on journalism and news audiences. Recent research suggests that attributable comments on platforms requiring the use of real names such as Facebook can be even more aggressive than anonymous comments, particularly on socio-political issues.¹²¹⁹ It is likely that the toxicity of online discourse discourages large proportions of the news audience from benefiting from, and contributing to, useful active engagement with news content.¹²²⁰

The level of vitriol and abuse present in online discourse also has a practical negative impact on journalism when directed at journalists themselves. In its worst instances, online abuse of journalists can include orchestrated harassment campaigns coordinated through digital platforms.

This behaviour often targets female journalists. In 2015, a study of 1000 women in Australian media found that '41 per cent of respondents [had] experienced harassment, bullying and trolling on social media, from mild instances to death threats and stalking', and that 60 per cent of respondents believed such harassment was most likely to be directed at women.¹²²¹ One in-house print journalist responding to the survey received 'quite constant death and rape threats'. An editor who had worked in journalism for over a decade stated that due to online harassment, she was 'less likely to state [her] opinion'.

This issue risks having a 'chilling effect' on the practice of journalism, affecting the types of stories that are covered, and potentially making the demographics of professional journalists less diverse and less representative of the general population.

1217 B Nicholson, '[How social data is revolutionizing earned media](#)', *NewsWhip*, accessed 21 November 2018.

1218 S Wang, '[The investigations and reporting of BuzzFeed News — *not* BuzzFeed — are now at their own BuzzFeedNews.com](#)', *NiemanLab*, 18 July, 2018.

1219 K Rost, L Stahel and BS Frey, '[Digital Social Norm Enforcement: Online Firestorms in Social Media](#)', *PLoS ONE*, vol. 11, no. 6, 2016; M Shanahan, *Journalism, Online Comments, and the Future of Public Disclosure*, Routledge, New York, 2018, p. 47.

1220 F Martin, '[Getting My Two Cents Worth In](#)', *International Symposium on Online Journalism*, vol. 6, no. 1, 2016; NJ Stroud, E Van Duyn, and C Peacock, '[News Commenters and News Comment Readers](#)', Center for Media Engagement, The University of Texas, Austin, 2016, accessed 11 October 2018.

1221 Media Entertainment & Arts Alliance, '[Mates over merit: The women in media report](#)', 2016, pp. 1, 11.

While this Report does not make any direct recommendations addressing this issue, the ACCC notes the link between online harassment and the quality of journalism in Australia, and suggests that there may be scope to more effectively prevent such activity through the user conduct policies administered by the major digital platforms.

6.10.2 Diminishing incentives to produce original high-quality journalism

The news gathering involved in journalism production involves up-front costs, as well as uncertainty around whether investigations will uncover a story of commercial value. Works of investigative reporting that can be considered high-quality public interest journalism require significant up-front fixed costs relative to their likely commercial value.

Conversely, the information at the core of journalism can be easily shared between individuals or re-published by other media organisations. As noted in chapter 4, if copyright exists in material, the *Copyright Act* allows 'fair use' by third parties if the use may fit within an established exception such as reporting the news.¹²²² These 'fair use' provisions in copyright law contribute to the public interest by allowing for information to be disseminated and transmitted freely by the media. However, such provisions are not strictly defined, and they present adverse incentives to the production of original content.

The combination of these factors illustrates some of the main challenges for media businesses in the provision of high-quality original journalism, including public interest journalism. In this context, stakeholders have raised issues regarding the incentives to produce original journalism in the era of digital platforms. Some of the issues relating to the use of 'snippets' by digital platforms, and the re-writing and ranking of original content on digital platforms are discussed in more detail in chapter 5.

6.11 Impacts on the consumption of journalism

Key findings

- Digital platforms are likely to have contributed to the increased number of media voices available to Australian news consumers by facilitating the entrance of digital native publishers.
- Algorithmic curation on digital platforms and user behaviour on social media have the potential to cause 'echo chamber' and 'filter bubble' effects, although the extent of any harm caused by these effects in Australia is not yet clear.
- Australian consumers accessing news through digital platforms may be at greater risk of exposure to unreliable news, including disinformation and malinformation, than those accessing news from other sources.

Sections 6.6 and 6.7 examined digital platforms' impact on the production of journalism, with implications for the levels of quality and choice of journalism available to Australian consumers. However, the influence of digital platforms also extends to how consumers access news and journalism. As set out in chapter 1, through their curation of content, digital platforms have played an influential role in the types of journalism likely to be consumed.

This influence extends to a growing proportion of consumers. While the growth of online news has provided an additional source of news for many Australians, the internet has also become the primary source of news for a large proportion of the population. The 2019 Digital News Report found that around 43 per cent of Australians use online sources as their primary source of news – similar to trends in the United Kingdom (42 per cent), Canada (44 per cent), and the United States (48 per cent).¹²²³

¹²²² *Copyright Act 1968* (Cth), s. 42.

¹²²³ C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 13.

Google and Facebook’s share of referrals to Australian news websites is set out in figure 6.4. Data provided to the ACCC in the course of this Inquiry shows that referrals from Google and Facebook account for:

- around half of all traffic to news websites operated by Australian print/online and digital native publishers
- 46 per cent of traffic to news websites operated by Australian television broadcasters
- 80 per cent of traffic to news websites operated by Australian radio broadcasters.

In this way, the impact of digital platforms on the quality and choice of journalism extends to the choices and experiences of a substantial proportion of Australian news consumers.

6.11.1 Changes to the plurality of sources consumed

While multiple data sources measure the consumption of online news, each one generally excludes some significant news websites. Overall, the available evidence suggests that the entrance of digital natives has affected the sources of news that consumers access online.

Roy Morgan survey data from over 50 000 respondents show that digital natives such as *The Daily Mail*, *BuzzFeed News Australia*, and *The Guardian Australia* are frequently used news websites across all age cohorts (table 6.2). Other popular sites are operated by established print publishers and television networks (News Corp and Nine).

Table 6.2: Ranked news websites according to usage within Australia, 2018, by birth cohort

Rank	Born Pre-1946 Aged 73 years or older	Born 1946-1960 Aged 58-72 years	Born 1961-1975 Aged 43-57 years	Born 1976-1990 Aged 28-42 years	Born 1991-2005 Aged 13-27 years
1	<i>news.com.au</i>	<i>smh.com.au</i>	<i>news.com.au</i>	<i>news.com.au</i>	<i>Daily Mail</i>
2	<i>ABC News</i>	<i>ABC News</i>	<i>smh.com.au</i>	<i>smh.com.au</i>	<i>BuzzFeed News</i>
3	<i>smh.com.au</i>	<i>news.com.au</i>	<i>ABC News</i>	<i>ABC News</i>	<i>smh.com.au</i>
4	<i>MSN</i>	<i>MSN</i>	<i>The Age</i>	<i>Daily Mail</i>	<i>news.com.au</i>
5	<i>9News.com.au</i>	<i>Daily Mail</i>	<i>MSN</i>	<i>The Age</i>	<i>Daily Telegraph</i>
6	<i>Herald Sun</i>	<i>The Age</i>	<i>Daily Mail</i>	<i>Daily Telegraph</i>	<i>ABC News</i>
7	<i>Guardian Australia</i>	<i>Daily Telegraph</i>	<i>Daily Telegraph</i>	<i>BBC</i>	<i>Guardian Australia</i>
8	<i>Daily Mail</i>	<i>Guardian Australia</i>	<i>Guardian Australia</i>	<i>Guardian Australia</i>	<i>BBC</i>
9	<i>Daily Telegraph</i>	<i>9News.com.au</i>	<i>BBC</i>	<i>Herald Sun</i>	<i>The Age</i>
10	<i>The Age</i>	<i>Herald Sun</i>	<i>Herald Sun</i>	<i>BuzzFeed News</i>	<i>The Australian</i>

Source: Roy Morgan Single Source: April 2017 – March 2018.

Note: Sample size: n = 50 014 Australians aged 14+

6.11.2 The potential for filter bubbles and echo chambers

The term ‘filter bubble’ has been used to refer to a scenario in which the choice of material displayed to a user is selected by algorithms according to the user’s previous behaviours, and this material is ‘devoid of attitude-challenging content’.¹²²⁴ In other words, it is a situation where users of digital platforms are repeatedly exposed to the same perspectives, as a result of algorithms curating content, and presenting only material that they might prefer. A similar concept of ‘echo chambers’ describes the repeated exposure to perspectives that affirm a person’s own beliefs, which may occur on social media platforms either as a result of curation by algorithms or sharing behaviour of other users populating a person’s newsfeed.¹²²⁵

¹²²⁴ E Bakshy, S Messing, and L Adamic, ‘[Exposure to ideologically diverse news and opinion on Facebook](#)’, *Science*, 2015, p. 1130.

¹²²⁵ D Robson, ‘[The myth of the online echo chamber](#)’, *BBC*, 17 April 2018, accessed 21 November 2018.

Filter bubbles and echo chambers pose potential risks to the plurality of news sources that consumers access, and also to the reliability of that information. For example, academics have argued that echo chambers promote the quick and effective dissemination of false and unreliable information, as users are more likely to willingly trust content that they access in such an environment.¹²²⁶

A further risk relates to the potential for consumers to be exposed to content that is increasingly emotive or extreme, particularly in an environment where there is 'no one to challenge the ideas'.¹²²⁷ This concern is often related to the operation of algorithms used by digital platforms that aim to provide users with 'relevant' and 'personalised' content according to past behaviours and preferences.

It is important to note that these occurrences are not exclusive to the online environment, and the 'filter bubble' effect cannot be completely divorced from personal choice. A consumer of offline news media may only access sources of journalism they choose to consume, and discuss the news with like-minded people. A habitual newspaper reader may only read news from a single newspaper or from multiple publications that express similar partisan views. In accounting for personal choice in this way, the level of plurality of sources of news and journalism available will not necessarily directly determine a consumer's exposure to different voices or perspectives.

However, in digital platform environments, personal choice is not the only, or even the main, factor determining which sources of news and journalism they are exposed to. Instead, the range of news sources available to a consumer on a digital platform is determined by:

- algorithms that curate news feeds, search results, and news aggregations
- the sharing and interaction behaviour of other social media users in their network (including news media businesses).

Importantly, unlike the case where a consumer deliberately and consciously chooses one particular news source, a digital platform user may not fully understand how the news and journalism displayed in their newsfeed, or provided in response to their search query, is curated. This means that a digital platform user may not know the extent to which the environment from which they source news amounts to a 'filter bubble'.

Given the opaque nature of algorithms determining news feeds and search results, it is unclear whether or how algorithms may have contributed to filter bubbles in recent years.

News-sharing behaviour is common in Australia, and has been described by one publisher as 'a form of self-expression'.¹²²⁸ The 2019 Digital News Report estimated that 37 per cent of Australian consumers discussed news stories in person with friends and colleagues. Survey respondents were relatively likely to share news content on social media (16 per cent), via email (9 per cent) or through instant messaging (10 per cent), in addition to those who reported 'post[ing] or send[ing] a news-related picture or video' on social media (7 per cent).¹²²⁹ This report also demonstrated that despite an overall decrease in news sharing behaviour since 2018, this activity remains popular with a politically-engaged subset of the Australian population. It found that 60 per cent of news consumers who had joined Facebook or WhatsApp groups about news or politics reported sharing news through social media.¹²³⁰

The 2018 edition of this report found that 45 per cent of respondents under the age of 35 noted that their choices of media sources were influenced by user interactions (such as shares, likes, and comments).¹²³¹

1226 C Wardle, and H Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Council of Europe, Strasbourg, 2017, p. 50.

1227 C Wardle, and H Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Council of Europe, Strasbourg, 2017, p. 50; Government of the United Kingdom, *The Cairncross Review: A Sustainable Future for Journalism*, Department for Digital, Culture, Media & Sport, 12 February 2019, p. 32; Ofcom, *The Changing World of News: Qualitative Research*, 13 July 2018, p. 54.

1228 L Champness, 'BuzzFeed in Australia- What they plan to do here, tips on making great social content, the evolving media landscape, audio and.... Quokkas', *ABC Radio*, 3 February 2018, accessed 21 November 2018.

1229 C Fisher, S Park, JY Lee, G Fuller and Y Sang, *Digital News Report: Australia 2019*, News & Media Research Centre, University of Canberra, 12 June 2019, p. 97.

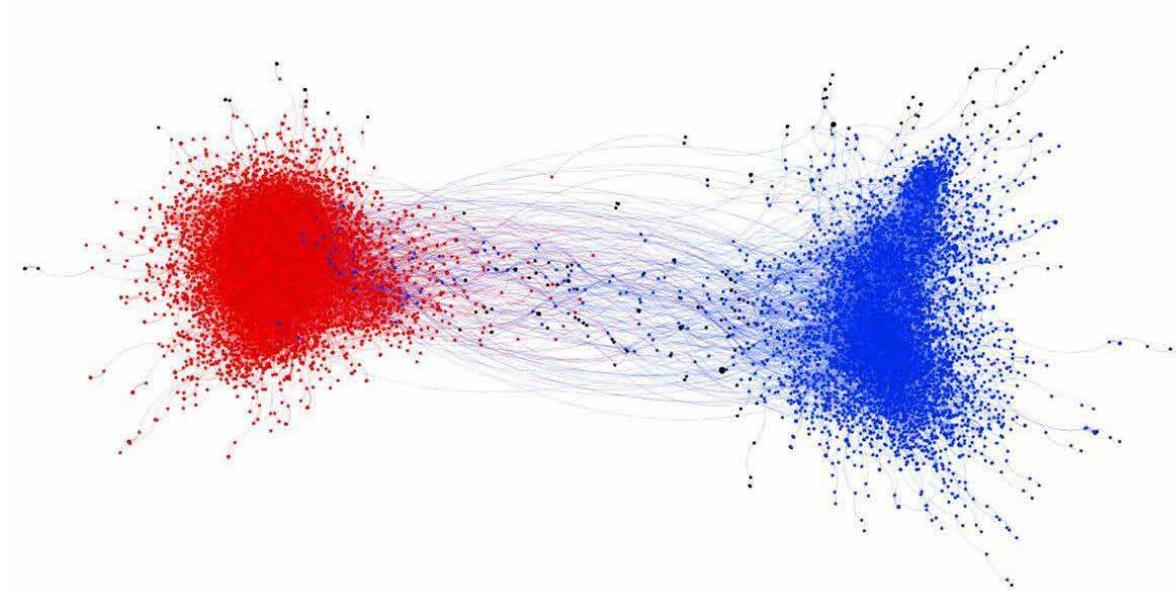
1230 C Fisher, S Park, JY Lee, G Fuller and Y Sang, *Digital News Report: Australia 2019*, News & Media Research Centre, University of Canberra, 12 June 2019, p. 99.

1231 S Park, C Fisher, G Fuller, and JY Lee, *Digital News Report: Australia 2018*, News & Media Research Centre, University of Canberra, 2018, p. 15.

Evidence suggesting the existence of digital filter bubbles and echo chambers

Some studies suggest the filter bubble effect has a discernible impact on news consumption. A 2017 study of political discussion on Twitter found that tweets expressing moral outrage tend to be widely shared within their political spheres.¹²³² The study analysed over 500 000 tweets relating to gun control, same-sex marriage and climate change, and found that most retweets came from people who shared the ideology expressed in the tweet. Figure 6.27 visualises the study's findings and shows the ideology underlying each tweet and the network of its retweets.¹²³³ While the study does not relate exclusively to the sharing and consumption of news content, it suggests an effect in relation to topical events, and its findings shed light on the filter bubble effect.

Figure 6.27: The filter bubble effect



Depiction of online discourse on Twitter travelling between and within politically aligned groups

Source: Brady, Wills, Jost, Tucker and Van Bavel, 2017.

A number of informal studies of YouTube's algorithm have found that it tends to present increasingly extreme content to users. A 2018 study informally tested the YouTube algorithm by creating new accounts and watching relatively mainstream videos relating to right- and left-wing topics and politicians. In each case, the YouTube algorithm recommended increasingly extreme content until it was suggesting conspiracy theory videos with the relevant political leaning.¹²³⁴

The Wall Street Journal conducted a similar experiment that again found users were shown far-right or far-left content after beginning to watch mainstream news content.¹²³⁵ Both studies found this effect was not just related to news, and that searches for flu vaccines would lead to suggestions for anti-vaccination videos, or searches for running would lead to ultramarathon suggestions. These informal studies again show the potential that algorithmic curation has to reinforce and escalate users' existing views.

A 2019 *Bloomberg* investigation quotes claims from former YouTube employees that various versions of the platform's algorithm were deliberately designed to recommend extreme and 'outrageous' content in order to maximise users' engagement, measured in hours spent watching videos.¹²³⁶

1232 WJ Brady, JA Wills, JT Jost, JA Tucker, and JJ Van Bavel, '[Emotion shapes the diffusion of moralized content in social networks](#)', *Proceedings of the National Academy of Sciences of the United States of America*, 26 June 2017, p. 1.

1233 WJ Brady, JA Wills, JT Jost, JA Tucker, and JJ Van Bavel, '[Emotion shapes the diffusion of moralized content in social networks](#)', *Proceedings of the National Academy of Sciences of the United States of America*, 26 June 2017, p. 5.

1234 Z Tufekci, '[YouTube, the Great Radicalizer](#)', *The New York Times*, 10 March 2018.

1235 J Nicas, '[How YouTube Drives People to the Internet's Darkest Corners](#)', *The Wall Street Journal*, 7 February 2018.

1236 M Bergen, '[YouTube Executives Ignored Warnings, Letting Toxic Videos Run Rampant](#)', *Bloomberg*, 2 April 2019.

A 2018 Massachusetts Institute of Technology study found that false news articles on Twitter spread faster than accurate ones as a result of users' sharing behaviour.¹²³⁷ This indicates the impact users can have on what appears in content feeds, illustrating the potential harm of echo chambers in which groups of like-minded users may be sharing inaccurate information that is quickly accepted and passed on with little scrutiny.

Evidence disputing digital filter bubbles and echo chambers

In contrast to concerns about filter bubbles and echo chambers on digital platforms, some evidence suggests that consumers using these platforms are in fact more likely to be exposed to a diverse range of news.

The Digital News Report 2017 found that almost half of consumers who used Facebook as a source of news agreed or strongly agreed that they often see news from outlets they would not normally use.¹²³⁸

After the closure of Google News in Spain, the resulting drop in traffic to Spanish news websites was uneven. The top 20 sites saw minimal impact while smaller sites lost 26 per cent of their traffic.¹²³⁹ This indicates that news aggregators direct consumers to sites they would not otherwise access, increasing the diversity of news provided to these consumers.¹²⁴⁰

A 2018 study found that Google News provided largely the same recommendations for political news, regardless of the survey respondents' own political leanings.¹²⁴¹

Another 2018 study of audiences accessing misinformation and disinformation (discussed further below) concluded that the consumption of such content was not driven by passive consumption through echo chambers, but by heavy internet users actively seeking out a wide variety of news sources, and accessing both mainstream and 'false news' sources.¹²⁴²

Conclusion on filter bubbles and echo chambers

The research summarised above indicates that while digital platforms provide environments that are susceptible to filter bubbles and echo chambers, some digital platforms may also increase the diversity of news to which their users are exposed. The specific effect is likely to depend on the algorithm in operation at the time, and the behaviours and cultures of platform users.

Even if filter bubbles and echo chambers do exist to some extent on digital platforms, consumers may already be compensating for them. The ACCC News Survey found nearly 60 per cent of digital platform users agreed that platforms filtered the selection of news stories they were exposed to, but that they used a range of sources to help balance the news they consume.¹²⁴³ This suggests that the majority of consumers are actively seeking out different sources of news to counteract any impact algorithmic filtering of news may be having.

There is a limited evidence base to study the effect of filter bubbles on online news consumption in Australia. However, Australian digital platform users are exposed to much the same algorithms as those in the United States. If, as some research suggests, algorithms do present users with increasingly extreme views or content, this would have a significant impact on the plurality and quality of news consumed by Australians.

1237 S Vosoughi, D Roy and S Aral, '[The spread of true and false news online](#)', *Science*, 9 March 2018.

1238 J Watkins, S Park, C Fisher, RW Blood, G Fuller, V Haussegger, M Jensen, JY Lee, and F Papandrea, [Digital News Report 2017](#), News & Media Research Centre, University of Canberra, 2017, p. 38.

1239 S Athey, M Mobious, and J Pal, '[The Impact of Aggregators on Internet News Consumption](#)', Stanford Graduate School of Business, Working Paper No. 3353, 11 January 2017, p. 15.

1240 As discussed in section 5.1.1 of this Report, consumers appear to be using Google search to access news, more than Google News. This may explain the minimal impact on traffic to major news sites after the closure of Google News in Spain.

1241 E Nechushtai, '[What kind of news gatekeepers do we want machines to be? Filter bubbles, fragmentation, and the normative dimensions of algorithmic recommendations](#)', *Computers in Human Behavior*, Vol. 90, January 2019, pp. 298-307.

1242 J Nelson and H Taneja, '[The Small, Disloyal Fake News Audience: The Role of Audience Availability in Fake News Consumption](#)', *New Media & Society*, 23 January 2018; R Fletcher, A Cornia, L Graves and RK Nielsen, '[Measuring the reach of fake news and online disinformation in Europe](#)', Reuters Institute Factsheet, February 2018.

1243 Roy Morgan Research, '[Consumer Views and Behaviours on Digital Platforms](#)', November 2018, p. 36.

While issues around plurality of news are not new or confined to journalism accessed through digital platforms, the ACCC's view is that these risks are potentially magnified online. The ACCC considers that consumers accessing news via digital platforms may be at risk of greater exposure to filter bubbles. However, the nature and extent of any harm in Australia is not yet clear.

The ACCC considers that these issues do not yet warrant any direct Government action. However, the monitoring of credibility signalling and responses to complaints about disinformation and malinformation proposed under Recommendations 14 and 15 below will provide mechanisms by which the Government can gather evidence on the nature and extent of harm caused by filter bubbles in Australia.

6.11.3 Consumption of different types of news in an 'atomised' environment

As discussed in section 6.6, news accessed through digital platforms is 'atomised' – presented as individual pieces of content alongside other news and non-news material. This atomisation results from presentation and curation practices central to the business models of digital platforms, and may be affecting the production of journalism by diluting the commercially-valuable branding of news media businesses. This demonstrates an area in which the commercial interests of digital platforms and news media businesses do not align.

Atomisation also directly affects the consumption of journalism on digital platforms by weakening the association between news and its source.¹²⁴⁴ Consumer confusion about the authenticity of atomised online news, particularly content important to the proper functioning of democracy such as public interest journalism, has given rise to potentially negative consequences internationally.¹²⁴⁵

There is increasing public concern about inaccurate and misleading content being surfaced to Australian consumers online.¹²⁴⁶ Australians' online news viewing patterns (figure 6.28 and 6.29) – which involve substantial proportions of consumers accessing news in atomised environments such as social media and news aggregators – suggest that consumers here may also be at risk of the negative consequences experienced overseas.

Atomisation of content on digital platforms also often makes it difficult to distinguish between genuine news items and paid-for or 'sponsored' content on news pages. This makes it difficult, even for discerning readers, to appreciate and distinguish the quality and credibility of all these channels.¹²⁴⁷

As discussed above, digital platforms have had some impact on the commercial incentives to produce particular kinds of news coverage. These impacts are largely due to consumption patterns of digital platform users. Survey evidence further suggests that consumers tend to use digital platforms for some forms of news more than others (figure 6.28).

For example, 41 per cent of digital platform users accessed celebrity related news through online sources other than news websites, compared to 35 per cent for lifestyle news, 23 per cent for news on crime and justice and 18 per cent for business and economic news. This suggests that commercial news media businesses might be facing increasing commercial incentives to favour some types of news (those more popular on digital platforms) than others.

Digital platform users still rely heavily on offline media formats for some forms of news (figure 6.28). Two-thirds of digital platform users accessed 'news of the day' on television, and 63 per cent accessed news on Australian politics. The evidence suggests that these patterns reflect consumers' preferences

1244 As noted in section 6.6, a 2017 study of over 1 600 online news users in the United Kingdom found that fewer than half of the online news consumers surveyed could recall the name of a news publisher when reading journalism from media companies other than their 'main brand' through search engines and social media. See A Kologeropoulos and N Newman, ['I Saw the News on Facebook', Brand Attribution when Accessing News from Distributed Environments](#), Digital News Project 2017, p. 10.

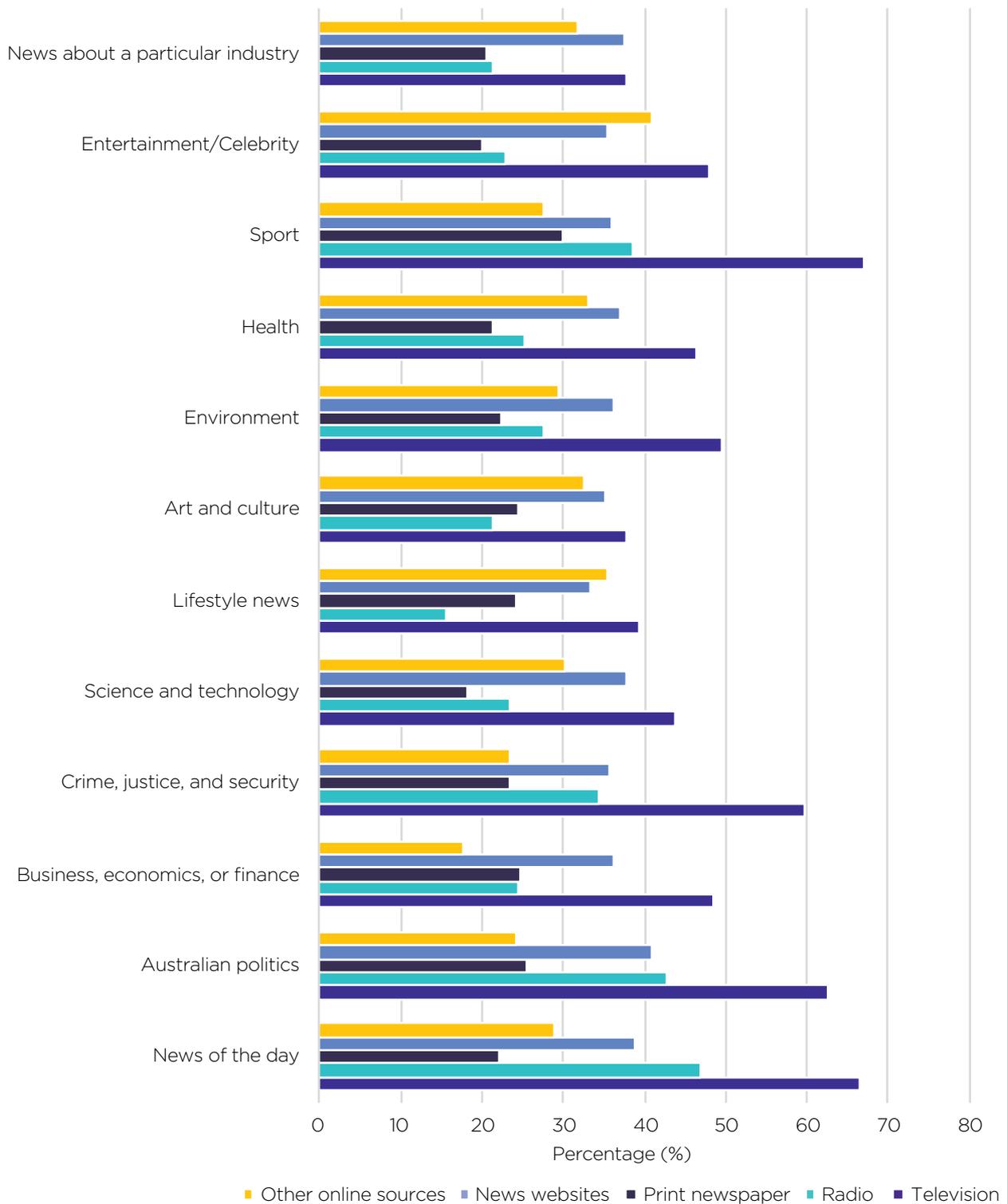
1245 European Commission, [Tackling online disinformation: a European Approach](#), p. 2, 26 March 2018; [Ledger of Harms](#), Center for Humane Technology, accessed 10 April 2019, referenced in the UK Commons Select Committee, Digital, Culture, media and Sports, [Disinformation and 'fake news': Final Report](#), 18 February 2019, p. 15.

1246 Roy Morgan Research, ['Consumer Use of News'](#), November 2018, p. 24; ACCC, [Digital Platforms Inquiry Preliminary Report](#), December 2018, p. 288.

1247 B Martens, L Aguiar, E Gomez-Herrera, F Mueller-Langer, ['The digital transformation of news media and the rise of disinformation and fake news'](#), JRC Digital Economy Working Paper, April 2018, p. 43.

rather than incidental consumption alone. For instance, 22 per cent of digital platform users stated that social media was their preferred source for lifestyle news, while only 11 per cent preferred to use social media for news on Australian politics (figure 6.29).

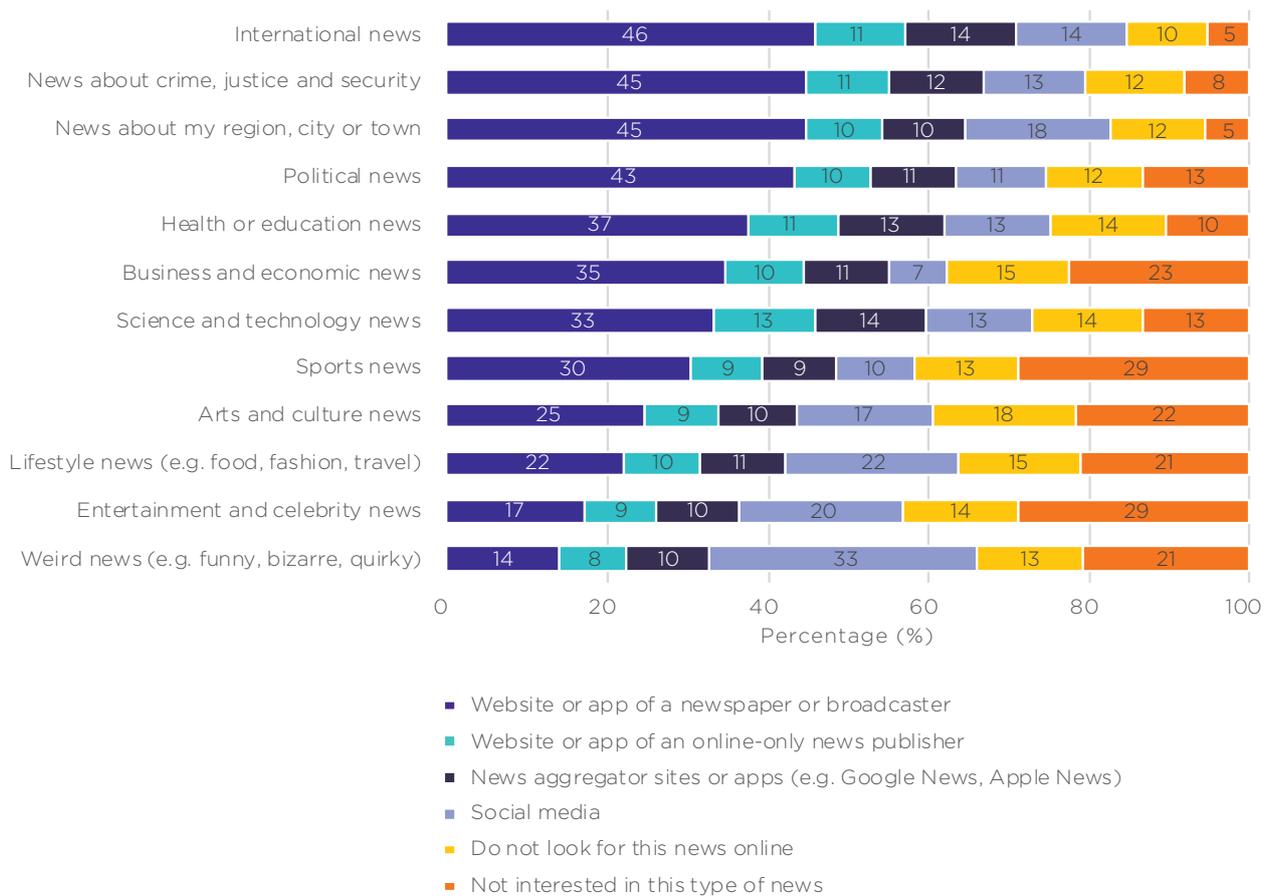
Figure 6.28 Media format accessed for particular types of news



Source: Roy Morgan Research, 'Consumer Use of News', November 2018

This suggests that even for people who use digital platforms, other media formats remain important sources for journalism significant to the public interest.

Figure 6.29 Preferred online news source



Source: Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018

6.11.4 Reliability of reporting

As noted in section 6.2 and 6.3, there are many ways in which news and journalism can provide value to society, including through the provision of public interest journalism. However, this societal value depends on the reliability and purpose of the information that news and journalism distributes.

Threats posed by information disorder

The Council of Europe has suggested a framework for different forms of unreliable information, known as 'information disorder'.¹²⁴⁸ Based on this framework, this Report uses the following definitions for types of unreliable information that may be present on digital platforms:

- 'disinformation' is false or inaccurate information that is deliberately created and spread to harm a person, social group, organisation or country¹²⁴⁹
- 'misinformation' is false or inaccurate information that is not created with the intention of causing harm
- 'malinformation' is accurate information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to the operation of democratic processes.

1248 C Wardle, and H Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Council of Europe, Council of Europe, Strasbourg, 2017, p. 5; European Commission, *Tackling online disinformation: a European Approach*, 26 March 2018, p. 2.

1249 The concept of 'disinformation' does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.

While information disorder clearly pre-dated the rise of digital platforms (and also the internet), digital platforms have presented new opportunities for these forms of information disorder to take place, particularly in the expansion of online public discourse, beyond the bounds of professional journalism.

Disinformation, misinformation and malinformation are particularly hard to identify on social media, where news content is often presented alongside content that has no relationship to news at all. And while people tend to think highly of their own ability to identify false information, they rate the ability of others much lower.¹²⁵⁰ Only 36 per cent of people believed that the average person in Australia could identify 'fake news', but 67 per cent thought that they personally could do so.¹²⁵¹ In this context, the European Commission pointed out in 2018 that professional journalism can potentially play an important role in combatting sources of poor quality information, although this is dependent on the reliability of news and journalism.¹²⁵²

Academics, journalists and government bodies have presented numerous recent examples of bad actors intentionally manipulating information through digital platforms with the aim of affecting democratic processes. For example:

- A United Kingdom House of Commons Select Committee identified sufficient evidence of foreign interference, disinformation and voter interference associated with the 2017 United Kingdom election, the 2016 United Kingdom Referendum on EU membership (the 'Brexit' vote) and the 2014 Referendum on Scottish independence to recommend a formal independent investigation into all of these issues.¹²⁵³
- In November 2018 *The New York Times* published reader submissions of huge volumes of inaccurate information spotted online during the 2018 United States midterm elections. These included doctored photos and inaccurate quotes misrepresenting the backgrounds and views of candidates, and falsely attributed campaigns and inaccurate information designed to suppress voter turnout in certain regions.¹²⁵⁴
- The *Disinformation Review* published by a taskforce commissioned by the European Union frequently publishes examples of disinformation designed to affect elections in Europe. On 28 May 2019, this service identified 'massive attempts to disturb the voting process' of the 2019 European Parliament election. These examples including inaccurate stories claiming that the European Union has Nazi roots; that the European Union's policies are dictated by the United States; and that Poland's current socio-economic situation under the European Union is worse than under the former communist regime.¹²⁵⁵

These instances most commonly constitute disinformation, as they involve fabrication or manipulation of information with the intent to mislead.

Examples of malinformation have been rarer, with commonly-cited examples including strategic leaking of private information to damage particular political candidates, such as occurred during the 2017 French election.¹²⁵⁶

Concerns about disinformation have also been expressed in Australia. In March 2019, the Australian Parliament's Joint Standing Committee on Electoral Matters released a report highlighting its concerns about the threat disinformation may pose for future Australian elections, and recommending continued

1250 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 33.

1251 Ipsos Public Affairs, ['Fake News, Filter Bubbles, Post-Truth and Trust'](#), 6 September 2018, pp. 7-8.

1252 European Commission, [A Multi-Dimensional Approach to Disinformation, High Level Expert Group on Fake News and Online Disinformation](#), Directorate-General for Communication Networks, Content and Technology, 2018, p. 11.

1253 UK Commons Select Committee, Digital, Culture, Media and Sports, [Disinformation and 'fake news': Final Report](#), 18 February 2019, p. 77.

1254 C Schmidt, ['The New York Times asked for examples of election disinformation – and got 4,000 responses'](#), *NiemanLab*, 5 November 2018, accessed 13 May 2019; K Roose, ['We Asked for Examples of Election Misinformation. You Delivered'](#), *The New York Times*, 4 November 2018, accessed 13 June 2019.

1255 C Schmidt, ['The New York Times asked for examples of election disinformation – and got 4,000 responses'](#), *NiemanLab*, 5 November 2018, accessed 13 May 2019; C Wardle, and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making, Council of Europe](#), Council of Europe, Strasbourg, 2017, pp. 21-22; EU vs Disinfo, ['Democracy as an Act of Defiance'](#), 28 May 2019.

1256 C Wardle, and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making, Council of Europe](#), Council of Europe, Strasbourg, 2017, p. 21.

investigation of this issue and consideration by the Australian Government.¹²⁵⁷ There were also reported instances of disinformation being spread through social media platforms including Facebook and WeChat in the lead-up to the 2019 Australian Federal Election.¹²⁵⁸ However, the ACCC is not aware of any serious incidents of malinformation being spread with the intent of affecting democratic processes in Australia.

For these reasons, the ACCC considers malinformation to be a more remote threat than disinformation in the Australian context.

The prevalence of information disorder on digital platforms

Evidence from the ACCC News Survey suggests that many Australians have experienced misleading headlines, doctored photographs, misleading news commentary, and factual mistakes in the media.¹²⁵⁹ A significant proportion of consumers reportedly experience these issues on digital platforms; most frequently on social media rather than on news obtained via search engines or news aggregators (figure 6.30). This supports the suggestion that digital platforms, and particularly social media platforms, have presented new opportunities for various forms of information disorder to take place.

Digital platforms may also provide unique incentives for the creation and spread of disinformation. In describing false political content circulating on Facebook in the United States, the Head of Cybersecurity Policy at Facebook states that:

*... the “news” stories or opinions these accounts and Pages share are often indistinguishable from legitimate political debate.*¹²⁶⁰

The Head of Cybersecurity Policy at Facebook also notes that such activity on Facebook is often motivated by money. He draws a direct link between the provision of ‘clickbait’ and ‘sensational political content’ and the revenue generated by organised networks providing links to websites that ‘seem legitimate, but are actually ad farms’.¹²⁶¹

However, evidence suggests that poor quality news and journalism is also seen and heard outside digital platforms (figure 6.30). For instance, issues regarding the reliability of information accessed on digital platforms will often relate to material that is published on a news website. These issues are likewise not exclusive to online media, particularly where they relate to articles produced by Australian media organisations that also operate print publications or broadcast networks. The 2018 Digital News Report found that consumers generally expected action to be taken against ‘fake news’, not only by social media companies (75 per cent), but by media companies (81 per cent) and governments (68 per cent).¹²⁶²

It is unclear how many incidents of unreliable news are egregious or serious, and this may be due to underreporting. The ACCC news survey found the majority of Australian adult news consumers had seen issues that they had deemed serious, even though only a minority had complained.¹²⁶³ Consumers may also consider news content that they disagree with to be unreliable or of poor quality, which could further affect reporting of information disorder.

1257 Australian Electoral Commission, [Annual Report 2017-18, Status Report](#), March 2019, p. 5.

1258 C Knaus and N Evershed, ‘[False election claims spark push for truth in political advertising laws](#)’, *The Guardian Australia*, 20 May 2019, accessed 29 May 2019; S Cannane, ‘[Federal election 2019: Anti-Labor scare campaign targets Chinese-Australians](#)’, *ABC News*, 3 May 2019, accessed 29 May 2019.

1259 Roy Morgan Research, ‘[Consumer Use of News](#)’, prepared for the ACCC, November 2018, p. 24.

1260 N Gleicher and O Rodriguez, ‘[Removing additional inauthentic activity from Facebook](#)’, 11 October 2018, accessed 21 November 2018.

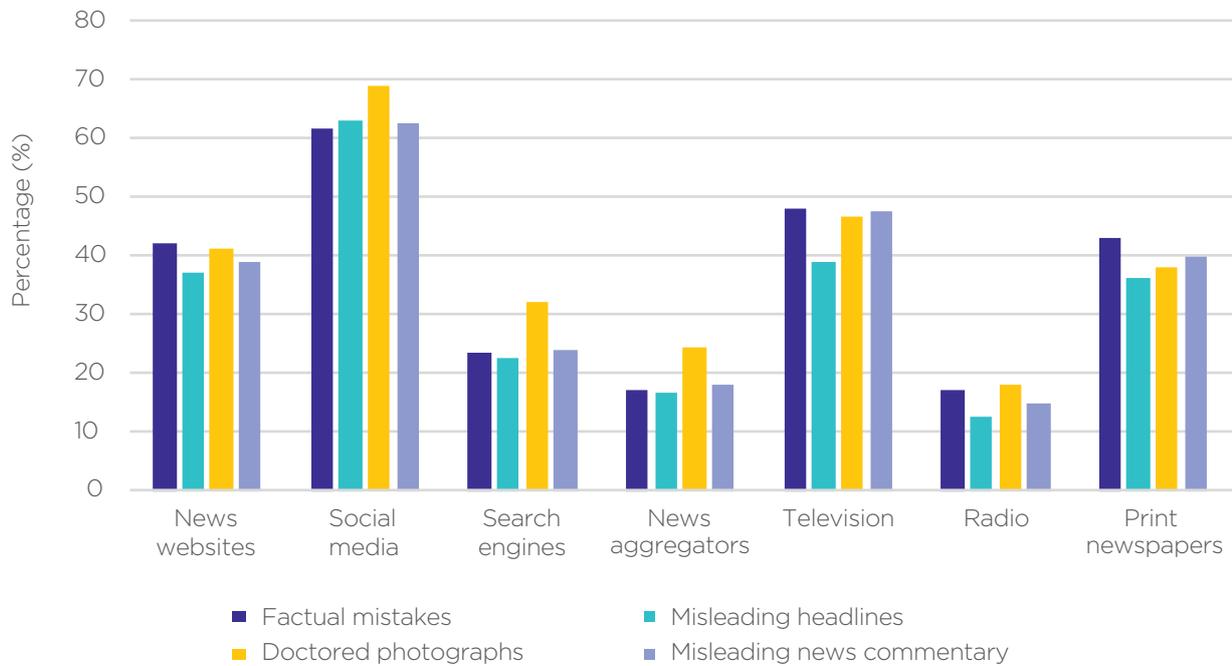
1261 N Gleicher and O Rodriguez, ‘[Removing additional inauthentic activity from Facebook](#)’, 11 October 2018, accessed 21 November 2018.

1262 S Park, C Fisher, G Fuller, and J.Y Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 38.

1263 Roy Morgan Research, ‘[Consumer Use of News](#)’, November 2018, p. 7. This survey found while only 6 per cent of adult Australians surveyed had lodged a formal complaint about mistakes and inaccuracies in journalism they consumed, an additional 70 per cent reported experiencing mistakes and inaccuracies. Of the consumers who experienced issues without lodging a complaint, only a minority (38 per cent) reported that they did not take action because the mistakes or inaccuracies were not serious.

Evidence also suggests that Australian consumers are very concerned about the extent of unreliable news. Around 92 per cent of the respondents to the ACCC news survey had some concern about the quality of news and journalism they were consuming (figure 6.31). Most respondents were concerned about stories being made up for political and commercial reasons (29 per cent), misleading commentary (19 per cent), and factual mistakes (16 per cent).¹²⁶⁴ The 2019 Digital News Report found that 62 per cent of Australian news consumers showed a high level of concern about the veracity of online information, above the global average of 55 per cent.¹²⁶⁵

Figure 6.30: Experience of poor quality news and journalism



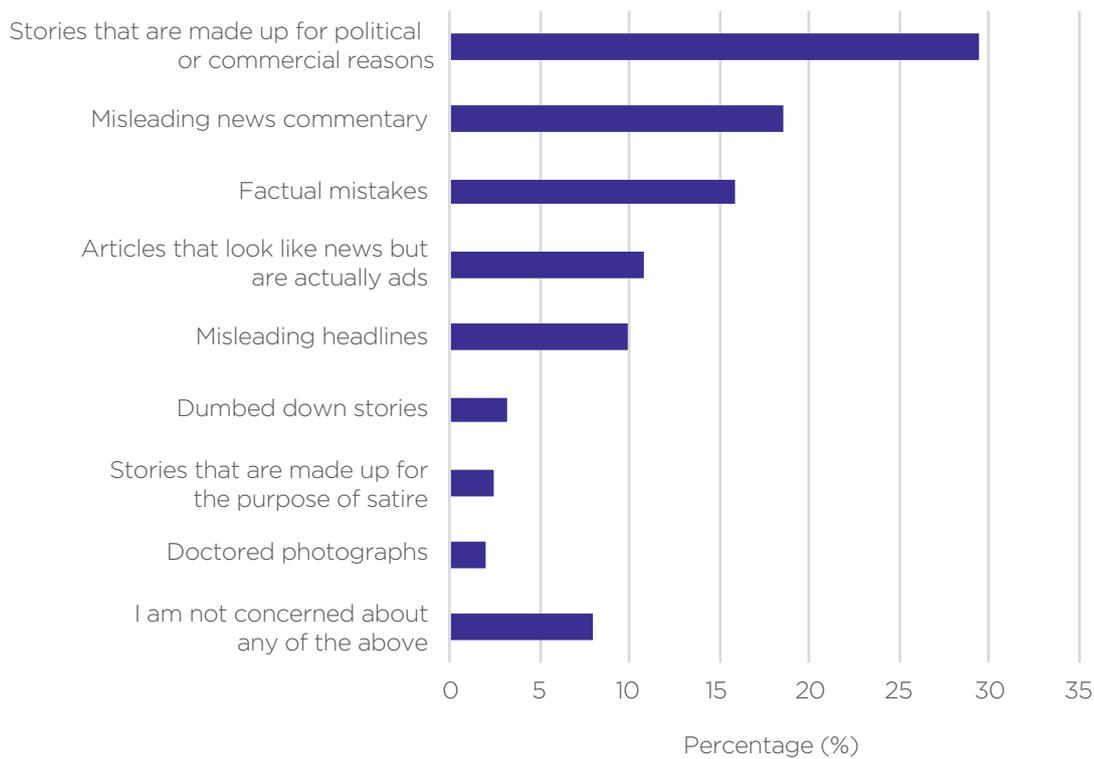
Source: Roy Morgan Research, 'Consumer Use of News', November 2018.

Note: Survey respondents were able to register experiences of poor quality journalism over multiple media formats.

1264 Roy Morgan Research, '[Consumer Use of News](#)', November 2018, p. 24.

1265 C Fisher, S Park, JY Lee, G Fuller and Y Sang, '[Digital News Report: Australia 2019](#)', News & Media Research Centre, University of Canberra, 12 June 2019, p. 17.

Figure 6.31: Concern over poor quality news and journalism



Source: Roy Morgan Research, Consumer Use of News, November 2018.

While information disorder on digital platforms is obviously a real and serious issue, recently emerging academic evidence suggests that exposure to disinformation and misinformation may be largely confined to heavy social media users who dig deeper into the long tail of news outlets beyond the mainstream.¹²⁶⁶

A 2018 study concluded that exposure to false news was driven by its consumers' demand for a variety of news. This study compared traffic to 30 known 'false news' and 24 known 'real news' websites, and found that real news audiences dwarfed false news audiences.¹²⁶⁷ By comparison, individual users who accessed false news sites spent around half as much time per visit on false news sites compared to real news sites.

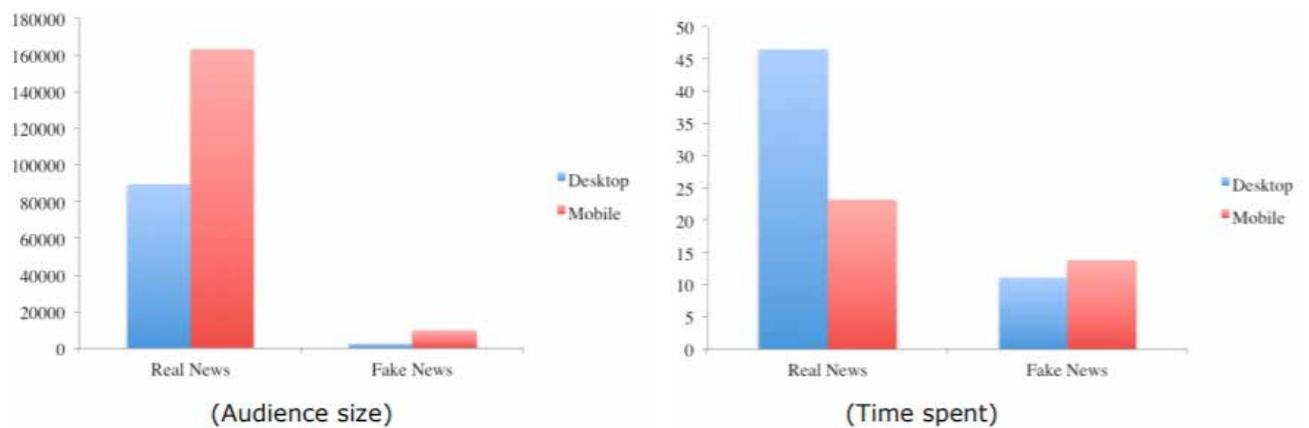
The authors of this study concluded that the audiences for false news arrive at sources for this content through a desire for more variation in media sources, and that social media facilitates this. This study suggests that use of digital platforms does not in itself lead to exposure to false news for all users. Rather, the amount of time a user spends on digital platforms is correlated with their levels of false news consumption. However, the authors of this study emphasised that they did not want to underplay the distorting impact that false news may have in society, irrespective of audience figures.¹²⁶⁸

1266 B Martens, L Aguiar, E Gomez-Herrera and F Mueller-Langer, '[The digital transformation of news media and the rise of disinformation and fake news](#)', JRC Digital Economy Working Paper 2018-02, April 2018, p. 30.

1267 J Nelson and H Taneja, '[The Small, Disloyal Fake News Audience: The Role of Audience Availability in Fake News Consumption](#)', *New Media & Society*, 23 January 2018; R Fletcher, A Cornia, L Graves and RK Nielsen, '[Measuring the reach of fake news and online disinformation in Europe](#)', Reuters Institute Factsheet, February 2018.

1268 R Fletcher, A Cornia, L Graves and RK Nielsen, '[Measuring the reach of fake news and online disinformation in Europe](#)', Reuters Institute Factsheet, February 2018.

Figure 6.32: Audience size and time spent on real and false news sites



Source: B. Martens, L Aguiar, E Gomez-Herrera and F Mueller-Langer, [The digital transformation of news media and the rise of disinformation and fake news](#), JRC Digital Economy Working Paper 2018-02, April 2018, p. 29.

A 2018 study in the United States found that most false news is consumed by a small group of heavy internet users, who were mostly referred to this content from social media platforms. The study examined cross-website visitation patterns and found large overlaps between visitors to false and real news sites. This suggests that while most internet users stick to popular news sources, regardless of ideology, a minority of heavy users consume extreme sources in addition to more popular ‘mainstream’ content.¹²⁶⁹

A 2018 Reuters Institute study¹²⁷⁰ emphasised the limited reach of false news. This compared audience metrics between 300 real news websites against websites known to publish false news in France and Italy. They found that none of the false news sites had a monthly reach above 3.5 per cent of online readers, while the most popular real news sites could reach 20 to 50 per cent.

These studies all suggest that despite widespread concern about information disorder on digital platforms, exposure to such potentially harmful material is most prevalent among ‘heavy users’ – although these heavy users are also likely to access a wide variety of news sources. This provides some perspective on the extent and nature of the harm currently being caused by information disorder on digital platforms. However, the ACCC notes that digital platforms have a commercial incentive to continually increase the amount of time individual users spend on their services, which could potentially exacerbate this problem by increasing the proportion of Australian digital platform users that are heavy users.

1269 A Guess, B Nyhan and J Reifler, [Selective Exposure to Misinformation: Evidence from the consumption of fake news during the 2016 U.S. presidential campaign](#), European Research Council, 9 January 2018; M Gentzkow, JM Shapiro and DF Stone, [Media bias in the marketplace: Theory](#), chapter 14, Handbook of Media Economics, Vol. 1B, January 2014.

1270 R Fletcher, A Cornia, L Graves and RK Nielsen, [Measuring the reach of fake news and online disinformation in Europe](#), Reuters Institute Factsheet, February 2018.

6.11.5 Overall implications for journalism consumption and the public interest

The ways in which Australian consumers access news are changing, with digital platforms now acting as gateways to news and information on the internet for a large number of Australians. As a result, digital platforms have considerable influence in shaping the news viewed by Australian consumers and perform curatorial functions when surfacing information.

However, the atomisation of media content and the risk of misinformation and disinformation being spread on digital platforms make it difficult for consumers to evaluate the veracity, trustworthiness and quality of the news content they receive online.¹²⁷¹ This may have the effect of undermining democratic processes¹²⁷², as the ability of consumers to recognise high-quality news is essential for a well-functioning democracy.¹²⁷³

As a consequence of digital platforms' personalisation of content to users, it can also be difficult to establish the level of disinformation or malinformation presented to consumers on digital platforms.¹²⁷⁴

As discussed in section 6.11.4, there have been frequent examples of disinformation and malinformation campaigns attempting to affect democratic processes in the United States, the United Kingdom and the European Union; and there is growing public concern about highly inaccurate and misleading information being surfaced to Australian consumers. These issues present a compelling argument to address these concerns as a public policy issue in Australia.

Disinformation and malinformation is not accidental. Some individuals and businesses deliberately spread inaccurate information in a systematic way to try to influence public opinion by targeting individuals or groups,¹²⁷⁵ or simply to make money.¹²⁷⁶ Such propagation of disinformation and malinformation is also aided by the use of personal data collected by online businesses and intermediaries.¹²⁷⁷

While public interest journalism contributes to a healthy democracy, disinformation and malinformation does the opposite. To the degree that online consumption makes it harder for public interest journalism to reach audiences, but easier for disinformation and malinformation to do so, this is clearly a significant public policy concern. Measures addressing the spread of disinformation and malinformation will have to focus both on supporting consumers' ability to identify unreliable information, and greater proactive and reactive efforts by the digital platform industry, as set out in section 6.12 below.

1271 A Kologeropoulos and N Newman, '[I Saw the News on Facebook](#)', [Brand Attribution when Accessing News from Distributed Environments](#), Digital News Project 2017, p. 7; The Digital News Project 2017 found that less than half of the respondents could recall the name of the news publisher when coming to an article from search engines (37%) and social media (47%). It is often difficult to distinguish between genuine news items and paid-for content on news pages. This makes it difficult, even for discerning readers, to appreciate and distinguish the quality and credibility of all these channels.

1272 European Commission, [2016 Annual Colloquium on Fundamental Rights](#), 18 November 2016, p. 3.

1273 European Commission, [Tackling online disinformation: a European Approach](#), 26 March 2018, paragraph 1.

1274 UK House of Commons Select Committee, Digital, Culture, media and Sports, [Disinformation and 'fake news': Final Report](#), 18 February 2019; N Evershed and C Knaus, '[Help us monitor political Advertising in Australia](#)', *The Guardian*, 24 July 2018, accessed 10 April 2019; C Knaus and N Evershed, '[Electoral watchdog powerless to crack down on offshore political ads targeting Australians](#)', *The Guardian*, 24 July 2018, accessed 10 April 2019; Facebook response to questions on notice before [US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, p. 204.

1275 Facebook response to questions on notice before [US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, p 204; Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 33.

1276 N Gleicher, and O Rodriguez, '[Removing additional inauthentic activity from Facebook](#)', 11 October 2018, accessed 21 November 2018.

1277 J Pallero and V Arroyo, '[Your data used against you: reports of manipulation on WhatsApp ahead of Brazil's election](#)', *Access Now*, 26 October 2018, accessed 16 May 2019.

6.12 Addressing impacts of digital platforms on the consumption of journalism

Key Findings

- The major digital platforms are taking action to address journalism consumption issues and the prevalence of disinformation and malinformation on their services. These approaches are not yet applied consistently across international jurisdictions.
- The threats posed by exposure to unreliable news, disinformation and malinformation on digital platforms warrant measures that improve understanding of these phenomena and action to limit the social harm they may cause.
- Increased media literacy can assist consumers in combatting information disorder.
- There is a role for an independent regulator to monitor, evaluate and report on the actions digital platforms are taking to improve and support credibility signalling.
- There is a role for an independent regulator to oversee digital platforms' actions to address disinformation and malinformation.

6.12.1 Action being taken by digital platforms to address journalism consumption issues

Some digital platforms have designed tools to support consumers to judge the quality of news content they find online. The main actions taken by digital platforms when surfacing content for users include:

- deciding whether to act on the basis of each piece of content, or on the source
- identifying what is trustworthy or problematic
- signalling different types of content or sources to users
- prioritising of content in news feeds
- removing content or sources from the platform.

Approaches taken by social media platforms

The major digital platforms are aware of the problems caused by information disorder. For example, Facebook is reported to have admitted that it did not do enough to stop the spread of disinformation on its platform.¹²⁷⁸ The platforms have taken different approaches to assessing and communicating the reliability of information on their services.

Facebook states that its general approach is to 'remove, reduce, inform'. It removes material that breaches its content policies, reduces the spread of problematic material that does not directly breach its content policies, and provides users with additional contextual information about the content that appears in their news feeds.¹²⁷⁹

In March 2019, Facebook launched the 'why am I seeing this?' tool. This tool is designed to show users how their past interactions with content and other users have affected the ranking of posts in their feeds, and provides information on which factors have the most influence over the order of the posts they are served.¹²⁸⁰

Both Facebook and Twitter provide badges verifying 'authoritative' sources, although this only relates to the verification of identity (box 6.5). Facebook allows users to complain about 'false news' as part of its 'leave feedback' option for posts. This option allows complaints about breaches of Facebook's community standards, which include rules about 'hate speech' and 'unauthorised sales'. Twitter allows users to report a post if they are 'not interested', or if the post is 'suspicious', 'spam', 'abusive', or 'harmful'.

1278 R Sabur, '[Mark Zuckerberg admits Facebook 'didn't do enough' to protect users](#)', *The Telegraph*, April 2018, accessed 10 April 2019.

1279 Facebook, '[Remove, Reduce, Inform: New Steps to Manage Problematic Content](#)', 10 April 2019, accessed 13 June 2019.

1280 Facebook, '[Why Am I Seeing This? We Have an Answer for You](#)', 31 March 2019, accessed 13 June 2019.

In responding to user complaints, both Facebook and Twitter have stated that they actively down-rank some content or sources in their respective newsfeeds, although for Twitter, this relates to abusive comments as opposed to unreliable information.¹²⁸¹ Facebook's approach also relies on third-party fact-checkers, and involves commercial restrictions as penalties. The company has publicly stated that:

*... If content from a Page or domain is repeatedly given a 'false' rating from our third-party fact-checkers ... we remove their monetization and advertising privileges to cut off financial incentives, and dramatically reduce the distribution of all of their Page-level or domain-level content on Facebook.*¹²⁸²

Facebook notes the problems caused by sensational or false information, but bans the purveyors of such websites for 'inauthentic behaviour', which relates to their strategic commercial interactions as opposed to the content itself. It has stated that:

*... we have a policy banning coordinated inauthentic behaviour — networks of accounts or Pages working to mislead others about who they are, and what they are doing. This year, we've enforced this policy against many Pages, Groups and accounts created to stir up political debate, including in the US, the Middle East, Russia and the UK. But the bulk of the inauthentic activity we see on Facebook is spam that's typically motivated by money, not politics.*¹²⁸³

1281 J Wong, '[Twitter announces global change to algorithm in effort to tackle harassment](#)', *The Guardian*, 16 May 2018, accessed 21 November 2018; O Darcy, '[Facebook touts fight on fake news, but struggles to explain why InfoWars isn't banned](#)', *CNN Business*, 11 July 2018, accessed 21 November 2018.

1282 O Darcy, '[Facebook touts fight on fake news, but struggles to explain why InfoWars isn't banned](#)', *CNN Business*, 11 July 2018, accessed 21 November 2018.

1283 N Gleicher, and O Rodriguez, '[Removing additional inauthentic activity from Facebook](#)', 11 October 2018, accessed 21 November 2018.

Box 6.5: Facebook and Twitter verification¹²⁸⁴

Facebook provides the following visual verification of authenticity for public figures and organisations:

The blue verification badge  lets people know that a Page or profile of public interest is authentic.

We apply the blue verification badge to eligible brands, media organizations and public figures. Eligibility for the blue verification badge is based on a variety of factors, such as account completeness, policy compliance and public interest.

In September 2018, Facebook also launched in Australia the option to click an information icon on links and articles posted by public profiles:

... including the publisher's Wikipedia entry, related articles on the same topic, information about how many times the article has been shared on Facebook, where it has been shared, as well as an option to follow the publisher's page. When a publisher does not have a Wikipedia entry, we will indicate that the information is unavailable, which can also be helpful context. ... [Update 19 September] We will now also share website/domain age, which will give people more information about the source .. We're expanding our coverage from articles to all links.

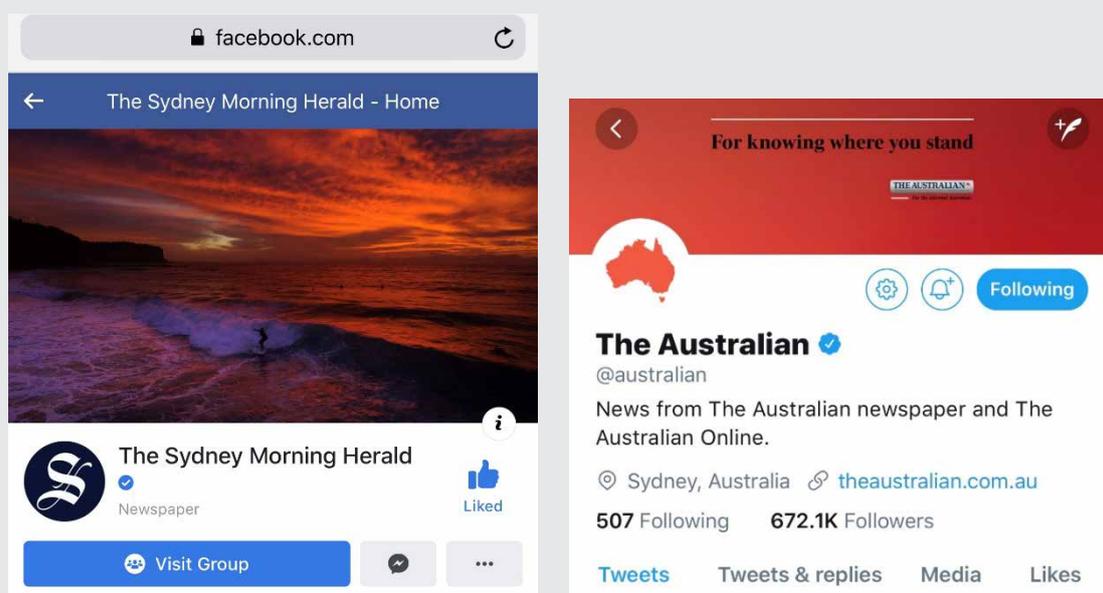


Image on left: The Sydney Morning Herald's Facebook page as it appears on the platform (on a mobile phone). The "i" button gives consumers more page information including, page creation and history.

Image on right: The Australian's Twitter profile as it appears on the platform (on a mobile phone). It shows a blue tick symbol to verify the page.

1284 Facebook, '[What is a Verified page or profile?](#)', accessed 21 November 2018; Twitter, '[About verified accounts](#)', accessed 21 November 2018; Facebook Newsroom, '[Helping people better assess the stories they see in News Feed with the Context Button](#)', accessed 21 November 2018.

Twitter also provides visual verification of authenticity for public figures and organisations:

The blue verified badge on Twitter lets people know that an account of public interest is authentic.

The badge appears next to the name on an account's profile and next to the account name in search results. It is always the same color and placed in the same location, regardless of profile or theme color customizations.

What types of accounts get verified?

An account may be verified if it is determined to be an account of public interest. Typically this includes accounts maintained by users in music, acting, fashion, government, politics, religion, journalism, media, sports, business, and other key interest areas.

A verified badge does not imply an endorsement by Twitter.

The verification account program is currently on hold and Twitter are not accepting new requests for verification.¹²⁸⁵

In January 2019, Facebook UK announced that Full Fact, an independent organisation, was to begin fact-checking images, videos and articles on Facebook, to minimise the spread of misinformation on users' news feeds.¹²⁸⁶ Facebook has increased its independent content fact-checking to 43 partners in 24 languages globally.¹²⁸⁷ In Australia, Facebook committed to independent Australian-based fact checking in time for the 2019 election campaign period. However, the scope of this commitment is unclear.¹²⁸⁸

On 1 April 2019, Facebook announced that it was opening a public consultation process in relation to the Oversight Board originally announced in November 2018 to provide accountability and oversight of Facebook's content policy and enforcement decisions.¹²⁸⁹

The impact of these very new Facebook measures could not be assessed at the time of drafting this Report.

As the largest digital platform providing search services, Google has noted that its approach to addressing low-quality journalism is not to ban content but to use down-ranking similar to social media services. The Chief Executive Officer of Google's parent company Alphabet Inc. said that:

*We don't want to ban the sites. That's not how we operate. I am strongly not in favour of censorship. I am very strongly in favour of ranking. It's what we do.*¹²⁹⁰

Google has stated publicly that algorithms across its products have been adjusted to:

*.. recognize these events and adjust our signals toward more authoritative content. There are comparable challenges on YouTube, and we're taking a similar approach, highlighting relevant content from verified news sources in a "Top News" shelf.*¹²⁹¹

1285 Twitter, '[About verified accounts](#)', accessed 24 April 2019.

1286 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 34.

1287 Facebook, '[Working to safeguard Elections in Australia](#)', 4 April 2019, accessed 24 April 2019.

1288 Facebook, '[Working to safeguard Elections in Australia](#)', 4 April 2019, accessed 24 April 2019.

1289 Facebook, '[Oversight board](#)', 28 January 2019, accessed 25 April 2019.

1290 E Schmidt, '[Google will downrank Russian state news agencies](#)', *Engadget*, 23 November 2017, accessed 21 November 2018.

1291 P Schindler, '[The Google News Initiative: Building a stronger future for news](#)', 20 March 2018, accessed 21 November 2018.

The Reuters Institute suggests that there would be value in collaborative solutions involving digital platforms and other stakeholders. This may include:

Working with publishers, fact-checkers, and other content creators to better label different kinds of content .. Platforms should also consider taking into account more signals about the quality and origin of content from publishers, improving the branding of trusted brands, and taking steps to reduce the speed with which extreme or disputed content can be spread through the network.¹²⁹²

Industry-led projects aimed at better labelling and curation are reportedly in progress (box 6.6).

Box 6.6: The Trust Project

The Trust Project is already providing indicators to news consumers about ethical and journalistic standards, which were reportedly due to be integrated into some digital platforms' algorithms in 2018. Those digital platforms were to increase the space given to logos of news brands and introduce tags to describe content such as breaking news or analysis.

This Project involved deciding on a core set of eight Trust Indicators by which to assess sources of journalism:

- **Best Practices:** What are the news outlet's standards? Who funds it? What is the outlet's mission? Plus commitments to ethics, diverse voices, accuracy, making corrections and other standards.
- **Author/Reporter Expertise:** Who made this? Details about the journalist, including their expertise and other stories they have worked on.
- **Type of Work:** What is this? Labels to distinguish opinion, analysis and advertiser (or sponsored) content from news reports.
- **Citations and References:** What's the source? For investigative or in-depth stories, access to the sources behind the facts and assertions.
- **Methods:** How was it built? Also for in-depth stories, information about why reporters chose to pursue a story and how they went about the process.
- **Locally Sourced?** Was the reporting done on the scene, with deep knowledge about the local situation or community? Lets you know when the story has local origin or expertise.
- **Diverse Voices:** What are the newsroom's efforts and commitments to bringing in diverse perspectives? Readers noticed when certain voices, ethnicities, or political persuasions were missing.
- **Actionable Feedback:** Can we participate? A newsroom's efforts to engage the public's help in setting coverage priorities, contributing to the reporting process, ensuring accuracy and other areas. Readers want to participate and provide feedback that might alter or expand a story.

As discussed in section 6.7, some digital platforms have also made efforts to address production issues experienced by news media businesses by providing funding and resources for research and the production of journalism.

The various approaches outlined above demonstrate how individual digital platforms make their own determinations about how to rate the trustworthiness of sources and how this should affect the journalism and other content they present to consumers.

These decisions are significant in setting the incentives around the production of 'quality' journalism for Australian news media businesses. Treatment as a 'trustworthy' source by the algorithms of major digital platforms is likely to be of significant commercial importance to these businesses.

1292 N Newman and R Fletcher, [Bias, Bullshit and Lies: Audience Perspectives on Low Trust in the Media, Digital News Project 2017](#), Reuters Institute for the Study of Journalism, Oxford University, 2017, p. 6.

The current situation implicitly places a great deal of public trust in digital platforms to make decisions about trustworthy news sources. Any bias or preference given effect by the platform, either human or algorithmic, could influence the information presented to consumers. Chapter 8 discusses issues of algorithmic bias in more detail.

Potential for Government intervention in credibility signalling

The Preliminary Report of this Inquiry indicated that the ACCC would undertake further analysis of whether it would be appropriate for the Government to require digital platforms to take a uniform approach to identifying news and journalism provided by media businesses that had signed up to certain Government-approved codes of conduct. Following further consideration and consultation, the ACCC has decided not to recommend a regulatory ‘badging’ mechanism in this Final Report. This is due to diverging stakeholder views on the need for and efficacy of the badging proposal, and a lack of evidence to show that it would lead to increased consumption of high quality journalism.

Stakeholders expressed concern that such a system would be ineffective as it would be extremely difficult to apply penalties or disincentives for poor conduct or breaches of journalism standards by ‘badged’ media companies. There was further concern that badging of content through a scheme administered by the Government may be perceived as interference with editorial independence or even censorship. Finally, as some new market entrants or international publications would not be badged under an Australian Government mechanism, this may advantage existing news businesses at the expense of others, and dilute the usefulness of the measure in helping consumers identify unreliable information.

6.12.2 International government action to address journalism consumption issues

A number of international jurisdictions are beginning to take action to address information disorder on digital platforms.

The European Union

The European Commission (EC) recently published the EU Code of Practice on Disinformation, which was developed in consultation with Google, Facebook, Twitter, Mozilla and the European Online Platform and Tech Trade Association (EDiMA) (box 6.7).

Box 6.7: EU Code of Practice on Disinformation

On 26 September 2018, the European Union released the EU Code of Practice on Disinformation. It is a voluntary code that involves obligations for digital platforms, as well as advertisers. It is not focused on news media.¹²⁹³

The code defines 'Disinformation' as 'verifiably false or misleading information' which:

- a) *'Is created, presented and disseminated for economic gain or to intentionally deceive the public'; and*
- b) *'May cause public harm', intended as 'threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security'.*

The notion of 'Disinformation' does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.

The code attempts to balance safeguards against disinformation and improve transparency, while also safeguarding freedom of speech. The code's purposes include to:

- *Ensure transparency about political and issue-based advertising, also with a view to enabling users to understand why they have been targeted by a given advertisement*
- ...
- *Ensure transparency with a view to enabling users to understand why they have been targeted by a given political or issue-based advertisement, also through indicators of the trustworthiness of content sources, media ownership and/or verified identity.*

The code includes a 12 month self-assessment period to analyse progress, implementation and functioning. Google, Facebook, Twitter and Mozilla provided self-assessed reports on their progress against the action plan in January 2019. While the EC welcomed this self-assessment, it stated that these initial reports showed that 'further efforts must be deployed in other areas to improve the reliability of the online ecosystem and the protection of users.'¹²⁹⁴

The code's definition of 'Disinformation' does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary.

This definition specifically includes disinformation campaigns by third countries, which the code states can be part of hybrid threats to internal security, including election processes, in particular in combination with cyberattacks.¹²⁹⁵ The EC notes that while disinformation campaigns about vaccination would also fall under this definition, it is proposing a Council Recommendation including specific measures to monitor and tackle disinformation in this area.¹²⁹⁶

The United Kingdom

The Cairncross Review recommends that a government regulator have oversight of digital platforms' efforts to enable users to identify reliability, and the trustworthiness of sources of news.¹²⁹⁷ Initially, the only requirement would be for platforms to report on their efforts, but over time the regulator could work with platforms and businesses to develop a 'best practices guide' for presentation of news on platforms. The recommendation is designed to evolve over time as the situation changes, incorporating increased regulation if necessary.

1293 European Commission, [EU Code of Practice on Disinformation](#), 26 September 2018.

1294 European Commission, [First results of the EU Code of Practice against discrimination](#), 29 January 2019.

1295 For example, Russian military doctrine explicitly recognises information warfare as one of its domains. European Commission, [Tackling online disinformation: a European Approach](#), 26 March 2018, p. 2.

1296 European Commission, [Tackling online disinformation: a European Approach](#), 26 March 2018, p. 2; European Commission, [Strengthened Cooperation against Vaccine Preventable Diseases](#), 26 April 2018.

1297 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 10.

Germany

In January 2018, the German Government began enforcing the Network Enforcement Act, commonly known as NetzDG. This legislation forces digital platforms to remove hate speech from their sites within 24 hours, or within one week for more 'complex cases', and fines them EUR€20 million if material is not removed within this timeframe.¹²⁹⁸ As a result of this law, one in six of Facebook's moderators now works in Germany.¹²⁹⁹ While this measure does not target disinformation (which is distinct from hate speech), it provides an example of digital platforms taking quick and comprehensive action to counter harmful content on their services in response to regulation introduced in a particular country.

France

In November 2018, France passed legislation allowing judges to order the immediate removal of online articles that they decide constitute disinformation, during election campaigns. The legislation states that users must be provided with 'information that is fair, clear and transparent' on how their personal data is being used, and that sites must disclose money they have been given to promote information. This legislation also gives the French national broadcasting agency the power to suspend television channels controlled by or under the influence of a foreign state if they 'deliberately disseminate false information likely to affect the sincerity of the ballot'. The legislation contains penalties for violation of these terms, including one year in prison and a fine of EUR€75 000.¹³⁰⁰

6.12.3 Digital media literacy as a tool to combat information disorder

Digital media literacy provides consumers with the ability to access, interpret and critically assess sources of journalism online. It also encompasses an understanding of how journalism is produced, how it is consumed and its role in society. Improving consumers' digital media literacy would reduce the risk of information disorder by equipping them with the ability to critically assess the news they consume and determine whether it is trustworthy and accurate. It would also address the spread of low-quality news by users on social media platforms.¹³⁰¹

Information disorder is a broad problem that has the potential to affect all Australians. The 2018 Digital News Report included questions testing media literacy. It found Australians' media literacy to be below the global average (and behind both the United Kingdom and the United States) with 68 per cent of Australian adults having either low or very low levels of media literacy.¹³⁰² The 2019 Digital News Report found that only 36 per cent of Australians were likely to check the veracity of news they accessed online (against a global average of 41 per cent), and that only 22 per cent of Australians said they would not share a story they believed to be dubious (against a global average of 29 per cent).¹³⁰³

Certain groups are at a higher risk from the negative effects of information disorder than others, including heavy users of social media, children and older people. The 2018 Digital News Report found that 76 per cent of Australian respondents who mainly accessed news through social media had low or very low levels of media literacy.¹³⁰⁴ The 2019 edition of this report found that older Australians and those with lower levels of formal education are least likely to take any steps to verify the accuracy of news online.¹³⁰⁵

1298 ['Germany starts enforcing hate speech law'](#), *BBC News*, 1 January 2018, accessed 10 April 2019.

1299 UK Commons Select Committee, Digital, Culture, media and Sports, [Disinformation and 'fake news': Final Report](#), oral evidence from S Lewandovsky, 23 January 2019, Q233.

1300 M Fiorento, ['France passes controversial "fake news" law'](#), *Euronews*, 22 November 2018, accessed 21 May 2019

1301 B Martens, L Aguiar, E Gomez-Herrera and F Mueller-Langer, ['The digital transformation of news media and the rise of disinformation and fake news'](#), JRC Digital Economy Working Paper 2018-02, April 2018, p. 50.

1302 S Park, C Fisher, G Fuller, and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, pp. 17, 44.

1303 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 17.

1304 S Park, C Fisher, G Fuller, and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 45.

1305 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, p. 90.

This report also found that 47 per cent of news consumers under 23 years old use social media as their main news source, although these users were more likely than other demographics to fact-check news they accessed online.¹³⁰⁶

A 2019 study of false news sharing behaviour on social media in the United States found that users over the age of 65 were almost seven times as likely to share false news than those aged 30 to 44, and more than twice as likely to share false news than those aged 45 to 65.¹³⁰⁷

Organisations such as the ABC already provide supplementary education and resources to help increase digital media literacy in Australia. This includes the ABC's Media Literacy Week, the Media Education Partnerships initiative and a range of educational resources aligned with the Australian Curriculum.¹³⁰⁸ The Australian Curriculum currently covers digital media literacy in a number of areas including English, Arts and Humanities and the Social Sciences learning areas. It is also specifically covered in the Media Arts subject as part of the Arts learning area.¹³⁰⁹

While the ACCC has not conducted a comprehensive review of the Australian Curriculum, recent academic research suggests that there is scope to improve and supplement the current approach to teaching digital media literacy in Australian schools. A 2018 study found that media literacy in the Australian Curriculum was 'developed in the pre-digital era [with] the resources available in many schools .. informed by understandings about legacy media and communications' and that 'there have thus far been very few efforts to reconceptualise media literacy for digital contexts within educational policy.'¹³¹⁰

Similarly, a review of digital media literacy in Tasmanian schools concluded that 'more clarity is required for teachers from school and curriculum authorities regarding media literacy instruction and the priority it should be given in Australian classrooms'.¹³¹¹

Several stakeholders support increasing digital media literacy education beyond the approach of the current Australian Curriculum. In its submission in response to the Preliminary Report, NewsMediaWorks stated it 'would support a proposal that the government fund programs to increase consumer literacy, especially among Australia's students at all levels of education'.¹³¹² The ABC and SBS expressed similar views.¹³¹³

Given the importance of digital media literacy in reducing the risk of information disorder, and the fact that the current approach to media literacy in the Australian Curriculum could be improved, a review of media literacy education in the Australian Curriculum would be timely.

1306 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News & Media Research Centre, University of Canberra, 12 June 2019, pp. 27, 90.

1307 A Guess, J Nagler and J.Tucker, '[Less than you think: Prevalence and predictors of fake news dissemination on Facebook](#)', *Science Advances* 5(1), January 2019, p. 4.

1308 Australian Broadcasting Corporation, [Submission in response to the Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 12; Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

1309 Australian Government, [Australian Government Response to the Senate Select Committee on Public Interest Journalism report: Future of Public Interest Journalism](#), 24 August 2018, p. 3.

1310 T Notely and M Dezuanni, '[Advancing children's news media literacy: learning from the practices and experiences of young Australians](#)', *Media, Culture & Society*, 20 December 2018, p. 6.

1311 J Nettlefold and K Williams, [Insight Five: A snapshot of Media Literacy in Australian Schools](#), University of Tasmania Institute for the Study of Social Change, 2018, p. 10.

1312 NewsMediaWorks, [Submission in response to the Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

1313 Australian Broadcasting Corporation, [Submission in response to the Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 12; Special Broadcasting Service, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 5.

6.12.4 Recommendations to address the impacts of digital platforms on the consumption of journalism

Recommendation 12: Improving digital media literacy in the community

A Government program be established to fund and certify non-government organisations for the delivery of digital media literacy resources and training based on frameworks currently used by the Online Safety Grants Program and Be Connected program administered by the Office of the eSafety Commissioner. The resources and training should be broadly delivered through community centres, libraries, schools and seniors centres for the benefit of all Australians.

The Online Safety Grants Program administered by the Office of the eSafety Commissioner (OeSC) provides grants to accredited non-Government organisations that provide education, training and resources to promote online safety.¹³¹⁴ The Government entity administering Recommendation 12 could develop similar guidelines, eligibility criteria and application processes to administer grants to deliver media literacy training. These criteria could require organisations to provide programs that promote and improve the ability of Australians to:

- assess the validity of news sources
- determine whether information (headlines, pictures, videos, facts, quotes) contained in news content is genuine and reliable
- understand options available for accessing news and how methods of accessing news shape and influence the type of news presented
- understand the importance of journalism to the democratic process
- distinguish between factual news reporting of information and events and editorial opinion and commentary on news and important issues.

The OeSC's Be Connected program provides online resources and face-to-face training to improve digital skills of older Australians. The program also provides grants to a network of partner organisations that provide this in-person training in libraries, seniors centres and community centres.¹³¹⁵ A similar website and partner network for digital media literacy education could be set up to target all Australians. This website could contain online courses and information about certified training providers. It could also contain information on the monitoring of complaints relating to disinformation by an independent regulator such as the ACMA as proposed in Recommendation 15.

Organisations applying for funding and certification under this new program should be encouraged to partner with entities already providing digital media literacy resources training and resources in Australia such as the ABC and SBS.

Recommendation 13: Digital media literacy in schools

The Terms of Reference for the review of the Australian Curriculum scheduled for 2020 should include consideration of the approach to digital media literacy education in Australian schools.

The Australian Curriculum is due to be reviewed in 2020.¹³¹⁶ Recommendation 13 would allow relevant stakeholders, including state and territory education authorities, to consider a consistent and potentially expanded approach to media literacy education in schools across Australia. This review could also consider potential opportunities to incorporate materials and resources provided through the Government grants program described above into elements of the curriculum.

1314 Australian Government Department of Communications and the Arts, [Keeping our kids safe online](#), 11 February 2019.

1315 The Hon C Porter MP, ['New Program to help older Australians be connected through digital technology'](#), media release, 1 November 2017.

1316 Australian Government Department of Education and Training, [Australian Curriculum](#), accessed 17 May 2019.

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

An independent regulator, such as the ACMA, should be directed to monitor the voluntary initiatives of digital platforms to enable users to identify the reliability, trustworthiness and source of news content featured on their services.

In undertaking this role, the regulator should be empowered to obtain data and information from digital platforms relevant to its inquiries, publicly report on its findings and make recommendations in relation to regulatory action if platforms' voluntary initiatives are ineffective.

As demonstrated in this chapter, digital platforms have considerable influence in shaping the news viewed by Australian consumers, and perform curatorial functions when surfacing information. However, the atomisation of media content and the risk for disinformation to be spread on digital platforms make it difficult for consumers to ascertain the veracity, trustworthiness and quality of the news and journalism they access online.¹³¹⁷ This may have the effect of undermining democratic processes¹³¹⁸ and affecting ability of consumers to recognise the kinds of high quality journalism that are essential for a well-functioning democracy.¹³¹⁹

International examples¹³²⁰ and growing public concern about the presence of highly inaccurate and misleading content surfaced to Australian consumers¹³²¹ present a compelling case for the Australian Government to address these issues.

The major digital platforms are taking positive steps to help users assess the reliability and trustworthiness of news and journalism on their services, including by highlighting the sources and origin of such content. However, the ACCC considers that addressing these issues is too important to be left at the sole discretion of digital platforms alone. On this basis, Recommendation 14 proposes that a regulator such as the ACMA monitor and evaluate the effectiveness of voluntary initiatives that digital platforms are already implementing.

As it is not yet possible to judge the impact of these new and emerging measures being taken by digital platforms, this recommendation is intended to provide the regulator with the ability to build an evidence base relating to the prevalence and harms of disinformation, malinformation and misinformation being served to Australian digital platform users, as well as the potential effects of echo chambers and filter bubbles. To do so, the regulator should be granted appropriate statutory information-gathering powers to allow it to conduct meaningful assessment of progress digital platforms are making in this area. If the ACMA fulfils this function, the implementation of these statutory powers might be modelled after Part 13 of the *Broadcasting Services Act 1992* (Cth) which already provides the ACMA with the ability to obtain information from private companies in the communications sector as part of its existing investigative functions.

The information and evidence gathered under this mechanism will allow the regulator to make recommendations to the Government based on the effectiveness of digital platforms' voluntary credibility-signalling mechanisms, as well as the necessity of more direct regulation in the future.

1317 The [Digital News Project 2017](#) found that less than half of the respondents could recall the name of the news publisher when coming to an article from search engines (37%) and social media (47%). It is often difficult to distinguish between genuine news items and paid-for content on news pages. That makes it difficult, even for discerning readers, to appreciate and distinguish the quality and credibility of all these channels.

1318 European Commission, [2016 Annual Colloquium on Fundamental Rights](#), 18 November 2016, p. 3.

1319 European Commission, [Tackling online disinformation: a European Approach](#), 26 March 2018.

1320 European Commission, [Tackling online disinformation: a European Approach](#), 26 March 2018, p 2; [Ledger of Harms](#), Center for Humane Technology, accessed 10 April 2019, referenced in the UK Commons Select Committee, Digital, Culture, Media and Sports, [Disinformation and 'fake news': Final Report](#), 18 February 2019, p. 15.

1321 Roy Morgan Research, ['Consumer Use of News'](#), November 2018, p. 24; ACCC, [Digital Platform Inquiry Preliminary Report](#), December 2018, p. 288.

Recommendation 15: Digital Platforms Code to counter disinformation

Digital platforms with more than one million monthly active users in Australia should implement an industry code of conduct to govern the handling of complaints about disinformation (inaccurate information created and spread with the intent to cause harm) in relation to news and journalism, or content presented as news and journalism, on their services. Application of the code should be restricted to complaints about disinformation that meet a 'serious public detriment' threshold as defined in the code. The code should also outline actions that constitute suitable responses to complaints, up to and including the take-down of particularly harmful material.

The code should be registered with and enforced by an independent regulator, such as the ACMA, that:

- is given information-gathering powers enabling it to investigate and respond to systemic contraventions of code requirements
- is able to impose sufficiently large sanctions to act as an effective deterrent against code breaches
- provides frequent public reports on the nature, volume and handling of complaints received by digital platforms about disinformation
- reports annually to Government on the efficacy of the code and compliance by digital platforms.

While the code should focus on addressing complaints about disinformation it should also consider appropriate responses to malinformation (information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to democratic processes).

In the event that an acceptable code is not submitted to the regulator within nine months of an announced Government decision on this issue, the regulator should introduce a mandatory industry standard.

The code should be reviewed by the regulator after two years of operation, and the regulator should make recommendations as to whether it should be amended, replaced with an industry standard, or replaced or supplemented with more significant regulation to counter disinformation on digital platforms.

Material covered in the code

The code proposed in this recommendation would apply to 'disinformation' using a definition of this concept based on existing internationally-accepted models such as the EU Code of Practice On Disinformation (the EU Code). The drafting of the proposed code should also consider and incorporate appropriate responses for countering 'malinformation', which the ACCC considers to be a more remote threat in the Australian context.

The ACCC considers that any intervention directly aimed at affecting individuals' access to information must carefully balance the public interest with the case for free speech and the right of individuals to choose. In particular, it should avoid the Government directly determining the trustworthiness, quality and value of news and journalism sources.

To balance these competing interests, the recommended code does not include 'misinformation' which is defined as false or inaccurate information not created with the intention of causing harm.

Under this approach, the ACCC expects the code would cover issues such as:

- doctored and dubbed video footage misrepresenting a political figure's position on issues
- incorrect information about time and location for voting in elections
- information incorrectly alleging that a public individual is involved with illegal activity.

The ACCC expects the code would not apply to:

- false or misleading advertising (which is regulated under the Australian Consumer Law and overseen by industry body Ad Standards, with advertising broadcast on television and radio also bound by additional legislative restrictions and is co-regulated by the ACMA)¹³²²
- reporting errors (news publishers are generally regulated by the Australian Press Council¹³²³, with complaints about news broadcast on television and radio subject to coregulation through an industry code overseen by the ACMA)¹³²⁴
- explicit hate speech or incitements to violence not presented as journalism or reporting of fact (addressed through the *Racial Discrimination Act 1975*)
- commentary and analysis that is clearly identified as having a partisan ideological or political slant
- incorrect or harmful statements made against private individuals (addressed by existing defamation laws)
- satire and parody.

However, the precise content to be covered by the code will be determined by its drafting, as agreed between the digital platforms industry and the independent regulator overseeing the code.

The proposed code would only apply to complaints about content that has the potential to cause 'serious public detriment'. This threshold is necessary to balance the public interest in minimising the spread of harmful and inaccurate information against the right of individuals to free expression. If this threshold is set too high, the code will not be effective in combatting disinformation or malinformation. If it is set too low, enforcement of the code may risk government interference with the rights of individuals to hold and express personal views and beliefs, particularly those outside of the 'mainstream'.

The EU code sets a slightly lower threshold, applying to information that 'may cause public harm' – intended to refer to 'threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security'.¹³²⁵ While this may be appropriate to the European context (in which multiple countries have already experienced harms including social media interference, and campaigns of disinformation and malinformation from external countries seeking to affect domestic political processes¹³²⁶), the ACCC considers that a 'serious public detriment' threshold is appropriate for a code operating in Australia.

The ACCC notes that this slightly higher threshold is necessary for the recommended code, which would include more significant enforcement and penalty provisions than the largely self-regulatory EU code. However, this threshold would ultimately be determined by the drafting of the proposed code.

Implementation and administration by the regulator

Under the proposed code, members of the public who are unsatisfied with digital platforms' handling of their complaints about disinformation or malinformation could refer these complaints to the independent regulator for investigation.

Based on escalated consumer complaints, the regulator would have the discretion to investigate systemic breaches of the code. In doing so, the regulator would not be making a 'first-principles' determination of whether content constitutes disinformation or malinformation, but would be assessing the response of the digital platforms to complaints against the terms of the code. The code should set out appropriate responses by digital platforms through actions up to and including the removal of content, subject to the seriousness of the complaint warranting such a response. Implementation of the code would likely require legislative changes to provide the regulator with appropriate investigative and information-gathering powers, as well as the capacity to impose sanctions for non-compliance of a sufficient scale to provide an effective deterrent for even the largest digital platforms.

1322 Ad Standards, '[About](#)', accessed 30 May 2019; Australian Communications and Media Authority, [Regulation of broadcasting advertisements](#), 13 February 2019, accessed 30 May 2019.

1323 Australian Press Council, '[Who are our members?](#)', accessed 2 May 2019.

1324 Australian Communications and Media Authority, [Australian TV Content](#), 15 April 2019, accessed 2 May 2019; *Broadcasting Services (Australian Content) Standard 2016* (Cth).

1325 European Commission, [Code of Practice on Disinformation](#), 26 September 2018.

1326 European Parliament, [Online disinformation and the EU's response](#), February 2019, p. 1.

The regulator should also be given the power to determine a mandatory industry standard if the industry does not register an appropriate code within nine months of a Government announcement on this issue, or if the regulator believes the code is not operating effectively. The regulator's inquiries into and reporting of complaints should inform an annual report to Government on the code's effectiveness and compliance by digital platforms.

Co-regulation through an industry-drafted code is preferable in this case to direct government regulation, and is expected to better ensure stakeholder concerns and practical considerations such as cost of compliance are managed.¹³²⁷

As part of the parallel monitoring function of recommendation 15, the regulator would provide frequent and contemporaneous reporting of complaints and responses by relevant digital platforms. This is intended to draw the public's attention to the existence of disinformation on platforms in general, and to particular current examples of this harmful content.

In providing this information, the regulator could publish complaints not considered vexatious on its website and in its Annual Report. Programs to improve digital media literacy introduced under recommendation 13 could also direct consumers to the regulator's public resources enabled by this recommendation.

Transparency of existing actions

Some digital platforms already perform some curation functions in relation to disinformation and malinformation.¹³²⁸ This code would improve transparency and make these actions enforceable, helping consumers by publicising, and enforcing, a minimum standard that digital platforms must maintain.

Like recommendation 14, this recommendation would allow the regulator to gather and distribute evidence on the nature and extent of harm caused by filter bubbles in Australia and the extent of disinformation and malinformation surfaced to consumers on digital platforms.

Consultation with stakeholders

As previously noted, recommendation 15 significantly differs from proposals to address information disorder outlined in the Preliminary Report. The ACCC has taken into account feedback received in response to the Preliminary Report in recommending this revised proposal.

Google stated that it already has strong procedures to handle consumer complaints about content¹³²⁹, and Facebook opposed direct regulation of the content that appears on its users, News Feeds.¹³³⁰ The ACCC believes that recommendation 15 would be consistent with these views, as it promotes strong complaints-handling procedures and does not propose direct Government regulation of content on digital platforms.

Submissions from media industry stakeholders highlighted divided views about the role of Government in addressing disinformation. Some stakeholders raised concerns about the risk of government interference with independent journalism and the right of individuals to choose.¹³³¹ However, the Media Entertainment and Arts Alliance supported extending the ACMA's existing roles in regulating complaints against media companies to digital platforms.¹³³² In developing recommendation 15, the ACCC has attempted to address the concerns expressed by these stakeholders while still proposing action that will protect Australian consumers from the potential harms posed by low-quality news and journalism spread on digital platforms.

1327 Council of Australian Governments, [Best Practice Regulation: A guide for ministerial councils and national standard setting bodies](#), October 2007, pp. 7-9.

1328 L Beckett, '[Facebook to ban white nationalism and separatism content](#)', *The Guardian*, 28 March 2019, accessed 11 April 2019.

1329 Google, [Submission to the Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 39, 48.

1330 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 9.

1331 Australian Press Council, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, pp. 2-3; ACCC, [Summary of ACCC Future of Journalism Roundtable](#), 15 March 2019, p. 6.

1332 Media, Entertainment and Arts Alliance, [Submission to ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 9.



07

7. Digital platforms and consumers

Key findings

- Digital platforms provide a wide range of valuable services to consumers, often for zero monetary cost, in exchange for consumers' attention and their user data.
- Many digital platforms can collect a large amount and variety of data on a user's activities beyond what the user actively provides while they are using the digital platform's services. Digital platforms often have broad discretions in how they use and disclose this data.
- Consumers have different privacy preferences and levels of privacy awareness. All consumers will be better off when they are sufficiently informed and have sufficient control over their user data, so that they can make informed choices that align with their privacy and data collection preferences.
- Several features of consumers' current relationship with digital platforms prevent consumers from making informed choices. They include bargaining power imbalances, information asymmetries between digital platforms and consumers and inherent difficulties for consumers to accurately assess the current and future costs of providing their user data.
- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.
- Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.
- Despite consumers being particularly concerned by location tracking, online tracking for targeted advertising purposes and third-party data-sharing, these data practices are generally permitted under digital platforms' privacy policies.
- Many consumers would like to be able to opt-out of certain types of data practices and some digital platforms give consumers the impression that they provide extensive privacy controls. However, it is not in the interests of most digital platforms to allow consumers to opt-out of data processing and in some cases, digital platforms do not provide consumers with meaningful control over the collection, use and disclosure of user data.
- Some digital platforms design user interfaces that lead users to make privacy-intrusive selections by appealing to certain psychological or behavioural biases, using design features such as privacy-intrusive defaults or pre-selections.
- In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws.
- Strong privacy protections that inform and empower consumers can promote competition, innovation, and the welfare of individual consumers in digital markets.
- The existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.

The Terms of Reference require the Inquiry to consider the implications for consumers of the impact of digital platforms on competition in media and advertising services markets, and the impact of information asymmetry between digital platforms and consumers.

This chapter focusses on consumers' bargain with digital platforms, including digital platforms' collection, use and disclosure of user data (referred to collectively as 'data practices'). Digital platforms' data practices are relevant to the Inquiry because they form an important part of digital platforms' bargain with consumers, and because user data is a key input in the advertising markets relevant to this Inquiry.

Where necessary, this chapter discusses issues arising under Australian privacy law, as this is the main regulatory framework to address market and regulatory failures in the collection, use and disclosure of personal information. This chapter also discusses data practices that may raise concerns under Australian competition and consumer laws and which may be subject to current or future ACCC investigation.

This chapter sets out the ACCC's findings and is structured as follows:

- **Section 7.1** sets out key features of the bargain between digital platforms and consumers, including the services provided by some digital platforms to consumers; and the attention and user data provided by consumers to digital platforms.
- **Section 7.2** discusses consumers' different attitudes and levels of awareness regarding digital platforms' data practices and notes the importance of consumers being able to make informed choices that align with their privacy and data collection preferences.
- **Section 7.3** outlines three data practices of particular concern to consumers: the collection of location data, online tracking of consumers for targeted advertising purposes, and the sharing of user data with third parties.
- **Section 7.4** discusses the nature of consumers' consents to digital platforms' data practices, which are often provided in response to clickwrap agreements containing take-it-or-leave-it terms and bundle together multiple consents.
- **Sections 7.5 and 7.6** discuss the clarity and accessibility of digital platforms' terms of use and privacy policies, including digital platforms' disclosures regarding three areas of particular concern to consumers: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties.
- **Section 7.7** discusses the extent to which consumers can meaningfully control the collection, use and disclosure of their data, including the extent to which consumers can effectively opt-out of certain data practices and digital platforms' use of defaults and pre-selections.
- **Section 7.8** discusses the impact of privacy laws on consumer protection, competition and innovation in digital markets and notes that existing regulatory frameworks may not effectively deter digital platforms from engaging in problematic data practices or provide individuals with sufficient recourse.
- **Section 7.9** discusses the resulting impact on consumers that arise from digital platforms and other businesses engaging in problematic data practices.
- **Section 7.10** sets out the ACCC's recommendations for addressing the information asymmetries, bargaining power imbalance, and behavioural biases which characterise consumers' interactions with digital platforms. These recommendations aim, among other things, to increase the effectiveness and deterrence effect of Australian privacy and data protection framework.

7.1 Consumers' bargain with digital platforms

Key findings

- Digital platforms provide a wide range of valuable services to consumers, often for zero monetary cost, in exchange for consumers' attention and their user data.
- Many digital platforms can collect a large amount and variety of data on a user's activities beyond what the user actively provides while they are using the digital platform's services. Digital platforms often have broad discretions in how they use and disclose this data.

7.1.1 What do digital platforms provide to consumers?

(a) Digital platforms provide a diverse range of valuable online services

As discussed in chapter 1, digital platforms enable interactions between numerous different groups of users, lower transaction and search costs, provide new ways to disseminate information, and facilitate collaboration. They allow Australians to take advantage of digitalisation and share in the benefits of the digital economy.

As identified in the Terms of Reference, three classes of digital platforms are relevant to this Inquiry: search engines, social media platforms and other digital content aggregators.

(b) Services often provided to consumers for zero monetary cost

Digital platforms often provide Australian consumers with a large range of services for zero upfront monetary cost. While some digital platforms collect subscription or membership fees for a paid version of their services, such as YouTube Premium and LinkedIn Premium, most of the digital platforms relevant to this Inquiry make their consumer-facing products available for zero monetary cost. Valuable services provided to consumers for zero monetary cost include Facebook, Snapchat, Google Search and Apple News.

Digital platforms are able to provide valuable services to consumers for zero monetary cost because their consumer-facing services are subsidised by the supply of advertising services.¹³³³

7.1.2 What do consumers provide to digital platforms?

(a) Consumers provide valuable attention and generate user data

Despite the zero upfront price usually paid by consumers when accessing many digital platform services, consumers' interactions with digital platforms nevertheless provide transactions of significant value. In exchange for the many and varied digital platforms' services provided, consumers provide (and effectively 'pay') digital platforms with their attention, user data and rights to user-uploaded content – see diagram illustrating this exchange at figure 7.1.

Figure 7.1: Exchanges of value in the provision of services for zero monetary cost¹³³⁴



When consumers perform a search on a search engine, post on a social media site, or view an article on a news aggregator, they are receiving valuable services from digital platforms, often at no monetary cost. In exchange, consumers provide digital platforms with their attention, which can be monetised by digital platforms through the supply of advertising services. Table 7.1 provides an overview of the typical flows of economic value between the digital platform, the consumer, and the advertiser.¹³³⁵

Table 7.1: Economic Deal between Advertiser, Digital Platform and Consumer¹³³⁶

	Advertiser	Digital Platform	Consumer
Content		Provides [and hosts] content	Receives [and provides] content for zero price
Advertising messages	Delivers message and gets benefit from it	Gets paid for message	Receives message which may annoy [or be appreciated]
Data and privacy	Gets benefit of data in the form of more relevant ads and higher conversion	Receives data and charges marketers more to deliver more relevant ads	Provides data which may increase relevance of ads but reduce privacy

1333 Facebook, 'Advertising', [Relevant ads that protect your privacy](#), accessed 20 April 2019; Google, [Advertising](#), 'Advertising keeps Google and many of the websites and services you use free of charge', accessed 20 April 2019.

1334 Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, p. 79. The figure, updated and adjusted by the ACCC as relevant to matters in this inquiry, regarding how firms economy-wide are using data. For discussion of whether digital platforms 'sell' *personal information*, as opposed to monetising deidentified *user data* for advertising purposes, see Appendix I.

1335 D Evans, [Mobile advertising: Economics, Evolution and Policy](#), 1 June 2016, p.33.

1336 D Evans, [Mobile advertising: Economics, Evolution and Policy](#), 1 June 2016, p.33. Amended by the ACCC by adding in the wording in the square brackets.

Digital platforms also receive the valuable user data generated by consumers, which is a key input into the supply of personalised and segmented advertising services that enable digital platforms to deliver more relevant ads (see discussion in chapter 3).¹³³⁷ Some digital platforms have expressly acknowledged the link between the ‘free’ nature of the services and the use of advertising.¹³³⁸

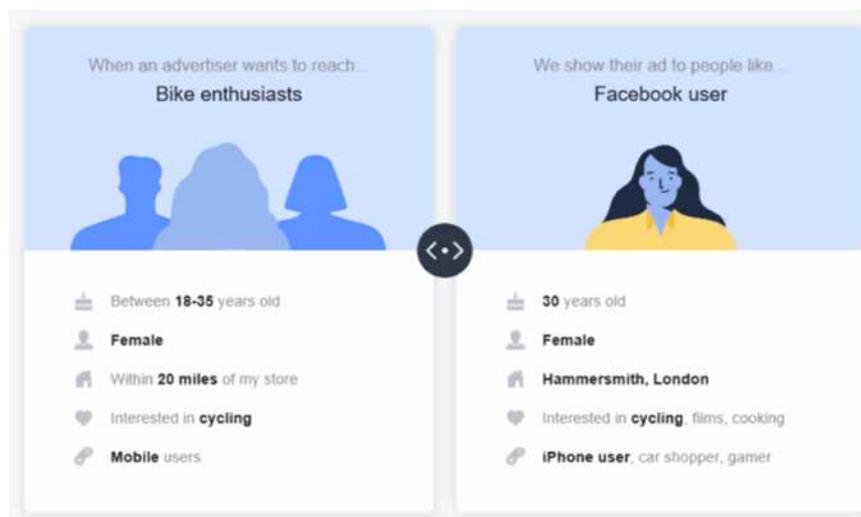
(b) The value of user data

The collection and analysis of user data by digital platforms can benefit consumers, such as when user data is used to fix problems, to improve products and services, or create new products. For example, Google Maps collects and aggregates location data to provide users with directions that take into account real-time traffic information to find the best route.¹³³⁹

As discussed in chapter 3, user data can be a key input to the supply of targeted advertising services, as digital platforms can use user data to create segmented user profiles that are sold to advertisers wishing to target ads to an audience with particular characteristics. Greater collection of user data is also likely to lead to more efficient targeting of ads. The insights generated from the data collected from consumers may also be provided to advertisers to measure the reach and distribution of ads served to the consumer.

Figure 7.2 provides an example of how different points of user data can be matched to an advertiser’s desired audience to enable targeted advertisements.

Figure 7.2: Facebook on ‘why you see a particular ad’¹³⁴⁰



User data can also be viewed as an asset for digital platforms that can be sold, licensed, disclosed or exchanged with third parties. In an ACCC review of the privacy policies and terms of use for several large digital platforms (the ACCC review of terms and policies),¹³⁴¹ each set of privacy policies and terms of use provided that user data, including personal information, may be sold or transferred to another entity in the event of bankruptcy, merger, acquisition, or sale of assets.

¹³³⁷ In April 2019, in response to action by the EU Consumer Protection Cooperation network, Facebook agreed to update its terms of service to explain that ‘it does not charge users for its services in return for users’ agreement to share their data and to be exposed to commercial advertisements...that their business model relies on selling targeted advertising services to traders by using the data from the profiles of its users’ (European Commission, Media Release, [Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities](#), 9 April 2019, accessed 29 April 2019).

¹³³⁸ See, for example, Facebook, [Hard Questions: What Information Do Facebook Advertisers Know About Me?](#), accessed 20 April 2019; Google, [Advertising, Advertising keeps Google and many of the websites and services you use free of charge](#), accessed 20 April 2019.

¹³³⁹ Google, [Use navigation in the Google Maps App](#), accessed 20 April 2019.

¹³⁴⁰ Facebook, [About Facebook Ads](#), accessed 20 April 2019.

¹³⁴¹ The ACCC reviewed the privacy policies from Facebook, Google, Twitter, Microsoft, Apple, WhatsApp and Snapchat and the terms of use for Facebook, Google, Twitter, Apple, WhatsApp and Snapchat. See further appendix H section 3.

The ACCC notes that many digital platforms have publicly stated that they do not sell user data – see further discussion in appendix I on ‘Do digital platforms ‘sell’ user information to third parties?’.

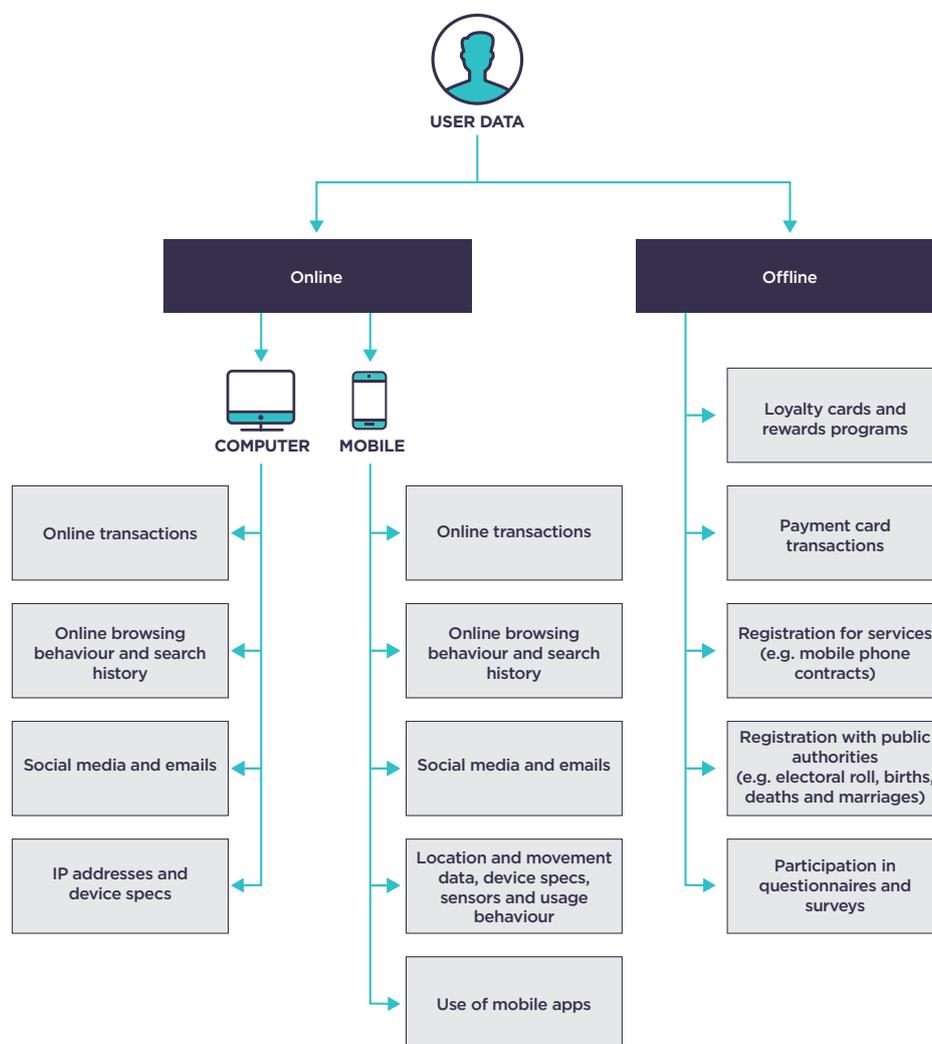
(c) The different methods of collecting user data

There are many different ways in which user data can be collected by or provided to digital platforms. User data can be:¹³⁴²

- **actively provided** by a consumer (for example, entering name and contact details in an online form)
- **passively collected** from a consumer (for example, background collection of location data from Wi-Fi networks, GPS, or IP addresses; sensor data collected from a device; or from a consumer’s use of third party websites)
- **inferred** from other sources (for example, by analysing and making inferences based on either data actively provided by a consumer, other passively-collected user data, or data from de-identified datasets).

The different types of data collected online or offline from users can vary significantly, though the extent of data collection from consumers has been increasing over time. Figure 7.3 illustrates the different types of user data that may be provided or collected from consumers both online and offline.

Figure 7.3: Tracking of consumer data online and offline¹³⁴³



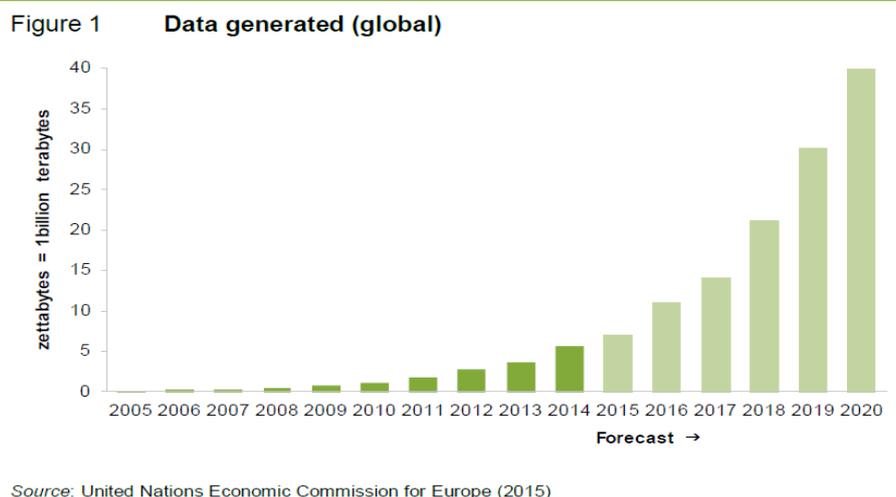
1342 OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220(2013), p. 10.

1343 Collated from various sources, including ACCC review of digital platforms’ privacy policies and Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, pp. 28-31.

The volume and scope of data collection

The volume of user data collected from consumers worldwide is growing exponentially – according to an IBM estimate, 90 per cent of all the data that exists in the world today was created in the past two years.¹³⁴⁴ The Productivity Commission has observed that the generation of data appears to be ‘heading upward on an unbounded trajectory’, as represented in figure 7.4 below.¹³⁴⁵

Figure 7.4: Global data generated¹³⁴⁶



The scope of data collected can be increased through direct collection by businesses and also by acquiring third-party data through transactions with third parties, such as data brokers or app developers. For example, in relation to the latter, media reports in 2015 indicated that Facebook made a data deal with data brokers Quantum, Acxiom and Experian to combine online and offline data.¹³⁴⁷ Quantum’s press release at the time stated that its ‘data partnership’ with Facebook’ would give Facebook ‘a targeting capability powered by Quantum’s deep customer behavioural insights’.¹³⁴⁸ Quantum further stated that its behavioural insights are drawn from transaction data sourced from de-identified customer shopping records including ‘supermarket and liquor sales as well as wider retail and services transactions both on and offline’ and ‘an understanding of property attributes’ that help ‘provide a rounded understanding of customer lifestyles and life stages’.¹³⁴⁹ In March 2018, Facebook informed advertisers that it would be shutting down these partnerships,¹³⁵⁰ including its partnership with Quantum, stating that it believed removing this tool would help people’s privacy on Facebook.¹³⁵¹ See further appendix I for a discussion of how app developers may share information with digital platforms to increase the scope of their user data collection.

Businesses and, in particular, digital platforms can increase the amount of first party data collected by increasing the services provided to users. For example, Google now provides over 60 different online services that provide Google with over 60 different sources of first-party user data that may be combined and associated with a single user account.

1344 J. Dipple-Johnstone, [Beesley Lecture - ‘Regulating the tech giants in the digital age’](#), UK Information Commissioner’s office, 31 October 2018.

1345 Productivity Commission, [Data Availability and Use](#), March 2017, p. 3.

1346 Productivity Commission, [Data Availability and Use](#), March 2017, p. 3.

1347 See, for example, Ad News, [Facebook makes data deal with Quantum, Acxiom and Experian to fuse offline and online data](#), 21 July 2015.

1348 Quantum, [Media Release: Quantum announces data partnership with Facebook](#), 23 July 2015, accessed via wayback machine (2 March 2016 snapshot).

1349 Quantum, [Media Release: Quantum announces data partnership with Facebook](#), 23 July 2015, accessed via wayback machine (2 March 2016 snapshot).

1350 Facebook, [shutting down partner categories](#), 28 March 2018, accessed 29 April 2019.

1351 Facebook, [shutting down partner categories](#), 28 March 2018, accessed 29 April 2019.

This expanding scope of first-party data collection by Google is illustrated in table 7.2 below, which depicts the types of user data collected by Google as expressly disclosed (unless otherwise specified) in various iterations of its privacy policy between June 1999 and January 2019.

Table 7.2: Information Google disclosed in its Privacy Policy – 1999-2019 as collected from users

	Jun 1999 ¹³⁵²	Jul 2004 ¹³⁵³	Jan 2009 ¹³⁵⁴	Dec 2014 ¹³⁵⁵	Jan 2019 ¹³⁵⁶
Name	✗	✓	✓	✓	✓
Birthday	✗	✗	✗	✓	✓
Phone number	✗	✗	✗	✓	✓
Email address	✗	✓	✓	✓	✓
Voice and audio information	✗	✗	✗	✗	✓
Payment information	✗	✓	✓	✓	✓
Location	✗	✗	✗	✓	✓
GPS	✗	✗	✗	✓	✓
Sensor data via wifi towers, bluetooth, etc	✗	✗	✗	✓	✓
IP addresses	✗	✓	✓	✓	✓
Your emails on Gmail (released Apr 2004)	NA	✗	✓	✓	✓
Your uploaded photos	✗	✗	✗	✓	✓
Your uploaded videos	✗	✗	✗	✓	✓
Your messages	✗	✗	✗	✓	✓
Your phone calls	✗	✗	✗	✓	✓
Comments you post	✗	✗	✗	✓	✓
Your calendar events on Google Calendar (general release Jul 2009)	NA	NA	NA	✓ ¹³⁵⁷	✓
Your search history	✗	✗	✗	✓	✓
Videos you watch on YouTube (acquired Nov 2006)	NA	NA	✗	✓	✓
Devices you use	✗	✗	✗	✓	✓
Apps you installed	✗	✗	✗	✗	✓
Browsers you use	✗	✓	✓	✓	✓
Third-party websites visited using Google's advertising services	✗	✓	✓	✓	✓
Chrome browsing history (released Sep 2008)	NA	NA	✗	✓	✓
Browser information	✗	✓	✓	✓	✓
Device information	✗	✗	✗	✓	✓
Cookies generally	✓	✓	✓	✓	✓
Purchase activity	✗	✗	✗	✗	✓
DoubleClick cookie information (DoubleClick acquired Mar 2008)	NA	NA	✗	✓ ¹³⁵⁸	✓
Mobile network information	✗	✗	✗	✓	✓

1352 Google, [Privacy Policy – 9 June 1999](#), accessed 13 April 2019.

1353 Google, [Privacy Policy – 1 July 2004](#), accessed 13 April 2019.

1354 Google, [Privacy Policy – 27 January 2009](#), accessed 13 April 2019.

1355 Google, [Privacy Policy – 19 December 2014](#), accessed 13 April 2019.

1356 Google, [Privacy Policy – 22 January 2019](#), accessed 13 April 2019.

1357 The ACCC notes that this collection was expressly listed in the December 2014 privacy policy; however, the privacy policy states that: 'We may combine personal information from one service with information, including personal information, from other Google services'.

1358 The ACCC notes that, within the December 2014 privacy policy, doubleclick cookie information was not collected without opt-in consent: 'We will not combine DoubleClick cookie information with personally identifiable information unless we have your opt-in consent.'

For a discussion on the types of data collected by Facebook and Google, see box 7.1.

Box 7.1 How much data does Facebook and Google have on consumers?

Facebook

In June 2018, an ACCC staff member downloaded their Facebook data. They found that Facebook had stored their 'active' user activity information, such as photos and comments posted on Facebook. They also found that Facebook stored data that had been collected passively, such as names and phone numbers of the user's contacts from the user's mobile device, even though those contacts were not the user's Facebook friends.

Despite having location tracking turned off in their Facebook account settings, the staff member's downloaded data showed Facebook had a comprehensive record of IP addresses matched to 53 different locations where the user had logged into their Facebook account.

The Facebook data showed that Facebook had also linked over 500 ad interests to the user's profile and matched the user to contact lists provided by 127 advertisers, including frequent flyer programs and private health insurance companies.

Google

In November 2018, an ACCC staff member downloaded the Google data attached to their Google family account. The data downloaded covered 51 products and services, accessed through Google, that the Google family account had interacted with between 2011 and 2018.

The ACCC staff member found a wide variety of data had been stored to the account, including some data collected from 2011, covering a period which included multiple additions and changes to devices used by the family. This data included a non-chronological list of every Android mobile app installed from 2014-2018 (comprising 2 482 Excel rows of data); orders made in the Google Play Store, including time of purchase, phone number, card type and expiry date, as well as the IP address it was purchased from; and the names and email addresses from a Google group set up and used in April 2011.

It also included a recording of every question asked to the family's Google Assistant (by various family members including children) between January 2018 and June 2018 (when the staff member's Google Home was active).

Location data was collected by a number of different products and services. For example, every photo stored had attached geodata, latitude and longitude and timestamp of when the photo was taken. Data stored with location history included latitude and longitude information.

The staff member also found that Google had stored copies of photos from 2011 to 2018, including photos which came from previous devices, and that had not been transferred to new devices or stored on the cloud. For further discussion on the different ways in which consumers' user data can be tracked, see figure 7.3 on '*Tracking of consumer data online and offline*'.

Google, noting this case study's observations of the storage of photos (which was outlined in the ACCC's Preliminary Report), stated that 'Google provides a backup sync feature that can be installed on a laptop or desktop to save photos to Google Cloud. On mobile devices, users can turn the feature on or off in the settings for Google Photos. This feature prevents users from losing their photos if they use the service.'¹³⁵⁹

The ACCC staff member subsequently checked with their family to see if they could recall when this had occurred. This was difficult as the family had multiple devices where photos were stored and not all photos on those devices featured in the data available in the Google data download. The staff member then checked the data download for information. It did not outline when consent had been granted and photos uploaded into the cloud or from what device.

1359 Google, [Submission to ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 28.

7.2 Consumer attitudes regarding their user data

Key findings

- Consumers have different privacy preferences and levels of privacy awareness. All consumers will be better off when they are sufficiently informed and have sufficient control over their user data so that they can make informed choices that align with their privacy and data collection preferences.
- Several features of consumers' current relationship with digital platforms prevent consumers from making informed choices. They include bargaining power imbalances, information asymmetries between digital platforms and consumers and inherent difficulties for consumers to accurately assess the current and future costs of providing their user data.

7.2.1 Overview of consumer attitudes in Australia

The ACCC consumer survey found that most Australians using digital platforms consider that there should be transparency and choice in how digital platforms should collect, use and disclose certain types of user data. The majority of digital platform users surveyed agreed or strongly agreed that digital platforms should:¹³⁶⁰

- tell users who they are providing personal information to (91 per cent)
- allow users to opt out of collection of certain types of information (90 per cent)
- be open about how they use data about users and assess eligibility for products and services (89 per cent)
- only collect information needed to provide their products or services (85 per cent).

The ACCC consumer survey indicates consumers are becoming increasingly concerned about their privacy and use of information on digital platforms and online. It found that more than half of the digital platform users surveyed (54 per cent) reported being more concerned about the privacy of their personal information on digital platforms than they were one year ago.¹³⁶¹

Other research reiterates that Australian consumers are concerned about privacy in dealing with private companies. A 2019 consumer survey conducted by Deloitte (Deloitte Privacy Index) found that 98 per cent of Australian consumers consider privacy to be either 'essential' or 'somewhat important' when choosing a new app.¹³⁶² The 'Australian Community Attitudes to Privacy Survey 2017' (OAIC survey) by the OAIC found that the proportion of Australians who have chosen not to deal with a private company because of privacy concerns has risen from 36 per cent in 2007 to 58 per cent in 2017.¹³⁶³ The Australian National University's research into attitudes towards data governance also found that consumers had low levels of trust in commercial entities appropriately handling consumer data, with levels of trust in social media companies being particularly low.¹³⁶⁴

Responses to the ACCC's Consumer Questionnaire on the Digital Platforms Inquiry website (the ACCC questionnaire) express similar concerns regarding transparency and choice in relation to data practices – see box 7.2.¹³⁶⁵

¹³⁶⁰ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 17.

¹³⁶¹ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 5.

¹³⁶² Deloitte, [Trust: Is there an app for that?: Deloitte Australian Privacy Index 2019](#), 14 May 2019, p. 12.

¹³⁶³ OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 19.

¹³⁶⁴ N Biddle, B Edwards, M Gray and S McEachern, [Public attitudes towards data governance in Australia](#), Australian National University, December 2018, pp. 12 & 14.

¹³⁶⁵ Excerpts from [ACCC's Consumer Questionnaire Responses](#).

Box 7.2 Some consumer views from ACCC questionnaire

“My main concern is that I don’t know what personal data is collected by digital platforms or how it is used, which means I can’t make an informed decision about whether or not to use a particular DP. If I knew that a particular DP was violating my privacy, I probably wouldn’t use it”

“I try to keep on top of what personal information each digital platform takes/uses/shares, but sometimes it’s hard to know the extent. Some platforms aren’t exactly forthright about it”

“The use of data collected is part of the platform owners, business model, but transparency with regards to use and users is lacking”

7.2.2 Different consumers have varying levels of privacy awareness

In addition to different privacy preferences, consumers also have varying levels of awareness regarding digital platforms’ data practices. For example, the ACCC consumer survey found that almost one in three digital platform users surveyed considered that a user owned the user data they shared online (29 per cent). More than one in three considered that the company to which they had given the user data owned the data, but that the company ‘must provide me with access to it at my request, and cannot share it with anyone else if I request they do not’.¹³⁶⁶ This suggests that a majority of consumers are not aware that the extent of control they retain over their user data is limited to the extent outlined in digital platforms’ privacy policies and terms of use.

There is also a possible disconnect between users’ general awareness of digital platforms’ data practices and users’ awareness of data practices of specific digital platforms. For example, 85 per cent of digital platform users surveyed indicated they thought digital platforms (as an aggregated whole) have the ability to follow user activities across the web; and 82 per cent believed digital platforms had the ability to collect and combine information about users from third parties.¹³⁶⁷ However, other responses from those digital platform users – such as what they regarded as a misuse of personal data,¹³⁶⁸ and what they considered personal information – indicate that users are not aware of the extent of online tracking occurring or how digital platforms may use user data such as location information.

Some consumers may also be unaware that agreeing to a digital platform’s terms of use and privacy policy means they have relinquished their control over their personal information and user data to the extent outlined in that privacy policy. For instance, the ACCC consumer survey found that 36 per cent of Australian digital platform users agreed with the statement ‘when a digital platform has a privacy policy, it means it will not share my personal information with anyone else (including other digital platforms)’.¹³⁶⁹ Similarly, the results of the ‘Consumer data and the digital economy’ survey (CPRC Survey), conducted by the Consumer Policy Research Centre (CPRC) in 2018 found that 19 per cent of respondents believed that a company with a privacy policy would not share information with other websites or companies, and 22 per cent of respondents did not know enough to answer the question.¹³⁷⁰ A factor contributing to this fundamental misunderstanding about the purpose and function of a privacy policy may be that the title of ‘privacy policy’ is a misnomer, given these policies tend not to outline privacy protections for users but rather tend to set out the extent of permissions granted to digital platforms.

1366 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 31.

1367 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 15.

1368 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, pp. 21-23.

1369 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 6.

1370 The Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 5. The CPRC Survey report was provided as an attachment to the submission (CPRC Survey Report).

7.2.3 Is there a privacy paradox?

The apparent disconnect between the privacy attitudes and intentions expressed by consumers and their actual behaviour has been called a ‘privacy paradox’ and is the subject of significant academic debate.¹³⁷¹ In essence, the privacy paradox refers to a perceived discrepancy between the strong privacy concerns voiced by consumers who, paradoxically, do not appear to make choices that prioritise privacy.¹³⁷²

One possible explanation for the privacy paradox is that consumers claim to care about their privacy in theory but, in practice, the value they derive from using a digital platform’s services outweighs the ‘price’ they pay in allowing the collection of their user data. A further explanation is that, while consumer attitudes are often expressed generically in surveys, actual behaviours are specific and contextual, and therefore, consumers’ generic views regarding privacy do not necessarily predict their context-specific online behaviours.¹³⁷³

However, these explanations for the privacy paradox rest on the premise that consumers are making informed choices in their transactions with digital platforms. As discussed above, providing digital platforms with user data is part of consumers’ bargain with digital platforms. It is through the use of user data that digital platforms, in part, recover the cost of providing their services to consumers and generate revenue. To the extent that consumers are fully aware of the actual ‘price’ they pay for use of a digital platform (by providing their data), their choice to use the platform indicates that they value the use of the platform more than the privacy that they give up. However, if consumers are not adequately informed about how their user data is collected, used and disclosed, and if consumers do not have sufficient control in deciding whether to give up their user data, their behaviours in using digital platforms may not accurately reflect consumers’ decisions or their individual privacy preferences.

Additional complexity is introduced as the risks of harm will vary in severity and likelihood for each consumer, and the associated harm may not occur until an unknown point in the future. Behavioural economics suggests that consumers are unlikely to be able to accurately assess the risks associated with a unilateral variation clause, which is a common clause in digital platforms’ privacy policies. That is because consumers tend to discount the likelihood of adverse changes and may be overly optimistic about their capacity to deal with the variation.¹³⁷⁴ This means it is very difficult for consumers to predict the long-term costs of data collection and factor these costs into their decision on whether to use a digital platform or whether to amend their privacy settings.

The ACCC’s view is that there are several factors of a consumer’s bargain with digital platforms that may prevent a consumer from making informed choices that align with their privacy and data collection preferences. These factors include the bargaining power held by the digital platform compared with the consumer, significant information asymmetries that exist between digital platforms and consumers, and inherent difficulties in accurately assessing the current and future costs of providing their user data.

7.3 Data practices of particular concern

Notwithstanding that consumers have different, context-dependent privacy preferences, the ACCC consumer survey has identified three categories of data practices about which consumers are often concerned: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties. Each of these data practices is discussed below.

1371 See, for example, B Berendt, O Gunther and S Spiekermann, [Privacy in E-Commerce: stated preferences vs. actual behavior](#), Communications of the ACM 48(2005), p. 101; P. Norberg, D.R Horne and D.A Horne, [The Privacy paradox: Personal Information Disclosure Intentions versus Behaviours](#), The Journal of Consumer Affairs, 41(2007), p.100; S. Kokolakis, [Privacy attitudes and privacy behavior: A review of Current research on the privacy paradox phenomenon](#), Computers & Security (2015); B. Brown, [Studying the internet experience](#), Hewlett Packard (2001).

1372 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 476.

1373 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 477.

1374 J M Paterson and R L Smith, ‘Why unilateral variation clauses in consumer contracts are unfair’, Competition & Consumer Law Journal, 23(2016), p. 205. See also, M.A. Eisenberg, ‘[The Limits of Cognition and the Limits of Contract](#)’, Stanford Law Review, 47(1995), p. 241; R Korobkin, ‘Bounded rationality, standard form contracts, and unconscionability’, UCLR, 70 (2003); C R Sunstein, ‘Behavioural Analysis of Law’, UCLR, 64(1997).

7.3.1 Collection of location data

(a) Overview of location data collection

The increase in personal mobile devices such as smartphones, and the improvement in location tracking technology, has led to an increase in the location data collected and used. The prevalence of location data was flagged by Google CEO Sundar Pichai in his testimony to the United States Congress in 2018, where he stated that location is ‘in the fabric of how people use the internet today’.¹³⁷⁵ Likewise, the value of location data is indicated by the fact that sales of location targeted advertising reached an estimated US\$21 billion in 2018.¹³⁷⁶

Location data can be collected or inferred by a wide variety of mechanisms. They include GPS, IP addresses, sensor data from the user’s mobile device (including gyroscopes), and information from Wi-Fi access points, cell towers, and Bluetooth-enabled devices,¹³⁷⁷ the name of a user’s mobile operator or ISP, language, time zone, mobile phone number, connection speed and, in some cases, information about other devices that are nearby or on a user’s network.¹³⁷⁸ This data is collected by digital platforms and by apps, but also by telecommunications businesses, which are able to leverage this data to provide insights to advertisers.¹³⁷⁹

Location data is something that apps frequently seek permission to collect. OECD research from 2013 has found that 29 per cent of the top rated paid apps and 60 per cent of free apps in the Google Play Store sought permission to collect a user’s location.¹³⁸⁰ Location data can be used to improve services of apps providing services that can be tailored to a user’s location – such as Google Maps providing directions and traffic conditions, or a weather app providing forecasts for a specific area.

Location data is also highly valued in the serving of targeted advertising, or other marketing related purposes. Location data is a way to link online and offline data; using location history to link the online activity of a consumer to what they do in the physical world.¹³⁸¹ It is particularly valuable to advertisers as it can provide a greater indication of a consumer’s preferences. An executive at Groundtruth, a company that trades in location data, provides the example: ‘someone may search online for healthy recipes, but GroundTruth can see that the person often eats at fast-food restaurants’.¹³⁸²

The prevalence and specificity of location data also presents particular issues in terms of tracking of individual consumers as, combining various points of location data, businesses are able to build up a map of a consumer’s activity that is capable in some instances of identifying a unique consumer.¹³⁸³ Researchers have found that four data points are sufficient to identify 95 per cent of individuals.¹³⁸⁴

(b) Consumer concerns

One of the most concerning types of data collection for Australian consumers is the collection of location data. In the ACCC consumer survey, 86 per cent of digital platforms users surveyed considered the monitoring of offline location and movement without the user’s consent to be a misuse of their data.¹³⁸⁵ Similarly, the CPRC Survey found that 71 per cent of consumers surveyed were uncomfortable with their location data being shared with third parties.¹³⁸⁶

1375 Sundar Pichai, [testimony to congress](#), CSPAN, 11 December 2018, accessed 29 April 2019.

1376 J Valentino-Devries, N Singer, M Keller & A Krolik, [Your Apps Know Where You Were Last Night, and They’re Not Keeping It Secret](#), 10 December 2018, accessed 29 April 2019.

1377 Google, [Privacy Policy](#), accessed 30 October 2018.

1378 Facebook, [Data Policy](#), accessed 30 October 2018.

1379 See, for example Telstra’s Location Insights: S Whyte, [Telstra’s new sales pitch: your location, hour by hour](#), 4 May 2018, accessed 30 April 2019; Optus partnership with Skyfii: P Cowan, [Optus enters data analytics market](#), 9 February 2015, accessed 30 April 2019.

1380 OECD, [The App Economy](#), Working Party on the Information Economy, 17 December 2013, p. 40, Figures 24 and 25.

1381 J Ewen, [How big data and location intelligence are changing the world](#), 5 March 2018, accessed 29 April 2019.

1382 Location Search Association, [Why location is the future of digital marketing](#), Youtube, 1 May 2017, accessed 30 April 2019.

1383 A Kovacevic, [The truth behind location data anonymity](#), 5 April 2019, accessed 29 April 2019.

1384 Y Montjoye, [Unique in the crowd: the privacy bounds of human mobility](#), Scientific Reports, 3 (2013).

1385 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 21.

1386 [CPRC Survey Report](#), 10 March 2018, p. 5.

These views are echoed in responses to the ACCC's consumer questionnaire – see box 7.3.

Box 7.3: Some consumer views from ACCC questionnaire

“Th[r]ough ‘Location Services’, Google pretty much knows my whole routine for the week. Time I leave home for work, route I take, where I park my car, time I leave work etc ... So, I am really concerned. I do not remember giving these platforms authority to collect and use my personal information to the extent that they now are tracking, storing and sharing information about my daily life (unless they did put a something in that service agreement that I just clicked OK to in exchange for a free email/social media account).”

“When I first started using Facebook, I did not use any of my personal data, my name consisted of my dogs names and [date of birth] was made up as I didn't think they needed to know me but slowly it became more convenient to start using my real personal data (eg to be able to find friends I lost touch with) then came location services without which some apps weren't as useful and today, I give my details to anyone just for the convenience and points/rewards. I still shred any paperwork with personal details out of habit and hope no one will do anything nasty with my personal details.”

7.3.2 Online tracking of consumers for targeted advertising purposes

(a) Overview of online tracking for targeted advertising purposes

As discussed in chapter 3, targeted advertising is highly valued by advertisers, which consider that targeting ads to consumers that are more likely to buy a product means advertisers are more likely to get a sale per placement of an ad, which means that targeted advertising is more valuable than non-targeted, traditional advertising.¹³⁸⁷ A survey of 12 advertising networks, undertaken by the National Advertising Initiative, found that conversion rates for targeted ads was more than twice that of traditional advertising. Professor Howard Beales, in his testimony to the United States House of Representatives in 2018 stated that:

*The value of online advertising, and hence the revenue available to support the production and development of online content, depends critically on the availability of information about the likely viewer of the ad.*¹³⁸⁸

Digital platforms, which have access to large amounts of consumer data, are able to offer detailed options for targeting audience segments. For example:

- **demographics** – including gender, age, parenthood status, or household income¹³⁸⁹
- **activity** – prior purchases,¹³⁹⁰ device use and settings, which sites they visit, or activity on sites¹³⁹¹
- **interests** – including things such as organic food,¹³⁹² bike riding,¹³⁹³ or gambling¹³⁹⁴
- **behaviours** – advertisements to select people based on their prior purchase behaviours, device usage, and other activities.¹³⁹⁵
- **location** – including where a person lives, is travelling, or has most recently been;¹³⁹⁶ and targeting of people within a specific radius.¹³⁹⁷

1387 H Beales, [The Value of behavioural targeting](#), National Advertising Initiative, March 2010, accessed 26 April 2019, p. 3.

1388 H Beales, [Testimony to Understanding the digital advertising ecosystem](#), House of Representatives, 14 June 2018, accessed 26 April 2019, p. 4

1389 Google, [About demographic targeting](#), accessed 26 April 2019. Household income (represented in percentage terms) is available for video campaigns only

1390 Facebook Business, [Ad targeting](#), accessed 29 April 2019.

1391 Google, [About demographic targeting](#), accessed 26 April 2019.

1392 Facebook Business, [Ad targeting](#), accessed 29 April 2019.

1393 Facebook, [About Facebook Ads](#), accessed 20 April 2019

1394 List of Google Ads Targeting, published M Garabal, [All Google Ads Targetings](#), LinkedIn, 4 April 2019, accessed 27 April 2019. The ACCC notes that this list is provided by a third party.

1395 Facebook Business, [Ad targeting](#), accessed 26 April 2019.

1396 See, for example: Facebook Business, [About Location Targeting](#), accessed 27 April 2019.

1397 Google, [Target ads to specific locations](#), accessed 27 April 2019; Snapchat, [Location targeting](#), accessed 26 April 2019.

While the type, amount and granularity of targeted advertising categories varies between digital platforms, the increased collection of data, and sophistication of data analysis has facilitated more targeted options being made available. Some digital platforms are reported to be able to offer segments such as whether people are the parent of toddlers, primary schoolers or teenagers;¹³⁹⁸ whether someone eats dinner out frequently,¹³⁹⁹ and in which percentage of the population they are in terms of affluence.¹⁴⁰⁰ Due to the improvements in location, some digital platforms also report they are able to offer accurate location targeting, including to within 100m.¹⁴⁰¹

Digital platforms may offer custom audiences, which allow advertisers to target based on lists of customers, which may be their own customer lists, or lists collated by data firms. Data firms can also combine a range of online and offline data to offer highly detailed categories for use by advertisers.¹⁴⁰²

As noted earlier, Facebook previously had ‘partner categories’ that allowed advertisers to directly use the categories offered by these data firms,¹⁴⁰³ but announced it was shutting these down in 2018.¹⁴⁰⁴ Advertisers may also continue, on their own, to use either their own customer lists or lists from third parties such as third-party data providers, to target advertising on Facebook but as Facebook indicates, these businesses are ‘required to have any necessary rights and permissions to use this information’.¹⁴⁰⁵

Facebook and Snapchat also offer ‘lookalike’ audiences, which allow advertisers to target new audiences based on the demographic features of their current customers.¹⁴⁰⁶

Figure 7.5: Facebook ‘Audience Insights’¹⁴⁰⁷

Know your audience like never before.

Facebook Audience Insights gives you aggregated information about two groups of people – people connected to your Page and people on Facebook – so you can create content that resonates and easily find more people like the ones in your current audience.

(b) Online tracking technologies

(i) Cookies

Consumer tracking is a common practice and aided by a variety of online tracking technologies. The most well-known online tracking technology is online cookies, which are small text files that store information about a user’s interaction with a web page. First-party cookies can be used by the web page to recall information about the user (for example, contents of their online shopping basket) and to personalise their experience (for example, displaying the time and weather in the user’s location). Third-party cookies may also be set by companies other than the one operating the website and are often used for advertising and to track users across different sites.¹⁴⁰⁸

1398 List of Google Ads Targeting, published M Garabal, [All Google Ads Targetings](#), LinkedIn, 4 April 2019, accessed 27 April 2019. The ACCC notes that this list is provided by a third party.

1399 See, for example: Google, [Affinity categories](#), accessed 29 April 2019.

1400 Google, [About demographic targeting](#), accessed 29 April 2019.

1401 See, for example: Snapchat, [Location targeting](#), accessed 26 April 2019.

1402 For example Successful spending (young, married couples with children and high income, living in outer suburban/ metro fringe areas) or Selfless & Hardworking (blue-collar families from multicultural backgrounds, living in outer-suburban areas, with average to high income) offered by Experian: Experian Mosaic, [Successful Spending](#), and [Selfless & Hardworking](#) accessed 29 April 2019.

1403 Facebook, [shutting down partner categories](#), 28 March 2018, accessed 29 April 2019.

1404 Facebook, [shutting down partner categories](#), 28 March 2018, accessed 29 April 2019.

1405 Facebook, [how does Facebook work with data providers](#), accessed 29 April 2019.

1406 Snap, [lookalike audiences](#), accessed 29 April 2019; Facebook, [about lookalike audiences](#), accessed 29 April 2019.

1407 Facebook, [Audience insights](#), accessed 29 April 2019.

1408 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, pp. 11-12.

In 2014, several Data Protection Authorities in the European Union conducted a sweep of cookies to assess the extent of use of cookies and the level of information provided. The 'Cookie Sweep Combined Analysis Report' found that a total of 16 555 cookies were set on all 478 sites reviewed, of which 70 per cent were third party cookies, mainly involved in advertising.¹⁴⁰⁹ The report also noted that most cookies had an average duration of one to two years, though a few cookies had duration periods of nearly 8 000 years.¹⁴¹⁰

(ii) Other tracking technologies

Growing consumer awareness of the use of web cookies and the ability to require web browsers to block cookies has also led to the development and widespread use of other online tracking technologies. They include:

- **web beacons or pixel tags:** small objects that can be embedded into a web page or email that are not visible to the user. When a user loads a web page or email with a beacon or pixel, it will make a call to the server to load the object, which enables a company to know that someone has loaded the web page or opened the email.¹⁴¹¹ These are used to collect information such as what users click on.¹⁴¹²
- **device or browser fingerprinting:** the collection of patterns of information about the device or browser to enable identification of a specific device or user. Information collected can include: browser type, font preference, operating system, battery status, plugins, and time-zone.¹⁴¹³ This technology can be used to recognise the same user across multiple online sessions even if cookies are deleted, user login changes, or IP addresses are hidden or changed.¹⁴¹⁴ For example, a privacy analysis of the HTML5 Battery Status API¹⁴¹⁵ that enables websites to access the battery state of a mobile device or a laptop to determine whether to show an energy-saving or high-performance display to users has been shown to provide identifiers that facilitate online tracking.¹⁴¹⁶
- **facial recognition:** biometric software can be used to identify individuals in a digital image. For example, the software used by the Facebook Moments app applies facial recognition technology to identify individuals in photos.¹⁴¹⁷
- **mobile device tracking:** there are numerous additional ways that consumers may be tracked on their mobile devices, including via mobile apps that display advertising, Wi-Fi network sensors that can track the movement of a mobile device, information collected by mobile carriers, GPS tracking, and iBeacons or antennas that use radio signals to communicate with mobile devices passing nearby.¹⁴¹⁸
- **cross-device tracking:** the use of various methods to identify a single user across different devices. This includes deterministic methods like tracking the user's log-ins on multiple devices and probabilistic methods that apply machine learning algorithms to de-identified data generated via fingerprinting, mobile IDs, and online cookies to create connections between separate devices.¹⁴¹⁹ Recent research by the CPRC cited a study that found 39 per cent of advertising and tracking services analysed were cross-device tracking services, which meant that over a third of these services can identify the same users across multiple devices.¹⁴²⁰

1409 European Commission, [Cookie Sweep Combined Analysis Report](#), 3 February 2015, pp. 2 and 19.

1410 European Commission, [Cookie Sweep Combined Analysis Report](#), 3 February 2015, p. 2.

1411 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 24.

1412 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p11-12.

1413 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 23.

1414 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, pp. 11-12; Citi GPS, [ePrivacy and data protection](#), March 2017, p. 23.

1415 For further discussion on APIs, see below box 7.20 on 'Data-sharing with third-party app developers'.

1416 See Olejnik et al, [The leaking battery – A privacy analysis of the HTML5 Battery Status API](#), *IACR Cryptology ePrint Archive*, 2015, p. 1.

1417 Citi GPS, [ePrivacy and data protection](#), March 2017, pp. 24-5.

1418 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 24.

1419 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 25. See further chapter 8 section 8.3 for a definition of 'machine learning'.

1420 CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, p. 7.

- **audio beaconing:** a recent innovation in cross-device tracking, audio beaconing can be used to drop a cookie onto a device and play an inaudible ultrasonic code through the device's speakers, which can be picked up by other smart devices with appropriate software installed and used to link the devices being used by the same person.¹⁴²¹

See box 7.4 on 'Facebook's web tracking' for a further discussion on the scale of Facebook's online tracking network.

Box 7.4: Facebook's web tracking



If a third-party website has embedded 'Facebook Technologies' such as the Facebook 'like' button, a 'Facebook login' option, or analytical services such as 'Facebook Analytics' – data will be transmitted to Facebook via application programming interfaces (APIs)¹⁴²² whenever a consumer visits the third party website.¹⁴²³ Facebook has stated that, as of April 2018, the Like button appeared on 8.4 million websites, the Share button on 931 000 websites covering 275 million web pages, and that there were 2.2 million Facebook pixels installed on websites globally.¹⁴²⁴

The browsing data collected via Facebook Technologies can be merged with data from the user's Facebook account, even if the user has blocked web tracking in their browser or device settings,¹⁴²⁵ and regardless of whether the consumer is logged in to their Facebook account or has a Facebook account at all.¹⁴²⁶ This data collection practice is discussed further at section 7.6.2.

(c) Consumer concerns

In the ACCC consumer survey, more than three in four digital platform users surveyed (77 per cent) considered the tracking of their online behaviour to be a misuse of their personal information if it is used to create profiles or enable targeted advertising.¹⁴²⁷

In addition, more than four in five digital platforms users surveyed (82 per cent) considered that tracking of online behaviour such as browsing history, viewing habits, or search history when they are not logged into an account to be a misuse of personal information.¹⁴²⁸ Figure 7.6 shows the ACCC consumer survey results on what consumers perceive to be a misuse of personal information when they are *not* signed in to a digital platform.¹⁴²⁹

1421 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 25.

1422 APIs are tools for building software that interacts with other software, for example, how apps interact with operating systems. APIs are discussed in more detail below at box 7.20 on 'Data-sharing with third-party app developers'.

1423 See Facebook Help Centre, [What information does Facebook get when I visit a site with the Like button?](#), accessed 20 May 2019; see also Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017, accessed 13 November 2018, p. 2.

1424 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 114.

1425 As described in Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017, accessed 13 November 2018.

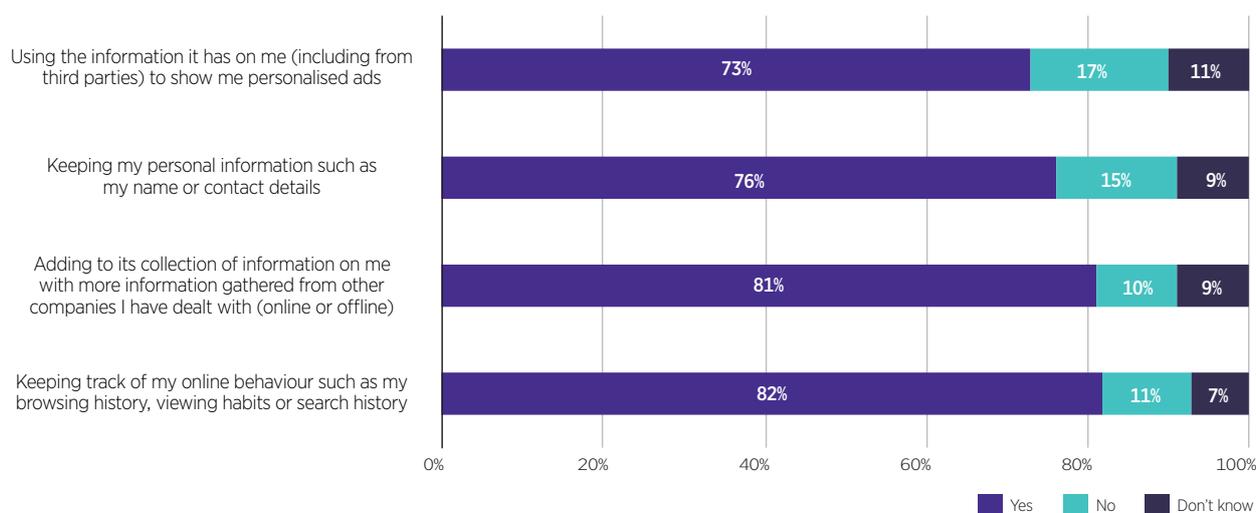
1426 See Facebook, [Cookies Policy](#), accessed 20 May 2019: 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in'.

1427 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 21.

1428 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 22.

1429 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 23.

Figure 7.6: Perceived misuse of personal information when *not signed-in*¹⁴³⁰



Source: ACCC consumer survey. Q15. If you are not signed into an account with a digital platform, would you consider any of the following actions by them a misuse of your personal information?
 Base: Australian digital platform users aged 18 or more (N=4,308)

This is supported by the OAIC survey, which found that only one in five Australians (21 per cent) were comfortable with targeted advertising based on their online activities and that only one in six Australians (17 per cent) were comfortable with social networking companies keeping databases of information on their online activity.¹⁴³¹ Similarly, the results of the CPRC survey also found that around half of Australians did not find it acceptable for companies to monitor their online behaviour to show them relevant advertising and offers.¹⁴³²

Consumer responses to the ACCC questionnaire expressed strong concerns about the monitoring of online activities to create profiles or target advertising – see box 7.5.

Box 7.5: Some consumer views from ACCC questionnaire

“Online tracking is the bane of the Internet, and there is no visibility to the end user as to WHAT is being tracked, and WHO that is being shared with. Let alone consent to it.”

“What is concerning is the cross platform sharing of data that allows deductions to be made of individuals. For example, if your shopping data is linked to your web browsing, then deductions about your health, financial status or party plans can be extrapolated. This can impact your privacy, particularly regarding your health, insurance or financial outcomes.”

“From basics like cookies and tracking of clicks or likes through to even reading the content of emails, and unsent Facebook searches, your digital fingerprint is recorded everywhere. No amount of firefox/chrome extensions can totally protect you.”

1430 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 23.

1431 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. ii.

1432 CPRC, [CPRC Survey Report](#), 10 March 2018, p. 6.

7.3.3 Sharing of user data with third parties

(a) Overview of third party data-sharing practices

Third party data-sharing occurs when user data is transferred from one entity to another or when one entity allows another entity to access its collection of user data. User data can be shared between digital platforms and a wide variety of third parties, including advertisers, measurement partners, researchers and academics;¹⁴³³ advertising partners, data analytics providers and payment providers.¹⁴³⁴

Large amounts of user data can also be shared between digital platforms and app developers. App developers collect user data from their mobile apps that they may share with third parties via APIs, which are tools for building software that interacts with other software and can facilitate the sharing of information or data between digital platforms and app developers.¹⁴³⁵

Digital platforms such as Google, Apple and Facebook all provide APIs to their software that enable the sharing of user data to and from app developers.¹⁴³⁶ For example, Twitter's API allows third party app developers to build apps that can obtain information directly from Twitter to display in their own apps.¹⁴³⁷ The collection of data via APIs is often noted in digital platforms terms of service or privacy policies: for example, Google's privacy policy states that the information it collects on a user may include 'Activity on third-party sites and apps that use our services'.¹⁴³⁸

A number of reports and studies have shown that Google and Facebook have the ability to collect significant amounts of user data from third-party apps. Researchers from Oxford University examined 959 000 apps from the US and UK Google Play Stores and found that most of the apps reviewed contain third-party tracking.¹⁴³⁹

Research from Privacy International has examined the transmission of data from third-party apps to Facebook, finding that at least 61 per cent of apps tested automatically transferred data to Facebook the moment a consumer open the third party app, regardless of whether the consumer has a Facebook account and whether they are logged-in to Facebook.¹⁴⁴⁰ See box 7.20 on '*Data-sharing with third-party app developers*' and appendix I for a more in-depth discussion of third party data-sharing between digital platforms and app developers.

Digital platforms may also acquire additional data sets from third parties to combine with the data they collect directly from their users, to create richer profiles of their users. The flow of data between consumers, businesses and third parties is illustrated in figure 7.7.¹⁴⁴¹

1433 Facebook, [Data Policy](#), accessed 1 May 2019.

1434 Snap, [Privacy Policy](#), accessed 1 May 2019.

1435 For further explanation on APIs, see MuleSoft Videos, [What is an API](#), YouTube, accessed 30 October 2018.

1436 [Google, APIs Explorer](#), accessed 20 May 2019, Apple, [Apple Developer Documentation](#), accessed 20 May 2019; Facebook, [Facebook for developers](#), accessed 20 May 2019.

1437 OECD, [The App Economy](#), Working Party on the Information Economy 17 December 2013, p. 35.

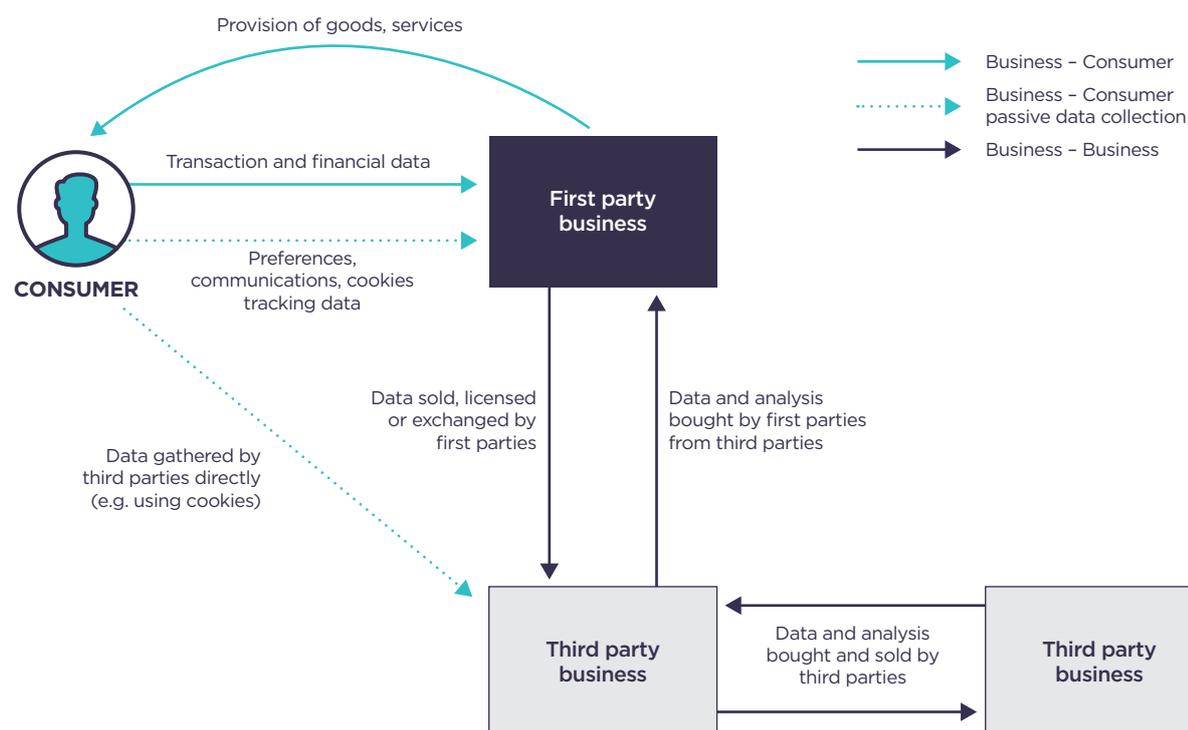
1438 [Google, Privacy Policy](#), accessed 4 June 2019.

1439 R Binns, U Lyngs, M Van Kleek, J Zhao, T Libert, N Shadbolt, [Third Party Tracking in the Mobile Ecosystem](#), Oxford University (2018), p. 5.

1440 Privacy International, [How Apps on Android Share Data with Facebook \(even if you don't have a Facebook account\)](#), 29 December 2018, last accessed 17 April 2019.

1441 Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, p. 35.

Figure 7.7: Illustration of data flows between consumers and businesses



As discussed above, targeted advertising has become more prevalent and more granular as the collection of data and sophistication of data analysis has increased. The combination of different data sets can enable businesses (including digital platforms) to draw insights not available when analysing the standalone data they hold. For example, the combination of online and offline data can provide businesses with a much more accurate indication of consumer preferences. Data partnerships between digital platforms and other entities (such as the one that existed between Facebook and Quantum)¹⁴⁴² are able to offer advertisers highly specific targeting options (see section 7.3.2 ‘*Online tracking of consumers for targeted advertising purposes*’).

The combining of data from multiple sources can allow digital platforms or advertisers to build a profile that can be used to provide de facto identification of a consumer. It may also change non-personal user data into personal information, if the user data becomes associated with identifying personal information in a consumer’s user account.¹⁴⁴³ For example, apps can collect a range of identifiers from a user’s device such as device serial numbers and unique advertising IDs. Some of these identifiers, such as the advertising IDs, are anonymous and may be collected and transmitted without notifying or seeking consent from the user, but these identifiers will cease to be anonymous as soon as it is associated with the personal information in a user account.¹⁴⁴⁴

(b) Consumer concerns

Consumers have expressed concerns about their personal information being shared with third parties. The ACCC consumer survey found that 86 per cent of digital platform users considered it a misuse of their personal information if it was shared with an unknown third party and 83 per cent considered it a misuse of their personal information if it was shared with a third party to enable targeted advertising.

Responses to the ACCC’s consumer questionnaire expressed similar views – see box 7.6.

¹⁴⁴² For a discussion regarding the former data partnership between Quantum and Facebook, see section 7.1.2(c).

¹⁴⁴³ A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), p. 447, citing A Acquisti and R Gross, ‘Predicting social security numbers from public data’, *proceedings of the National Academy of Sciences* 106 (27) (2009), pp. 10975-80.

¹⁴⁴⁴ See further discussion in AppCensus blog, [Ad IDs behaving badly](#), 14 February 2019; Mobilsicher.de, [How Facebook knows which apps you use – and why this matters](#), 20 December 2018; and Tech Crunch, [Many popular iPhone apps secretly record your screen without asking](#), 7 February 2019.

Box 7.6: Some consumer views from ACCC questionnaire

“I am concerned about how and why digital platforms collect personal data, and the extent to which this impacts my privacy. It also concerns me that this personal information may be available to others who may misuse it”

“What I’d like to know more about is what/if any personal data is shared with digital platform partners/service suppliers and what security these third-party groups have when managing data”

“I work in Communications so know how personal data is collected and used, but not sure who it is shared with. I’m concerned that profiling using digital technologies is both intrusive and detrimental to dimensions of social, cultural, political diversity”

“The terms and conditions are so loosely defined that, without extensive research into all commercial relationships of each digital platforms, users will never know where their data is shared/sent to.”

These views are also supported by the results from the CPRC Survey, which found that at least two thirds of Australians indicated they were uncomfortable with most types of information being shared with third parties.¹⁴⁴⁵ Similarly, the OAIC Survey found that 79 per cent of consumers do not want their data shared with other organisations,¹⁴⁴⁶ and an online survey by MediaScope found that 94 per cent of respondents were concerned with third party use of data tools such as those used in the Cambridge Analytica data breach.¹⁴⁴⁷

Despite these consumer views, digital platforms may disclose user data to third parties, particularly if that user data does not constitute ‘personal information’ under their privacy policy. See further section 7.6(c) regarding the broad discretion of digital platforms to disclose user data not defined as ‘personal information’ to third parties.

7.3.4 ACCC views regarding data practices of particular concern

The ACCC’s research has identified that certain data practices are of particular concern to consumers, such as the collection of location data, online tracking for targeted advertising purposes, and third-party data-sharing practices. These data practices are likely to become more prevalent as advancements in tracking and data analytics technologies continue to increase businesses’ ability and incentive to collect an increasing volume and range of user data to generate valuable consumer insights.

Ensuring that consumers have effective control over the use of their data within these evolving technologies would be assisted by changes to the Australian privacy framework. In particular, updating the definition of ‘personal information’ in the Privacy Act to clarify that it includes the growing variety of technical data such as IP addresses, device identifiers, location data, and other unique identifiers that may be used to identify an individual online or via their mobile devices (see section 7.10, recommendation 16(a)). This amendment would ensure that the scope of the Privacy Act reflects the realities of how data is collected on Australian consumers in the digital economy and provide the protection and control for consumers over common data practices of particular concern to consumers.

In some cases, the large amounts of information collected from consumers may not constitute ‘personal information’, such as personal information that has been de-identified or inferred information that does not relate to a specific, identifiable individual. The ACCC notes that de-identified information and inferred information may nevertheless carry risks of harm for consumers, for example where de-identified information can be re-identified and linked to a specific individual (see further box 7.15 *‘Risks associated with de-identified data’*). As such, it may be appropriate for Australian privacy law to set out some protections for certain types of de-identified or inferred data that may be particularly sensitive or carry particular risks of harm (see section 7.10, recommendation 17(4) and 17(5)).

1445 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 32.

1446 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 11.

1447 Mediascope, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 15.

Further detail in relation to the ACCC's proposed recommendations relating to the Australian privacy framework is provided in section 7.10.

7.4 The nature of consumer consents

Key findings

- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.

This section discusses the nature of consumers' consents to digital platforms' data practices. The ACCC's view is that these consumer consents are generally not well-informed or freely-given, as they are provided by consumers in response to 'clickwrap agreements', which are online agreements using digital prompts that request users to provide their consent to online terms and policies without requiring them to fully engage with the terms and policies of use.¹⁴⁴⁸ The clickwrap agreements used by digital platforms also contain take-it-or-leave-it terms and involve the bundling of a wide range of consents.

The ACCC considers that these features of the consumers' bargain with digital platforms result in significant information asymmetry between consumers and digital platforms in relation to the terms on which digital platforms collect, use and disclose user data. It also reflects a bargaining power imbalance between consumers and digital platforms.

7.4.1 Clickwrap agreements

(a) Impact on information asymmetries

Figure 7.8: Facebook sign-up screen

Create an account
It's free and always will be.

First name Surname

Mobile number or email address

New password

Birthday
19 Jul 1993 Why do I need to provide my date of birth?

Female Male

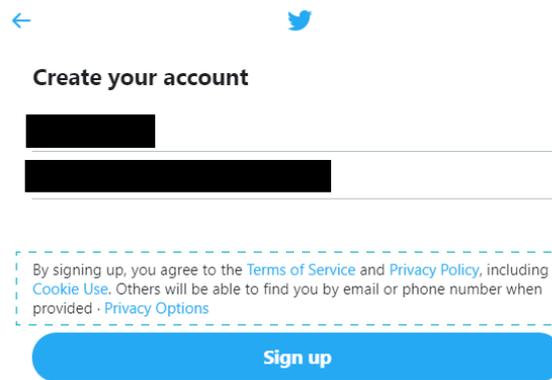
By clicking Sign Up, you agree to our [Terms](#), [Data Policy](#) and [Cookie Policy](#). You may receive SMS notifications from us and can opt out at any time.

Sign Up

[Create a Page for a celebrity, band or business.](#)

1448 J Obar and A Oeldorf-Hirsch, [The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media](#), *Social Media + Society*, July-September 2018.

Figure 7.9: Twitter sign-up screen



In the ACCC's review of the sign-up processes of Google's Gmail, Facebook, Twitter and Apple's Apple ID (ACCC review of sign-up processes), it found that Facebook, Google, and Twitter's sign-up processes used a clickwrap agreement where a consumer is deemed to have accepted the digital platform's terms of use and privacy policies by proceeding with the sign-up process (see screenshots at figure 7.8 and figure 7.9).¹⁴⁴⁹ Apple did not require users to accept its terms of service as part of the sign-up process for creating a new Apple ID.

The use of clickwrap agreements means that users are agreeing to terms and conditions, which may include extensive rights to collect, use and disclose user data, without being asked to review any of the relevant terms of service or privacy policies.

Clickwrap agreements can also deem a user's consent to multiple separate agreements, some of which may change over time. The ACCC's review of digital platforms' terms of use and privacy policies found that each digital platform used terms of use that incorporated their privacy policies and sometimes incorporated extra policies regarding the use of cookies.¹⁴⁵⁰ This means that a consumer's act of signing-up to a digital platform is deemed to signal their acceptance of both the terms of use as well as the associated privacy policies of the digital platform, despite most digital platforms being able to unilaterally vary their privacy policies from time to time after the sign-up has occurred.

(b) The role of behavioural biases

While consumers often do not pay a monetary price to access a digital platform, they may still incur costs when their user data is collected, used, and disclosed by digital platforms.

These costs can include increased risk of data breach and cybercrime from increased online transmission, storage and disclosure,¹⁴⁵¹ which may result in both financial detriments, such as those associated with identity fraud, as well as non-financial detriments, such as harm to health and safety and reputational injury.¹⁴⁵² Other costs include decreased privacy, potential increases in unsolicited targeted advertising and third parties leveraging information against the consumers' interests, for example by engaging in price discrimination (where it allows businesses to take more of the consumer surplus through higher prices) or targeting of scams. Each of these costs is discussed in greater detail at section 7.9.

Presenting consumers with services marketed as 'free' in the form of a clickwrap agreement can exploit behavioural biases that lead consumers to provide their consent to a transaction without informing themselves of the content of the terms and conditions and without due regard to these other potential costs of providing their user data – see box 7.7 on '*Behavioural biases resulting from offers of 'free' online services*'.

¹⁴⁴⁹ See further ACCC review of sign-up processes at appendix H section 1.

¹⁴⁵⁰ As found in the ACCC review of terms and policies, see appendix H section 3.

¹⁴⁵¹ C J Hoofnagle and J. Whittington, [Free: Accounting for the Costs of the Internet's Most Popular Price](#), UCLA Law Review (via SSRN), 606 (2014), p. 611.

¹⁴⁵² M K Ohlhausen (former Commissioner, Federal Trade Commission), [Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases](#), 19 September 2017. pp. 4-8.

Box 7.7: Behavioural biases resulting from offers of ‘free’ online services

Presenting offers to consumers as ‘free’ is likely to exploit behavioural biases due to the emotional appeal of free offers.¹⁴⁵³ This is because marketing a service as ‘free’ presents consumers with ‘a narrow way of thinking that focuses on only one or a few aspects of a more complex decision problem.’¹⁴⁵⁴ As a result, consumers are likely to focus more on the zero monetary cost of signing-up to a digital platform and less on the other potential costs of providing digital platforms with their user data.

Consumers receiving free services are also less likely to perceive digital platforms as commercial entities supplying advertising services, which may have the effect of lowering their guard in transactions with digital platforms.¹⁴⁵⁵

(c) Consumer outcomes

The use of clickwrap agreements is likely to contribute to consumers’ tendency not to read online terms of service or privacy policies, creating significant information asymmetry between consumers and digital platforms regarding the terms of their agreement.

It is well established that most consumers do not read the terms of online standard form contracts, particularly if they are acting under time or financial constraints.¹⁴⁵⁶ This is also reflected in the ACCC consumer survey results about digital platforms’ terms and policies, which found that less than one in five digital platforms users surveyed (18 per cent) reported they read the privacy policies or terms of use for online sites or apps most or every time; three in five users (60 per cent) indicated that they rarely or never did so.¹⁴⁵⁷ In addition, as illustrated in figure 7.10, people younger than 50 years old are also less likely to read terms and conditions before agreeing.¹⁴⁵⁸

1453 D A Friedman, *Free Offers: A New Look*, *New Mexico Law Review*, 38 (2008), pp. 49, 68–69; C. J. Hoofnagle and J. Whittington, [Free: Accounting for the Costs of the Internet’s Most Popular Price](#), *UCLA Law Review* (via SSRN), 606 (2014), p. 609.

1454 D Boush et al., *Deception in the marketplace: the psychology of deceptive persuasion and consumer self-protection*, (2009); cited in C J Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet’s Most Popular Price](#), *UCLA Law Review* (via SSRN), 606 (2014).

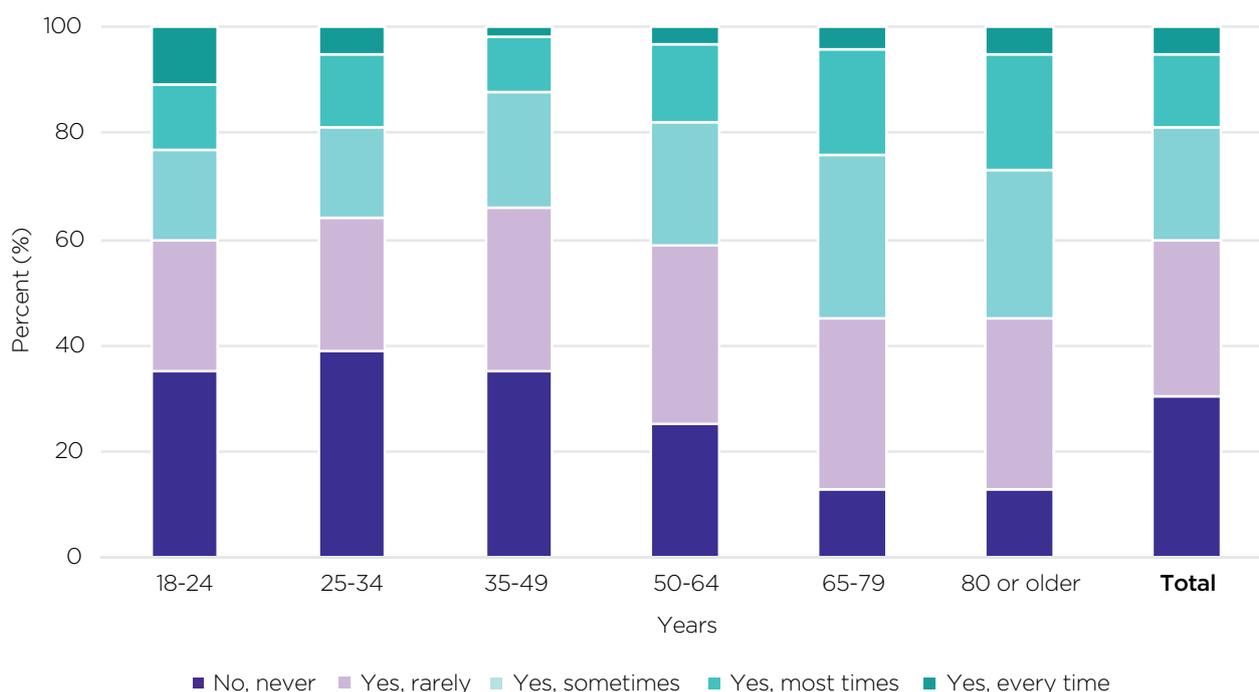
1455 C J Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet’s Most Popular Price](#), *UCLA Law Review* (via SSRN), 606 (2014), p. 611.

1456 As discussed in J M Paterson and R L Smith, *Why unilateral variation clauses in consumer contracts are unfair*, *Competition & Consumer Law Journal* 23 (2016), p. 205. See also, M. A. Eisenberg, [The Limits of Cognition and the Limits of Contract](#), *Stanford Law Review*, 47 (1995), p. 241; R. Korobkin, *Bounded rationality, standard form contracts, and unconscionability*, *University of Chicago Law Review* Vol. 70 (4)(2003); C. R. Sunstein, *Behavioural Analysis of Law*, *Coase-Sandor Institute for Law & Economics Working Paper*46 (1997), p. 64.

1457 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 25.

1458 The ACCC notes that the figures in figure 7.10 will not sum to 100% due to rounding results to the nearest percentage.

Figure 7.10: How often users read privacy policies¹⁴⁵⁹



Source: ACCC consumer survey. Q12. Do you normally read all the privacy policy or terms and conditions for an internet site or app?

Base: Australian digital platform users aged 18 or more (n=4308)

The CPRC survey similarly found that only six per cent of consumers reported they had read all the privacy policies or terms of use for all the products they signed up to.¹⁴⁶⁰ The OAIC survey has also found a declining trend in the proportion of Australians reporting that they normally read online privacy policies from 44 per cent in 2013 to 29 per cent in 2017.¹⁴⁶¹

7.4.2 Take-it-or-leave-it terms

Consumers are invariably provided with a standard set of terms that are offered to all prospective users with no opportunity to negotiate with digital platforms on any specific term, including in relation to how much user data can be collected from them and how that user data may be used and shared with third parties.

Take-it-or-leave-it terms may be offered for a range of reasons including because the cost of customising terms for each user may be prohibitive relative to the amount of value generated from each user.

(a) Impact on information asymmetries and bargaining power imbalance

Offering terms on a take-it-or-leave-it basis may contribute to information asymmetries between digital platforms and their users, as their terms of use and privacy policies are standard-form documents that do not clearly set out to each user what is occurring with their user data specifically.

The use of take-it-or-leave-it terms may also reflect the significant bargaining power held by digital platforms compared with consumers, such that they can unilaterally set the terms of use and privacy policies applicable to their transaction with consumers, which often include the right to unilaterally change their terms of service and privacy policies from time to time. In contrast, consumers may only decide whether they will access a digital platform's services, and therefore accept all of its terms and policies, or not.

¹⁴⁵⁹ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 26.

¹⁴⁶⁰ Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 31.

¹⁴⁶¹ OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 31.

(b) Lack of viable alternatives

As discussed in chapter 2, the markets in which the key digital platforms (Google and Facebook) operate are concentrated and consumers are faced with a relatively low level of choice. Whereas established digital platforms have millions or billions of users worldwide¹⁴⁶², consumers have relatively few search engine and social media platform options. Further, these options are unlikely to be fully substitutable for each other.

Consumer responses to the ACCC questionnaire indicate that consumers perceive there to be a lack of viable alternatives, and that this lack of alternatives could reduce their incentive to be informed about, and opt-out of, digital platforms' data practices – see box 7.8. The Deloitte Privacy Index also found that while 38 per cent of Australian consumers used the apps of a brand they trusted the least, the consumers would cease using that app if there was a better alternative.¹⁴⁶³

Box 7.8: Some consumer views from ACCC questionnaire

“...Being on Facebook is pretty much the same, it is the biggest social network, so it has the most people that you may know and therefore it is the one that you do have to use even grudgingly if you want to keep in touch. It is actually not possible to switch to another platform if none of your friends or family are there”.

“I have never thought about what data is collected or how it's used. Maybe I'm not concerned enough as I still continue to use these platforms, but also don't really think I have a choice not to use them...”

(c) Consumer outcomes

As a result of these information asymmetries and bargaining power imbalance, Australian consumers may provide nominal consents to terms and conditions even when they are uncomfortable with them. For instance, the CPRC survey found that, of the consumers surveyed who did read the privacy policies, 67 per cent had signed up even though they were not comfortable with the terms of use.¹⁴⁶⁴ When asked why they signed up in spite of this discomfort, 73 per cent of respondents stated that it was the only way to access the product or service.¹⁴⁶⁵

Responses to the ACCC questionnaire also describe a level of discomfort and lack of choice in the terms of their transactions with digital platforms – see box 7.9.¹⁴⁶⁶

Box 7.9: Some consumer views from ACCC questionnaire

“We are forced to sign agreements to ‘terms & conditions’ to use software that in most cases we have little choice in using if we are to be able to function at work and in society.”

“I'm aware some data is collected via cookies and possibly shared across platforms. It seems difficult to control this without stopping to access the sites.”

“I know my data is collected and used but I'm not sure by whom. It is impossible to use the internet effectively if you object to this so you have to agree or be locked out of content, social and political forums.”

“On most sites I use as much privacy software as I can and still be able to access the content I wish too. However it's never 100% effective and I don't get a choice really.”

1462 For a discussion of the market power of digital platforms, see further discussion at chapter 2.

1463 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 9.

1464 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 31.

1465 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 4.

1466 Excerpts from responses to [ACCC Consumer Questionnaire](#).

The requirement that Facebook users accept all of Facebook's terms, 'including an extensive disclosure of personal data', or not use Facebook at all was the focus of a decision by the Bundeskartellamt (the German Federal Cartel Office) which found that such conduct amounted to an abuse of Facebook's dominant position.¹⁴⁶⁷

7.4.3 The use of bundled consents

Bundled consent is the practice of seeking one consent from an individual for numerous different types of collections, uses and disclosures of their personal information.¹⁴⁶⁸ Bundled consents are often used where there may be such a large number of consents sought that it would be impractical or unreasonable for a business to request each consent individually.¹⁴⁶⁹

(a) Impact on information asymmetries and bargaining power imbalance

Digital platforms bundle consents, which facilitates the collection of large amounts of personal information and user data. The ACCC review of terms and policies found that digital platforms' collection often went beyond what was necessary to provide the service. For example, WhatsApp's terms of use requires users to agree to its privacy policy, which states that WhatsApp collects information from users that it shares with Facebook.¹⁴⁷⁰ The sharing of this data does not appear to be necessary to provide WhatsApp's instant messaging service and may not be what many users expect.

Digital platforms can also bundle consents across different services. For example, Google's privacy policy states that it collects user information across its services and that 'We may combine the information we collect among our services and across your devices for the purposes described above'.¹⁴⁷¹ This privacy policy is incorporated into Google's Terms of Service,¹⁴⁷² and applies to users of over 60 different online services provided by Google.

The ACCC's review of terms and policies found that digital platforms' terms of use include the grant of potentially valuable rights to user-created content, including grants of licences from the user to the digital platform with broad permissions to use, distribute or modify content uploaded by the user¹⁴⁷³, and from the user to the digital platforms to use the user's name and picture in connection with advertising or sponsored content.¹⁴⁷⁴

Table 7.3 summarises some of the rights consumers are required to grant to Google, Facebook, Twitter and Snapchat in order to use the platform under their respective terms of use.

1467 Bundeskartellamt, [Bundeskartellamt prohibits Facebook from combining user data from different sources](#), 7 February 2019.

1468 OAIC, [APP guidelines – complete set as at 2 March 2018](#), p. 10.

1469 The OAIC suggests that businesses that are considering the use of bundled consent could consider whether 'it is practicable and reasonable to give the individual the opportunity to refuse consent to one or more proposed collections, uses and/or disclosures': OAIC, [APP guidelines – complete set as at 2 March 2018](#), pp. 10-11.

1470 WhatsApp, [Privacy policy](#), accessed 20 May 2019.

1471 Google, [Privacy Policy](#), accessed 20 May 2019.

1472 See [Google Terms of Service](#): 'By using our Services, you agree that Google can use such data in accordance with our privacy policies', accessed 20 May 2019.

1473 See further ACCC review of terms and policies at appendix H section 3.

1474 For example:

Facebook: 'You give us permission to use your name and profile picture and information about actions that you have taken on Facebook next to or in connection with ads, offers and other sponsored content that we display across our Products, without any compensation to you.' [Terms of Service](#), accessed 20 May 2019.

Snap Inc.: 'To the extent it's necessary, when you appear in, create, upload, post, or send Public Content, you also grant Snap Inc., our affiliates, and our business partners the unrestricted, worldwide, perpetual right and license to use your name, likeness, and voice, including in connection with commercial or sponsored content.' [Terms of Use](#), accessed 20 May 2019.

Google: 'If you have a Google Account, we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1's, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts. We will respect the choices you make to limit sharing or visibility settings in your Google Account. For example, you can choose your settings so your name and photo do not appear in an ad'. [Terms of Service](#), accessed 20 May 2019.

Table 7.3: Rights granted to digital platforms under their terms of use on sign-up

	Can the digital platform use the user-uploaded content and images without further negotiation with the user?	Can the digital platform sell user-uploaded content and images to third parties without further agreement of the user?
Google	Yes, if the use is within the scope of the limited purpose and the user's privacy settings.	Yes, if the use is within the scope of the limited purpose and the user's privacy settings.
Facebook	Yes.	Yes, but only content that is shared publicly.
Twitter	Yes.	Yes.
Snapchat	Yes.	Unlikely as this does not fall within the scope of the licence.

(b) Consumer outcomes

A digital platform's bargaining power towards consumers will frequently enable the digital platform to obtain consents to a broader range of conduct. Where consumers only provide one bundled consent, they are less likely to be adequately informed about all the different types of user data collected by digital platforms and about how that user data is used and disclosed.

As mentioned above, the ACCC consumer survey found that 85 per cent of digital platforms users considered that digital platforms should only collect the information they need to provide their product or service.¹⁴⁷⁵ The OAIC has raised concerns with the practice of bundled consent as early as 2002, and considers that this practice has the potential to undermine the voluntary nature of any consumer consent.¹⁴⁷⁶ By bundling consents, digital platforms ask consumers to enter into contracts 'without giving the individual the opportunity to choose which collections, uses and disclosures they agree to and which they do not'.¹⁴⁷⁷

As a result, consumers may find themselves providing nominal consent to data practices that they feel uncomfortable about so that they can access a digital platform's services. The likely consumer harms and harms to competition in digital markets are discussed further at section 7.9.1 'Extent of consumer harm' below.

7.4.4 ACCC assessment of digital platforms' consent processes

The ACCC's review of digital platforms' sign-up processes found various clickwrap agreements with unobtrusive links to online documents that detail the collection, use and disclosure of extensive amounts of user data, offered on a take-it-or-leave-it basis that involves the bundling of numerous different consents. Seeking consent to data processing using these processes leverages bargaining power imbalances between digital platforms and consumers and deepens information asymmetries between them. They have the effect of preventing consumers from providing meaningful consent to the collection and use of their personal information and user data. As a result, consumers may find themselves providing nominal consent to data practices that they feel uncomfortable about, in order to be able to access a digital platform's services.

While the focus of the Inquiry has been on digital platforms, the ACCC notes that some features of these problematic consent processes extend beyond the data practices of digital platforms to other sectors across the economy (see section 7.9.2 'Data practices and consumer harms extend beyond digital platforms').

¹⁴⁷⁵ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 17.

¹⁴⁷⁶ OAIC, [Announcement: bundled consents and the Privacy Act](#), 23 May 2002; OAIC, [APP guidelines – complete set as at 2 March 2018](#), p. 10.

¹⁴⁷⁷ OAIC, [APP guidelines – complete set as at 2 March 2018](#), p. 11.

The ACCC's view is that the information asymmetries can be addressed by amending the Privacy Act to include stronger consent requirements for entities collecting the personal information of Australians (see recommendation 16(c)). These economy-wide changes should be supplemented with additional measures to improve the consent processes of digital platforms, both by enhancing the quality of consent obtained and to minimise consent fatigue on consumers (see recommendation 18(2)). For example, consumers should be provided with specific, opt-in controls for any data collection that is for a purpose other than the purpose of supplying the core consumer-facing service.

Giving consumers, who have previously given consent to data practices, the ability to withdraw their consent and request erasure of their personal information in certain circumstances would also improve the bargaining power imbalance between digital platforms and consumers (see recommendation 16(d)). The ACCC supports raising the standard of protection offered by the Privacy Act, for example, by requiring that all use and disclosure of personal information should be by fair and lawful means to provide consumers with a higher basic level of privacy and data protection (see recommendation 17(3)).

Finally, the ACCC considers that a prohibition under the Australian Consumer Law against engaging in certain unfair trading practices would help address practices of significant detriment to consumers (see recommendation 21).

Further details in relation to the ACCC's proposed recommendations relating to the Australian privacy framework are set out in section 7.10.

7.5 Disclosures in privacy and data policies

Key findings

- Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.
- Despite consumers being particularly concerned by location tracking, online tracking for targeted advertising purposes, and third-party data-sharing, these data practices are generally permitted under digital platforms' privacy policies.

Clear and effective privacy policies are a critical first step to ensuring that consumers can engage in the digital economy, in an informed way, to make decisions that are in their own best interests and ensure effective competition between businesses online.¹⁴⁷⁸

This section considers the way that digital platforms' terms and policies are presented to consumers, as well as their clarity and accessibility. These are important factors informing the ACCC's analysis of consumers' awareness of how digital platforms collect, use and disclose data and the extent of information asymmetry between digital platforms and consumers. This section considers the scope of 'personal information' and digital platforms' disclosures regarding three areas in which consumers typically appear to have concerns: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties.

¹⁴⁷⁸ OECD, [Policy Note, Improving online disclosures with behavioural insights](#), April 2018, p. 4.

Box 7.10: ACCC review of terms and policies

The ACCC reviewed the privacy policies and terms of use of several large digital platforms relevant to the Inquiry, including Google, Facebook, Apple, WhatsApp, Instagram, Twitter, and Snapchat. The ACCC's review found some key characteristics that are likely to impede consumers' ability to accurately and comprehensively understand the digital platforms' data practices, including the length of privacy policies, the complexity of many interlinked web pages, the vague language used, and the tendency to understate data collection, use and disclosure.

The findings of the ACCC's review of these digital platforms' privacy policies and its research into sign-up and opt-out processes is set out in more detail in appendix H.

7.5.1 Privacy policies are long, complex, vague, and difficult to navigate

The ACCC's review of terms and policies found that digital platforms' privacy policies are often long, complex, vague and difficult to navigate. This is despite recent research that indicates it is important to 97 per cent of consumers for apps to have a clear privacy policy.¹⁴⁷⁹ This view is also reflected in consumer responses to the ACCC's Questionnaire that have raised concerns about digital platforms' terms and conditions being difficult to understand – see box 11.

Box 7.11: Some consumer views from ACCC questionnaire

“Usually the privacy policies of most sites are buried somewhere and hard to find and are very lengthy and confusing.”

“Terms and conditions are seemingly intentionally vague and full of legalese. They are obviously designed so that people do not read them and realise what they are signing away. A notification should be sent to any person who has their personal data held by a 3rd party who want to send that data onto another party asking for permission.”

“I'm sure the terms explaining how your data is being used exists, but are difficult to navigate and find.”

“Terms and conditions of sites are far too tedious and not actually understood.”

In addition, difficulties accessing privacy policies do not appear to be limited to digital platforms, with the Deloitte Privacy Index finding that privacy policies are not accessible in 22 per cent of 100 apps analysed across ten industries.¹⁴⁸⁰

The ACCC considers that the length, complexity, ambiguity and difficulty of navigation in privacy policies exacerbate information asymmetries between consumers and entities collecting their personal information. In some instances, information asymmetries can be a source of market failure – see further discussion in box 7.12 *'Information asymmetries and market failure'*.

1479 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 13.

1480 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 20.

Box 7.12: Information asymmetries and market failure

Information asymmetries can occur when users cannot access the information they need because it is not made available to them, or when the relevant information is made available to consumers but they are not aware of it or are unable to understand it (for example, it may be too complex to understand). Results of information asymmetry between digital platforms and consumers can include:

- consumers not engaging in beneficial relationships with digital platforms because they do not have sufficient information to enable trust in digital platforms' data practices
- consumers entering into inappropriate or detrimental relationships with digital platforms because they do not have sufficient information to identify data practices of concern
- consumers being unable to assess the quality of privacy offered by digital platforms, which may impede competition between digital platforms along the privacy dimension of their products and lead to digital platforms only offering low quality products and services.

When these occur, information asymmetry prevents the market from operating as efficiently and effectively as it could and, as such, is a source of market failure.

(a) Length

The ACCC review of terms and policies found that each digital platform's privacy policies, excluding the additional links to separate web pages, were between 2 500 and 4 500 words, and would take an average reader between 10 and 20 minutes to read.¹⁴⁸¹ These average reading times are likely to significantly exceed the time actually spent by consumers trying to read digital platforms' privacy policies.

Information provided by Google to the Inquiry shows that in 2018, the average time spent by Australian users viewing the Google Privacy Policy web page¹⁴⁸² was less than two minutes.¹⁴⁸³ Overall, only 0.03 per cent of devices with an Australian IP address spent more than 10 minutes on the Google Privacy Policy web page.¹⁴⁸⁴ Although there may be a range of reasons for the brevity of a consumer's visits to a privacy policy web page, these figures suggest that very few consumers are likely to be engaging meaningfully with the text of a digital platform's privacy policy, even when they are on a privacy policy web page.

In addition to the length of individual policies, the number of separate privacy policies for online services that a consumer encounters is also likely to be impracticably large. US researchers estimated in 2008 that consumers are likely to encounter an average of 1 462 privacy policies a year for all the different online services they use and different websites that they visit. Combining the estimated average time to read each policy means that it would take an average of 244 hours, or 76 working days of eight hours a day,¹⁴⁸⁵ to read all of the privacy policies.¹⁴⁸⁶ This research provides an indication of the volume of terms and conditions that consumers are likely to be presented with online in 2008. It is likely that this figure has significantly increased in the past decade in line with increased consumer interaction with online services and apps.

1481 See further ACCC's review of terms and policies at appendix H section 3.

1482 Google, [Privacy Policy](#), accessed on 30 October 2018.

1483 Information provided to the ACCC.

1484 Information provided to the ACCC.

1485 A. McDonald and L. Cranor, [The Cost of Reading Privacy Policies](#), I/S: A Journal of Law and Policy for the Information Society (2008), p. 17. See also A.C. Madrigal, [Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days](#), *The Atlantic*, 1 March 2012.

1486 A. McDonald and L. Cranor, [The Cost of Reading Privacy Policies](#), I/S: A Journal of Law and Policy for the Information Society (2008), p. 17.

Box 7.13: Information overload

Information overload describes the excess of information available to a person making a decision.¹⁴⁸⁷

Consumers confronted with complex products may face information overload, and subsequently find it difficult to engage with the decision to purchase a product or service. In order to make a decision a consumer may either rely on relatively simple “rules of thumb”, limit the number of decision criteria they consider (for example, focus exclusively on price at the expense of other factors) or defer their decision. They may also choose not to engage with the terms and conditions of a product.¹⁴⁸⁸

Information overload may result in suboptimal outcomes such as:

- consumers putting off making a purchase that would have made them better off
- consumers remaining with their existing supplier when switching suppliers would have made them better off
- low consumer awareness and understanding of product risks, for example the risk of data breaches or targeted advertising
- consumers feeling anxious and stressed from information overload.¹⁴⁸⁹

As information overload has the potential to hinder consumers’ ability to engage with privacy policies, it has important implications for businesses’ ability to ensure that consumers can provide, or withhold, meaningful consent to the collection and use of their personal information and user data. A better understanding of how information overload impacts consumers’ engagement, and how it can be reduced, can lead to more effective policy implementation.

The existing literature on product disclosures, which also focusses on the importance of context and presentation of information in consumer decision making, suggests that simplifying and prioritising information can reduce the potential for information overload:

- **layering of information:** layered information involves distilling information into key headings with short summaries, and providing links to consumers who want to know more on each topic. As it reduces the volume of information disclosed to consumers, it can reduce the potential for consumers to face information overload.¹⁴⁹⁰ The literature also suggests that the summaries should include only the most relevant information, and be designed in a manner that is effective in informing consumers. For example, it has been suggested that consumer comprehension could be improved by placing the most important and unexpected information at the top of terms and conditions.¹⁴⁹¹ It should also be noted that layering information may increase the chance that some consumers will ignore the full disclosure and only engage with the summary.¹⁴⁹²
- **simplifying the message:** research suggests that consumers are more likely to respond to simplified messages, usually because the main requests are made clearer.¹⁴⁹³ The OECD has found that shortening and simplifying terms and conditions enhanced readability and improved consumers’ understanding of and trust in terms and conditions.¹⁴⁹⁴ The literature also warns against the ‘accumulation problem’ in disclosure where consumers may not engage with disclosure, not because of the poor design of a single disclosure, but because of the

1487 Interaction Design Foundation, [Information overload](#), accessed 10 May 2019.

1488 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018.

1489 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018; Interaction Design Foundation, [Information overload](#), accessed 10 May 2019.

1490 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, P. 40.

1491 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, P. 36.

1492 Oxera, [Review of literature on product disclosure](#), 29 October 2014, p. 14.

1493 Behavioural Insights Team, [EAST Four simple ways to apply behavioural insights](#), p. 16.

1494 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, P. 36.

large number of disclosures that consumers are faced with.¹⁴⁹⁵ As a result, it is important that disclosures are tested in the context in which they are likely to be presented to the consumer to ensure that the disclosure is achieving the desired consumer outcomes.

(b) Complexity

Privacy policies of digital platforms are often complex. In the ACCC review of terms and policies, six out of the seven privacy policies of Google, Facebook, Apple, WhatsApp, Instagram, Twitter, and Snapchat required a university education to understand (all except Snapchat).¹⁴⁹⁶

The complexity of language makes it harder for average consumers to process the information contained within these policies. It also creates particular difficulties for children, teenagers and users from a non-English speaking background.

(c) Ambiguity

Privacy policies of digital platforms are often vague. The ACCC review of terms and policies found a range of broad, vague statements in a number of the digital platforms' policies relating to the collection, use and disclosure of user data. A key example of vague language is the frequent use of the word 'may' in digital platforms' privacy policies. For example:

- **Twitter's privacy policy** states: 'We *may* also disclose personal data about you to our corporate affiliates in order to help operate our services and our affiliate's services, including the delivery of ads' (emphasis added).¹⁴⁹⁷
- **Instagram's cookies policy** states: 'Third-party cookies *may* be placed on your device by someone providing a service for Instagram' (emphasis added).¹⁴⁹⁸
- **WhatsApp's privacy policy** states: 'As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We *may* use the information we receive from them, and they *may* use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings' (emphasis added).¹⁴⁹⁹

The word 'may' can denote various meanings, including the expression of uncertainty, permission, possibility, intention or hope.¹⁵⁰⁰ When used in contract terms, including in a digital platform's terms of use or privacy policy, the use of the word 'may' give digital platforms significant discretion to do, or not do, the actions prefaced by the word. A consumer reading this policy therefore cannot accurately determine the exact scope of the user data the platform is collecting from them and how the user data will be used and disclosed.

The ambiguity of digital platforms' privacy policies has been explored by other regulators overseas. In the Privacy Commissioner of Canada's April 2019 report of findings into its investigation into Facebook Inc, it found that Facebook failed to gain meaningful consent from users and users' friends, relying instead on 'vague and over-broad, over-arching language in its terms and conditions'.¹⁵⁰¹

1495 Oxera, [Review of literature on product disclosure](#), 29 October 2014, p. 19.

1496 ACCC review of the privacy policies showed that most of the policies rated 30-50 on the Flesch-Kincaid readability scale. The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 60.0-50.0 are classified as 'fairly difficult to read', which translates to around a US 10th to 12th grade school level; documents scoring between 50.0-30.00 are 'difficult to read', at a US college reading level. Snapchat's privacy policy scored above 51, meaning it requires US 10-12 grade education level to read. See ACCC review of terms and policies at appendix H section 3.

1497 Twitter, [Privacy policy](#), accessed 20 May 2019.

1498 Instagram, [About Cookies](#), accessed 20 May 2019.

1499 WhatsApp, [Privacy policy](#), accessed 20 May 2019.

1500 See [Macquarie Dictionary](#) definition.

1501 Office of Privacy Commissioner of Canada, PIPEDA Report of Findings #2019-002, [Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia](#), 25 April 2019.

In its news release following the investigation, the Privacy Commissioner of Canada stated that ‘Facebook’s privacy framework was empty, and their vague terms were so elastic that they were not meaningful for privacy protection’.¹⁵⁰² Facebook reportedly disputed the findings of the investigation.¹⁵⁰³

(d) Difficulty of navigation

Many digital platforms’ terms and conditions are also hard to navigate, with numerous separate, interlinked policies that all contain information regarding the digital platform’s data practices. For example: Google’s privacy policy states that ‘This Privacy Policy doesn’t apply to services that have separate privacy policies that do not incorporate this Privacy Policy’.¹⁵⁰⁴

But it is only by reading each of the eight separate privacy policies for other Google services (that is, Chrome and Chrome OS, Play, Books, Payments, Fiber, Project Fi, G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link) that a user would discover that each of those separate privacy policies do incorporate Google’s main policy and that, therefore, Google’s privacy policy does apply to all of its services (although the privacy policies for G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link state that their terms prevail in the event of any inconsistency with Google’s main privacy policy).¹⁵⁰⁵

Some digital platforms also have policies where key terms can only be accessed by following a link that takes users away from the privacy policy web page. In box 7.13 ‘*Information Overload*’, the ACCC considers that the layering of information can be an effective way of increasing consumer engagement by reducing information burden. For multi-layered notices to be effective, however, it is critical that the first layer of information provides a meaningful summary of the terms and conditions that are the most unexpected and the most important to consumers. That way, this first layer can guide consumers to relevant areas in subsequent layers providing more detailed information on each of these unexpected or important terms.

A multi-layered notice will not be effective or helpful if the first layer of information does not set out the most important information about how data is processed or if key information can only be found by clicking through numerous different links. The interlinking of separate pages can substantially increase the amount of navigation and reading time for a user, as there is often no differentiation between links that contain key terms and links that contain explanatory content. An example of a digital platforms notification practices is below at box 7.14 ‘*Facebook’s multi-layered layout*’.

Box 7.14: Facebook’s multi-layered layout

Facebook submitted that it uses a multi-layered layout for its privacy policy aimed at making its Data Policy ‘more readable compared with a document that people would need to scroll through from top to bottom to find the information they are interested in’.¹⁵⁰⁶

As noted above, the ACCC views that an effective multi-layered notice sets out a concise summary of the most important for consumers in the first layer of information. Although Facebook applies a multi-layered format, the ACCC’s review of terms and policies found that the first layer of Facebook’s Data Policy was long, complex and contained ambiguous language and circular definitions.¹⁵⁰⁷ In particular, Facebook’s Data Policy does not appear to be layered in a way that provides consumers with progressively more detailed information regarding key topics of concern.

1502 Office of Privacy Commissioner of Canada, News Release, [Facebook refuses to address serious privacy deficiencies despite public apologies for “breach of trust”](#), 25 April 2019.

1503 Office of Privacy Commissioner of Canada, News Release, [Facebook refuses to address serious privacy deficiencies despite public apologies for “breach of trust”](#), 25 April 2019.

1504 Google, [Privacy policy](#), accessed 20 May 2019.

1505 See [Chrome and Chrome OS](#), [Play Books](#), [Payments](#), [Fiber](#), [Project Fi](#), [G Suite for Education](#), [YouTube Kids](#), [Google Accounts Managed with Family Link](#).

1506 Facebook, [Submission to the Preliminary Report](#), March 2019 p. 51.

1507 Facebook’s Data Policy ‘describes the information we process to support Facebook, Instagram, Messenger and other products and features offered by Facebook (Facebook Products or Products)’, but ‘Facebook Products’ is defined to include ‘any other features, apps, technologies, software, products, or services offered by Facebook Inc. or Facebook Ireland Limited under our Data Policy’: see [Facebook Data Policy](#) and [What are the Facebook Products?](#), accessed 2 June 2019.

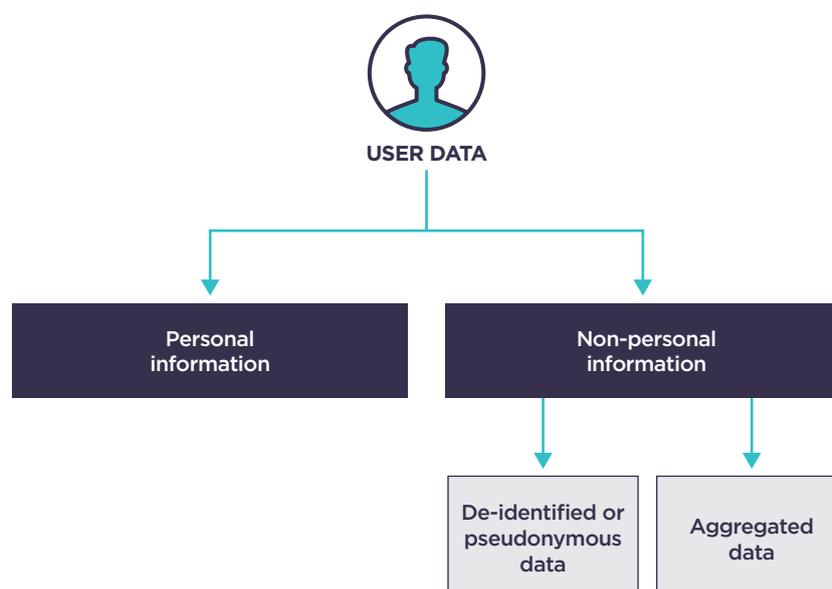
For example, in relation to explaining how information may be shared with third parties:

- Facebook’s Data Policy does not provide a clear and concise statement of the types of personal information that Facebook uses for the purposes of targeted advertising or of the extent of any sharing of personal information between Facebook and third parties. Rather, it has statements such as ‘Partners receive your data when you visit or use their services, or through third parties that they work with’.¹⁵⁰⁸
- When a consumer clicks on a link to ‘Learn more about the types of partners we receive data from’, they are directed to a webpage that states ‘Facebook no longer works with third-party data providers to offer their targeting segments directly on Facebook.’¹⁵⁰⁹ Accordingly, a consumer cannot easily find further information about any other third parties aside from data providers that Facebook might receive data from such as app developers or publishers.
- Facebook’s Data Policy contains general statements such as ‘We work with third-party partners who help us provide and improve our Products or who use Facebook Business Tools to grow their businesses, which makes it possible to operate our companies and provide free services to people around the world. We don’t sell any of your information to anyone and we never will.’¹⁵¹⁰ Such statements provide broad assurances to readers but arguably does not provide a meaningful overview of the extent to which Facebook may transact with third parties regarding access to user data.¹⁵¹¹

7.6 Disclosure practices of particular concern

Digital platforms collect large amounts of user data from consumers, including both ‘personal information’ and ‘non-personal information’ (see figure 7.11).

Figure 7.11: Different types of user data



1508 [Facebook Data Policy](#), accessed 2 June 2019.

1509 Facebook, [How does Facebook work with data providers?](#), accessed 2 June 2019.

1510 [Facebook Data Policy](#), accessed 2 June 2019.

1511 DCMS, [Disinformation and ‘fake news’: Final Report](#), 14 February 2019, p. 30-33. See further discussion in appendix I on ‘Do digital platforms ‘sell’ user information to third parties?’

Generally, personal information refers to data that can be used alone or in combination with other data to identify specific individuals.¹⁵¹² In contrast, non-personal information cannot be used alone to identify individuals. It includes:¹⁵¹³

- **De-identified data (or anonymous data):** data collected from individuals that has been stripped of any personally-identifying information
- **Pseudonymous data:** data collected from individuals where the personally-identifying information has been replaced with artificial identifiers
- **Aggregated data:** data created by aggregating the personal or non-personal data of multiple individuals.

An important reason for distinguishing between ‘personal information’ and ‘non-personal information’ is because privacy protections generally apply only to user data that constitutes ‘personal information’. That is, the *Privacy Act 1988* (Cth) (Privacy Act) only protects data within its definition of ‘personal information’, which is ‘information or an opinion about an identified individual, or an individual who is reasonably identifiable’.¹⁵¹⁴ Many digital platforms’ privacy policies outline protections for user data considered to be ‘personal information’, while occasionally describing wide discretions in their handling of ‘non-personal information’ (see section 5.2).

(a) The definitions of ‘personal information’

Despite the significance of the distinction between ‘personal’ and ‘non-personal’ information, there is no consistency in how ‘personal information’ is defined and used by digital platforms. In some policies, the term is not defined at all. The definitions of ‘personal information’ in the policies also do not match the definition of ‘personal information’ under the Privacy Act. Whereas the Privacy Act definition includes ‘information or an opinion’ about an identified individual ‘or an individual who is reasonably identifiable’, digital platforms tend to refer to personal information as information that can be used to directly identify or contact a person.

Table 7.4 compares the definition of ‘personal information’ under the Privacy Act with the definitions under some digital platforms’ privacy policies.

Table 7.4: Definitions of ‘personal information’

Source	Definition of ‘personal information’?
Privacy Act	‘information or an opinion about an identified individual, or an individual who is reasonably identifiable.’ ¹⁵¹⁵
Google’s privacy policy	Defines ‘personal information’ as ‘ <i>information that you provide to us which personally identifies you, such as your name, email address, or billing information, or other data that can be reasonably linked to such information by Google, such as information we associate with your Google Account.</i> ’ ¹⁵¹⁶
Facebook’s data policy	Does not expressly define ‘personal information’ but describes ‘information that personally identifies you’ as ‘ <i>information such as your name or email address that by itself can be used to contact you or identifies who you are.</i> ’ ¹⁵¹⁷
Twitter’s privacy policy	Does not expressly define ‘personal information’ but describes ‘personal data’ as including ‘ <i>a display name (for example, “Twitter Moments”), a username (for example, @TwitterMoments), a password, and an email address or phone number.</i> ’ ¹⁵¹⁸
Apple’s privacy policy	‘ <i>Personal information is data that can be used to identify or contact a single person.</i> ’ ¹⁵¹⁹

1512 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA’s call for information](#), June 2015, pp. 25-26.

1513 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA’s call for information](#), June 2015, pp. 25-26.

1514 Privacy Act, s 6(1).

1515 Privacy Act, s 6(1).

1516 Google, [Privacy Policy](#), accessed 20 May 2019.

1517 Facebook, [Data Policy](#), accessed 20 May 2019.

1518 Twitter, [Privacy Policy](#), accessed 20 May 2019.

1519 Apple, [Privacy Policy](#), accessed 20 May 2019.

How digital platforms define ‘personal information’ is important, as most digital platforms’ policies state that how they handle user data will depend on whether it falls within this definition. Some examples of the protections set out in digital platforms’ privacy policies for ‘personal information’ include:

- **Google’s Privacy Policy** states that: ‘We do not share your personal information with companies, organizations, or individuals outside of Google except in [specific] cases’.¹⁵²⁰
- **Facebook’s Data Policy** states that: ‘We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing, but we don’t share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are) unless you give us permission’.¹⁵²¹
- **Apple’s Privacy Policy** states that: ‘Personal information will never be shared with third parties for their marketing purposes’.¹⁵²²

The different meaning that ‘personal information’ can take between digital platforms’ privacy policies, and under the Privacy Act, is likely to create significant confusion for users.

(b) Consumers’ interpretation of ‘personal information’

There is also evidence to suggest that Australian consumers interpret ‘personal information’ more broadly than either the Privacy Act definition or the definitions employed by some digital platforms. For instance, the ACCC consumer survey found that the majority of digital platform users surveyed found each of the following types of information to be ‘personal information’:

- Date of birth – 86 per cent
- Name – 84 per cent
- Photos – 79 per cent
- Telephone and device information – 79 per cent
- Location information – 78 per cent.¹⁵²³

Of the above types of information, only an individual’s name is definitively ‘personal information’ within the Privacy Act. The nature of the Privacy Act definition means that some types are personal information depending on their context (date of birth, photos, telephone number). Device information and location information are also context-dependent, but it is not clear whether they constitute ‘personal information’ under the Privacy Act.¹⁵²⁴

(c) Broad discretions regarding non-personal information

As noted earlier, any user data that constitutes ‘non-personal information’ is not regulated by the Privacy Act. Where personal information collected by digital platforms has been de-identified and aggregated, the collection and distribution of this data is not then subject to protections under the Privacy Act.

Information that is deemed ‘non personal’ by digital platforms is typically subject to fewer protections under digital platforms’ privacy policies. Some digital platforms share de-identified information gathered from their users with third parties, including data brokers¹⁵²⁵ or advertisers, often for purposes

1520 Google, [Privacy Policy](#), accessed 20 May 2019.

1521 Facebook [Data Policy](#), accessed 20 May 2019.

1522 Apple, [Privacy Policy](#), accessed 20 May 2019.

1523 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, pp. 19-20.

1524 Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4. While the Full Federal Court did not expressly state that metadata could never be personal information, it did not overturn the decision of the Administrative Appeal Tribunal which had found that network metadata was not sufficiently connected to an individual because the allocation of an IP address to a device is normally only temporary and can change frequently.

1525 For a discussion on how data brokers interact with range of businesses to share and provide data, including digital platforms, see FTC, [Data Brokers: A Call for Transparency and Accountability: A Report of the Federal Trade Commission](#), May 2014. See also Quantum, [Media Release: Quantum announces data partnership with Facebook](#), 23 July 2015, accessed via wayback machine (26 March 2016 snapshot).

related to their supply of advertising services.¹⁵²⁶ The following statements from digital platforms' privacy policies further illustrate their stated discretions in relation to non-personal information:

- **Google's privacy policy** states that: 'We may share non-personally identifiable information publicly and with our partners – like publishers, advertisers or connected sites.'¹⁵²⁷
- **Apple's privacy policy** states that: 'We may collect, use, transfer, and disclose non-personal information for any purpose.'¹⁵²⁸
- **Twitter's privacy policy** states that: 'We share or disclose non-personal data...'¹⁵²⁹

(d) De-identification of 'personal information'

De-identification can transform 'personal information', which is protected under privacy regulations and privacy policies, into information that is no longer 'personal information'. Definitions of de-identification can vary. The OAIC considers it refers to a process whereby personal identifiers are removed or altered and, in addition, where techniques or controls are applied to 'remove, obscure, aggregate, alter and/or protect' data so that it is no longer 'reasonably identifiable' to an individual. The OAIC has published guidance in relation to de-identification, though specific procedures are not currently prescribed under the Privacy Act.¹⁵³⁰

Two common techniques for de-identification (or 'pseudonymisation') of personal information include:

- **Hashing:** This generally refers to a process in which a unique identifier using a hashing encryption process is allocated to an individual instead of using their personal information.¹⁵³¹ This enables entities to use and share information about the same individual, without knowing that individual's identity. If the hashed identifiers 'match', the entities know that they are exchanging information regarding the same hashed individual and can, for example, target that individual with a relevant advertisement.¹⁵³² This process allows advertising associated with a particular hash or device ID to follow a particular user across different devices or browsing sessions.
- **Unique identifiers:** Digital platforms may assign a 'unique identifier' to a user, such as to the browser, mobile device or IP address of a user when the user is using their service. Advertisers seeking to market through a platform generally need to use the unique identifier to match their data with those of a digital platform to market through a platform. Some digital platforms indicate that such a system ensures that marketers don't need to send personal information they hold about a user to a digital platform.¹⁵³³

Though these techniques ostensibly remove personal identifiers from user data, de-identification does not remove all risk of re-identification¹⁵³⁴ – see box 7.15 on '*Risks associated with de-identified data*'.

1526 J Tyson, Facebook, [Relevant Ads that Protect Your Privacy](#), 30 September 2012, accessed 30 October 2018. The ACCC notes that Facebook indicated in 2018 that it intends to roll back its 'partner' categories program.

1527 Google, [Privacy Policy](#), accessed 20 May 2019. Google's policy defines non-personal identifiable information as '... information that is recorded about users so that it no longer reflects or references an individually-identifiable user'.

1528 Apple, [Privacy Policy](#), accessed 20 May 2019.

1529 Twitter, [Privacy Policy](#), accessed 20 May 2019.

1530 OAIC, [De-identification and the Privacy Act](#), March 2018; OAIC and Data61, [The De-Identification Decision-Making Framework](#), 18 September 2017.

1531 For an explanation of the hashing encryption process, see The Economist, [Pseudonymisation is helping firms comply with a new EU privacy law](#), 5 April 2018, accessed 30 October 2018.

1532 J Tyson, [Facebook Relevant Ads that Protect Your Privacy](#), Facebook, 30 September 2012, accessed 20 May 2019.

1533 J Tyson, [Facebook Relevant Ads that Protect Your Privacy](#), Facebook, 30 September 2012, accessed 20 May 2019.

1534 OAIC and Data61, [The De-Identification Decision-Making Framework](#), 18 September 2017, p. 10.

Box 7.15: Risks associated with de-identified data

The Productivity Commission has noted that the ‘[r]isks of re-identification change as more datasets become available and analytical techniques advance’.¹⁵³⁵ The UN Special Rapporteur on Privacy noted that de-identified information can be re-identified through identifying a person’s “digital fingerprint”, which is a set of features that uniquely identifies a person. This may create risks in the ‘linking of a person’s data across .. two different datasets – if the additional dataset has names then the “de-identified” dataset can be re-identified.’¹⁵³⁶ Research has also demonstrated that data can be re-identified through analysing particular data sets (such as telephone metadata, social network connections and credit card transactions).¹⁵³⁷

In 2016, the Australian Government’s Department of Health released a de-identified dataset that was later found to be re-identifiable by a University of Melbourne research team.¹⁵³⁸ The OAIC investigated this incident to determine whether there had been a breach of the Privacy Act. It ultimately found that the de-identified data, despite being re-identifiable, did not constitute ‘personal information’ of patients and so was not protected under the Privacy Act.¹⁵³⁹

7.6.1 Disclosures regarding location tracking

Despite the prevalence of consumer concerns regarding location tracking discussed at section 7.1, the ACCC’s review of terms and policies found that each digital platform collected detailed location information on its users. For instance:

- **Google’s privacy policy** discloses the collection of user location data via GPS, IP addresses, sensor data from the user’s mobile device, and information from Wi-Fi access points, cell towers, and Bluetooth-enabled devices.¹⁵⁴⁰ More information is available by clicking on the link in ‘sensor data’, which discloses that sensor data from a mobile device can provide granular data on the user’s movement: ‘an accelerometer can be used to determine your speed and a gyroscope to figure out your direction of travel’.¹⁵⁴¹
- **Facebook’s data policy** (covering Facebook, Instagram and Messenger) discloses that the information it obtains from users’ devices includes ‘Bluetooth signals, information about nearby Wi-Fi access points, beacons and mobile phone masts’, ‘the name of your mobile operator or ISP, language, time zone, mobile phone number, IP address, connection speed’. In some cases, it also includes ‘information about other devices that are nearby or on your network’¹⁵⁴², and GPS location information.
- **Twitter’s privacy policy** discloses that ‘Subject to your settings, we may collect, use, and store additional information about your location - such as your current precise position or places where you’ve previously used Twitter - to operate or personalize our services including with more relevant content like local trends, stories, ads, and suggestions for people to follow’.¹⁵⁴³

1535 Productivity Commission, [Data Availability and Use](#), March 2017, p. 156.

1536 Supporting document to UN Special Rapporteur on Privacy, [Report of the Special Rapporteur on the right to privacy \(advanced unedited version\)](#), 19 October 2017, p. 5, .

1537 See: Y A De Montjoye, C Hidalgo, M Verleysen, and V Blondel, [Unique in the crowd: The privacy bounds of human mobility](#), Nature Scientific Reports, 3 (2013); M Srivatsa & M Hicks, Deanonymizing mobility traces: Using social network as a side-channel, Proceedings of the 2012 ACM Conference on Computer and Communications Security, ACM (2012); Y A De Montjoye, L Radaelli, V K Singh & A Pentland, Unique in the shopping mall: On the reidentifiability of credit card metadata. Science347 (2015).

1538 OAIC, [Annual Report 2017- 2018](#), p. 63.

1539 OAIC, [Annual Report 2017- 2018](#), p. 63. The OAIC investigation also found that though personal information was not disclosed the Department had ‘improperly disclosed the information of service providers’ and that the Department of Health’s processes to remove personal information were inadequate. The OAIC accepted an offered undertaking from the Department to oversee its data governance arrangements.

1540 Google, [Privacy Policy](#), accessed 20 May 2019.

1541 Google, [Privacy Policy](#), accessed 20 May 2019.

1542 Facebook, [Data Policy](#), accessed 20 May 2019.

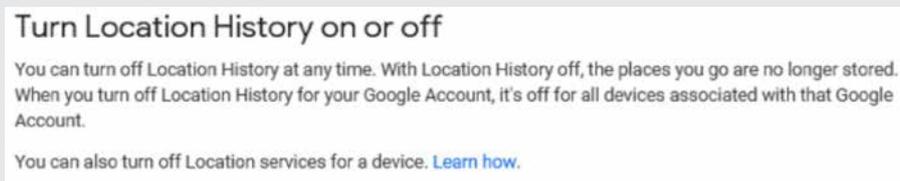
1543 Twitter, [Privacy Policy](#), accessed 20 May 2019.

There may be several explanations for the extent of location data collection among digital platforms and consumer concerns. One is that consumers may not be aware or fully understand all of the different technologies that can be used to track a user's location, such as geo-location tracking via satellites (GPS), Wi-Fi network sensors, radio signals to mobile antennas, or the IP addresses collected when individuals use online services. Another possible explanation is that consumers have insufficient bargaining power to negotiate with digital platforms to stop tracking their location. A contributing factor is that the opt-out controls for location tracking that digital platforms provide may also be confusing to consumers – see box 7.16 on 'Google's location tracking'.

Box 7.16: Google's location tracking

According to an Associated Press report from August 2018, Google made potentially misleading statements to its users regarding its collection of location information by stating on a support page for 'Location History' that: 'You can turn off Location History at any time. With Location History off, the places you go are no longer stored' (see figure 7.12 screenshot).¹⁵⁴⁴

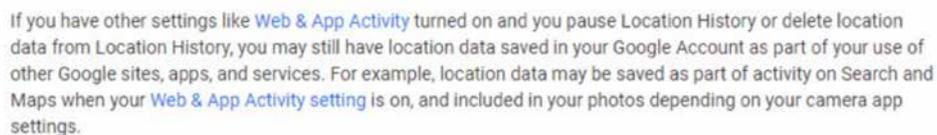
Figure 7.12: Screenshot of Google 'Location History' page before August 2018¹⁵⁴⁵



However, the investigation by Associated Press (confirmed by Princeton University researchers) indicated that, despite this statement, location data could still be collected even when Location History was paused.¹⁵⁴⁶ Associated Press reported that, even when Location History was paused, some Google apps (like Google Maps) automatically store time-stamped location data without asking, and that this occurred for consumers on a phone running the Android operating system or consumers on an iPhone using Google Maps or Google Search.¹⁵⁴⁷

These data collection practices were controlled via a separate setting titled 'Web & App activity', which is set to 'save Web & App activity' by default for Google user accounts.¹⁵⁴⁸ Since then, Google has revised its explanation of 'Location History' to provide more details on the location data it may collect (see figure 7.13 screenshot):

Figure 7.13: Screenshot of Google 'Location History' page after August 2018¹⁵⁴⁹



1544 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 20 May 2019.

1545 Google Support Page, [Location History](#), accessed via wayback machine (29 July 2018 snapshot).

1546 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 20 May 2019.

1547 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 20 May 2019.

1548 ACCC analysis of sign-up processes, see further appendix H section 1. This was also the analysis of the Norwegian Consumer Council in [Deceived by Design](#), June 2018, p. 14.

1549 Google Support Page, [Location History](#), accessed 25 October 2018.

Google's location tracking practices and representations are currently facing class-action lawsuits for potential violation of the US State of California's privacy laws.¹⁵⁵⁰ They are reportedly under investigation by the US State of Arizona Attorney-General¹⁵⁵¹ and are subject to complaints by the Norwegian Consumer Council and six other European consumer agencies relating to their compliance with the GDPR.¹⁵⁵² The latter follows the release of the Norwegian Consumer Council's report 'Every step you take' in November 2018 relating to Google's tracking practices.¹⁵⁵³

Further information regarding the ability to opt out of location tracking is at box 7.25.

7.6.2 Disclosures regarding online tracking for targeted advertising purposes

(a) Disclosures regarding online tracking

As with location tracking, online tracking of users for targeted advertising purposes is a common practice despite widespread consumer discomfort. The ACCC's review of terms and policies found that each of the digital platforms' privacy policies reviewed alluded to the practice of online tracking of users, though the language in the privacy policies reviewed tended to understate the extent to which users and non-users can be tracked online for targeted advertising purposes.

Extent of online tracking

In general, the privacy policies reviewed tend not to clearly outline the extent to which users are tracked online for advertising purposes. Instead, they tend to describe online tracking technologies as being used for product improvement or user convenience purposes. The privacy policies emphasise the value of online tracking to customers rather than the value of user data for the digital platforms. For example:

- A '**How Google uses cookies**' web page states that: 'We use cookies for many purposes. We use them, for example, to remember your safe search preferences, to make the ads you see more relevant to you, to count how many visitors we receive to a page, to help you sign up for our services, to protect your data, or to remember your ad settings'.¹⁵⁵⁴
- **Facebook's cookies policy** states that: 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in.'¹⁵⁵⁵
- **Twitter's privacy policy** states that: 'When your browser or device allows it, we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences.'

Digital platforms also frame online tracking as standard practice. For example:

- **Google's privacy policy** links to a 'Key Terms' page that states: 'Like most websites, our servers automatically record the page requests made when you visit our sites. These "server logs" typically include your web request, Internet Protocol address, browser type, browser language, the date and time of your request, and one or more cookies that may uniquely identify your browser.'¹⁵⁵⁶

1550 See, for example: [Patacsil v Google](#) (ND Cal) Case No. 18-5062, filed 17 August 2018.

1551 See T Romm, '[Google's location privacy practices are under investigation in Arizona](#)', *The Washington Post*, 11 September 2018, accessed 30 October 2018.

1552 F Yun Chee, [European consumer groups want regulators to act against Google tracking](#), *Reuters*, accessed 20 May 2019.

1553 Norwegian Consumer Council, [Every Step you take: How deceptive design lets Google track users 24/7](#), 27 November 2018.

1554 Google, [How Google uses cookies](#), accessed 20 May 2019.

1555 Facebook, [Cookies Policy](#), accessed 20 May 2019.

1556 Google, Privacy and Terms, [Key Terms](#), accessed 20 May 2019.

- **Twitter’s privacy policy** also states that ‘Like many websites, we use cookies and similar technologies to collect additional website usage data and to operate our services’.¹⁵⁵⁷

Digital platforms’ privacy policies can often also warn users not to delete or disable cookies. For example:

- **Facebook’s cookies policy** states that ‘certain parts of the Facebook Products may not work properly if you have disabled browser cookie use’. But it fails to specify whether it is the consumer-facing or advertiser-facing Facebook Products that may not work properly.¹⁵⁵⁸
- **Twitter’s privacy policy** similarly warns readers that ‘some of our services may not function properly if you disable cookies’.¹⁵⁵⁹

Facebook was previously able to collect detailed user data from users who downloaded the Onavo Protect VPN – see box 7.17 on ‘Facebook tracking users via the Onavo Protect VPN’.

Box 7.17: Facebook tracking users via the Onavo Protect VPN

As discussed in chapter 2,¹⁵⁶⁰ in 2013 Facebook Inc. acquired Onavo which, among other things, provided users with VPN services.

A common reason for individuals and businesses to use a VPN is to mask their identity and their online activities. Privacy policies of leading VPN providers, such as Private Internet Access, NordVPN and TorGuard, are consistent with this objective and explicitly state that they do not log online traffic when consumers use their VPN services.¹⁵⁶¹

Facebook provided Onavo Protect as a typical VPN to consumers stating that ‘Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information’.¹⁵⁶² By February 2018, Onavo had been installed more than 33 million times across the Apple App Store and the Google Play App Store.¹⁵⁶³

As noted in chapter 2,¹⁵⁶⁴ Onavo’s privacy policy enabled Facebook to receive personally identifying information of a user as well as a user’s mobile data traffic, including location data.

Onavo was removed from the Apple App Store in August 2018. Apple reportedly stated that it considered the app to be in violation of its app store policies and ‘that apps should not collect information about which other apps are installed on a user’s device for the purposes of analytics or advertising/marketing and must make it clear what user data will be collected and how it will be used’.¹⁵⁶⁵ In its submission to the Preliminary Report, Facebook stated that it would ‘end the Onavo program and have already stopped collecting data for market research purposes on Onavo’.¹⁵⁶⁶ In late March 2019, the Onavo website was updated to announce that Facebook would stop supporting the app for both iOS and Android on 6 May 2019.¹⁵⁶⁷

1557 Twitter, [Privacy Policy](#), accessed 20 May 2019.

1558 Facebook, [Cookies Policy](#), accessed 20 May 2019.

1559 Twitter, [Privacy Policy](#), accessed 20 May 2019.

1560 See chapter 2, Box 2.4.

1561 See, for example, Private Internet Access, [Privacy Policy](#), accessed 30 October 2018 and Nord VPN, [Privacy Policy](#), accessed 30 October 2018.

1562 Onavo from Facebook, [Onavo Protect for Android](#), accessed via wayback machine (27 May 2019 snapshot).

1563 S Perez, [Facebook is pushing its data-tracking Onavo VPN within its main mobile app](#), *TechCrunch*, February 2018, accessed 31 October 2018.

1564 See chapter 2, Box 2.4.

1565 T Hatmaker, [Apple removed Facebook’s Onavo from the App Store for gathering app data](#), *TechCrunch*, August 2018, accessed 31 October 2018.

1566 Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 65.

1567 Onavo from Facebook, [Onavo Protect for Android](#), accessed 20 May 2019.

Onavo's privacy policy (still available online) does not make it immediately clear that the Onavo App shared detailed user traffic data and personally identifying information with Facebook:

- Onavo's privacy policy stated that it does not share personal information except in limited circumstances, which include sharing 'personally identifying information with third parties and "Affiliates" (businesses that are or become legally part of the same group of companies that Onavo is part of, including but not limited to Facebook, Inc.) to operate, maintain and enhance the Services, or for other purposes as described below'.
- In the section on 'Sharing Personally Identifying Information', the first sentence is 'We do not share or sell your personally identifying information to third parties except if we have received your consent or given you notice, or in limited circumstances described in this Policy'.
- Later in the privacy policy, Onavo states 'We do not share or sell users' personally identifying information to third parties unless you give us permission to do so (including by your use of the services as described by this Privacy Policy)'.¹⁵⁶⁸

In its submission on the Preliminary Report, Facebook stated that it had 'always been clear when people download Onavo about the information that is collected and how it is used'.¹⁵⁶⁹

Minimal references to targeted advertising

Digital platforms' privacy policies often include broad discretions to collect, use, and disclose user data for targeted advertising purposes but also tend to minimise references to targeted advertising. Privacy policies may camouflage the targeted advertising purpose within a long list of other purposes beneficial to users. For example:

- **Google's privacy policy** states that it collects data from its users to: provide its services; maintain and improve its services; develop new services; provide personalised services, including content and ads; measure performance; communicate with users; and protect Google, its users, and the public (emphasis added).¹⁵⁷⁰
- **Facebook's data policy** states that it collects user data to: provide, personalise and improve its products (including to select and personalise ads, offers and other sponsored content); provide measurement, analytics and other business services, promote safety; integrity and security; communicate with its users; and research and innovate for social good (emphasis added).¹⁵⁷¹
- **Twitter's privacy policy** states that 'we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences' (emphasis added).¹⁵⁷²

A lack of clarity in information provided to consumers regarding how their personal information is used (and whether it is used for targeted advertising purposes) is particularly problematic when information ostensibly collected for a consumer-facing service or feature is also used for purposes beyond a consumer's reasonable expectations. See box 7.18 '*Facebook two-factor authentication*'.

1568 Onavo, [Privacy Policy - Sharing Personally Identifying Information](#), accessed via wayback machine (25 November 2018 snapshot).

1569 Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 65.

1570 Google, [Privacy Policy](#), accessed 20 May 2019.

1571 Facebook, [Data Policy](#), accessed 20 May 2019.

1572 Twitter, [Privacy Policy](#), accessed 20 May 2019.

Box 7.18: Facebook two-factor authentication

In an April 2018 blog post, Facebook announced it was disabling the feature allowing people to search for Facebook users using a phone number or email address, citing misuse of the feature by malicious actors.¹⁵⁷³

In 2019, media reports stated that a phone number provided for the purposes of two-factor authentication could be used to find the user on Facebook.¹⁵⁷⁴ Once a user had provided a phone number for two-factor authentication, they could be searched based on that number, and were not able to prevent that number being searchable. The most restrictive option for users was limiting the permission to Facebook 'friends'. In one report, a Facebook spokesperson stated this feature was 'not new' and 'applies to any phone numbers [a user] added to [their] profile'.¹⁵⁷⁵

Other 2018 media reports reported that numbers provided for two-factor authentication could also be used by advertisers to target ads to a consumer.¹⁵⁷⁶ These reports followed research undertaken into which sources of personal information were used by Facebook to target advertising.¹⁵⁷⁷

(b) Disclosures regarding data-combining practices

An important aspect of online tracking is the potential for consumers' user data to be combined with multiple different sources, as the value and sensitivity of user data will change depending on the other pieces of data that it is combined with.¹⁵⁷⁸ The combining of data from multiple sources can also change non-personal information into personal information, if de-identified or pseudonymised data becomes associated with personally identifying information.¹⁵⁷⁹ Further discussion about the combining of de-identified data with identifiable personal information is found at appendix I.

1573 Facebook, [An Update on Our Plans to Restrict Data Access on Facebook](#), 4 April 2018, accessed 11 April 2019.

1574 L Mathews, [Facebook lets people find you by your two-factor phone number and you can't stop it](#), *Forbes*, 4 March 2019, accessed 20 May 2019.

1575 Z Whittaker, [Facebook won't let you opt out of its phone number 'lookup' setting](#), *TechCrunch*, 3 March 2019, accessed 11 April 2019.

1576 K Hill, [Facebook is giving advertiser access to your shadow contact information](#), *Gizmodo*, 27 September 2018, accessed 11 April 2019.

1577 G Venkatadari, E Lucherini, P Sapiezynski, A Mislove, [Investigating sources of PII used in Facebook's targeted advertising](#), 19 April 2018, accessed 10 May 2019.

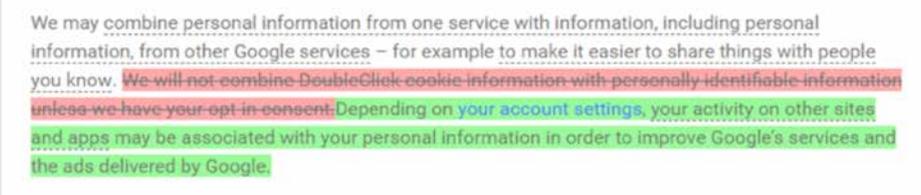
1578 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), p. 447.

1579 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), p. 447, citing A Acquisti and R Gross, Predicting social security numbers from public data, *proceedings of the National Academy of Sciences* 106 (27) (2009), pp. 10975-80.

Box 7.19: Google disclosures regarding combining of data sets

In 2012, Google consolidated the privacy policies for over 60 of its products and services into a single policy, and explicitly noted that, under the policy, Google may combine user data provided from one service with information from other services.¹⁵⁸⁰

Separate to this, in July 2016, Google updated its privacy policy to remove a term that outlined how Google would treat data from its subsidiary DoubleClick. DoubleClick is an ad-serving technology company that was acquired by Google in 2007; Google's privacy policy previously explicitly stated that Google would not combine DoubleClick cookie information with personally identifiable information without the user's opt-in consent.¹⁵⁸¹



We may combine personal information from one service with information, including personal information, from other Google services – for example to make it easier to share things with people you know. We will not combine DoubleClick cookie information with personally identifiable information unless we have your opt-in consent. Depending on your account settings, your activity on other sites and apps may be associated with your personal information in order to improve Google's services and the ads delivered by Google.

The ACCC's review of terms and policies found that the privacy policies of digital platforms often provide broad discretions for digital platform to combine user data collected from a broad range of sources with a user's information. For example:

- **Google's privacy policy** states that: 'We may combine the information we collect among our services and across your devices for the purposes described above'.¹⁵⁸² A different web page to its privacy policy provides additional information: 'Many websites and apps use Google services to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google'.¹⁵⁸³
- **Twitter's privacy policy** states: 'We may also associate your account with browsers or devices other than those you use to log into Twitter (or associate your logged-out device or browser with other browsers or devices)'.¹⁵⁸⁴
- **Facebook's data policy** states: 'We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their Terms and Policies'.¹⁵⁸⁵ Facebook Companies is defined to include WhatsApp, Oculus, Masquerade, and CrowdTangle websites.¹⁵⁸⁶ See further box 7.24 on 'WhatsApp data-sharing'.

Digital platforms may also encourage users to sign-in to their services as much as possible to facilitate the combination of user data across devices (see section 7.3.2 on 'cross-device tracking').¹⁵⁸⁷ In September 2018, Google released a new version of Chrome that signed users into Chrome automatically whenever a user signs into any other Google service such as Gmail.¹⁵⁸⁸ Google has explained via its blog that 'this change to sign-in does not mean Chrome sync gets turned on. Users who want data like their browsing history, passwords, and bookmarks available on other devices must take additional action, such as turning on sync'.¹⁵⁸⁹ However, Google's privacy policy does not mention that changes to Chrome sync settings

1580 Google, [Updating our privacy policy and terms](#), 24 January 2012, accessed 20 May 2019.

1581 Google, [Privacy policy](#) – 28 June 2016, accessed 24 November 2018. Google provides archived versions of its privacy policy, tracking the changes made in each version.

1582 Google, [Privacy Policy](#), accessed 20 May 2019.

1583 Google, Privacy and Terms, [How Google uses information from sites or apps that use our services](#), accessed 20 May 2019.

1584 Twitter, [Privacy Policy](#), accessed 20 May 2019.

1585 Facebook, [Data Policy](#), accessed 20 May 2019.

1586 Facebook, Help Centre, [The Facebook Companies](#), accessed 20 May 2019. Previously this list also included Onavo (see box 7.17 on 'Facebook tracking users on the Onavo Protect VPN').

1587 Although, as discussed in section 3.2, digital platforms may still collect user data from some users even when they are not signed in.

1588 Google, [Chrome, Product updates based on your feedback](#), 26 September 2018, accessed 20 May 2019.

1589 Google, [Chrome, Product updates based on your feedback](#), 26 September 2018, accessed 20 May 2019.

affect its ability to 'combine the information we collect among our services and across your devices'. Google has provided the following information regarding a growth in the number of signed-in users on Google Search, Chrome and YouTube:

*In recent years, for those Google's Search, Chrome and YouTube products which experienced growth in user numbers on desktop, mobile and tablet devices, there has been higher growth in the number of signed-in users compared with the number of users overall. The percentage of Google search queries made by signed-in Australian users in 2018 is higher than the percentage of Google search queries made by signed-in Australian users in 2014.*¹⁵⁹⁰

(c) Disclosures regarding online tracking of non-users

Despite consumer concerns, some digital platforms' privacy policies also note the collection of information on users who are not signed-in to that digital platform. For example, Facebook tracks the web browsing activity of logged-out users and non-users as well as logged-in users (as discussed in box 7.4 on 'Facebook's Web Tracking').

Facebook has explained that 'when a website uses one of our services, our users' browsers send the same kinds of information to Facebook as the website receives'.¹⁵⁹¹ 'One of our services' refers to any of the Facebook services such as Facebook's 'Like' and 'Share' buttons, the Facebook Login, Facebook Analytics, and Facebook ads and measurement tools.¹⁵⁹² Facebook has stated that it is the responsibility of the third party site or app to tell users that data is being shared with Facebook via the Facebook business tools.¹⁵⁹³ It has also stated that 'We do not use web browsing data to show ads to non-users or otherwise store profiles about non-users'.¹⁵⁹⁴

Consumers who are not registered as users of a particular digital platform may not be aware that their online activity is being tracked by that digital platform, as they are unlikely to read that digital platform's privacy policy. They are also less likely to receive prompts from the digital platform regarding changes to its privacy policy. These consumers are therefore likely to experience greater information asymmetry in relation to that digital platform's data practices than its registered users.

7.6.3 Disclosures regarding third-party data-sharing

(a) Third-party data-sharing disclosures

The ACCC found that there is a lack of clarity in digital platforms' terms of use and privacy policies regarding the sharing of data with third parties, such as advertisers and app developers (see discussion in box 7.20 on 'Data-sharing with third-party app developers'). Digital platforms' privacy policies and terms of use often refer to app developers as 'affiliates' or 'trusted partners' without providing more information on their identity. Table 7.5 provides a sample of the terms used by digital platforms in online statements referring to the third parties that may exchange user data with digital platforms.

For instance, when agreeing to Twitter's User Agreement (which incorporates its Privacy Policy), a user accepts that 'We may also disclose personal data about you to our **corporate affiliates** in order to help operate our services and our affiliate's services, including the delivery of ads'¹⁵⁹⁵

1590 Information provided to the ACCC.

1591 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 74.

1592 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 74.

1593 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 148.

1594 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 75.

1595 Twitter, [Privacy Policy](#), accessed 20 May 2019.

Similarly, Snapchat’s terms of use requires a user to ‘agree that we, Snap Inc., **our affiliates, and our third-party partners** may place advertising on the Services, including personalised advertising based upon the information you provide us or we collect or obtain about you’.¹⁵⁹⁶

Table 7.5: Sample of terms used to describe third parties providing or receiving user data

Company	Third parties who may receive user data	Third parties who may provide user data
Google	‘our advertising partners’ ‘trusted businesses or persons’	‘our advertising partners’ ‘trusted partners, including marketing partners .. and security partners’ ‘our partners’
Facebook	‘partners’ ‘measurement partners’ ‘partners who use our analytics services’ ‘advertisers’ ‘partners offering goods and services in our Products’ ‘vendors and service providers’ ‘research partners and academics’	‘partners’ ‘select group of third-party data providers’ ‘third-party partners’ ‘website owners and publishers, app developers, business partners (including advertisers)’
Twitter	‘advertisers’ ‘partners’	‘ad partners and affiliates’ ‘partners (including ad partners), or our corporate affiliates’ third parties who are not our ad partners’, ‘partners who help us evaluate the safety and quality of content on our platform’
Apple	‘strategic partners that work with Apple to provide products and services, or that help Apple market to customers’ ‘our partners’	‘other persons’ ‘datasets such as those that contain images, voices or other data that could be associated with an identifiable person’
Snapchat	‘Snapchatters’ ‘third parties’ ‘business partners’ ‘the general public’	‘third-party services’
WhatsApp	‘third-party providers’ ‘Facebook family of companies’	‘third-party providers’ ‘Facebook family of companies’

None of the terms of use or privacy policies reviewed by the ACCC provided a definitive list of third parties that may receive or provide user data to the digital platform. This means that there is no way for a consumer reading a digital platform’s terms of use or privacy policy to know what types of entities, on what terms and for what purposes, may access their user data if they use a digital platform’s services. In addition, these terms may understate to readers the number of entities to whom their user data may be disclosed. For instance, Facebook estimated that 1.5 million app developers were active on Facebook between February and April 2018 and that it has over five million advertisers.¹⁵⁹⁷

Where terms and conditions, data or privacy policies do not clearly outline important information that consumers are concerned about, such as the sharing of information with third parties, consumers are placed at a significant disadvantage and denied the ability to make an informed decision about the collection and use of their data.

¹⁵⁹⁶ Snap, [Terms of Service](#) (outside the United States), accessed 20 May 2019.

¹⁵⁹⁷ Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, pp. 645 and 687.

However, the ACCC notes that this opacity is not confined to the terms and conditions for using digital platforms. For example, the privacy policy for News Corp's online site states that 'We may also share information we hold about you with those trusted businesses' but does not specify who the trusted businesses are;¹⁵⁹⁸ Nine's privacy policy states that a user agrees that 'information including your personal information may be shared within the Nine Entertainment Co. group of companies and provided to third parties, and used by those organisations for any of the purposes disclosed in this Privacy Policy'.¹⁵⁹⁹

Box 7.20: Data-sharing with third-party app developers *Facebook*

The Cambridge Analytica data breach involved the misuse of Facebook user data which had initially been accessed through an API.¹⁶⁰⁰ An academic researcher and app developer built a 'this is your digital life' app (TYDL), which requested Facebook users' permission to collect Facebook profile information on users and on users' friends.¹⁶⁰¹ Once the user granted permission, the app collected that user's personal information such as name, gender, birthdate, location, photos and Page likes, and similar information from that user's friends (depending on each friend's own privacy settings).¹⁶⁰² All this user data was then improperly shared by the researcher and app developer with Cambridge Analytica, which used some of it to build models that could profile users' political views and target them with political ads.¹⁶⁰³

In October 2018, the UK Information Commissioner's Office (ICO) fined Facebook GB£500 000 for serious breaches of data protection law. It found that Facebook processed the personal information of users unfairly by allowing application developers access to their information without sufficiently clear and informed consent.¹⁶⁰⁴ In November 2018, it was reported that Facebook had issued a statement that it was appealing the fine and the ICO's findings.¹⁶⁰⁵ In April 2019, a report of a joint investigation by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia noted that it had found that Facebook's actions were not compliant with some clauses in their privacy regulations, including that Facebook failed to obtain meaningful consent of users installing the TYDL app or of the friends of those users.¹⁶⁰⁶ Facebook reportedly disputed these findings.¹⁶⁰⁷

1598 News Corp Australia, [Privacy Policy](#), accessed 20 May 2019.

1599 Nine, [How will we use or disclose your information?](#), accessed 20 May 2019.

1600 J. Albright, [The Graph API: Key Points in the Facebook and Cambridge Analytica Debacle](#), *Medium*, 21 March 2018, accessed 30 October 2018.

1601 M. Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 20 May 2019.

1602 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 3.

1603 M. Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 20 May 2019. See also C. Cadwalladr and E. Graham-Harrison '[Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach](#)', *The Guardian* (Australia Edition), 18 March 2018, accessed 20 May 2019.

1604 UK Information Commissioner's Office, [ICO issues maximum £500,000 fine to Facebook for failing to protect users' personal information](#), 25 October 2018, accessed 1 November 2018.

1605 See, for example, A. Hearn, [Facebook to lodge appeal against ICO's £500,000 fine](#), *The Guardian*, 22 November 2018, accessed 22 November 2018.

1606 Office of Privacy Commissioner of Canada, PIPEDA Report of Findings #2019-002, [Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia](#), 25 April 2019.

1607 Office of Privacy Commissioner of Canada, News Release, [Facebook refuses to address serious privacy deficiencies despite public apologies for "breach of trust"](#), 25 April 2019.

In 2014, Facebook announced that it would more tightly restrict its platform APIs to prevent abuse.¹⁶⁰⁸ Facebook has also stated that the majority of app developers were required to transition to more limited data access in the next 12 months, though 61 companies were provided a six month extension to this 12 month period.¹⁶⁰⁹ After the Cambridge Analytica data breach was reported in March 2018, Facebook further restricted app developers' data access to this kind of information.¹⁶¹⁰

Facebook estimated that, between October and December 2015, approximately two million apps were active on Facebook.¹⁶¹¹ These apps potentially had access to user data under Facebook's earlier, less restrictive policies. Between February and April 2018, Facebook estimates that approximately 1.8 million apps and 1.5 million app developers were active on Facebook.¹⁶¹²

Google

In July 2018, following media reports, Google confirmed that its Gmail APIs allowed for third party developers to gain access to Gmail users' messages if they had sought and been granted permission.¹⁶¹³ One of the permissions that app developers are allowed to seek via Gmail APIs is to 'read, create, or modify message bodies (including attachments), metadata, or headers'.¹⁶¹⁴

In October 2018, Google announced it will amend policies relating to Gmail APIs from January 2019 to direct that developers can no longer '...transfer or sell the data for other purposes such as targeting ads, market research, email campaign tracking, and other unrelated purposes'.¹⁶¹⁵

Though apps will still be able to seek permission to access/read user's email under the new policy,¹⁶¹⁶ the policy restricts use of such data to 'providing or improving user-facing features that are prominent in the requesting application's user interface'.¹⁶¹⁷ The types of apps that can seek permissions relating to reading of emails have also been restricted. The new policy also contains restrictions on when a human is permitted to read emails (rather than emails being scanned by an automated system).¹⁶¹⁸

7.6.4 ACCC assessment of digital platforms' disclosure practices

As stated earlier, the ACCC's review of terms and policies found online agreements that are long, complex, vague, and difficult to navigate. While it is inherently difficult to measure concepts such as 'consumer awareness', the accessibility, clarity and accuracy of digital platforms' privacy policies are important factors in determining whether consumers can accurately assess the data practices of digital platforms and decide whether these data practices meet their own privacy preferences.

While the ACCC's review has focused on terms and policies of digital platforms, there is some evidence to suggest that disclosure practices of concern extend beyond digital platforms to other sectors across the economy (see section 7.9.2 '*Data practices and consumer harms extend beyond digital platforms*').

Lack of easily accessible, clear and accurate disclosures create acute information asymmetries that impair consumers' ability to make informed decisions. The ACCC considers that these information asymmetries may be addressed by stronger economy-wide disclosure requirements regarding the

1608 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 4.

1609 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 95-96.

1610 M. Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 30 October 2018.

1611 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 644.

1612 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 645.

1613 Google, [Ensuring your security and privacy within Gmail](#), accessed 20 May 2019.

1614 Google, [Google API Services: User Data Policy](#), accessed 20 May 2019.

1615 A Wen, Google, [Elevating user trust in our API ecosystem](#), 8 October 2018, accessed 20 May 2019.

1616 The ACCC notes that Google considers there to be a clear distinction between an automated system scanning messages and a human reading them: see Google, [Ensuring your security and privacy within Gmail](#), accessed 20 May 2019.

1617 Google, [Google API Services: User Data Policy](#), accessed 20 May 2019.

1618 Google, [Ensuring your security and privacy within Gmail](#), accessed 20 May 2019.

collection, use and disclosure of personal information in Australia to better inform consumers of how their personal information is used across different sectors (see recommendation 16(b)).

The ACCC has found that data practices of particular concern to consumers, such as location tracking, online tracking for targeted advertising purposes, and third-party data-sharing are all permitted under digital platforms' privacy policies, though often in understated or ambiguous language. Such opaque disclosures are likely to exacerbate rather than mitigate the information asymmetries between digital platforms and consumers by providing consumers with general reassurances of privacy while simultaneously outlining broad discretions for digital platforms to engage in data practices of concern.

Accordingly, the ACCC considers that the disclosures of digital platforms should be subject to additional, specific regulations that target the specific issues identified in relation to digital platforms, such as requirements to provide informative, multi-layered disclosures which includes a regularly updated online notice regarding key areas of concern and interest for consumers (see recommendation 18(1)).

The ACCC also considers that in order to address the bargaining power imbalance between consumers and businesses, the Australian Consumer Law should be amended to ensure civil pecuniary penalties are applied to the use of any unfair contract terms such as may exist in terms of use and privacy policies (see recommendation 20). In addition, the introduction of a prohibition on certain unfair trading practices would assist in addressing particular data practices that may have a particularly detrimental impact on Australian consumers (see recommendation 21).

7.7 The extent of consumer control

Key findings

- Many consumers would like to be able to opt-out of certain types of data practices and some digital platforms give consumers the impression that they provide extensive privacy controls. However, it is not in the interests of most digital platforms to allow consumers to opt-out of data processing and in some cases digital platforms do not provide consumers with meaningful control over the collection, use and disclosure of user data.
- Some digital platforms design user interfaces that lead users to make privacy-intrusive selections by appealing to certain psychological or behavioural biases using design features such as privacy-intrusive defaults or pre-selections.

This section examines the extent to which consumers have meaningful control over digital platforms' collection, use and disclosure of their data. It will consider consumers' ability to effectively opt-out of certain data practices, the impact of design features including the use of defaults and pre-selection, and the availability of viable alternatives.

7.7.1 Consumer demand for meaningful controls

While a range of different consumer privacy preferences exist, consumers would benefit from being given a choice to opt-out of the types of data collection that concern them, in a way that best suits their own privacy preferences.

The ACCC consumer survey results suggest that consumer demand exists for the ability to opt-out of certain types of data practices. 90 per cent of digital platform users surveyed agree with the statement 'Digital platforms should allow me to opt out of collecting certain types of information about me, how they use it, and/or what they can share'.¹⁶¹⁹ Similarly, the CPRC survey found that 95 per cent of Australians surveyed wanted companies to provide options to opt-out of certain types of information they can collect, use or share.¹⁶²⁰

¹⁶¹⁹ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 17.

¹⁶²⁰ CPRC, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 6.

Australian digital platforms users have indicated that they will actually opt-out of sharing information when offered the opportunity. 57 per cent of digital platforms users surveyed in the ACCC consumer survey indicated that they select opt outs when they are available.¹⁶²¹ The CPRC survey also found that 89 per cent of Australians surveyed indicated that they select opt-outs when they were available.¹⁶²²

7.7.2 Representations regarding consumer control

Given the value provided by user data to the business models of digital platforms, including for product development and targeted advertising, digital platforms are not incentivised to encourage consumers to opt-out of their collection, use or disclosure of user data.¹⁶²³ However, digital platforms are incentivised to convey an impression that they offer consumers significant control over the collection, use and disclosure of their user data. Research suggests that the impression of user control increases users' propensity to take more risks when disclosing sensitive information.¹⁶²⁴

The digital platforms' privacy terms reviewed by the ACCC contain a number of reassuring representations as to consumer control:

- Google's privacy policy states: 'You can control what information we use to show you ads by visiting your ad settings' and 'across our services, you can adjust your privacy settings to control what we collect and how your information is used.'¹⁶²⁵
- Facebook's first privacy principle on its web page titled 'Facebook's Privacy Principles' states: 'We give you control of your privacy - You should be able to make the privacy choices that are right for you...'¹⁶²⁶ An April 2018 blog post stated: 'You can't opt out of ads altogether because ads are what keep Facebook free, but you do have different options to control how your data can and can't be used to show you ads'.¹⁶²⁷

In submissions to the Preliminary Report responding to the ACCC's findings regarding consumer control, Google and Facebook reiterated that they consider that they do provide consumers with the level of control represented by the public statements above. In their responses:

- Facebook said it considers 'that all information sharing that takes place on Facebook is properly informed, voluntary, and necessary'¹⁶²⁸
- Google said its users 'have many opportunities to minimise data collection, to turn off behavioural advertising, and to otherwise control their experience'¹⁶²⁹.

These assurances of control may provide comfort to consumers that data practices are in line with what they consider appropriate. The Norwegian Consumer Council's June 2018 report 'Deceived by Design' argues that, in some circumstances, give users an 'illusion' of privacy control, for example by not providing substantial choice, or by providing large amounts of granular choices which may discourage users from engaging in privacy choices.¹⁶³⁰

The ACCC notes that Facebook announced new privacy tools to provide users with greater control over data collection. However, at the time of finalising this report, they were yet to be released.

1621 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 26.

1622 CPRC, [Submission to the Issues Paper](#), 10 March 2018, p. 6.

1623 Facebook stated in July 2018 that one of the impacts of the GDPR was that some European users had not opted-in to third party data use and that, in the second quarter of 2018, the GDPR had caused a faster deceleration in ad revenue growth than in other regions: Facebook, [Second Quarter 2018 Results Conference Call](#), 25 July 2018, pp. 16-18.

1624 A Acquisti, I Adjerid and L Brandimarte, [Gone in 15 Seconds: The Limits of Privacy Transparency and Control](#), IEEE computer society, 11 (2013).

1625 Google, [Privacy Policy](#), accessed 20 May 2019.

1626 Facebook, [Facebook's Privacy Principles](#), accessed 11 April 2019.

1627 Facebook, [Hard Questions: What Information Do Facebook Advertisers Know About Me?](#), 23 April 2018, accessed 11 April 2019.

1628 Facebook, [Submission to ACCC Digital Platforms Inquiry](#), March 2019, p. 54.

1629 Google, [Submission to ACCC Digital Platforms Inquiry](#), February 2019, p. 28.

1630 Norwegian Consumer Council, [Deceived by Design](#), June 2018, pp. 34 & 39.

On 2 May 2018, Mark Zuckerberg announced that Facebook will provide a new privacy control called ‘Clear History’ that will allow its users to clear their browsing history on Facebook.¹⁶³¹ Recent media reports suggest that this tool will be introduced later in 2019.¹⁶³² Facebook’s submission to the Preliminary Report in May 2019 stated that:¹⁶³³

We’ll also soon introduce Clear History, a tool where you’ll be able to see the information we receive from the websites and services who use our business tools and disassociate it from your account.

Another privacy tool announced by Facebook called ‘anonymous login’ was also trialled but does not appear to have been released. See box 7.21 ‘Case Study – Facebook’s ‘anonymous login’ feature’.

Box 7.21: Case study – Facebook ‘anonymous login’ feature

In 2014, Facebook announced that it would introduce ‘anonymous login’, which it stated would allow users to ‘log into apps without sharing any personal information from Facebook’¹⁶³⁴. Facebook said this was in response to consumer concerns expressed ‘about sharing information with apps and want more choice and control over what personal information apps receive’.¹⁶³⁵ In 2015, Facebook reportedly was still testing the tool, with only a couple of dozen app developers accessing the tool and even fewer using it as part of their app.¹⁶³⁶ Media reports said this was due largely to disinterest from developers who lacked incentive to allow login without the accompanying access to data.¹⁶³⁷ Media reports in 2018 stated that the feature was ceased in 2015.¹⁶³⁸

As discussed earlier in this chapter, the ACCC has found significant information asymmetry between consumers and digital platforms in relation to how digital platforms collect, use and disclose user data. These information asymmetries can arise where information is either inaccessible to consumers or too costly (for example, where it is too complex for a consumer to understand). An information gap that causes consumers to misunderstand how their personal information will be collected, used or shared further limits consumers’ ability to have meaningful control over their data.

7.7.3 The role of behavioural biases

There are many behavioural “biases” that may hinder the ability of consumers to engage with and understand the terms and conditions and privacy policies of entities who collect their personal information. Examples of such biases that are likely to affect consumers when deciding whether or not to accept a digital platform’s terms of service and privacy policy include:¹⁶³⁹

- **Information overload:** When faced with complex products or bewildering amounts of information, consumers may ignore possible choices, defer their choice, or make their decision based on simple rules of thumb.
Information overload can hinder consumers’ ability to engage with privacy policies, and may result in consumers using products with intrusive data practices while being unaware that these data practices are taking place (see box 7.12 ‘Information overload’ for a more detailed discussion).
- **Default effect:** Presenting one choice as a default option can induce consumers to choose that option. The default effect is related to the status quo effect, where consumers have a strong tendency to retain the status quo.

1631 M Zuckerberg [Facebook Post](#), 2 May 2018, accessed 10 May 2019.

1632 N Statt, [Facebook’s promised Clear History privacy tool to launch later this year following delay](#), *The Verge*, 26 February 2019; C Page, [Facebook’s long-awaited ‘clear history’ privacy tool will arrive this year](#), *The Inquirer*, 27 February 2019; K Wagner, [Facebook still hasn’t launched a big privacy feature that Mark Zuckerberg promised more than seven months ago](#), *Vox*, 17 December 2018.

1633 Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 76.

1634 Facebook, [introducing anonymous login and updated Facebook login](#), 30 April 2014, accessed 29 April 2019.

1635 Facebook, [introducing anonymous login and updated Facebook login](#), 30 April 2014, accessed 29 April 2019.

1636 K Wagner, [whatever happened to Facebook’s anonymous login?](#), *Recode*, 6 March 2019, accessed 29 April 2019.

1637 K Wagner, [whatever happened to Facebook’s anonymous login?](#), *Recode*, 6 March 2019, accessed 29 April 2019.

1638 K Bell, [Facebook created a tool to hide your data from apps but it never launched](#), *Mashable*, 20 March 2018, accessed 29 April 2019; L. Matsakis, [the security risks of logging in with Facebook](#), *Wired*, 19 April 2018, accessed 29 April 2019.

1639 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 20.

The use of defaults and pre-selections are both examples of design features that may nudge consumers towards more privacy-intrusive settings.¹⁶⁴⁰ One of the many possible explanations for the default effect is that making an option the default leads consumers to focus on reasons to accept the default and reject the alternative.¹⁶⁴¹ With a different default option, consumers may otherwise choose differently (see box 7.30 for further details on the default effect).

- **Framing and presentation:** Consumers are influenced by how information is presented. Presenting an option in a certain way may also induce consumers to evaluate the choice from a particular reference point.

Consumers tend to only read text towards the top of long text disclosures, and digital platforms could take advantage of this by putting problematic terms further down.

- **Hyperbolic discounting and myopia:** Consumers tend to treat the present as if it were much more important than future time periods.

Hyperbolic discounting may cause consumers to accept longer-term detriments from intrusive data practices for the shorter-term benefit of accessing a digital platform.

- **Overconfidence:** Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome. Overconfidence may lead consumers to think that they are less likely to experience adverse outcomes from privacy-intrusive terms and policies.

7.7.4 Consumer controls over data collection

There are several ways in which digital platforms may leverage the information asymmetries, bargaining power imbalances, and behavioural biases discussed in this chapter to provide users with privacy controls that do not, in practice, provide a meaningful way to opt-out of data collection.

(a) User-facing and platform-facing controls

One way is by offering privacy settings that give a user detailed user-to-user controls to protect their data from being shown or used by other users, without necessarily changing the amount of user data collected by the digital platform or available to third parties such as advertisers.¹⁶⁴² Digital platforms often emphasise to users the many privacy settings provided regarding the sharing of user-uploaded information with other users. This can give users an impression of granular control over the sharing of user data without providing options for less data collection.

Table 7.6 compares the privacy settings Facebook provides to its users to control the information accessible to other users and any corresponding counterpart setting available to the user to control the information accessible to Facebook or third parties who are Facebook's 'trusted partners'.

1640 Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 6.

1641 Steffel et al, "['Default' choices have big impact, but how to make sure they're used ethically?](#)" *the Conversation*, 4 April 2017, accessed 15 November 2018.

1642 J Albright, [The Graph API: Key Points in the Facebook and Cambridge Analytica Debacle](#), *Medium*, 20 March 2018, accessed 30 October 2018.

Table 7.6: Consumer-facing vs advertiser-facing privacy controls on Facebook

Can users prevent <u>other users</u> from using this data?		Can users prevent <u>third parties</u> from using this data, if all advertising data sharing settings are turned off?
Can the user control who sees what they post in the News Feed and on their profile?	✓	✗ Third parties may still target advertising on Facebook to users based on things that users do on Facebook. ¹⁶⁴³
Can the user control who sees their contact phone and email address?	✓	✗ Third parties may still use contact information to match their customer list to a Facebook profile and target advertising to that user. ¹⁶⁴⁴
Can the user control who sees the apps and websites they use?	✓	✗ There is no setting that prevents Facebook from targeting advertising to users while on Facebook based on the apps and websites they use.

(b) Controls that appear to provide broader opt-outs than they do in practice

A second way to avoid providing users with meaningful controls over data collection is by providing opt-outs that does not actually opt-out users to the extent that the user might expect.

The Norwegian Consumer Council's 'Deceived by Design' report found that certain privacy controls provided by Facebook and Google give users the illusion of control without providing users with substantial or convenient controls in reality.¹⁶⁴⁵ For example, Google gives users the option of turning off 'Location History' on both Android and iPhone devices, but turning this setting off does not prevent Google from continuing to track users' location via the 'Web & App Activity' setting (see box 7.16 'Google's Location Tracking').

Another example is the extent of users' ability to opt-out of targeted advertising. Most of the key digital platforms rely on placement of advertising to make money, so users cannot opt out of seeing advertising. Whether, and to what degree, they can opt out of receiving targeted advertising depends on the digital platform. However, overall, the ACCC has found that most digital platforms do not enable a user to opt-out of all targeted advertising entirely. Three platforms are discussed by way of example in box 7.22 'Can users opt-out of targeted advertising?'

1643 Facebook Ad Settings, under 'Ads based on data from partners': 'You'll still see the same number of ads, but they'll be based on things that you do on Facebook Company Products, or they may be from a specific business that you've shared your contact information with, if we've matched your profile to their customer list'.

The ACCC notes that Facebook does allow users to turn off targeting based on four profile fields: 'relationship status', 'employer', 'job title', and 'education'. See Facebook, [Your ad preferences](#) (NB: a user must log in to access webpage).

1644 Facebook Ad Settings, under 'Ads based on data from partners': 'You'll still see the same number of ads, but they'll be based on things that you do on Facebook Company Products, or they may be from a specific business that you've shared your contact information with, if we've matched your profile to their customer list'.

1645 Norwegian Consumer Council, [Deceived by Design](#), June 2018, pp. 31-39.

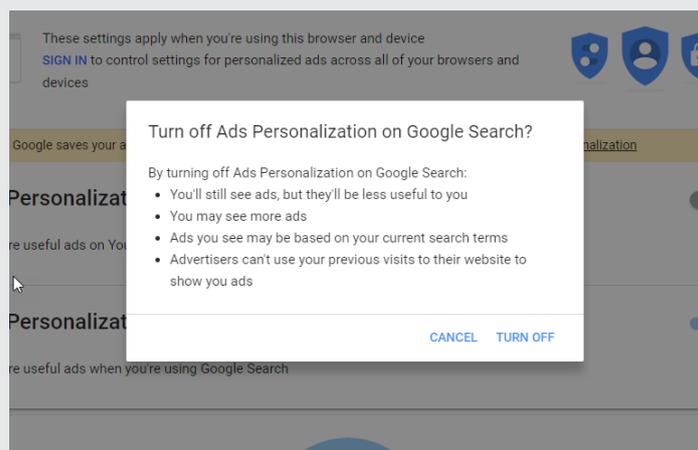
Box 7.22: Can users opt-out of targeted advertising?

Google

Google provides separate controls for 'ads personalization across the web' and 'ads personalization for Google search'.¹⁶⁴⁶

The dialogue box that appears when a user turns off 'ads personalization for Google search' notes that the user will still see ads, only ones less useful; also stating that turning this off may result in the user seeing more ads (see figure 7.14):

Figure 7.14: Screenshot of dialogue box when a user turns off 'ads personalization for Google Search'



Google also indicates that turning off these controls does not necessarily mean that users will not experience targeted advertising. The dialogue boxes that appear both when you turn off and turn on ads personalisation advise that ads may be based on current search terms,¹⁶⁴⁷ and on what the user is viewing and their general location.¹⁶⁴⁸ On its privacy & terms advertising page, Google states that 'Even if you opt out of Ads Personalization, you may still see ads based on factors such as your general location derived from your IP address, your browser type, and your search terms'.¹⁶⁴⁹

Facebook

Within its ad settings, Facebook provides options for users to opt out of two instances of targeted advertising. They are: 'ads based on data from partners', for ads shown on Facebook using data collected by third parties, and 'ads based on your activity on Facebook Company Products that you see elsewhere', for ads on third party sites using Facebook preferences.¹⁶⁵⁰ Facebook doesn't provide an option to opt out of targeted advertising on Facebook using data collected by Facebook. On a page titled 'How does Facebook work with data providers?',¹⁶⁵¹ it provides a list of links where users can opt out individually from each of the data companies.

Facebook indicates that users will still experience targeted advertising after opting out of the above. A Facebook help centre FAQ regarding adjusting ad preferences notes that 'Facebook always uses information about your age, gender, location and the devices you use to access Facebook when deciding which ads to show you'.¹⁶⁵²

1646 Google, [Ad settings](#), accessed 21 October 2018 (NB: a user must login to access webpage).

1647 Google, Ad settings, [Ads personalization on Google Search](#), accessed 21 October 2018 (NB: a user must log in to access webpage).

1648 Google, Ad settings, [Ads personalization on Google Search](#), accessed 21 October 2018 (NB: a user must log in to access webpage).

1649 Google, Privacy and terms, [Advertising](#), accessed 20 May 2019.

1650 Facebook, [Your ad preferences](#), accessed 21 October 2018 (NB: a user must log in to access webpage).

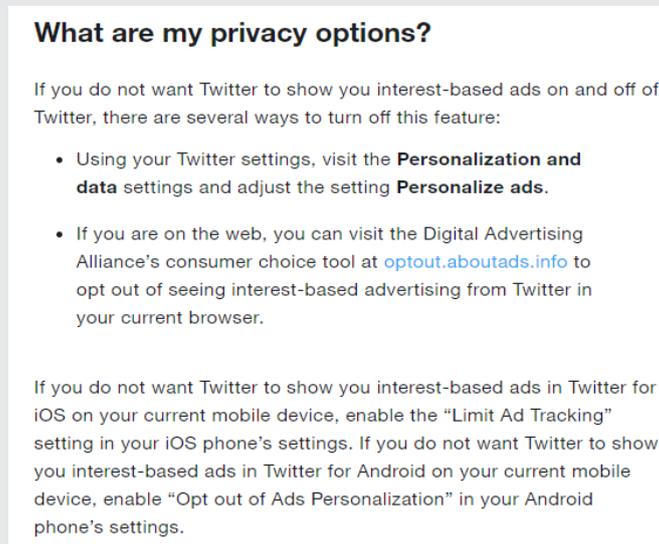
1651 Facebook, [How does Facebook work with data providers?](#), accessed 21 October 2018.

1652 Facebook, [What are my ad preferences and how can I adjust them?](#), accessed 21 October.

Twitter

Twitter’s help centre provides several options for users to opt out of targeted ads.¹⁶⁵³ They include options to opt-out of ads from third parties, including from Google, and to opt-out of seeing ads from Twitter on its service or across the web:

Figure 7.15: Screenshot of Twitter’s help centre.



Twitter notes that users who opt out may still see targeted ads, based on other information, including 'what you tweet, who you follow, what type of phone you use, where you are, and the links you click on Twitter'.¹⁶⁵⁴

(c) Pro-consumer user controls

The ACCC notes that some digital platforms have introduced new privacy controls that seek to make it easier for consumers to manage the collection of their user data. Google, for instance, has announced new privacy controls for users to request automatic deletion of certain types of user data– see box 7.23 'Google's new auto-delete controls'.

Box 7.23: Google's new auto-delete controls

In May 2019, Google announced a new privacy control that would allow users with a Google account to request automatic deletion of 'Location History' and 'Web & App Activity' by selecting whether the user data should be kept for three months, 18 months, or until manually deleted.¹⁶⁵⁵ Once a user has selected a time period for deletion, any data older than that time period will be automatically deleted from that user's Google account on an ongoing basis¹⁶⁵⁶ – see screenshot at figure 7.16 on the next page.

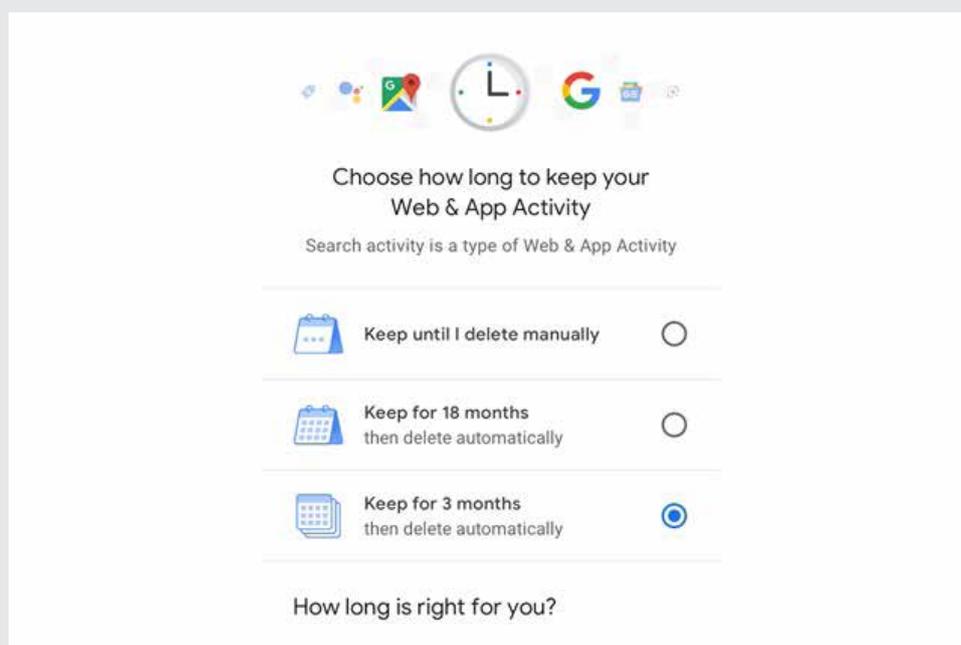
1653 Twitter, [Your privacy controls for personalized ads](#), accessed 25 October 2018.

1654 Twitter, [Your privacy controls for personalized ads](#), accessed 24 October 2018.

1655 Google Blog, [Introducing auto-delete controls for your Location History and activity data](#), 1 May 2019.

1656 Google Blog, [Introducing auto-delete controls for your Location History and activity data](#), 1 May 2019.

Figure 7.16: Screenshot of auto-deletion control for ‘Web & App Activity’¹⁶⁵⁷



7.7.5 User interface design

Digital platforms may design user interfaces in ways that lead users to make privacy-intrusive selections; in some cases by appealing to certain psychological or behavioural biases.¹⁶⁵⁸ These include using default settings to opt-in users to certain types of data collection or pre-selecting options in ways that may nudge users towards more privacy-intrusive choices. For the avoidance of doubt, ‘default settings’ as discussed in this chapter and in appendix H refers to the preset function of a setting that applies unless changed by the user.¹⁶⁵⁹

(a) Default settings

The concern with defaults and pre-selections is that they may nudge consumers towards more privacy-intrusive settings, especially where consumers would have selected a less privacy-intrusive option if the options were presented differently. The ACCC has found many examples of digital platforms using privacy-intrusive defaults.

The Norwegian Consumer Council’s report ‘Deceived by Design’ found that digital platforms design user interfaces that nudge users towards selecting or accepting privacy-intrusive options.¹⁶⁶⁰ That report found that Google and Facebook both have privacy intrusive defaults and require users who want greater privacy to go through a significantly longer series of menus, some of which are deliberately obscure.¹⁶⁶¹

The ACCC’s review of Google’s ad settings found that when ‘Ad personalisation’ is turned on, there is a pre-selected checkbox for ‘Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. This stores data from websites and

¹⁶⁵⁷ Beta News, [Google to roll out auto-delete controls for location history and activity data](#), 1 May 2019.

¹⁶⁵⁸ Norwegian Consumer Council, [Deceived by Design](#), June 2018,

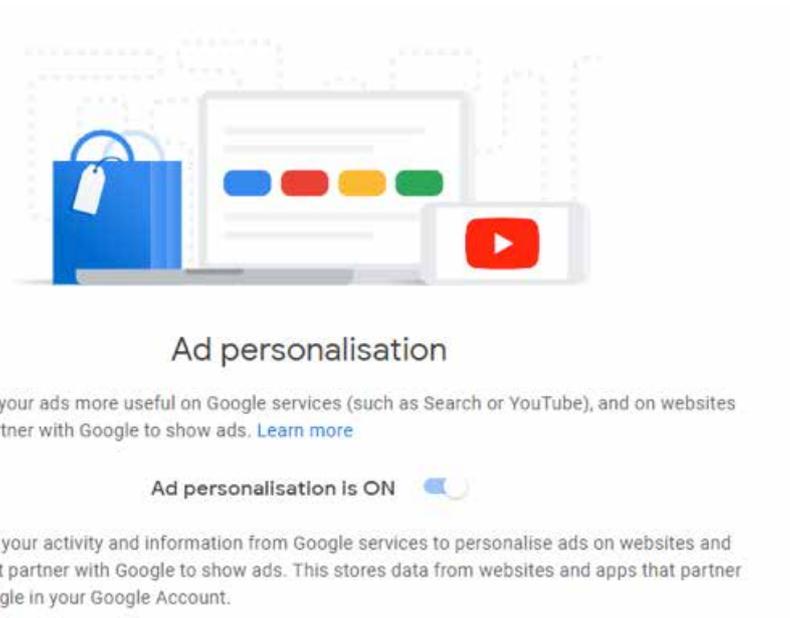
¹⁶⁵⁹ The [Macquarie Dictionary](#) defines ‘default’ as both ‘a course which a program automatically follows in the absence of any specific alternative instruction’ and ‘a procedure which has preset parameters which operate unless changed by the user’.

¹⁶⁶⁰ Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 4.

¹⁶⁶¹ Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 15.

apps that partner with Google in your Google Account' (see figure 7.17).¹⁶⁶² A user would have to expressly deselect that checkbox to exclude non-Google activity from their Google account.

Figure 7.17: Screenshot of web page on 'Ad personalisation'



Defaults and pre-selection were also found to have a role in inducing WhatsApp users to consent to the sharing of their user data with Facebook, which was subject to a fine by the Italian Competition Authority – see box 7.24 'WhatsApp data-sharing with Facebook'.

Box 7.24: WhatsApp data-sharing with Facebook

In 2017, the Italian Competition Authority fined WhatsApp for inducing users to believe they had to provide consent to a change in WhatsApp's terms of use relating to the sharing of user data with Facebook in order to continue using the service.¹⁶⁶³ It found that WhatsApp achieved this by, among other things: the pre-selection of the option to share the data, opting-in users to data-sharing by default, and use of complex user interface design to discourage users from exercising an opt-out option once the new terms of use had been accepted.

The Italian Competition Authority likewise fined Facebook 10 million euros in 2018 for misleading and aggressive practices in relation to data sharing between Facebook and WhatsApp.¹⁶⁶⁴

(b) Other user interface designs

Certain user interface designs can work against consumers who are trying to make informed choices about digital platforms' data practices. The ACCC's review has found that digital platforms' user interfaces may be designed in such a way that makes it less likely for users to opt-out of certain data practices.

¹⁶⁶² Google, Ad settings, [Ad personalisation](#), accessed 22 October 2018. The ACCC notes that this site is only accessible to a logged-on account holder.

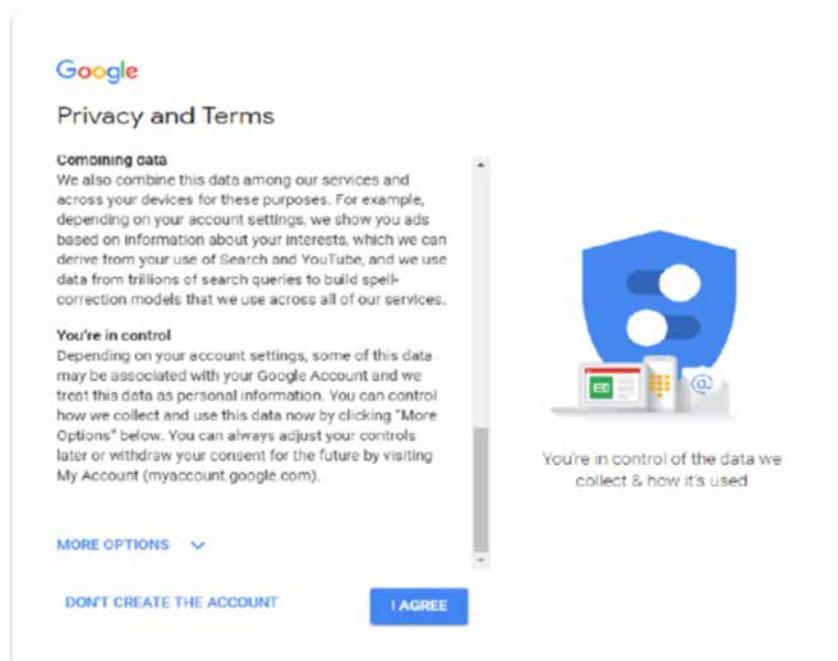
¹⁶⁶³ AGCM, [WhatsApp fined for 3 million euro for having forced users to share their personal data with Facebook](#), 12 May 2017, accessed 31 August 2018.

¹⁶⁶⁴ AGCM, [Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes](#), accessed 16 May 2019.

For example, the ACCC review of sign-up processes found that none of the digital platforms reviewed (Gmail, Facebook, Twitter and Apple) required a user to review and edit their default data and privacy controls before the creation of a new account.¹⁶⁶⁵ As such, users do not necessarily need to understand or make any choices about the collection, use and disclosure of their user data when they sign-up for a new account. Unless users navigate to, and change, their privacy settings, they will be configured to the default settings.

While Gmail did offer users options to customise certain types of data collection, these options were displayed only if a new user clicked on 'more options' to open a dropdown menu (see figure 7.18). This is likely to result in greater information asymmetries for new Gmail users who do not have the time or expectation to click on 'more options' to discover the additional options for control. A more detailed discussion of the ACCC review of sign-up processes is provided at section H.3 of appendix H.

Figure 7.18: Screenshots of Google's sign-up process



User interface design features may also nudge users away from making changes to the default settings. For example, there are several elements of the user interface design in Google Account settings that are likely to discourage or prevent some users from opting-out of Google's collection of their location data – see further discussion in box 7.25 on 'Can users easily opt-out of Google's collection of location data?'.

The Norwegian Consumer Council's report 'Deceived by Design' found that Google and Facebook require users who want greater privacy to go through a significantly longer series of menus, some of which are deliberately obscure.¹⁶⁶⁶

¹⁶⁶⁵ Although, Apple did take new users directly to a 'manage account' web page once the Apple ID was created, and Facebook did take new users to a web page where users were prompted to take a number of actions, including to upload a profile picture, add friends, and to review their privacy settings. See further appendix H.

¹⁶⁶⁶ Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 15.

Box 7.25: Can users easily opt-out of Google's collection of location data?

Opting out

Google has provided information to the Inquiry indicating that there are six account- or device-level settings that provide ways for users to control the collection and use of location information: Use Location, Google Location Accuracy, Usage & Diagnostics, Web & App Activity, Google Location Sharing and Location History.¹⁶⁶⁷

'Pausing' Google's Location History setting does not stop Google collecting location data. Google states that 'If you have other settings like Web & App Activity turned on and you pause Location History or delete location data from Location History, you may still have location data saved in your Google Account as part of your use of other Google sites, apps, and services. For example, location data may be saved as part of activity on Search and Maps when your Web & App Activity setting is on, and included in your photos depending on your camera app settings.'¹⁶⁶⁸

If an Android user opts out of both Location History and Web & App Activity, Google may still be collecting location data through 'usage & diagnostics', an option provided to a user when they first set up an Android device.¹⁶⁶⁹ On its support page for 'usage and diagnostics' Google states that users can have this option on to help Google 'improve Android, you can let your device send us information about how you use it and how it's working'.¹⁶⁷⁰

In a drop down box that can be opened on the Google support page for Location History, Google states that information shared for 'usage and diagnostics could include 'Location accuracy: Google can use information from location sensors and settings to help improve location estimates for apps and services'¹⁶⁷¹. Google has stated that 'When Web & App Activity is disabled, and Usage & Diagnostics is enabled, Google group may store deidentified IP Addresses'. Google also stated that 'If Web & App Activity is disabled, Google Group does not store the IP addresses that it collects via this Setting in a manner linked to a Google Account'.¹⁶⁷²

Google states that turning off usage and diagnostics won't affect information that apps might collect. It says that turning off usage and diagnostics doesn't affect a device's ability to send the information needed for essential services such as system updates and security.¹⁶⁷³

Google states that if a user has disabled 'ads personalization', Google may still use 'implicit Location Data such as a user inputting a search query, and IP address information, to deduce a user's general location to serve ads, as well as to measure ad performance and to report aggregated, anonymised statistics to advertisers'.¹⁶⁷⁴

Observations from opting out

An ACCC staff member with an existing Google account took steps to opt out of the collection of location information by Google by opting-out of Location History (set to 'off' by default) and Web and App Activity (set to 'on' by default).¹⁶⁷⁵

1667 Information provided to the ACCC.

1668 Google, Account Help, [Manage your Location History](#), accessed 31 October 2018.

1669 Google, Account Help, [Manage your Location History](#), accessed 31 October 2018; Google, Google Account Help, [Share usage & diagnostics information with Google](#), accessed 21 November 2018.

1670 Google, [Share usage & diagnostics information with Google](#), accessed 25 October 2018.

1671 Google, Account Help, [Manage your Location History](#), accessed 25 October 2018.

1672 Information provided to the ACCC

1673 Google, [Share usage & diagnostics information with Google](#), accessed 25 October 2018.

1674 Information provided to the ACCC.

1675 See further ACCC review of sign-up processes, see appendix H section 1. This was also the analysis of the Norwegian Consumer Council in its '[Deceived by Design](#)' report, June 2018, p. 14 (regarding Location History) and in its '[Every Step You Take](#)' report, November 2018, p. 16 (regarding Web & App Activity).

The staff member navigated via the 'privacy checkup' function, described by Google as a 'quick checkup to review important privacy settings and adjust them to your preference'.¹⁶⁷⁶ This function contains links to both Location History and Web and App Activity. Allowing users to opt-out of collection of location data is theoretically a pro-consumer control provided by Google. However, the staff member found a number of design features that either introduced confusion or may nudge users against opting-out of location tracking, lessening the effectiveness of the control. These features are outlined below.

Location History can only be 'paused' rather than 'turned off' – the Google Account Help page for 'Manage Your Location History' has a section titled 'Turn Location History on or off',¹⁶⁷⁷ but the options provided are only to turn Location History on or to 'pause' it. There is no explanation of whether there is a distinction between Location History being 'paused' or 'turned off' (the latter is not offered as an option).

Indirect route – the ACCC staff member found that, from the 'Manage Location History' link on the privacy checkup page, a user must go through a minimum of five clicks and through a minimum of two web pages to pause Location History. The ACCC notes that this is not a large number relative to the number of clicks and page changes Australians would go through daily; these numbers are provided rather because every additional click and page change may serve as a nudge against making any change.

Distractions – When the user clicks on 'Manage Location History', Google shows the user a pop up box 'explore your timeline'.¹⁶⁷⁸

- The user must scroll through three screens. The final screen of the pop-up box is titled 'You're in control' and contains a 'Learn more' link, positioned above a more prominent button in blue labelled 'Start exploring'.
- The less prominent 'Learn more' link takes the user away from the timeline page and provides instructions for how to make changes to Location History.
- Following these instructions, a user can then click back to timeline page, and navigate, through the cog icon, to the web page with the Location History setting.

Positive and negative wording – after selecting 'delete' for data collected as part of 'Web and App Activity', a user must confirm that they wish to delete the collected data twice. The first time, the wording focuses on the positive aspects of retaining 'Web and App activity' and the second time warning that deleted data cannot be recovered.¹⁶⁷⁹

For further explanation of the opt-out process, including screenshots of the above, please see appendix H, section 2.

7.7.6 ACCC assessment of the extent of consumer control

The ACCC has found that despite significant consumer demand for control over their personal information, digital platforms' user interface design features and opt-out processes tend not to provide consumers with effective opt-outs or meaningful controls over how their personal information is collected, used and disclosed. This arises as a result of information asymmetries between digital platforms and consumers regarding the purpose and effect of the privacy controls and settings provided by digital platforms and user interface design features that leverage behavioural biases to nudge consumers towards more privacy-intrusive options.

1676 Google, [My account](#), accessed 20 August 2018.

1677 Google, Account Help, [Manage your Location History](#), accessed 20 August 2018.

1678 For a discussion of the possible distraction by popups, see: Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 30.

1679 Similar to the 'Framing and Rewards' and 'Punishment' examples of dark patterns discussed in Norwegian Consumer Council, [Deceived by Design](#), June 2018, pp. 22-27.

The ACCC considers that the information asymmetries regarding the purpose and effect of digital platforms' privacy controls and settings could be addressed by requiring stronger disclosures and better opt-out controls within an enforceable digital platforms code of practice (see recommendation 18(1) and 18(3)). A requirement for digital platforms to establish a time period for the retention of personal information collected outside the purpose of providing the core consumer-facing service would also assist in overcoming the status quo bias that hinders consumers' from taking steps to delete their personal data where it is no longer necessary to provide them with a service (see recommendation 18(6)). These requirements under a digital platforms code of practice should be supported by clear and effective complaints-handling mechanisms (see recommendation 18(7)).

In addition to these measures targeted at digital platforms' privacy controls, the ACCC notes that there are other sectors that may employ similar data practices to prevent consumers from exercising meaningful control over their personal information (see section 7.9.2 '*Data practices and consumer harms extend beyond digital platforms*'). The ACCC therefore considers that stronger and more specific consent requirements across the economy are likely to benefit consumers. For example, default settings which better reflect consumer preferences can address some of the behavioural biases that nudge consumers into more privacy-intrusive settings than they would otherwise select (see recommendation 16(c)). The strengthened consent requirements will work in conjunction with other measures that seek to improve consumer control over data collection, such as the ability to request deletion of their user information (see recommendation 16(d)). Finally, consumers rights under the Privacy Act should be further strengthened by giving consumers a direct right to bring actions or class actions for interferences with their privacy under the Privacy Act (see recommendation 16(e)) and increased penalties for any breaches of the Privacy Act (see recommendation 16(f)).

Further detail in relation to the ACCC's proposed recommendations relating to the Australian privacy framework is provided in section 7.10.

7.8 The privacy and data protection regulatory framework

Key findings

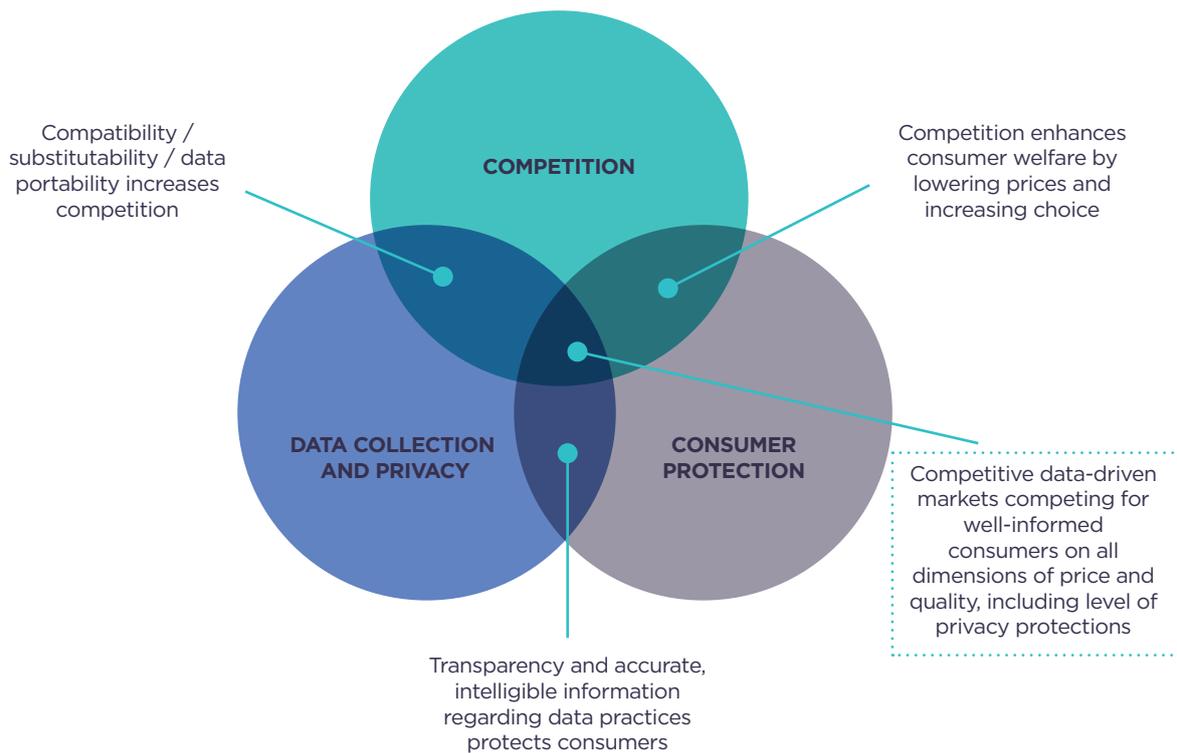
- In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws.
- Strong privacy protections that inform and empower consumers can promote competition, innovation, and the welfare of individual consumers in digital markets.
- The existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers.

As user data, including personal information, becomes an increasingly valuable input in a myriad of markets in the digital economy, the volume and scope of data collection has been steadily growing (see section 7.1.2 above). The collection, use and disclosure of user data and personal information is therefore of increasing importance from a consumer protection, privacy, competition and innovation perspective.

7.8.1 Interaction between data protection, competition, and consumer protection frameworks

Data-driven markets such as those in which digital platforms operate raise new issues at the intersection of privacy, competition, and consumer protection considerations. Figure 7.19 provides a stylised illustration of the interplay between data protection, competition, and consumer protection.

Figure 7.19: Overlapping issues in data protection, competition and consumer protection



Source: Adapted from European Data Protection Supervisor, Privacy and competitiveness in the age of big data, March 2014.

As illustrated in figure 7.19, data collection and privacy laws can enhance consumer protection by ensuring that consumers receive accurate, intelligible information about entities' data practices. This can increase the transparency of digital platforms' data practices, which then assists consumers to make rational and informed choices about which digital platform service to use. It can lead to increased incentives for digital platforms to improve the privacy dimension of their services to meet consumer demand.

A lack of privacy and control over data-sharing can give a data holder economic leverage over the data subject (for example, by allowing a seller to use their knowledge of consumers to target vulnerable consumers or discriminate against customers on the basis of gender, race or sexual orientation).¹⁶⁸⁰ Privacy laws that require consumers to be provided with certain controls over their personal information are therefore also likely to shift the balance of economic power in favour of consumers and reduce the bargaining power imbalance between consumers and digital platforms.

Data protection and privacy laws can increase portability and compatibility of data such that consumers are able to readily port their data from one service provider to another, decreasing switching costs for consumers, lowering barriers to entry or expansion for rivals and increasing competition in data-driven markets.

7.8.2 Overview of existing regulatory framework

(a) Privacy regulatory framework

In light of these overlaps between privacy, competition, and consumer protection, digital platforms' supply of services to consumers and their data practices are governed under both privacy laws and competition and consumer protection laws. The Privacy Act sets out the legislative framework for the protection of 'personal information' in Australia and applies to 'APP entities', which include any private and non-profit organisations with an annual turnover of more than AU \$3 million and data companies.

¹⁶⁸⁰ A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), pp. 21 and 445.

'Personal information' is defined as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable'. It is not clear whether the scope of 'personal information' under the Privacy Act includes metadata such as IP addresses, other location data, or other technical data.¹⁶⁸¹

APP entities must handle, use and manage personal information in accordance with the 13 **Australian Privacy Principles** (APPs) set out in the Privacy Act. They include requirements to: maintain a privacy policy disclosing how personal information is collected, held and disclosed (APP 1); not collect personal information unless it is reasonably necessary (APP 3); and not disclose personal information for direct marketing purposes, unless exceptions apply (APP 7).¹⁶⁸²

The **Notifiable Data Breaches Scheme** (the NDB Scheme) in Part IIIC of the Privacy Act also imposes obligations on APP entities which experience a data breach to conduct an assessment of all data breaches to determine whether a suspected breach is an '*eligible data breach*' that is likely to involve serious harm to individuals affected.¹⁶⁸³ All eligible data breaches must be reported to the OAIC and to affected users within 30 days.

The **Office of the Australian Information Commissioner** (the OAIC) is responsible for enforcing the Privacy Act. It has powers to investigate an APP entity after receiving a privacy complaint from an individual or to investigate an entity on its own initiative (referred to as Commissioner-initiated investigations).¹⁶⁸⁴ The OAIC's powers include: making determinations on a privacy complaint, accepting enforceable undertakings from an APP entity and applying to the courts for an injunction or for civil penalties to be imposed on an APP entity for engaging in serious and repeated interference with privacy.

(b) Privacy regulatory framework

The CCA regulates the conduct of suppliers, wholesalers, retailers and consumers in Australia, including the conduct of any digital platforms carrying on business in Australia.¹⁶⁸⁵

Schedule 2 of the CCA sets out the Australian Consumer Law (ACL), which prohibits businesses from engaging in the following forms of conduct:

- **Misleading or deceptive conduct and false or misleading representations:** businesses (including digital platforms) must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive, or make false or misleading representations about their goods or services.¹⁶⁸⁶ It does not matter if there is an intention to mislead or not.¹⁶⁸⁷ It includes express and implied representations, including for example statements about how user data is collected, used, or shared, that are incorrect or likely to mislead.
- **Unconscionable conduct:** businesses (including digital platforms) must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services.¹⁶⁸⁸ Although 'unconscionable conduct' does not have a precise legal definition, it generally refers to conduct that is against good conscience by reference to the norms of society¹⁶⁸⁹ and that goes beyond mere unfairness.¹⁶⁹⁰

1681 See *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.

1682 Privacy Act, s 18.

1683 An 'eligible data breach' occurs when (1) there is unauthorised access to, or disclosure of, personal information (or information is lost in circumstances where unauthorised access or disclosure is likely to occur), (2) this is likely to result in serious harm to any of the individuals whose information is compromised, and (3) the entity has been unable to prevent the likely risk of serious harm with remedial action: see Privacy Act, s26WE.

1684 OAIC, [Commissioner initiated investigation reports](#), accessed 30 October 2018.

1685 ACCC, [Legislation](#), accessed 13 November 2018.

1686 ACL, ss 8, 29, 33 and 34.

1687 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 Gibbs J; *Yorke v Lucas* (1985) 158 CLR 661 at 666.

1688 ACL, ss 20, 21 and 22.

1689 *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

1690 *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261 at [121], approved in *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [356] (Allsop CJ).

- **Unfair contract terms:** Terms that are deemed to be unfair in standard form contracts are considered to be void and cannot be enforced.¹⁶⁹¹ Digital platforms' consumer-facing terms of use and privacy policies would likely be considered standard form contracts, which would mean that they must comply with the unfair contract term provisions in the ACL.¹⁶⁹²

Box 7.26: The Consumer Data Right

On 26 November 2017, the Australian Government announced the introduction of a consumer data right (CDR) in Australia. One of the key aims of the CDR is to improve consumers' ability to compare and switch between products and services by facilitating access to data held by businesses. The CDR system will be regulated by both the ACCC and the OAIC. The ACCC is the lead regulator and has the role of advising on new sectors of the economy to be subject to the regime, as well as establishing and enforcing the CDR rules. The OAIC has a role in the privacy and confidentiality aspects of the regime, including enforcement of the CDR privacy safeguards.

To protect the information being accessed under the CDR, strong privacy and information security protections are reflected in the CDR legislation and draft CDR rules.¹⁶⁹³ The legislative framework for the CDR contains requirements for the collection and use of CDR data that include continuing notification requirements for data collection, time-limited consents, requirements for destruction or de-identification of redundant data, individual rights of action for breach, and civil penalties for breach.

The ACCC notes that stakeholder submissions to the Preliminary Report raised concerns that the proposed recommendations may contain differences from the CDR framework and risk fragmenting Australian privacy regulations¹⁶⁹⁴ and could result in different levels of privacy protection for consumers.¹⁶⁹⁵ However, this Inquiry's recommendations are forward-looking proposals for the Government to generally update and strengthen the overarching Australian privacy regulatory framework. In contrast, the CDR operates within the existing legislative framework to deal with certain types of data and mechanisms for accessing that data in specific sectors of the economy. The CDR privacy protections should therefore be viewed as extra protections applicable only to CDR data, as defined for the purposes of the CDR legislative framework.¹⁶⁹⁶

7.8.3 ACCC assessment of the effectiveness of existing laws in regulating digital platforms' data practices

(a) Gaps in existing privacy framework in Australia

The ACCC notes that, since the Privacy Act was passed 30 years ago, the Internet and digitalisation have radically altered the ways in which businesses and consumers interact and exchange personal information. Numerous amendments have been made to the Privacy Act, but these incremental changes may not be sufficient to address the volume and significance of privacy and data protection issues proliferating in the digital economy. The data practices of digital platforms considered in this chapter demonstrate some significant gaps in Australian privacy laws.

The APPs under the Privacy Act which regulate the collection of personal information, may be susceptible to excessively broad interpretation by APP entities. This could be due to the frequent use of terms like 'reasonable' and 'reasonably' in the Privacy Act to qualify a test or obligation on an APP entity. For example,

1691 ACL, s 23(1).

1692 ACL, Part 2-3.

1693 Treasury Laws Amendment (Consumer Data Right) Bill 2019, Explanatory Memorandum; ACCC, Consumer Data Right, Exposure draft CDR rules, 29 March 2019.

1694 AI Group, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2; Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2.

1695 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2; Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

1696 Treasury, [Consumer Data Right Privacy Protections](#), December 2018, p. 4.

some APPs require an APP entity to ‘take such steps as are reasonable in the circumstances’,¹⁶⁹⁷ or outline exceptions to the APP if the information is considered to be ‘reasonably necessary’,¹⁶⁹⁸ or limit the APP’s requirements where it is ‘impracticable’.¹⁶⁹⁹

One instance where the use of terms such as ‘reasonably necessary’ may lead to excessive discretion is APP 3 regarding ‘collection of solicited personal information’. APP 3 requires APP entities to only collect personal information where it is ‘reasonably necessary for one or more of the entity’s functions or activities’.¹⁷⁰⁰

This means that a digital platform or other APP entity could potentially collect personal information from individuals without obtaining their consent if that information is ‘reasonably necessary’ for one of the digital platform’s functions or activities. In the case of a social media platform, it may be permitted under APP 3 to collect the web-browsing data of users on third-party websites where that browsing history is ‘reasonably necessary’ for the platform’s advertising-related functions, without seeking that consumer’s consent. Such practices may not meet consumer expectations. As noted in the ACCC Consumer Survey, 83 per cent of digital platforms users considered monitoring and collection of their online activities without their express consent to be a misuse of their personal information.¹⁷⁰¹

Another significant gap in the APPs is APP 6 which covers the ‘use or disclosure of personal information’. APP 6 requires that APP entities that collect personal information for a primary purpose must not use or disclose the information *for a secondary purpose* unless the individual either consents, or would reasonably expect the APP entity to use or disclose the information for the secondary purpose.¹⁷⁰² However APP 6 does not similarly restrict the disclosure of personal information to third parties for the same primary purpose for which the information was collected.

The impact of this gap is exacerbated where digital platforms list numerous, broadly-expressed purposes for their collection of personal information. For example, as part of the ACCC’s review of terms and policies, the ACCC found that Facebook’s data policy states that it uses the information collected to:

- ‘provide, personalise and improve our Products’ (‘Products’ being defined to include Facebook, Messenger, Instagram as well as the Facebook Business Tools used by website owners, publishers, app developers, business partners and their customers);
- ‘provide measurement, analytics and other business services’
- ‘promote safety, integrity and security’
- ‘communicate with you’
- ‘research and innovate for social good’.¹⁷⁰³

Taken together with APP 6, this can mean that under current regulation, it could be possible for Facebook or other APP entities to argue that all disclosed purposes are primary purposes for its collection of personal information. Therefore, under APP 6, Facebook would not be required to seek any additional consents from users to use or disclose personal information for any of these purposes. This ability appears to be contrary to consumer expectations. The ACCC Consumer Survey found that 86 per cent of digital platforms users considered sharing information with unknown third parties to be a misuse of their personal information.¹⁷⁰⁴

Another consequence of the combined effect of APP 3 and APP 6 is that they may inadvertently provide an unfair competitive advantage to large digital platforms or other businesses with numerous functions and activities (and therefore many different primary purposes of data collection) over smaller firms with fewer, more clearly defined functions. This is because the larger firms with more functions appear to be permitted a greater scope of personal information gathering under APP 3 and greater scope to use and disclose that personal information to third parties under APP 6.

1697 See, for example, APP 1, APP 6, APP 8, APP 11, and APP 13.

1698 See, for example, APP 3, APP 6, APP 8 and APP 9.

1699 See, for example, APP 2, APP 3, APP 7 and APP 13.

1700 APP 3.1.

1701 ACCC Consumer Survey, p. 21 (Figure 10).

1702 See APP 6.1 and 6.2.

1703 See Facebook Privacy Policy and Facebook, [What are the Facebook Products?](#), accessed 22 May 2019. .

1704 ACCC Consumer Survey, p. 21.

The ACCC considers that the problematic data practices of digital platforms are partly enabled by an overly-broad interpretation of the Privacy Act's principles-based model that has not been adequately designed to address the exponential increase in use, collection and disclosure of personal information in digital markets dominated by digital platforms. As such, the ACCC recommends a suite of targeted amendments to the Privacy Act to close some existing gaps in the definition of 'personal information' and to strengthen the current notification and consent requirements (see section 7.10, recommendation 16(a), 16(b) and 16(c)).

In addition, the ACCC recommends that the broader Australian privacy framework should be reviewed to ensure the continued effectiveness of privacy and data protection regulations in a data economy characterised by the increasing volume, significance, and complexity of privacy and data protection concerns (see section 7.10, recommendation 17). In particular, the ACCC recommends the re-examination of the Privacy Act's objectives to place greater emphasis on empowering consumers to make informed choices and a re-consideration of whether the Privacy Act should apply to some of the entities currently exempt from the definition of 'APP entities' (see section 7.10, recommendation 17(1) and 17(2)).

(b) Comparison with privacy protections under the GDPR

The ACCC notes that some of the potentially problematic data practices discussed in this chapter have been met with regulatory action in the EU under the General Data Protection Regulation (GDPR).

The Data Protection Commission of Ireland (DPC Ireland) is investigating data-sharing practices between Facebook and WhatsApp (see discussion in box 7.24). In particular, DPC Ireland is investigating whether WhatsApp has discharged its transparency obligations under the GDPR regarding 'the provision of information and the transparency of that information to both users and non-users of WhatsApp's services, including information provided to data subjects about the processing of information between WhatsApp and other Facebook companies'.¹⁷⁰⁵

The French data protection authority (CNIL) in January 2019 found that Google breached the GDPR by combining user data across its services including previously anonymous DoubleClick browsing data (see discussion in box 7.19). It fined Google for violating the obligations of transparency and the obligation to have a legal basis for processing personal information under the 'ads personalisation' setting (as the consents obtained for 'Ad Personalisation' were not sufficiently informed, specific or unambiguous).¹⁷⁰⁶ Google has announced that it will appeal the fine.¹⁷⁰⁷

As discussed further in section 7.10, the ACCC does not propose wholesale adoption of the GDPR in this Report, but rather particular recommendations to address key findings of the Inquiry (some of which reflect key features and principles of the GDPR, for example recommendation 16(c)).

However, the ACCC notes that more generally, closer alignment of Australian privacy regulations with the GDPR's higher standards of protection could significantly increase the effectiveness of Australian privacy law and increase the accountability of entities processing the personal information of Australian consumers. This could be a matter for consideration as part of broader reform set out in recommendation 17.

(c) Comparison with consumer protections in overseas jurisdictions

The ACCC notes that some jurisdictions deal with data practices of concern under consumer protection legislation, sometimes under provisions similar to those in the ACL but other times under provisions not found in the ACL, such as a general prohibition against unfair practices.

Comparable overseas jurisdictions (including the EU, UK, US, Canada and Singapore) have adopted a combination of general and specific consumer protections regarding unconscionable and misleading

¹⁷⁰⁵ DPC Ireland, [Annual Report 25 May - 31 December 2018](#), p. 51.

¹⁷⁰⁶ CNIL Press Release, [The CNIL's restricted committee imposes a financial penalty of 50 Million euros against GOOGLE LLC](#), 21 January 2019.

¹⁷⁰⁷ D Meyer, [Google Appeals \\$57 Million privacy fine in Europe](#), *Fortune*, 24 January 2019.

practices and unfair trading practices.¹⁷⁰⁸ The unfair practices prohibitions in those jurisdictions have enabled regulatory action to address concerning data practices. For example:

- The Federal Trade Commission (FTC) has relied on the general prohibition against ‘unfair or deceptive acts or practices’ in section 5 of the Federal Trade Commission Act (FTC Act) to seek to address changes to service terms without adequate notice. This included filing a complaint against Facebook, alleging that Facebook data practices were unfair and deceptive, and violated federal law. The settlement for this matter required Facebook to give consumers clear and prominent notice and obtain consumers’ express consent before their information is shared beyond the privacy settings they have established.¹⁷⁰⁹
- The FTC also issued warning letters in May 2019 that three dating apps allowed children under the age of 13 to access them, which appeared to violate requirements under the Children’s Online Privacy Protection Act (COPPA) and possibly the prohibition against unfair practices under the FTC Act. The warnings caused the apps to be removed.¹⁷¹⁰
- The Italian Competition Authority issued a EUR10 million fine against Facebook over the data-sharing between Facebook and WhatsApp. It found that Facebook had carried out an aggressive practice to induce consumers to allow sharing of data.¹⁷¹¹
- Washington State’s Attorney-General conducted an investigation under the unfair acts and practices provisions of its consumer law that resulted in the creation of a legally binding agreement with Facebook to prevent the continuation of ‘discriminatory’ advertising categories.¹⁷¹²

Some jurisdictions also have pieces of legislation to protect specific segments of the community which may provide overlapping protections to a general prohibition against unfair practices. For example, see box 7.27 ‘*The US Children’s Online Privacy Protection Act*’ below.

Another measure being considered in the US to strengthen privacy protections is legislation which would mandate a ‘Do Not Track’ option for internet users, which would allow consumers to block online companies from collecting data beyond what is necessary for their services.¹⁷¹³ The proposed legislation would seek for consumers to activate this option via a one-time click in the settings on their web browser or by downloading a mobile app.¹⁷¹⁴ In addition, companies would be banned from discriminating against users who activate Do Not Track and violations of this law will be accompanied by strict penalties.¹⁷¹⁵

Box 7.27: The US Children’s Online Privacy Protection Act

In the US, COPPA requires companies to post clear privacy policies, to notify parents, and to get their verifiable consent before collecting, using, or sharing personal information from a child under the age of 13.¹⁷¹⁶ In May 2019, the FTC issued warning letters that three dating apps allowed children under the age of 13 to access them in violation of COPPA requirements, resulting in the removal of these apps from Apple’s App Store and Google’s Google Play store until they address the alleged violations outlined by the FTC.¹⁷¹⁷

1708 Queensland University of Technology, [Comparative analysis of overseas consumer policy frameworks](#), April 2016, pp. 2-3.

1709 FTC, [Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises](#), 29 November 2011.

1710 FTC, [App Stores Remove Three Dating Apps After FTC Warns Operator about Potential COPPA](#), FTC Act Violations.

1711 AGCM, [Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers’ data for commercial purposes](#), accessed 16 May 2019.

1712 Washington State Attorney General, Media Release, [AG Ferguson investigation leads to Facebook making nationwide changes to prohibit discriminatory advertisements on its platform](#), 24 July 2018, accessed 22 May 2019.

1713 Press Release, [Senator Hawley to introduce legislation to give the American people a ‘Do Not Track’ option](#), 20 May 2019.

1714 Press Release, [Senator Hawley to introduce legislation to give the American people a ‘Do Not Track’ option](#), 20 May 2019.

1715 Press Release, [Senator Hawley to introduce legislation to give the American people a ‘Do Not Track’ option](#), 20 May 2019.

1716 [Children’s Online Privacy Protection Act](#).

1717 [Children’s Online Privacy Protection Act](#).

(d) Effectiveness of deterrence under existing regulations

Effective deterrence under the Privacy Act relies on regulatory oversight accompanied by meaningful sanctions for any conduct interfering with an individual's privacy. Given the size of some of the entities collecting, using and disclosing personal information in the digital economy, which includes digital platforms operating in Australia, the ACCC recommends that the maximum penalties for breaches of the Privacy Act should be increased to mirror the recently increased penalties for breaches of the ACL (see recommendation 16(f)).

To more effectively deter businesses from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use and privacy policies, the ACCC considers it appropriate to amend the ACL to provide for civil pecuniary penalties that apply to the use of unfair contract terms (see recommendation 20). The ACCC also recommends that entities should be deterred from engaging in certain data practices that cause significant consumer detriment by introducing a prohibition on certain unfair trading practices to effectively regulate problematic conduct that is not currently expressly prohibited under the ACL (see recommendation 21).

Finally, the ACCC is currently investigating a number of possible contraventions of the ACL by digital platforms – see section 7.11 on *'Further ACCC actions'*.

(e) Extent of individual recourse

Under the existing regulatory framework, individuals have limited recourse against digital platforms or other firms to seek compensation for mishandling their user data or personal information. Under the Privacy Act, consumers cannot take any direct action against digital platforms or other companies that are APP entities¹⁷¹⁸ to seek compensation for mishandling of their personal information or sensitive personal information. The only recourse is to first complain directly to the APP entity and then to make a complaint to the OAIC.¹⁷¹⁹

It has also been a consistent finding of a number of legislative reviews that Australia's privacy regulatory framework does not provide consumers with adequate remedies for invasions of privacy. For example:

- The NSW Legislative Council's inquiry on *'Remedies for the serious invasion of privacy in New South Wales'* from 2016 found that 'there remain significant gaps in the coverage afforded to privacy protection'.¹⁷²⁰ The inquiry found that the existing privacy framework in NSW (which includes the federal Privacy Act) does not provide adequate remedies to many people who suffer a serious invasion of privacy.¹⁷²¹
- The ALRC's report on *'Serious Invasions of Privacy in the Digital Era'* from 2014 found significant gaps or uncertainties in the existing legal protection against invasions of privacy.¹⁷²² It found that the Privacy Act only provides for 'limited civil redress' via complaints to the OAIC, does not protect against intrusions against privacy from individuals or media companies, and does not generally apply to businesses with an annual turnover of less than AU \$3 million.¹⁷²³ The ALRC noted that there is no recourse for individuals to seek compensation for invasions of privacy by media or communications entities.¹⁷²⁴

1718 As discussed, APP entities include any private and non-profit organisations with an annual turnover of more than \$3 million and data companies.

1719 OAIC, [How do I make a privacy complaint](#), accessed 13 November 2018. Section 40(1A) of the Privacy Act requires that the OAIC must not investigate a complaint where the complainant has not first complained to the respondent.

1720 NSW standing committee on law and justice, [Remedies for the serious invasion of privacy in New South Wales Report](#), NSW Legislative Council, 3 March 2016, p. 57.

1721 NSW standing committee on law and justice, [Remedies for the serious invasion of privacy in New South Wales Report](#), NSW Legislative Council, 3 March 2016, p. 57.

1722 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 51. See also the ALRC's earlier report into Privacy Framework: ALRC, [For Your Information: Australian Privacy Law and Practice Report](#), 12 August 2008.

1723 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 53.

1724 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 53.

- The Victorian Law Reform Commission (VLRC) report on '*Privacy Law – Options for Reform*' from 2001 had found that 'substantial gaps still exist' in legal protections for information privacy in Australia,¹⁷²⁵ many of which persist in the current legal framework. The VLRC noted the Privacy Act's exemptions for employee records and small businesses and the need to consider the protection of personal information contained in publicly available information.¹⁷²⁶

Other comparable jurisdictions do provide consumers a direct cause of action to enforce their rights under their relevant privacy and data protection regulations. Consumers in the UK, New Zealand, and certain provinces in Canada have greater control over their data and privacy by having the ability bring action against parties that have misused their personal data or breached their privacy. In contrast, Australian consumers have no direct right to seek redress for misuse of their data.

The ACCC considers that deterrence against problematic data practices that interfere with an individual's privacy could be improved if individuals could directly bring actions or class actions in court for breaches of privacy and data protection laws. This could be achieved by giving individuals a right to bring an action for an interference with privacy under the Privacy Act (see recommendation 16(f)) and by introducing a statutory tort of privacy to address any serious incursions of privacy that are outside the scope of the Privacy Act (see recommendation 19).

7.9 Impact on consumers

The information asymmetry and lack of control consumers have over the collection and use of their personal information, and the current lack of deterrence under the current privacy framework, contribute to the proliferation of problematic data practices, not just by digital platforms but by other businesses that deal with consumer's personal information.

7.9.1 Extent of consumer harm

The ACCC believes that digital platforms' data practices leverage significant information asymmetries, bargaining power imbalances, and behavioural biases between digital platforms and consumers to obtain broad discretions in the collection, use and disclosure of user data. These market inefficiencies result in considerable consumer harm, such as decreasing the likelihood of effective competition on important quality dimensions of digital platforms' products and services. This section discusses the consumer harms that have been found as part of this Inquiry.

(a) Consumer trust and data-based innovations

Digital platforms such as search engines, social media, and content aggregation services compete in the sale of data-based targeted advertising services and products, and acquire data by providing users with zero-priced services. There are many benefits from data-based innovations for both businesses and consumers. As noted by the OECD, 'more extensive and innovative uses of personal data are bringing increasing economic and social benefits' for both businesses and consumers.¹⁷²⁷

However, realising these benefits relies on maintaining consumer trust in data-driven technologies to enable the free flow of information. Trust is at the core of the relationship between business and customer and remains critical in the digital economy.¹⁷²⁸ If consumers perceive that they do not understand or cannot control an organisation's use of their personal information, they may seek ways to undermine the accuracy of the data collected or reconsider their relationship with that organisation.

1725 VLRC, [Privacy law options for reform: Information Paper](#), 1 July 2001, p. 28.

1726 VLRC, [Privacy law options for reform: Information Paper](#), 1 July 2001, pp. 28-30.

1727 OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 4.

1728 See further CPRC, '[A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#)', May 2019, p. 4 and OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 25.

The 2019 Deloitte Privacy Index found that 89 per cent of consumers surveyed have at some point denied an app access to their phone's location, photos, contacts, camera, or microphone due to privacy concerns.¹⁷²⁹ It found that 46 per cent of consumers are likely to provide false personal information when engaging with an app, with 81 per cent citing privacy as the reason for doing so – and in so doing, compromising the accuracy and usefulness of the data collected.¹⁷³⁰ Sixty-five per cent of consumers surveyed said that their level of trust in a company was essential when deciding whether to grant permissions to access personal information.¹⁷³¹ A 2017 OAIC survey found that six in ten respondents would avoid dealing with a private company because of privacy concerns.¹⁷³²

Privacy protections have an integral role in maintaining the consumer trust necessary to enable the continued economic and social benefits of personal data flows.¹⁷³³ A recent survey conducted in the US, UK, Canada, Japan, Australia, France and the US on behalf of Consumers International and the Internet Society found that 75 per cent of consumers do not trust the way data is shared.¹⁷³⁴ The survey found that concerns regarding privacy and data security were sufficient to deter 28 per cent of consumers who do not own smart devices from buying one.¹⁷³⁵

Stakeholder submissions to the Inquiry have argued against the strengthening of privacy protections on the basis that data protection regulations have the potential to curb innovation. The Digital Industry Group Incorporated, which includes representatives from Facebook, Google, and Twitter, submitted that it 'supports the development of legislative and policy frameworks that do not inadvertently discourage the development of new business models but rather encourage innovative uses of digital platforms'.¹⁷³⁶ The ACCC also notes arguments regarding the potential consequences of the increased requirements under the GDPR as having a chilling effect on innovation and potentially increasing barriers to entry, although no substantive evidence was provided to the ACCC of this effect.¹⁷³⁷ The Australian Finance Industry Association's submission is illustrative. It generally opposes the proposed amendments to increase regulation but also acknowledges that, when data is used in line with consumer consent or expectations, it can enhance customer relationships and facilitate the development of better products and services.¹⁷³⁸

The ACCC considers that strengthened privacy safeguards has the potential to protect and foster the consumer trust necessary to facilitate data accessibility and portability and to encourage data-related innovations. The ACCC therefore recommends consideration of broader reform of Australian privacy law that considers whether the Privacy Act should be supplemented with additional data protections that could facilitate the flow of data to and from overseas jurisdictions such as the EU (see recommendation 17(6)).

Clear and effective rules on digital platforms' collection, use and disclosure of consumers' user data, particularly regarding transparency, accountability, security and purpose limitation of their data practices, is likely to maintain the consumer trust necessary for continued growth in data-based innovations, and help to minimise the potential economic and social harms from misuse of personal information.

1729 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 14.

1730 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 16.

1731 Deloitte, [Trust: Is there an app for that?](#): Deloitte Australian Privacy Index 2019, 14 May 2019, p. 14.

1732 OAIC '[Australian Community Attitudes to Privacy Survey](#)' (2017), p. i.

1733 See further OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 4.

1734 Consumers International and the Internet Society, [The trust opportunity: Exploring Consumers' Attitudes to the Internet of Things](#), 1 May 2019, p. 4.

1735 Consumers International and the Internet Society, [The trust opportunity: Exploring Consumers' Attitudes to the Internet of Things](#), 1 May 2019, p. 2.

1736 Digital Industry Group Incorporated, [Submission to ACCC Digital Platforms Inquiry](#), April 2018, p. 2.

1737 See, for example N. Wallace and D. Castro, [The Impact of the EU's New Data Protection Regulation on AI](#), Center for Data Innovation, 27 March 2018; B. Chakravorti, '[Why the Rest of the World Can't Free Ride on Europe's GDPR Rules](#)', *Harvard Business Review*, 30 April 2018.

1738 Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2.

(b) Decreased consumer welfare from decreased privacy

The detriments suffered by consumers through decreased privacy and control over data can result in numerous additional harms ranging from receiving unsolicited targeted advertising to data breaches exposing their personal or financial information. These harms cause increased risks of online identity fraud and the potential for more effective targeting of scams. For instance, poor data security may expose consumers to greater risk of their personal information of being hacked or stolen, which may result in financial loss, reputational damage, and emotional distress.

The loss or theft of personal information may be ultimately used in identity crime which is associated with financial losses for individuals.¹⁷³⁹ Data breaches impact not only individuals whose personal information is affected but also the organisations involved, as they may incur costs from implementing remedial measures, defending possible legal action, repairing reputational damage, and potential loss of consumers' trust or confidence.¹⁷⁴⁰

The OAIC survey results indicate that more than one in 10 Australians have been a victim of identity fraud or theft and more than one in four Australians knew a victim of identity fraud or theft.¹⁷⁴¹ The OAIC Survey also found that Australians believed the biggest privacy risks facing their community include the use of online services (including social media sites), ID fraud and theft, data security breaches, and risks to financial data.¹⁷⁴² In 2019, the OAIC noted that it is receiving increasing calls to its agency and '... the exponential growth in complaints'.¹⁷⁴³

OAIC data also indicate that a significant number of notifiable data breaches are reported to them under the NDB Scheme, since it came into effect in February 2018. This is shown in table 7.7. In its 12-month Insights Report, the OAIC said that reporting of data breaches increased by 712 per cent following the introduction of the NDB Scheme.¹⁷⁴⁴

Table 7.7. Number of data breaches reported to the OAIC under the Notifiable Data Breaches Scheme to March 2019¹⁷⁴⁵

Quarter 2018-19	Number of reported breaches to OAIC under Notifiable Data Breaches Scheme
February-March 2018 ¹⁷⁴⁶	63
April-June 2018	242
July-September 2018	245
October-December 2018	262
January-March 2019	215
Total	1 027

1739 For example, the Australian Institute of Criminology conducted an [online community survey](#) in 2013 which found that 9.4 percent of respondents reported having their personal information stolen and misused in the previous 12 months, with five percent reporting that they suffered financial losses as a result. On average, victims of identity crime lose \$4 101 per incident and spend at least 8 hours dealing with the consequences of the incident.

1740 See further OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 23.

1741 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. iii.

1742 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 4.

1743 OAIC, Speeches, [Privacy Awareness Week Business Breakfast 2019](#), 13 May 2019, accessed 14 May 2019.

1744 OAIC, [Notifiable Data Breaches Scheme 12-month Insights Report](#), 13 May 2019, p. 8.

1745 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: January 2018 – March 2018, p. 1](#); OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 April – 30 June 2018](#), 31 July 2018; OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 July – 30 September 2018](#), 30 October 2018, p. 4; OAIC, OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 October – 31 December 2018](#), 15 May 2019, p. 3; OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 January – 31 March 2019](#), 15 May 2019, p. 3.

1746 The Notifiable data breach scheme came into effect on 22 February 2018.

The ACCC notes the data collected under the NDB Scheme has limitations. It relies on self-reporting, has been in place for little over a year and only requires reporting of breaches that are 'likely to result in serious harm'.¹⁷⁴⁷ This may mean instances of data being disclosed that which consumers might consider to be a breach of their privacy are not captured in the reporting. However, the NDB Scheme does provide a previously unavailable indication of the number of consumers affected by data breaches in Australia.

For example, in January 2019, the ACCC asked Facebook for specified information about security breaches leading to the accidental or unlawful destruction of, loss of, alteration to, or unauthorised disclosure of personal or aggregated user information (including de-identified personal and aggregated information) in respect of users located in Australia, for a period covering July 2015 to the end of 2018. The information requested included the number of users located in Australia that were affected, the types of data affected, the name of third parties who accessed user data and notification to Australian users. In March 2019, Facebook stated in response to this question that it does not have readily available or reliable records in relation to data incidents prior to 2018. Facebook subsequently clarified to the ACCC in May 2019 that it does not record information about data incidents affecting its users in the manner requested by the ACCC. Facebook therefore did not provide records in relation to the specific information requested for the period prior to 2018. It was, however, able to provide some examples of data breaches for the period from 2018.¹⁷⁴⁸

While the data covers a short period of time, the statistics reported by the OAIC show a large and increasing number of people have been affected by data breaches. Twenty-seven per cent of breaches affected more than 100 people in the first quarter of 2018.¹⁷⁴⁹ This rose to 39 per cent of breaches in the second quarter of 2018,¹⁷⁵⁰ 37 per cent in the third quarter of 2018,¹⁷⁵¹ 40 per cent in the final quarter; and 32 per cent for the first quarter of 2019.¹⁷⁵² In the first year of the NDB Scheme, 15 per cent of breaches (118 breaches) affected more than 1 000 people and another 2 per cent (19 breaches) affected an unknown number of people.¹⁷⁵³ In the first quarter of 2019, one notified data breach affected '10 000 001 or more' people.¹⁷⁵⁴

In light of the significant risks of harm to individual consumers from data breaches, the ACCC recommends that digital platforms should be subject to additional requirements to maintain adequate information security management systems that meet accepted international standards (see recommendation 18(5)).

(c) Risks to consumers from increased profiling

The large volumes of user data controlled by digital platforms may also be used in psychological profiling of users for commercial interests. Marketers commonly segment their target audience into demographics defined by objective traits such as age, gender, marital status, or income. This demographic information is increasingly complemented with psychographic information that measures more subjective and intangible traits such as a target audience's attitudes and interests.¹⁷⁵⁵

Detailed online profiles about consumers can be used to influence their behaviour, which causes consumer harm from risks associated with manipulation and loss of autonomy.¹⁷⁵⁶ As noted earlier, the ACCC consumer survey found that consumers are uncomfortable with the use of their personal information to create profiles or monitor online activities to enable targeted advertising, with more than three out of four of digital platforms users surveyed finding it a misuse of their personal information.¹⁷⁵⁷

1747 OAIC, [Guide to managing data breaches](#), February 2018, accessed 29 April 2019.

1748 Information provided to the ACCC.

1749 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: January 2018 – March 2018](#), p. 5.

1750 OAIC, [Notifiable Data Breaches Quarterly Statistics Report 1 April – 30 June 2018](#), 31 July 2018, p. 5.

1751 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 July – 30 September 2018](#), 30 October 2018, p. 5.

1752 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 January – 31 March 2019](#), 15 May 2019, p. 5.

1753 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 July – 30 September 2018](#), 30 October 2018, p. 14.

1754 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 January – 31 March 2019](#), 15 May 2019, p. 5.

1755 A. Samuel, 'Psychographics are just as important for marketers as demographics', *Harvard Business Review*, 11 March 2016, accessed 13 November 2018.

1756 CPRC, 'A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia', May 2019, p. 34-36.

1757 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 21.

Digital platforms can be a rich source of psychographic information. Social media platforms provide both analytics tools to identify trends in interests and attitudes and social media monitoring that can help with identifying emerging issues or psychographic clusters.¹⁷⁵⁸ A high-profile example of social media user data used in psychological profiling is the Cambridge Analytica data breach in March 2018. Access to user data profiles led to Cambridge Analytica building models that enabled it to profile individual US voters and target them with personalised political ads.¹⁷⁵⁹

Highly specific categories can also be used to target groups to inflame societal tensions. News reports have stated that Facebook ad categories in Australia included: nationalism, opposition to immigration, 'far left politics' and 'far right politics,' and movements such as 'vaccine controversies' and 'climate change denial'.¹⁷⁶⁰

The risks of detailed profiling of users extend beyond the targeting of political ads and include potential price discrimination by online retailers.¹⁷⁶¹ Price discrimination may result in businesses setting higher prices for one group or person relative to another. In some instances, it may allow businesses, particularly monopolies¹⁷⁶², to take more of the benefit that would otherwise go to consumers through these higher prices.¹⁷⁶³ The increasing availability of data and use of sophisticated pricing algorithms, particularly by online retailers, increases the scope for businesses to engage in highly personalised pricing, effectively sorting customers into ever finer categories.¹⁷⁶⁴ However, the ACCC notes that, to date, there has been limited anecdotal evidence of individually personalised, online price discrimination.¹⁷⁶⁵ See further section 8.2 in chapter 8 for a further discussion on future implications of price discrimination.

The OAIC's 2017 survey found that only 21 per cent of respondents were comfortable with targeted advertising based on their online activities and only 17 per cent felt comfortable with social media companies keeping databases of information on their online actions.¹⁷⁶⁶

(d) Risks to consumers from discrimination and exclusion

As discussed above, the increased data collection and sophistication of analysis allows digital platforms to offer highly targeted audience segments to advertisers. This increasing ability to segment individuals, however, increases the risk that consumers can experience discriminatory or exclusionary harm as the result of this targeting.

The specificity of advertising enables highly detailed segmentation of consumers that may be used to exclude or discriminate against groups of people. Recent research from the CPRC noted that consumer profiles are already used 'to support automated decision-making in finance, insurance, employment and other industries'.¹⁷⁶⁷ For example, insurance provider MLC had requested access to the medical records of a consumer indicating that she had accessed mental health services for sexual abuse she suffered as a child in the 1980s, which led to MLC excluding her from mental health coverage in her life insurance.¹⁷⁶⁸

1758 A Samuel, [Psychographics are just as important for marketers as demographics](#), *Harvard Business Review*, 11 March 2016, accessed 13 November 2018.

1759 See, for example C Cadwalladr & E Graham-Harrison, [Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach](#), *The Guardian*, 18 March 2018.

1760 McDuling and Duke, [Facebook targeting of extremists, fringe movements in Australia stokes civil unrest fears](#), 25 February 2019, accessed 27 April 2019.

1761 As discussed in [CPRC Survey Report](#), 10 March 2018, p. 24.

1762 Office of Fair Trading, [The economics of online personalised advertising](#), May 2013, p. 89.

1763 Office of Fair Trading, [The economics of online personalised advertising](#), May 2013, p. 24.

1764 Competition and Markets Authority, [Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#), 8 October 2018, p. 36. For anecdotal discussion on instances of online price discrimination, see P Longman, [Big tech is spying on your wallet](#), *Washington Monthly*, April/May/June, accessed 17 May 2019.

1765 Competition and Markets Authority, [Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#), 8 October 2018, p. 3.

1766 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. ii.

1767 CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, p. 36.

1768 ABC News, [Insurers gaining 'open-ended access' to medical records slammed as 'unfair privacy breach'](#), 24 January 2019, cited in CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, p. 36.

Many digital platforms give advertisers the ability to exclude consumer segments that an advertiser considers are not relevant to their advertisement, or to protect groups from inappropriate ads.¹⁷⁶⁹ There is a risk that such tools could be used to unfairly discriminate against or exclude groups of consumers on the basis of information in their online profiles, which are usually opaque to consumers and do not provide a way for consumers to see or verify the information held about them or to appeal decisions made on the basis of that information.¹⁷⁷⁰

For example, in September 2017, ProPublica found that its journalists could purchase rental ads from Facebook that excluded categories of users, including categories relating to ethnicity, language, and (dis)ability.¹⁷⁷¹ In April 2018, responding to feedback about exclusion advertising, Facebook stated that it had 'removed thousands of categories from exclusion targeting .. [and] focused mainly on [removing] topics that relate to potentially sensitive personal attributes, such as race, ethnicity, sexual orientation and religion'.¹⁷⁷² In July 2018, Facebook signed a legally binding agreement with the Washington State Attorney-General to make changes to its advertising categories available in the US to remove, '...the ability of third-party advertisers to exclude ethnic and religious minorities, immigrants, LGBTQ individuals and other protected groups from seeing their ads'.¹⁷⁷³ In August 2018, Facebook stated:

'...while these options [for exclusion] have been used in legitimate ways to reach people interested in a certain product or service, we think minimizing the risk of abuse is more important. This includes limiting the ability for advertisers to exclude audiences that relate to attributes such as ethnicity or religion'.¹⁷⁷⁴

The ACCC considers that the increase in data collection enables more detailed targeting of individual consumers, which increases the likelihood and magnitude of consumer harm resulting from risks associated with discriminatory or exclusionary targeting. These risks are exacerbated by the opacity of information provided to consumers about how their data is or may be used and the lack of control asserted by consumers over their personal information and user data.

(e) Particular risks to vulnerable consumers

The extensive amount of data collected by digital platforms may include data that identifies (or infers) an individual's vulnerabilities. The detriments identified above can be especially harmful to vulnerable consumers by placing them at risk of being targeted with inappropriate products or scams, discriminated against, or inappropriately excluded from markets. Submissions to the Inquiry have highlighted that the risks associated with data collection and use could be particularly acute for children.¹⁷⁷⁵

Recent research by the CPRC similarly notes that the collection, sharing and use of data may have special harms for children.¹⁷⁷⁶ To address these issues and minimise the harm caused to children, the ACCC recommends that there should be requirements for digital platforms to minimise the collection of children's personal information or additional restrictions where children's personal information is collected, used or disclosed for targeted advertising or online profiling purposes (see recommendation 18(4)).

1769 Facebook, [reviewing targeting to ensure advertising is safe and civil](#), 24 April 2019, accessed 29 April 2019.

1770 CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, p. 37.

1771 J Angwin, A Tobin and M Varner, '[Facebook \(Still\) Letting Housing Advertisers Exclude Users by Race](#)', 21 November 2017, accessed 20 November 2018.

1772 Facebook, [Reviewing Targeting to Ensure Advertising is Safe and Civil. 24 April 2018. accessed 20 November 2018.](#)

1773 Washington Attorney General's Department, Media release, [AG Ferguson Investigation Leads To Facebook Making Nationwide Changes To Prohibit Discriminatory Advertisements On Its Platform](#), 24 July 2018, accessed 29 April 2019.

1774 Facebook, [keeping advertising safe and civil](#), 21 August 2018, accessed 29 April 2019.

1775 Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Australian Council on Children and the Media, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Foundation for Alcohol Research and Education, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Public Health advocacy institute of Western Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019

1776 CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, pp. 39-40.

In addition to risks posed to young children, psychological profiling of consumers may facilitate discrimination against certain groups on the basis of their willingness to pay as well as for their gender, race or sexual orientation.¹⁷⁷⁷ Tools that target consumers based on their online profiles and browsing history may also result in unfair exclusion to accessing products and services. For example, consumers with a low socio-economic background would be harmed if online profiling is used to distinguish between high-value and low-value customers, particularly in essential services markets.¹⁷⁷⁸

Certain groups of consumers may lack the technical, critical and social skills to engage with the internet in a safe and beneficial manner in all circumstances despite increasing use of internet connected devices, especially tablets and smartphones for these groups.¹⁷⁷⁹ A report by the eSafety Commissioner found that respondents aged over 70 years old were more likely to experience a security breach, such as a virus attack, having contact details stolen, or becoming a victim of a scam.¹⁷⁸⁰

(f) Decreased consumer welfare from reduced competition

As discussed previously, information asymmetries and inequalities in bargaining power limit consumers' ability to access the product that best meets their data and privacy preferences. Despite consumers' demand for greater control and transparency over the collection and use of their data, information asymmetries and bargaining power inequalities are likely to have reduced the degree of competition between digital platforms over the quality of data and privacy protections. The information asymmetry may also limit the ability of potential new entrants that provide greater data and privacy protections or transparency in data collection from competing with incumbent digital platforms.

As a result, Australian consumers may suffer a decrease in welfare from reduced choice and reduced quality of digital platforms services along the privacy dimension, compared to consumers in jurisdictions with stronger privacy protections in place. Consumers in the EU may access many of the same digital platforms as Australian consumers, but the application of stricter rules under the GDPR appears to translate to greater rights under digital platforms' data and privacy policies for EU-residents.

For instance, WhatsApp's EU users are not required to consent to Terms of Service allowing their user data to be combined with Facebook user data. WhatsApp's terms for EU users say: 'Nothing you share on WhatsApp, including your messages, photos, and account information, will be shared onto Facebook'. In contrast, Australian users must consent to terms that state: 'WhatsApp receives information from, and shares information with, [the Facebook family] of companies'.¹⁷⁸¹

In addition to increasing transparency, privacy and data protection laws can also provide incentives for digital platforms to improve the privacy dimension of their services to meet consumer demand, despite a lack of competitive constraint. Such laws could also improve the detection and punishment of certain data practices.

As discussed in chapter 3, user data is a key input in the supply of online advertising services because it enables precise targeting of ads, which means that the collection of larger volumes of user data can provide a competitive advantage. As such, digital platforms have an incentive to exploit existing information asymmetries to obtain more user data and personal information from its users, enabling them to create more specifically targeted advertising opportunities to sell to advertisers.

In response, rivals competing for the same advertising revenue may endeavour to protect their market share by adopting similarly invasive data practices. It would be difficult for consumers themselves to detect and punish certain data practices, due to the existing information asymmetries and bargaining power imbalances. Therefore, privacy and data protection laws can perform an important role in monitoring and deterring problematic data practices that result in consumer harm.

1777 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA's call for information](#), June 2015, p. 128.

1778 As discussed in Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 24.

1779 For example, toddler, pre-schoolers and children under nine: EU Kids Online, [Zero to eight: Young children and their internet use](#), LSE August 2013, p. 4.

1780 eSafety Commissioner, [Understanding Digital Behaviours of amongst adults aged 50 years and over](#), September 2017, p. 102.

1781 WhatsApp [Terms of Service](#) for non-EU users, viewed 22 May 2019.

7.9.2 Data practices and consumer harms extend beyond digital platforms

The detriments identified in section 7.9.1 above affect not only consumers of digital platform services, but may extend to the myriad of industries across the Australian economy that collect, use or disclose the user data of Australians. This is because information asymmetries, bargaining power imbalances, and behavioural biases identified in this chapter also characterise the data practices of many other businesses beyond digital platforms.

They include financial institutions (for example, banks providing access to transaction data), telecommunications service providers, retailers offering rewards card schemes (for example, Woolworths Rewards Program, Coles Fly Buys), airlines (for example, Qantas Frequent Flyer program), and news media businesses. Data brokers also have a central role in exchanging and combining personal information and data across a wide variety of sectors in Australia.¹⁷⁸² Consumer interactions with these entities raise similar concerns as the data practices of some digital platforms.

Some of these key concerns are set out below.

First, consumer concerns with data collection and use are not confined to digital platforms. The OAIC survey indicates that Australians have concerns over the collection, use and disclosure of their information by entities across the Australian economy.¹⁷⁸³ Second, the ACCC has found that consumer experiences indicate that other sectors may employ similar data practices to those raising concerns about digital platforms. They include:

- **Many users do not read the online privacy policies of entities that are not than digital platforms.** The length and complexity of privacy policies is not an issue exclusive to digital platforms. Research suggests that a decreasing number of consumers say that they read privacy policies across all online businesses.¹⁷⁸⁴
- **Entities other than digital platforms seek consents using clickwrap agreements.** Clickwrap agreements are commonly used in various industries, including off-the-shelf software, smartphone applications, social media and a host of online services to consumers, small businesses and even occasionally large businesses.¹⁷⁸⁵ The terms of service for both Nine and News Corp Australia require that users accept their privacy policy as part of agreeing to their Terms of Use.¹⁷⁸⁶
- **Entities other than digital platforms share user data with third parties and use consumers' personal information for targeted advertising and profiling.** The ACCC has found that other entities collect personal information for targeted advertising and profiling purposes, sometimes without providing consumers with clear notice. News Corp does not mention third party use of personal information by advertisers in its Terms of Use, nor does it identify any third party businesses that it may share users' information with. As discussed below in box 7.28, News Corp has reported that it has several strategic partnerships that combine datasets from Skyscanner, Near, Ticketek Entertainment Group and Quantum. NAB reportedly supplies Quantum with de-identified customer transaction data from NAB account holders. However, the NAB's privacy policy does not state this.¹⁷⁸⁷

Third, the ACCC is concerned that the same consumer harms found in digital platforms data practices (such as decreased consumer welfare from reduced competition and reduced privacy, and risks to consumers from discriminatory targeting) exist in the broader Australian economy. In particular, users are exposed to data breach risks in a variety of industries.

1782 CPRC, [A Day in the Life of Data Removing the opacity surrounding the data collection, sharing and use environment in Australia](#), May 2019, p. 8-11. See further Federal Trade Commission, [Data Brokers: A Call for Transparency and Accountability](#) (May 2014).

1783 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017.

1784 See for example: OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017; OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018.

1785 Clayton Utz, [Click-wraps the way of the future – but make sure they're legal](#), 2 August 2018, accessed 29 April 2019.

1786 News Corp, [Terms of Use](#), accessed 29 April 2019; Nine Entertainment co, [Terms of service](#), accessed 29 April 2019.

1787 NAB, [Privacy policy](#), accessed 30 April 2019; ABC, [Sportsbet's big punt](#), 15 March 2019, accessed 30 April 2019.

The OAIC's quarterly statistics includes a breakdown of sectors that reported breaches under the NDB Scheme. The top five industry sectors in the first quarter of 2019 were health service providers, finance (including superannuation), legal, accounting & management services, education, and retail.¹⁷⁸⁸ Notable data breach incidents involving third parties outside digital platforms services markets include:

- the Cambridge Analytica data breach involving Facebook's user information discussed earlier in Box 7.20 'Data-sharing with third-party app developers'), and
- the Australian Red Cross Blood Service data breach, where a third-party provider saved a file containing the personal information of approximately 55 000 prospective blood donors on a public facing web-server.¹⁷⁸⁹

A more detailed discussion on common data practices of entities that are not digital platforms, see box 7.28 'Data collection and use by businesses in advertising, media and other sectors'.

Box 7.28: Data collection and use by businesses in advertising, media and other sectors

During this Inquiry, the ACCC has received information from stakeholders, including in submissions on the Preliminary Report, indicating that data practices of concern are not confined to the data practices of digital platforms.¹⁷⁹⁰

Advertising Services

Large amounts of data are collected and used in advertising services:

- APIs not only provide data to the digital platforms which provide them, but also to the app developers themselves. Apps routinely ask for a number of permissions to collect a variety of data that can be used for purposes other than providing the service. An Australian study of medicine-related Android apps found that '19 of the 24 apps shared data outside of the app to a total of 55 entities, owned by 46 parent companies' including personal information such as email addresses, medical conditions and drug lists.¹⁷⁹¹
- Data firms are significant holders of consumer data, which allows them to offer insights for businesses and advertisers. Quantum has relationships with large Australian businesses which themselves provide large amounts of data, including Woolworths (part-owner of Quantum) and NAB (which shares deidentified spending data with Quantum).

Media Services

Media companies are holders of consumer data, and are beginning to offer services based on this data, particularly for advertising services. For example:

- News Corp, as part of its audience targeting platform, reported in March 2019 that it has entered into strategic partnerships with businesses including Ticketek, Skyscanner (an online travel search company), Quantum and Near (a geo-targeting company that provides anonymous mobile location data for targeting purposes).¹⁷⁹² News Corp stated that the combination of these data partnerships enables it to offer 1 600 customer segments, including '96 000 cricket fans who regularly eat fast food, 53 000 live sport lovers primed and ready to buy a new car and 55 000 AFL fans searching for a home loan'.¹⁷⁹³

1788 OAIC, [Notifiable Data Breaches Quarterly Statistics Report 1 January – 30 March 2019](#), 13 May 2019.

1789 OAIC, [Office of the Australian Information Commissioner: Annual Report 2017-18](#), 17 September 2018, p.62.

1790 See for example Google, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 2.

1791 Willis and Bogle, [Data sharing by popular health apps found to be 'routine', prompting calls for more transparency](#), The New Daily, 21 March 2019, accessed 27 April 2019.

1792 News Corp Australia, [News Corp Australia takes News Connect to new levels](#), 19 March 2019, accessed 27 April 2019.

1793 News Corp Australia, [News Corp Australia takes News Connect to new levels](#), 19 March 2019, accessed 27 April 2019.

- Nine reports that it has data partnerships with Microsoft, Experian (a data analytics firm) and Roy Morgan, which it has stated combine for the ‘world’s richest media owned data lake’.¹⁷⁹⁴ Nine says its data partnership with Microsoft offers over 200 targeting segments, ensuring that an advertiser ‘can target any attribute you want to’.¹⁷⁹⁵ Its partnerships with Roy Morgan and Experian allow for the combination of its online data with ‘the most colourful and rich offline profiles’.¹⁷⁹⁶ Nine’s head of data products reportedly stated in September 2018 that Nine was most interested in data partnerships that provide access to personally identifiable datasets.¹⁷⁹⁷

In its submission to the Preliminary Report, Nine noted that the collection and use of personal information is critical to the business models of a range of businesses in Australia (beyond the digital platforms). It said that this is an area of increased focus for Nine and that ‘the ability to collect and use personal information without any unreasonable constraints’ was necessary for Nine’s advertising service to competitively constrain digital platforms’ advertising services.¹⁷⁹⁸

Other sectors

Other areas involve increasing collection and use of data. Examples include:

- Retailers can collect a large amount of consumer data through consumer loyalty cards which allows them to better target customers.¹⁷⁹⁹ Woolworths, in concert Quantum, which it part-owns, uses its loyalty rewards program to run a ‘personalisation engine’ to target offers to individual customers; Woolworths states that using this system makes it five times more likely that the product offered is purchased.¹⁸⁰⁰ Woolworths has also stated previously that it was able to combine its insurance company’s data with its rewards database to determine which customers to target with better insurance offers.¹⁸⁰¹
- Free wifi services often require, as part of a user accessing the wi-fi, agreement to terms that allow collection of a wide variety of data: for example, Westfield wi-fi’s terms of use states that the data collected will include a user’s name, number, location data, time of arrival and departure at the centre, and pages accessed;¹⁸⁰² and that Westfield can ‘for an indefinite period, use the information for the purposes set out above and for promotional, marketing, publicity, research and profiling purposes, including sending electronic messages or push notifications or telephoning users and for such other purposes as set out in our Privacy Policy’.¹⁸⁰³ The terms of use also state that Westfield can combine any unidentifiable data it holds about a consumer with identifiable data provided when that consumer accesses the wi-fi.
- Consumer data is being increasingly used in elections, with political parties employing in-house data analysis,¹⁸⁰⁴ data analytics firms, or lookalike audience features on digital platforms,¹⁸⁰⁵ to target voters.

The ACCC notes that, as part of addressing its 2019 compliance and enforcement priority into ‘competition and consumer issues arising from customer loyalty schemes’, it has commenced a review of customer loyalty schemes with a focus on the major customer loyalty schemes available in Australia. The objective of this review is for the ACCC to gain a better understanding of how customer loyalty schemes operate; the collection, use and disclosure of consumer data; and the terms and conditions of these schemes. This review may also be a precursor for industry engagement to address any issues or problems identified. The ACCC anticipates releasing a report detailing its findings in mid-2019.

1794 Nine Entertainment, [Data and Targeting](#), 26 April 2019, accessed 27 April 2019.

1795 Nine Entertainment, [Data and Targeting](#), 26 April 2019, accessed 27 April 2019.

1796 Nine Entertainment, [Data and Targeting](#), 26 April 2019, accessed 27 April 2019.

1797 Crozier, [Nine, eBay Australia try to onboard more identity data](#), 11 September 2018, accessed 27 April 2019.

1798 Nine, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

1799 N Wallace and S Whyte, [Supermarket spies: big retail has you in its sights](#), Sydney Morning Herald, 16 September 2013, accessed 27 April 2019.

1800 Quantum, [WOW personalisation](#), 3 November 2016, accessed 27 April 2019.

1801 W Ma, [Woolworths: no ads, just data](#), Adnews, 5 September 2013, accessed 27 April 2019.

1802 Westfield, [Wifi terms of service](#), accessed 27 April 2019.

1803 Westfield, [Wifi terms of service](#), accessed 27 April 2019.

1804 A Burns and M Morris, [Political parties may know a lot more about you than you think](#), ABC 730, 22 November 2018, accessed 27 April 2019.

1805 See discussion in DCMS, [Disinformation and ‘fake news’: Final Report](#), 14 February 2019, 17-18.

7.9.3 Economy-wide scope of recommendations

The prevalence of potentially problematic data practices beyond digital platforms supports the implementation of some economy-wide changes to strengthen the privacy regulatory framework in Australia. However, the ACCC notes submissions from stakeholders who oppose the economy-wide scope of the preliminary recommendations to amend the privacy regulatory framework.¹⁸⁰⁶ This section sets out:

- the ACCC's analysis on the strengths of both an economy-wide approach and of a digital platforms industry-specific approach
- the ACCC's conclusion that some of the recommended amendments to the privacy law should apply economy-wide.

(a) Strengths of an economy-wide approach

(i) Increase in consumer welfare in other markets

An economy-wide approach to addressing problematic data practices would ensure that consumers transacting in other markets receive consistent consumer protections and welfare improvements as digital platforms users. It would also protect consumers using digital platforms in cases where their personal information is shared with third parties that would not be covered under a digital platform specific regime.

(ii) Reduced risk of competitive distortions

An economy-wide approach would reduce the risk of gaps that allow businesses to avoid regulation and avoid the risk of distorting investment signals.¹⁸⁰⁷ That is, it could reduce the risk of digital platforms shifting some of their data practices to third party businesses to avoid having to notify users of such practices, or to avoid having to delete users' personal information.

It could also preserve competitive neutrality between businesses that offer similar products, such as advertising services, but may not all be required to comply with industry-specific regulation. With industry-specific regulation, investors and consumers may find digital platforms less attractive as a result of their higher regulatory costs, not because of changes in their relative ability to provide customers with better products more cheaply.¹⁸⁰⁸ A key example relevant to digital platforms is that online media businesses typically seek to collect information from their audience and subscriber base and use it to sell targeted advertising opportunities in competition with digital platforms offering display advertising opportunities. Restricting the ability of digital platforms to collect and use their users' data (and not online media businesses) would introduce a degree of regulatory asymmetry that would advantage media businesses and disadvantage digital platforms.

(iii) Increased visibility and reduced complexity for businesses and customers

An economy-wide approach can increase the visibility of privacy regulation to promote understanding and compliance.¹⁸⁰⁹ This can also reduce complexity for both businesses and consumers. While the Terms of Reference for the Inquiry have a relatively clear definition of digital platforms (search engines, social media platforms and digital content aggregators), other online businesses such as Amazon, eBay, Gumtree are also typically considered digital platforms due to their role in matching advertisers/businesses and consumers. Complex, industry-specific definitions could create confusion for consumers who may incur difficulties identifying digital platforms that are, and are not, covered.

1806 See submissions from Google, Free TV, International Center for Law & Economics, AANA, BSA / The Software Alliance, Arnold Bloch Liebler, MIGA, Indue, Insurance Council of Australia, Fundraising Institute of Australia.

1807 OECD, [Relationship between regulators and competition authorities](#), June 1999, p. 31.

1808 Consumer Affairs Victoria, [Choosing between general and industry specific regulation. Research Paper No. 8](#), November 2006, p. 8.

1809 Consumer Affairs Victoria, [Choosing between general and industry specific regulation. Research Paper No. 8](#), November 2006, p. 8.

The interconnected nature of digital platforms' business models may result in compliance that is broader than the reach of digital platforms. Google submitted that 'it is inevitable that the introduction of privacy rules that apply only to certain digital platforms would, as a practical matter, extend beyond those digital platforms, requiring other businesses to incur costs and invest resources in ensuring compliance with new privacy standards applicable under those rules'.¹⁸¹⁰ The OAIC's submission supports an economy-wide application of amendments to the Privacy Act to improve privacy practices in Australia.¹⁸¹¹

(iv) Adaptable to new and emerging industries

An economy-wide approach provides flexibility for deregulation as technological and other conditions change over time, reducing the need to modify legislation to cover new products, industries or ways of doing business.¹⁸¹² This strength is particularly important in digital markets characterised by rapid technological development and innovation.

(b) Strengths of a digital platform-specific approach

(i) Ability to tailor regulation to the particular needs of the digital platforms market

A key advantage of industry-specific regulation is that it can target particular issues of a single industry. Greater specificity and technical rules can make it easier to enforce and prove a breach. Industry-specific regulation can be more effective when an issue is more diverse in nature across industries, when an industry is more homogeneous, when it has industry-specific technical issues, and when technical standards are required.¹⁸¹³ The OAIC notes that, given the range of heightened privacy risks in the digital platforms sector identified in the Preliminary Report, 'the handling of personal information by digital platforms is an area where higher or more particular standards are warranted'.¹⁸¹⁴

(ii) Reduced risks of unintended consequences in other markets

Due to the confined nature of industry-specific regulation, it can minimise the risk of unintended consequences such as:

- the application of regulation to industries in which it is not needed,
- overlap of multiple, potentially conflicting regulations and rules,
- businesses incurring unanticipated compliance costs,
- a reduction in data-based innovations for businesses and consumers,
- a reduction in beneficial, personalised services, and
- increasing barriers to entry.

Submissions to the Preliminary Report have raised concerns regarding regulatory overlap for industries where personal information and data management is already regulated,¹⁸¹⁵ compliance costs for businesses whose systems are not designed to comply with potential notification and deletion requirements,¹⁸¹⁶ and the potential for data protection regulations to curb innovation.

1810 Google, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 4.

1811 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 4.

1812 See, for example, Consumer Affairs Victoria, [Choosing between general and industry specific regulation. Research Paper No. 8, November 2006](#), p. 7 and ACCC, [Submission to the Productivity Commission Review of the National Access Regime](#), December 2000, p. 68.

1813 Consumer Affairs Victoria, [Choosing between general and industry specific regulation. Research Paper No. 8, November 2006](#), p. 10.

1814 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 9.

1815 MIGA p. 10; Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5, Optus, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

1816 ACCC Privacy Roundtable summary.

7.9.4 ACCC views on scope of recommendations

The ACCC considers that the most effective way to regulate issues occurring across a wide range of industries is to employ economy-wide regulatory reform. Where necessary, these economy-wide changes will be supplemented by specific obligations targeted at the conduct of digital platforms in particular.

This not only enables consumer harms occurring in the broader economy to be addressed but also minimises the risks of creating loopholes that could be exploited by digital platforms if they did not wish to comply. A digital platform-specific approach would not provide any meaningful protections to consumers due to the numerous pathways that would still exist for significant consumer harm, given the multiple sectors currently involved in collecting consumer data. Economy-wide privacy protections are also better able to maintain the consumer trust necessary to facilitate data-based innovations in the digital economy.

The ACCC recognises that there are also significant benefits in industry-specific approaches to regulation that may be effective in addressing particular concerns identified in this Inquiry and considers that economy-wide and industry-specific regulations may be both necessary and mutually-reinforcing.

This Inquiry has also highlighted the intersecting issues in data protection, competition and consumer protection. Consumer and privacy laws, as well as competition law, are critical in addressing potential harms associated with data collection and use practices. The ACCC considers, therefore, that regulatory reform of both the Privacy Act and the ACL is required to help address these potential harms.

Therefore, the ACCC's recommendations include both economy-wide and industry-specific recommendations to increase the effectiveness of both the Privacy Act and the ACL:

- recommendation 16 contains a range of targeted amendments to the Privacy Act and Recommendation 17 contains suggestions for broader reform of Australian privacy regulation. Both of these recommendations will lead to changes that apply economy-wide, affecting Australian businesses that are classified as APP entities. The ACCC estimates that there is likely to be at least 100 000 APP entities,¹⁸¹⁷ noting that the existing small business exemption in the Privacy Act may exclude an estimated 94 per cent of Australian businesses.
- recommendation 18 seeks to establish a Privacy Code applying specifically to digital platforms that process a large volume of Australian consumers' personal information, to proactively target concerning data practices of digital platforms identified in this Inquiry.
- recommendation 19 provides for a new statutory tort for serious invasions of privacy. It will apply across the economy with broader coverage than the Privacy Act amendments in recommendation 18. This will establish for consumers a base level of privacy and data protection in Australia by providing a means of redress against serious invasions of privacy.
- recommendations 20 and 21 address economy-wide changes to the ACL to increase the deterrence against entities for using unfair contract terms or unfair practices in their dealings with Australian consumers.

In examining the options available, the ACCC considered the option of maintaining the status quo and not regulating at all. However, this would mean that the significant information asymmetries, bargaining power imbalances, and behavioural biases identified in this chapter would persist and may even escalate as the collection, use and disclosure of user data increases across the economy.

As discussed in this Report, poor data practices can cause a range of consumer harms, including from: reduced choice and reduced quality of digital platforms services along the privacy dimension of their services, risks of discrimination and exclusion, and decreased privacy leading to increased risks of cybercrime. These consumer harms can lead to a substantial reduction in consumer welfare despite consumers receiving many digital platform services for zero upfront monetary cost.

The ACCC considers that strong privacy protections can help prevent consumer harm and protect and enhance consumer welfare. The ACCC also considers that strengthened privacy safeguards have the potential to encourage growth and innovation in the digital platforms market. They can generate and maintain trust between consumers and digital platforms and other businesses that seek to use

¹⁸¹⁷ ACCC Privacy Roundtable summary.

consumer data to innovate and develop new products. Such safeguards can reduce the potential economic and social harm from the misuse of personal information. These include costs to businesses relating to data breaches, such as implementing remedial measures, defending possible legal action, and repairing reputational damage.

The ACCC therefore considers that the most effective way to address the issues identified in this Inquiry is to implement a combination of economy-wide and industry-specific regulatory reforms to both privacy and consumer law, as outlined above.

Box 7.29: Regulatory costs and net public benefit of recommendations

To address the data practices of concern identified in this chapter (which are not limited to digital platforms), the ACCC examined whether no regulation, industry specific or economy-wide regulation should be adopted to address these issues. For the reasons outlined, the ACCC considers that economy-wide regulatory reform is needed in some circumstances, and should apply to businesses beyond digital platforms.

The ACCC made the recommendations in this chapter based on the benefits that can be realised in addressing the market inefficiencies identified and ensuring a competitive market that confronts the current inefficient and inequitable outcomes for Australian consumers. It has identified the benefits that this regulation will have on innovation. If consumer trust in providing data can continue long-term, then data-driven innovations by business can continue in the Australian economy. This is particularly relevant as other jurisdictions seek to strengthen their privacy regulations above those protections that exist within Australia.

However, the ACCC is aware that the recommendations in this chapter will, if implemented, have direct cost impacts on businesses other than digital platforms. Some submissions to this Inquiry have argued that this is a reason either not to pursue regulatory reform or to delay reform until these can be extensively detailed. These regulatory costs, along with the benefits, are important considerations in ensuring the recommendations result in a net public benefit and it is important that the regulatory costs are calculated and considered.

7.10 Recommendations

The rapid growth of online activity, including the high levels of social media penetration in Australia, has increased the need for enhanced privacy and data protection. This need is particularly acute given the multi-faceted and pervasive role digital platforms now perform in Australian communities, including as a communication tool for schools, community groups, sports clubs and governmental bodies. Many Australian consumers therefore find they must use digital platforms to receive communications and remain involved in community life.

The ACCC has found that a number of market and regulatory failures exist that prevent consumers from making informed choices as to how their personal information is collected, used and shared with others by entities, including digital platforms. These failures may also impede competition by rival services on the basis of offering higher of privacy protection.

The market and regulatory failures include:

- information asymmetries that undermine a consumer's ability to assess whether services align with their privacy preferences
- bargaining power imbalances that prevent consumers from making genuine choices as to how their personal information is collected, used and shared
- behavioural biases that work against consumers' ability to select privacy options that better align with their privacy concerns
- a lack of effective deterrence under current consumer protection and privacy laws against certain data practices by digital platforms.

The recommendations below seek to address these failures to improve consumers' ability to make well-informed, genuine choices regarding digital platforms' products and services that maximise their welfare and improve competition between digital platforms on the privacy dimensions of their services.

Recommendation 16 – Strengthen protections in the Privacy Act

Summary of amendments

- **Recommendation 16(a) Update 'personal information' definition:** Update the definition of 'personal information' in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data, and any other online identifiers that may be used to identify an individual.
- **Recommendation 16(b) Strengthen notification requirements:** Require all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an overriding legal or public interest reason.

The notice must be concise, transparent, intelligible and easily accessible, written in clear and plain language, provided free of charge, and must clearly set out how the APP entity will collect, use and disclose the consumer's personal information. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user.

To provide consumers with a readily understood and meaningful overview of an APP entity's data practices and as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of multi-layered notices or the use of standardised icons or phrases.

- **Recommendation 16(c) Strengthened consent requirements and pro-consumer defaults:** Require consent to be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

Valid consent should require a clear affirmative act that is freely given, specific, unambiguous and informed (including about the consequences of providing or withholding consent). This means that any settings for data practices relying on consent must be pre-selected to 'off' and that different purposes of data collection, use or disclosure must not be bundled. Where the personal information of children is collected, consents to collect the personal information of children must be obtained from the child's guardian.

It may also be appropriate for the consent requirements to be implemented along with measures to minimise consent fatigue, such as limiting consent requirements to when personal information is collected for a new purpose, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers' comprehension and decision-making.

- **Recommendation 16(d) Enable the erasure of personal information:** Require APP entities to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.
- **Recommendation 16(e) Introduce direct rights of action for individuals:** Give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy under the Privacy Act.
- **Recommendation 16(f) Higher penalties for breach of the Privacy Act:** Increase the penalties for an interference with privacy under the Privacy Act to mirror the increased penalties for breaches of the Australian Consumer Law.

The ACCC recommends a range of amendments to Australian privacy legislation to increase the level of transparency and control that consumers have over the data practices of all entities regulated under the Privacy Act.

Digital platforms acknowledge the importance of data protection and the need for privacy regulation to protect consumers' personal information. For instance, Facebook's submission supported 'updates to Australia's privacy laws to stay up-to-date with the increased data-driven nature of our economy and society'.¹⁸¹⁸ Google's submission supported 'smart regulation and other innovative ways to address emerging privacy and data protection issues here in Australia and around the world'.¹⁸¹⁹

The ACCC consulted publicly on the proposed Privacy Act amendments in the Preliminary Report. Generally, privacy and consumer advocates such as the Australian Privacy Foundation, Consumer Action Law Centre, Financial Rights Legal Centre, and the Foundation for Alcohol Research and Education, were supportive of the proposal to strengthen privacy laws in Australia. Their submissions highlighted the need to update existing privacy laws to address issues emerging in the data economy so that appropriate privacy and data protection safeguards were maintained for Australian consumers.

Stakeholders from wide-ranging industries such as Free TV, The Software Alliance, Optus, News Corp, Insurance Council of Australia and American Express generally opposed the proposed economy-wide application of the privacy law changes. Some of the submissions in opposition (Global Antitrust Institute, AI Group, REA Group) argued that the proposed amendments are likely to increase compliance costs and may have unintended consequences. Other submissions (AANA, Optus, ADMA) submitted that the proposed changes are not necessary because the current privacy regime is adequate. Other stakeholders such as Google, Twitter, and International Center for Law and Economics argued that further analysis and consultation is required.

The ACCC has considered the arguments for and against its proposal to strengthen privacy regulations. It notes the increasing awareness and concern of consumers about the privacy of their personal information being collected by digital platforms (as illustrated in the responses to the ACCC's consumer questionnaire the ACCC consumer survey). Similar concerns have been raised in consumer surveys in other sectors of the economy in Australia (including by the OAIC) and overseas.¹⁸²⁰

These surveys and other material received by the ACCC¹⁸²¹ have raised the importance of consumer trust in data security to ensure future data driven innovation. A report by the Productivity Commission stated that community trust is integral to data quality and access; and that a lack of community trust surrounding data collection can lead to underutilisation of data, and the erosion of any associated public benefits.¹⁸²²

The recommended amendments seek to address consumers' concerns and provide increased legal certainty for APP entities collecting, using, and sharing personal information. They seek to increase Australians' level of trust in organisations to keep their personal information secure and to use it responsibly. This is critical to encouraging the flow of data to enable organisations to realise the potential benefits of the new data age.¹⁸²³ As discussed at section 7.9, the ACCC considers it important for the Australian privacy regime to require a clear and consistent standard of data protection across different industries in the data-driven digital economy to consistently protect consumers and to achieve the economy-wide potential benefits of data.

Strengthening privacy protections under the Privacy Act will also improve the bargain between Australian consumers and digital platforms, in line with the 'better' bargain offered to consumers in other countries with stronger privacy protections. A number of jurisdictions have recently strengthened their data

1818 Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 48.

1819 Google, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 18.

1820 See, for example: Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 5; N Biddle, B Edwards, M Gray and S McEachern, [Public attitudes towards data governance in Australia](#), Australian National University, December 2018, P Hitlin and L Raine, [Facebook algorithms and personal data](#), Pew Centre, 16 January 2019, accessed 23 January 2019.

1821 See, for eg: [ACCC privacy roundtable summary](#); A Henschke, R Young, M Gould & H Smith, [From secrecy to agency: Trust and policy implications of shifting public attitudes to privacy](#), Australian National University, (10) 2019.

1822 Productivity Commission, [Data Availability and Use](#), March 2017, p. 127.

1823 See, for eg: [ACCC privacy roundtable summary](#); A. Henschke, R. Young, M. Gould & H. Smith, [From secrecy to agency: Trust and policy implications of shifting public attitudes to privacy](#), Australian National University, (10) 2019.

collection and consent requirements, including the EU,¹⁸²⁴ Japan,¹⁸²⁵ Argentina,¹⁸²⁶ and states within the US.¹⁸²⁷ This means that Australian consumers access the same digital platform services that are available in other countries but are often not afforded the same additional notifications, controls, or protections over their personal information. Similarly, firms that use personal information across jurisdictions must effectively meet higher data protection standards overseas than in Australia.

Finally, the ACCC notes that the OAIC should be sufficiently resourced to fulfil any additional functions arising from the proposed amendments to the Privacy Act in this recommendation, from a broader review of the Australian privacy framework (see recommendation 17) and to support its development and enforcement of a privacy code of practice applicable to digital platforms (see recommendation 18). The OAIC's submission to the Preliminary Report agrees that it should be resourced to undertake its broad range of functions and activities to drive an economy-wide uplift in privacy practices.¹⁸²⁸

Recommendation 16(a) – Update ‘personal information’ definition

Update the definition of ‘personal information’ in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data, and any other online identifiers that may be used identify an individual.

Overview

The definition of ‘personal information’ is central to the application of the Privacy Act but is currently subject to considerable legal uncertainty on the issue of whether technical data collected in relation to individuals is within the scope of the definition. The ACCC therefore recommends that the definition of ‘personal information’ should be updated to clearly capture any technical information such as the IP addresses, device identifiers, location data, and any other online identifiers that relate to an identified individual.

This update could be made by amending the definition of ‘personal information’ to reflect the wording used in the GDPR, which would be in greater alignment with international standards. Clarifying the definition of ‘personal information’ will update the Privacy Act in line with current and future technological developments relating to the scope of technical information collected, used and shared about individuals in the digital economy and is particularly important in light of the large and increasing volume of technical information collected from individuals in Australia.

Existing uncertainty as to scope of ‘personal information’

The Privacy Act regulates how the personal information of Australians is handled by APP entities. Information that is not ‘personal information’ falls outside the regulation of the Privacy Act. Currently, ‘personal information’ is defined in the Privacy Act as:

*information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable.*¹⁸²⁹

The OAIC's non-binding guidance states that personal information may include, for example, an Australian's name, signature, address, telephone number, date of birth, medical records, bank account details and commentary about that person.¹⁸³⁰

1824 The [General Data Protection Regulation 2016/679](#) came into effect 25 May 2018. Chapter 8 further discusses the EU's current (as at the time of this report) consideration of additional changes to its 2002 ePrivacy Directive which regulates the confidentiality of communications and rules in relation to tracking and monitoring.

1825 Personal Information Protection Commission, [Amended act on the Protection of Personal Information](#), came into effect 30 May 2017.

1826 Data Protection News, [Argentina publishes GDPR-style data protection bill](#), 25 September 2018, accessed 30 October 2018.

1827 See, for example California: the California Consumer Privacy Act of 2018 requirements will take effect from 1 January 2020).

1828 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, pp. 12-13.

1829 Privacy Act, s 6.

1830 Office of the Australian Information Commissioner, Guidance, [Privacy Act](#), accessed 2 November 2018. To note, this guidance is not included in the Privacy Act definition of personal information.

At present, there is significant legal uncertainty as to whether the definition of ‘personal information’ in the Privacy Act includes metadata such as IP addresses or other technical data. This issue was considered by the Full Federal Court in 2017 in *Privacy Commissioner v Telstra Corporation Ltd*.¹⁸³¹ In that decision, the Court upheld the decision of the Administrative Appeal Tribunal, which had found that network metadata was not sufficiently connected to an individual because the allocation of an IP address to a device is normally only temporary and can change frequently.

However, the Court also held that information is ‘personal information’ if the individual is the ‘subject matter of the information’¹⁸³² and that information can be inherently personal or it can be so when combined with other information,¹⁸³³ leaving open the possibility that metadata could *sometimes* constitute ‘personal information’.

In contrast, case law in the EU has found that dynamic IP addresses can be used to indirectly identify an individual where it is held with additional data that can be used to identify the individual.¹⁸³⁴ Such information, therefore, clearly constitutes personal data under European data protection laws. Under the EU GDPR, ‘personal data’ is defined as ‘any information relating to an identified or identifiable natural person’.¹⁸³⁵

The Full Federal Court’s finding is broadly consistent with the OAIC’s non-binding APP Guidelines regarding the scope of ‘personal information’, though ultimately neither provides specific guidance on when technical data is within the scope of the Privacy Act. The OAIC’s APP Guidelines states that a person’s information may become personal information if it is collated to make a person ‘reasonably identifiable’. It also states that whether information is ‘reasonably identifiable’ will depend on the circumstances and degree of information available.¹⁸³⁶

Given advancements in data analytics technologies and the volume of technical data relating to identifiable individuals that is collected, used and shared in digital markets, the ACCC considers that it is important to clarify that technical data relating to an identified individual is considered ‘personal information’ within the scope of the Privacy Act.

Need for clarification

The existing uncertainty about the scope of ‘personal information’ was raised by several stakeholders in submissions to the Preliminary Report.

The OAIC submitted that the definition of ‘personal information’ should be updated to align with the definition of ‘personal data’ in the GDPR to address ‘challenges posed by emerging technologies such as artificial intelligence and data analytics’.¹⁸³⁷ The Australian Privacy Foundation submitted that the ACCC’s preliminary recommendation to amend the Privacy Act ‘will not be sufficient to achieve its aims unless the definition of personal information in the *Privacy Act* is amended’. It submitted that the definition must include an IP address, a URL, or other information that can be used to identify an individual’, because ‘IP addresses, URLs and similar data are among the types of data most commonly correlated by Google or Facebook to identify data that is about an individual’.¹⁸³⁸ This view was endorsed by Dr Katharine Kemp and Dr Rob Nicholls.¹⁸³⁹

1831 *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.

1832 *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4, paras 5 and 73.

1833 To note, however, the *Telecommunications (Interceptions and Access) Act 1979* deems certain telecommunications metadata such as account details for devices and the location of equipment used in connection with a communication to be personal information. Under s.187AA of that Act, such metadata for the purposes of the *Telecommunications (Interceptions and Access) Act 1979* includes subscriber and account details for telecommunications services and devices; information about the sources and destinations of communications; the date, time and duration of communications; and the location of equipment or line used in connection with a communication.

1834 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (C-70/10, EU:C:2011:771)*, 24 November 2011, paragraph 51, which expressly states that dynamic IP addresses collected by ISPs constitutes personal data. See also *Breyer v Germany (ECLI:EU:C:2016:779)*, 19 October 2016.

1835 GDPR, Article 4(1).

1836 OAIC, [What is personal information?](#), Accessed 2 November 2018.

1837 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 11.

1838 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3.

1839 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6.

The Internet of Things Alliance Australia (ITAA) submitted that the proposed amendments should include data collected by an ‘ever increasing range of sensing and actuating products’ such as the range of Google Home products that ‘increase Google’s ability to capture information about the home environment that may, over time, through the use of data analytics, yield highly personal information such as home occupancy and a wide range of behaviours’.¹⁸⁴⁰ ITAA submitted that much of the data collected by these products would not currently be considered personal information under the Privacy Act.¹⁸⁴¹

Totally Awesome submitted that ‘it is critical to use a broad definition of personal information in any law protecting kids’ data privacy’.¹⁸⁴² The Obesity Policy Coalition stated the definition of ‘personal information’ as defined by either the Privacy Act or by the digital platforms ‘is unlikely to match the way consumers perceive ‘personal information’,¹⁸⁴³ which was also the ACCC’s finding in the Preliminary Report.¹⁸⁴⁴ However, the Law Council of Australia has opposed amending the definition of ‘personal information’ as it is a fundamental legal threshold issue that requires careful consideration.¹⁸⁴⁵

To provide clarity as to how the courts should interpret this central concept in the Privacy Act, the ACCC recommends that the definition of ‘personal information’ should be updated to include information such as IP addresses, device identifiers, and other technical data that may be used in combination with other information to identify an individual. This would update the scope of the Privacy Act to align with consumer expectations and to reflect the realities of how data is used in digital markets.

Alignment with international standards

Clarifying the definition of ‘personal information’ would align Australian privacy law with international data protection laws. For example, the GDPR regulates ‘personal data’, which is defined as ‘any information relating to an identified or identifiable natural person (‘data subject’). Such a person can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person’.¹⁸⁴⁶ Recital 30 of the GDPR states that:

Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them.

As noted earlier, it is established in European case law that technical data such as IP addresses can constitute ‘personal data’ when held with other information that may be used to identify an individual.¹⁸⁴⁷

The Australian Privacy Foundation submitted that it would be ‘highly desirable’ for Australian privacy law to adopt a similar approach to the GDPR.¹⁸⁴⁸ Dr Katharine Kemp and Dr Rob Nicholls noted that clarifying the definition of ‘personal information’ to include technical data is in line with the GDPR and that it ‘is essential that Australia has a clear definition of ‘personal information’ which takes account of the realities of the digital age’.¹⁸⁴⁹ Totally Awesome stated that, in addition to the GDPR:

*the FTC and most regulators have come to the conclusion that such identifiers are not in fact anonymous, can be resolved to specific persons, and must therefore be reclassified as personally identifiable information.*¹⁸⁵⁰

1840 Internet of Things Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 1.

1841 Internet of Things Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 1.

1842 Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 1.

1843 Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019 p. 4.

1844 ACCC Preliminary Report, pp. 185-187.

1845 Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 21.

1846 GDPR, Article 4(1).

1847 See *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (C-70/10, EU:C:2011:771)* and *Breyer v Germany (ECLI:EU:C:2016:779)*, 19 October 2016.

1848 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 4.

1849 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6.

1850 Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3.

The ACCC considers that there are significant benefits in updating the definition of ‘personal information’ so that it covers the realities of how data is collected on individuals in the digital economy and to bring the Australian privacy regime into greater alignment with standards set by overseas data protection regulations.

Recommendation 16(b) – Strengthen notification requirements

Require all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an overriding legal or public interest reason.

The notice must be concise, transparent, intelligible and easily accessible, written in clear and plain language, provided free of charge, and must clearly set out how the APP entity will collect, use and disclose the consumer’s personal information. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user.

To provide consumers with a readily understood and meaningful overview of an APP entity’s data practices as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of layered notices or the use of standardised icons or phrases.

Overview

To improve consumers’ awareness of how their personal information is collected, used and shared, and lessen the information asymmetry, the ACCC recommends that the Privacy Act is amended to require a notice of the information collected that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge. This means that the notice provided should be written at a level that can be readily understood by the minimum age of the child whose personal information is permitted to be collected.

All APP entities directly collecting personal information from a consumer or indirectly collecting personal information as a third party must provide this notice to consumers, unless the consumer already has this information or there is an overriding legal or public interest reason, such as being required under law or necessary to protect the safety of another individual.

Compliance with these notification requirements should be monitored through the OAIC’s existing audit powers under the Privacy Act and any non-compliance should be enforced by the OAIC and, as recommended in 16(e) below, by any individuals whose personal information is collected, used or disclosed without proper notice.

Rationale for strengthening notification requirements

The Privacy Act currently requires APP entities to ‘take such steps (if any) as are reasonable in the circumstances’ to notify the individual of such matters regarding the data collection ‘as are reasonable in the circumstances or to otherwise ensure that the individual is aware of any such matters’.¹⁸⁵¹ As a result, APP entities have significant discretion regarding whether to notify consumers about the collection of their personal information and how that notification or notice should be provided. The OAIC has issued APP Guidelines stating that ‘an entity is not excused from taking particular steps by reason only that it would be inconvenient, time-consuming or impose some cost to do so’.¹⁸⁵² But these Guidelines are not legally binding and it is ultimately left to the APP entity to decide whether and how to provide notification under APP 5.

¹⁸⁵¹ Privacy Act, Schedule 1, Australian Privacy Principle 5.1.

¹⁸⁵² OAIC, [chapter 5: APP 5 – Notification of the collection of personal information](#), March 2018, p. 3.

Numerous stakeholders made submissions in support of stronger notification requirements; including privacy and consumer advocacy organisations.¹⁸⁵³ The Consumer Policy Research Centre supported the primary goal of policy makers being an increase in transparency, to increase consumer comprehension, build trust in markets, and enable more effective regulatory remedy.¹⁸⁵⁴

Stakeholder submissions against strengthened notification requirements argued that it would increase regulatory burden on businesses.¹⁸⁵⁵ The ACCC has considered these views but considers that the regulatory burden from the strengthening of notification requirements is unlikely to outweigh the benefits, particularly as the size of the burden imposed by stricter notification requirements will be commensurate with the extent to which the APP entity collects, uses and discloses the personal information of Australian consumers.

In light of these stakeholder submissions, as well as the key findings in this chapter, the ACCC considers that there are considerable benefits to consumers of an express notification requirement setting out the types of information that must be provided by APP entities to consumers. A clear and accessible notice would significantly decrease the information asymmetry between consumers and businesses who collect, use and disclose personal information. This would assist consumers to better assess whether a business's data practices meets their privacy preferences and make an informed decision about whether to engage with that business. In particular, the requirement for third parties who indirectly collect personal information to provide a notice of that collection will alert consumers to that collection and, in conjunction with recommendation 16(d), will give consumers an opportunity to request erasure of their personal information where they are not comfortable with this collection.

Information to be provided in the notice

The required notice should include at least the following information:

- the identity and contact details of the APP entity that is directly or indirectly collecting personal information
- the types of data collected
- the purposes for which each type of data is collected
- whether the data will be shared with any third parties and, if so, which types of third parties and for what purposes.

These requirements are based on the information required to be provided to EU citizens under Articles 13 and 14 of the GDPR regarding 'Information to be provided where personal data are collected from the data subject' and 'Information to be provided where personal data have not been obtained from the data subject'.¹⁸⁵⁶

The ACCC also considers that the notices should include specific consideration of how information can be clearly communicated to children. This is because difficulties arising from the length and complexity of privacy policies are likely to be even greater for children, which may result in additional harms when children's personal information is collected.

1853 Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

1854 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, pp. 4-5.

1855 Optus, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019.

1856 GDPR, Article 13.

Stakeholder submissions to the Preliminary Report have also noted the importance of strong protection for the data of children.¹⁸⁵⁷ The Obesity Policy Coalition and Australian Council on Children and the Media both recommended that the ACCC give special consideration to protecting children online.¹⁸⁵⁸ Totally Awesome (a child-specific digital media company) underlined the importance of providing notice in language that a child could understand.¹⁸⁵⁹

The importance of providing notification to children that they are able to understand was underscored during the ACCC Privacy Roundtable, with a number of stakeholders noting that age restrictions, and compliance with parental controls, often had to be taken at face value.¹⁸⁶⁰

Measures to limit information burden

The ACCC notes that notification requirements should be carefully designed to minimise the information burden on consumers and to avoid causing consumers to experience information overload (see discussion in box 7.13 ‘*Information Overload*’), which can hinder consumers’ engagement with information notices. At the ACCC Privacy Roundtable, stakeholders raised concerns that strengthened notice requirements may lead to longer privacy policies that consumers are less likely to read.¹⁸⁶¹

As such, the ACCC notes that it may be appropriate for the strengthened notice requirements to be accompanied by measures to reduce the information burden on consumers.

For example, it may be beneficial for businesses across the economy to adopt a multi-layered format for their information notices, similar to the specific obligations proposed for digital platforms at recommendation 18(1) below, though any such requirements should retain sufficient flexibility to be applicable to the wide range of entities collecting, using and disclosing personal information across the Australian economy.

In addition, standardised wording or icons could be developed to denote certain types of data practices. For example, standardised wording could be developed for purposes for which personal information is collected (for example, product development, personalised advertising, personalised services), which means entities would not have to set out their purposes of data collection in a more granular way using different overlapping terms that may cause confusion for consumers. Another example is to set standardised wording for categories of third parties to whom personal information may be disclosed, such as media companies, data brokers, or market research companies.

The GDPR does not expressly require the use of standardised wording or categories, although Articles 13 and 14 of the GDPR provides that information to be disclosed to data subjects may include ‘categories of personal data’ as well as ‘categories of recipients of personal data’.¹⁸⁶²

The ACCC notes that the design of effective information notices that limit information overload will depend on comprehensive consumer testing – see box 7.33 ‘*ACCC recommends Consumer Testing*’.

1857 Submissions from OPC, ACCM and Totally Awesome.

1858 Submissions from OPC and ACCM.

1859 Totally Awesome supported layered notification, considering that it would help to achieve the balance ‘between giving sufficient information and not overpowering the user with a ‘wall of words’ which could have an adverse impact on readability, particularly for younger readers’: Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12.

1860 ACCC [privacy roundtable summary](#), p. 4.

1861 ACCC [privacy roundtable summary](#).

1862 GDPR Article 13 and 14.

Recommendation 16(c) – Strengthen consent requirements and pro-consumer defaults

Require consent to be obtained whenever a consumer’s personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

Valid consent should require a clear affirmative act that is freely given, specific, unambiguous and informed (including about the consequences of providing or withholding consent). This means that any settings for data practices relying on consent must be pre-selected to ‘off’ and that different purposes of data collection, use or disclosure must not be bundled. Where the personal information of children is collected, consents to collect the personal information of children must be obtained from the child’s guardian.

It may also be appropriate for the consent requirements to be implemented along with measures to minimise consent fatigue, such as not requiring consent when personal information is processed in accordance with a contract to which the consumer is a party, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers’ comprehension and decision-making.

Overview

To improve consumer choice over the use of their personal information, the ACCC recommends that the Privacy Act is amended to strengthen consent requirements. Such amendments would require consent to be obtained whenever a consumer’s personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason. In addition, valid consents would be required to be adequately informed, voluntarily given, current and specific, and given by an individual with the capacity to understand and communicate their consent. This means that consents to collect the personal information of children must be obtained from the child’s guardian.

The ACCC further recommends that APP entities are required to set pro-consumer defaults that reflect consumer preferences. This means that privacy settings enabling the collection of user data must be pre-selected to ‘off’ and unbundled with consents for any data collection for the purposes of supplying the core consumer-facing service.

Compliance with these consent requirements should be monitored through the OAIC’s existing audit powers under the Privacy Act. Any non-compliance should be enforced by the OAIC and should also be enforced by any individuals whose personal information is collected, used or disclosed without their valid consent (see recommendation 16(e)).

Rationale for expanding the circumstances in which consent is required

The Privacy Act currently requires that individuals must provide consent when their personal data is collected in limited instances, including:

- the collection of sensitive information
- the collection of personal information by an agency from someone other than the individual (that is, an individual must consent for an agency to disclose their personal information to another agency)
- the use or disclosure of personal information for a secondary purpose
- the use or disclosure of personal information or sensitive personal information for direct marketing purposes
- the disclosure of personal information to an overseas recipient.¹⁸⁶³

¹⁸⁶³ See APP 3, clause 3.3(a); APP 3, clause 3.6(a)(i); APP 6, clause 6.1(a); APP 7, clause 7.3(b) and clause 7.4; and APP 8, clause 8.2(b).

Under APP 6, consumers are not required to provide consent when their personal information is used or disclosed for a 'primary purpose'.

Although 'primary purpose' is not expressly defined in the Privacy Act, it appears broadly construed. APP 6.1 describes 'primary purpose' as a particular purpose for which personal information about an individual was collected. The non-binding OAIC Guidelines note that primary purpose 'is the specific function or activity for which the entity collects the personal information'¹⁸⁶⁴ and that it may be 'described in general terms, as long as the description is adequate to inform an individual of how the APP entity may use or disclose their personal information'.¹⁸⁶⁵

Therefore, it appears that an entity could describe, in general terms, the functions or activities for which it collects personal information and each of these functions or activities could be a 'primary purpose'. This means that an entity could use (or disclose to a third party) personal information for any of these activities or functions without being required to seek consent from the consumer. There is no requirement for the 'primary purpose' to be a purpose that consumers are aware of, or a purpose that is necessary or beneficial to consumers.

As discussed in section 7.6.2(a) of this Chapter, the ACCC's review of terms and policies found that digital platforms tend to list numerous purposes for their collection of personal information. These purposes include some that are necessary to provide consumers with a service under their terms of service (such as to maintain their services or to provide personalised services), but also includes other purposes where consumers' personal information is used or disclosed, for example, for targeted advertising purposes.¹⁸⁶⁶ Under APP 6, each of these purposes identified in digital platforms' privacy policies could be considered a 'primary purpose' for which personal information could be used or disclosed to third parties without further consent.

This results in very broad discretion for entities to use and disclose personal information about an individual for any of the 'primary purposes' set out in their privacy policies. This could include circumstances where personal information is used and disclosed to provide the consumer with a service, such as using location information to provide navigational assistance. However, it could also include the use and disclosure of personal information for purposes that may not be in the consumer's interests, such as disclosure to third parties for targeted advertising or online profiling purposes.

This broad discretion for entities to use and disclose personal information without consent significantly undermines consumer control. Stronger consent requirements are critical to ensuring that consumers have adequate control over how and why their personal information is used and disclosed to third parties. A requirement to obtain consent when using or disclosing personal information for purposes other than to perform a contract to which a consumer is a party will both increase the transparency of information processing and significantly reduce the effects of the bargaining power imbalance between consumers and the entities processing their personal information.

The ACCC recognises that consents can be burdensome for consumers and considers that consumer consent should not be required where use or disclosure occurs in accordance with a contract to which the consumer is a party. That is, any use or disclosure of data to supply the consumer with a service or product that they have contracted for (whether in writing or orally) should not require their consent. However, real and informed consents should always be required where the consumer's personal information is used or disclosed for a purpose that is not in accordance with the consumer's own interests, such as where it is used or disclosed for targeted advertising purposes.

International convergence of privacy regulations

Some stakeholder submissions, including from Facebook, American Express, and BSA/Software Alliance, opposed the preliminary recommendation to strengthen consent requirements on the basis that, unlike the GDPR, they did not recognise other bases for processing personal information.¹⁸⁶⁷

1864 OAIC, [APP Guidelines](#), para B.98.

1865 OAIC, [APP Guidelines](#), paras B.101 and 102.

1866 See further discussion in section 7.6.2(c) '*Disclosures regarding online tracking*'.

1867 BSA/Software Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; American Express, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019.

The ACCC has considered these submissions as well as the benefits of broader international convergence in data protection recommendations. As such, the ACCC recommends strengthening consent requirements in a way that broadly aligns with the GDPR.

That is, the ACCC recommends consumer consent to be required unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason. These exceptions reflect the GDPR lawful bases for processing personal data on the basis of contract, legal obligation, vital interests and public task but do not include the lawful basis of 'legitimate interests'.¹⁸⁶⁸

Google submits that 'legitimate interests' can be an effective alternative to consent that balances the impact of data processing against the 'legitimate interests' of the entity processing the information.¹⁸⁶⁹ The ACCC notes, however, that there is considerable uncertainty and concern surrounding the relatively broad and flexible definition of the 'legitimate interests' basis for processing personal information under the GDPR.¹⁸⁷⁰ Therefore, the ACCC does not recommend that the personal information collected, used or disclosed on the basis of 'legitimate interests' to be exempt from the proposed consent requirements.

The ACCC also notes overseas commentary that the increased consent requirements under the GDPR may have increased barriers to entry for those businesses which seek to rely on the collection of personal data and may have therefore entrenched the dominance of the large well-established businesses. While the ACCC notes these concerns, the ACCC has not been provided with any evidence showing that the GDPR has had an adverse impact on the level of competition in any European markets or has contributed to the substantial market power of the major digital platforms. In addition, most entities with an annual turnover of under AU\$3 million are not currently regulated under the Privacy Act. Finally, the ACCC considers that stronger consent requirements are a critical part of effective privacy protections necessary to maintain consumer trust. This will encourage data portability and lower switching costs for consumers, which could ultimately lower barriers to entry or expansion for smaller rivals.

Conditions for valid consent

The Privacy Act currently defines 'consent' to mean 'express consent or implied consent'¹⁸⁷¹ and does not outline any criteria for valid consent. As discussed in section 7.4 *'The nature of consumer consents'*, there are several common features of consent processes that degrade the quality of consent provided by consumers such as the use of clickwrap agreements, take-it-or-leave-it terms, and bundling of consents.

To address these issues, the ACCC recommends that the definition of 'consent' should be updated to require a clear affirmative act that is freely given, specific, unambiguous and informed. This would amend the Privacy Act in line with the higher standard of data protection provided under the GDPR.¹⁸⁷² In particular:

- A **clear affirmative act** should be required to establish consent. This could include either ticking a website, actively selecting a setting that enables the collection of personal information, or another statement or conduct that clearly indicates the consumer's acceptance of the collection, use or disclosure of their personal information.¹⁸⁷³ As noted by the GDPR, 'Silence, pre-ticked boxes or inactivity should not therefore constitute consent'.¹⁸⁷⁴
- To assess whether a consent is **freely given**, it is critical that the provision of a service to the consumer must not be conditional on consent to the processing of personal information that is not necessary for the provision of that service.¹⁸⁷⁵ In addition, where electronic consents are sought, the request for consent must not unnecessarily disruptive to the use of the service for which it is provided.¹⁸⁷⁶

1868 See GDPR Article 6(1)(b), (c), (d) and (e).

1869 Google, [Submission to the Digital Platforms Inquiry](#), May 2019.

1870 For discussion of the concerns on 'legitimate interests' basis in GDPR, see: SS Rana & Co, [Loopholes in the General Data Protection Regulation](#), 4 June 2018; D Kelleher, [What does legitimate interest mean? The CJEU gives its answer in Rīgas, IAPP](#), 4 May 2017, accessed 21 May 2019.

1871 Privacy Act, s 6(1).

1872 GDPR Recital 32, 'Conditions for consent' (2)

1873 GDPR Recital 32, 'Conditions for consent' (3).

1874 GDPR Recital 32, 'Conditions for consent' (6).

1875 GDPR Article 7(4).

1876 GDPR Recital 32, 'Conditions for consent' (6).

- The requirement that consents must be **specific** and **unambiguous** means that consents will relate specifically to each type of data collection and must not generally be bundled. This means that, where the processing of personal information has multiple purposes, consent should be given for all of them.¹⁸⁷⁷
- Consents must also be **informed**, to mitigate the information asymmetries between consumers and entities who are collecting their personal information.

Strong consent requirements were supported by a number of stakeholders.¹⁸⁷⁸ The Financial Rights Legal Centre and Dr Kemp and Dr Nicholls submitted that the requirements for express, informed, voluntary, current and adequately understood consent be made binding.¹⁸⁷⁹ The OAIC endorsed 'the elevation of its guidance on consent in relation to digital platforms', however it submitted that consent should require an 'affirmative, unambiguous act' noting 'some broader limitations of privacy self-management tools' such as consent.¹⁸⁸⁰

Stakeholders submitted that it was critical that any consent mechanism allow consumers to provide unbundled consent. The Australian Privacy Foundation submitted that information not requiring consent should be unbundled from any information requiring consent.¹⁸⁸¹ The Consumer Policy Research Centre and Dr Kemp and Dr Nicholls submitted that consent requirements should avoid bundled consents, which may allow firms to make consumer's access to a service dependent on the consumer agreeing to 'unnecessary and unwanted data collection'.¹⁸⁸²

Submissions opposing strengthened consent requirements predominantly focussed on the additional burden to business that the stronger consent requirements would produce.¹⁸⁸³ The ACCC notes, however, that these conditions for consent not only align with international standards under the GDPR but also closely follows the four key elements of consent set out in the OAIC's non-binding APP Guidelines, which require that:¹⁸⁸⁴

- the individual is adequately informed before giving consent
- the individual gives consent voluntarily
- the consent is current and specific
- the individual has the capacity to understand and communicate their consent.

Accordingly, updating consent requirements in the Privacy Act to align with the GDPR is likely to be of limited disruption to APP entities who are already following the OAIC's APP Guidelines.

1877 GDPR Recital 32, 'Conditions for consent' (4).

1878 See for example: Consumer Policy Research centre, Submission to the ACCC Digital Platforms Inquiry, February 2019; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Australian Data Privacy Certification Register, Submission to the ACCC Digital Platforms Inquiry, February 2019; Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019.

1879 Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10; Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6.

1880 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, pp. 5-6.

1881 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 6.

1882 Consumer Policy Research Centre, Submission to the ACCC Digital Platforms Inquiry, February 2019, p. 8; Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6.

1883 Google, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; BSA/Software Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Fundraising Institute of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Amex, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019; Optus, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

1884 OAIC, [Chapter 6: APP 6 – Use or disclosure of personal information](#), February 2014, pp. 6-7. These requirements are also similar to the requirements for under the GDPR, Article 7 and Recital 32 that consents be given by a clear affirmative act that is freely given, specific, informed and unambiguous.

Obtaining valid consents from children

The ACCC notes that digital platform users often include children who are likely to lack the capacity to understand how their personal information is collected, used and disclosed. Therefore, the ACCC views that consents to collect the personal information of children by APP entities must be obtained from the child's guardian.

The ACCC recognises that this requirement for a guardian to provide consent may be impracticable or easily side-stepped in an online setting. Therefore, this recommendation should be supported by additional requirements for digital platforms to minimise the collection of personal information from children and to ensure that meaningful guardian consent is obtained. This should be set out in a privacy code of practice specific to digital platforms (see recommendation 18).

Aligning defaults with consumer preferences

The APPs currently do not contain requirements as to the default settings for the collection, use and disclosure of personal information. As noted in section 2 above, 85 per cent of Australian digital platforms users consider that digital platforms should only collect information needed to provide their products or services.¹⁸⁸⁵ The ACCC therefore considers that default settings enabling data processing for a purpose other than the performance of a contract concerning the consumer should be pre-selected to 'off' to reflect the preference of the majority of digital platform users.

This recommendation requires that all settings enabling data collection for a purpose other than performance of a contract to which the consumer is a party must be pre-selected to 'off'. As noted above, the requirement for consents to be freely given means that data collection for the purpose of providing a service to the consumer must not be conditional on consents to the processing of personal information that is not necessary for the provision of that service. These changes will provide consumers with meaningful control over whether to allow additional data collection based on whether they truly prefer to enable the use of their personal information for other purposes such as targeted advertising purposes.

This requirement also addresses the impact of behavioural biases by preventing entities from using defaults to nudge users to select more intrusive data collection settings. It also means that the status quo bias is less likely to induce consumers to unwittingly opt-in to more intrusive data collection settings. For instance, consumers who prefer to provide their personal information for purposes unrelated to the digital platforms' provision of services to the consumer (for example, for targeted advertising purposes) must actively make this selection. During consultation, a small number of submissions stated that requiring opt-in consent for non-essential data collection – particularly for targeted advertising – would harm consumers by lessening the relevance, and increasing the intrusiveness, of advertising.¹⁸⁸⁶ However, the ACCC notes that businesses will still be able to seek opt-in consent for the purposes of providing targeted advertising and consumers will still be able to experience the benefits of targeted advertising should they choose to opt-in.

For further discussion on the impact of defaults on consumers' ability to provide or withhold meaningful consent to the collection of personal information, see box 7.30 *'The default effect and consumer consent'*.

¹⁸⁸⁵ Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 17.

¹⁸⁸⁶ ACCC [privacy roundtable summary](#); NSW Business Chamber, Australian Association of National Advertisers, AI Group, Facebook, Professor Tucker.

Box 7.30: The default effect and consumer consent

The default effect refers to decision-makers being predisposed to accept the default when confronted by a choice with a default option.¹⁸⁸⁷ A famous public policy example of the default effect is in the area of organ donations where researchers found significant differences in consent rates depending on whether the policy was opt-in or opt-out.¹⁸⁸⁸ Research specific to online privacy policies or digital platforms has found that default privacy settings can nudge users towards more privacy-intrusive options and that the default effect may simply arise in this context because most users never look at the default settings.¹⁸⁸⁹

This demonstrates how defaults can impact on decisions with significant, real world implications. As default privacy settings have the potential to influence a consumer's choice, it has important implications for consumers' ability to provide, or withhold, meaningful consent to the collection and use of their personal information and user data. A better understanding how defaults impact consumers' choices can lead to more effective policy implementation.

There is some discussion in the literature around the complexity of, and considerations for, selecting the appropriate default. Defaults tend to be suited to contexts where there is a large degree of homogeneity in individuals' preferences and when decision-makers have limited expertise.¹⁸⁹⁰ Policy-makers should also consider the balance of misclassification errors that could result from default settings against other potential benefits and costs of the proposed default. For example, in the case of organ donation, two potential misclassification errors are: willing donors who do not become donors, and people who become donors against their wishes.¹⁸⁹¹ Further investigation into the causes of default effects can also be informative.¹⁸⁹²

This consideration has been undertaken by some jurisdictions in relation to fees and charges for online purchases. The potentially serious consumer detriment of defaults in relation to online purchases has been recognised by some jurisdictions resulting in the banning of pre-ticked boxes for online purchase in the EU¹⁸⁹³ and the voiding of charges for goods sold by way of pre-ticked boxes in Britain¹⁸⁹⁴. Further, the OECD considers that to the extent that businesses are signing consumers up to incur future fees or charges (monetary and otherwise), they should seek and obtain express and meaningful consumer consent.¹⁸⁹⁵

Measures to reduce consent fatigue

The ACCC recommends that the strengthened consent requirements should be implemented along with measures to limit consent fatigue, such as not requiring consent when personal information is processed in accordance with a contract to which the consumer is a party, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers' comprehension and decision-making.

This responds to stakeholder submissions that strengthened consent requirements may result in harm to consumers from an increase in consents and longer administrative processes.¹⁸⁹⁶ During the ACCC Privacy Roundtable, stakeholders submitted that obtaining specific consents from consumers

1887 ACCC [privacy roundtable summary](#); See also Submissions from NSW Business Chamber, Australian Association of National Advertisers, AI Group, Facebook, Professor Tucker.

1888 E Johnson and D Goldstein, [Do Defaults Save Lives?](#), Science, 302 (2003)

1889 E Johnson, S Bellman and G Lohse, [Defaults, framing and privacy: Why opting in-opting out](#), Kluwer, 2002; Norwegian Consumer Council, [Deceived by Design](#), June 2018.

1890 J Beshears, J Choi, D Laibson and B Madrian, The importance of default options for retirement savings outcomes: evidence from the United States, NBER Working Papers Series, January 2006, p. 22.

1891 E Johnson and D Goldstein, [Do Defaults Save Lives?](#), Science, 302 (2003).

1892 E Johnson and D Goldstein, [Do Defaults Save Lives?](#), Science, 302 (2003).

1893 See EU Consumer Rights Directive 2011: European Commission, Media Release, [New EU rules on consumer rights to enter into force](#), 10 October 2011.

1894 UK, The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations.

1895 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 38.

1896 Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019; Nine, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019.

may burden consumers with an unmanageable amount of consents.¹⁸⁹⁷ For example, there are some concerns that the introduction of the GDPR led to ‘consent fatigue’ where consumers did not engage with the consents they were presented.¹⁸⁹⁸ Facebook’s submission noted research that too many consents will lead to consumers feeling overwhelmed and tuning out.¹⁸⁹⁹

Some of these issues may be addressed by measures discussed in Recommendation 16(b) ‘*Measures to limit information burden*’, including the use of standardised icons or phrases to denote categories of personal information or categories of purposes. That is, by requiring APP entities to only have to seek consent when they are intending to collect personal information other than in accordance with a contract to which the consumer is a party. The ACCC considers that this is likely to minimise the risk of ‘consent fatigue’, enabling consumers to better engage with the data collection process and choose the level of data collection that aligns with their individual preferences. Consumer testing would also assist in the design of effective and meaningful consent processes that maximise consumer engagement and understanding.

For example, when a consumer is accessing a maps app, consent would not need to be sought to collect or use the consumer’s personally identifiable GPS data for the purpose of showing the consumer where they are or giving them directions. Consent would be required if the business wished to use the consumer’s personally identifiable GPS data for the purposes of targeted advertising or for the purposes of market research.

The ACCC recognises that consents are becoming an increasingly complex and burdensome task for consumers in the digital economy.¹⁹⁰⁰ While obtaining valid consumer consent may not, in itself, provide consumers with sufficient protection over personal information, strong consents are nevertheless a fundamental mechanism in ensuring consumers have some control and awareness over the extent of acceptable data collection. In addition, this recommendation operates in tandem with other recommendations to protect consumer’s control over their personal information such as ensuring clear notification (see recommendation 16(b)), a right to request erasure (see recommendation 16(d)), and a right for individuals to bring actions for breach (see recommendation 16(e)).

The ACCC notes that it may also be appropriate for this recommendation to be supplemented with a higher basic standard of data protection under the Privacy Act to shift some of the burden for management of personal information from consumers to the entities collecting their personal information (see further recommendation 17(3)).

Recommendation 16(d) – Enable the erasure of personal information

Require APP entities to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an overriding public interest reason.

Overview

The ACCC recommends that the Privacy Act is amended to give consumers the ability to request APP entities to erase that individual’s personal information. APP entities should be required to comply with any such request for erasure without undue delay. To avoid unnecessary disruptions to an APP entity’s activities and obligations, the obligation to erase personal information on request should be limited to circumstances where there are no overriding reasons for the APP entity to retain the information, such as where the data continues to be necessary to perform a contract to which the consumer is a party, where there are legal requirements to maintain personal information, or where there are other overriding public interest reasons.

¹⁸⁹⁷ ACCC [privacy roundtable summary](#), p. 3.

¹⁸⁹⁸ J Baker, [Are all these GDPR consent emails even necessary](#), IAPP, 22 May 2018, accessed 22 May 2019.

¹⁸⁹⁹ Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 54.

¹⁹⁰⁰ David Medine, [Data Protection and Financial Inclusion: Why Consent Is Not Enough](#), 20 December 2018.

This ability for individuals to request erasure of their personal information is supported by the existing right to access personal information under APP 12.1.¹⁹⁰¹ It will apply to ‘personal information’ as it is defined under the Privacy Act. This definition, as set out in recommendation 16(a), should be updated to include technical information relating to an individual such as their IP address or device ID.

This recommendation broadly aligns with the principles outlined in Article 17 of the GDPR that provide EU citizens with a right to erasure of their personal data without undue delay where it is no longer necessary or the data subject has withdrawn consent, unless the personal data processing is necessary in certain circumstances.¹⁹⁰²

Rationale for introducing a right to request erasure

The ACCC considers that enabling consumers to request erasure of their personal information gives them greater control over their personal information and is likely to help mitigate the bargaining power imbalance between consumers and digital platforms.

Under the APPs, APP entities must not collect personal information unless it is reasonably necessary for, or directly related to, one or more of the entity’s functions or activities.¹⁹⁰³ While individuals could request an APP entity to consider whether its collection of personal information is ‘reasonably necessary for’ or ‘directly related to’ its functions or activities, there is no obligation for APP entities to erase personal information of individuals. Effectively, therefore, individuals cannot withdraw their consent for personal information to be collected and held by an APP entity.

This can be particularly problematic given a lack of meaningful consents provided by consumers who are required to accept take-it-or-leave-it terms before accessing a digital platform’s services or to provide bundled consents to the processing of their personal information for the large number of different purposes set out in a digital platform’s privacy policy. The exponential increase in the number of data sets and technological developments in data analytics may also mean that personal information provided at one point in time could in future be used in ways not envisioned when consent was first given.¹⁹⁰⁴

Stakeholders supporting this recommendation include the Law Council of Australia, Oracle, Office of the Victorian Information Commissioner, Australian Data Certification Register, Australian Privacy Foundation, Dr Katharine Kemp and Dr Rob Nicholls, the Consumer Policy and Research Centre and Financial Rights Legal Centre. Google submitted that it ‘already gives users the ability to delete and manage their personal information from Google services’. Google also urged that any new provisions incorporate or are compatible with existing frameworks such as the GDPR.¹⁹⁰⁵

The CPRC strongly supports this recommendation and submitted that it is important for individuals to have the option of withdrawing their consent for APP entities to have access to their data.¹⁹⁰⁶ This is because ‘data use is highly dependent on technological advancements’ and the value of that data changes over time, which means that individuals do not necessarily have the capacity to assess the value of that data in the future.¹⁹⁰⁷ The CPRC stated that the ability to request erasure of data is important in building consumer trust and would also incentivise companies to engage in data practices that are in line with community expectations.¹⁹⁰⁸ The Australian Data Privacy Certification Register and the OAIC also made submissions in support of a right to request erasure.¹⁹⁰⁹

The Law Council of Australia submitted that it ‘shares concerns that with technological developments in data analytics, consumers are increasingly at risk when information provided at one point in time when consent was given could be used in the future in ways the consumer had not envisaged when they gave

1901 APP 12.1: If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.’

1902 GDPR, Article 17.

1903 OAIC, [Chapter 3: APP 3 – Collection of solicited personal information](#), February 2014, p. 5.

1904 Productivity Commission, [Data Availability and Use](#), March 2017, p.156.

1905 Google, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, pp. 19 & 23.

1906 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

1907 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

1908 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8-9.

1909 Australian Data Privacy Certification Register, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5; OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 7.

their consent' and that adoption of this recommendation would bring Australian privacy law into closer alignment with the GDPR.¹⁹¹⁰ The Australian Privacy Foundation further submitted that, in its view, the introduction of a right to erasure in the EU has generally been positive.¹⁹¹¹

The ACCC considers that the right to request the erasure of personal information is a critical complement to the strengthened consent requirements outlined in recommendation 16(c) by providing consumers with a mechanism for withdrawing their consent if they are no longer comfortable with an APP entity collecting, using or sharing their personal information.

Limits on the right to request erasure

The ACCC recognises that the economy-wide effect of any changes to the Privacy Act means that the changes will interact with laws and regulations across a large number of industries. It is important therefore to emphasise that the recommended right to request erasure will not impact on APP entities' existing legal obligations to retain personal information for specific periods of time or to deal with personal information in a particular way. Nor will this recommended right apply to small businesses operators which are exempt from the definition of 'APP entities'.

Submissions from multiple stakeholders expressed concerns that a right to request erasure may conflict with their existing data retention requirements under industry-specific laws. For instance, MIGA submitted that a right to erasure 'would conflict with various clinical record-keeping requirements' and 'would adversely affect the ability of a doctor, other health practitioner or healthcare organisation to respond to civil claims, complaints or healthcare incident investigation processes'.¹⁹¹² Australian Finance Industry Association stated that 'many organisations, especially those in financial services, have legal obligations to hold personal information for specific periods of time, such as under AML/CTF requirements, responsible lending and other laws'.¹⁹¹³ Optus noted that 'the telecommunications industry is subject to a range of industry-specific data obligations relating to the collection and sharing of data'.¹⁹¹⁴ In each of these instances, however, a consumer's request for erasure will not require APP entities to erase personal information where there is a conflicting legal obligation to retain the personal information.

The Insurance Council of Australia submitted that 'insurers often retain personal data after a customer no longer has a current policy with them in order to continue servicing potential long tail claims'. It said that 'data collected by insurers in the course of underwriting insurance products and paying out claims becomes actuarial data which is essential to the pricing of future applications for insurance' and that enabling consumers to delete their data 'will have a detrimental impact to the sustainability of the industry'.¹⁹¹⁵ The ACCC notes that, if personal information continues to be necessary for the servicing of potential claims, then the APP entity would not be required to delete personal information even where a consumer has made a request for erasure. In addition, to the extent the data collected by insurers is de-identified or anonymised, it will not fit within the definition of 'personal information' under the Privacy Act. As such, any properly de-identified or anonymised data will not be captured by the erasure requirement.

The right to request erasure will also be counterbalanced by any competing public interest reasons for the APP entity to retain the information. These include matters such as freedom of speech, freedom of the media, public health and safety, and national security.¹⁹¹⁶ The ACCC notes the Financial Rights Legal Centre's submission that these reasons must 'align with public interest reasons not commercial or other self-interested business reasons'.¹⁹¹⁷

1910 Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10.

1911 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

1912 MIGA, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10.

1913 Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

1914 Optus, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

1915 Insurance Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2.

1916 As noted in ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 23.

1917 Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12.

Proposed mandatory deletion obligation

The ACCC had raised the introduction of a mandatory deletion of data obligation in the Preliminary Report to apply to all APP entities. This obligation may be helpful where there are behavioural biases that prevent consumers from requesting deletion of their user data, even when they might prefer that their data is deleted. For example, consumers are impacted by default bias, where ‘consumers have a strong tendency to remain at the status quo’.¹⁹¹⁸

The Office of the Victorian Information Commissioner also submitted that the ‘need to request deletion of personal information may pose a burden to some consumers who may not actively take the steps to make such a request, or who may not have even been a customer of that platform’.¹⁹¹⁹ Open-ended data retention increases the risks of data breaches to all consumers, as illustrated by the October 2018 Google+ data breach that impacted the personal information of 52.5 million users globally, many of whom were no longer active users of Google+.¹⁹²⁰

However, stakeholder feedback from submissions and the ACCC Privacy Roundtable have indicated that imposing a mandatory duty to delete data could create a significant regulatory burden, which could be particularly onerous for smaller businesses that only partially operate in the digital space.¹⁹²¹ In addition, there is a large number and variety of entities that collect and use personal data, which means that an obligation to delete data should operate flexibly to accommodate different businesses data needs and requirements. Some industry stakeholders have noted that mandatory deletion of data also risks adverse consequences such as deleting data against a user’s wishes, for example if a user wanted to return to a platform.¹⁹²²

The ACCC has considered the potential benefits to consumers of introducing an obligation to delete user data once it is no longer necessary as well as the potentially high regulatory burden of such an obligation on businesses which may not have developed systems frameworks in place to facilitate such a proposal. On balance, the ACCC considers that it would be more appropriate for this obligation to apply specifically to certain digital platforms collecting, using and sharing a large volume of personal information, many of which may have already developed such frameworks as part of GDPR compliance mechanisms, rather than to all APP entities regulated by the Privacy Act. Accordingly, the ACCC recommends that this obligation should be set out in the DP Privacy Code at recommendation 18.

Recommendation 16(e) – Introduce direct rights of action for individuals

Give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy under the Privacy Act.

Overview

The ACCC recommends that individuals should have a right of action in the Federal Court or the Federal Circuit Court to be able to seek compensatory damages as well as aggravated and exemplary damages (in exceptional circumstances) for the financial and non-financial harm suffered as a result of an infringement of the Privacy Act and the APPs.

This would give consumers greater control over their personal information by providing an avenue of redress in court without having to rely on the OAIC alone to take representative action. This ability will not only empower consumers but may also provide an additional incentive for APP entities to ensure they comply with their obligations under the Privacy Act and the APPs.

1918 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, pp. 20 & 31.

1919 Office of the Victorian Information Commissioner, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3.

1920 See, for example, L Newman, [A New Google+ Blunder Exposed Data From 52.5 Million Users](#), Wired, accessed 12 October 2018.

1921 ACCC [privacy roundtable summary](#), p. 5.

1922 ACCC [privacy roundtable summary](#), p. 5.

Rationale for giving individuals a direct right of action

The ACCC considers that allowing individuals to enforce their rights under the Privacy Act is critical to the effectiveness of those rights. Currently, individuals may only seek limited redress under the Privacy Act to seek an injunction for breach of the Privacy Act or lodge a complaint with the OAIC.¹⁹²³

Stakeholders who support providing individual courses of action to consumers include the Australian Privacy Foundation, the Privacy and Data Law Committee of the Law Society of NSW, and Dr Katharine Kemp and Dr Rob Nicholls. The Australian Privacy Foundation submitted that ‘the most important reason for supporting an alternative enforcement route is that it will mean that Courts will have the opportunity to interpret the Privacy Act, and Courts will through their judgments set standards for what are appropriate types and levels of penalties and compensation for privacy breaches’.¹⁹²⁴ This view is shared by Dr Kemp and Dr Nicholls, who submitted that increased opportunities for the courts to interpret the Privacy Act would provide ‘greater clarity and certainty for all those affected by its provisions’ and that direct rights of action could reduce the enforcement burden on the OAIC.¹⁹²⁵ The ACCC considers these important reasons for providing individual courses of action to consumers.

Stakeholders opposing this recommendation include the Communications Alliance, Google, MIGA, Australian Finance Industry Association, Indue, Optus, and Nine. The Australian Finance Industry Association, Nine, and Indue submit that existing dispute resolution mechanisms provide sufficient avenues for complaint and achieve satisfactory outcomes for consumers at a significantly lower cost than litigation.¹⁹²⁶ The ACCC notes that individual consumers will not lose the ability to make a complaint with the OAIC or pursue other existing methods of redress under this recommendation.

Some stakeholders note that individual rights of action may impact on journalistic investigation.¹⁹²⁷ The ACCC notes that the Privacy Act does not apply to acts and practices engaged in by a media organisation ‘in the course of journalism’ and if that media organisation is publicly committed to observe certain standards regarding privacy.¹⁹²⁸

While recognising the expense and time required to litigate matters in court, the ACCC considers it is important for individuals to have the ability to directly enforce their rights under the Privacy Act.

The ACCC further recommends that the Government regularly monitor the impact of granting individuals direct rights of action in court to assess whether individual plaintiffs appear to experience undue difficulty establishing harm from a breach of the Privacy Act or whether APP entities are subject to undue business burden from the risk of excessive damages orders.

Parity with consumer rights in other jurisdictions

Consumers in the UK, New Zealand, certain provinces in Canada, and the EU have direct rights to bring action against firms that have misused their personal data or breached their rights under privacy and data protection legislations. Introducing a similar right for Australian consumers will bring Australian privacy law better in line with international standards.

EU citizens have direct rights of action under the GDPR. Article 79 provides a right to an effective judicial remedy where their personal data has been processed in breach of the GDPR.¹⁹²⁹ Article 78 also gives EU citizens a right to seek judicial review of a legally binding decision of a data protection authority concerning them, including any decisions concerning the exercise of investigative, corrective and authorisation powers by the data protection authority or the dismissal or rejection of complaints.¹⁹³⁰

¹⁹²³ Privacy Act, s 98.

¹⁹²⁴ Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 7.

¹⁹²⁵ Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 7.

¹⁹²⁶ Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 6; Indue, [Submission to the ACCC Digital Platforms Inquiry, January 2019, p. 4](#). Nine, p. 30.

¹⁹²⁷ SBS, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12; Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11.

¹⁹²⁸ Privacy Act, section 7B(4).

¹⁹²⁹ GDPR, Article 79.

¹⁹³⁰ GDPR, Article 78, Recital 141 ‘Right to lodge a complaint’ and Recital 143 ‘Judicial remedies’.

EU citizens also have the right under Article 82 to receive compensation for any material or non-material damage as a result of an infringement of the GDPR.

Recommendation 16(f) – Higher penalties for breach of the Privacy Act

Increase the penalties for an interference with privacy under the Privacy Act to mirror the increased penalties for breaches of the Australian Consumer Law.

Overview

The ACCC recommends that penalties under the Privacy Act should be increased to reflect the penalties under the ACL – that is, whichever is the higher of:

- AU \$10 million
- three times the value of the benefit received, or
- 10 per cent of the entity’s annual turnover in the last 12 months, if a court cannot determine benefit obtained from the offence.

Rationale for increasing penalties for breach

Currently, the OAIC may apply to the courts for civil penalties for a serious or repeated interference with privacy of up to AU \$420 000 for individuals and AU \$2.1 million for organisations.¹⁹³¹

This recommendation would bring the penalties for serious or repeated interferences of privacy in line with the new civil pecuniary penalties available under the ACL. These penalties were increased recently because the previous penalties had been found to be insufficient to deter profitable breaches of the ACL that had been seen by some entities as ‘a cost of doing business’ (see table 7.8).¹⁹³² Given the financial benefits that firms may gain from unauthorised use of user data and the large firms that currently collect and use it, the ACCC considers that similar observations could be made in relation to the deterrence effect of the Privacy Act penalties.

Table 7.8: Maximum penalties for corporations breaching the Privacy Act and the ACL

Legislation	Maximum penalty for corporations (AUD)
Privacy Act	2 100 000
ACL (prior to amendment)	1 100 000
ACL (current penalties)	10 000 000
	(or 3x benefit received or 10% of turnover)
Privacy Act (recommended penalties)	10 000 000
	(or 3x benefit received or 10% of turnover)

The OAIC supported the recommendation to increase penalties for breach of the Privacy Act to provide effective deterrence for large multinational corporations. It submitted that it is consistent with an international trend of increasing penalties for breaches of data protection laws.¹⁹³³ Some submissions against the increase in penalties considered them to be too high for the risk of harm in privacy breaches, and risk chilling innovation. Other stakeholders considered that the increase was insufficient deterrence, and should be at least at the level of GDPR. Some other opposing submissions believed there was insufficient evidence that an economy-wide increase in penalties was needed.

1931 Privacy Act, s 13G.

1932 CAANZ, [Australian Consumer Law Review Final Report](#), March 2017, p. 88.

1933 AIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 8.

The ACCC considers that aligning penalties for serious or repeated interference with privacy strikes the appropriate balance between deterrence and proportionality to risk of harm. As this recommendation only sets the upper limit of possible penalty, the ACCC believes significant discretion remains for courts in the penalties they award against each business that breaches the Privacy Act.

On 24 March 2019, the Australian Government announced that it would increase penalties for serious or repeated interference with privacy under the Privacy Act in line with penalties available under the ACL.¹⁹³⁴ The ACCC welcomes the Government's plan to introduce these changes and considers that, for the reasons stated above, it is an appropriate amendment to increase the deterrent effect of the requirements in the Privacy Act.

Complementarity with other recommendations

The ACCC notes that this increase in penalties is intended to complement the other recommended amendments to the Privacy Act, as it does not consider that an increase in penalties alone would be sufficient to remedy the range of potentially problematic data practices identified earlier in this chapter.

Recommendation 17 – Broader reform of Australian privacy law

Broader reform of Australian privacy regime to ensure it continues to effectively protect consumers' personal information in light of the increasing volume and scope of data collection in the digital economy.

This reform should have regard to the following issues:

Objectives: whether the objectives of the Privacy Act should place greater emphasis on privacy protections for consumers including protection against misuse of data and empowering consumers to make informed choices

Scope: whether Privacy Act should apply more to some of the entities which are currently exempt (for example, small businesses, employers, registered political parties)

Higher standard of protections: whether the Privacy Act should set a higher standard of privacy protection, such as by requiring all use and disclosure of personal information to be by fair and lawful means.

Inferred information: whether the Privacy Act should offer protections for inferred information, particularly where inferred information includes sensitive information, such as information about an individual's health, religious beliefs, or political affiliations.

De-identified information: whether there should be protections or standards for de-identification, anonymisation and pseudonymisation of personal information to address the growing risks of re-identification as datasets are combined and data analytics technologies become more advanced

Overseas data flows: whether the Privacy Act should be revised such that it could be considered by the European Commission to offer 'an adequate level of data protection' to facilitate the flow of information to and from overseas jurisdictions such as the EU, and

Third-party certification: whether an independent certification scheme should be introduced.

(a) Overview

Following extensive consultation after the release of the Preliminary Report, the ACCC has identified key aspects of the existing privacy law regime that could benefit from broader reform to increase its effectiveness.

Any wholesale reform of Australian privacy law will have wide-ranging impacts across the Australian economy beyond the targeted amendments set out at recommendations 16(a) to (f) and will require considerable further consultation and analysis far beyond the scope of this Inquiry.

¹⁹³⁴ Australian Government Press Release, [Tougher penalties to keep Australia safe online](#), 24 March 2019.

The ACCC notes that submissions from numerous industry stakeholders have opposed the economy-wide amendments to the Privacy Act proposed in recommendations 16(a) to (f) above and are therefore likely to have similar concerns regarding a broader overhaul of privacy laws in Australia.¹⁹³⁵

However, the ACCC believes that broader reform of the Australian privacy law is likely to result in a more robust privacy regulatory framework that better meets expectations of Australian consumers, maintains consumer trust and increase the potential for data portability within Australia and overseas. This will ultimately assist encouraging and sustaining data-based innovations for the Australian economy. The OAIC's submission also proposes that a review should be conducted 'to ensure that Australia's privacy protection framework is fit for purpose in the digital age'.¹⁹³⁶

Accordingly, the ACCC recommends that the Government consider broader reform of the Australian privacy regulatory framework, considering the impact of innovation and rapid technological change on the collection, use and disclosure of personal information, the growing concerns of Australian consumers regarding privacy and data protection, and the benefits of harmonisation with international data protection standards.

As part of this reform, the OAIC must also be adequately resourced to fulfil any new responsibilities stemming from broader reforms to the Australian privacy framework in addition to carrying out its existing functions. The ACCC notes that the introduction of the GDPR has raised standards of protection for EU citizens' personal information as well as increased the workload for many data protection authorities in the EU. As such, the 2019 funding allocated to DPC Ireland has increased funding for 2019 by €3.5 million to €15.2 million.¹⁹³⁷

(b) Reconsider objectives of the Privacy Act

First, the ACCC recommends that the Government consider whether the objectives of the Privacy Act should place a greater emphasis on privacy protections for consumers. This should include a consideration of the appropriate level of protection for consumers against misuse of their data, the value that should be placed on safeguarding Australian consumers' right to privacy and whether it is remains appropriate for the current objectives of the Privacy Act to require the protection of privacy to be balanced with the interests of businesses in carrying out their functions or activities.¹⁹³⁸

Prior reviews by the ALRC have noted that although the right to privacy of individuals is a human right enshrined in Australia's international obligations,¹⁹³⁹ privacy is not an absolute right but should be balanced with other public interests such as the right to freedom of expression, the right to liberty and security of the person.¹⁹⁴⁰ These balancing considerations are currently considered in the objects provisions of the Privacy Act.

The ACCC considers it may be appropriate to reconsider the merits of balancing the right to privacy against the commercial interests of businesses that collect, use and disclose personal information; and whether this consideration places sufficient emphasis on the importance of protecting Australian consumers' right to privacy. Submissions to the Preliminary Report, such as from the CPRC and Financial Rights Legal Centre, argue that there is a need to review the principles and objectives of data collection;¹⁹⁴¹ with the Financial Rights Legal Centre submitting that the current application of the privacy laws appear to err 'on the side of being against the consumer interest'.¹⁹⁴²

1935 See, for example: submissions from Google, Free TV, International Center for Law & Economics, AANA, BSA / The Software Alliance, Arnold Bloch Liebler, MIGA, Indue, Insurance Council of Australia, Fundraising Institute of Australia.

1936 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 9.

1937 Data Protection Commission Ireland Press Release, [Data Protection Commission welcomes significant increased funding of €3.5 million in 2019 Budget](#), 9 October 2018.

1938 Privacy Act, section 2(a).

1939 See ICCPR, Article 17 and UDHR, Article 12.

1940 As noted by ALRC, 'For Your Information: Australian Privacy Law and Practice' (ALRC Report 108), 12 August 2008, p. 290.

1941 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3; Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11.

1942 Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11.

(c) Higher standard of privacy protections

The ACCC recommends the Government consider whether the Privacy Act should require a higher standard of privacy protection to shift the growing burden of maintaining privacy protections from consumers to APP entities. For example, it may be appropriate for the Government to raise the standard level of privacy protections for all consumers by imposing an obligation on APP entities to use and disclose personal information by fair and lawful means.

The proliferation of online services and data collection via increasingly interconnected devices is accompanied by an exponential rise in the information and consent burden placed on consumers.¹⁹⁴³ As noted in recommendation 16(c), the ACCC recognises that privacy self-management tools that rely on consumers to read privacy policies and provide consent may no longer be sufficient, in themselves, to provide consumers with adequate data protection and privacy in a digital economy.¹⁹⁴⁴ The size of the task facing those consumers who want to provide truly informed consent suggests that it may be necessary to shift more of the responsibility for data protection and privacy on to the entities collecting, using, and disclosing personal information.

One way to increase the responsibility of entities processing personal information and reduce the burden on consumers could be to limit the use and disclosure of personal information to fair and lawful means.¹⁹⁴⁵ The APPs currently only require APP entities to *collect* personal information by fair and lawful means, but does not contain any requirement that the *use and disclosure* of personal information must also be fair and lawful.¹⁹⁴⁶ In contrast, comparable international jurisdictions such as the UK, EU and Canada each contain broader requirements that the collection, use and disclosure of personal information must be fair or reasonable.¹⁹⁴⁷ Other jurisdictions have also considered or adopted data protection approaches including limiting data use to 'legitimate purposes' or establishing a fiduciary relationship between providers and consumers.¹⁹⁴⁸

A new requirement for the fair use and disclosure of personal information would ensure that all handling of personal information by APP entities is underpinned by a broader obligation to act fairly and lawfully. This could mitigate some of the information asymmetries, bargaining power imbalances and behavioural biases identified in this chapter that lead to consumer harm from unfair uses of personal information such as discriminatory targeting (see further section 7.9 on consumer harms). The OAIC submitted that such a requirement would strengthen the existing obligation for fair collection of user data in APP 3.5 and 'enhance the organisational accountability obligations under the Privacy Act'.¹⁹⁴⁹

The government may consider the introduction of increased obligations on the use and disclosure of consumer personal information by businesses in other international jurisdictions.

1943 See further discussion in section 7.5.1 above, in particular box 7.13 'Information Overload'.

1944 See, for example, David Medine, [Data Protection and Financial Inclusion: Why Consent Is Not Enough](#), 20 December 2018. Wolfgang Kerber, 'Digital markets, data, and privacy: Competition law, consumer law, and data protection', Joint Discussion Paper Series in Economics, No. 14-2016, pp. 11-12 regarding the issues in the use of information solution such as 'notice and consent'; Santiago Ramírez López, 'Informing Consent: Giving Control Back to the Data Subject from a Behavioural Economics Perspective (2018) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 35; Terrell McSweeney, 'Consumer Protection in the Age of Connected Everything', (2017/18) 62 New York Law School Law Review 203.

1945 See, for example discussion regarding 'limiting data use to legitimate purposes' in D Medine & G Murthy, [3 Data protection approaches beyond consent](#), CGAP, 7 January 2019.

1946 APP 3.5.

1947 See EU GDPR article 5(1)(a), Data Protection Act 2018 (UK) section 2(1), and Personal Information Protection and Electronic Documents Act (Canada) section 5(3). See also OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 13.

1948 D Medine & G Murthy, [3 Data protection approaches beyond consent](#), CGAP, 7 January 2019.

1949 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 13.

(d) Coverage of APP entities

Second, the Government could review the scope of the Privacy Act to consider whether it adequately covers the different entities that should be bound by its provisions when collecting, using, or disclosing the personal information of Australians. As the Privacy Act applies only to ‘APP entities’, it does not include most organisations with an annual turnover of less than AU \$3 million (unless they are data companies or private health service providers).¹⁹⁵⁰

In addition, acts and practices of employers in relation to employee records are exempt from the APPs,¹⁹⁵¹ despite human resources data often containing sensitive information that carries a high risk of privacy violations.¹⁹⁵² Narrowing these exemptions is likely to provide Australians with significantly better coverage of privacy protections under Australian privacy law in relation to any personal information or sensitive personal information collected, held or disclosed by small businesses or by their employer.

The ALRC concluded in its 2008 review of the Privacy Act that the Act’s current exemption for registered political parties should be removed or reformed. It noted that ‘[i]n the interests of promoting public confidence in the political process, those who exercise or seek power in government should adhere to the principles and practices that are required of the wider community.’¹⁹⁵³ Recent media reports on the collection and use of personal information by political parties also raise whether a broad exemption for ‘registered political parties’ from the Privacy Act remains appropriate.¹⁹⁵⁴

These changes are also likely to allow Australia to move closer to achieving an adequacy decision from the European Commission, as discussed further below.

(e) Inferred information

Third, the Government could consider whether the Privacy Act should set out protections and standards relating to inferred information.

Inferred information relates to the use of data analytics based on personal information to infer additional information about an individual, which may include sensitive information. For example, location information about an individual visiting a church may lead to inferred information about an individual’s religious beliefs. The UK Information Commissioner’s Office has expressed the view that ‘as this information is based on assumptions about individuals’ interests and preferences and can be attributed to specific individuals, then it is personal information and the requirements of data protection law apply to it’.¹⁹⁵⁵

Submissions from numerous stakeholders have suggested expanding the definition of ‘personal information’ in the Privacy Act to include some protections for information inferred about an individual.¹⁹⁵⁶ The ACCC’s consumer survey found that 48 per cent of digital platform users considered inferred tastes and preferences (48 per cent) or actual (46 per cent) or inferred (45 per cent) opinions and beliefs to be their personal information.¹⁹⁵⁷

1950 For more detail see definitions for ‘APP Entity’, ‘agency’, ‘organisation’, ‘small business’ and ‘small business operator’ in Privacy Act, sections 6, 6C and 6D.

1951 Privacy Act, s7B(3), see also OAIC, [Privacy business resource 13: Application of the Australian Privacy Principles to the private sector](#), accessed 18 June 2019.

1952 The full text of the Article 29 Working Party’s Opinion (Opinion 3/2001) https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp40_en.pdf (accessed 19 October 2018).

1953 ALRC, ‘For Your Information: Australian Privacy Law and Practice’ (ALRC Report 108), 12 August 2008, p. 1428.

1954 See ABC News, [Clive Palmer’s mobile app could track voter data and there’s no law that can stop it](#), 29 January 2019, accessed 18 June 2019; ABC News, [Labor’s voter tracking practices exposed by a simple Google search, 23 October 2018](#), accessed 18 June 2019.

1955 Information Commissioner’s Office, [Democracy disrupted? Personal information and political influence](#), November 2018, 11 July 2018, p. 32.

1956 See, for example: Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 4; Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3; Internet of Things Alliance Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 1.

1957 Roy Morgan Research, [Consumer Views and Behaviours on Digital Platforms](#), November 2018, p. 19.

(f) Protections for de-identified or anonymised information

Fourth, the Government could consider whether the Privacy Act should set out additional protections or requirements for the de-identification, anonymisation, or aggregation of personal information. These are all ways that entities may remove personally identifying information so that the information is no longer within the scope of the Privacy Act. However, there are increasing risks that such information may become re-identified as more information becomes available, multiple datasets are combined, and advances in data analytics are made. It may be appropriate for the Privacy Act to set out some requirements or standards for de-identification to address the risk of re-identification.

(G) Data information flows

Fifth, the Government could assess whether it would be beneficial to seek a decision of the European Commission that Australian privacy law offers ‘an adequate level of data protection’,¹⁹⁵⁸ which would facilitate the secure flow of data between Australian businesses¹⁹⁵⁹ and those within the EU.¹⁹⁶⁰ Australia’s privacy law framework was last considered by the Article 29 Data Protection Working Party in 2001. It identified eight key areas of concern, including the exemption of most small businesses and employee data from the scope of the Privacy Act, the transparency of data collection, and the collection of data for direct marketing purposes, and concluded that data transfers to Australia did not have an adequate level of data protection.¹⁹⁶¹

If the Working Party’s areas of concern could be addressed, personal data would be able to flow from any EU member state to Australia without further safeguards. This would facilitate commercial exchanges involving transfers of personal data and ease trade negotiations or complement existing trade agreements.¹⁹⁶² So far, countries such as Argentina, Canada, Israel, New Zealand, Switzerland, and Uruguay have all been recognised by the EC as providing adequate protection.¹⁹⁶³

(h) Third-party certification

Sixth, the ACCC recommends that the Government should consider introducing an independent certification mechanism to monitor and demonstrate the compliance of particular APP entities collecting, using or disclosing a large volume of Australians’ personal information. Such a scheme could significantly increase the transparency of an organisation’s data practices by enabling Australians to quickly assess the level of data protection offered by an APP entity. This mechanism seeks to address issues arising from consumers not reading or being able to understand digital platforms’ privacy policies by outsourcing the potentially complex and time-consuming assessment to a qualified and independent thirdparty.

The ACCC had proposed independent third-party certification mechanisms in the Preliminary Report, which received mixed feedback and little consensus from industry stakeholders. The OAIC supports the introduction of a third-party certification scheme, which ‘could assist in ensuring that regulated entities are meeting their obligations under the Privacy Act without the need to substantially increase regulatory action’ and provide evidence-based information to consumers.¹⁹⁶⁴ However, the Australian Privacy Foundation and UN Special Rapporteur for Privacy caution that certification mechanisms must be carefully designed to avoid the conflict of interest that would arise where third-party certification groups rely on the entities that they are certifying for revenue.¹⁹⁶⁵

1958 Under article 45 of Regulation (EU) 2016/679. See https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en#dataprotectionincountriesoutsidetheeu

1959 In accordance with that business’s privacy policy.

1960 Countries that have previously achieved adequacy include Japan (<https://www.eubusiness.com/regions/japan/adequacy>) and New Zealand (<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32013D0065>)

1961 European Commission, [Opinion 3/2001 on the level of protection of the Australian Privacy Amendment](#), Article 29 Data Protection Working Party, 26 January 2019, p. 6.

1962 European Commission, ‘Communication from the commission to the European parliament and the council Exchanging and Protecting Personal Data in a Globalised World’, 10 January 2017.

1963 European Commission, Factsheet, [Adequacy Decisions](#), 22 May 2019.

1964 OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 5.

1965 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5; UN Special Rapporteur on the Right to Privacy, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, pp. 7-8.

SBS submitted that careful consideration must be given to determining an appropriate threshold for certification, in view of the different types of personal information collected by the different types of APP entities.¹⁹⁶⁶ Indue and Twitter both note that certification carries significant compliance costs.¹⁹⁶⁷ The ACCC considered these concerns and notes that its recommended legislative amendments to the Privacy Act and broader reform of Australian privacy regulatory framework will also impact on how a certification scheme might be implemented.

The ACCC recommends that a third-party certification scheme should be considered as part of broader reforms of the Australian privacy regulatory framework. This will enable the underlying privacy regulatory framework to be settled before a third-party certification scheme must be designed. How the voluntary certification scheme under the GDPR will operate in practice is still to be settled. It would be useful if the development and experiences of the new certification scheme in the EU informed the proposed certification mechanism in Australia.

Recommendation 18 – OAIC Privacy Code for Digital Platforms

An enforceable code of practice be developed by the OAIC, in consultation with industry stakeholders, to enable proactive and targeted regulation of digital platforms' data practices (DP Privacy Code). The code should apply to all digital platforms supplying online search, social media, and content aggregation services to Australian consumers and which meet an objective threshold regarding the collection of Australian consumers' personal information.

The DP Privacy Code should be enforced by the OAIC and accompanied by the same penalties as are applicable to an interference with privacy under the Privacy Act. The ACCC should also be involved in developing the DP Privacy Code in its role as the competition and consumer regulator.

The DP Privacy Code should contain provisions targeting particular issues arising from data practices of digital platforms, such as:

1. **Information requirements:** requirements to provide and maintain multi-layered notices regarding key areas of concern and interest for consumers. The first layer of this notice should contain a concise overview followed by more detailed information in subsequent layers provided to consumers. The final layer should contain all relevant information that details how a consumer's data may be collected, used, disclosed and shared by the digital platform, as well as the name and contact details for each third party to whom personal information may be disclosed.
2. **Consent requirements:** requirements to provide consumers with specific, opt-in controls for any data collection that is for a purpose other than the purpose of supplying the core consumer-facing service and, where consents relate to the collection of children's personal information, additional requirements to verify that consent is given or authorised by the child's guardian.
3. **Opt-out controls:** requirements to give consumers the ability to select global opt-outs or opt-ins, such as collecting personal information for online profiling purposes or sharing of personal information with third parties for targeted advertising purposes.
4. **Children's data:** additional restrictions on the collection, use or disclosure of children's personal information for targeted advertising or online profiling purposes and requirements to minimise the collection, use and disclosure of children's personal information.
5. **Information security:** requirements to maintain adequate information security management systems in accordance with accepted international standards.
6. **Retention period:** requirements to establish a time period for the retention of any personal information collected or obtained that is not required for providing the core consumer-facing service.

1966 SBS, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12.

1967 Twitter, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 7; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019, p. 2.

7. **Complaints-handling:** requirements to establish effective and timely mechanisms to address consumer complaints.

The ACCC considers that this recommendation could align with the Government's March 2019 announcement to create a legislated code applying to social media and online platforms which trade in personal information.

(a) Overview of DP Privacy Code

While recommendation 16 addresses the concerns raised by current data practices by entities across the Australian economy, the Inquiry has also found certain data practices of concern specific to digital platforms and which are compounded by the scope and volume of data collection and the central role digital platforms play in Australian consumers' lives.¹⁹⁶⁸ To address these specific data practices of concern, the ACCC recommends that an enforceable privacy code of practice should be developed and implemented for digital platforms operating in Australia (DP Privacy Code). The DP Privacy Code should set out specific obligations to address data practices of concern specific to digital platforms collecting a large volume of Australian consumers' personal information. These obligations on digital platforms will be in addition to those obligations following from the enhanced economy-wide protections proposed in Recommendation 16.

The DP Privacy Code should be developed through wide consultation with relevant stakeholders, including digital platforms and privacy and consumer advocates, and set out obligations to address issues of particular concern, such as tailored notification and consent requirements, requirements to provide specific opt-out controls, restrictions on the collection of children's information, information security requirements, requirements about retention of data, and requirements to establish complaint mechanisms.

Breaches of the DP Privacy Code should constitute an interference with the privacy of an individual subject to investigation and enforcement by the Australian Information Commissioner.¹⁹⁶⁹

The more specific obligations set out in the DP Privacy Code will more effectively regulate the data practices of digital platforms and increase certainty for both digital platforms and regulators in assessing whether digital platforms' data practices meet the required standard.

(b) Implementation of the DP Privacy Code

There are several ways in which a DP Privacy Code may be enacted. Firstly, currently under Part IIIB of the Privacy Act, the Australian Information Commissioner has the power to develop, approve and register enforceable APP codes.¹⁹⁷⁰ These codes may impose additional requirements to those imposed by the APPs, so long as the additional requirements are not contrary to, or inconsistent with, the APPs.¹⁹⁷¹ An APP code would not require legislative amendments and could therefore be developed and registered as soon as is practicable to provide an immediate means of regulating the specific issues arising from digital platforms' data practices identified in this Inquiry.

Alternatively, the OAIC has suggested that the Australian Information Commissioner be provided with rule making powers, by legislative amendment, which could allow it to issue binding rules regarding data practices by digital platforms (and other businesses).¹⁹⁷²

Finally, a code could also be created by separate legislative amendment to the Privacy Act. To this extent, it's noted that this recommendation could align with the Government's recently-announced intention to enact legislative amendments that will result in 'a code for social media and online platforms

¹⁹⁶⁸ As discussed in Chapter 1.

¹⁹⁶⁹ See sections 13 and 40 of the Privacy Act.

¹⁹⁷⁰ Privacy Act, s 26G(2).

¹⁹⁷¹ Privacy Act, s26C(3)(a).

¹⁹⁷² OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 9.

which trade in personal information'.¹⁹⁷³ The ACCC welcomes this proposal and any other method which could ensure that the matters proposed by this Code could be addressed by an instrument which provides appropriate enforcement mechanisms and penalties on parties to ensure effective compliance.

(c) Stakeholder views

This recommendation for a DP Privacy Code targeting digital platforms' data practices as proposed in the Preliminary Report was supported by stakeholders including Oracle, SBS, Optus, MEAA, UN Special Rapporteur, Nine, the OAIC and key consumer and privacy advocates. SBS stated that a DP Privacy Code 'would provide a range of benefits to consumers and industry by providing consumer safeguards established by industry experts while also providing an alternative to legislative changes in the first instance'.¹⁹⁷⁴ The Financial Rights Legal Centre supported this recommendation as 'an opportunity to address many of the issues raised in the Preliminary Report'.¹⁹⁷⁵

Dr Katharine Kemp and Dr Rob Nicholls submitted that this recommendation would give regulators the opportunity to propose boundaries on digital platforms' data practices' and 'address the incentives to degrade consumer data privacy created by the particular dynamics of multi-sided digital platform markets'.¹⁹⁷⁶ The OAIC agreed that a code would allow greater proactive and targeted regulation of digital platforms' data collection practices. The OAIC suggested that it would be complemented by a new rule-making power for the Australian Information Commissioner to issue binding rules addressing the governance and handling of personal information by digital platforms to ensure that the OAIC has leadership over the process for developing the code.¹⁹⁷⁷

Some digital platforms and DIGI, the digital platforms industry body, noted that digital platforms may already comply with the Preliminary Report's suggested requirements proposed to be included in the DP Privacy Code. DIGI said that 'many of the areas the ACCC outlines in relation to this code are broadly consistent with DIGI's members' practices'.¹⁹⁷⁸ Facebook submitted that the targeting of digital platforms with differential regulation was not justified,¹⁹⁷⁹ similarly, Twitter submitted that 'Twitter, along with many others in the industry, already participate in third party verification schemes that promote organisational accountability and compliance'.¹⁹⁸⁰

The ACCC values any proactive efforts by the digital platforms to implement privacy protective data practices. However, it considers significant benefit would arise from enacting a uniform set of rules to apply to digital platforms operators that engage in broadly similar data practices. A further discussion of these proposed rules are below.

(d) Key issues covered by the DP Privacy Code

Industry stakeholders made numerous submissions regarding the issues that should be covered in a DP Privacy Code applicable to digital platforms. The UN Special Rapporteur said that the DP Privacy Code:

'...requires specific obligations on how digital platforms must inform consumers and obtain consumers' informed consent, specific protections for vulnerable users, as well as appropriate consumer controls over digital platforms' data practices including the protections from differing treatment according to gender or gender identity'.¹⁹⁸¹

¹⁹⁷³ Attorney General's Department and Department of Communications and the Arts, Joint Media Release, [Tougher penalties to keep Australians safe online](#), 24 March 2019.

¹⁹⁷⁴ SBS, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11.

¹⁹⁷⁵ Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019 submission, p. 15.

¹⁹⁷⁶ Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 7.

¹⁹⁷⁷ OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, pp. 8-9.

¹⁹⁷⁸ DIGI, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 5.

¹⁹⁷⁹ Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 58.

¹⁹⁸⁰ Twitter, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12.

¹⁹⁸¹ UN Special Rapporteur on the Right to Privacy, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

SBS similarly proposed that the DP Privacy Code could:

'...consider specific obligations on: how digital platforms inform consumers and how to obtain consumers' informed consent; appropriate consumer controls over digital platforms' data practices; and an appropriate consumer complaint handling process'.¹⁹⁸²

The Law Council of Australia and APF suggested that the DP Privacy Code could deal with issues relating to data analytics and artificial intelligence.¹⁹⁸³ The Financial Rights Legal Centre said that the DP Privacy Code could contain commitments 'including adhering to 'Privacy by Design' Principles, implementation of ethical data management principles and human design standards'.¹⁹⁸⁴

The ACCC believes the final form of the DP Privacy Code should be developed following comprehensive consultation with the digital platforms industry and other relevant stakeholders. In light of this Inquiry's findings, the ACCC considers that the DP Privacy Code should set out some obligations tailored to address the following issues of concern arising from data practices of digital platforms. They are:

1. Requirements to provide notices in a multi-layered format and to maintain a regularly updated online notice regarding key areas of concern and interest for consumers, such as any sharing of personal information with third parties.
2. Requirements to provide consumers with specific, opt-in controls for any data collection that is for a purpose other than the purpose of supplying the core consumer-facing service and, where consents relate to the collection of children's personal information, additional requirements to verify that consent is given or authorised by the child's guardian.
3. Requirements to provide consumers with specific controls to opt-in and out of whether their personal information is shared with third parties and whether their personal information is used for targeted advertising or online profiling purposes.
4. Restrictions on the collection, use or sharing of children's personal information for targeted advertising or online profiling purposes and requirements to minimise the collection, use and disclosure of children's personal information.
5. Requirements to maintain adequate information security management systems in accordance with accepted international standards.
6. In alignment with the principle of data minimisation, requirements to establish a time period for retaining any personal information collected or obtained that is not required for providing the core service.
7. Requirements to establish effective mechanisms to address complaints from consumers in a timely manner.

The ACCC considers that a DP Privacy Code dealing with the above issues would alleviate information asymmetries about personal information collection, use and shared by digital platforms, increase consumer control over their personal information, and improve protections for all consumers (including vulnerable consumers) from data-related harms.

Some of these requirements address similar issues as the legislative amendments proposed in recommendation 16 above. In particular, requirements regarding notification and consent under the DP Privacy Code are also addressed in recommendations 16(b) and (c). However, the ACCC notes that the issues to be addressed with the DP Privacy Code would supplement the legislative amendments proposed in recommendation 16, in order to address issues specific to digital platforms. Additionally, if the DP Privacy Code is developed by the OAIC without requiring legislative amendment, the DP Privacy Code will be able to provide consumers with important notification and controls in the interim while the Government is considering the proposed amendments to the Privacy Act.

1982 SBS, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11.

1983 Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 12; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 9.

1984 Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 16.

(i) Information requirements

As discussed in recommendation 16(b), the ACCC considers that strengthening information requirements for digital platforms will help address the information asymmetry experienced by consumers regarding the particular data practices of digital platforms.

A number of stakeholders to the Inquiry submitted that information requirements of platforms should be specific,¹⁹⁸⁵ and include a requirement that platforms maintain a register of relevant information;¹⁹⁸⁶ not just for the benefit of consumers but also for privacy and consumer advocates and regulators.¹⁹⁸⁷

The ACCC notes that, during consultation, numerous stakeholders raised that a potential risk of strengthened notification requirements would be longer and more numerous notifications, risking information overload for consumers.¹⁹⁸⁸

As discussed in section 7.1, the ACCC recognises information overload (including from numerous and lengthy terms and conditions) can be a key barrier to consumers' engaging with privacy policies and providing meaningful consent. The risk of information overload is likely to be greater in instances where a business collects a large amount of data for a wide variety of purposes; and the ACCC notes its findings above regarding the already lengthy and complex privacy policies that many digital platforms have. The scope of data collection and use by digital platforms means the risk of this information overload is particularly acute.

In order to strike a balance between providing sufficient information and avoiding information overload, the ACCC views that any notification requirements for digital platforms should also include:

- a specific requirement that notifications be multi-layered, and
- use of standardised categories or language both for purposes for data collection and third-parties that personal information may be shared with.

(ii) Multi-layered notification

As requirement for multi-layered notification reflects the existing privacy policy best practice guidance of the OAIC¹⁹⁸⁹ and a number of stakeholder submissions.¹⁹⁹⁰ In addition, the ACCC also notes that this requirement should not prescribe how each of the layers must be presented to the consumer or prevent initiatives to make notifications more engaging for consumers, but instead is intended to set out a baseline of requirements for what each layer contains.

A part of this requirement, the first layer should contain concise, high-level statements regarding key areas of consumer concern and interest in relation to data collection practices (for example, data sharing practices) with more detailed information set out in subsequent layers provided to consumers. The final layer should contain all relevant information that details how a consumer's data may be collected, used, disclosed and shared by the digital platform, as well as the name and contact details for each third party to whom personal information may be disclosed.

Careful consideration should also be given to ensuring that the 'layering' requirement does not inadvertently mislead consumers. The content of the first layer of notification should provide an accurate summation of what can be found in subsequent layers. An example of how such an approach could work is provided in box 7.31.

1985 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3; Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

1986 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6; Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3.

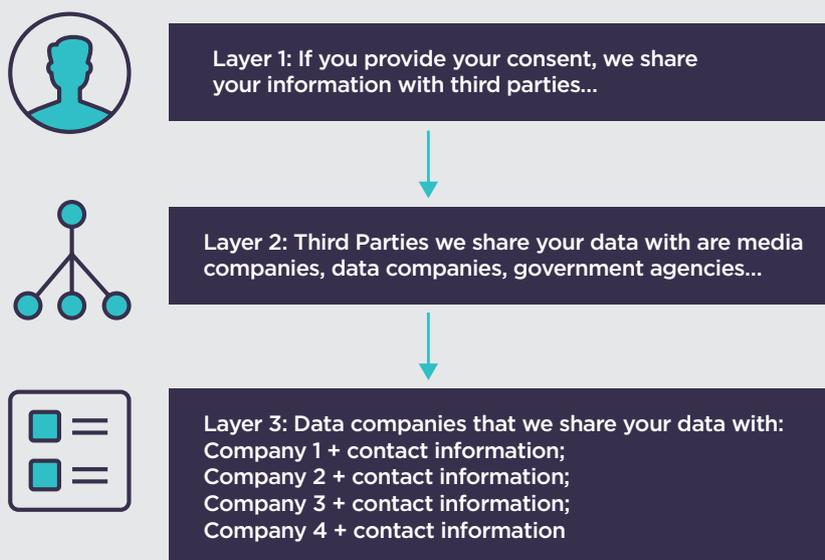
1987 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6; ACCC [privacy roundtable summary](#).

1988 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 6; see also ACCC [privacy roundtable summary](#).

1989 OAIC, Guidance, [Guide to developing an APP privacy policy](#), May 2014.

1990 Dr Katharine Kemp and Dr Rob Nicholls, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p.; Totally Awesome, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; ACCC [privacy roundtable summary](#).

Box 7.31: Example of a notification using multi-layered approach



(iii) Standardised categories/language

Standardised categories or language would also help inform consumers why their data is being collected and with whom it is being shared, while avoiding information overload.

The FLRC submitted that vague, incomparable and inconsistent terminology is an issue, and submitted that standardised key terms, under the DP Privacy Code, could address this issue.¹⁹⁹¹ Use of standardised categories or language may increase consumer engagement with the notification by simplifying the notice and facilitating comparison across different entities which are collecting similar types of information but for different purposes or sharing with different types of third parties.¹⁹⁹² These categories should not be overly specific, but rather serve as ‘umbrella’ categories or terms for the different purposes and third parties that are involved in the collection and use of consumer’s personal information. Examples of categories that could benefit from standardised definition/terms to assist consumer understanding is provided in box 7.32.

¹⁹⁹¹ Financial Rights Legal Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, pp. 14-15.

¹⁹⁹² For discussion on summary disclosures, see: Oxera, [Review of literature on product disclosure: prepared for Financial Conduct Authority](#), 29 October 2014, p. 13.

Box 7.32: Examples of standardised definitions

Standardised definitions could be particularly useful for consumers to describe types of third parties to whom information may be provided. For example: media companies, data analytics firms, or market research companies.

Examples of standardised categories that could be useful to develop for consumers in order to more clearly identify the types of purposes for which a digital platform could use a consumer's data could include: 'market research and product development'; 'diagnostics and troubleshooting'; 'personalised advertising', or 'personalised services'.

Providing clear differentiation between categories would be particularly beneficial for consumers to assist in understanding the purpose in which their data may be used by a platform. For example, the ACCC considers that there is an important distinction between 'personalised services' and 'personalised advertising'; especially for businesses which consider providing an individualised experience an important part of the service they provide.¹⁹⁹³

In providing these examples for both layering and standard language, the ACCC notes that the effectiveness of both requirements would rely on their being rigorously consumer tested, and that the examples above are merely provided as non-exhaustive examples.

The ACCC notes that it has suggested, as part of recommendation 16(b), that the Australian Government consider whether these requirements may be appropriate to apply to all APP entities. The ACCC considers that the volume and scope of digital platforms' data practices, their central role in consumers' lives, and their data-focussed business models, mean it is appropriate for these additional requirements to be separately prescribed under the DP Privacy Code.

The ACCC notes that the effectiveness of notification requirements rely on rigorous consumer testing. See box 7.33 '*ACCC recommends Consumer Testing*' for a discussion on the importance of testing to design effective notifications for consumers.

Box 7.33: ACCC recommends Consumer Testing

Behavioural insights literature offers numerous examples of how the presentation of information can influence consumers' understanding of an issue and their behaviour.¹⁹⁹⁴ It illustrates that what works for consumers in one context may not work in another.

How information is presented should be a key consideration for anyone working to give consumers sufficient knowledge to make informed decisions. The ACCC believes the Government should undertake consumer testing to measure the effectiveness of various forms of notification and express opt-in consent. This testing should assess their ability to help consumers understand digital platforms' data practices and give meaningful consent. The testing could also evaluate whether these interventions ultimately facilitate more competition between digital platforms along the privacy dimension or whether they are counter-productive.

Consumer testing could uncover and resolve issues with the design of notifications such as those reported in the Norwegian Consumer Council's June 2018 report 'Deceived by Design'.¹⁹⁹⁵ This report presented a review of Facebook's "Review your data settings" popup that related to the European General Data Protection Regulation. The Norwegian Consumer Council found that the process that users had to go through to limit data collection and use was much longer than the process that resulted in the collection of the largest amount of data. The reduced data collection option required more than three times the clicks (13 clicks) of the largest data collection option (4 clicks).

¹⁹⁹³ See, for example: Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 56.

¹⁹⁹⁴ Oxera, [Review of literature on product disclosure: prepared for Financial Conduct Authority](#), 29 October 2014.

¹⁹⁹⁵ Norwegian Consumer Council, [Deceived by Design](#), June 2018.

It noted that users who were in a rush to use Facebook were inclined to follow the quicker and easier route, resulting in the maximum amount of data collection and use. The Norwegian Consumer Council also found that Facebook desktop users may not have felt like they could defer the review. These users would have felt they must either read and agree to 21 pages of text or otherwise delete their account. Assuming that deleting their account is not a viable option for most users, this would force users to accept the new terms immediately.

Examples of where academics, governments or businesses have tested information notices on consumers include:

- The Association of Super Funds of Australia funded a study of consumers' comprehension of a product disclosure statement for superannuation products. Initially only 10 per cent of consumers were able to correctly answer 90 per cent of the questions. Interview processes were used to reveal why consumers were making mistakes and this information was used to re-design the document. Some of the changes included clearly explaining superannuation terms and including useful 'signposts' (such as a table of contents and logical headings). Following another round of testing and refinement, 40 per cent of consumers were able to correctly answer 90 per cent of the questions.¹⁹⁹⁶
- The EC commissioned work to test ways of increasing readership and comprehension of terms and conditions.¹⁹⁹⁷ They conducted two preliminary studies to provide insights into consumer behaviour about general awareness of their rights and whether they had alternative strategies to reading terms and conditions to inform themselves of their rights. The EC then conducted an experiment to understand if shortening and simplifying terms and conditions would increase readership. They found that it did improve readership, understanding and trust in terms and conditions. They also found that requiring consumers to scroll through terms and conditions, as opposed to consumers accessing terms and conditions by clicking on a link, could also increase readership.

The ACCC notes that organisations responsible for developing technical standards for the CDR are engaging in multiple rounds of consumer testing to ensure consumer understanding and to facilitate sharing of consumer data within the CDR framework.¹⁹⁹⁸

Among the many sources of information on conducting consumer testing, the OECD provides broad guidance on how to undertake behavioural experiments to test the effectiveness of online information disclosures.¹⁹⁹⁹ Although not intended to be an exhaustive discussion, the OECD outlines the following high-level steps for consumer testing:

- **Problem identification:** First, identify the problem. The specific policy issue and its behavioural aspects should be identified and defined as tightly as possible. This stage may involve a review of the literature and quantitative and qualitative research. Focus groups, in depth interviews, observation and potentially initial testing could be used to determine the extent of the problem and to act as a baseline against which to measure the success of any change.
- **Developing options for improving notification:** Second, identify ways to improve notification, based on the policy issue identified in the first step. Areas to target should be informed by the initial quantitative and qualitative research or relevant literature on the topic. From this a number of options can be developed for testing.
- **Testing options:** Third, test the options. This could be done in a laboratory setting, online, through a randomised control trial, or in the field. A combination of methods can be used. Once the most effective types of notification have been identified through the testing, the benefits from the intervention can be compared with its costs. The OECD also notes other factors to consider include sample size, and the extent to which results can be generalised to other contexts.

1996 Productivity Commission, [Review of Australia's Consumer Policy Framework](#), 30 April 2008, p. 265.

1997 European Commission, [Study on consumers' attitudes towards Terms and Conditions](#), 21 March 2016.

1998 Consumer Data Standards, [Reports](#), viewed 21 May 2019.

1999 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018.

(e) Consent requirements

Digital platforms collect a wide variety of data for a wide variety of purposes outside of providing the core consumer service. The ACCC notes that under the current framework, which does not require consent for the use or disclosure of personal information for a 'primary purpose', means there are few instances of data use that require consumers to consent. This forms a clear instance of the information asymmetry found during this chapter; where digital platforms engage in data practices of concern to consumers, but of which consumers are not necessarily aware.

The ACCC considers that the scope and breadth of consumer data collected and used by digital platforms means it is appropriate to include a requirement within the DP Privacy Code that digital platforms seek consent whenever they use or disclose data for purposes other than the core consumer-facing service. This requirement means digital platforms would have to inform consumers of all the purposes they collect data that do not contribute to the consumer's use of the platform, and provide consumer control over what data they provide as part of their use of a digital platform.

The ACCC notes that a number of stakeholders opposed the consent requirements, proposed in the Preliminary Report,²⁰⁰⁰ on the basis that unlike the GDPR, they did not recognise other bases for processing personal information.²⁰⁰¹ The ACCC notes that the GDPR allows for the collection of personal information on bases other than consent, and therefore this requirement is likely to involve some additional burden for digital platforms. The ACCC took into account these views in forming its final recommendations and considers it appropriate to require the basis for collecting non-essential information be consent, particularly given concerns surrounding the broad and flexible definition of the 'legitimate interests' basis for collecting personal information.²⁰⁰²

The ACCC also notes stakeholder submissions raising concerns that strengthened consent requirements may harm consumers by overburdening them with an unmanageable amount of consents;²⁰⁰³ and that the concept of 'consent fatigue' (which may result in consumers not engaging with the consents they are presented with) is a concept that was also raised following the introduction of the GDPR.²⁰⁰⁴ The ACCC also notes submissions that focused on the additional burden to digital platforms that stronger consent requirements would produce.²⁰⁰⁵

This recommendation seeks to strike the balance between enabling meaningful consent for consumers without overwhelming them with consent, by confining individual consents with the same standardised categories as discussed in the section above (see box 7.34). That is, businesses would have to seek separate consent when they were intending to collect or use personal information for a new standardised category of purpose, or share the information with a new category of third party.

2000 ACCC, Preliminary Report, p. 229.

2001 BSA/Software Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Amex, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Facebook, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019.

2002 For discussion of the concerns on 'legitimate interests' basis in GDPR, see: SS Rana & Co, [Loopholes in the General Data Protection Regulation](#), 4 June 2018; D. Kelleher, [What does legitimate interest mean? The CJEU gives its answer in Rīgas](#), IAPP, 4 May 2017, accessed 21 May 2019.

2003 ACCC [privacy roundtable summary](#), p. 3

2004 J Baker, [Are all these GDPR consent emails even necessary](#), IAPP, 22 May 2018, accessed 22 May 2019.

2005 Google, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; BSA/Software Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Fundraising Institute of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Amex, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019; Optus, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

Box 7.34: Example of when a digital platform would be required to get consent from a consumer

Under this recommendation, a digital platform would not have to seek consent to place cookies essential to the functionality of the platform; however, it would have to seek consent to place other cookies for the purposes of personalising the service, or targeting advertising.

A digital platform providing search engine services would not have to seek consent to collect a consumer's location to set the language of the search and tailor search results; it would have to seek consent to use that same location data to tailor targeted advertising and perform market research.

An example of when consent would be required when a digital platform sought to use the location data of a user is below:

Purpose	Required to seek Consent?
Collection and use of location data for the purpose of providing the core service.	63
Use of location data (collected for the purpose of providing the core service) for the purpose of targeted advertising.	242
Sharing of location data (collected for the purpose of providing the core service) to a third party	245
Collection of new type of location data for the purposes of providing the core service.	262
Collection of new type of location data for the purposes of providing targeted advertising.	215

By requiring consent for standardised categories, rather than every piece of 'new' information collected, the ACCC considers that this recommendation minimises the risk of 'consent fatigue', enabling consumers to engage with the data collection process and choose the level of data collection that aligns with their individual preferences. Standardised categories will also reduce the burden on digital platforms.

As with the strengthened consent requirements at recommendation 16(c), effective consent mechanisms should be designed following extensive consumer testing – see further discussion in box 7.33 '*ACCC recommends Consumer Testing*'. For an example of measures which seek to minimise consent fatigue, see box 7.35 '*Consent overload and the ePrivacy Directive*'.

Box 7.35: Consent overload and the ePrivacy Directive

At the time of this report, the European Parliament is considering amendments to the EU 2002 ePrivacy Directive to ensure '[t]he principle of confidentiality should apply to current and future means of communication, including calls, internet access, instant messaging applications, e-mail, internet phone calls and personal messaging provided through social media'.²⁰⁰⁶

The draft currently before EU parliament states that, 'The methods used for providing information and obtaining end-user's consent should be as user-friendly as possible'.²⁰⁰⁷ In this context, the draft notes that the increased use of tracking cookies means users are increasingly requested to provide consent for the placement of these cookies, leading to an overload of requests; and that technical means to provide consent may be able to address this kind of problem. The regulation states, for example:

End-users should be offered a set of privacy setting options, ranging from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, 'reject third party cookies' or 'only accept first party cookies').²⁰⁰⁸

There is some evidence of websites for businesses that operate under the GDPR providing these different types of options.²⁰⁰⁹ The ability of consumers to globally opt-in, stay opted-out, or make an intermediate decision could provide a useful way to minimise consent fatigue, by allowing consumers to select their preferred level of data collection as quickly as possible.

(F) Retention period

The ACCC received numerous submissions about the mandatory deletion of data, including concerns about the impact of such an obligation on businesses that are less digitally-focused than digital platforms.²⁰¹⁰ As noted in recommendation 16(d), the ACCC considers that it would be more appropriate for a mandatory obligation for the deletion of data that is not required for providing the core consumer-facing service to apply specifically to certain digital platforms that collect, use and disclose a large volume of Australian consumers' personal information.

The ACCC recognises concerns that a set retention period risks adverse consequences such as deleting data against a user's wishes, if a user wanted to return to a platform or if users were using the digital platform for the purposes of storage (for example, photos or emails).²⁰¹¹ However, the requirement for a retention period is only intended to apply to data that is not required for the provision of the core consumer-facing service, and therefore is primarily concerned with personal information held by a digital platform which is no longer providing a service to the consumer. The ACCC also recommends that digital platforms should notify users before the expiry of the retention period and the deletion of their personal information.

The ACCC recommends that instead of specifying the criteria or time period for deletion, there should be an obligation for digital platforms to each establish a time period for the retention of any personal information collected or obtained. This retention period must be kept to a strict minimum and publicly disclosed to consumers.

The OAIC's submission notes that a mandatory obligation to delete user data 'would align with agency record destruction practices' and considers that 'the obligation should also take account of consumer

2006 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 1.

2007 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 22.

2008 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 23.

2009 See, for example: [Jamie Oliver website](#), accessed 30 April 2019.

2010 ACCC privacy roundtable summary, p. 5.

2011 ACCC privacy roundtable summary, p. 5.

expectations about continuing access to data'.²⁰¹² It may also be appropriate for the Code to set out some required controls for automatic deletion of personal information, similarly to the controls introduced recently by Google – see further box 7.23 'Google's new auto-delete controls'.

A flexible minimum data retention requirement has the benefits of being adaptable to the data practices of a large variety of entities and broadly aligning with the GDPR, which already governs data practices of digital platforms in relation to any users residing in the EU.

(g) Proposed consultation process

Stakeholders have generally recommended a broad consultation process in developing a DP Privacy Code for digital platforms. The UN SRP suggests broad consultation during the process for developing this code 'which extends beyond that of companies and the ACCC, to the broader community'.²⁰¹³ Several stakeholders support the ACCC's involvement in developing the DP Privacy Code,²⁰¹⁴ which is likely to need consideration of how digital platforms interact with consumers and involve broader competition and consumer protection issues.

The consultation process for developing the DP Privacy Code would depend on if it was created under existing legislative provisions of the Privacy Act or whether the Government enacts legislative amendments to facilitate its creation. If the OAIC were to develop an APP code within the existing provisions of the Privacy Act, the ACCC recommends that the OAIC engages with key digital platforms operating in Australia to develop, register and enforce the DP Privacy Code. Those platforms include Google, Facebook, Apple, Twitter, and Snapchat.²⁰¹⁵ Alternatively, if the DP Privacy Code is to be developed as part of the Australian Government's proposed code of practice or via the provision of rule-making powers for the OAIC, its development would need to be guided by the new legislative provisions once they come into effect.

In any case, the ACCC agrees with stakeholders that the code requires extensive consultation, not only with digital platforms and regulators but also the many other stakeholders who would be affected by the Code. They include consumer representatives and advocates such as the CPRC, Consumer Action Law Centre and the Financial Rights Legal Centre. The ACCC should also be involved in the development of the DP Privacy Code in its capacity as competition and consumer regulator.

The many issues to be addressed in consultation include not only obligations that should be in the DP Privacy Code as proposed above but also:

- the range of digital platforms who should be regulated under the DP Privacy Code.
- an appropriate process for continuing review and revision of the DP Privacy Code.
- an appropriate reporting process to assist the OAIC in monitoring compliance with the DP Privacy Code.

(h) Enforcement of the DP Privacy Code

If a DP Privacy Code were created by the OAIC, a breach of the DP Privacy Code would constitute an interference with the privacy of an individual. That means the Australian Information Commissioner may investigate and make a determination regarding the breach.²⁰¹⁶

This enforcement power is an important element of the DP Privacy Code, as it would serve as a deterrent for digital platforms employing data practices that do not meet the DP Privacy Code's requirements. If a code or its terms were enacted via legislative amendment to the Privacy Act, such an amendment should be subject to the usual penalty provisions of the Privacy Act.

²⁰¹² OAIC, [Submission to the ACCC Digital Platforms Inquiry](#), May 2019, p. 7.

²⁰¹³ UN Special Rapporteur on the Right to Privacy, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

²⁰¹⁴ See Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10; Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 13.

²⁰¹⁵ See OAIC, [Guidelines for developing codes](#), 27 September 2018.

²⁰¹⁶ See sections 13 and 40 of the Privacy Act.

Recommendation 19 – Statutory tort for serious invasions of privacy

Introduce a statutory cause of action for serious invasions of privacy, as recommended by the Australian Law Reform Commission (ALRC). This cause of action provides protection for individuals against serious invasions of privacy that may not be captured within the scope of the Privacy Act. The cause of action should require privacy to be balanced against other public interests, such as freedom of expression and freedom of the media. This statutory cause of action will increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

(a) Overview

The ACCC recommends the ALRC's 2014 recommendation is adopted to introduce a new statutory cause of action in the form of a tort of serious invasions of privacy.²⁰¹⁷ Doing this would lessen the bargaining power imbalance between consumers and digital platforms by providing Australian consumers with an additional way of seeking redress for poor data practices by digital platforms and other businesses that collect Australians' personal information.

Empowering individuals to bring actions for serious invasions of their privacy will also address existing gaps in the privacy framework and increase the deterrence effect of Australian privacy laws against harmful data practices that seriously invade Australians' privacy.

The ALRC's proposed tort comprises the following key elements:

- **Two types of invasion:** The invasion of privacy must be either by intrusion into seclusion or misuse of private information.²⁰¹⁸
- **Reasonable expectation of privacy:** The plaintiff must prove that they had a reasonable expectation of privacy in all the circumstances (the ALRC recommended a series of factors that a court may consider when determining whether a person had a reasonable expectation of privacy).²⁰¹⁹
- **Fault element:** The invasion of privacy must have been committed intentionally or recklessly.²⁰²⁰
- **Seriousness:** The invasion of privacy must be serious.²⁰²¹
- **Proof of damage:** The invasion need not cause actual damage and damages for emotional distress may be awarded.²⁰²²
- **Countervailing public interests:** The court must be satisfied that the public interest in privacy outweighs any countervailing public interests (including freedom of speech, and freedom of the media).²⁰²³ This will incorporate a balancing consideration to address potential media concerns regarding the publication of information in the public interest.

The ACCC likewise supports the ALRC recommendation that courts should be empowered to award a range of remedies including damages for economic loss or emotional distress, exemplary damages (in exceptional circumstances), an account of any profits made from the invasion of privacy, injunctions at any stage of the proceedings, the delivery up and destruction or removal of material, and the publication of a correction.²⁰²⁴

2017 A full outline of the ALRC's recommendation can be found in their 2014 report: ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014.

2018 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 5-1.

2019 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 6-1 and 6-2.

2020 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 7-1.

2021 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 8-1.

2022 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 8-2.

2023 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 9-1.

2024 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 12-1, 12-4, 12-6, 12-8, 12-9, 12-10.

(b) The need for a new economy-wide statutory cause of action has been subject to extensive previous review

The proposed recommendation for this new statutory cause of action received mixed feedback from stakeholders in response to the Preliminary Report. Some media companies argue that the existing laws and regulations in Australia are sufficient and there is no demonstrated need to introduce this cause of action economy-wide.²⁰²⁵ The Australian Press Council notes the existing standards and complaints-handling system applicable to news media organisations that are members of the Press Council²⁰²⁶ and the Australian Finance Industry Association notes the existing dispute resolution mechanisms under the Privacy Act and the Australia Financial Complaints Authority.²⁰²⁷ Other stakeholders submit that further analysis and consultation on a new statutory cause of action should be conducted before implementing legislative reform in this area. Some said that it is unclear that new rights under a statutory tort would increase consumers' control over user data and benefit consumers above existing remedies.²⁰²⁸

However, as noted by submissions, including by the UN Special Rapporteur for the Right to Privacy (UN Special Rapporteur), numerous inquiries at Federal and State levels concluded that a statutory cause of action for serious invasions of privacy should be enacted in Australia and apply across the economy.²⁰²⁹ These inquiries have involved comprehensive consultation with key stakeholders and careful examination of the gaps in the coverage of privacy protections in Australia.²⁰³⁰

Some submissions, such as from Dr Katharine Kemp and Dr Rob Nicholls' support the introduction of a statutory tort as 'a long overdue reform' that will bring Australian privacy law closer to the privacy laws of other major jurisdictions. They note that the statutory cause of action 'has been thoroughly considered, and justified, by the Australian Law Reform Commission'. Also supporting this recommendation were the OAIC, Law Society of NSW, the Law Institute of Victoria, the NSW Bar Association, the Privacy and Data Law Committee of the Law Society of South Australia, and the South Australian Bar Association, the Australian Privacy Foundation and the Consumer Action Law Centre.²⁰³¹

The Australian Privacy Foundation said the ALRC's examination of the issue was 'very thorough and its recommendations well-balanced.' It further proposed that the statutory tort proposed by the ALRC should be strengthened to include negligent conduct.²⁰³²

On balance, the ACCC agrees with the careful analysis and extensive consultation conducted over numerous past inquiries that have demonstrated a significant gap in existing Australian law and the need for a new statutory cause of action for individuals suffering from serious invasions of privacy. Its introduction would lessen the bargaining power imbalance between consumers and entities collecting their personal information, including digital platforms, by providing the consumers with an additional way of seeking redress for harmful data practices that seriously invade their privacy. This will also create a new deterrent discouraging entities from engaging in harmful data practices.

(c) Impact on freedom of speech and freedom of the media

A key concern in submissions to the Preliminary Report was that a new cause of action for serious invasions of privacy would have a negative impact on freedom of speech and freedom of the media. Free TV submitted that this statutory tort would 'risk an unjustified adverse effect on the freedom of the media to seek out and disseminate information of public concern'. They said it would 'act as a

2025 See, for example, submissions from MIGA, SBS, Foxtel, Australian Finance Industry Association, Australian Press Council, Communications Alliance Ltd, and Nine.

2026 [APC Submission](#), p4.

2027 Australian Finance Industry Association, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 6.

2028 See, for example, submissions from MEAA, Indue, AI Group, Google.

2029 UN Special Rapporteur on the Right to Privacy, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 8.

2030 See for example, ALRC 2008 inquiry, ALRC 2014 inquiry, NSW Parliamentary Committee 2016 inquiry.

2031 Law Council of Australia has noted conflicting views among its members regarding support for this recommendation: Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p 14.

2032 Australian Privacy Foundation, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10.

deterrent to media companies reporting public interest stories due to the added complexity it would introduce to the privacy law framework and the increased risk of costly litigation'.²⁰³³ SBS also opposed this recommendation due to 'the lack of any counterbalancing protection of freedom of speech under Australian law'.²⁰³⁴

Other stakeholders opposing this recommendation included the Law Council of Australia's Media and Communications Committee, Business Law Section, and Privacy Law Committee, some of whom cited similar concerns about the potential chilling effect on freedom of the media.²⁰³⁵ REA Group submit that this new cause of action may cause Australian businesses to be much more conservative in the way they utilise data, decreasing innovation and overall consumer benefit.²⁰³⁶

The ACCC recognises the risks that a statutory tort for serious invasions of privacy may interfere with other public interests and that there is a need to balance the value of privacy with other fundamental values including freedom of expression and freedom of the media to report on matters of public interest.

However, the ACCC notes that this issue was also carefully considered and addressed by the ALRC in designing its statutory cause of action for serious invasions of privacy. The ALRC created 'a clear process for balancing competing interests, to ensure the new action does not privilege privacy over other important public interests'.²⁰³⁷ It recommended that, for an individual to have a cause of action, 'the court must be satisfied that the public interest in privacy outweighs any countervailing public interest'. The ALRC set out a non-exhaustive list of countervailing public interest matters which a court may consider, which includes:²⁰³⁸

- freedom of expression, including political communication and artistic expression
- freedom of the media, particularly to responsibly investigate and report matters of public concern and importance
- the proper administration of government
- open justice
- public health and safety
- national security
- the prevention and detection of crime and fraud.

To further protect fundamental interests such as the media's right to freely report on matters of public interest, the ALRC recommended a comprehensive array of defences to be made available in relation to the statutory tort, including a defence of fair reporting of proceedings of public concern.²⁰³⁹ Other defences recommended by the ALRC include a defence that the defendant's conduct was required or authorised by law; a defence for conduct that was proportionate, necessary and reasonable to defend a person or property; a defence of necessity; a defence of consent; a defence of absolute privilege; a defence of publication of public documents; and an exemption for children and young persons.²⁰⁴⁰

The ACCC considers these countervailing public interest matters should be included in any cause of action created.

2033 Free TV, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 38.

2034 SBS, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 13.

2035 Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, pp. 14-15.

2036 REA group, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. p. 5.

2037 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 148.

2038 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, Recommendations 9-1 and 9-2 discussed at pp. 144-158.

2039 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 11-7 at p. 206.

2040 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 11-1, 11-2, 11-3, 11-4, 11-5, 11-6, 11-8.

(d) Complementarity with recommendation 16(e) on individual recourse

The Fundraising Institute of Australia submitted that to introduce a direct right of action under the Privacy Act as well as a separate statutory tort 'would appear to be overkill'.²⁰⁴¹ The ACCC considers that, while there is overlap between this recommendation and recommendation 16(e) regarding individual recourse, there are also important distinctions between the two causes of action that mean they are both crucial to providing adequate protection to individuals for privacy-related harms.

Recommendation 16(e) would give individuals the ability to directly enforce their rights under the Privacy Act, which applies to instances where APP entities do not appropriately handle their 'personal information' in accordance with the Privacy Act's regulatory framework. However, not all serious invasions of privacy are regulated under the Privacy Act. For example, individuals and most small businesses with an annual turnover of less than AU \$3 million are not 'APP entities' regulated by the Privacy Act. Media organisations engaging in an act or practice 'in the course of journalism' are also exempt from the Privacy Act.²⁰⁴²

The ALRC's analysis similarly notes that:

*...although there are many regulatory regimes, criminal laws and civil obligations and remedies that help protect people from breaches or invasions of privacy, there are also a number of notable gaps in these laws.*²⁰⁴³

The ALRC noted (in considering whether a statutory tort should extend to negligent behaviour) that for negligent data breaches, a number of remedial responses were available under the Privacy Act.²⁰⁴⁴

A 2014 submission by the OAIC to the ALRC stated that 'a dedicated privacy based cause of action could serve to complement the already existing legislative based protections afforded to individuals and address some gaps that exist both in the common law and legislation.'²⁰⁴⁵ The OAIC noted that such gaps included that the Privacy Act does not cover acts or practices of an individual acting in their personal capacity (so it does not protect an individual against a breach of their information privacy by another individual).²⁰⁴⁶

This Office of the Victorian Privacy Commissioner, in a submission to the ALRC in 2014, indicated that it receives a large number of complaints from individuals seeking:

*'redress for interferences with spatial or physical privacy for which there is currently no readily accessible remedy in Australian law, or seek to complain about interferences with personal information by other individuals, which are effectively beyond the jurisdiction or all current regulators.'*²⁰⁴⁷

The ACCC therefore considers that this recommendation for a statutory tort and recommendation 16(e) for individual recourse under the Privacy Act both provide important and complementary remedies for individuals in Australia. There is significant scope for a new statutory cause of action to fill gaps in the existing law regarding breaches of privacy, which will equip consumers with greater control over their privacy and personal information.²⁰⁴⁸ It would also reduce the burden on the OAIC, which currently has sole responsibility for taking representative action for breaches of privacy under the Privacy Act.

2041 Fundraising Institute of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 4.

2042 See Privacy Act s7B(4).

2043 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 38.

2044 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 122.

2045 Submission of the Office of the Privacy Commissioner, cited in ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 257.

2046 OAIC, Submission to the Australian Law Reform Commission, [Serious Invasions of Privacy in the Digital Era](#), December 2013, p. 30.

2047 Office of the Victorian Information Commissioner, [Submission to the Australian Law Reform Commission, Serious Invasions of Privacy in the Digital Era](#), December 2013, p. 4.

2048 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 51.

Recommendation 20 – Prohibition against Unfair Contract Terms

Amend the *Competition and Consumer Act 2010* so that unfair contract terms are prohibited (not just voidable). This would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract.

Due to the significant information asymmetries and bargaining power imbalances in the relationship between consumers and digital platforms, consumers are unable to negotiate a bargain with digital platforms for the collection, use and disclosure of their personal data. This bargaining imbalance results in terms within the consumer bargain that are potentially unfair contract terms (UCTs) under the ACL.

However, as the laws currently apply, it is not a contravention of the ACL to include UCTs in contracts and, therefore, no penalties can be sought. Rather, if declared unfair, the provision is simply void. The ACCC proposed introducing this prohibition, backed by penalties for the use of UCTs, as it would increase the deterrent effect of the current law.

In submissions on the Preliminary Report, some stakeholders opposed any changes to the UCT provisions. Most of these objections were based on the argument that prohibition and the introduction of penalties would introduce unacceptable uncertainty surrounding the definition of ‘unfair’,²⁰⁴⁹ and that the UCT provisions provide sufficient deterrent against the use of unfair terms by businesses.²⁰⁵⁰ Some opposing submissions also stated that the economy-wide impact of changes to UCT provisions would mean the changes would affect more than digital platforms.²⁰⁵¹ This was noted by the ACCC in its Preliminary Report.²⁰⁵² However, submissions from consumer protection and privacy stakeholders agree that introducing penalties to the use of unfair contract terms would more effectively deter businesses.²⁰⁵³

Considering the information received after the Preliminary Report, the ACCC believes that the current UCT provisions do not provide sufficient deterrence. This recommendation would allow the ACCC to hold businesses (including digital platforms) to account for including UCTs, not just to have UCTs declared void (as is currently the case).²⁰⁵⁴ The ability to seek pecuniary penalties for the use of UCTs will provide a greater deterrent against their use.

This is particularly significant in standard form contracts where there is a zero monetary price, like many digital platforms’ terms of use and privacy policies, where the impact of declaring a term void is less likely to have immediate impacts on the parties’ financial rights and obligations. Introducing penalties to the use of UCTs will help lessen the bargaining imbalance between digital platforms and consumers over any potential UCTs that digital platforms may wish to use in their terms of use and privacy policies.

The ACCC considers that the findings in this Inquiry strongly reinforces its previous advocacy regarding the need to introduce penalties for the use of unfair contract terms. The ACCC made this recommendation previously, in the broader context of business to business contracts. The ACCC Deputy Chair Mick Keogh has stated that ‘lacking a legal impediment, and without fear of financial penalties, businesses have an incentive to include potentially unfair terms in their contracts’.²⁰⁵⁵

2049 Foxtel, [Submission to ACCC Digital Platforms Inquiry](#), February 2019; News Corp, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019; Nine, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019.

2050 Foxtel, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Nine, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019; Twitter, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019; Gladwin Legal, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019.

2051 Google, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019; BSA/the Software Alliance, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019.

2052 ACCC, [Digital Platforms Inquiry Preliminary Report](#), December 2018, p. 88.

2053 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 10; Professor Jeannie Patterson, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2; Fundraising institute of Australia, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 4; UNSRP, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 9.

2054 ACCC, [Inquiry into the operation and effectiveness of the Franchising Code of Conduct: ACCC submission](#), 11 May 2018, p. 6.

2055 ACCC, Media Release, [Stronger penalties required for franchising codes and UCT laws](#), 14 October 2018.

In March 2019, a Parliamentary Joint Committee's review of the Franchising Code of Conduct recommended that a Franchising Taskforce be created to 'examine the appropriateness of making unfair contract terms in franchise agreements illegal and for civil penalties to be established'.²⁰⁵⁶ In response to this review, the Government announced that it would strengthen the UCT laws, subject to a Regulation Impact Statement (RIS) process; and that, 'to ensure the regime continues to be consistently applied across the economy, the Government will also consult, as part of the RIS process, on whether it is appropriate to apply any enhanced protections for small business to consumers and insurance contracts'²⁰⁵⁷. The ACCC had made a submission to Committee which recommended that the inclusion of a UCT in a standard form contract should be prohibited under the CCA and that civil pecuniary penalties and infringement notices should be made available for breach of the prohibition.²⁰⁵⁸

Recommendation 21 – Prohibition against certain unfair trading practices

Amend the *Competition and Consumer Act 2010* to include a prohibition on certain unfair trading practices. The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.

The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

(a) Overview

As noted throughout this report, the amount and variety of consumer data collected has significantly increased,²⁰⁵⁹ as has increased sophistication in data analysis that allows for even greater targeting of consumers by businesses. The ACCC considers that the ubiquity of data collection and use, by both digital platforms and other businesses,²⁰⁶⁰ and the resulting increased potential for significant harm to consumers, demands consideration of the current protections provided to consumers by the ACL in relation to these practices.

To this end, in the course of the Inquiry, the ACCC has identified some kinds of conduct that it considers to be significantly detrimental to consumers which are not expressly prohibited by the ACL. Such conduct include:

- businesses collecting and/or disclosing consumer data without express informed consent
- businesses failing to comply with reasonable data security standards, including failing to put in place appropriate security measures to protect consumer data
- businesses unilaterally changing the terms on which goods or service are provided to consumers without reasonable notice, and without the ability for the consumer to consider the new terms, including in relation to subscription products and contracts that automatically renew
- businesses inducing consumer consent or agreement to data collection and use by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information that would enable consumers to properly consider the contract terms
- business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.

Examples and case studies of these practices are included in more detail at sections 7.4.1, 7.4.2, 7.5.1 and 7.6.4 of this report.

2056 Parliamentary Joint Committee on Corporations and Financial Services, [Fairness in Franchising](#), March 2019, p. 135.

2057 Assistant Treasurer and Department of Jobs and Small Business, Media Release, [Further strengthening the unfair contract term protections for small businesses](#), 28 March 2019.

2058 ACCC, [Inquiry into the operation and effectiveness of the Franchising Code of Conduct: ACCC submission](#), 11 May 2018, Recommendation 3.

2059 See discussion at section 7.1.2.

2060 See discussion at box 7.28 regarding the data collection of businesses other than digital platforms.

The ACCC notes that these areas of concern exist, not just in the context of digital platforms, but across all businesses that are involved in data-driven industries. These concerns were identified in the context of the data-driven industries that are the focus of the Inquiry, but are not exclusive to those industries. As discussed in section 7.9.2, many businesses other than digital platforms may have long and complex privacy policies, use click wrap agreements, or have data practices that result in unauthorised disclosure of consumer's personal information.

(b) Stakeholder views

In its Preliminary Report, the ACCC noted the existing provisions of the ACL (including regarding unconscionable conduct, conduct that is misleading or deceptive, and unfair contract terms) may not be broad enough to address these types of practices.²⁰⁶¹ The ACCC said that it was considering whether a prohibition against unfair practices in the ACL would be an appropriate way to prohibit such practices.

Submissions from consumer groups, in response to the Preliminary Report, supported the introduction of an unfair practices prohibition, as in their view, the current legal framework does not capture all instances of conduct harmful to consumers.²⁰⁶² Some noted that such a prohibition would be a useful tool against companies (not just digital platforms) undertaking such practices, with the Consumer Action Law Centre supporting the introduction of a prohibition which could make it unlawful for traders to design pricing strategies that significantly disadvantage certain groups of customers, including more vulnerable groups.²⁰⁶³

Submissions opposing this proposal predominantly focused on the economy-wide aspect of such a prohibition. Many argued further analysis of the economy-wide effects was needed, and that any consideration of unfair practices through the lens of this Inquiry risked missing the views of other businesses that would be affected.²⁰⁶⁴ These submissions also raised concerns that a broad prohibition against unfair contract terms risked introducing uncertainty into the legislation.²⁰⁶⁵

(c) ACCC assessment

In light of stakeholder views and the key findings in this chapter, the ACCC considers that a prohibition on unfair trading practices (referred to below as an 'unfair practices prohibition') would be appropriate to address conduct not currently caught by the consumer protection laws but which has the potential for significant consumer harm.

As set out in sections 7.4 to 7.7 of this chapter, consumer transactions with digital platforms often feature acute information asymmetries and bargaining power imbalances and the existing regulatory framework does not effectively deter data practices that exploit these characteristics. Promoting competition relies on consumers being able to make free and informed choices regarding products and services that best meet their interests. As such, it is critical that the ACL is able to protect consumers from any conduct that deprives them of a real and meaningful choice, such as a monopolist's conduct in imposing extortionate take-it-or-leave-it terms to consumers who are in need of a service.²⁰⁶⁶

The ACCC recognises that an economy-wide prohibition would necessarily affect many more businesses than digital platform-specific legislation. However, as the practices of concern identified during the Inquiry are not confined to digital platforms, the ACCC has concluded that unfair practices prohibition should apply across the economy to ensure consistent application across all industries.

2061 ACCC, [Preliminary Report](#), p. 238.

2062 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 11; [Consumer Action Law Centre, Submission to the ACCC Digital Platforms Inquiry, February 2019, p. 1](#); Obesity Policy Coalition, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 4, Professor Jeannie Paterson, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 2.

2063 [Consumer Action Law Centre, Submission to the ACCC Digital Platforms Inquiry, February 2019, pp. 3-4](#).

2064 News Corp, [Submission to the ACCC Digital Platforms Inquiry](#), March 2019, p. 56; Google, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 73.

2065 Arnold Bloch Liebler, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 7; AI Group, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 3; Indue, [Submission to the ACCC Digital Platforms Inquiry](#), January 2019, p. 4.

2066 See comment from Edelman J in *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18 (12 June 2019) at [313].

In recommending this, the ACCC notes that the effectiveness of any unfair practices provision depends significantly on how it is drafted, and will require careful consideration. The ACCC notes that unfair practices prohibitions in other jurisdictions are not unrestrained, and have boundaries that are codified in the law. Similar codification would be required in Australia to ensure that the new law is targeted in its application.

(d) Unfair practices consideration in Australia

In its 2017 review of the Australian Consumer Law, Consumer Affairs Australia and New Zealand (CAANZ) recommended to governments that exploration be undertaken as to how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices. The Final Report into the ACL Review had found that the value of introducing an unfair trading prohibition was ‘uncertain’, but stated that exploring an unfair trading prohibition in Australia would be an ongoing priority, in particular, in its capacity to address market-wide or systemic unfair conduct.

Subsequent to this recommendation, the Legislative and Governance Forum on Consumer Affairs (CAF) placed a research project into unfair practices on its forward work program, with NSW officials are leading the project. As part of this project, ACL regulators, including the ACCC, have provided case study examples for the consultants to consider. A draft of the research report is expected to be completed by late June or early July 2019. NSW expects to be in a position to present the final research report for consideration by CAANZ in late 2019.

(e) Use of unfair practices in overseas jurisdictions

In considering unfair practices in the Preliminary Report, the ACCC noted other jurisdictions which have unfair practices and trading provisions and in particular, their capacity to address the consumer data collection issues identified in this chapter.

Comparable jurisdictions (including in the EU, UK, USA, Canada and Singapore) adopt a combination of general and specific protections in relation not only to unconscionable and misleading practices, but also to unfair trading practices.²⁰⁶⁷ As such, these jurisdictions provide potential models for an Australian unfair trading prohibition. For example, the US FTC Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce’.²⁰⁶⁸ For further discussion about overseas jurisdictions using unfair practices to address problematic data practices, see section 7.8.3(c) of the Report.

In the US, the FTC views that its ‘unfairness authority’ under the FTC Act, along with its ‘deception authority’ (similar to the ACL’s misleading or deceptive conduct provisions) provide a complementary set of provisions that allow it to address the types of harm that are not otherwise captured by a standalone ‘deception authority’. In the data collection industry, this includes providing a cause of action against companies that may operate behind another company (for example, to sell data), but which have not made representations to a consumer, or to address conduct where consumers do not have oversight as to whether a company is treating their personal data carelessly or illegally.²⁰⁶⁹

(f) Importance of appropriate safeguards and guidance

The ACCC notes that the unfair practices provisions in comparable jurisdictions are a useful reference point in any consideration of an unfair practices provision. The ACCC notes, in particular, that the prohibitions are not unrestrained prohibitions on all unfair conduct, but have boundaries that are codified in law. For example, the FTC’s unfairness provision prohibits practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.²⁰⁷⁰

²⁰⁶⁷ Queensland University of Technology, [Comparative analysis of overseas consumer policy frameworks](#), April 2016, 2-3.

²⁰⁶⁸ Federal Trade Commission Act, s 5(a).

²⁰⁶⁹ Jessica Rich (Director, Bureau of Consumer Protection FTC), [‘Built to last: Section 5 and the changing marketplace’](#), speech delivered at section 5 Symposium Washington, D.C., 26 February 2015.

²⁰⁷⁰ Federal Trade Commission Act, s 5(n).

In addition, in Europe, practices are unfair where they are contrary to the requirements of professional diligence, and materially distort (or are likely to) the economic behaviour of the average consumer.²⁰⁷¹ **Professional diligence** means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.²⁰⁷²

The EU Directive further provides that aggressive commercial practices (as set out in that Directive) shall be unfair,²⁰⁷³ and provides that a commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that they would not have taken otherwise.²⁰⁷⁴ The EU Directive contains a list of practices that shall in all circumstances be regarded as unfair.²⁰⁷⁵

The ACCC recommends that in drafting any unfair practices provision in Australia consideration should be given to the appropriate parameters, and that in developing such parameters, it will likely be useful to have regard to the unfair practices provisions in comparable jurisdictions. The ACCC considers that this is particularly important to ensure the provision avoids an overly broad interpretation of 'unfairness', and to ensure that uncertainty, which was raised by stakeholder submissions, is minimised to the extent possible.

7.11 Further ACCC actions

The ACCC is investigating the conduct of certain digital platforms under the Competition and Consumer Act.

These investigations include:

- Whether representations made by Google to some users about the control users have over Google's collection of location data raise issues under the ACL.
- Whether representations by Google about its privacy policy, and the level of disclosure about subsequent privacy policy changes that enabled Google to combine or match different sets of user data, raise issues under the ACL.
- Whether representations made by Facebook (and/or related entities) in relation to the nature of its services and the scope of its terms and conditions, including terms and conditions that allowed user data to be shared with third parties, raise issues under the ACL.
- Whether terms of use and privacy policies used by Facebook (and/or its related entities) may contain unfair contract terms.

Given the nature of the issues being investigated, the potential impact on the significant numbers of Australian consumers who use Google and Facebook's services and the significant industry and community interest in the matters being considered in the DPI inquiry, the ACCC considers it to be in the public interest to disclose these investigations. The investigations are continuing, and the ACCC has not formed a view on the issues being considered. We expect to conclude the investigations later in the year and will not make further comment until that time.

The ACCC will also continue to investigate whether any other conduct of digital platforms raises concerns under the CCA and whether it is appropriate for the ACCC to take enforcement action.

2071 EU Unfair Commercial Practices Directive 2005, Article 5.

2072 EU Unfair Commercial Practices Directive 2005, Article 2.

2073 EU Unfair Commercial Practices Directive 2005, Article 5.

2074 EU Unfair Commercial Practices Directive 2005, Article 8.

2075 Annex 1 to the EU Unfair Commercial Practices Directive 2005.

08

8. Addressing emerging harm from scams, artificial intelligence and other new technology

Key findings

- Ongoing technological and business developments in the media and digital platform markets pose significant social and consumer issues that can shape the direction society takes.
- Governments have a role to closely monitor and update regulatory and legislative frameworks to ensure society and individuals are protected from harm.
- The rise of digital platforms has enabled the growth of online scams, resulting in significant losses for consumers and small businesses. The ease with which scammers use digital platforms to conduct scams, particularly romance scams, investment scams and advertisements containing false representations, is especially concerning.
- The growth in ‘internet of things’ devices, voice-activated devices and 5G mobile communications is resulting in innovative new services and is likely to affect the supply of news and advertising in Australia.
- Increasing collection, analysis and distribution of user data has increased potential risks to user rights, privacy, autonomy and data security.
- The increased collection of individuals’ data made possible by new technologies and devices has significant implications for consumers and society as a whole, and will require serious consideration by citizens and governments.
- News outlets and media companies are experimenting with new content delivery formats in response to social media trends.
- Artificial intelligence, machine learning and the use of chatbots have potential positive applications in the production of news, and in counteracting the spread of disinformation, misinformation and malinformation. However, these technologies also have potential to cause harm, particularly in relation to scams and fraudulent economic and social activities.
- Dynamic market changes may affect the degree of competition in the relevant markets. In particular, new digital platforms may enter and existing digital platforms may exit, affecting the structure of the relevant markets.

The Terms of Reference for this Inquiry direct the ACCC to consider the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets.

Recommendations in earlier chapters are forward-looking and anticipate a wide range of issues, including emerging trends that have potential to threaten the rights, privacy and autonomy of individuals.

This chapter discusses emerging developments, the wider impact of which is not yet always clear. This chapter also contains discussion of increasing existing harms such as those resulting from the proliferation of scams conducted online and using digital platforms.

This chapter contains findings, and makes two recommendations in relation to internal dispute resolution and an ombudsman scheme to address identified issues, including the rise in scams perpetuated using digital platforms (section 8.1). The increased digitisation of society means that consumer and business harms relating to online scams are already occurring, and need to be addressed.

This chapter also considers a number of emerging technologies and trends to prompt public consideration of these issues, and the potential need for government and regulatory responses, including:

- emerging technologies including the ‘internet of things’, voice-activated devices and advancements in data use, security and authentication (section 8.2)
- emerging development in online news and artificial intelligence (section 8.3)
- potential changes to the composition and function of major digital platforms, such as expansion into related markets and entry or exit of market participants (section 8.4).

8.1 Technology enabled scams

Key Findings

- Ongoing technological and business developments in the media and digital platform markets pose significant social and consumer issues that can shape the direction society takes.
- Governments have a role to closely monitor and update regulatory and legislative frameworks to ensure society and individuals are protected from harm.
- The rise of digital platforms has enabled the growth of online scams, resulting in significant losses for consumers and small businesses. The ease with which scammers use digital platforms to conduct scams, particularly romance scams, investment scams and advertisements containing false representations, is especially concerning.

Rise in scams conducted on digital platforms

The use of online channels (particularly social media platforms) to find victims and conduct scams is on the rise. The ACCC works with state and territory consumer protection agencies and other government agencies to promote awareness in the community about scams. It also runs Scamwatch, a website that provides information to consumers and small businesses about how to recognise, avoid and report scams. Based on complaints received by the ACCC through Scamwatch between 2014 and 2018, reports of scams occurring through social media have increased by 188 per cent, with a corresponding increase of 165 per cent in the value of losses incurred from scams on social media.

In 2018, AU\$489.7 million in financial losses were reported to Scamwatch, the Australian Cybercrime Online Reporting Network and other state and territory government agencies. These losses represent an increase of 44 per cent over the AU\$340 million reported in 2017, demonstrating that the significant impact of scams on the Australian public.²⁰⁷⁶ It is important to note that many scams are not reported and that the true cost of scams is likely much higher than the reported figure.

In the same year, 22 per cent of total reported scams were reported to the ACCC's Scamwatch (representing AU\$107 million in financial losses). Of the scams reported to the ACCC, 4 per cent of scams and 15 per cent of total financial losses occurred on social media or online forums and 6 per cent of such scams and 16 per cent of total losses were reported as originating on the internet. This highlights the significant losses suffered by victims of such scams. Consumers reported losses of AU\$15.7 million from scams occurred on online platforms and AU\$16.5 million from scams occurring on the internet in 2018.²⁰⁷⁷ Victims of social-media based dating and romance scams reported losses of AU\$9.3 million and victims of social-media based investment scams reported losses of AU\$3.3 million in this year.

The main social media platforms associated with scams are currently Facebook and Instagram. Of scams conducted on social media platforms, 72 per cent had reportedly occurred on Facebook and 17 per cent of had reportedly occurred on Instagram.

The ACCC notes that while the ACCC's Scamwatch website captures the names of social media platforms where scams are served, the broader category of scams that originated online is not broken down by platforms. Not all of the scams reported to have originated online would have originated on Google Search, but it is likely that a proportion of scams would have come from Google Search.

In addition, given that these are only scams reported to the ACCC (and these reported scams represent 22 per cent of the total value of scams reported), the number of scams occurring on social media and other digital platforms and the consequent loss suffered is likely to be considerably higher than the figures reported in this chapter.

²⁰⁷⁶ ACCC, [Targeting scams: report of the ACCC on scams activity 2018](#), May 2019, p. iii.

²⁰⁷⁷ ACCC, [Targeting scams: report of the ACCC on scams activity 2018](#), May 2019, p. 13.

There are a number of scams that are either unique to digital platforms, or are more easily facilitated on digital platforms, for example:

- Online shopping scams are unique to the online sphere. These take many forms, including near-perfect replicas of legitimate stores that deceive consumers, as well as stores that offer goods that are never delivered. Such ads appear in numerous places including Facebook and Instagram and on services offered by digital platforms that connect buyers and sellers, such as Facebook Marketplace.
- Dating and romance scams are increasing, both in the number of scams and the losses incurred by users. In 2018, dating and romance scams accounted for 60 per cent of losses experienced by victims of scams occurring on social media.²⁰⁷⁸ These scams cause emotional as well as financial harm.
- False advertisements, including ads featuring celebrities without their permission.
- Investment scams that take place online and on digital platforms provide scammers with a broader audience than scammers may be able to otherwise reach, and result in significant loss to consumers. Of the total financial loss from scams reported to Scamwatch and other agencies in 2018, AU\$86 million were a result of investment scams.²⁰⁷⁹ Assuming 17.6 per cent of these losses were from investment scams found online or on social networking (based on data reported to Scamwatch), Australians lost approximately AU\$15.1 million as a result of investment scams originating online (including on social media platforms).²⁰⁸⁰ An example of such a scam advertised on Facebook, and the magnitude of resulting financial harm, is set out below.

Box 8.1: Anonymised complaint to Scamwatch

"I was on Facebook & saw advertised Bitcoin with familiar faces so clicked on it then a form came up. I filled it in then got a phone call from so called [redacted] as a financial adviser for [redacted], I said no but he kept ringing me & telling me how good it was & he would look after me. I gave in & paid 2 separate amounts Total= \$156,114.26, into [redacted] account. But I think now that the Web page is fake & actually of another company. The Facebook still puts up faces we know saying they use these products which is false & needs to be reported to Facebook."

The ACCC expects these concerning online scam trends to continue and for consumer harm to increase. As noted earlier in this Report, consumers are increasingly conducting their lives online, with digital platforms operated by Google and Facebook occupying an integral part of the lives of many Australians.

Online platforms represent a convenient way for scammers to reach and communicate with victims, maintain their anonymity and receive payments. This is particularly the case with social media platforms that allow users to share content and communicate with each other, such as Facebook and Instagram.

There have also been a number of media reports exploring the rise in scams conducted on digital platforms, including a recent ABC *Four Corners* investigation into dating and romance scams in which entrepreneurial 'foot soldiers' and 'café boys' use Facebook to find victims.²⁰⁸¹

Celebrity Scams

There also appears to be a growing trend of advertisements appearing on digital platforms (including social media platforms and search engines) and other seemingly legitimate, trustworthy sites containing false representations. These ads for scam products or investments can contain sensationalised quotes and doctored or out-of-context images of celebrities, and often include the promotion of products

2078 ACCC, [Targeting scams: report of the ACCC on scams activity 2018](#), May 2019, p. 15.

2079 ACCC, [Targeting scams: report of the ACCC on scams activity 2018](#), May 2019, p. xii.

2080 [Scamwatch Statistics](#), accessed 3 June 2019, reported that in 2018 consumers lost AU\$38 846 635 as a result of investment scams. AU\$3 518 744 of these losses were from investment scams found on the internet and AU\$3 311 105 from social networking. This means that 17.6 per cent of financial losses from investment scams originated online (including via social media).

2081 S Rubinsztein-Dunlop, L Robinson and S Dredge, [Meet the scammers: Could this be your online lover?](#), ABC, 11 February 2019, accessed 10 May 2019.

such as skin care creams, weight loss pills, or investment schemes. Users that click on these ads are then redirected to websites where they are encouraged to sign up to a service or purchase a product resulting in potential financial loss for the user.

Nine submits that ads including fake endorsements from celebrities became widespread in 2018,²⁰⁸² and has provided the ACCC with examples of fake celebrity ads that appeared on Google Display Network. Nine claims that at the time Google advised it was unable to stop the offending ads appearing. However, it advises that Google has since taken steps to attempt to remedy the appearance of the advertisements on its display network. Nine claims that while these steps have curtailed the appearance of false advertisements, Google was unable to give it certainty that the ads will not reappear in the future.²⁰⁸³

Nine has also publicly raised similar concerns about fake celebrity ads appearing on Facebook, claiming that there had been little response from Facebook.²⁰⁸⁴ Michael Healy, Director of TV, Nine Network stated:

*In recent years, there has been an explosion of fraudulent Facebook ads, built on our celebrities' trusted brands. We have raised this issue with Facebook multiple times but they continue to facilitate these scams, taking money and publishing fraudulent ads into newsfeeds of ordinary Australians. Enough is enough, it is time for them to take responsibility.*²⁰⁸⁵

In addition to the concerns expressed by Nine above, Seven has also made similar comments:

The nature of Facebook, You Tube and Google's 'self-serve' ad networks allows these damaging adverts to proliferate. Regrettably, these platforms seem very happy to carry such content. A clear case of how they put profit before any social responsibility.

*Fundamentally the issue is that we bear the responsibility for identifying this content and when we do, while it gets taken down, it often reappears quickly and then we have to go through the process all over again.*²⁰⁸⁶

The ABC's *Media Watch* has reported on celebrity scam advertisements on Facebook. It provided examples of fake advertisements featuring Mark Ferguson, Larry Emdur, Michael Usher, and businessman Andrew "Twiggy" Forrest, and attempts by Channel Nine and the Daily Telegraph, to have these advertisements removed. It also showed footage of *Sunrise* hosts Samantha Armytage and David Koch asking Facebook's vice president about scams featuring them on the Facebook platform, and Facebook's failure to remove the scam content.²⁰⁸⁷ Despite the fact these people are well-known and likely well-resourced, and some of these people had made public comments on the scams, Facebook did not remove these advertisements. Given the difficulties faced by these individuals in having scam advertisements removed, it would presumably be even more difficult for everyday consumers to compel Google or Facebook to remove such content.

The *Australian Financial Review* also reported on investment scams and false advertisements appearing on the advertising networks of Google and Facebook and provided the following examples:

- Google serving scams using fake ABC news articles claiming property developer Harry Triguboff was using cryptocurrency to make money
- Google serving fake ads claiming *Sunrise* hosts Samantha Armytage and Natalie Barr were leaving the program
- Facebook serving fake ads featuring Eddie McGuire advertising erectile dysfunction supplements.²⁰⁸⁸

Often these ads are created by entities designed to drive traffic. Sometimes this traffic is not sent to an original product site but instead resold for a commission which becomes a source of revenue for the entities creating bad ads. As mentioned above, often these landing websites will encourage users to sign up for some product or service.

2082 Nine Network, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#) April 2019, p. 25.

2083 Information provided to the ACCC.

2084 J Duke, [Nine slams Facebook over ads impersonating TV stars](#), *Sydney Morning Herald*, 15 August 2018, accessed 9 November 2018.

2085 M Healy, [Statement made to ABC Media Watch](#), ABC, 26 April 2019, accessed 10 May 2019.

2086 Seven Network, [Statement made to ABC Media Watch](#), ABC, 29 April 2019, accessed 10 May 2019.

2087 ABC *Media Watch*, [Facebook scams](#), 29 April 2019, accessed 10 May 2019.

2088 M Mason, [Triguboff's image used by scammers](#), *Australian Financial Review*, 16 April 2019, accessed 22 May 2019.

ACCC views in relation to scams on digital platforms

The ACCC considers it critical that there are avenues for consumers and business users to seek redress from digital platforms and, if their complaints are not properly resolved by digital platforms, assistance from an external body that will facilitate the resolution of these complaints. The ACCC considers that Google and Facebook need to do more to take down scam ads and similar content and provide redress, where appropriate, for consumers that have experienced harm as a result.

To address the harm caused by false advertisements, and to provide a method of redress for small businesses, consumers, advertisers and media businesses that have experienced loss on digital platforms, the ACCC had identified in the Preliminary Report the establishment of a digital platforms ombudsman as an area for further analysis and assessment. The intention was that the ombudsman could be responsible for resolving complaints and disputes with digital platforms.

The ACCC received mixed feedback about the ombudsman proposal. Facebook considered that there was merit in the proposal to field advertising related complaints from small-to-medium advertisers and consumers.²⁰⁸⁹ Google did not support the proposal, submitting that its dispute resolution processes, efforts to combat ad-fraud and existing laws and public bodies are sufficient.²⁰⁹⁰

Other stakeholders highlighted the potential overlap between the proposed ombudsman's functions and those of existing regulators. They noted that if the ACCC were to recommend an ombudsman, it should further consider whether an existing body could take on that role.²⁰⁹¹

To assist with its assessment of this proposal, the ACCC held a special out-of-session meeting with members of the Small Business and Franchising Consultative Committee (SBFCC) on 22 February 2019. The purpose of the meeting was to discuss the members' experience dealing with Google, Facebook and other digital platforms, and their views about the proposal to establish a digital platforms ombudsman.

While some SBFCC members recognised the benefits that digital platforms have brought, members also highlighted the difficulties they experienced, including:

- not understanding how advertising on Google and Facebook operates and not knowing whether advertising on these platforms actually reaches the desired target audience
- delays and an inability to reach the correct contacts to resolve disputes and complaints with both Facebook and Google
- dissatisfaction with Google and Facebook's resolution of allegedly defamatory comments and fake reviews, which are often posted anonymously.

The feedback expressed by stakeholders, and complaints made by consumers and businesses, suggest that there is substantial room for improvement in the internal dispute resolution (IDR) systems of digital platforms. The difficulty faced by consumers and businesses in reaching digital platforms to notify them of issues is especially concerning.

To facilitate the improvement in the IDR systems of digital platforms, the ACCC considers that mandatory minimum standards for such systems should be established.

In addition, the ACCC considers that the establishment of a new ombudsman or the expansion of an existing ombudsman's role to resolve issues specific to digital platforms would improve the position of consumers and businesses. If complaints or disputes cannot be, or are not, resolved by large digital platforms through their own IDR systems, consumers and businesses could approach to the ombudsman to resolve these issues and make binding decisions.

2089 Facebook, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 25.

2090 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, pp. 48-49.

2091 SBS, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 8; News Corp, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 53; Law Council of Australia, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 18.

Internal dispute resolution

The ACCC considers that the IDR processes of large digital platforms could be improved. An important first step to resolving complaints and disputes is for a complainant to engage with the digital platform. For this to be an effective first step, the digital platform must have a robust internal dispute resolution system in place.

Stakeholder feedback suggested that neither Google's nor Facebook's IDR processes are sufficient. For example, consumers and business users raise the difficulty of contacting Google or Facebook in Australia to speak with a representative and have their complaints resolved.²⁰⁹² Even large businesses, such as Nine, submit the view that they were unable to contact the entity to make a complaint. This casts doubt on the fundamental effectiveness of the digital platforms' IDR process.

The European Commission has recognised IDR processes as an issue and stated that a third of all platform to business problems remain unsolved and a third are solved with difficulties.²⁰⁹³ To address this, the European Commission has proposed new rules to improve the fairness of online platforms' trading practices. The regulation setting out these rules was adopted by the European Council on 14 June 2019. The regulation requires all digital platforms (with the exception of small platforms with fewer than 50 staff members and generating less than EUR€10 million) to set up an efficient and swift internal system for handling complaints, and to report annually on its effectiveness.²⁰⁹⁴ It also requires platforms to list in their terms and conditions two or more mediators for cases when the internal complaint-handling system is not able to resolve a dispute between business users, demonstrating the value in having an external dispute resolution system in place, in addition to IDR processes.

The ACCC recommends that the ACMA should develop IDR standards for digital platforms. Digital platforms that supply services in Australia and have over one million monthly active Australian users will be required to comply with these standards. These standards may be modelled on the Australian Securities and Investment Commission's [Regulatory Guide 165: Licensing: Internal and external dispute resolution](#) (RG165) and should include any standards that must be complied with, such as the [AS/NZS 10002:2014 Guidelines for complaint management in organizations](#).

Similar to the principles set out in RG165, the IDR standards should require that digital platforms comply with the following principles:

- **visibility** – of IDR procedures and how to make a complaint or dispute
- **accessibility** – arrangements for making complaints or disputes should be accessible, including how consumers and businesses can contact the digital platform, such as by calling an Australian phone number
- **responsiveness** – IDR procedures should have clear response times
- **objectivity** – complaints and disputes should be address in an equitable, objective and unbiased manner
- **charges** – complainants or disputants should not have to pay to access the IDR process
- **confidentiality** – personally identifiable information concerning the complaint or dispute should be kept confidential, subject to the express consent of the complainant or disputant
- **customer-focused approach**
- **accountability** – platforms should report on complaints or disputes to the top management of the platform
- **continual improvement** – the platform should aim to continually improve its IDR processes
- **commitment** – the platform should be actively committed to resolving complaints and disputes
- **resources** – the platform should ensure that adequate resources are dedicated to its IDR procedures in Australia

2092 ACCC, [Summary of Small Business and Franchising Consultative Committee Meeting](#), 22 February 2019, p 3.

2093 European Commission, Media Release, [Digital Single Market: EU negotiators agree to set up new European rules to improve fairness of online platforms' trading practices](#), 14 February 2019.

2094 'Council of the European Union, [EU introduces transparency obligations for online platforms](#), press release, 14 June 2019, accessed 21 June 2019.

- **collection of information** – there should be a recording system established for managing complaints or disputes
- **analysis and evaluation of complaints** – all complaints or disputes should be classified and then analysed to identify systemic, recurring and single incident problems and trends.

Google, Facebook and other digital platforms that meet the relevant threshold will have six months to comply with the standards provided by the ACMA once published.

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.

Ombudsman scheme for digital platforms

The ACCC recommends that there should be an ombudsman scheme in place for consumers and business users of digital platforms. The ombudsman responsible for the ombudsman scheme would be able to resolve disputes or complaints that have not been settled through the digital platform's IDR procedures within a set timeframe, and would be responsible for disputes and complaints of the nature discussed above.

The ACCC has identified particular areas where recourse to an ombudsman should be available including complaints regarding scam content, business users' complaints relating to the delivery of advertising campaigns and suspended business accounts. The ACCC recommends that the ACMA consult broadly to identify all areas which could benefit from the recommended ombudsman scheme.

The ACCC acknowledges the stakeholder submissions that suggest there is scope for an existing entity to take on these functions, rather than establishing a new ombudsman. The ACCC notes the overlap between the functions of the ombudsman and the existing functions of the Telecommunication Industry Ombudsman (TIO). In its submission to the Preliminary Report, the TIO also notes that 'there appear to be proposals that could create regulatory overlap with the framework for the telecommunications service industry and the sector's arrangements for complaints handling'.²⁰⁹⁵

The TIO is an industry-based ombudsman, fully funded by industry fees and charges, and is responsible for handling complaints about telephone and internet services.²⁰⁹⁶ This includes complaints made about any type of telecommunications service supplied or offered by a TIO member, or the supply of which is arranged by a TIO member, where the consumer is an end-user of the telecommunications service or is directly affected by the telecommunications service.²⁰⁹⁷

²⁰⁹⁵ Telecommunications Industry Ombudsman, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 1.

²⁰⁹⁶ Telecommunications Industry Ombudsman, [About Us](#), accessed 10 May 2019.

²⁰⁹⁷ The TIO's terms of reference defines TIO members as 'suppliers of telecommunications services (including retail and wholesale suppliers and carriage service intermediaries that arrange for the supply of telecommunications services), telecommunications carriers or other businesses that are members of the TIO scheme'.

The ACCC considers that it is likely to be efficient for an existing ombudsman to resolve complaints about digital platforms, rather than creating a new ombudsman or organisation. For example, it may be appropriate for the TIO to undertake the functions of the ombudsman. The ACCC recognises, however, that this would be a major change for the organisation, the implications of which would need to be carefully considered.

The ACCC recommends that the ACMA and the TIO should together explore the feasibility of expanding the TIO's functions to capture complaints and disputes regarding digital platforms. If the ACMA and the TIO conclude this is not feasible, a standalone ombudsman should be created to resolve complaints about digital platforms.

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.

8.2 New devices, new data

Key findings

- The growth in 'internet of things' devices, voice-activated devices and 5G mobile communications is resulting in innovative new services and is likely to affect competition the supply of news and advertising in Australia.
- Increasing collection, analysis and distribution of user data has increased potential risk to user rights, privacy, autonomy and data security.
- The increased collection of individuals' data made possible by new technologies and devices has significant implications for consumers and society as a whole, and will require serious consideration by citizens and governments.

The internet of things (IoT) generally refers to 'an ecosystem in which applications and services are driven by data collected from devices that sense and interface with the physical world'.²⁰⁹⁸ IoT can cover a wide range of currently-available products and services, as well as those that are still being developed.

²⁰⁹⁸ OECD, [The Internet of Things: Seizing the benefits and addressing the challenges](#), 7 June 2016, p. 8.

The Organisation for Economic Co-operation and Development (OECD) considers that the IoT products currently in the market are in three broad categories²⁰⁹⁹, which are listed below alongside examples of products available, or soon to be available, in the Australian market:

- **Wearables, health monitors, and implantable devices** – items worn by, or implanted into, a consumer. This can include exercise trackers, smart watches and technology-enabled glasses.
- **Smart home applications** – including voice-activated smart speakers and addressable TV and other connected devices such as fridges, as well as online e-readers such as Amazon's Kindle. Voice-activated smart speakers from Amazon, Apple and Google are available in Australia; Facebook has recently unveiled its smart speaker device, Portal.
- **Connected vehicles** – car manufacturers are installing technology to enable digital platforms to interact with their vehicles. Renault, Nissan and Mitsubishi recently entered into a partnership with Google,²¹⁰⁰ and Mercedes Benz, Audi and Volvo have entered into partnerships with Alibaba to install its digital assistant into cars sold in China.²¹⁰¹

The increased uptake and rapid development of IoT devices have expanded the potential for data collection and use by digital platforms. This may have an impact on future media and advertising. The following section focuses on devices most relevant to the Terms of Reference of this Report.

Voice-activated devices

Voice-activated devices are devices controlled by means of the human voice that are able to understand and undertake spoken commands.

Voice-activated devices have two primary components: the hardware (the physical device) and the software that enables the device to understand and process spoken commands (often known as virtual assistants).

The most common type of voice-activated device is the smart speaker, a combined internet-connected speaker and microphone. It features an integrated virtual assistant (that is, the software) with microphones programmed to start recording in response to the user's voice.

Virtual assistants are also available on mobile and desktop devices, with some mobile phones integrated with virtual assistants, such as the Apple iPhone with Siri and Google Pixel with Google Assistant.

The uptake of smart speakers as a form of voice-activated device is experiencing rapid growth in Australia. Telsyte projected that the number of Australian households that own a smart speaker will increase from 1.15 million in June 2018 to three million by 2022.²¹⁰² The Reuters Institute reported that the adoption of voice-enabled smart speakers is taking off rapidly, and that 'these stand-alone devices are reshaping home ecosystems'.²¹⁰³

Smart speakers are also becoming a way for Australian consumers to access news; although the ACCC notes that while people's use of voice activated speakers for general purposes is growing, only three per cent of Australian news consumers have used them to access news in the past week. This marks a small increase from 1 per cent in 2017.²¹⁰⁴ The Reuters Institute noted that 58 per cent of media companies polled in its 2018 survey said that they would be investing more in audio-based media.²¹⁰⁵

The most popular voice-activated devices and the associated software offered in Australia are listed in table 8.1.

2099 OECD, [The Internet of Things: Seizing the benefits and addressing the challenges](#), 13 May 2016, p.9.

2100 P Campbell, [Renault, Nissan and Mitsubishi in car tech deal with Google](#), *Australian Financial Review*, 18 September 2018, accessed 20 November 2018.

2101 L Chen, [Alibaba Gets its Smart Assistant into Chinese Mercedes](#), *Bloomberg*, 23 April 2018, accessed 20 November 2018.

2102 Telsyte, [Smart speakers help send Australian IOT@Home market skyward](#), 15 May 2018, accessed 20 November 2018.

2103 N Newman, [Journalism, Media and Technology Trends and Predictions 2018](#), *Reuters Institute for the Study of Journalism*, p. 34.

2104 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, June 2019, p. 107.

2105 N Newman, [Journalism, Media and Technology Trends and Predictions 2018](#), *Reuters Institute for the Study of Journalism*, pp. 34-35.

Table 8.1: Popular voice-activated devices

Manufacturer	Smart speaker	Virtual assistant
Google	Home	Google Assistant
	Home Mini	
	Home Max	
	Home Hub	
Amazon	Echo	Amazon Alexa
	Echo Dot	
	Echo Plus	
Apple	Homepod	Apple Siri
Microsoft	Invoke	Microsoft Cortana
Samsung	Galaxy Home	Samsung Bixby
Sonos	One	Amazon Alexa
	Beam	

On 8 October 2018, Facebook announced its own smart speaker (with the added attachment of a camera and screen), known as Portal and Portal+, which has voice-activated virtual assistant Amazon Alexa integrated into its functions.²¹⁰⁶

The adoption of voice-activated devices and their growing popularity as a channel to access news may raise issues about how these devices select and present news items in response to consumer requests. Stakeholders have highlighted the potential for competition issues to emerge in the supply of news.²¹⁰⁷

These competition concerns held by stakeholders are similar to concerns about the operation of algorithms that rank and display news on search engines and social media platforms – that the selection, presentation and sourcing of news content may lack transparency.

News Corp submits that it considers that to the extent that digital platforms control the curation of content, marketing and advertising of smart speakers, the same issues with monetisation and licensing of content (identified elsewhere in this Report) will apply.²¹⁰⁸ These concerns are exacerbated in the case of smart speakers, as rather than being presented with a selection of news sources on a screen, a user of a voice-activated device is typically only presented with one result.

The risks resulting from widespread use of smart speakers include:

- potential foreclosure of news media businesses, in the form of refusing to supply their news content on a voice activated device, or charging exorbitant fees for supplying their content on the device
- reduced consumer choice of news supplier, depending on how news content is presented and whether consumers are able to select their preferred news sources
- where devices supply news based on consumer preferences or previous searches, this could create an ‘echo chamber’ or ‘filter bubble’ effect
- increased threats to consumer privacy due to increased data collection.

²¹⁰⁶ Facebook, [Introducing Portal from Facebook: New Video Calling Devices to Connect You with Friends and Family](#), 8 October 2018, accessed 20 November 2018.

²¹⁰⁷ See e.g. Southern Cross Austereo, [Submission to ACCC’s Digital Platforms Inquiry](#), April 2018, pp. 4-5; News Corp Australia, [Submission to ACCC’s Digital Platforms Inquiry](#), April 2018, p. 8; News Corp, [Submission to the ACCC Digital Platforms Inquiry](#), February 2019, p. 20; Australian Society of Authors, [Submission to ACCC’s Digital Platforms Inquiry](#), p. 2.

²¹⁰⁸ News Corp, [Submission to the ACCC Digital Platform Inquiry Preliminary Report](#), March 2019 p. 8.

Increased data gathering through IoT devices

As with other data collection practices, there are likely to be some benefits for consumers in new and increased collection of data through IoT devices, including convenience, remote control and automation of living spaces.²¹⁰⁹

The widespread deployment of IoT devices provides specific new avenues for data collection, particularly passive data collection, by businesses including digital platforms. The OECD has stated that 'the sheer volume of data that devices can generate is stunning', noting that 'fewer than 10 000 households using [a] company's IoT home automation product can generate 150 million discrete data points a day'.²¹¹⁰

The collection of data from IoT devices may include data not previously available to digital platforms and other third parties (for example, heart rate monitors).²¹¹¹ The OECD has noted that the data collected through IoT devices can often be more intimate, sensitive and revealing than anything consumers would ordinarily divulge online (or off line).²¹¹² Devices such as Amazon's Echo Show, Google's Home Hub and Facebook's Portal, for example, are intended to integrate seamlessly and invisibly into the routines, and homes, of users,²¹¹³ becoming active in response to users' voices.²¹¹⁴

The increased collection of data through IoT devices may therefore result in the risk of loss of privacy, and may increase the severity of data breaches due to the more intimate nature of the data collected. For example, in 2017, Google moved to fix an issue with Google Home mini devices that were recording even when the user was not intending them to.²¹¹⁵

The presence of these devices in households presents new avenues for misuse by third parties beyond the misuse of data. As IoT devices are increasingly incorporated into consumers' homes and security systems through household automation, information breaches and third party misuse of data will also carry the risk of actual physical and emotional harm.²¹¹⁶ There have been media reports of new patterns of behaviour in domestic abuse cases tied to the rise of smart home technology, including the use of these devices to control or harass abuse victims.²¹¹⁷ Concerns have emerged about the safety of children due to unsecured wireless connections, location tracking and poor data protections in IoT devices such as toys.²¹¹⁸ Professor Jeannie Patterson, in her submission to the Preliminary Report, suggested that it was possible that the consumer guarantee regarding acceptable quality could develop to require goods equipped with IoT technology to include reasonable protections against hacking and spyware. Professor Patterson suggested that this obligation would usefully be expressly included in the factors relevant to assessing 'acceptable quality', listed under s 54 of the ACL.²¹¹⁹

As the popularity of IoT devices continues to increase, the collection of data and associated issues are also likely to continue to evolve. This may require ongoing monitoring by governments and regulators, as discussed later in this chapter.

2109 OECD, [Consumer Product Safety in the Internet of Things](#), 2 March 2018, p. 17.

2110 FTC, [Internet of Things: Privacy & Security in a Connected World](#), January 2015, p. 14 cited in OECD, [Consumer Policy and the Smart Home](#), 5 April 2018, p. 19.

2111 OECD, [Consumer Product Safety in the Internet of Things](#), 2 March 2018, p. 9.

2112 OECD, [Consumer Policy and the Smart Home](#), 5 April 2018, p. 19.

2113 For an example of the wide variety of functions offered, see Google, ['Get the Most out of Google Home'](#), accessed 21 November 2018.

2114 See, for example, Amazon, [Alexa FAQ](#), accessed 20 November 2018.

2115 Google, [Google Home Mini Touch Controls Behaving Incorrectly](#), accessed 20 November 2018.

2116 OECD, [Consumer Policy and the Smart Home](#), 5 April 2018, p. 20.

2117 N Bowles, [Thermostats, Locks and Lights: Digital Tools of Domestic Abuse](#), *The New York Times*, 23 June 2018, accessed 20 November 2018.

2118 M Maras, [4 Ways 'Internet of Things' Toys Endanger Children](#), *The Conversation*, 10 May 2018, accessed 20 November 2018.

2119 Professor Jeannie Marie Patterson, [Submission to the ACCC Digital Platform Inquiry](#), February 2019, p. 2.

Box 8.1: Smart Cars

Most modern cars are repositories for large amounts of consumer data, collected as a consumer drives. Data can include contacts lists from paired phones, navigation locations, video files from car cameras, and radio-listening data,²¹²⁰ as well as brake and windscreen wiper data.²¹²¹ Media reports have stated that modern cars ‘pack the power of 20 personal computers and can process up to 25 gigs of data every hour’ and that the value of data from cars could soon exceed the value of the cars themselves.²¹²² A researcher, who purchased a wrecked Tesla and sought to extract existing data from it, reportedly found stored data from at least 17 different devices, including 11 phone books’ worth of contact information; and also found 73 navigation locations.²¹²³

5G technology

5G is the fifth generation and latest iteration of mobile technology, and is expected to provide significantly higher peak connection speeds and lower latency (time delays) in mobile data communication.²¹²⁴ The first large Australian auction of radiofrequency spectrum suitable for 5G commenced in November 2018,²¹²⁵ and service providers in Australia have already begun trialling 5G services in preparation for the widespread introduction of 5G capable devices to the market, with Telstra launching the first 5G mobile device in May 2019.²¹²⁶

The introduction of 5G technology is expected to play a role in supporting a wider deployment of IoT devices in Australia.²¹²⁷ Telsyte predicts that 5G will account for 32 per cent of all Australian mobile connections by the end of June 2023.²¹²⁸ Global mobile industry body GSMA projects that 1.2 billion people will be using 5G technology worldwide by 2025, and that growth in 5G will be significantly boosted by IoT technology, which it expects to account for 25 billion connections worldwide by 2025.²¹²⁹

One feature of 5G technology is an increase in the accuracy of location tracking, with the majority of 5G devices expected to benefit from ‘positioning technologies that achieve a location accuracy of the order of one meter’.²¹³⁰ Increased location accuracy will have a broad series of applications including important safety functions – for example, improving the functioning of self-driving cars, and allowing better-targeted public disaster and safety communications.²¹³¹

The pinpoint accuracy offered by 5G technology is also likely to benefit the provision of targeted advertising. At the Consumer Policy Research Centre’s 2018 conference on data, 5G technology was described as a paradigm shift, with the extreme accuracy of location tracking making geographical ad targeting possible.²¹³² This is likely to exacerbate and amplify issues regarding location tracking by digital platforms discussed in chapter 7.

2120 J Torchinsky and Jalopnik, [Wrecked Teslas are full of sensitive data and so are most modern cars](#), Gizmodo, 2 April 2019, accessed 30 April 2019.

2121 CBS News, [Carmakers are collecting data and cashing in – and most drivers have no clue](#), 13 November 2018, accessed 2 May 2019.

2122 CBS News, [Carmakers are collecting data and cashing in – and most drivers have no clue](#), 13 November 2018, accessed 2 May 2019.

2123 J Torchinsky and Jalopnik, [Wrecked Teslas are full of sensitive data and so are most modern cars](#), Gizmodo, 2 April 2019, accessed 30 April 2019.

2124 J Rabaey, ‘[What is 5G? The next generation of wireless, explained](#)’, *The Conversation*, 17 May 2018, accessed 20 November 2018.

2125 Australian Communications and Media Authority, [Australia’s 5G spectrum action on its way](#), 6 August 2018, accessed 20 November 2018.

2126 Telstra, [Telstra launches Australia’s first 5G mobile device](#), accessed 16 June 2019.

2127 Australian Communications and Media Authority, [5G and mobile network developments - Emerging issues](#), February 2016, p. 1.

2128 Telsyte, [Household Interest in 5G Gathers Space](#), 16 October 2018, accessed 20 November 2018.

2129 GSMA, [Intelligent Connectivity: How the combination of 5G, AI and IOT is set to change the Americas](#), p.1.

2130 R Taranto, S Muppirisetty, L Raulefs, ‘[Location-aware communications for 5G networks: How location information can improve scalability, latency and robustness of 5G](#)’, *IEEE Signal Processing Magazine*, 31(2014), p. 102.

2131 Australian Communications and Media Authority, [5G and mobile network developments - Emerging issues](#), February 2016. p. 27.

2132 Consumer Policy Research Centre, query:data Consumer Data Conference, 2018.

Addressable television advertising

The adoption of smart TVs and set-top boxes is one already-common example of consumers integrating IoT devices into their homes. These devices allow the viewing of online streaming video not just on phones, tablets and computer screens, but on televisions. Television broadcasters are attempting to harness this development through the introduction of 'addressable advertising', in order to capture some of the benefits of targeted advertising that are already enjoyed by online publications and digital platforms.

Similar to the targeted nature of digital advertising offered by Google, Facebook and other digital platforms, addressable television provides advertisers with the ability to utilise data and target their advertisements to particular segments of the market. Addressable television advertising can be delivered through a variety of online video services including on-demand, catch-up video services operated by traditional television broadcasters (e.g. SBS on Demand and Tenplay) and internet-enabled services delivered through proprietary set-top boxes such as Foxtel's iQ.

As Roy Morgan stated:

Addressable TV will enable broadcasters to fight back and compete with the likes of Facebook and Google by enabling them to move from simply selling ad slots based on broad demographics to allowing advertisers to use sophisticated first and third party data to target individuals or households and show them different ads during the same programme. This will bridge the gap between the traditional TV advertising model and the personalisation of advertising enabled by the 'Big Data' analytics that the interactive nature of the Internet empowers.²¹³³

Roy Morgan noted that addressable television advertising already has a potential audience of over nine million Australians who use smart TVs and streaming devices.²¹³⁴

Australian commercial broadcasters, including Seven and Nine, already offer addressable television advertising to viewers using their online streaming services. Seven first launched addressable television advertising in 2017 during its live coverage of the Rugby League World Cup.²¹³⁵ On 2 August 2018, Nine announced that it had used data from 9Now (Nine's broadcast video on-demand service) to build up a database of more than 6.5 million people.²¹³⁶

Box 8.2 – How broadcasters can use addressable advertising

Broadcasters can use addressable advertising to supply different advertisements to different households, based on data the broadcaster holds or acquires on the household. For example, two households may both have accounts with and stream programming from Seven's video on demand service 7Plus. Household A consists of a professional couple in their thirties with no children, and Household B consists of a family with three school-aged children. While both households may watch the same program (for example the 2018 Australian Open), they may receive different ads. Household A may receive ads for Uber Eats, while Household B may receive ads for family holiday destinations. Viewers in Households A and B may not know that they are being served targeted advertising, or that they have been watching a different ad to viewers in other households.

2133 Roy Morgan, [Addressable TV will challenge existing attitudes to TV advertising](#), 4 July 2018, accessed 20 November 2018.

2134 Roy Morgan, [Addressable TV advertising technology already reaches over 9 million Australian](#), 26 August 2018, accessed 20 November 2018.

2135 Seven West Media, [Seven launches Addressable TV via Dynamic Ad Insertion at Scale](#), October 2017, accessed 20 November 2018.

2136 M Mason, [Nine Entertainment tackles Facebook and Google with addressable TV](#), *Australian Financial Review*, 6 August 2018, accessed 20 November 2018; Nine Entertainment Co., [Nine Launches Real Addressability To The Australian Market](#), 2 August 2018, accessed 20 November 2018.

Addressable television advertising may present an alternative option for advertisers seeking to target consumer groups of a certain demographic or with specific characteristics. However, addressable television advertising in Australia is still developing, and the extent to which advertisers consider addressable television advertising to be substitutable for online advertising is unclear. It is also unclear which businesses are likely to obtain data on consumers and control the delivery of the addressable advertisements.

The ACCC notes that as addressable television advertising becomes more prevalent, it may raise consumer and privacy issues that are similar to those raised by targeted online advertising, as discussed in chapter 7.

Implications of increased data collection

The increased volume and granularity of data collection made possible by the uptake of IoT technology and the rollout of 5G form part of a broader trend of increased collection and use of consumer data. This trend is likely to have significant implications for the social contracts between consumers, companies and governments.

The incorporation of increasingly sophisticated data analysis into decision-making can bring both benefits and detriments for consumers, as extremely detailed information on individuals' behaviour and attributes can be collected, compiled and accessed by both governments and private companies.

The ability to tailor a profile of an Australian user through data has a range of applications beyond already ubiquitous targeted advertising discussed in this Report. This may include harnessing user data to make commercial decisions relating to individuals, including exclusion or exploitation of individuals based on online profiling.

Online profiling and exclusionary targeting

Online profiling based on the collection and combination of user data may be used to exclude some consumers from accessing products or services, thereby promoting inequality. Conversely, there is the potential for profiles to be developed for the purpose of marketing to vulnerable consumers.²¹³⁷ Though exclusionary targeting may be used for legitimate means, it is also open to misuse.

Chapter 7 discusses the potential for extensive and more granular targeted advertising to be used to discriminate against groups.

Online profiling and exploitation

Online profiling may enable companies to negatively target or exclude customers based on vulnerabilities, or to exploit or exacerbate vulnerabilities and trigger irrational behaviours in consumers.²¹³⁸ Different advertisements may also be targeted to consumers based on algorithmic determinations of a user's emotional state.²¹³⁹

Technological advances may facilitate the detection of a user's emotional state. For example, The Atlantic reported Amazon has patented a new technology that would empower Alexa to analyse the pitch and volume of speaker commands. This would monitor users' emotions such as 'happiness, joy, anger, sorrow, sadness, fear, disgust, boredom, [or] stress' and to respond to commands appropriately, potentially with 'highly targeted audio content, such as audio advertisements or promotions.'²¹⁴⁰ Google holds a similar patent on using one or more processors of a device to detect a negative emotion of a user.²¹⁴¹ Google also owns a patent that would help search engines return results based on a user's current emotional state, which may be identified in various different ways - including a camera and facial recognition program, a microphone, or a monitoring device connected to the user such as a smartwatch.²¹⁴²

2137 P Nguyen and L Solomon, [Consumer data & the digital economy](#), *Consumer Policy Research Centre*, 17 July 2018, p. 25.

2138 R Calo, [Digital Market Manipulation](#), *The George Washington Law Review*, August 2014, p. 999, pp. 1017-1018.

2139 R Calo, [Digital Market Manipulation](#), *The George Washington Law Review*, August 2014, p. 999, pp. 996-997.

2140 S Fussel, [Alexa Wants to Know How You're Feeling Today](#), *The Atlantic*, 12 October 2018, accessed 20 November 2018.

2141 Google Patents, [Providing help information based on emotion detection](#), accessed 20 November 2018.

2142 Google Patents, [Web search based on browsing history and emotional state](#), accessed 20 November 2018.

There are clear applications of mood detection technology by digital platforms for a range of purposes, including customising services for users and in the better targeting of advertising services. In 2017, *The Australian* reported that Facebook told advertisers it could identify when teenagers felt 'insecure', 'worthless' or 'need[ed] a confidence boost'.²¹⁴³ In response, Facebook stated that this research was done with the intention 'to help marketers understand how people express themselves on Facebook. It was never used to target ads and was based on data that was anonymous and aggregated'.²¹⁴⁴

Increased price discrimination

The collection of increasingly sophisticated data on individual consumers may enable and encourage highly targeted price discrimination - businesses charging different prices to individuals based on their perception of the individual's ability or willingness to pay.

As discussed in chapter 7, to date there has been fairly limited evidence of personalised price discrimination online,²¹⁴⁵ with retailers setting prices based on relatively broad categories or demographics, such as the customer's geographical location or whether they visited a website directly or through a referral from a discount aggregator.²¹⁴⁶ The scope for personalised pricing will grow as the volume and quality of user data collected expands and algorithms become more sophisticated. Businesses may be able to collect and use highly detailed profiles of their customers' behaviours and attributes to offer each customer a different price for a product or service.

Recent academic research suggests that online retailers could theoretically employ user data to introduce 'first degree' or 'perfect' price discrimination. A 2016 study found that:

*[t]ailoring prices based on web browsing histories increases profits by 14.55%, and results in some consumers paying nearly double the price others do for the same product [while] [u]sing only demographics to personalise prices raises profits by only 0.30%, suggesting the percent profit gain from personalized pricing has increased 48-fold.*²¹⁴⁷

Recent media reports suggest that online retailers are making increasing use of user data for personalised pricing purposes. Vendors are using 'fingerprinting' technology to track users across multiple browsers, and shopping platforms such as Amazon updating prices for each customer 'every 10 minutes'.²¹⁴⁸ Even 'bricks and mortar' retailers appear to be trialling technology that would allow price discrimination based on user data - including combining offline and online purchasing behaviour through customer loyalty programs tied to user accounts ('omnichannel shopping')²¹⁴⁹ and installing 'smart shelves' - digital price displays that allow for quickly changing prices - in physical retail stores.²¹⁵⁰

Some consumers may gain from increasingly personalised pricing - for example, consumers with limited ability to pay may be offered a lower price for products they otherwise could not afford. However, many consumers are likely to pay more, particularly in circumstances where consumers have limited choice of who to buy from, or have a limited inclination to shop around.

New authentication and security technology

As well as the potentially harmful developments in data use described above, there have been a number of recent developments aimed at ensuring greater user control of personal data.

2143 D Davidson, [Facebook targets 'insecure' young people to sell ads](#), *The Australian*, 1 May 2017, accessed 20 November 2018.

2144 Facebook Newsroom, [Comments on Research and Ad Targeting](#), 30 April 2017, accessed 20 November 2018.

2145 Competition and Markets Authority, [Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#), 8 October 2018, p. 3.

2146 J Mikians, L Gyarmati, V Erramilli, N Looutaris, [Detecting price and search discrimination on the Internet](#), *Universitat Politècnica De Catalunya Barcelonatech*, 2012, accessed 31 January 2018.

2147 B Shiller, [Personalized Price Discrimination using Big Data](#), *Working Papers*, Brandeis University, 108(2016), p. 1.

2148 N Howe, [A Special Price Just for You](#), *Forbes*, 17 November 2017, accessed 20 November 2018.

2149 N Howe, [A Special Price Just for You](#), *Forbes*, 17 November 2017, accessed 20 November 2018.

2150 T Walker, [How Much? The Rise of dynamic and personalised pricing](#), *The Guardian*, 20 November 2017, accessed 20 November 2018.

For example, Tim Berners-Lee, inventor of the world-wide web and co-lead of the Decentralized Information Group at MIT's Laboratory for Computer Science and Artificial Intelligence, advocates for user control of how data is accessed and where it is stored.²¹⁵¹ His advocacy has called for consumers to nominate a company they trust to store different types of information.²¹⁵²

In some jurisdictions, governments have sought to create digital identities that store and govern data, and which can be used by businesses to allow consumers to easily sign up to commercial services. For example, in New Zealand the government verification program RealMe²¹⁵³ allows consumers to prove who they are online and log in to 124 services, including government internal affairs and 37 verified private businesses like Westpac banking.²¹⁵⁴ More than 600 000 verified identities have been created through this system, with 92 million transactions recorded as at October 2018.²¹⁵⁵ Consumers who sign up through RealMe must provide the New Zealand government with their current passport, email address and a photograph before being allocated a RealMe verified account.²¹⁵⁶

At the time of this Report, the Australian Government is currently testing a digital identity program, myGovID²¹⁵⁷, ahead of a full public launch in 2019.²¹⁵⁸ The trial will allow consumers with a myGovID to apply for a tax file number online. The purpose of the testing is to facilitate a broader digital identity program which would allow Australian citizens and permanent residents a single digital identity to access government services online through a single secure mechanism. The Government has indicated it will continue to undertake a series of pilot programs until mid-2019 to test and evaluate myGovID and the broader program.²¹⁵⁹

The extent to which these government programs could be used to facilitate greater control by consumers over their own data, including in the commercial context, is not yet clear. In particular, it is not clear how individuals would react to a government program to replicate the 'Subscribe with Google' or 'Sign up with Facebook' options which are commonly used to link a consumer's use of a separate service with the data profile collected by these platforms.

Implications for governments

New devices and technology are enabling increasingly sophisticated data collection and use, with significant implications. This includes an unprecedented capacity for government agencies and private companies to gain oversight and control of the lives of individuals. Policy makers will need to actively engage with the implications of these developments when formulating policy, and considering regulatory reform.

2151 K Finley, [Tim Berners-Lee, inventor of the web, plots a radical overhaul of his creation](#), *Wired*, 4 April 2017, accessed 31 October 2018.

2152 K Finley, [Tim Berners-Lee, inventor of the web, plots a radical overhaul of his creation](#), *Wired*, 4 April 2017, accessed 31 October 2018.

2153 RealMe, [About us](#), accessed 1 November 2018.

2154 RealMe, [Where to Use](#), accessed 10 May 2019.

2155 RealMe, [About us: Where we've been](#), accessed 10 May 2019.

2156 RealMe, [Get verified with Real Me Now](#), accessed 8 November 2018.

2157 Digital Transformation Agency, [Testing digital identity](#), 31 October 2018, accessed 1 November 2018.

2158 Digital Transformation Agency, [Creating a digital identity](#), accessed 1 November 2018.

2159 Digital Transformation Agency, [Testing digital identity](#), 31 October 2018, accessed 8 November 2018.

8.3 Emerging development in online news and artificial intelligence

Key findings

- News outlets and media companies are experimenting with new content delivery formats in response to social media trends.
- Artificial intelligence, machine learning and the use of chatbots have potential positive applications in the production of news, and in counteracting the spread of misinformation and disinformation. However, these technologies also have the potential to cause harm, particularly in relation to scams and fraudulent economic and social activities.

Changes in consumption patterns and habits of news consumers, including a shift from ‘open’ social media platforms to private messaging applications, have encouraged media businesses to experiment with new formats and delivery mechanisms for journalism. This section examines how media businesses are responding to emerging journalism consumption habits.

This section also explores how emerging artificial intelligence technology is used by news producers and digital platforms to produce journalism, and notes some of the issues associated with the use of artificial intelligence in journalism.

Use of messaging apps for news

The use of social media platforms to access news remains extremely popular, as explored in earlier chapters. However, there are signs that the popularity of using traditional ‘open’ social media such as Facebook for this purpose may no longer be growing, and that online news sharing and consumption behaviour may be shifting towards private messaging apps. This may have mixed impacts on the production and consumption of journalism, allowing news media businesses new innovative avenues of providing news to consumers but also potentially exacerbating risks posed by information disorder on online platforms.

Move to private messaging

The 2019 Digital News Report surveyed news consumers in 38 countries, and found that more than half used social media to access news, with 17 per cent using social media as their main news source.²¹⁶⁰ This report also found that use of social media for news has remained stable over the past year. In Australia, 18 per cent of respondents used social media as a main source of news, up from 17 per cent in 2018.²¹⁶¹

The same report found that sharing news on social media decreased from 22 per cent to 16 per cent between 2016 and 2019 and that consumers prefer sharing news in private groups as opposed to public ones. Consumers are increasingly using instant messaging apps and services such as WhatsApp, Facebook Messenger, Instagram and Snapchat for this purpose.²¹⁶²

In September 2018, Kantar Media released a qualitative study of Facebook users in Brazil, the United States, the United Kingdom and Germany that corroborated the trends of decreased public sharing of news identified by the Digital News Report. This study found benefits offered by sharing news through messaging apps include:²¹⁶³

- tailored content – users can tailor their audiences to connect directly and privately with individuals and groups selected for shared interests and values

2160 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, June 2019, p. 13.

2161 C Fisher, S Park, JY Lee, G Fuller and Y Sang [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, June 2019, p. 13.

2162 C Fisher, S Park, JY Lee, G Fuller and Y Sang, [Digital News Report: Australia 2019](#), News and Media Research Centre, University of Canberra, June 2019, p. 97.

2163 See Kantar Media, [News in social media and messaging apps](#), qualitative research report prepared for the Reuters Institute for the Study of Journalism, University of Oxford, September 2018.

- relevance – messages received are likely to be more relevant because of the self-selecting and targeted communication of messaging apps
- authenticity – the private environment offered by messaging apps grants users a sense of safety, and allows them to express themselves more openly and authentically
- immediacy – the immediacy of messaging apps allows communication to feel quicker and more personal than posts to open social media platforms.

Digital platforms have recognised this move away from ‘open’ communication and have shifted their focus towards privacy-centric ‘closed’ communication. In March 2019, Facebook announced the development of a privacy-focused messaging platform as ‘the future of communication will increasingly shift to private, encrypted services’.²¹⁶⁴ In announcing the new service, Facebook CEO Mark Zuckerberg said he expects that ‘privacy-focused communications platform[s] will become even more important than today’s open platforms’.²¹⁶⁵ Facebook has subsequently made updates to its core products to reflect this new privacy focus.²¹⁶⁶

Businesses have followed the migration of users from open social media platforms to messaging apps, and numerous companies are beginning to use messaging apps rather than email for customer service, marketing and sales.²¹⁶⁷ In doing so, many businesses are managing this communication through artificially intelligent ‘chatbots’, which are able to carry out simple human-like text interactions with users natively on messaging apps.²¹⁶⁸ The broader use of chatbots on digital platforms, and potential impacts on consumers, are explored further in the section below.

Opening private messaging apps up for business use has been a key monetisation strategy for these services. Facebook (which owns WhatsApp) launched the stand-alone WhatsApp Business application in January 2018, attracting over three million users by April 2018.²¹⁶⁹ Facebook (for both WhatsApp and Facebook Messenger), Apple, Twitter and Microsoft have all released application programming interfaces (APIs) allowing businesses to easily configure and implement their own chatbots on their private messaging services.²¹⁷⁰

Use by news services

Like other businesses, news outlets are moving into the realm of private messaging services. International media businesses including the BBC, *The New York Times* and *The Washington Post* are beginning to use these services to deliver news directly to audiences.²¹⁷¹ In Australia, the ABC launched a news service through Facebook Messenger on 1 November 2016. By 2017, this service attracted an average of 152 000 monthly users, with users averaging 23.2 sessions per month.²¹⁷² By late 2018 it reached nearly 1.5 million users.²¹⁷³

2164 M Zuckerberg, [A privacy-focused vision for social networking](#), *Facebook Notes*, 6 March 2019, accessed 10 May 2019.

2165 M Zuckerberg, [A privacy-focused vision for social networking](#), *Facebook Notes*, 6 March 2019, accessed 10 May 2019.

2166 M Isaac, [Facebook Unveils Redesign as it tries to move past privacy scandals](#), *The New York Times*, 30 April 2019, accessed 10 May 2019.

2167 A Asli, [How Facebook Messenger bots are revolutionising business](#), *Forbes*, 6 June 2018, accessed 20 November 2018.

2168 A Asli, [How Facebook Messenger bots are revolutionising business](#) *Forbes*, 6 June 2018, accessed 20 November 2018.

2169 K Johnson, [Facebook: WhatsApp business has over 3 million users](#), *Venture Beat*, 25 April 2018, accessed 20 November 2018.

2170 J Constine, [Facebook launches Messenger platform with chatbots](#) *TechCrunch*, 12 April 2016, accessed 20 November 2018; K Johnson, [WhatsApp launches Facebook chat ads and Business API for automated messaging with customers](#), *Venture Beat*, 1 August 2018, accessed 20 November 2018; K. Johnson [Apple’s Business Chat plans to take on WhatsApp, Skype and Facebook Messenger](#), *Venture Beat*, 6 June 2017, accessed 20 November 2018.

2171 BBC, [Bots, Status Active](#), accessed 13 May 2019; A Phelps, [This is how the New York Times is using bots to create more on-to-one experiences with readers](#), *NiemanLab*, 26 April 2017, accessed 13 May 2019; WashPostPR, [New Washington Post bot available on Messenger](#), *Washington Post*, 12 July 2016, accessed 12 May 2019.

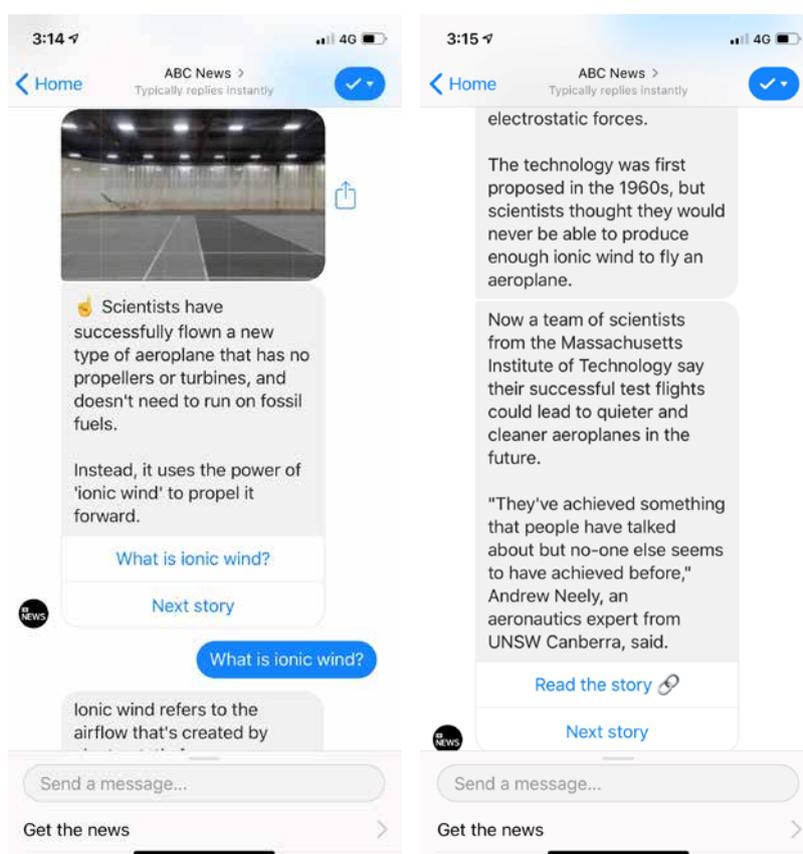
2172 ABC, [Submission to the ACCC Digital Platforms Inquiry](#), 20 April 2018, p. 20.

2173 P Marsh, [Backstory: Why we assigned a dedicated Messenger journalist to cover the midterms](#), *ABC*, 4 December 2018, accessed 20 April 2019.

One of the obvious benefits of providing news through private messaging is the presence of engaged audiences, particularly in light of movement of audiences away from open platforms, and Facebook's recent changes to newsfeed algorithms which have de-prioritised news content, as discussed in chapter 6.²¹⁷⁴ News organisations have found benefits in the nature of the delivery mechanism, which allows news to be more interactive and more personal than broadcast journalism, print news, and even more conventional online news services.

In assessing the success of the ABC's Facebook Messenger news service, an ABC journalist stated that 'on Messenger, we're existing alongside our readers' personal chats with loved ones and group chats with friends about reality TV shows.'²¹⁷⁵ This personal and interactive nature is reflected in the example below, which demonstrates the conversational tone of the service, as well as the ability of the reader to choose to receive more detail on certain stories based on points of interest.

Figure 7.1: ABC News on Facebook Messenger (Example article)²¹⁷⁶



2174 C McCosker, [Fishing where the fish are: ABC News on Facebook Messenger](#), *The Walkley Foundation*, 24 February 2017, accessed 20 November 2018.

2175 P Marsh, [Backstory: Getting personal on Facebook Messenger](#), *ABC*, 7 October 2017, accessed 20 November 2018.

2176 Facebook Messenger, Chat with ABC News, accessed 22 November 2018.

Most messaging-based news services use simple chatbots to guide users through pre-authored content, similar to the example above. However, delivering news through messaging provides the flexibility to allow a degree of personalised communication between news audiences and particular journalists. For example, coverage of the 2017 Budget on the ABC's Messenger service focused on the experience of journalist Peter Marsh, who attended the Budget lock-up for the first time that year.²¹⁷⁷ Peter Marsh also covered the US midterm elections in late 2018 using the Messenger service.²¹⁷⁸ Another innovative feature of this style of news delivery is the ability of audience members to quickly, directly and privately respond to stories. The ABC's Head of News Digital has stated that:

One of the key characteristics of our foray into messaging is the interaction with the audience that it allows. This could go in a number of interesting directions. For example, the natural behaviour in a messaging app is to reply to messages. This offers the prospect of us "harvesting" reactions to news stories which we can then incorporate into our coverage.²¹⁷⁹

The use of private messaging is an extremely new format for news, with the capacity to change and evolve significantly over coming years. For example, it is not yet apparent how publishers may monetise this delivery mechanism. The introduction of display advertising and sponsored content ('advertorials') may seem particularly intrusive given the personal tone and feel of these services. In this respect, it is telling that the only Australian news service to offer news through messaging is the ABC, which is publicly funded and does not need to make a return through the provision of its content.

Potential news quality issues

In the context of this Inquiry, it is worthwhile noting potential (if still hypothetical) issues private messaging may pose to the choice and quality of journalism. One such issue is the lack of transparency inherent in the private nature of this medium. For example, a news outlet could use a combination of user data and private messaging to serve a particular news story to a certain user or group of users, and not to others – or even two different stories based on the same set of facts, each with different political slants, to different groups of users. As it is not easy to discern which stories are being served to other users, this could reduce the accountability of previously entirely public-facing news outlets.

This kind of activity may exacerbate potential issues of online filter bubbles or, in a worst-case scenario, promote the spread of misinformation, disinformation and malinformation explored in chapter 6. In India, racially-charged hoax messages shared widely on WhatsApp have been reported as directly leading to the deaths of over 30 people.²¹⁸⁰ In the lead-up to the 2018 Presidential election in Brazil, political campaigners reportedly used WhatsApp to involuntarily add citizens to political chat groups and to send thousands of messages without the consent of recipients.²¹⁸¹ While in these examples material appears to have been spread by individuals and political organisations rather than media businesses, they demonstrate the potential of private messaging services to quickly and covertly spread disinformation and malinformation, and the difficulty of combatting the distribution of such material on these services.

The delivery of news through messaging relies entirely on hosting of these services by private digital platforms such as Facebook. This messaging format is at risk of interference from the hosting service, which could influence, rank, moderate or charge for its use by news media businesses.

If the delivery of news through private messaging becomes more popular over time, the content, accountability and control of these services should be considered as part of any broader updates to the regulatory frameworks governing media and journalism.

2177 P Marsh, [Backstory: Getting personal on Facebook Messenger](#), ABC, 7 October 2017, accessed 20 November 2018.

2178 P Marsh, [Backstory: Why we assigned a dedicated Messenger journalist to cover the midterms](#), ABC, 4 December 2018, accessed 20 April 2019.

2179 S Watt, [And now the news...via Facebook Messenger](#), ABC, 7 November 2016, accessed 20 November 2018.

2180 M Safi, [WhatsApp murders: India struggles to combat crimes linked to messaging service](#), *The Guardian*, 3 July 2018, accessed 20 November 2018; K Purohit, [WhatsApp rumours have led to 30 deaths in India. In this social media disinformation age, the only question is: who's next?](#), *South China Morning Post*, 25 February 2019, accessed 10 May 2019.

2181 M Magenta, [How WhatsApp is being abused in Brazil's elections](#), *BBC*, 24 October 2018, accessed 20 November 2018.

AI in News Production

Box 8.3: Artificial intelligence

Artificial intelligence (AI) refers to a branch of computer science that enables computers to undertake tasks of sufficient difficulty to appear intelligent.²¹⁸² While there are multiple subset technologies within the broad category of AI, those most relevant to this section's discussion include 'machine learning' and 'natural language' techniques.

- 'Machine learning' and related 'deep learning' technology enable software to autonomously improve its knowledge and processes through iteration and experience, without being explicitly programmed with new information or instructions.²¹⁸³ This can include:
 - algorithms that teach machines to learn cause and effect by analysing samples of data that were manually labelled in order to highlight clear distinctions between different features of data (supervised learning)
 - algorithms that try to identify hidden structures and patterns from unlabelled data (unsupervised learning)
 - algorithms performing tasks and learning through trial and error (reinforced learning).²¹⁸⁴
- 'Natural language processing' and 'natural language generation' techniques allow software to collect, analyse, interpret and produce 'natural' language in the form of text and speech.²¹⁸⁵

Some media businesses use AI technology to support the production of news. AI technology has applications in news-gathering, analysis of data and even the generation and publication of stories.

Automated newsgathering

Several news producers use machine learning to quickly collect, sort and analyse large volumes of data to aid newsgathering processes. This use of AI is intended to increase efficiency of newsrooms to allow news media businesses to redirect journalists to other tasks, or to reduce the number of employed journalists.

- The BBC's 'News Juicer' tool monitors and collates news published by 850 global news sources, extracting data (such as names of people, places and organisations), automatically assigning tags and collating this data in an easily searchable form. The BBC makes this tool available to its own journalists and those from other outlets in the form of an online database and an API, allowing easy and quick analysis of trends evident in the collated reports.²¹⁸⁶
- *The New York Times* 'Editor' program uses similar principles to the BBC's News Juicer, but operates to identify and gather information based on key words in articles written by the publication's journalists in real-time. This accelerates fact-checking by linking journalists to relevant information during drafting of articles. It ensures that all new content is appropriately tagged even before publication, assisting other journalists' future research of similar subjects.²¹⁸⁷
- The 'News Tracer' algorithm developed by wire service Reuters uses machine learning to monitor Twitter for breaking news. This algorithm seeks out clusters of potentially newsworthy tweets and makes automated judgements about the veracity of accounts on which they originate. The technology is designed to give Reuters journalists a head start on other media businesses in covering major world events, and the company credits News Tracer with enabling its staff to be the first to report on over 50 world news stories in 2016 and 2017.²¹⁸⁸

2182 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 9.

2183 D Wilding, P Fray, S Molitorisz and E McKewon, [The Impact of Digital Platforms on News and Journalistic Content](#), Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 62.; M. Jordan and T M Mitchell, [Machine learning: Trends, perspectives, and prospects](#), *Science*, vol. 349.6245, 2015, pp. 255-260.

2184 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 9.

2185 D Wilding, P Fray, S Molitorisz and E McKewon, [The Impact of Digital Platforms on News and Journalistic Content](#), Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 64.

2186 BBC News, [The Juicer API](#), accessed 20 November 2018.

2187 *The New York Times*, [Editor, an experiment in publishing](#), accessed 20 November 2018.

2188 J Stray, [The age of the cyborg](#), *Columbia Journalism Review*, 2016, accessed 20 November 2018; Reuters, [Reuters News Tracer: Filtering through the noise of social media](#), 15 May 2017, accessed 20 November 2018.

Automated journalism

Media businesses are also increasingly using machine learning, natural language processing and natural language generation to automate the writing and publishing of content.

- In early 2019, *The Guardian Australia* published its first story written entirely by AI, a system called ReporterMate. The system took a dataset and a story template file to create a story outlining the decline in political donations in Australia.²¹⁸⁹
- *The Los Angeles Times* uses its 'Quakebot' AI to monitor emails from the US Geological Survey about earthquake activity in the area, and to automatically generate and publish stories about earthquakes above a certain Richter scale threshold.²¹⁹⁰
- The wire service Associated Press and online publisher *Yahoo! Sports* publish stories using the 'Wordsmith' natural language software developed by Automotive Insights. This software is capable of quickly generating and publishing simple plain English stories based on data, such as financial information released by publicly-listed companies and the results of sports events.²¹⁹¹
- The Washington Post's 'Heliograph' bot was first launched to generate stories based on the results of events at the 2016 Rio Olympics, and has since been used to cover results of American elections and high-school football games.²¹⁹²
- Digital platforms including Google and Facebook have been using machine learning and natural language processing and generation technologies for the purpose of 'abstractive summarisation'. This allows AI-generated summaries of large portions of text, such as summarising long news articles into the 'snippets' of news content discussed in chapter 6.²¹⁹³

How AI can address the spread of online disinformation and malinformation online

As discussed in chapter 6, digital platforms have increased the potential for consumers to be exposed to disinformation, misinformation and malinformation. AI can help digital platforms and other parties to identify and filter out disinformation, misinformation and malinformation on a more efficient and timely basis than direct human intervention. For example, machine learning and natural language processing can be used to analyse the text of news stories to evaluate how well the content matches its headline. AI can compare facts across similar articles. AI can also de-prioritise content from social media accounts and news sources that have been identified as spreading low-quality news.²¹⁹⁴ This technology is already funded, developed and used, including by the digital platforms.

- In May 2018, Google announced that its Google News service was using machine learning and natural language processing to highlight and prioritise high-quality news sources, in addition to serving the news stories most relevant to individual users.²¹⁹⁵
- Google's Digital News Initiative also recently funded Belgian start-up Veriflix, which uses machine learning to scan user-submitted videos to determine the authenticity of their contents.²¹⁹⁶

2189 N Evershed, [Why I created a robot to write news stories](#), *The Guardian*, 1 February 2019, accessed 10 May 2019; ReporterMate, [Political donations plunge to \\$16.7m down from an average \\$25m a year](#), *The Guardian*, 1 February 2019, accessed 10 May 2019.

2190 W Oremus, [The First News Report on the L.A. Earthquake Was Written by a Robot](#), *Slate*, 17 March 2014, accessed 20 November 2018.

2191 S Stroh, [As AI Technology Advanced, So Does its Ability to Assist Journalists](#), *Editor & Publisher*, 1 December 2017, accessed 20 November 2018; Automated Insights, [Yahoo! Sports uses NLG to produce over 70 million reports and match recaps](#), accessed 20 November 2018.

2192 L Moses, [The Washington Post's robot reporter has published 850 articles in the past year](#), *DigiDay*, 14 September 2017, accessed 20 November 2018.

2193 D Wilding, P Fray, S Molitorisz and E McKewon 'The Impact of Digital Platforms on News and Journalistic Content', Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 65-66.

2194 A Susarla, [How artificial intelligence can detect and create fake news](#), *The Conversation*, 3 May 2018, accessed 20 November 2018.

2195 S Sharma, [Google News is now powered by AI to fight fake news](#), *Digit*, 10 May 2018, accessed 20 November 2018; T. Upstill, [The new Google News: AI meets human intelligence](#), Google, 8 May 2018, accessed 20 November 2018.

2196 B Marr, [This Google-Funded Company Uses Artificial Intelligence To Fight Against Fake News](#), *Forbes*, 18 July 2018, accessed 20 November 2018.

- Facebook has publicly stated that it uses machine learning to identify and block fake accounts and those that violate its terms of service by spreading spam and fraudulent material.²¹⁹⁷

Issues with AI in news

The increasing use of AI in news production and consumption may raise issues of ‘AI bias’. As noted in ‘The Impact of Digital Platforms on News and Journalistic Content’, ‘AI systems that exhibit statistical biases in their models or algorithms can result in actions that cause undesirable, unequal and/or unfair outcomes’.²¹⁹⁸ Such outcomes may reflect unconscious bias on the part of the programmers of AI software or evident in the datasets used by AI algorithms. The use of machine learning tools in other fields has frequently demonstrated potential issues of AI bias, with recent examples including:

- a recruitment AI developed by Amazon, which was reportedly scrapped by the company after repeatedly developing tendencies to favour male job applicants over females²¹⁹⁹
- the popular smartphone application FaceApp used machine learning for a feature that automatically made photos ‘more attractive’, and exhibited a tendency to do so by whitening users’ skin-tones and making their features look more European.²²⁰⁰

These examples show that issues of AI bias may lead to extremely concerning outcomes if replicated in the socially important functions of producing, distributing and consuming news.

Operators of the leading digital platforms are at the forefront of AI development, including the development of AI for journalism purposes. For example, in September 2017 the Google News Initiative publicly encouraged media businesses to start using the company’s proprietary and open source machine learning and natural language tools to aid their businesses.²²⁰¹ As the use of AI in the newsroom becomes increasingly common, this may present another avenue by which digital platforms influence the production of news. The further development and uptake of ‘abstractive summarisation’ techniques by digital platforms to automatically generate news snippets may exacerbate the issues associated with snippets discussed in chapter 6.

Some commentators and academics have publicly doubted the ability of AI technologies to effectively combat fake news in the near future. A 2018 study found that even the best AI model for predicting the trustworthiness of news sources could only accurately make predictions 65 per cent of the time.²²⁰² Academic analysis has noted that AI’s effectiveness in this area will be severely challenged by current limitations of natural language processing, difficulties with analysing online video content, and the use of AI tools to generate malinformation and evade detection.²²⁰³ However, AI technology is developing rapidly, and in February 2019 the AI research company OpenAI opted not to release its text generation product as it was too good at creating news stories and the company feared the product would be misused to create disinformation.²²⁰⁴

2197 T Lyons, [Hard Questions: What’s Facebook’s Strategy for Stopping False News?](#), *Facebook News Room*, 23 May 2018, accessed 20 November 2018.

2198 F Daniel, C Cappiello, B Benatallah, [Bots Acting like Humans: Understanding and Preventing Harm](#), *IEEE Internet Computing*, April 2019, pp. 40-49; D Wilding, P Fray, S Molitorisz and E McKewon [The Impact of Digital Platforms on News and Journalistic Content](#), Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 67.

2199 BBC, [Amazon scrapped ‘sexist AI’ tool](#), *BBC News*, 10 October 2018, accessed 20 November 2018.

2200 S Emerson, [That Viral ‘FaceApp’ Is Making Everyone Look Whiter](#), *Motherboard*, 25 April 2017, accessed 20 November 2018.

2201 V Nicholson, [‘How publishers can take advantage of machine learning’](#), *Google*, 19 September 2017, accessed 20 November 2018.

2202 K Hao, [‘Even the best AI for spotting fake news is still terrible’](#), *MIT Technology Review*, 3 October 2018, accessed 20 November 2018.

2203 W Knight, [‘Three problems with Facebook’s plan to kill hate speech using AI’](#), *MIT Technology Review*, 12 April 2018, accessed 20 November 2018.

2204 A Hern, [‘New AI fake text generator may be too dangerous to release, say creators.’](#) *The Guardian*, 15 February 2019, accessed 10 May 2019.

Consumer implications of AI

Data collection in AI

As with the use of AI in news, there are concerns with inbuilt discrimination in AI in relation to consumers; in particular, the capacity for AI discrimination to threaten human rights.²²⁰⁵ In the Australian context, the Australian Human Rights Commission, in its white paper on AI, stated that: ‘despite AI’s potential for beneficial use, its use creates important risks to Australians, including exclusion, discrimination, privacy, skill loss, economic impacts, security of critical infrastructure, and social well-being’.²²⁰⁶

Chatbots

Chatbots²²⁰⁷ are machine learning algorithms that interact with humans. They are commonly used in client and customer services, such as providing financial advice,²²⁰⁸ but also include conversational intermediaries with cloud services such as Apple’s Siri, Microsoft’s Cortana and Amazon’s Alexa.

More sophisticated chatbot virtual assistants can seamlessly switch to another AI bot or a human if the query becomes too complex.²²⁰⁹ Australian Government agencies such as the Australian Tax Office²²¹⁰ and IP Australia use the virtual assistant chatbot ‘Alex’.²²¹¹

Some submissions to the Inquiry suggested that the use of chatbots and machine learning algorithms may aid scams and deception as well as the dissemination of misinformation badged as news and journalistic content.²²¹² Discussion on the rise of scams through online channels is set out above in section 8.1.

Chatbot harm has been broadly characterised as falling into five detriment categories: psychological, legal, economic, social and democratic.²²¹³ Two examples of such harms include:

- Economic harm: such harm can occur where bots imitate professional services usually provided by humans, such as the provision of financial advice, without disclosing they are not human.²²¹⁴
- Democratic harm: such harm can occur when an article containing misinformation attains prominence on digital platforms through interactions with chatbots rather than humans. This may create artificial consensus for a particular idea.²²¹⁵ Researchers found about 20 per cent of election-related conversations during one month of activity on Twitter in 2016 was generated by chatbots.²²¹⁶

2205 Australian Human Rights Commission and World Economic Forum, White Paper, [Artificial intelligence: governance and leadership](#), January 2019, p. 7.

2206 Australian Human Rights Commission and World Economic Forum, White Paper, [Artificial intelligence: governance and leadership](#), January 2019, p. 7.

2207 In this section the term ‘chatbots’ is used, but they are also known as Software Agents, Virtual Agents, Intelligent Personal Assistants or Intelligent Conversational Agents.

2208 OECD, [Financial markets, insurance and pensions: Digitisation and Finance](#), 9 April 2018, p. 16.

2209 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 17.

2210 Australian Tax Office, [Introducing Alex, our new web assistant](#), 15 September 2015, accessed 17 October 2018.

2211 IP Australia, [Alex: IP Australia’s virtual assistant](#), 7 October 2016, accessed 17 October 2018.

2212 See, for example [Freedom Publishers Union Submission to the ACCC’s Digital Platforms Inquiry](#), April 2018, pp. 2-3. There have also been reports over several years of dating scams run through chatbots; see for example, R. Epstein, [‘From Russia, with Love’](#), *Scientific American Mind*, November 2007, p. 16-17, accessed 17 October 2018.

2213 F Daniel, C Cappiello and B Benatallah, [‘Bots Acting like Humans: Understanding and Preventing Harm’](#), *IEEE Internet*, IEEE April 2019, pp. 42-44.

2214 F Daniel, C Cappiello and B Benatallah, [‘Bots Acting like Humans: Understanding and Preventing Harm’](#), *IEEE Internet Computing*, p. 42, accessed 17 October 2018. For example, a bot collecting information on a form of cryptocurrency and providing information as tips on a social network (Reddit) without disclosing it was a bot. Researchers indicated they viewed this as an economic harm, see r/dogecoin, [Final poll - are automated posts from wise shibe welcome?](#), *Reddit*, 2014, accessed 24 October 2018.

2215 F Manjoo, [‘How Twitter is being gamed to feed misinformation’](#), *New York Times*, 31 May 2017. Accessed 24 October 2018.

2216 A Bessi, E. Ferrara, [‘Social bots distort the 2016 US presidential election online discussion’](#), *First Monday*, 7 November 2016, accessed 24 October 2018.

These risks may grow as language fluency and natural language expression improves in chatbots.²²¹⁷ Trials of Google's Duplex Assistant demonstrated that it was able to make voice phone calls to carry out tasks such as booking restaurants, and that its communication was so realistic that humans were not aware they were talking to a bot (Google notes Duplex will disclose the caller is a bot in future).²²¹⁸ Although Duplex did not pass the Turing test,²²¹⁹ under specific conditions it was able to mimic human interaction to a level that made it indistinguishable from a human.

Bots are also present on Twitter, Facebook, Instagram, Q&A sites, on-line newspapers, emails, and Messenger chats. As these technologies improve, it will be relevant to consider whether existing laws can address both harms to individuals and any resultant societal harms.²²²⁰

Some jurisdictions have introduced, or are seeking to introduce, new regulation to address these challenges. Such approaches may be worth future consideration as harms from emerging technologies are further understood. However, as these and other technologies continue to develop, it will also be important to ensure that innovation and investment are not constrained by regulatory frameworks that do not keep pace with such developments.

2217 F Daniel, C Cappiello and B. Benatallah, '[Bots Acting like Humans: Understanding and Preventing Harm](#)', *IEEE Internet Computing*, April 2019, p. 45.

2218 Google AI Blog, [Google Duplex, An AI System for Accomplishing Real-World Tasks Over the Phone](#), 8 May 2018, accessed 17 October 2018.

2219 H Levesque, 'Common Sense, the Turing Test and the Quest for Real AI', *The MIT Press*, London, 2017, pp. 8-10. The 'Turing test' refers to a machine's ability to exhibit intelligent behaviour indistinguishable from that of a human during verbal or written contact.

2220 F Daniel, C Cappiello and B Benatallah note that '[s]pamming, spreading misinformation, mimicking interest in people or topics, and cloning profiles to make these actions look credible may cause democratic harm, e.g., by diverting the attention of lawmakers to topics of little interest to society as a whole or even by altering the outcome of elections'. F Daniel, C Cappiello and B Benatallah, '[Bots Acting like Humans: Understanding and Preventing Harm](#)', *IEEE Internet Computing*, April 2019 p. 47.

Box 8.4: Examples of international regulatory responses to AI

Some jurisdictions have introduced, or are seeking to introduce, new regulation to address potential harms that arise from the increased use and sophistication of chatbots, and from AI more generally.

New Zealand

In 2015, New Zealand's Harmful Digital Communications Act 2015 came into effect and lists ten communication principles that may result in abuse if violated. For example, Principle 5 states that a digital communication should not be part of a pattern of conduct that constitutes harassment, remaining technology-neutral in the manner it defines 'digital communication' as 'any form of electronic communication'. The new civil enforcement regime provides for initial complaints about harmful digital communications to be made to an 'Approved Agency'. The Approved Agency may investigate a complaint and attempt to resolve it by negotiation, mediation and persuasion. Where the Approved Agency cannot resolve the complaint, an individual may make an application to the District Court for a number of civil orders, including requiring harmful digital communications to be taken down and requiring a defendant to cease the harmful conduct.²²²¹

This legislation created new offences and penalties, including a maximum of two years imprisonment or a fine of NZ\$50 000 for individuals,²²²² and fines of up to NZ\$200 000 for companies.²²²³ New Zealand has also amended the Harassment Act 1997, the Human Rights Act 1993 and the Privacy Act 1993 to clarify their application to digital communications.

Europe

At the time of drafting this Report, the European Parliament is considering changes to the EU's 2002 ePrivacy Directive to provide additional regulation to protect the confidentiality of communications between parties, namely to ensure that '[t]he principle of confidentiality should apply to current and future means of communication, including calls, internet access, instant messaging applications, e-mail, internet phone calls and personal messaging provided through social media'.²²²⁴

In particular, this regulation would seek to recognise the need for existing regulation to ensure the privacy of communications in machine-to-machine communications (Internet of Things) and communications using publicly accessible networks,²²²⁵ for example, to ensure the protection of information transferred using public internet hotspots.²²²⁶ The EU has noted that the provision of such regulation, such as it relates to machine-to-machine communications is proposed to among other things 'promote a trusted and secure Internet of Things in the digital single market'.²²²⁷

A breach of these laws, if passed, could for some breaches be subject to fines up to EUR€10 000 000 or two per cent of worldwide annual turnover (the latter in the case of an undertaking) and for others, up to EUR€20 000 000 or four per cent of worldwide annual turnover (whichever is the higher).²²²⁸

2221 Harmful Digital Communications Bill (NZ) Section 19 (3)(a)(b) [Explanatory Note](#) 5 November 2013, p. 2, accessed 8 November 2018.

2222 Harmful Digital Communications Act 2015 Section 22(3)(a)(b).

2223 Harmful Digital Communications Bill (NZ) Section 19 (3)(a)(b) [Explanatory Note](#) 5 November 2013, p. 8, accessed 24 October 2018.

2224 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 2.3.

2225 See Council of the European Union, '[Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 13 March 2019.

2226 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 13.

2227 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, para 12.

2228 European Commission '[Proposal for a Regulation of The European Parliament and of The Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC \(Regulation on Privacy and Electronic Communications\)](#)', 10 January 2017, Article 23.

8.4 Future market developments in digital platforms

Key findings

- Dynamic market changes may affect the degree of competition in the relevant markets. In particular, new digital platforms may enter and existing digital platforms may exit, affecting the structure of the relevant markets.

The markets for the supply of online search services, social media services and other related digital markets are subject to rapid change and innovation, with key suppliers expanding and changing their product and service offerings and firms entering and exiting these markets. This may affect the structure of, and degree of competition in, these markets. These dynamic changes may also influence the extent to which competing firms are able to constrain the activities of Google and Facebook.

This section explores key market-driven trends identified by the ACCC in the relevant markets, including the potential for:

- Google and Facebook to expand into adjacent services markets and foreclose suppliers of specialised search
- dynamic market changes, such as entry and exit of digital platforms in the relevant markets.

Expansion into adjacent markets

A potential trend is the continued expansion by Google and Facebook into digital markets adjacent or related to their respective supply of online search services and social media services.²²²⁹ In particular, stakeholders have raised concerns about the potential for Google and Facebook to expand into vertical or specialised search services.

As discussed in chapter 2, there are two types of online search services – general and specialised search services (also known as ‘vertical search services’). The ACCC considers that there is limited substitutability between these services.

The scope of information provided by general search services is far greater than information provided by specialised search services. Unlike general search services, specialised search services only index pages for particular topics. Some information is only available on specialised search services and not on general search services. Examples of specialised search services include platforms that connect buyers and sellers of real estate, and services providing information on travel, including flights, tours and accommodation.

The ACCC understands that Google and Facebook already offer some specialised search services. For example, the Facebook platform offers a ‘Marketplace’ feature which allows Facebook users to buy and sell goods and services without leaving the platform. Google operates Google Flights, which provides users with the ability to search for flights, track flight prices and explore potential destinations, and shopping comparison service Google Shopping.

With Google and Facebook continuing to expand into specialised search services, there is some concern that these companies may be able to foreclose suppliers in certain specialised search services markets. As discussed previously in this report, Google and Facebook are effectively ‘gateways to the internet’ for many consumers and are able to gather large amounts of data to improve the quality of their services and offer new services.

The ACCC considers that there are at least two ways in which Google could use its substantial market power in general search, and in which Facebook could use its substantial market power in social media services, to foreclose competition in related markets:

- by leveraging their large databases and user engagement to expand into neighbouring markets
- by using their search engine or social media ranking algorithms to restrict the amount of referral traffic to a supplier of specialised services or to redirect traffic to their own competing services.

²²²⁹ See, for example, REA Group, [Submission to ACCC's Digital Platforms Inquiry](#), 3 May 2018, p. 3.

REA Group submits that digital platforms²²³⁰ would be able to foreclose competition from suppliers of specialised services by leveraging their large user bases and ability to target services.²²³¹ Global platforms have access to a large amount of data that they can process in close to real time. This facilitates improvements in the services they offer (including specialised services) and better target advertising. This provides the global digital platforms with a powerful competitive advantage relative to other suppliers.²²³²

The ACCC notes that there is a potential for Google or Facebook to manipulate their algorithms or alter the display of content on their search engine results page or newsfeed (as relevant) to affect traffic to websites. For example, comparison shopping websites, a type of specialised search service, typically rely on traffic from general search services to reach consumers. As discussed in box 8.5, in 2017 the European Commission (EC) found that Google effectively leveraged its market power in general search services into the market for comparison shopping services, providing itself with an unfair competitive advantage. In the media release announcing this decision, the EC noted that it 'continues to examine Google's treatment in its search results of other specialised Google search services'.²²³³

Box 8.5: The EC's Google Shopping case

On 27 June 2017, the EC fined Google EUR€2.42 billion for abusing market dominance as a search engine by giving illegal advantage to its own comparison shopping service, Google Shopping. The EC found that from 2008, Google changed its strategy to:

- systematically give prominent placement to its own comparison shopping service, and
- demote rival comparison shopping services in its search results.

The EC found that Google's practices relied on Google's dominance in general internet search, instead of competition on merits in comparison shopping markets, and amounted to an abuse of Google's dominance in the general internet search industry by restricting competition in comparison shopping markets.

Of relevance, the EC also found that:

- Comparison shopping services rely to a large extent on traffic to be competitive. More traffic leads to more clicks and generates revenue. More traffic also attracts more retailers that want to list their products with a comparison shopping service. Given Google's dominance in general internet search, its search engine is an important source of traffic for comparison shopping services.
- By reducing the visibility of rival comparison shopping services, Google effectively deprived consumers of a genuine choice of services and the full benefits of innovation.

In September 2017, Google appealed the EUR€2.42 billion fine which is currently pending. It also introduced the following changes in the same month:

- giving competitor comparison shopping services access (allocated using a bidding process) to the Google Shopping unit box (found on the general search results page), and
- separating accounts between Google Shopping and Google Search.

However, competitors argued that the changes are having little effect and further fines should be made.²²³⁴

2230 The ACCC notes that the REA Group refers to 'Global Platforms' in its submission.

2231 See, for example, REA Group, [Submission to ACCC's Digital Platforms Inquiry](#), 3 May 2018, p. 8.

2232 See, for example, REA Group, [Submission to ACCC's Digital Platforms Inquiry](#), 3 May 2018, p. 16.

2233 European Commission, '[Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#)', 27 June 2017, accessed 20 November 2018.

2234 J Titcomb, '[Google faces fresh EU showdown as rivals attack search giant's response to record fine](#)', *The Telegraph*, 16 December 2017, accessed 20 November 2018.

These concerns are not limited to Google Shopping. Following this EC ruling, in May 2018, Yelp Inc renewed a complaint, originally made to the EC in 2014, that Google had unfairly promoted its own local search service Google Reviews above Yelp's service in search results.²²³⁵ Yelp Inc has also called for the United States to take action on this issue.²²³⁶ As at the date of this report, neither the EC or the US Federal Trade Commission or Department of Justice have commenced investigations based on the complaint.

The ACCC notes that concerns over potential anti-competitive behaviour, including by leveraging market power in one market into related markets, is a key reason for the creation of a specialised digital platforms branch of the ACCC, to build on and develop expertise in digital markets and the use of algorithms (recommendation 4). The creation of this branch will allow the ACCC to pro-actively monitor the conduct of digital platforms and investigate potentially anti-competitive behaviour on the part of digital platforms, including the type of potential conduct discussed in this section.

New entry and exit

This section discusses the potential for new digital platforms to emerge or exit. The ACCC notes that the purpose of this section is not to assess the likelihood of any new entry or exit, but to observe and note potential trends in this area.

Amazon

Amazon is a multinational company based in the United States, operating across a number of different industries, including e-commerce, cloud computing, advertising services and streaming services. In particular, Amazon owns and operates Amazon Marketplace, a platform for end users and third party sellers to buy and sell goods. This is separate from Amazon Retail, where wholesale sellers supply goods to Amazon, who then resells those goods on the Amazon.com website. Amazon also offers advertising services, and associated ad tech services, on its Amazon owned platforms and more broadly across the Internet.

In December 2017, Amazon officially launched its Australian-specific e-commerce site and had reportedly generated AU\$292 million in revenue from this website in the calendar year 2018.²²³⁷ Since then, it has also launched a number of other services in Australia, including:

- Fulfilment by Amazon (FBA), launched in February 2018. FBA is a service provided to third party traders on Amazon Marketplace, which allows those traders to send their products to Amazon's fulfilment centres in Sydney and Melbourne, It has Amazon pick, pack and ship orders to consumers in Australia and overseas and handle returns.
- Amazon Prime, launched in June 2018. Amazon Prime is a subscription service that provides consumers with the following features:
 - free two-day delivery on domestic purchases
 - free standard delivery on orders over AU\$49 made from the 'global' section (that is, international purchases)
 - access to Prime Video, Prime Music, Prime Reading and Twitch Prime
 - early access to discounts and deals
 - savings on Amazon Prime Day.
- Amazon Advertising, an advertising service launched in April 2019. Amazon Advertising includes the supply of display advertising and video advertising, offered on and off the Amazon platform, and Amazon's demand side platform service.²²³⁸

2235 P Dave and M. Vengattil, '[Yelp seeks to revive EU antitrust complaint against Google](#)', *Reuters*, 23 May 2018, accessed 20 November 2018.

2236 L Lowe, '[Regarding the European Commission's Guilty Verdict Against Android](#)', *Yelp*, 18 July 2018, accessed 20 November 2018.

2237 E Koehn, '[We're just getting started: Amazon Australia revenue surges to \\$292m](#)', *Sydney Morning Herald*, 1 April 2019, accessed 30 April 2019.

2238 Amazon, '[Amazon Advertising](#)', accessed 30 April 2019.

These services are in addition to Amazon Web Services (AWS), an on-demand cloud computing platform that Amazon has been supplying in Australia since 2012.²²³⁹

Amazon's revenue for the 2018 calendar year was US\$233 billion, with 61 per cent of this revenue originating in North America.²²⁴⁰ Part of this revenue, US\$25 billion, was from AWS, which was a 47 per cent increase from 2017.²²⁴¹ Amazon is estimated to be the largest ecommerce retailer in the United States, with a 47 per cent market share.²²⁴² Its closest competitor is eBay, which has a market share of just 6.1 per cent.²²⁴³

In the United States elected officials have criticised Amazon's market behaviour. Senator Elizabeth Warren has said 'Amazon has used its immense market power to force smaller competitors like Diapers.com to sell at a discounted rate. Amazon crushes small companies by copying the goods they sell on the Amazon Marketplace and then selling its own branded version'.²²⁴⁴

This type of conduct is currently being investigated by regulators in other jurisdictions. In September 2018, the European Commission opened a preliminary probe into Amazon's use of data on its third party merchants, given its role as both the platform on which third party merchants sell goods and as a competitor with these merchants through its own retail offering.²²⁴⁵ As of April 2019, the European Commission has not yet announced whether it will continue this preliminary investigation.

Similarly, on 29 November 2018, the Bundeskartellamt (the German Competition Authority) initiated an abuse proceeding against Amazon, to examine its terms of business and practices towards sellers on its German marketplace amazon.de.²²⁴⁶ In the press release announcing this decision, Andreas Mundt, the President of the Bundeskartellamt, stated:

*Amazon is the largest online retailer and operates by far the largest online marketplace in Germany. Many retailers and manufacturers depend on the reach of Amazon's marketplace for their online sales. Amazon functions as a kind of "gatekeeper" for customers. Its double role as the largest retailer and largest marketplace has the potential to hinder other sellers on its platform. Because of the many complaints we have received we will examine whether Amazon is abusing its market position to the detriment of sellers active on its marketplace. We will scrutinize its terms of business and practices towards sellers.*²²⁴⁷

In Australia, Amazon only has a small presence on the online retailing space, given its recent entry. However, there are media reports predicting growth. For example, the ABC reports 'analysts say Amazon remains on track to dominate the Australian retail landscape in a few years, and that it should not be underestimated despite a lacklustre start'.²²⁴⁸ The Australian Financial Review reports that Amazon is 'on-track to replicate US success'.²²⁴⁹ Given Amazon's global backing, it is likely to continue its growth trajectory and potentially replicate its current dominant position in other jurisdictions, in the Australian market.

2239 Amazon, [Announcing the AWS Asia Pacific \(Sydney\) Region](#), 12 November 2012, accessed 13 May 2019.

2240 United States Securities and Exchange Commission, [Amazon Form 10K for the fiscal year ended December 31 2018](#), p. 23.

2241 United States Securities and Exchange Commission, [Amazon Form 10K for the fiscal year ended December 31 2018](#) p. 23.

2242 L Thomas and C Reagan, [Watch out, retailers. This is just how big Amazon is becoming](#), *CNBC*, 13 July 2018, accessed 30 April 2019.

2243 L Thomas and C Reagan, [Watch out, retailers. This is just how big Amazon is becoming](#), *CNBC*, 13 July 2018, accessed 30 April 2019.

2244 E Warren, [Here's how we can break up Big Tech](#), *Medium*, 8 March 2019, accessed 13 May 2019.

2245 S Amaro, [A full EU probe into Amazon could come in the next few months, top officials say](#), *CNBC*, 3 April 2019, accessed 30 April 2019.

2246 Bundeskartellamt, [Bundeskartellamt initiates abuse proceedings against Amazon](#), 29 November 2018, p 1.

2247 Bundeskartellamt, [Bundeskartellamt initiates abuse proceedings against Amazon](#), 29 November 2018, p 1.

2248 D Chau, [Amazon on track to dominate Australian retail within seven years, despite a shaky start](#), *ABC*, 26 December 2018, accessed 30 April 2019.

2249 S Mitchell, [Amazon triggers 'step change' in Australian e-commerce](#), *Australian Financial Review*, 4 December 2018, accessed 30 April 2019.

WeChat

WeChat is a social media platform that is popular in China, with approximately one billion monthly active users globally as at March 2018.²²⁵⁰ WeChat is specifically designed for communicating within networks and friendship groups, and offers features similar to Facebook, including a news feed and direct messaging. It also specifically commissions content, including journalistic content and entertainment content,²²⁵¹ and operates a payment mechanism known as WeChat Pay.

In describing the extremely broad and integrated suite of functions available on WeChat, technology analyst Connie Chan notes that:

*Along with its basic communication features, WeChat users in China can access services to hail a taxi, order food delivery, buy movie tickets, play casual games, check in for a flight, send money to friends, access fitness tracker data, book a doctor appointment, get banking statements, pay the water bill, find geo-targeted coupons, recognize music, search for a book at the local library, meet strangers around you, follow celebrity news, read magazine articles, and even donate to charity ... all in a single, integrated app.*²²⁵²

WeChat is owned by Tencent, which also operates the QQ instant messaging platform. A commentator submitted to the ACCC that Tencent intends to launch WeChat in the west.²²⁵³ While WeChat is currently used in Australia (mostly by members of diasporas from Chinese speaking countries), its full functionality is not available here. Media reports suggest strong growth of WeChat in Australia, particularly by Australian businesses, as they seek to connect with Chinese-speaking customers residing in or visiting Australia.²²⁵⁴

Baidu

Baidu, based in China, supplies general online search services and vertical search-based products, such as Maps, Image Search, Video Search and News Search.²²⁵⁵ Baidu is reported to have a 66 per cent share of the search market in China²²⁵⁶ and recently announced that it has 150 million daily active users of its app, which offers its search engine and news feed.²²⁵⁷

Baidu was reportedly preparing to launch into the Australian market in 2012,²²⁵⁸ but there have not been any significant developments publicly announced since then. There have been media reports regarding Baidu's expansion of its mapping service into 'Europe and the rest of the world'.²²⁵⁹

DuckDuckGo

The ACCC also notes the presence of DuckDuckGo as a potential alternative search engine to Google. In October 2018, DuckDuckGo reached 30 million direct searches in one day on its search engine.²²⁶⁰ While this is much smaller than the volume of searches run on Google, it demonstrates the growth of DuckDuckGo as an alternative search engine. It had taken DuckDuckGo seven years to reach 10 million searches in one day, a further two years to reach 20 million and less than a year to reach 30 million.²²⁶¹

2250 J Kilbride, ['WeChat: Chinese social media app reaches 1 billion monthly users, makes waves in Australia'](#), ABC, 7 March 2018, 20 November 2018.

2251 M Simons, [Submission to the ACCC Digital Platforms Inquiry](#), 3 May 2018, p 3.

2252 C Chan, ['When One App Rules Them All: The Case of WeChat and Mobile in China'](#), *Andreessen Horowitz*, 6 August 2015, accessed 20 November 2018.

2253 M Simons, [Submission to the ACCC Digital Platforms Inquiry](#), 3 May 2018, p 3.

2254 See, for example, R. Goncalves, ['Too good an opportunity': Australian small businesses harnessing power of WeChat](#), SBS, 16 February 2018, accessed 20 November 2018; N Shah, ['Why more Australian businesses are turning to WeChat'](#), *AdNews*, 17 April 2018, accessed 20 November 2018.

2255 Baidu, [Company Overview](#), accessed 20 November 2018.

2256 Stat Counter Global Stats, [Search Engine Market Share in China 2017 - 2018](#), accessed 20 November 2018.

2257 Baidu, [Baidu App Reaches 150 Million DAUs after Launching Ads-Free Search](#), 5 June 2018, accessed 24 October 2018.

2258 T Burrowes, ['Baidu International launches Australian office led by Dean Capobianco and Paul Christy'](#), *Mumbrella*, 2 May 2012, accessed 20 November 2018.

2259 S Shead, ['The 'Google of China' has partnered with a mapping company owned by Audi, BMW, and Daimler to plot the world'](#), *Business Insider*, 16 January 2017, accessed 20 November 2018.

2260 DuckDuckGo, [DuckDuckGo Traffic](#), accessed 20 November 2018.

2261 DuckDuckGo, [Tweet - DuckDuckGo fun fact](#), *Twitter*, 11 October 2018, accessed 20 November 2018.

This may also indicate an increased consumer interest in privacy, noting that DuckDuckGo's main selling point is in keeping users' search history private and blocking advertising trackers.

Future of the Facebook platform

The ACCC notes media speculation regarding the potential exit of Facebook the platform (as distinct from Facebook the company) from the social media services market. Media articles have reported the 'fall of Facebook', which cite contributing factors including privacy concerns about the platform and the perception of the platform as an 'echo chamber' or 'filter bubble' for news.²²⁶² The declining use of open social media services such as Facebook for news is discussed in more detail in section 8.3 above.

While Facebook remains extremely popular in Australia, its year-on-year growth for new monthly active users has recently slowed.²²⁶³ However, this may be due to the fact that with a user base of 17 million users aged 14+ in Australia²²⁶⁴ and over two billion users globally,²²⁶⁵ Facebook's future growth may be limited by its significant existing degree of market penetration.

One distinct international trend is the decline in Facebook's use by younger people. Recent reports have shown that:

- in the United Kingdom, 700 000 fewer 18- to 24-year olds are projected to regularly use Facebook in 2018 than did so in 2017, with these younger users shifting use towards more private services²²⁶⁶
- in the United States, only 51 per cent of teenagers say they use Facebook, compared to 71 per cent in 2015²²⁶⁷
- 42 per cent of adults in the United States have taken a break from Facebook in the past year, and 26 per cent have deleted the Facebook app from their smartphones (including 44 per cent of respondents aged 18 to 29).²²⁶⁸

The ACCC notes that while Facebook as a platform may be stagnating in terms of user growth, its other apps (Instagram, Messenger and WhatsApp) continue to grow.

The ACCC will continue to monitor developments in the markets for digital platforms, including those that may indicate potential longer-term trends.

8.5 Conclusion

The technological and market-driven trends explored in this chapter will have a range of implications for businesses and individuals.

Some trends are already having adverse implications, such as the proliferation of scams conducted online and using digital platforms. Consumers and businesses have suffered harm with no proper method of redress. Governments have a role in ensuring consumers and businesses have an effective, efficient and reasonable dispute resolution mechanism with digital platforms.

In relation to future and emerging trends, media businesses will continue to experiment with innovative content. While the composition of the various digital platform markets may vary over the longer term, it is likely that these markets will continue to thrive. New technologies and services will be developed and implemented which will provide value to consumers while also collecting and harnessing their data for use by advertisers and other businesses.

2262 See, for example, A Wolk, '[The Fall of Facebook](#)' *Forbes*, 30 July 2018, accessed 20 November 2018; A Madrigal, '[The Fall of Facebook](#)', *The Atlantic*, December 2014, accessed 20 November 2018.

2263 N Statt, '[Facebook's growth continues to slow down](#)', *The Verge*, 30 October 2018, accessed 20 November 2018.

2264 Roy Morgan, '[Facebook Watch set to leverage off 17m user base](#)', 31 August 2018, accessed 20 November 2018.

2265 Facebook, '[Our Mission: Stats](#)', *Facebook Newsroom* accessed 20 November 2018.

2266 M Sweney, '[Is Facebook for old people? Over-55s flock in as the young leave](#)', *The Guardian*, 12 February 2018, accessed 20 November 2018; eMarketer, '[UK: Younger Audiences Moving Off Facebook](#)', 12 February 2018, accessed 20 November 2018.

2267 M Anderson and J Jiang, '[Teens, Social Media & Technology 2018](#)', *Pew Research Center*, 31 May 2018, accessed 20 November 2018.

2268 A Perrin, '[Americans are changing their relationship with Facebook](#)', *Pew Research Center*, 5 September 2018, accessed 20 November 2018.

Consumers are welcoming new devices and services into their homes and daily lives. These new technologies provide benefits through increased connectivity and convenience, but present risks to the privacy and autonomy of users.

New technological developments have significant implications for consumers, businesses, media, government, regulators and digital platforms. These developments re-balance the power relationship between individuals and the private and public entities that have access to increasing amounts of user data and increasingly sophisticated capabilities to obtain value from that data. Governments and regulators will have an increasing role in monitoring these developments, enforcing existing law as well as considering whether further regulation is required.



Appendix A: Terms of Reference





COMMONWEALTH OF AUSTRALIA

COMPETITION AND CONSUMER ACT 2010

INQUIRY INTO DIGITAL PLATFORMS

I, Scott Morrison, Treasurer, pursuant to subsection 95H(1) of the Competition and Consumer Act 2010, hereby require the Australian Competition and Consumer Commission to hold an inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms (platform 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.

Matters to be taken into consideration include, but are not limited to:

- i. the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers;
- ii. the impact of platform service providers on the level of choice and quality of news and journalistic content to consumers;
- iii. the impact of platform service providers on media and advertising markets;
- iv. the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and
- v. the impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets.

This is not to be an inquiry into supply by any particular persons or persons, or by a state or territory authority.

This inquiry is to commence today and submit to me a preliminary report within 12 months and a final report within 18 months.

DATED THIS 4th DAY OF December 2017

SCOTT MORRISON
Treasurer



Appendix B: Overview of defamation law and application to digital platforms and media businesses



This appendix provides an overview of key features of Australian defamation law as applicable to digital platforms and media companies.

Overview of defamation law

Australian defamation law is set out in the national uniform defamation legislation which was enacted by each of the states and territories (the National Defamation Law) in 2005 and 2006,²²⁶⁹ supplemented by the common law.²²⁷⁰

Defamation requires a judge to be satisfied that the material is capable of bearing a defamatory meaning and a jury to be satisfied that the defamatory meaning would be conveyed to an ordinary, reasonable reader.²²⁷¹ There is a limitation period of one year for defamation claims, with the possibility of a court-ordered extension of up to three years.²

A necessary element of defamation is that the defendant must have published the defamatory material.²²⁷³ ‘Publication’ under defamation law is broadly defined and includes any person who has voluntarily disseminated the defamatory material.²²⁷⁴ Content creators such as newspapers are liable under defamation law as ‘primary publishers’, while distributors of defamatory materials who did not create the material but voluntarily disseminated it to others such as libraries or newsagents are also liable under defamation law as ‘secondary publishers’.²²⁷⁵

Liability under defamation law applies to digital platforms in a similar way as to other media businesses. That is, digital platforms that distribute defamatory material on their platforms may be liable as ‘secondary publishers’ under defamation law, much like any other media business which distributes defamatory material on its website or via another channel. Further, if a digital platform were to create the defamatory material, it would be liable under defamation law as a primary publisher.

The key difference between primary and secondary publishers is that secondary publishers may try to make out the defence of innocent dissemination.

Defence of innocent dissemination

While both primary and secondary publishers of defamatory material are liable under defamation law for being involved in the publication of material, secondary publishers may rely on the innocent dissemination defence,²²⁷⁶ which requires the following elements:

- not made aware of the defamatory material²²⁷⁷, or
- if made aware of the defamatory materials, took steps to remove it within a reasonable timeframe.²²⁷⁸

2269 These laws were enacted in substantially the same form by the state and territory legislatures: see *Civil Law (Wrongs) Act 2002 (ACT)* Ch 9; *Defamation Act 2006 (NT)*; *Defamation Act 2005 (NSW)*; *Defamation Act 2005 (Qld)*; *Defamation Act 2005 (SA)*; *Defamation Act 2005 (Tas)*; *Defamation Act 2005 (Vic)*; *Defamation Act 2005 (WA)*.

2270 The National Defamation Law does not affect the operation of the common law tort of defamation, except to the extent that the National Defamation Law provides otherwise (whether expressly or by necessary implication). *Civil Law (Wrongs) Act 2002 (ACT)* s 118; *Defamation Act 2006 (NT)* s 5; *Defamation Act 2005 (NSW)* s 6; *Defamation Act 2005 (Qld)* s 6; *Defamation Act 2006 (SA)* s 6; *Defamation Act 2005 (Tas)* s 6; *Defamation Act 2005 (Vic)* s 6; *Defamation Act 2005 (WA)* s 6.

2271 D Rolph et al, *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, p. 74.

2272 See ss. 14B, 56A; *Limitation of Actions Act 1974 (Qld)* ss. 10AA, 32A; *Limitation of Actions Act 1936 (SA)* s 37(1), (2); *Defamation Act 2005 (Tas)* s. 20A(1), (2); *Limitation of Actions Act 1958 (Vic)* ss 5(1AAA), 23B; *Limitation Act 2005 (WA)* ss 15, 40.

2273 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

2274 See *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 505 per Bridge LJ; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 647 per Callinan J.

2275 D Rolph et al, *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, p. 214.

2276 See *Defamation Act 2005 (Vic)* (NSW) (Qld) (WA) s 32, *Defamation Act 2006 (NT)* s 29, *Defamation Act 2005 (SA)* s 30, *Civil Law (Wrongs) Act 2002 (ACT)* s 139C.

2277 See *Von Marburg v Aldred & Anor* [2015] VSC 467, where Dixon J said that ‘an awareness of the existence of the impugned material is a precondition before an internet intermediary such as an administrator or sponsor of a Facebook page will be held to be a publisher. The internet intermediary is not the publisher of it if not aware of its existence’.

2278 See *Trkulja v Google Inc. LLC* [2012] VSC 533.

In *Google Inc. v Duffy*²²⁷⁹, Google sought to rely on the defence of innocent dissemination by arguing that its search engine algorithms automatically indexed relevant links and images without any knowledge that the material was defamatory. This argument was rejected by the court because Dr Duffy had notified Google of the defamatory materials and gave Google a reasonable timeframe to remedy the situation.

Liability of digital platforms under defamation law

Digital platforms may be liable as secondary publishers of defamatory material if they do not remove defamatory material after:

- being notified of the defamatory material, and
- a reasonable period of time for the removal of the offending search terms has passed.²²⁸⁰

There are several cases where digital platforms have been found liable under defamation law as secondary publishers.²²⁸¹

- For instance, in *Google Inc v Duffy*²²⁸², Dr Duffy discovered that Google searches for her name were accompanied by an autocomplete suggestion 'Janice Duffy Psychic Stalker' and that the search results included a link to a website called the Ripoff Report (which had published defamatory materials about her). Dr Duffy wrote to Google requesting removal of the content, but Google did not respond to her request. Dr Duffy then sued Google for defamation. Google argued that there was no 'publication' of its search results, but the Court found Google liable as a secondary publisher of the defamatory material for reasons including that Google had intentionally designed its search engine to produce results in the way it did and had facilitated the reading of the defamatory material in an indispensable, substantial and proximate way.
- In *Trkulja v Yahoo! Inc LLC*²²⁸³, Mr Trkulja successfully sued Yahoo! for displaying photos of him alongside articles associated with violent crimes and photographs of Tony Mokbel. Mr Trkulja argued that the way the search results were arranged gave rise to the imputation that he had been involved in violent crimes and his rivals had hired a hitman to murder him.
- In *Trkulja v Google Inc LLC*²²⁸⁴, Google initially made an application to strike out the proceeding on the basis that it had no prospects of success, which was dismissed by the Victorian Supreme Court, successfully appealed by Google in the Court of Appeal, and then successfully appealed by Mr Trkulja in the High Court. The outcome of this trial is still pending.

Despite the theoretical liability of digital platforms, it should be noted that the majority of defamation cases have involved the author or publisher of the defamatory material being sued rather than the digital platform involved. For example, in *Hockey v Fairfax Media Publications Pty Ltd*,²²⁸⁵ Fairfax Media was sued under defamation law, not Twitter.²²⁸⁶

2279 [2017] SASCFC 130.

2280 The most recent Australian authority for this is *Google Inc v Duffy* [2017] SASCFC 130.

2281 *Google Inc. v Duffy* [2017] SASCFC 130.

2282 [2017] SASCFC 130.

2283 [2012] VSC 88.

2284 [2012] VSC 533.

2285 [2015] FCA 652.

2286 In this instance the court found defamatory imputations in two tweets written by Fairfax Media and broadcast on Twitter. Fairfax Media was ordered to pay Mr Hockey \$80 000 for the two tweets published on Twitter by *The Age*. *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652 at 515, 517.

Remedies for publishing defamatory content

The main remedy in defamation cases is the award of damages set by the trial judge,²²⁸⁷ who is required to ensure there is a rational relationship between the amount of damages awarded and the harm suffered.²²⁸⁸ Damages may be awarded for both economic and non-economic losses. Non-economic losses are capped at a maximum of \$250 000 (subject to annual indexation).²²⁸⁹

In *Google v Duffy*, Google was ordered to pay Dr Duffy \$115 000.²²⁹⁰ In *Trkulja v Yahoo! Inc LLC*, Yahoo was ordered to pay Mr Trkulja \$241 000 in damages.²²⁹¹

2287 See *Defamation Act 2005* (NSW) s 22(3); *Defamation Act 2005* (Qld) s 22(3); *Defamation Act 2005* (Tas) s 22(3); *Defamation Act 2005* (Vic) s 22(3); *Defamation Act 2005* (WA) s 22(3).

2288 See *Civil Law (Wrongs) Act 2002* (ACT) s 139E; *Defamation Act 2006* (NT) s 31; *Defamation Act 2005* (NSW) s 34; *Defamation Act 2005* (Qld) s 34; *Defamation Act 2005* (SA) s 32; *Defamation Act 2005* (Tas) s 34; *Defamation Act 2005* (Vic) s 34; *Defamation Act 2005* (WA) s 34.

2289 *Civil Law (Wrongs) Act 2002* (ACT) s 139F(1); *Defamation Act 2006* (NT) s 32(1); *Defamation Act 2005* (NSW) s 35(1); *Defamation Act 2005* (Qld) s 35(1); *Defamation Act 2005* (SA) s 33(1); *Defamation Act 2005* (Tas) s 35(1); *Defamation Act 2005* (Vic) s 35(1); *Defamation Act 2005* (WA) s 35(1).

2290 *Duffy v Google Inc* (No 3) [2016] SASC 1 at 3.

2291 *Trkulja v Yahoo! Inc & Anor* (No 2) [2012] VSC 217 at 1.



Appendix C: Recent reviews of media industry laws and regulations



The ACCC notes there has been numerous government reviews and reports in relation to various different and sometimes overlapping issues in media and intellectual property regulation in recent years. Key reviews relevant to media services providers (and their equivalent regulation) are noted below.

Media laws and regulations

Outlined below are relevant key government reviews, inquiries or reports over the past 15 years in relation to Australian media law and regulations, in reverse chronological order:

2013-18

- [Inquiry into the competitive neutrality of the national broadcasters](#), Department of Communications and the Arts, 2018 - ongoing
- [Communications sector market study: final report](#), Australian Competition and Consumer Commission, April 2018
- [Inquiry into impacts on local businesses in Australia from global internet-based competition](#) (the Internet Competition Inquiry), Standing Committee on Industry, Innovation, Science and Resources, March 2018
- [Report on Public Interest Journalism](#), Australian Senate Select Committee, February 2018
- [Local content in regional Australia—2017 report](#), Australian Communications and Media Authority, May 2017
- [Review of the Australian Communications and Media Authority: final report](#), Department of Communications and the Arts, October 2016
- [Digital disruption: what do governments need to do?](#) Productivity Commission, June 2016
- [Reconnecting the customer: estimation of benefits](#), Australian Communications and Media Authority, November 2015
- [The Australian internet security initiative: interviews with industry participants](#), Australian Communications and Media Authority, October 2015
- [Five-year spectrum outlook 2015-19: the ACMA's spectrum demand analysis and strategic direction for the next five years](#), Australian Communications and Media Authority, September 2015
- [Digital radio report](#), Department of Communications, July 2015
- [Independent cost benefit analysis of broadband and review of regulation](#), Department of Communications and the Arts, August 2014
- [Broken Concepts—The Australian Communications Legislative Landscape](#), Australian Communications and Media Authority, originally published in August 2011 and updated June 2013
- [Connected citizens—A regulatory strategy for the networked society and information economy](#), Australian Communications and Media Authority, June 2013

2012 and earlier

- [Convergence Review](#) by Glen Boreham, Department of Broadband, Communications and the Digital Economy, May 2012
- [Classification—Content Regulation and Convergent Media](#), Australian Law Reform Commission, March 2012
- [News Media Regulation](#) by Ray Finkelstein and Matthew Ricketson (the Finkelstein Review), Department of Broadband, Communications and the Digital Economy, February 2012
- [Enduring Concepts—Communications and media in Australia](#), Australian Communications and Media Authority, November 2011
- [Digital Australians: expectations about media content in a converging media environment](#), Australian Communications and Media Authority, October 2011

- [Draft children’s television standards 2008](#), Australian Communications and Media Authority, September 2008
- [Survey of the community radio broadcasting sector 2002-03](#), Australian Communications and Media Authority, August 2005

Importantly, most of the studies and reports listed above have focused on specific media or communications sectors or on a specific category of rules (for example, content classification). The relatively fragmentary approach taken by past reviews is illustrated in the table below. As such, there has been limited opportunity to consider the overarching media and communications regulatory framework, as proposed in **Recommendation 7**.

Table 1: Focus of past inquiries, reviews and reports

Inquiry / review / report	Focus of inquiry / review / report ²²⁹²					
	Print publishing?	Online publishing and broadcasting?	TV broadcasting?	Radio broadcasting?	Information communications technology?	Advertising?
Inquiry into the competitive neutrality of the national broadcasters 2018 - ongoing	X	X	✓	✓	X	X
Communications sector market study: final report April 2018	X	X	X	X	✓	X
Internet Competition Inquiry March 2018	X	X	X	X	✓	X
Report on Public Interest Journalism February 2018	✓	✓	✓	✓	X	X
Local content in regional Australia - 2017 report May 2017	✓	✓	✓	✓	X	X
Review of the Australian Communications and Media Authority: final report October 2016	X	✓	✓	✓	✓	X
Digital disruption: what do governments need to do? June 2016	X	X	X	X	✓	X
Reconnecting the customer: estimation of benefits November 2015	X	X	X	X	✓	X
The Australian internet security initiative: interviews with industry participants October 2015	X	X	X	X	✓	X
Five-year spectrum outlook 2015-19: the ACMA’s spectrum demand analysis and strategic direction for the next five years September 2015	X	X	✓	✓	X	X

²²⁹² The table provides a general and high-level summary of the relevant sectors that are considered in detail by the inquiries, reviews, and reports listed. The ticks denote sectors that were areas of focus, whereas the crosses denote sectors that were not discussed in depth (although some of these were mentioned peripherally in the inquiries, reviews, and reports).

Inquiry / review / report	Focus of inquiry / review / report ²²⁹²					
	Print publishing?	Online publishing and broadcasting?	TV broadcasting?	Radio broadcasting?	Information communications technology?	Advertising?
Digital radio report July 2015	X	X	X	✓	X	X
Independent cost benefit analysis of broadband and review of regulation August 2014	X	X	X	X	✓	X
Broken Concepts—The Australian Communications Legislative Landscape Published Aug 2011, updated June 2013	X	✓	✓	✓	✓	X
Connected citizens—A regulatory strategy for the networked society and information economy June 2013	X	✓	✓	X	✓	X
Convergence Review May 2012	X	✓	✓	✓	✓	X
Classification—Content Regulation and Convergent Media March 2012	X	✓	✓	✓	✓	✓
News Media Regulation (the Finkelstein Review) February 2012	✓	✓	✓	✓	X	✓
Enduring Concepts—Communications and media in Australia November 2011	X	✓	✓	✓	✓	X
Digital Australians: expectations about media content in a converging media environment October 2011	X	✓	✓	X	✓	X
Draft children’s television standards 2008 September 2008	X	X	✓	X	X	X
Survey of the community radio broadcasting sector 2002-03 August 2005	X	X	X	✓	X	X

Intellectual property laws and regulations

The ACCC notes that in the past 20 years, there have been numerous reviews undertaken by various departments and organisations in relation to copyright and defamation law, including an ongoing consultation being conducted by the Department of Communications and the Arts. A number of these discuss the provision of businesses providing media services (along with a range of other matters).

2013-18

- [Copyright modernisation consultation](#), Department of Communications and the Arts, 2018 - ongoing
- [Consumer survey on online copyright infringement 2018, Department of Communications and the Arts, August 2018](#)
- [Statutory Inquiry into NSW Defamation Act 2005](#), New South Wales Department of Justice, June 2018
- [Cost benefit analysis of changes to the Copyright Act 1968](#), Ernst and Young, commissioned by the Department of Communications and the Arts, December 2016
- [Intellectual Property Arrangements](#), the Productivity Commission, August 2016.
- [Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements](#), August 2017
- [Inquiry into Australia's Innovation System](#), Senate Standing Committees on Economics, December 2015
- [Inquiry into Copyright and the Digital Economy](#), Australian Law Reform Commission, November 2014

2012 and earlier

- [Review of intellectual property legislation under the Competition Principles Agreement](#), Intellectual Property and Competition Review Committee, Attorney-General's Department, September 2000
- [Numerous past inquiries](#) by the Copyright Law Review Committee (no longer in existence), Attorney-General's Department, 1984-2005



Appendix D: Results of the ACCC's experiment searching for news-related content on Google Search



Table 1: Search term: 'Banking Royal Commission'

Number of times different publishers had their articles appearing in top stories carousel		Number of times different publishers had their articles appearing in organic search results	
ABC	58	The Australian Financial Review	20
Sydney Morning Herald	14	ABC	10
The Australian	6	News.com.au	5
The Guardian	4	Sydney Morning Herald	4
News.com.au	3	Choice	2
The Australian Financial Review	3	Business Insider	1
Business Insider	2	Macrobusiness	1
Cuffelinks	1	SBS	1
Herald Sun	1	The Guardian	1
The West Australian	1		
Total	93	Total	45

Table 2: Search term: 'Scott Morrison'

Number of times different publishers had their articles appearing in top stories carousel		Number of times different publishers had their articles appearing in organic search results	
The Guardian	17	News.com.au	7
News.com.au	15	Sydney Morning Herald	6
The Australian	13	ABC	5
Sydney Morning Herald	11	The Guardian	5
The Australian Financial Review	8	The Australian	4
ABC	7	The Monthly	3
9News	6	9News	1
Daily Telegraph	4	The Australian Financial Review	1
The New Daily	3	Daily Telegraph	1
Herald Sun	3	SBS	1
2GB.com	3	The New Daily	1
The Conversation	2		
SBS	2		
Pedestrian TV	1		
New Matilda	1		
3AW	1		
Music Feeds	1		
Junkee	1		
The West Australian	1		
Total	100	Total	35

Table 3: Search term: 'AFL'

Number of times different publishers had their articles appearing in top stories carousel		Number of times different publishers had their articles appearing in organic search results	
Fox Sports	43	Fox Sports	5
News.com.au	15	News.com.au	3
AFL	14		
Herald Sun	12		
Wwos - Nine	6		
The Age	3		
The Advertiser	2		
Carlton Football Club	1		
ESPN	1		
Sydney Morning Herald	1		
The Roar	1		
Triple M	1		
Total	100	Total	8



**Appendix E:
Changes to news
provision - Analysis
of major metropolitan
and national print
publications 2001-2018**



Summary

The ACCC analysed articles published in twelve major Australian metropolitan and national newspapers between 2001 and 2018, and identified declining provision of articles in a number of topics related to public interest journalism.

This analysis found that, overall, newspapers:

- published 26 per cent fewer articles on local government issues in 2018 than at the peak of local government coverage in 2005 (a drop from approximately 11 400 to 8 400 articles per year)
- published 40 per cent fewer articles on local court matters in 2018 than at the peak of local court reporting in 2005 (a drop from 11 900 to 7 200 articles per year)
- published 30 per cent fewer articles on health issues than at the peak of health reporting in 2004 (a drop from 21 600 to 13 300 articles per year), and
- published 42 per cent fewer articles on science in 2018 than at the peak of science reporting in 2006 (a drop from 6 400 to 3 700 articles per year).

The newspapers considered by the ACCC in this exercise each have both print and online versions. The data considered by the ACCC in this exercise were drawn from print versions, as the relevant database did not contain consistent data on online versions. However, the ACCC considers that an analysis of the articles contained in print editions still provides a good indication of the editorial priorities of various publications, particularly given the significant overlap between articles published in online and print editions during the period surveyed.

Overview and methodology

This exercise was designed to assess trends in the provision of articles relating to various topics of journalism by Australian traditional print news media companies (now print/online news media companies) over a period of significant disruptions to their businesses and declining revenues, as outlined in chapter 6.

Publications in scope

The ACCC analysed the number and topic of articles published from 2001 to 2018 across 12 print editions of major metropolitan and national daily news publications from Australia's three largest publishers.

Publication	Coverage	Publisher
<i>The Australian Financial Review</i>	National	Nine Entertainment Co (formerly Fairfax Media) ²²⁹³
<i>The Australian</i>	National	News Corp Australia (formerly News Limited) ²²⁹⁴
<i>The Advertiser</i>	Metropolitan (Adelaide)	News Corp Australia (formerly News Limited)
<i>The Herald Sun</i>	Metropolitan (Melbourne)	News Corp Australia (formerly News Limited)
<i>The Age</i>	Metropolitan (Melbourne)	Nine Entertainment Co (formerly Fairfax Media)
<i>The Courier Mail</i>	Metropolitan (Brisbane)	News Corp Australia (formerly News Limited)
<i>The West Australian</i>	Metropolitan (Perth)	Seven West Media (formerly Western Australian Newspapers Holdings Limited) ²²⁹⁵
<i>The Daily Telegraph</i>	Metropolitan (Sydney)	News Corp Australia (formerly News Limited)
<i>The Sydney Morning Herald</i>	Metropolitan (Sydney)	Nine Entertainment Co (formerly Fairfax Media)
<i>The NT News</i>	Metropolitan (Darwin)	News Corp Australia (formerly News Limited)
<i>The Hobart Mercury</i>	Metropolitan (Hobart)	News Corp Australia (formerly News Limited)
<i>The Canberra Times</i>	Metropolitan (Canberra)	Nine Entertainment Co (formerly Fairfax Media) ²²⁹⁶

These publications were selected to represent a comprehensive range of the most popular daily news publications in Australia's capital cities. A separate exercise (available at Appendix F) assessed the availability of newspapers in local and regional areas of Australia.

Choice of news topics

The analysis focussed on news articles relating to 10 topics or categories of reporting: **local courts, higher courts, local government, public policy, health, education, science, industrial relations, corporate conduct and sport.**

These categories were selected to represent a range of 'specialist' reporting topics relevant to the provision of public interest journalism as defined in chapter 6. Sport was included as an example of a popular topic of reporting less frequently relevant to public interest journalism.²²⁹⁷

2293 Fairfax Media was acquired by Nine Entertainment Co in December 2018, at the end of the period surveyed in this exercise.

2294 News Limited rebranded itself as News Corp Australia in June 2013, during the period surveyed in this exercise.

2295 Seven West Media was formed through the merger of Seven Media Group and West Australian Newspaper Holdings Limited in 2011.

2296 *The Canberra Times* was acquired by private investors as part of Nine Entertainment Co's sale of Australian Community Media in April 2019. This occurred after the period surveyed in this exercise.

2297 As discussed in chapter 6 of the Report, public interest journalism can include journalism focused on a wide range of different topics. While many sports articles published during the period contain results, commentary and analysis of sporting events that are unlikely to constitute public interest journalism, some articles related to sport can comprise public interest journalism - for example, where they report on corruption or criminal behaviour involving sports clubs or governing bodies.

Source of data

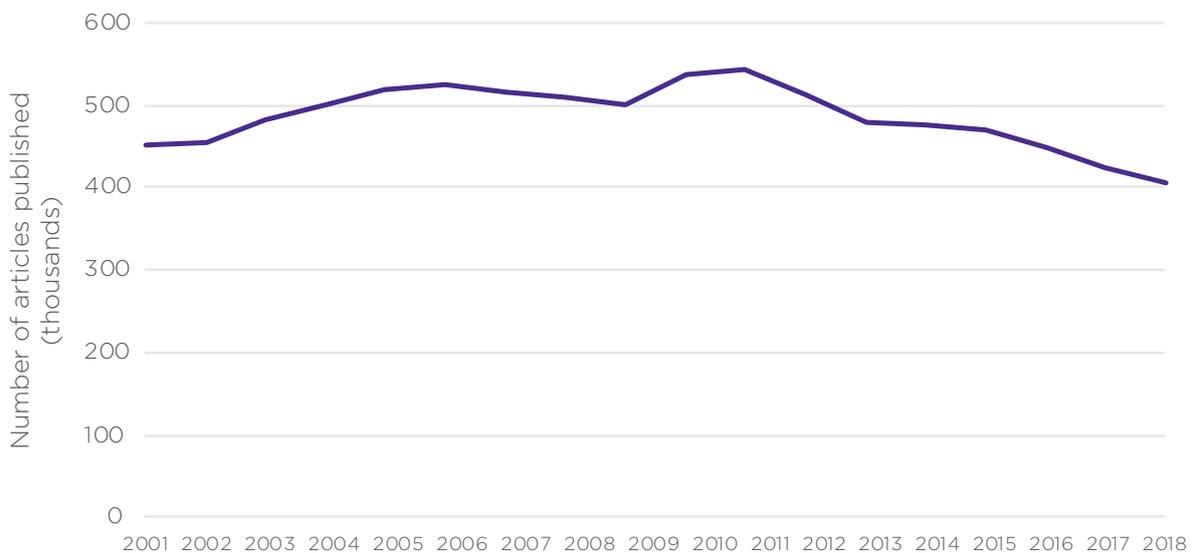
The results show that the total number of articles published in the selected publications peaked in 2010 followed by steady decline to 2018 (figure 1). This exercise used data generated through keyword searches of the Factiva Global News Database (Factiva database), which contains full text versions of articles from all major Australian news publications. As the Factiva database did not contain consistent data for the online provision of articles by the publications selected throughout the period surveyed, the exercise was limited to articles in print editions.

While the Factiva database includes its own 'tagging' and 'filtering' of articles in various categories of journalism, these were not used to distinguish between news topics in this exercise.²²⁹⁸

Instead, to provide consistency and transparency of results, this exercise conducted keyword searches to identify news articles under each of the 10 reporting categories.

The development of keyword search terms was assisted by manually reading and categorising all articles published by the publications on a single day during the period – amounting to around 1 600 articles. The initial set of search terms was then applied to this dataset, and calibrated in order to provide results acceptably consistent with the manual categorisation of these articles.

Figure 1: Total articles published from 2001 to 2018

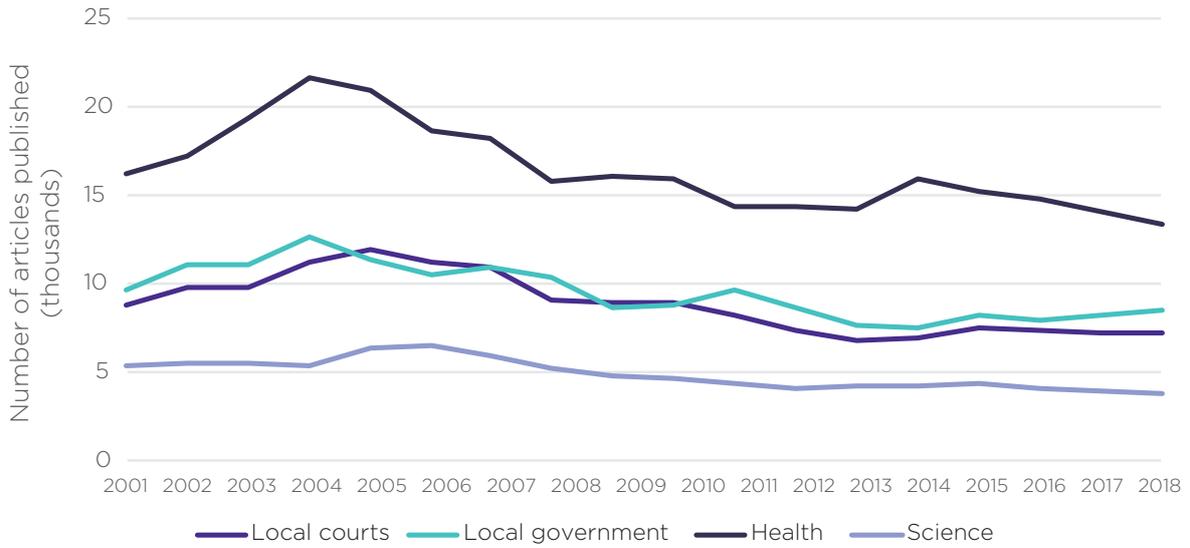


Source: ACCC analysis of data sourced from the Factiva Global News Database.

However, the reporting categories analysed in this exercise did not uniformly follow this overall trend. Figure 2 shows that the number of news articles relating to local government, local courts, science and health peaked in 2004 and 2005, and fell to levels well below this peak by 2018.

²²⁹⁸ The exercise did, however, use Factiva's in-built 'subject' categorisations to exclude non-news content such as editorials, calendars of events, press releases, transcripts and advertorials.

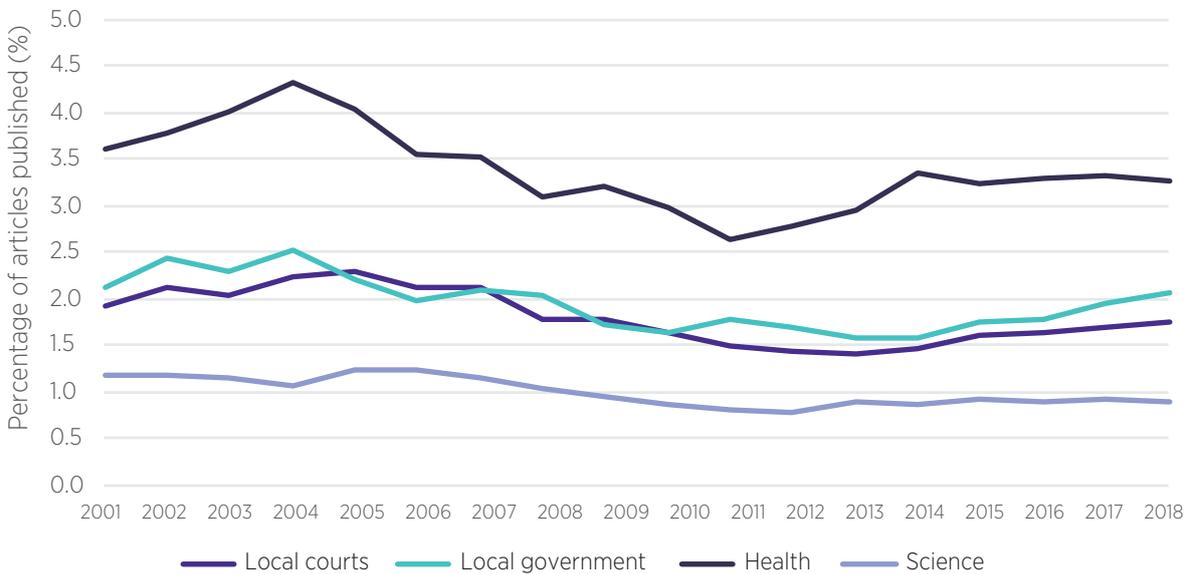
Figure 2: Reduced provision of specialist reporting – articles published per year



Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 3 shows the provision of these four categories of reporting as a proportion of all articles published. This analysis shows these categories of journalism exhibit a similar decline from peaks in 2004 and 2005, although the proportional provision of articles on these topics stabilised (and to some degree recovered) between 2014 and 2018.

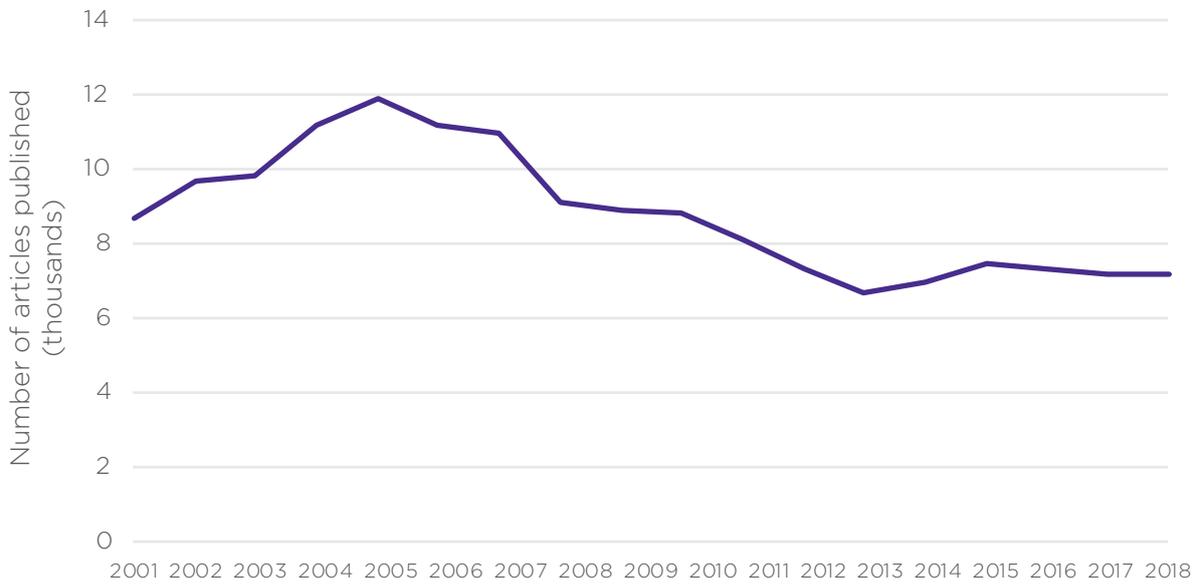
Figure 3: Reduced provision of specialist reporting – percentage of all articles per year



Source: ACCC analysis of data sourced from the Factiva Global News Database.

Full results – provision by category

Figure 4: Local court reporting - articles published per year



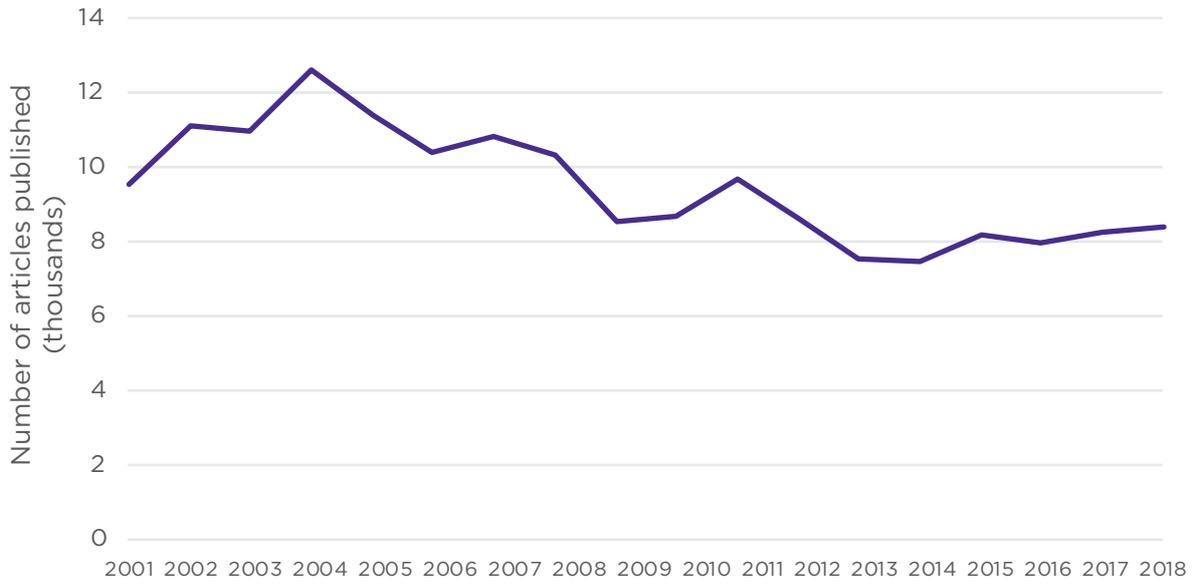
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 5: Higher court reporting - articles published per year



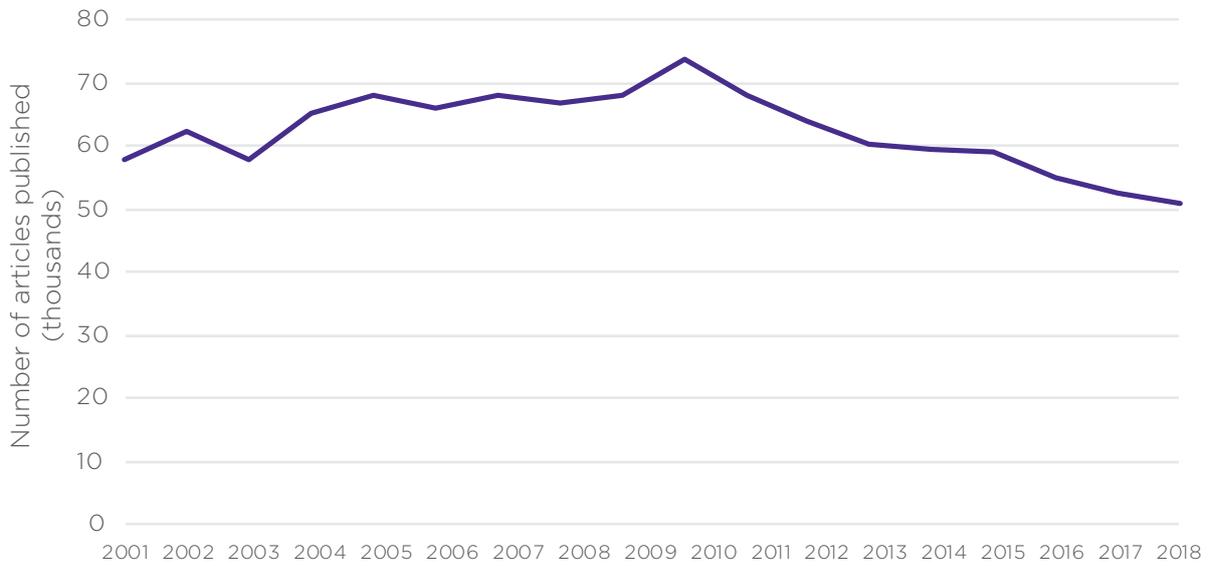
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 6: Local government reporting – articles published per year



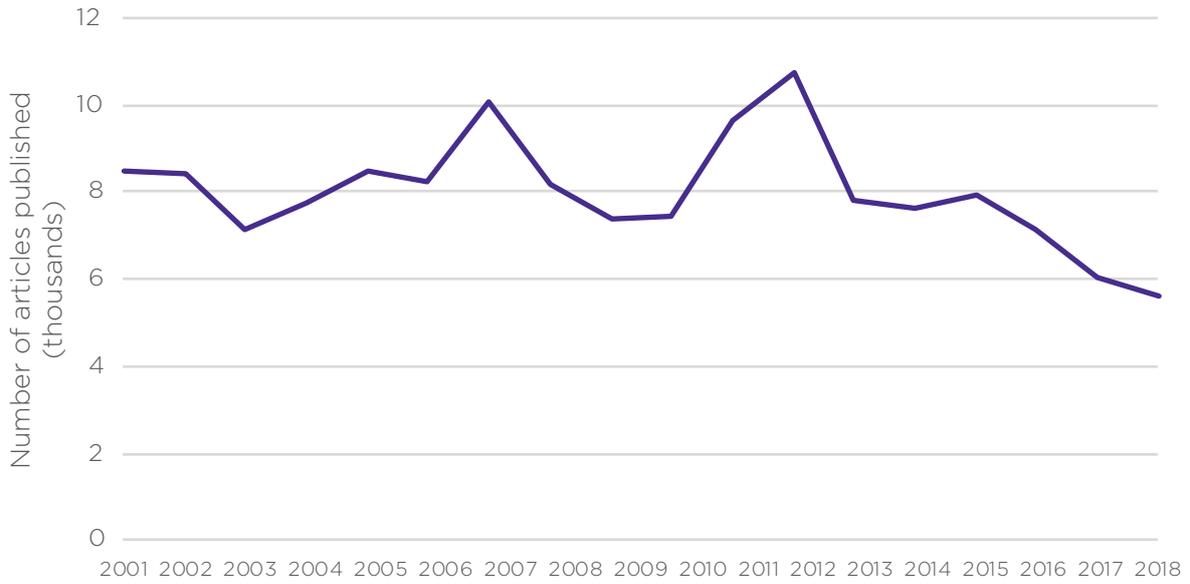
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 7: Public policy reporting – articles published per year



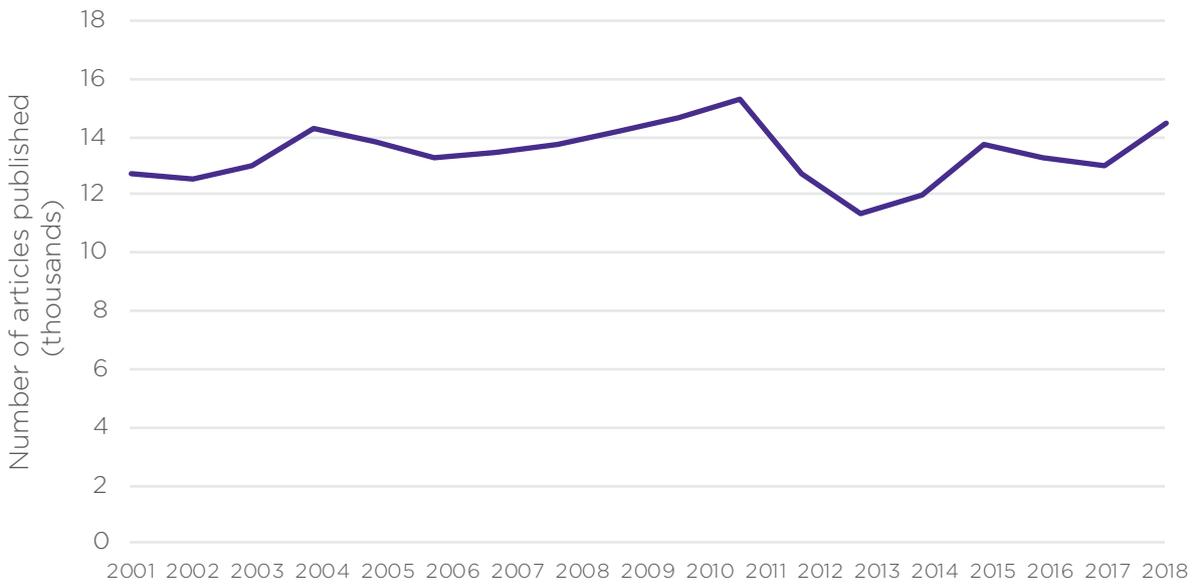
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 8: Industrial relations reporting - articles published per year



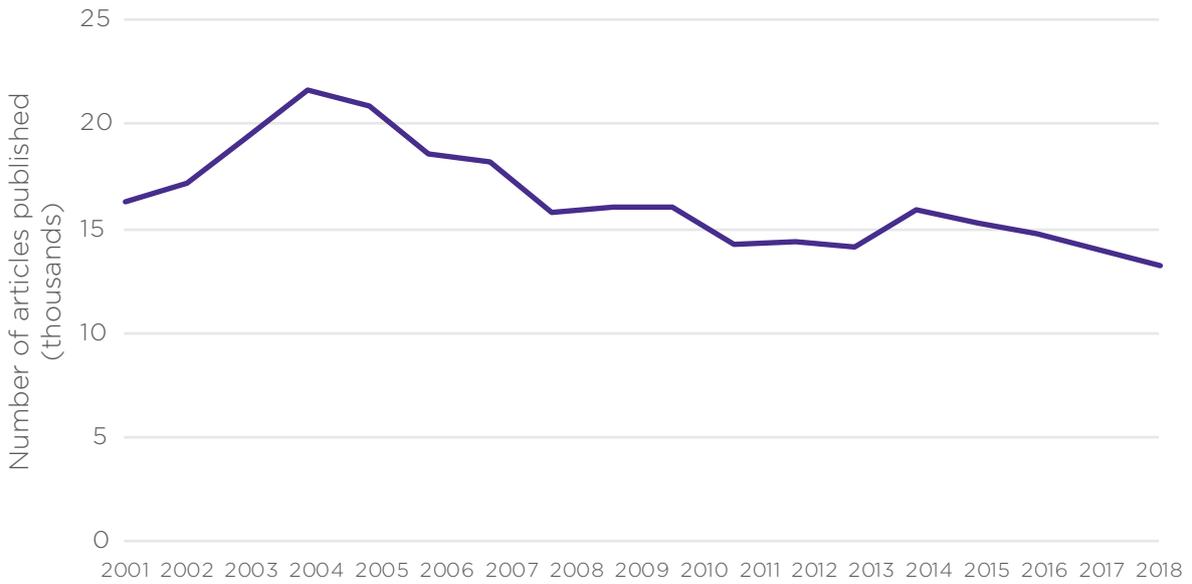
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 9: Corporate conduct reporting - articles published per year



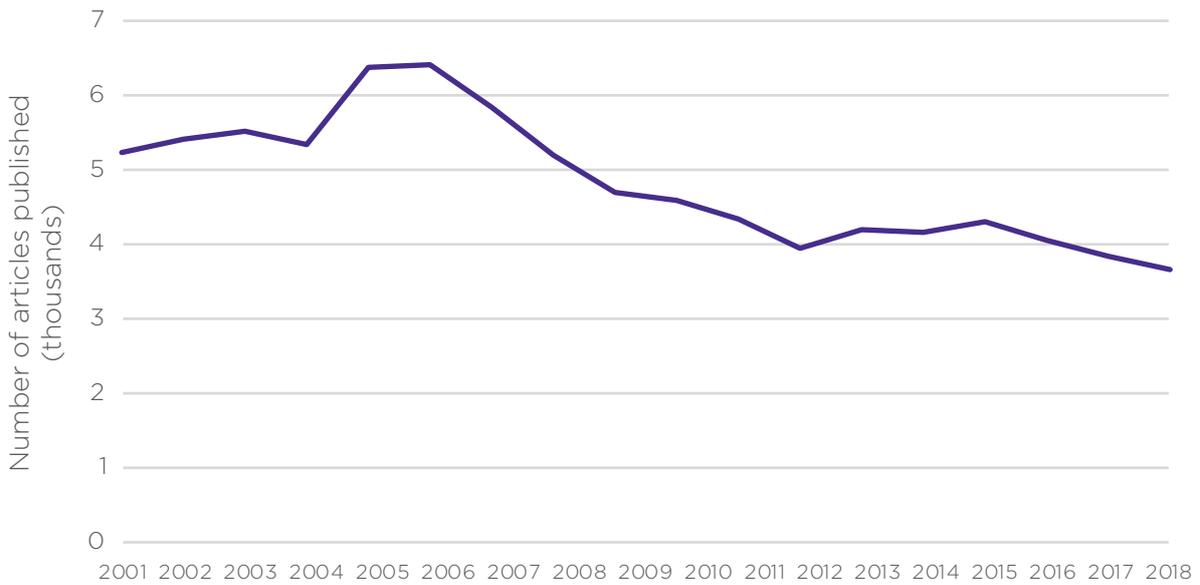
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 10: Health reporting - articles published per year



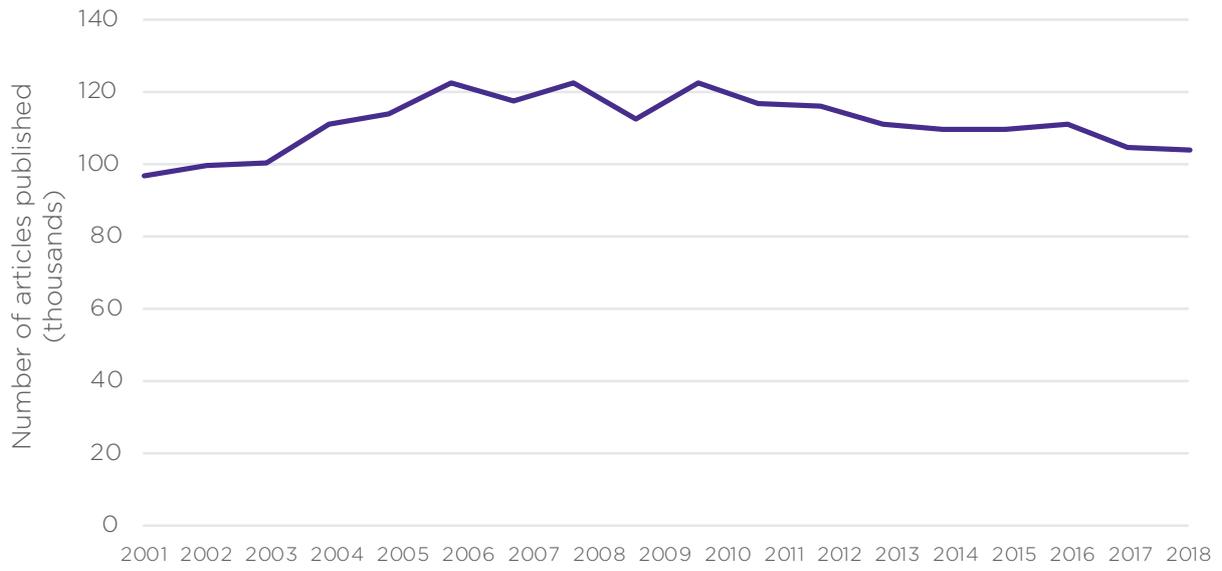
Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 11: Science reporting - articles published per year



Source: ACCC analysis of data sourced from the Factiva Global News Database.

Figure 12: Sport reporting – articles published per year



Source: ACCC analysis of data sourced from the Factiva Global News Database.



**Appendix F:
Local and regional
newspaper closures -
2008-09 to 2017-18**



Summary

A simple analysis of the number and location of Australian local and regional newspaper titles shows that the net total of unique newspaper titles declined by 15 per cent between 2008-09 and 2017-18. Closures during this period left 21 local government areas without a single local or regional newspaper, including 16 local government areas in regional Australia.

Introduction

The provision of local journalism, either in newspapers or online, plays an important democratic role. A range of international studies have directly linked reductions to local journalism with declines in civic engagement and negative impacts on the management of public finances.²²⁹⁹

This exercise attempts to quantify the risk of under-provision of local journalism by analysing trends in the number and location of local and regional newspaper titles published by Australian media businesses in Australia during the ten years from 2008-09 to 2017-18.

Methodology

This exercise uses data obtained by the ACCC from major Australian news media businesses through the issue of notices under section 95ZK of the *Competition and Consumer Act 2010*. These businesses included: News Corp, Nine Entertainment Co (includes former Fairfax Media), The Taylor Group, Seven West Media, McPherson Newspapers and Star News Group.

Key data variables included the following: name of the newspaper, publisher, genre of newspaper (local/regional), area of circulation, area of circulation by postcode, office location, office location by postcode, frequency of publication, closure date and circulation (for closed newspapers). Publishers provided the ACCC with data for each financial year from 2008-09 to 2017-18. They also provided information about mergers and acquisitions where relevant.

Following the methodology used by Gao, Lee and Murphy²³⁰⁰, this exercise matched newspapers to local government areas based on circulation postcodes. The ACCC used the 2011 Australian Bureau of Statistics (ABS) definition of local government area to identify local government areas serviced by each newspaper. If a newspaper serviced postcodes across multiple local government areas, it was matched to each of these areas accordingly.²³⁰¹ This matching yielded 545 unique newspapers servicing 376 local government areas at some point between 2008-09 and 2017-18.

Analysis of this data assumed that newspapers 'dropped out' of the dataset during the period surveyed for one of two reasons: (1) the newspaper was closed or absorbed by another newspaper or (2) the newspaper merged with another newspaper to form a new newspaper.

Given both of these scenarios lead to an effective reduction in the provision of newspaper publications, the ACCC has referred to them collectively as 'closures' throughout this appendix.

The ACCC notes that newspapers have been considered to be effectively closed when both print and online circulation cease. None of the publications identified as 'closures' in this exercise have continued providing local coverage as online-only publications.

A number of newspaper titles launched during the 10-year period, some of which also closed by the end of the period. These dynamics are accounted for in the sample, such that 'closures' should be read as *net* closures.

2299 See V Lee and D Wessel ., '[How closures of local newspapers increase local government borrowing costs](#),' *Brookings*, 16 July 2018, accessed 15 April 2019; P Gao, C Lee, D Murphy, '[Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance](#)', *Journal of Financial Economics*, (Forthcoming), 2019.

2300 P Gao, C Lee, D. Murphy, '[Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance](#)', *Journal of Financial Economics*, (Forthcoming), 2019, an earlier version of this paper can be found at <https://www.brookings.edu/wp-content/uploads/2018/09/WP44.pdf> , pp. 8-9, accessed 9 May 2019.

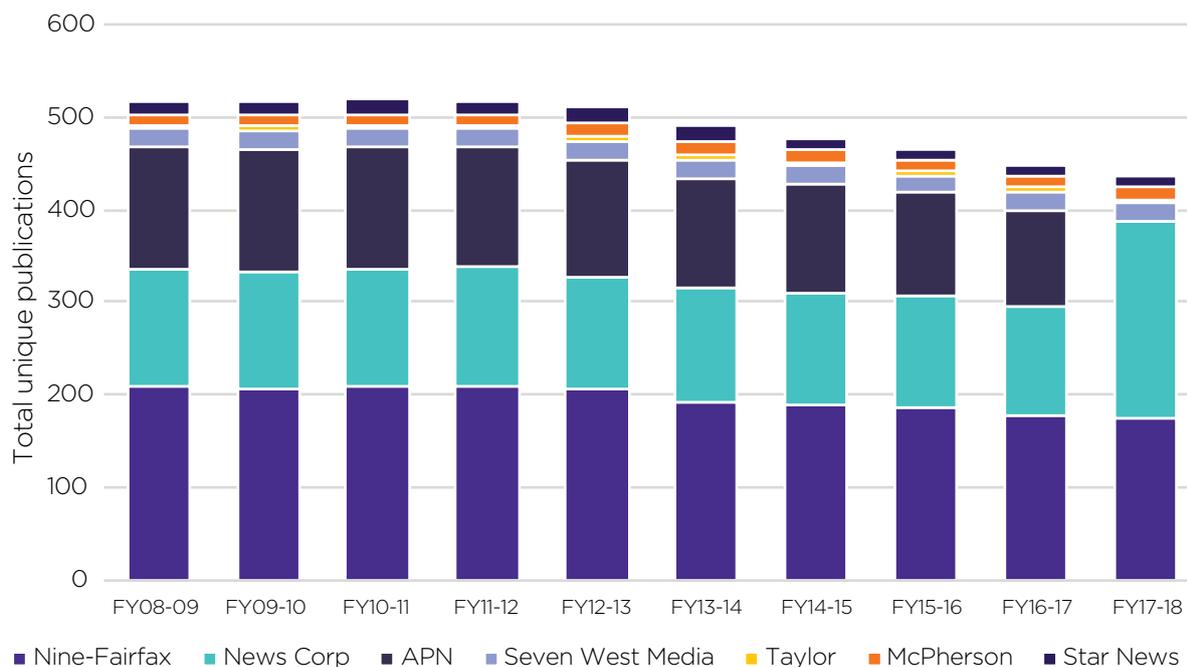
2301 Australian Bureau of Statistics, [Australian Statistical Geography Standard \(ASGS\)](#), July 2011, Cat. No. 1270.0.55.006, "Statistical Area Level 1 2011 to Local Government Area 2011 (zip file, 'table 2' sheet), accessed 1 February 2019.

Results

Decline in provision of local newspapers

The net total of local and regional newspapers in Australia decreased by 15 per cent between 2008–09 and 2017–18 (figure 1). There were 106 closures over the period; 85 per cent of which relate to titles owned by major national media publishing groups. Following these closures, 21 local government areas that were initially serviced by at least one newspaper were left without a single local or regional newspaper.

Figure 1: Total number of unique newspapers from 2008-09 to 2017-18, by major media company



Source: ACCC analysis of data provided to the Inquiry

Note: APN was acquired by News Corp in December 2016.²³⁰² Data shown in this chart for that business is based on the ACCC's assuming that acquired publications existed between 2008–08 and 2016–17.

The trends identified by this exercise are not unique to Australia; similar trends have been observed in the United States of America and the United Kingdom.²³⁰³ It has been indicated to the ACCC that a number of other local and regional newspapers are earmarked to either reduce frequency of circulation or close entirely in 2019.²³⁰⁴ The ACCC therefore expects that the trend of local and regional newspaper closures is likely to continue.

²³⁰² ACCC, [News Corporation - proposed acquisition of APN News & Media Limited's Australian Regional Media division - ARM](#), 8 December 2016; T Burrowes, [News Corp completes takeover of APN's regional newspapers](#), Mumbrella, 29 December 2016.

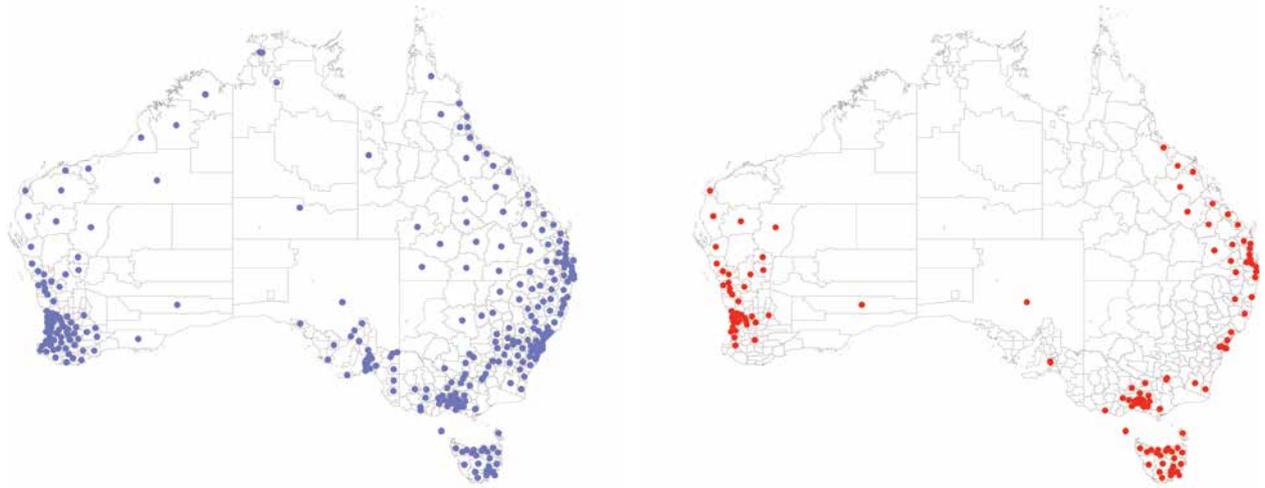
²³⁰³ See P Gao, C Lee, D Murphy, [Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance](#), Journal of Financial Economics, (Forthcoming), 2019; Mediatique, [Overview of recent dynamics in the UK press market](#), April 2018, report commissioned by the UK Department for Digital, Culture, Media and Sport, pp. 55–56.

²³⁰⁴ Information provided to the ACCC as part of the s95ZK notice response process.

Geographical coverage

Figure 2 shows the geographic locations of local and regional newspaper coverage, and locations of closures identified in this exercise. On the left hand side of figure 2, the blue dots indicate local government areas where a local or regional newspaper was published at some point between 2008-09 and 2017-18.²³⁰⁵ On right hand side, the red dots indicate local government areas affected by the closure of one or more local or regional newspaper closures at any point between 2008-09 and 2017-18. Note that a single local or regional newspaper can provide coverage to multiple government areas, and that closure of a single newspaper can affect multiple local government areas.

Figure 2: Geographical coverage and closure of regional and community newspapers (2008-09 to 2017-18)



Source: ACCC analysis of data provided to the Inquiry

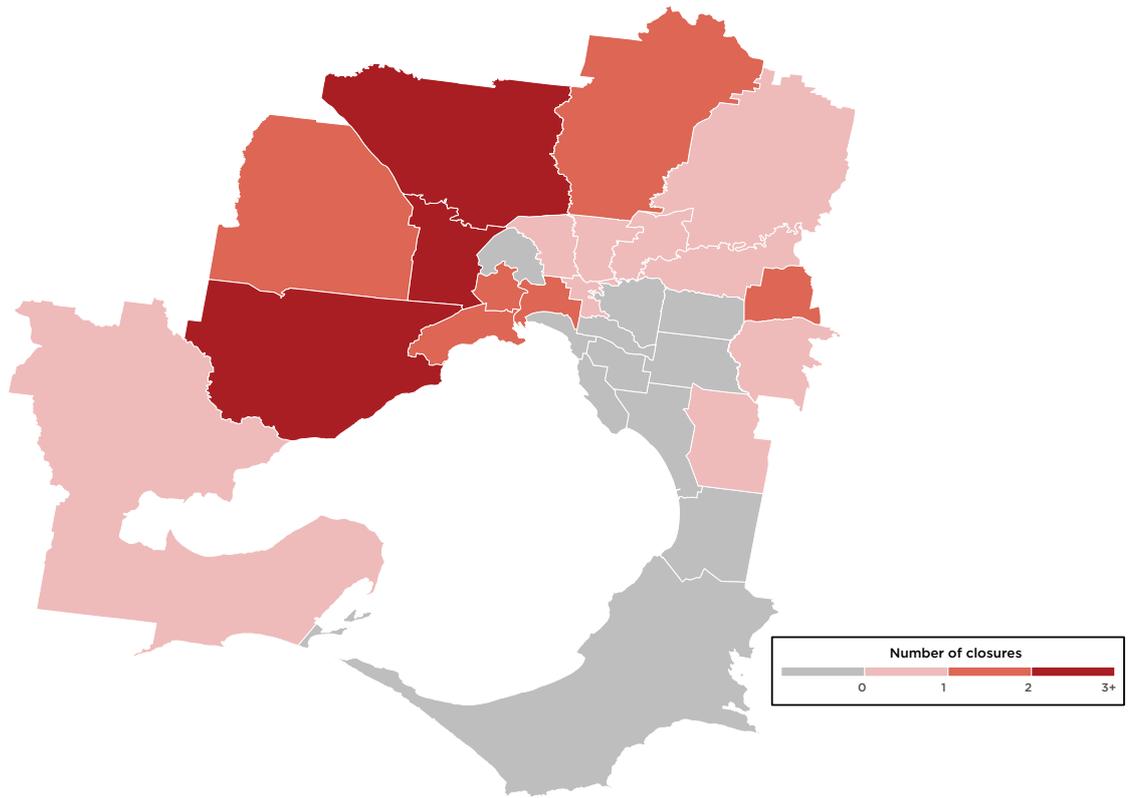
The exercise also demonstrates reduced availability of local and regional newspapers; 92 per cent of metropolitan local government areas were serviced by at least one newspaper at some point during 2008-09 to 2017-18 compared to 59 per cent of regional areas.

Newspaper closures in capital cities

The following heat maps show local government areas in capital cities affected by the closure of one or more local newspapers at any point between 2008-09 and 2017-18. These maps demonstrate the effect local newspaper closures are having in urban and suburban areas of capital cities, which is particularly noticeable in Melbourne and Brisbane.

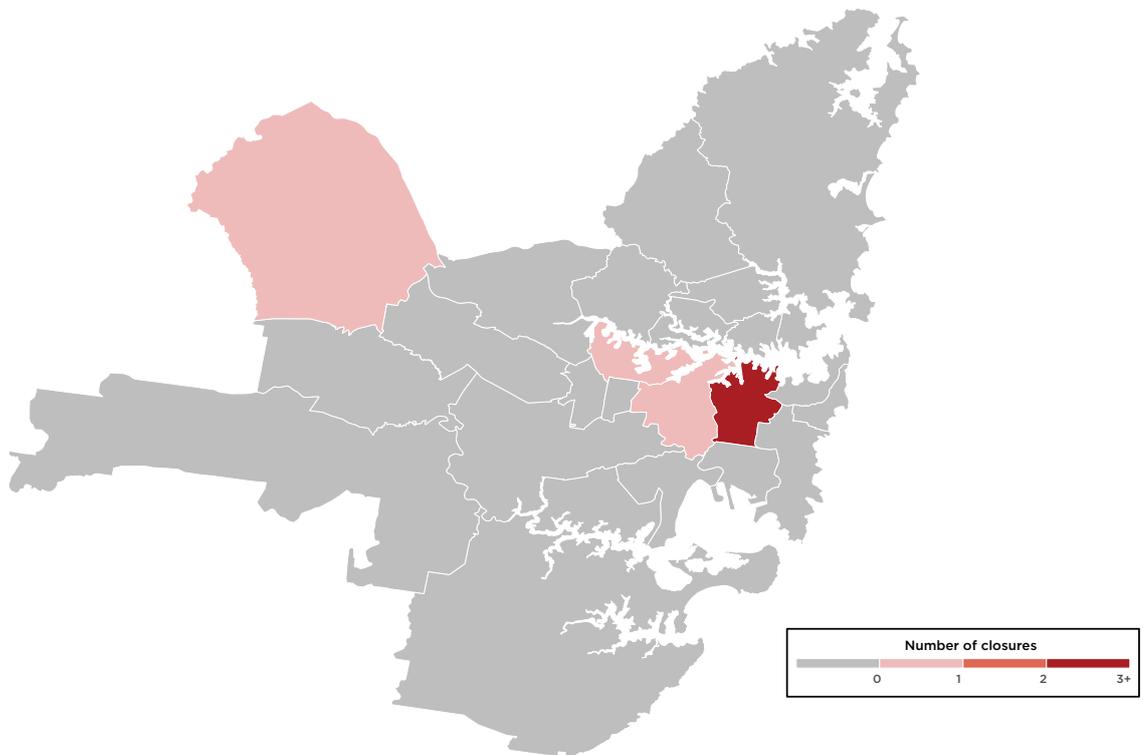
²³⁰⁵ Note that clustering around capital cities only reflects that local government areas in that region are geographically small.

Figure 3: Local government areas in Melbourne affected by local newspaper closures (2008-09 to 2017-18)



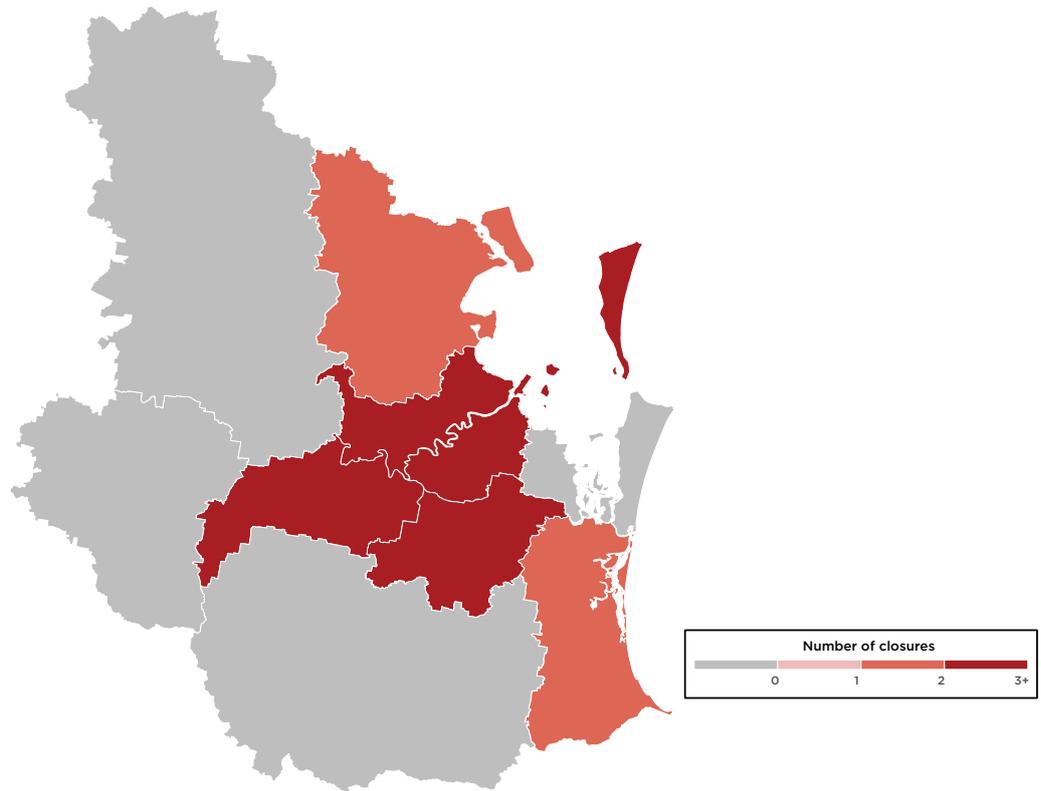
Source: ACCC analysis of data provided to the Inquiry

Figure 4: Local government areas in Sydney affected by local newspaper closures (2008-09 to 2017-18)



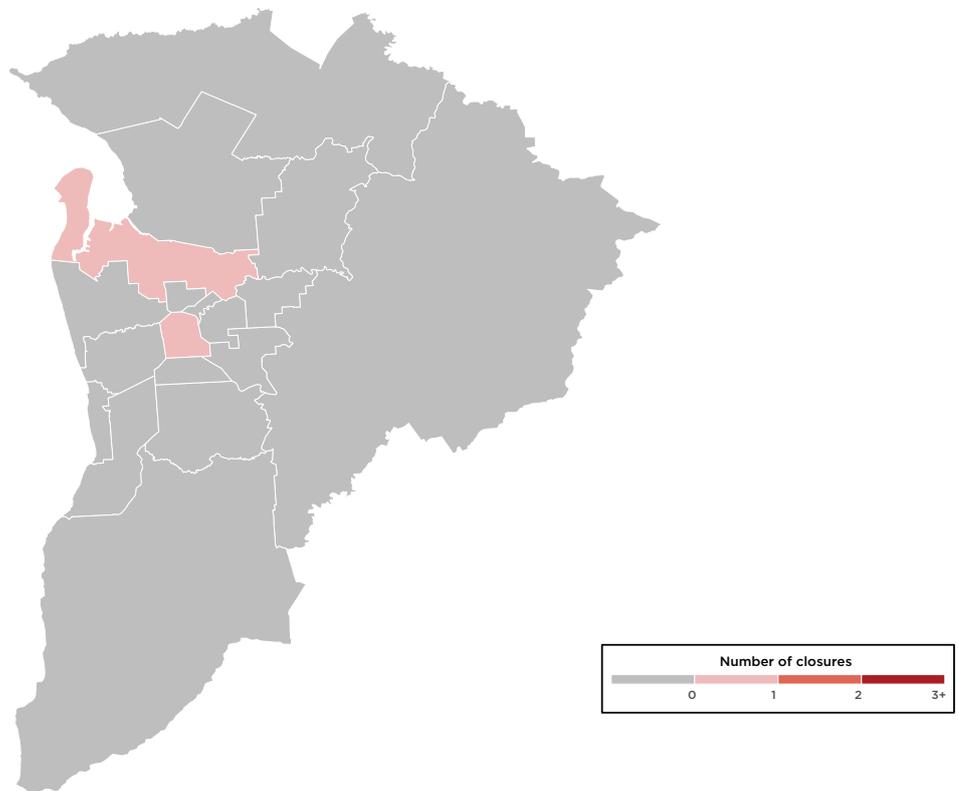
Source: ACCC analysis of data provided to the Inquiry

Figure 5: Local government areas in Brisbane affected by local newspaper closures (2008-09 to 2017-18)



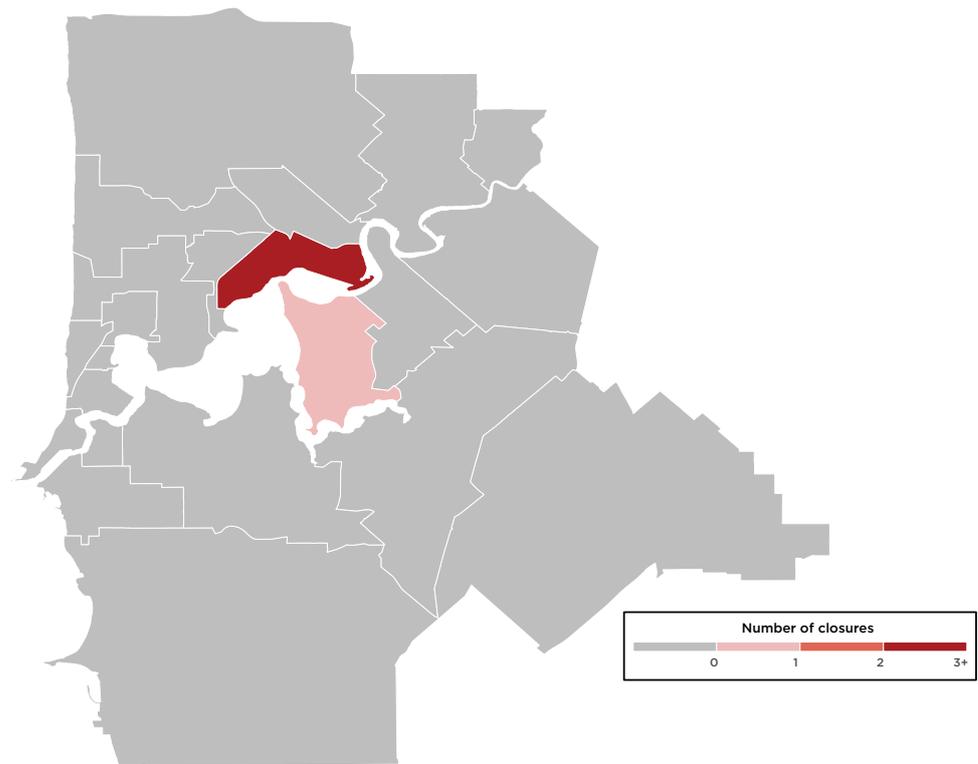
Source: ACCC analysis of data provided to the Inquiry

Figure 6: Local government areas in Adelaide affected by local newspaper closures (2008-09 to 2017-18)



Source: ACCC analysis of data provided to the Inquiry

Figure 7: Local government areas in Perth affected by local newspaper closures (2008-09 to 2017-18)



Source: ACCC analysis of data provided to the Inquiry

Conclusion

This exercise analysed trends in the number and location of Australian local and regional newspapers that cover the news of the country's small towns, city neighbourhoods and suburbs. This analysis found that:

- during the ten years surveyed, a net total of 106 newspapers closed, decreasing the total number of Australia's local and regional newspapers by 15 per cent between 2008-09 and 2017-18
- 21 local government areas initially serviced by at least one local or regional newspaper were left with no coverage by the end of the surveyed period.

Based on information provided to the ACCC, the trends observed over the study period are likely to continue in the near future.



Appendix G: Philanthropic support for journalism in international jurisdictions



Summary

This appendix provides an overview of regulation as it relates to philanthropic funding of journalism and the current state of philanthropically funded journalism in a number of international jurisdictions.

The United States of America (the US)

The US has a well-developed philanthropically-funded non-profit news ecosystem. An October 2018 report from the Institute for Nonprofit News (INN) found there are over 200 non-profit newsrooms in the US, and that three-quarters of these newsrooms launched after 2008. INN estimates its over 180 member organisations employ nearly 2200 journalists and earn annual revenue totalling nearly US\$350 million.²³⁰⁵ Some of the larger non-profits such as ProPublica have annual operating budgets of US\$10 million and have won prestigious journalism awards including Pulitzer Prizes.²³⁰⁶ Table 1 shows some of the major philanthropically-funded journalism organisations in the US.

Table 1: Selection of major philanthropically-funded journalism organisations in the US.

Organisation	Date founded	Role
ProPublica	2007 ²³⁰⁷	Non-profit media business
Center for Investigative Reporting	1977 ²³⁰⁸	Non-profit media business
Center for Public Integrity	1989 ²³⁰⁹	Non-profit media business
The Nieman Foundation	1938 ²³¹⁰	Provides scholarships for journalists
The Democracy Fund	2011 ²³¹¹	Provides grants to fund journalism
The Lenfest Institute for Journalism	2016 ²³¹²	Aims to develop and support sustainable business models for local journalism

Some commentators suggest the success of philanthropic funding for journalism in the US is a result of the ingrained culture of philanthropic support for public interest activities in American life.²³¹³ However, it also appears to be supported by favourable regulatory settings and administration.

The US's regulatory settings require media businesses to be granted non-profit status in order to receive tax deductible donations. Like Australia's regulatory framework for charitable status and deductible gift recipient (DGR) status, organisations must have a purpose that fits into one of a number of specific categories designated by the Internal Revenue Service (IRS). While the production of public interest journalism does not fit neatly into any of these categories, the IRS has granted non-profit status to a significant number of media businesses under the 'education' category.²³¹⁴ Thus, despite the similarity in regulatory structure between the US and Australia in this area, it appears to be, in effect, much easier for media businesses to receive DGR-equivalent status in the US than in Australia.

²³⁰⁵ Institute for Nonprofit News, [INN Index: The state of non-profit news](#), October 2018, p. 4.

²³⁰⁶ B Birnbauer 'Philanthropy is funding serious journalism in the US, it could work for Australia too' *The Conversation*, 16 June 2017, accessed 14 March 2019.

²³⁰⁷ ProPublica, [The Mission](#), accessed 16 May 2019.

²³⁰⁸ Reveal, [About Us](#), accessed 16 May 2019.

²³⁰⁹ The Center for Public Integrity, [About Us](#), accessed 16 May 2019.

²³¹⁰ Nieman Foundation, [About](#), accessed 16 May 2019.

²³¹¹ The Democracy Fund, [About the Democracy Fund](#), accessed 16 May 2019.

²³¹² The Lenfest Institute, [Local Journalism, Innovation, Democracy](#), accessed 16 May 2019.

²³¹³ R Foster and M Bunting, Public funding of high-quality journalism, 10 April 2019, p. 29.

²³¹⁴ B Birnbauer, 'Philanthropy is funding serious journalism in the US, it could work for Australia too' *The Conversation*, 16 June 2017, accessed 14 March 2019. However, there is uncertainty around the exact eligibility criteria for media businesses under the 'education' category and the IRS has been criticised for this lack of clarity. See R. Foster and M. Bunting, Public funding of high-quality journalism, 10 April 2019, p. 29.

While it is substantial, philanthropy in the US remains a relatively small source of funding for journalism in proportion to commercial revenue. It is estimated that philanthropy contributed around US\$100 million a year between 2010 and 2015 to the production of journalism in the US while the sector more broadly reported total annual commercial revenues of over US\$25 billion.²³¹⁵ The scale of philanthropy appears to be growing, and in February 2019 the Knight Foundation announced a US\$300 million contribution over five years to support local news.²³¹⁶ Philanthropic funding for journalism in the US also appears to be unevenly distributed, with organisations that have received funding in the past more likely to receive it again in the future. It is estimated that just 25 not-for-profits received over 80 per cent of total grant funding between 2010 and 2018.²³¹⁷

The United Kingdom (the UK)

Philanthropically-funded journalism in the UK is not as widespread as it is in the US, but is slightly more prevalent than in Australia.

In 2017, the European Journalism Centre estimated that philanthropic contributions worth about £30 million a year are made to journalism in the UK.²³¹⁸ This includes funding for a number of prominent organisations including the Bureau for Investigative Journalism, the Centre for Investigative Journalism and Full Fact. These organisations conduct their own investigations, provide education and assistance to investigative journalists and conduct fact-checking in the wider media respectively.

Organisations must become registered charities to receive tax-deductible donations in the UK, and there is no separate category equivalent to DGR status. Similar to Australia and the US, organisations in the UK must have objectives that fit into certain designated categories to be registered as charities and journalism does not fit neatly into any of the existing categories. While some organisations that have a strong journalism focus have had success in obtaining charitable status through the 'education' category, this has been a challenging process, involving multiple rejections and challenges to rulings of the Charity Commission.²³¹⁹

The Centre for Investigative Journalism and Full Fact are both registered charities, but the Bureau for Investigative Journalism (which actually produces public interest journalism) has had its application rejected twice.²³²⁰ It is likely that these regulatory hurdles have limited the expansion of not-for-profit media businesses in the UK.²³²¹

In early 2019, the UK's Cairncross Review recommended that the UK Government extend eligibility for charitable status to not-for-profit news organisations. This recommendation was intended to provide both a new revenue stream and significant tax benefits for these organisations.²³²²

2315 R Foster and M Bunting, Public funding of high-quality journalism, 10 April 2019, p. 30.

2316 Knight Foundation, [Knight Foundation Focuses on Building the Future of Local News in \\$300 Million Five-Year Commitment](#), accessed 18 March 2019.

2317 Shorenstein Center on Media, Politics and Public Policy and Northeastern University's School of Journalism, [Funding the News: Foundations and Nonprofit Media](#), 18 June 2018, p. 43.

2318 Journalism Funders Forum, [Philanthropic Journalism Funding in the UK](#), April 2017, commissioned by European Journalism Centre, p. 22.

2319 Journalism Funders Forum, [Philanthropic Journalism Funding in the UK](#), April 2017, commissioned by European Journalism Centre, p. 7.

2320 Journalism Funders Forum, [Philanthropic Journalism Funding in the UK](#), April 2017, commissioned by European Journalism Centre, p. 7.

2321 The Reuters Institute for the Study of Journalism and the Information Society Project, [The impact of charity and tax regulation on not for profit news organisations](#), March 2016, p. 77.

2322 Government of the United Kingdom, [The Cairncross Review: A Sustainable Future for Journalism](#), Department for Digital, Culture, Media & Sport, 12 February 2019, p. 99.

Canada

Similar to arrangements in the UK, in Canada only registered charities can receive tax-deductible donations. Media businesses do not fit neatly within the laws regulating charitable status in Canada, and as a result the country has few philanthropically-funded journalism outlets.²³²³

However, in its 2018 Fall Economic Statement the Canadian Government introduced a CAN\$595 million package to support journalism which included measures specifically aimed at encouraging philanthropic funding of not-for-profit journalism. The reforms create a new category of 'qualified donee' for not-for-profit media businesses, which will allow them to receive tax-deductible donations.²³²⁴ The Canadian Government is therefore expressly promoting philanthropic support for the country's journalism sector.

2323 The Reuters Institute for the Study of Journalism and the Information Society Project, [The impact of charity and tax regulation on not for profit news organisations](#), March 2016, p. 39

2324 B Campion-Smith and T MacCharles, '[Ottawa to provide aid to support Canadian journalism](#)', *The Toronto Star*, 21 November 2018, accessed 19 March 2019.



Appendix H: ACCC review of digital platforms' processes, terms and policies



This Appendix provides an overview of the ACCC's desk-based review in relation to a selection of digital platforms' sign-up processes (section 1), opt-out processes (section 2) and terms of use and privacy policies (section 3). These findings are referenced, where relevant, in chapter 5. Details of the methodology for each of these reviews are provided as relevant below.

Review of sign-up processes

Key findings

- The ACCC reviewed the sign-up processes to create new accounts on Google's Gmail, Facebook, Twitter and Apple (Apple ID) in July and November 2018.
- Three of the four digital platforms reviewed used clickwrap agreements where a user proceeding with the sign-up process is deemed by the digital platform to constitute acceptance of its terms of use and privacy policies.
- In each of the sign-up processes reviewed, the fastest way to create an account does not require users to review or edit their privacy settings.
- Google gives new Gmail users the option to review and edit their privacy settings before creating their account; if new users do not edit any of these six privacy settings, four of the settings are preset to saving the relevant information to the user's Google Account by default,²³²⁵ while two of the settings are preset to not saving the information to the user's Google Account.

Methodology

In July and November 2018, ACCC staff reviewed the sign-up process for new Australian users²³²⁶ of Google (Gmail), Facebook, Twitter and Apple (Apple ID). This research was conducted by ACCC officers on a Windows PC using the Chrome internet browser and on a Macbook Pro using the Chrome internet browser.

The following steps were taken to create new accounts:

- Visit 'create account' page:
 - Gmail: <https://accounts.google.com/>
 - Facebook: <https://www.facebook.com/r.php>
 - Twitter: <https://twitter.com/i/flow/signup>
 - Apple: <https://appleid.apple.com/account#!&page=create>
- Follow prompts to create an account on each platform. All links such as 'learn more' within the sign-up process were followed and screenshots recorded.
- Flowcharts were created to visually represent the path a new user takes through the sign in process, see section 1.3 below. Where applicable, the headings of the screens have been extracted in the flowcharts.
- Relevant screenshots of the sign-up process from the time of the ACCC's review are extracted below. The ACCC notes that the webpages may have been updated since the time this review was conducted and that each screenshot used in this Appendix is accompanied by a reference stating the date on which the webpage was last accessed by the ACCC.

²³²⁵ For the avoidance of doubt, 'default' means 'a procedure which has preset parameters by that operate unless changed by the user' (as defined by the [Macquarie Dictionary](#)). 'Default setting' accordingly refers to the preset function of a setting which applies unless changed by the user.

²³²⁶ That is, users accessing an account from a device with an IP address located within Australia.

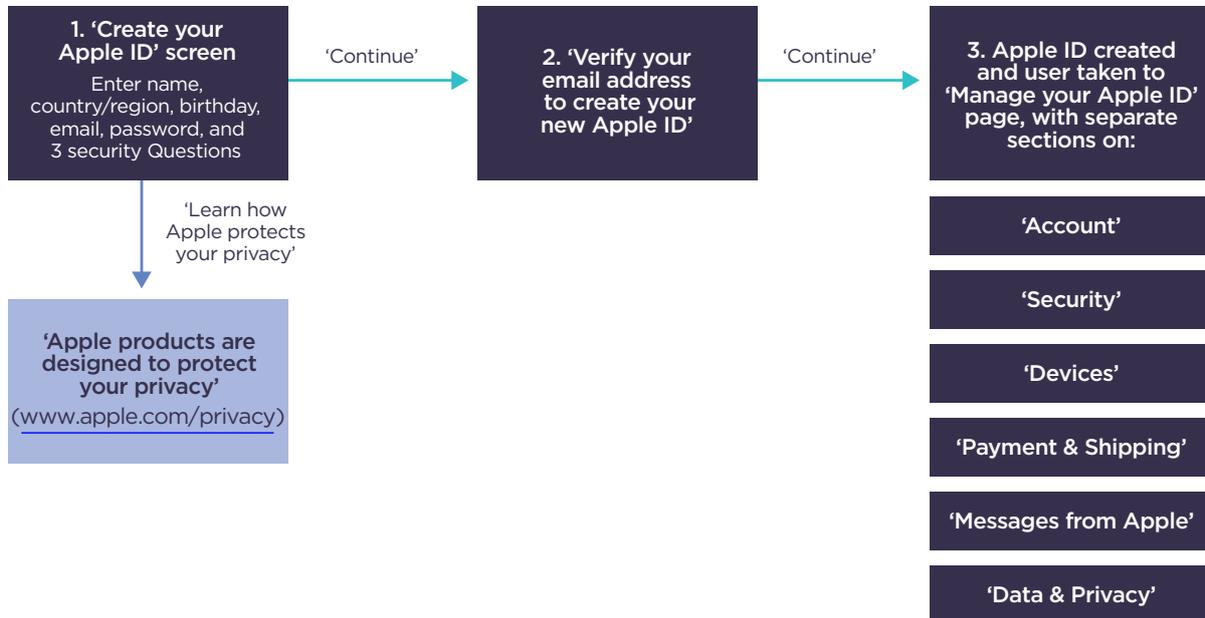
Sign-up flowcharts

The flowcharts below represent the path a new user can take when making an account and any possibility to opt-out of data collection. In particular:

- **Dark purple boxes** represent the fastest steps for a user to take to create a new account on each digital platform.
- **Light blue boxes** represent a separate webpage outside the sign-up process, some of which include pages setting out the digital platforms' terms of use and privacy policies.²³²⁷
- **Green boxes** represent pop-ups with additional information that do not take the user away from the sign-up process.
- **Orange boxes** represent the user being taken to a separate page or section with more options to change privacy settings.

Apple ID sign-up flow chart

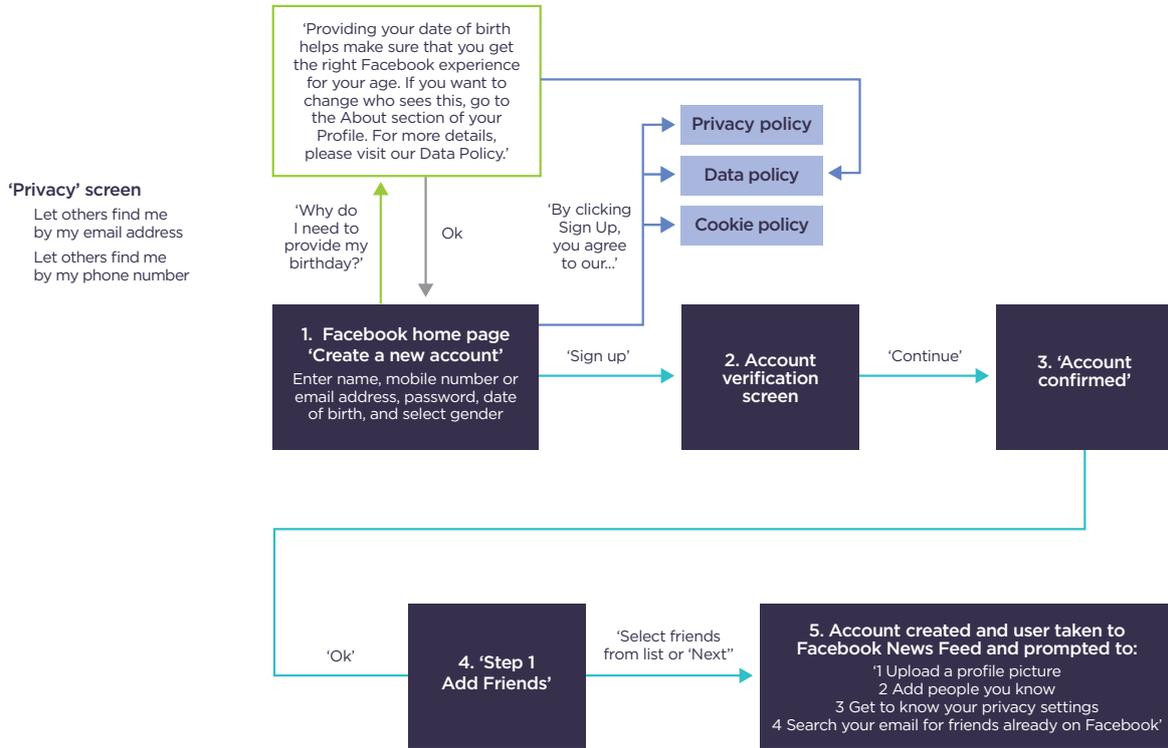
Figure 1: Sign-up process for a new Apple ID



²³²⁷ If the user was directed to an external page such as the platform's privacy policy, further links from the external page were not followed as no direct changes to settings can be made from pages such as the privacy policy. While there may be links to further information from such pages, the user has been taken away from the main sign-up process.

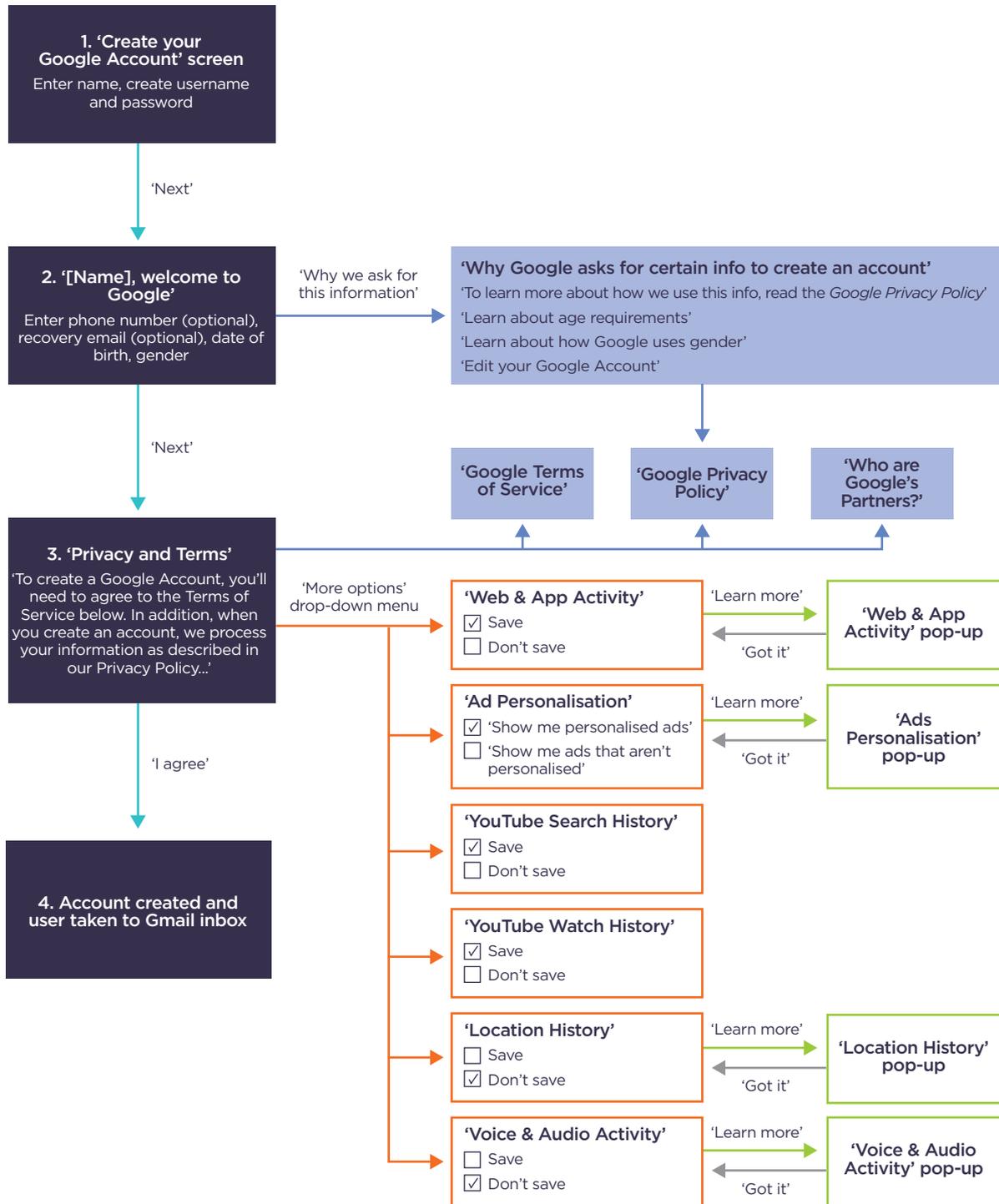
Facebook sign-up flow chart

Figure 2: Sign-up process for a new Facebook account



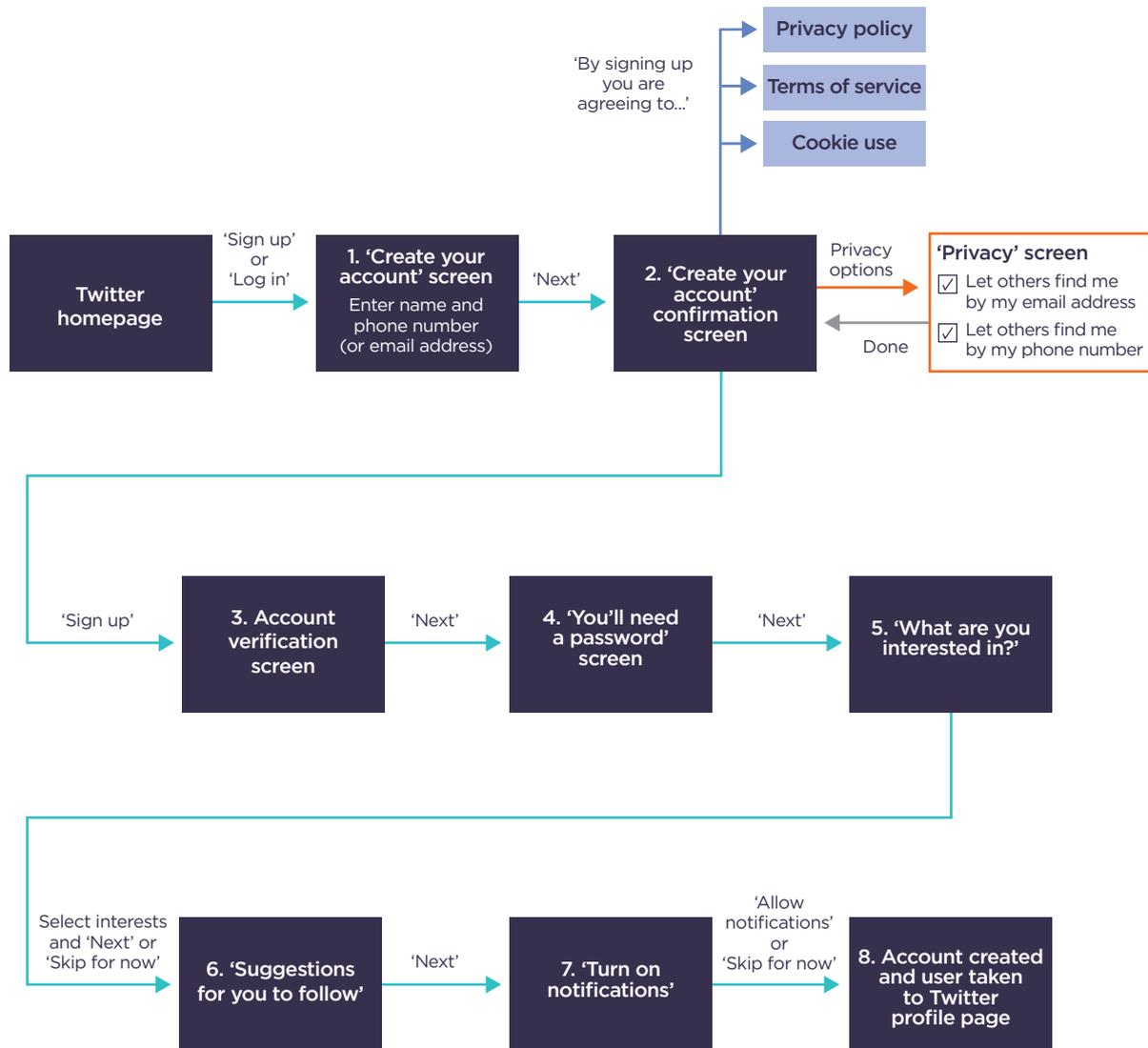
Gmail sign-up flow chart

Figure 3: Sign-up process for a new Google Gmail account



Twitter sign-up flow chart

Figure 4: Sign-up process for a new Twitter account



Clickwrap agreements

As shown in the light blue boxes in the above flowcharts for Facebook, Google and Twitter, each of these three digital platforms use a clickwrap agreement where new users are deemed to have accepted their terms and conditions (which incorporate their privacy policies) by proceeding with the sign-up process.

The screenshots at figures 5, 6 and 7 below show the wording used on each digital platform to let users know that signing-up will mean that they have accepted the terms of use.

For example:

- Facebook's 'Create an account' page states 'By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy' in small font (figure 5).²³²⁸ This means that users signing up to Facebook can agree to Facebook's terms, including consenting to Facebook's collection and use of the user's data, without being asked to read or understand any of the terms of service.

²³²⁸ Wording used by Facebook on sign-up. Facebook, [Create a new account](#), accessed 31 October 2018.

- Google's 'Privacy and Terms' screen states that 'To create a Google account, you'll need to agree to the Terms of Service below'. Google also states that 'when you create an account, we process your information as described in our Privacy Policy, including these key points' (figure 6). While users may agree to Google's Terms of Use and Privacy Policy without reviewing these webpages, Google provides some dot points summarising its privacy policy on this screen to allow new users to review a summary of some key points relating to Google's privacy policy and data practices.
- Twitter's 'Create your account' screen states 'By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use.', with hyperlinks to separate pages for Twitter's Terms of Service, Privacy Policy, and Cookie Use webpage (figure 7). This means that users signing up to Twitter can agree to its terms and data practices without seeing any of its terms of service or privacy policies.

Apple did not require new users to accept its terms of service or privacy policy as part of the sign-up process for creating an Apple ID. The Apple Media Services Terms of Service specifically governs the use of Apple's services which are: iTunes Store, App Store, Apple Books, Apple Music, and Apple News.²³²⁹ Use of the Apple ID or any other Apple services aside from those listed are therefore not covered under the Apple Media Services Terms of Service.

Clickwrap agreements and engagement with terms and conditions

The use of clickwrap agreements to gain consent is relevant to consider as it may affect the engagement of consumers with the terms and conditions for the services provided. For example, research conducted by the European Commission in 2016 found 9.4 per cent would click through to view the terms and conditions in a clickwrap agreement, whereas 77.9 per cent would read or scan at least part of the terms and conditions if they were provided to users within the acceptance process (for example, in an embedded window on the page that users could scroll through).²³³⁰

Figure 5: Facebook 'Create an account' screen²³³¹

2329 See Apple, '[Apple Media Services Terms and Conditions](#)', accessed 22 November 2018.

2330 European Commission 2016, '[Study on consumers' attitudes towards Terms and Conditions](#)', accessed 20 November 2018.

2331 Screenshot taken from sign-up process commenced at <https://www.facebook.com/r.php>, accessed 20 July 2018.

Figure 6: Google 'Privacy and Terms' screen²³³²

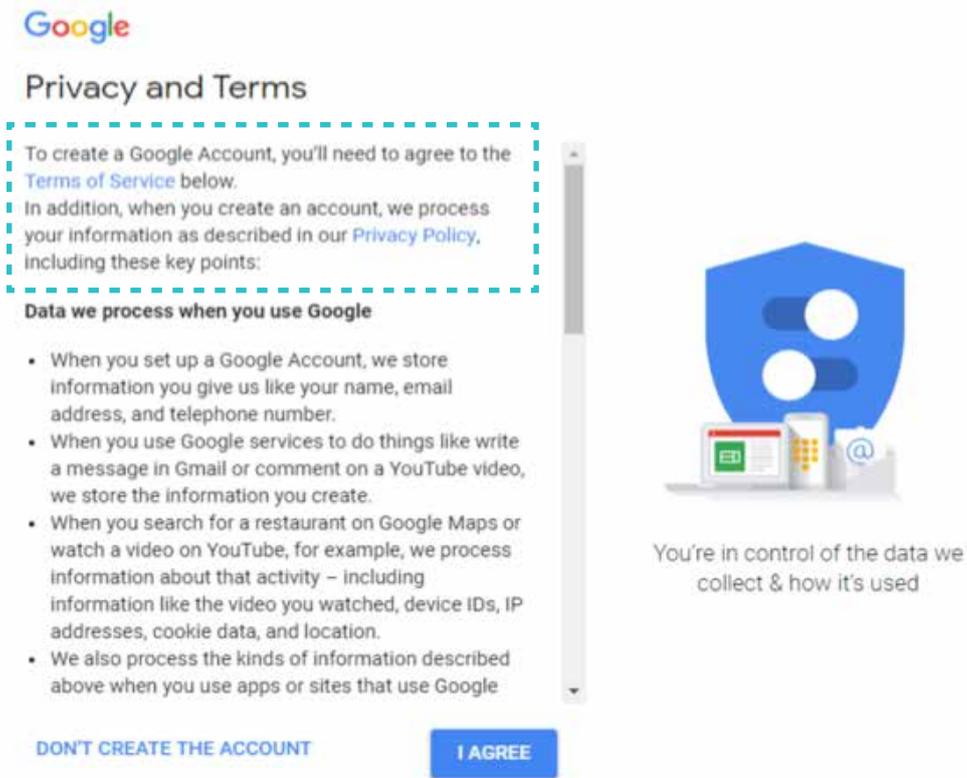
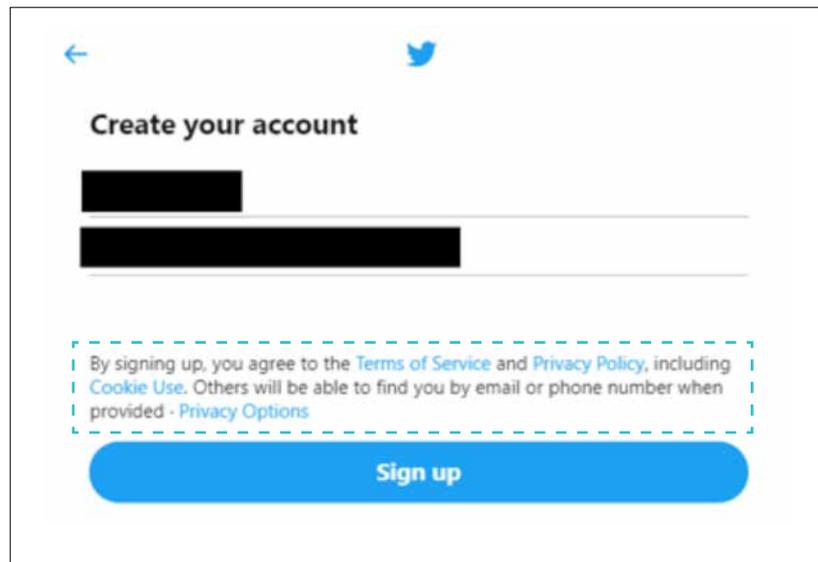


Figure 7: Twitter 'Create your account' screen²³³³



2332 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed 20 July 2018.

2333 Screenshot taken from sign-up process commenced at <https://twitter.com/i/flow/signup>, accessed 24 July 2018.

User prompts to review and edit privacy settings

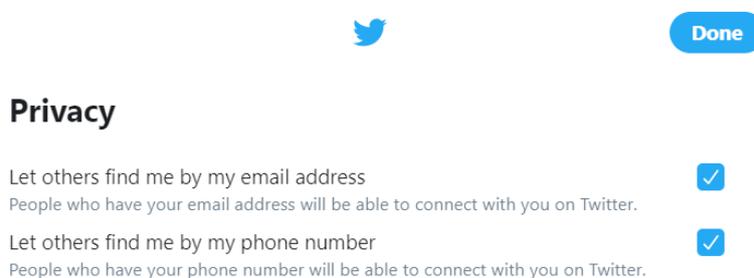
In each of the sign-up processes reviewed, the ACCC found that the fastest way to create an account, as denoted by the line of dark purple boxes in the flowcharts above did not include new users reviewing or editing their privacy settings.

While none of the sign-up processes required a user to review and edit their privacy settings *before* a new account is created, Apple and Facebook took users to a page with either privacy settings or prompts to check their privacy settings directly *after* a new account is created:

- Once a new Apple ID is created, users were taken directly to a ‘manage account’ webpage where they can review and edit information and settings in relation to their account, including in relation to ‘Data & Privacy’.
- Once a new Facebook account was created, the user was taken to their Facebook News Feed page and prompted to do the following:
 - upload a profile picture,
 - ‘Add people you know’,
 - ‘Get to know your privacy settings’, and
 - search email for friends already on facebook. However, the ACCC notes that, whilst ‘Get to know your privacy settings’ can be viewed by a user scrolling down, a user may have to scroll through a lengthy ‘people you know’ list before reaching the ‘Get to know your privacy settings’ section.

The review further found that Twitter’s sign-up process allows users to click on a link to ‘Privacy Options’ (see figure 7), but this link only allowed new users to select whether other Twitter users can connect with the new user on Twitter by searching their email address or phone number (see figure 8). These user-to-user privacy settings did not appear to affect how Twitter collects, uses and discloses the new user’s information except in relation to other Twitter users.

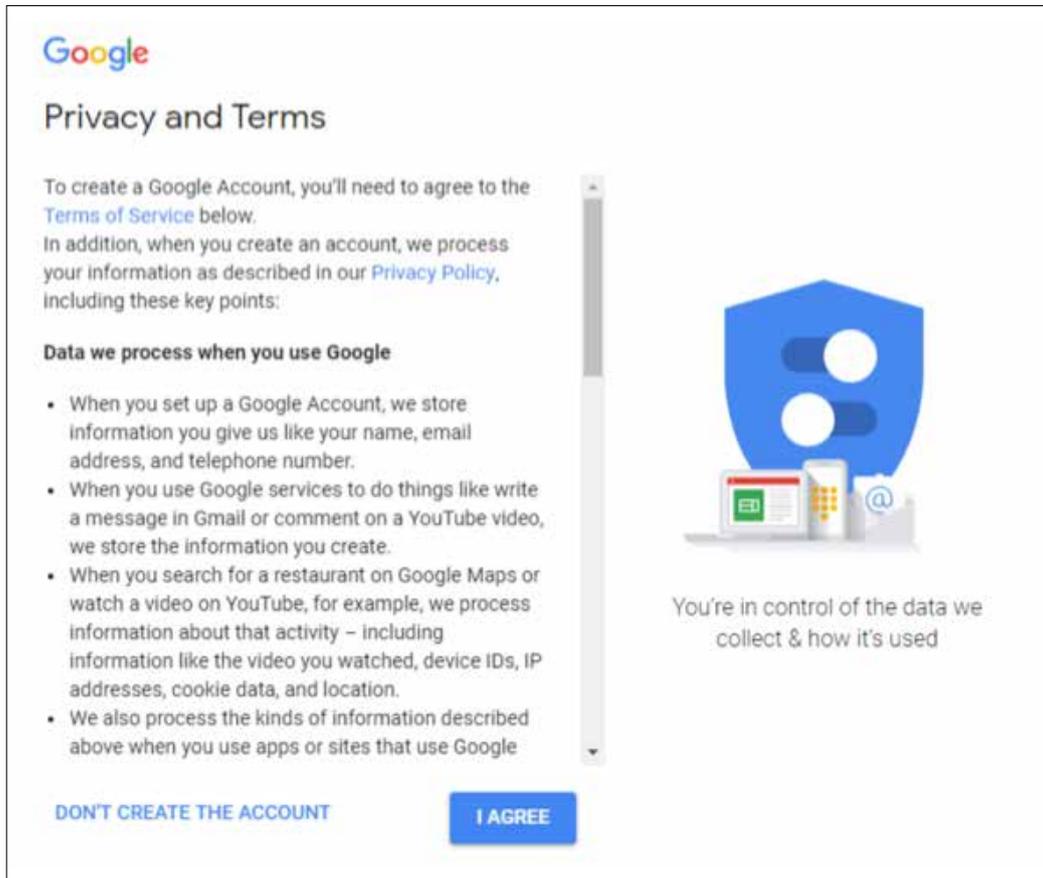
Figure 8: Twitter ‘Privacy Options’ screen²³³⁴



The review also found that Google offers Gmail users creating a new Google Account the option of customising their privacy settings as part of step 3 on the ‘Privacy and Terms’ webpage, although this option has limited visibility. That is, the options to edit Google’s default privacy settings are only visible to new users who first scroll down past Google’s key points on their privacy policy to see the ‘More Options’ link, and then click on the ‘More Options’ link to open a drop-down menu that sets out the privacy settings (see figures 9 and 10 below). Because these privacy settings are folded within a drop-down menu, and the link to this drop-down menu is at the end of a scrolling passage of text, new users may be less likely to see these options to customise the data collected and associated with their Google Account.

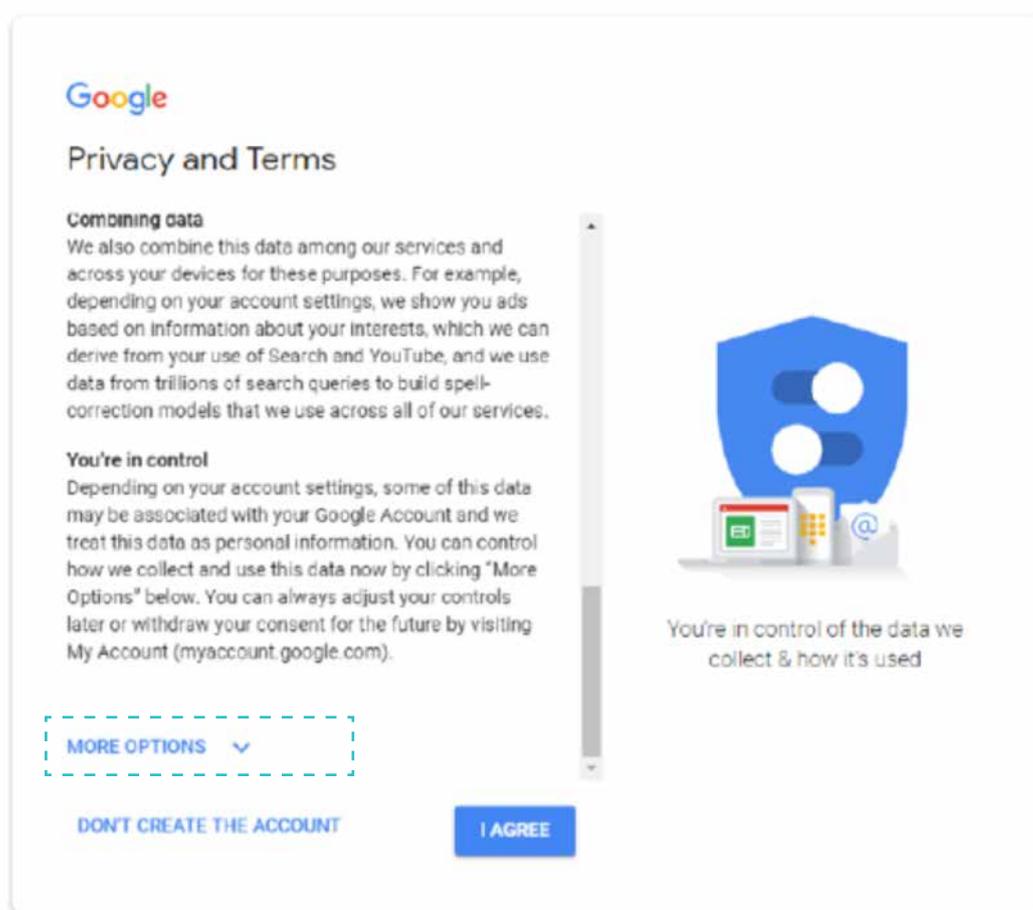
2334 Screenshot taken from sign-up process commenced at <https://twitter.com/i/flow/signup>, accessed 24 July 2018.

Figure 9: Google 'Privacy and Terms' screen before scrolling to the end of the text ('More Options' link not visible)²³³⁵



2335 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Figure 10: Google 'Privacy and Terms' screen after scrolling to the end of the text ('More Options' link visible)²³³⁶



Use of defaults

The privacy settings available in the 'More Options' drop-down menu for new users creating a Google Account had different pre-selected defaults. That is, without editing any of the privacy settings in the 'More Options' drop-down menu, ACCC staff found that some of the privacy settings were pre-selected to save certain activity to the user's Google Account and some of the privacy settings were pre-selected not to save certain activity.

Overall, four of the six settings were preset to save information to a user's Google Account, while two settings were preset not to do so. Specifically:

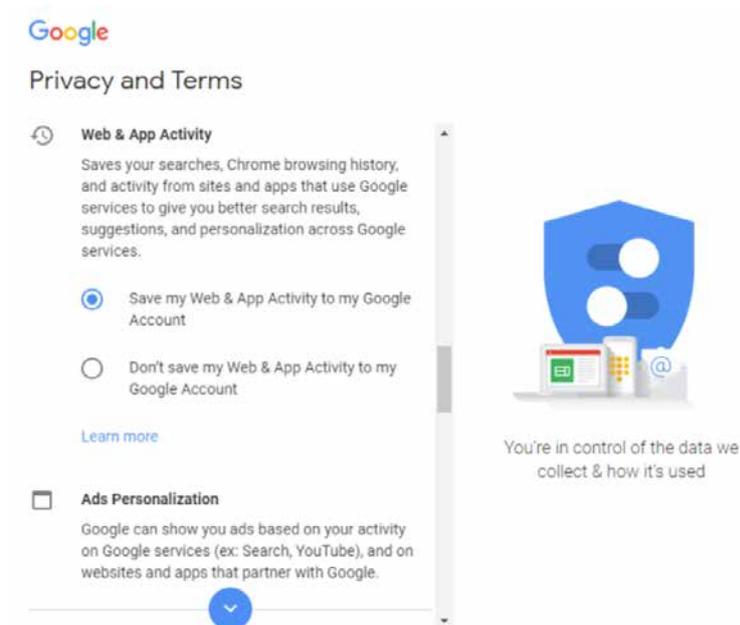
- 'Web & App Activity' has 'Save my Web & App Activity to my Google Account' pre-selected (see figure 11)
- 'Ad Personalisation' has 'Show me personalised ads' pre-selected (see figure 12)
- 'YouTube Search History' has 'Save my YouTube Search History to my Google Account' pre-selected (see figure 13)
- 'YouTube Watch History' has 'Save my YouTube Watch History to my Google Account' pre-selected (see figure 14)
- 'Location History' has 'Don't save my Location History to my Google Account' pre-selected (see figure 15)
- 'Voice & Audio Activity' has 'Don't save my Voice & Audio Activity to my Google Account' pre-selected (see figure 16)

²³³⁶ Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Use of defaults and effect on consumer decision making

The default settings used by digital platforms is important because consumers tend to keep the default option (i.e. the status quo) rather than actively choosing another alternative.²³³⁷ Research suggests that there are a number of possible reasons for consumers' tendency to choose the default setting, including 'favouring inaction, avoiding cognitive effort, inferring that the default option is the best recommended, or tending to favour the status quo'.²³³⁸ Therefore, whether the default settings are in consumers' best interests may impact on consumer welfare.²³³⁹

Figure 11: 'Web & App Activity' default setting²³⁴⁰



2337 OECD, 'Improving online disclosures with behavioural insights', 2018, p.31.

2338 Ahmetoglu et al, 'Pricing Practices: Their Effects on Consumer Behaviour and Welfare', 2010, Prepared for the Office of Fair Trading, pp.13-14.

2339 OECD, 'Improving online disclosures with behavioural insights', 2018, p.31.

2340 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed 20 July 2018.

Figure 12: 'Ad Personalisation' default setting²³⁴¹

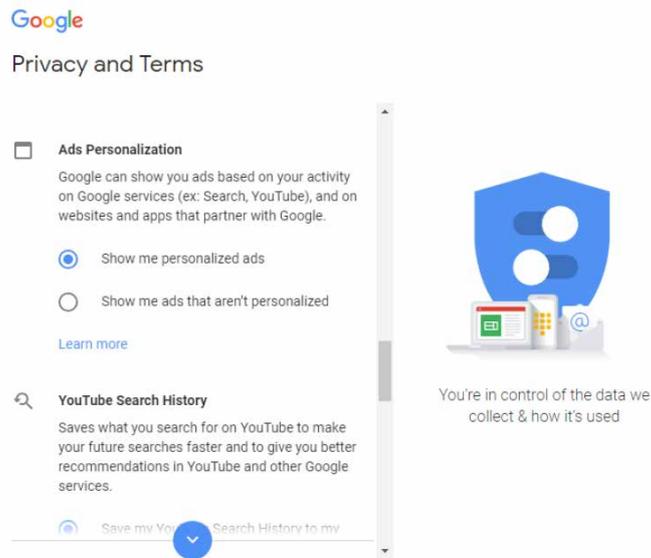
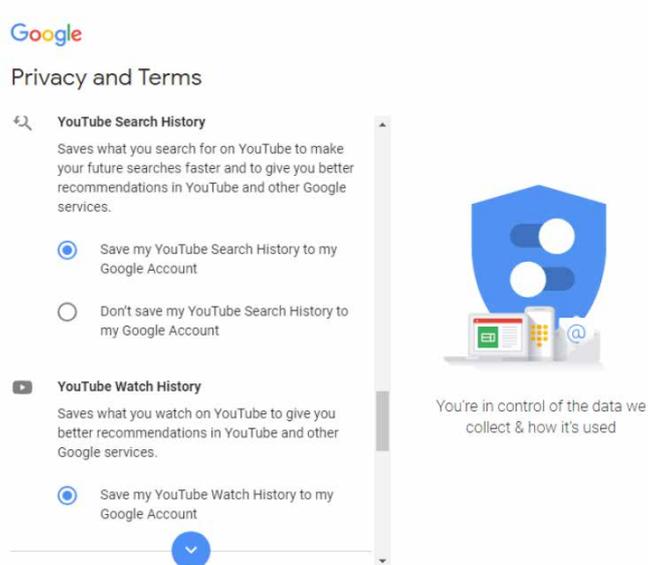


Figure 13: 'YouTube Search History' default setting²³⁴²



2341 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed 20 July 2018.

2342 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed 20 July 2018.

Figure 14: 'YouTube Watch History' default setting²³⁴³

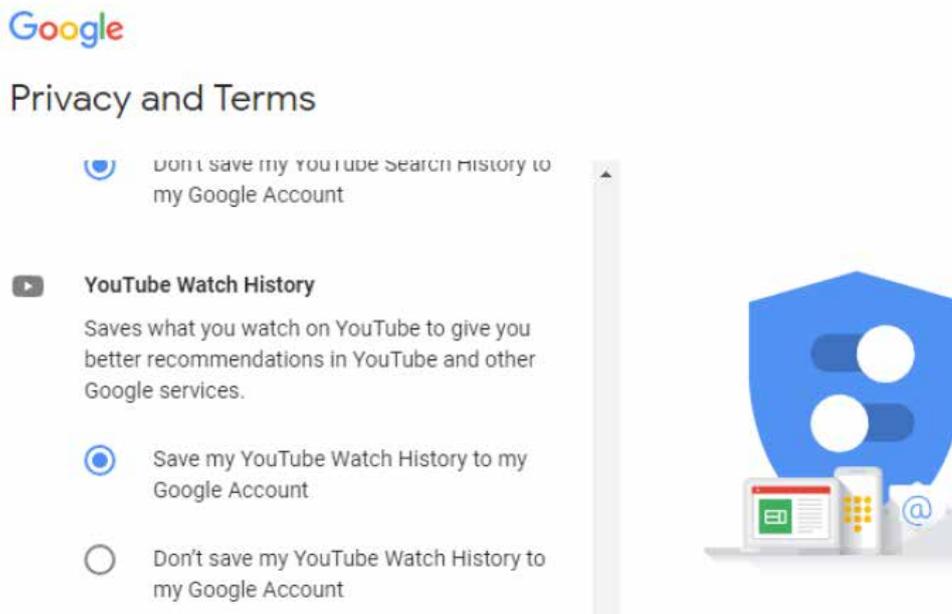
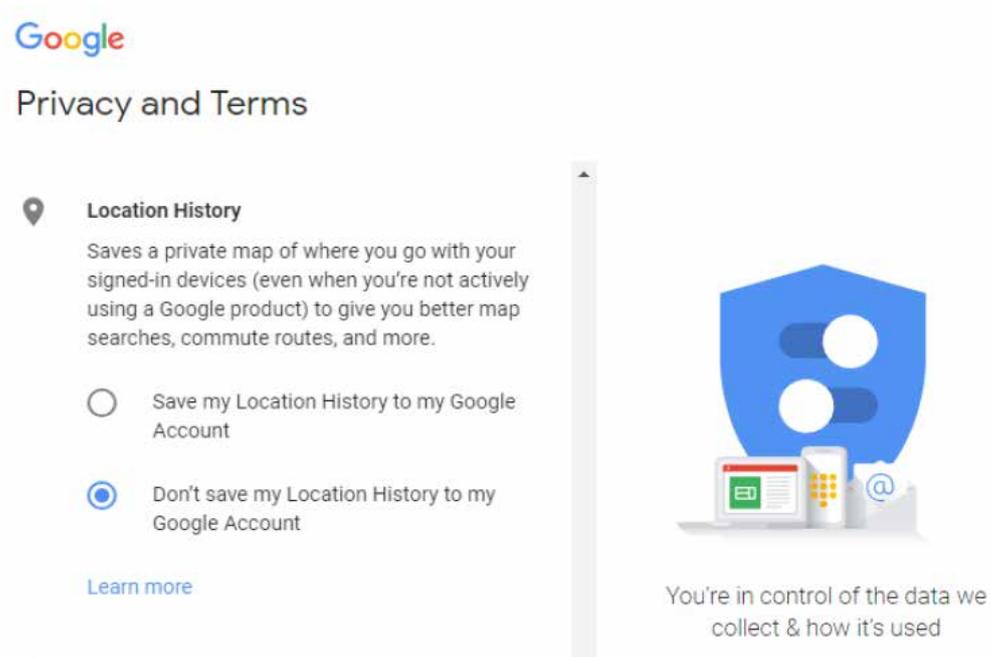


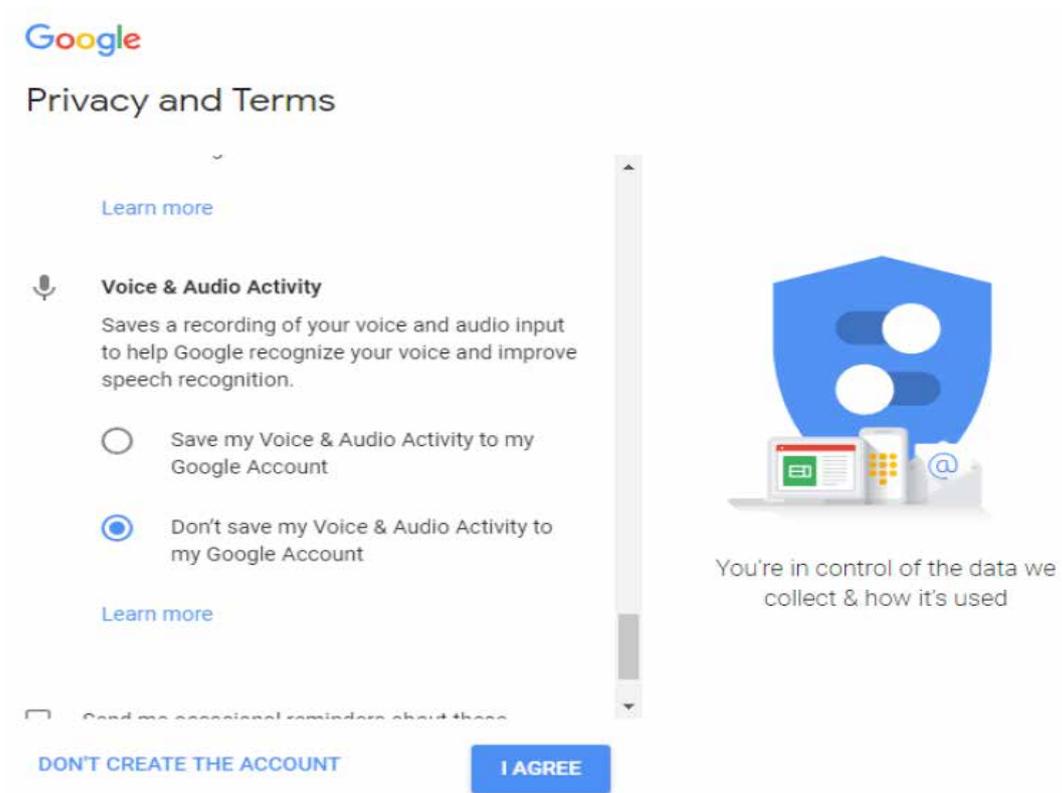
Figure 15: 'Location History' default setting²³⁴⁴



2343 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

2344 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Figure 16: 'Voice & Audio Activity' default setting²³⁴⁵



Review of opt-out processes

Key findings

- The ACCC reviewed select opt-out processes on a Google Account between August and November 2018.
- ACCC staff found there were several pre-selected settings where a user is, by default, taken to have opted in to certain uses of their user data unless the user actively seeks out and de-selects the setting. In the case of 'Ad personalisation', the pre-selection is not immediately visible to the user, who must click on a 'more options' link to see the pre-selection.
- Google's policies indicate that turning off Google's 'Ad personalisation' setting does not opt-out users to all types of targeted advertising because Google states it may still target ads to a user 'based on general factors' and, in addition, turning off 'Ad personalisation' will not turn off online tracking for advertising purposes by other ad networks.
- Generally, the explanations around the data collection settings frame the data collection in positive terms with descriptions of how the data may be used to improve services to the user, whilst opting-out of the data collection tends to be framed in negative terms in terms of limiting or disabling the personalised services a user may receive.

²³⁴⁵ Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed 20 July 2018.

Methodology

On various dates between August and November 2018, ACCC staff researched the opt-out processes in an existing user's Google Account. This research was conducted by ACCC staff on a Windows PC using the Chrome internet browser and on a Macbook Pro using the Safari internet browser. The research involved documenting the steps to opt-out of the following settings in a user's Google Account:

- Google's 'Ad personalisation' setting
- Google's 'Location History' setting
- Google's 'Web & App Activity' setting

Relevant screenshots of the opt-out process from the time of the ACCC's review are extracted below. The ACCC notes that the webpages may have been updated since the date this review was conducted and that each screenshot used in this Appendix is accompanied by a reference stating the date on which the webpage was last accessed by the ACCC.

Opting-out of targeted advertising

Steps for opting-out

The ACCC documented the process for opting-out of the 'Personalised Advertising' setting on an existing user's Google Account:

- When visiting <https://myaccount.google.com/> and after signing in, users are presented with a number of customisable settings divided into 'Sign-in & security', 'Personal info & privacy', and 'Account preferences'.²³⁴⁶
- In the 'Personal info & privacy' section, users can click on 'Manage Ad Settings' (see figure 5.17 below) to view their 'Ad Personalisation' setting, which is turned on by default (see figure 5.18 below).
- A user can click 'More Options' to see an additional option to 'Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. This stores data from websites and apps that partner with Google in your Google Account'. This is also pre-selected to on by default (see figure 5.19 below).
- When a user selects 'Turn Off' to disable 'Ad Personalisation', users are presented with a pop-up explaining the consequences of turning off this setting (see figure 5.20 below).
- Google notes that turning off 'Ad Personalisation' will not stop ads from being targeted to a user 'based on general factors, like the subject of what you're looking at, the time of day, or your general location' (see figure 5.20 below).
- Once 'Ad Personalisation' has been turned off, users are presented with a pop-up with additional information stating that 'It may take some time before this change is reflected across our systems' and 'You can also turn off ads personalisation for the Google ads that you see when you're signed out and 100+ other online ad networks' followed by a link to 'Visit Your Online Choices' (see figure 5.21 below).

²³⁴⁶ See <https://accounts.google.com/> and signing in to an existing Google account, accessed 9 August 2018 and 16 November 2018.

Figure 17: Google's 'Ad Settings'²³⁴⁷

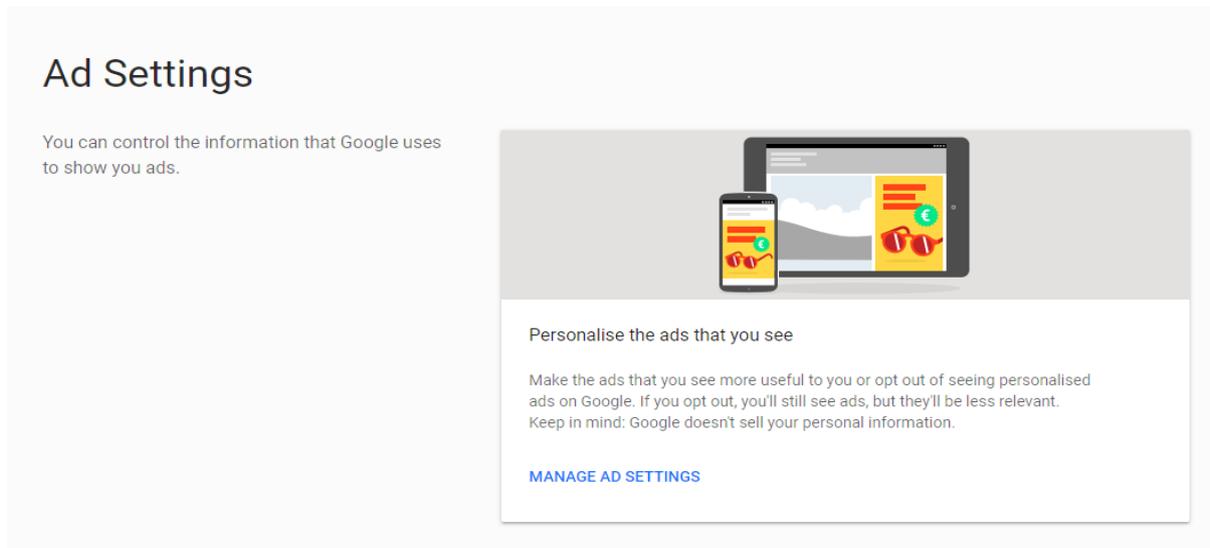
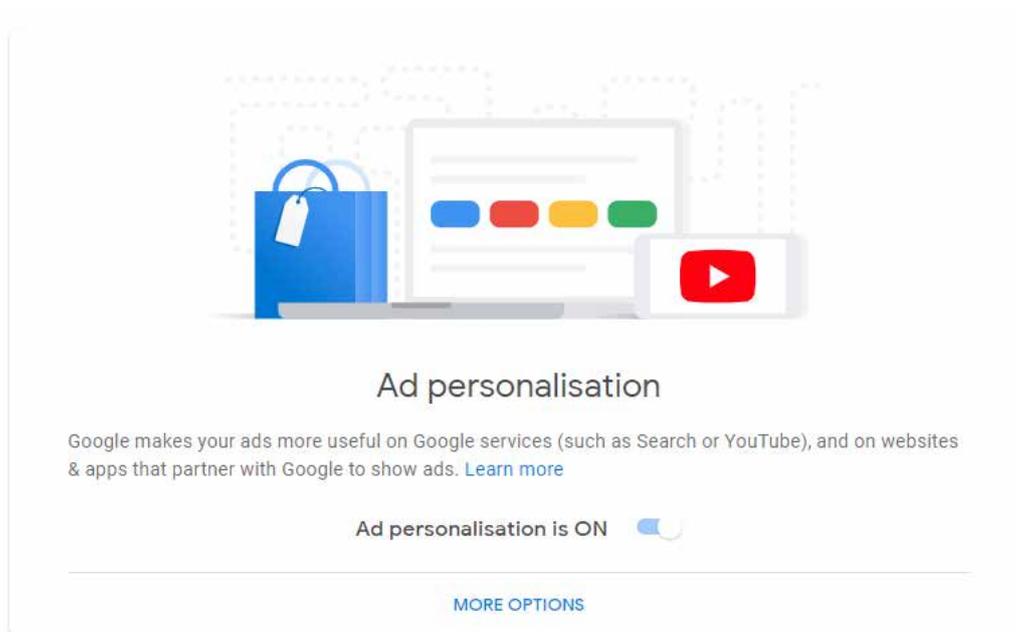


Figure 18: Google's 'Ad personalisation' setting²³⁴⁸



2347 Screenshot taken from opt-out process described above: <https://accounts.google.com/> > Ad Settings, accessed 19 November 2018.

2348 Screenshot taken from opt-out process described above: <https://accounts.google.com/> > Ad Settings > Manage Ad Settings, accessed 19 November 2018.

Figure 19: Google's 'Ad personalisation' setting after clicking on 'More Options'²³⁴⁹

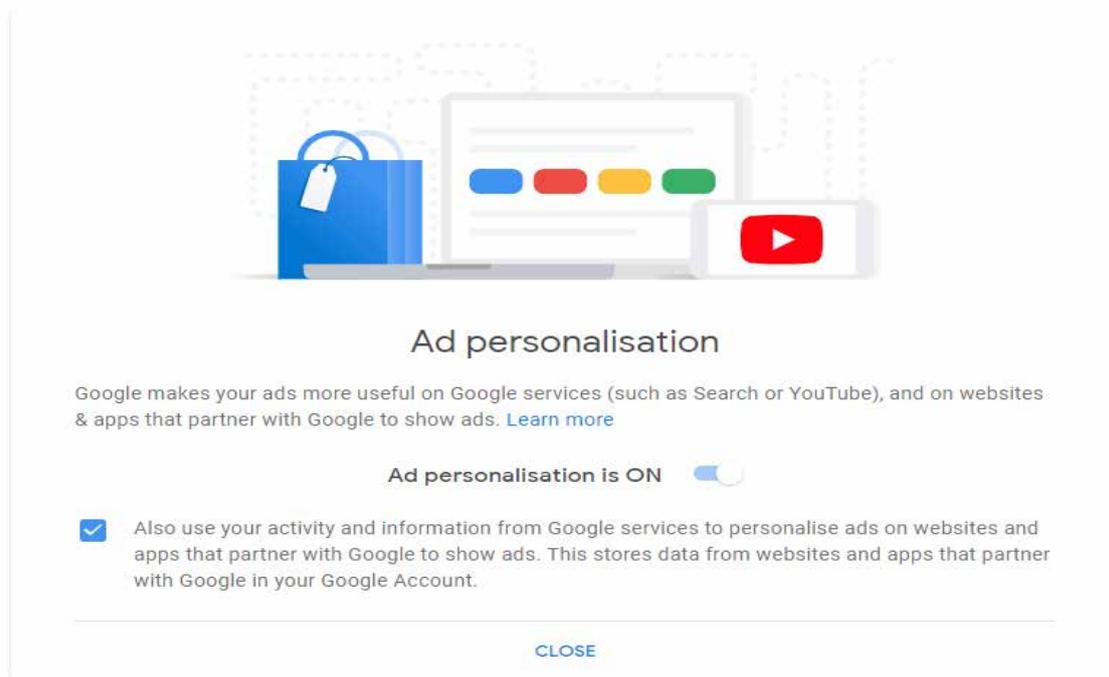
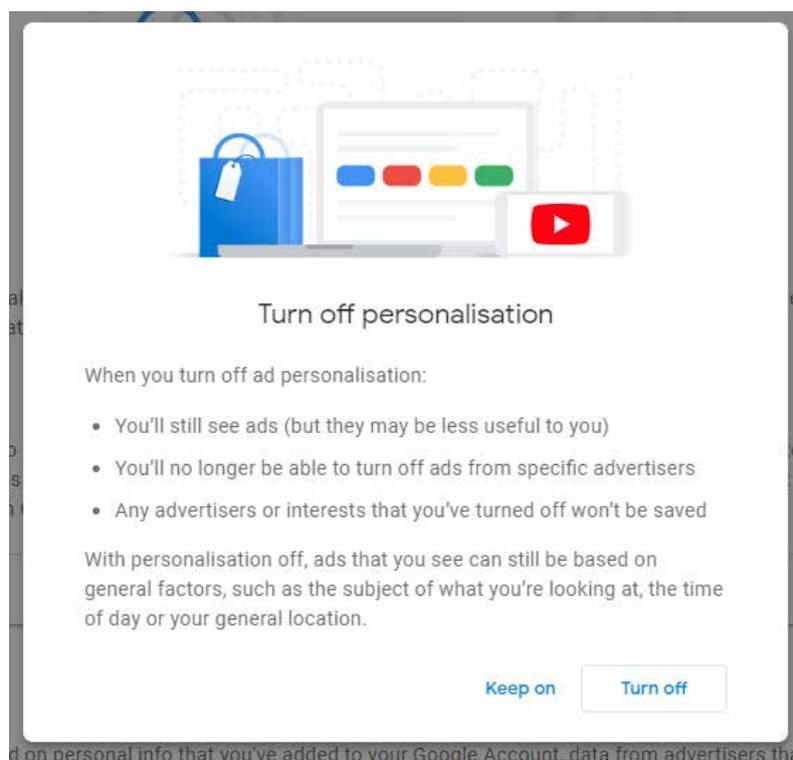


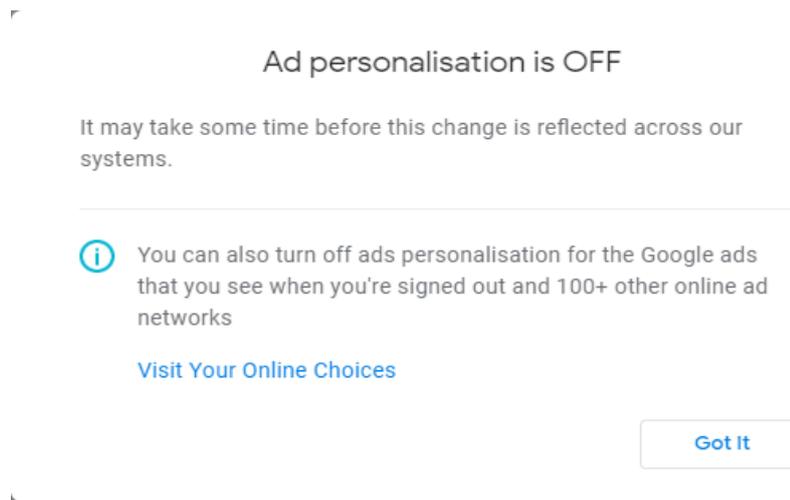
Figure 20: Google's 'Turn off personalisation' pop-up²³⁵⁰



2349 Screenshot taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > More Options, accessed 19 November 2018.

2350 Screenshot taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > Turn off Ad Personalisation, accessed 19 November 2018.

Figure 21: Google's 'Ad personalisation is OFF' pop-up²³⁵¹



ACCC observations

The ACCC found a number of design features that either introduced potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of hidden pre-selections - When a user sees that 'Ad personalisation is ON' (see figure 5.18 above), the user must click on the 'more options' link to see that there is another option pre-selected for 'Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. *This stores data from websites and apps that partner with Google in your Google Account*' (emphasis added) (see figure 5.19 above). As noted above, default pre-selections can impact consumer decision making as consumers are more likely to remain with a default. Moreover, by designing the user interface such that it is only visible to users who click on 'more options', many users may not be aware that they have the setting turned on or that they have the option to turn it off.
- Lack of clarity - The 'Turn off personalisation' pop-up notes that the ads shown to a user can still be targeted to that user 'based on general factors, such as the subject of what you're looking at, the time of day or your general location' (see figure 5.20 above). ACCC officers were unable to find a definition of what 'general factors' means from Google's policies and therefore could not determine the scope of the 'general factors' that can continue to be used to target advertising to a user with 'Ad Personalisation' turned off.
- Framing - Google's description of the 'Ad personalisation' setting is framed in positive terms; 'Google makes your ads more useful on Google services (such as Search or YouTube), and on websites & apps that partner with Google to show ads' (see figure 5.19 above). Additionally, the 'Turn off personalisation' pop-up focusses on the negative aspects of turning off ad personalisation, noting that 'You'll still see ads (but they may be less useful to you)', 'You'll no longer be able to turn off ads from specific advertisers', and 'Any advertisers or interests you've turned off won't be saved' (see figure 5.20 above). By framing 'Ad personalisation' in such positive language, and focusing on the potential negative consequences of turning it off, users may be nudged to keep their 'Ad personalisation' turned on.

2351 Screenshot of popup taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > Turn off Ad Personalisation > Turn off, accessed 19 November 2018.

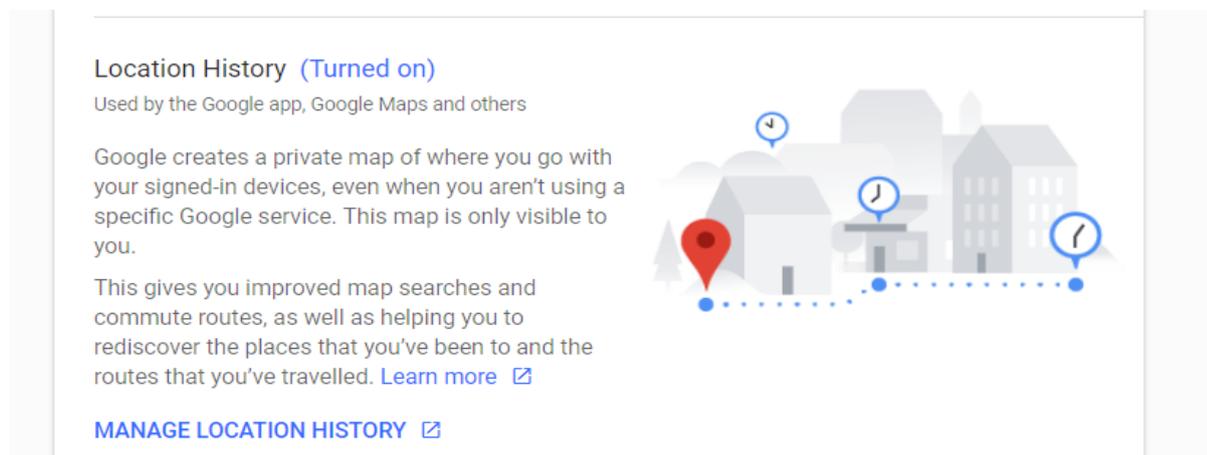
Opting-out of the collection of location data

Steps for opting-out

The ACCC documented the process for opting-out of the ‘Location History’ setting on an existing user’s Google Account:

- When visiting <https://myaccount.google.com/> and after signing in, users are not provided with a direct menu option to edit their location settings.
- However, users may manage their location information by selecting ‘Privacy Checkup’. This displays the following settings to users:²³⁵²
 - Web & App Activity
 - Location History
 - Device Information
 - Voice & Audio Activity
 - YouTube Search History
 - YouTube Watch History
- A user may complete the following steps to turn ‘Location History’ off:
 - Select ‘Manage Location History’ (see figure 5.22 below). This takes a user to their timeline along with a pop-up titled ‘Explore your timeline’ (see figure 5.23 below).
 - Scroll through the three screens of the pop up and click on ‘Learn more’ on the final screen of the pop-up (see figure 5.24 below). This takes users to a webpage with instructions on how to change their location data collection settings (see figure 5.25 below).
 - Following these instructions, a user can then click back to their timeline page, and navigate, through the Settings cog icon, to the webpage with their ‘Location History’ setting (see figure 5.26 below).
 - Toggle the setting off and then click ‘Pause’ on the popup titled ‘Pause Location History?’ (see figure 5.27 below).

Figure 22: Google’s Privacy Checkup webpage displaying the ‘Location History’ section²³⁵³



²³⁵² Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed 19 November 2018.

²³⁵³ Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed 20 November 2018.

Figure 23: Google's 'Explore your timeline' pop-up²³⁵⁴

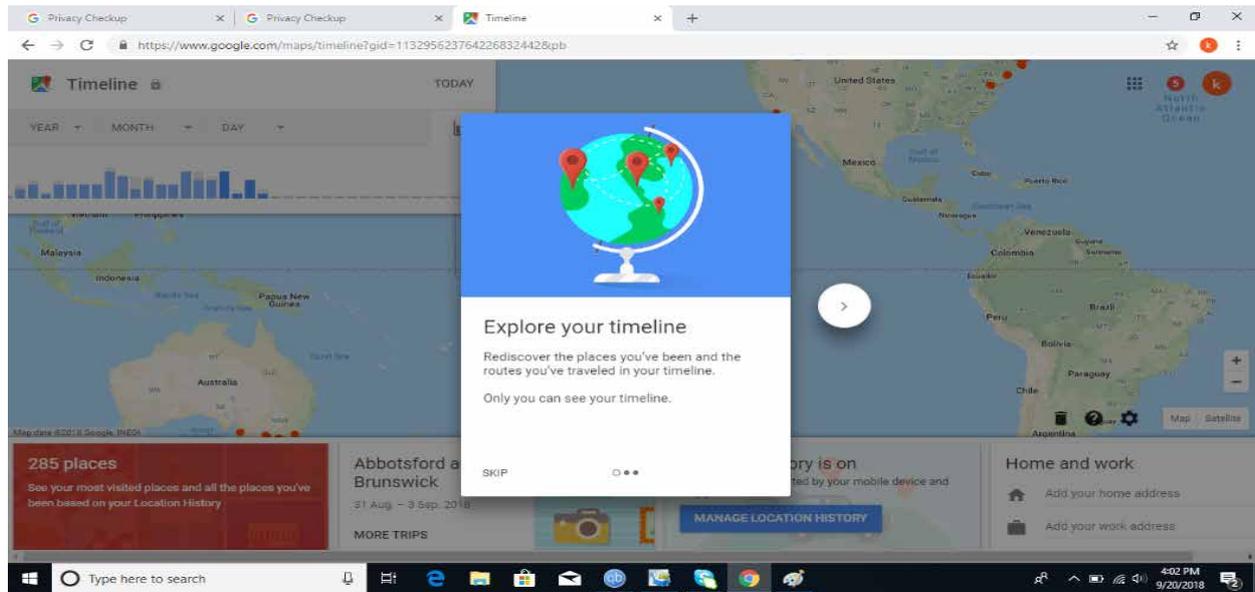
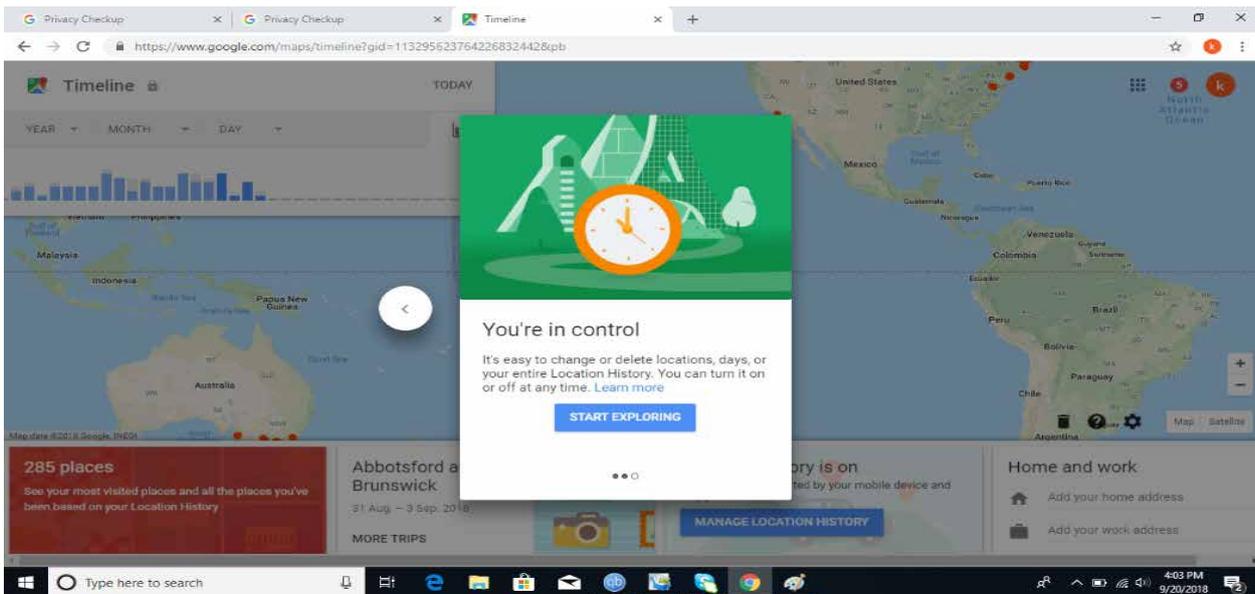


Figure 24: Google's 'You're in control' pop-up²³⁵⁵



2354 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 1), accessed 20 September 2018.

2355 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2), accessed 20 September 2018.

Figure 25: Google's instructions on how to 'Turn on or pause Location History'²³⁵⁶

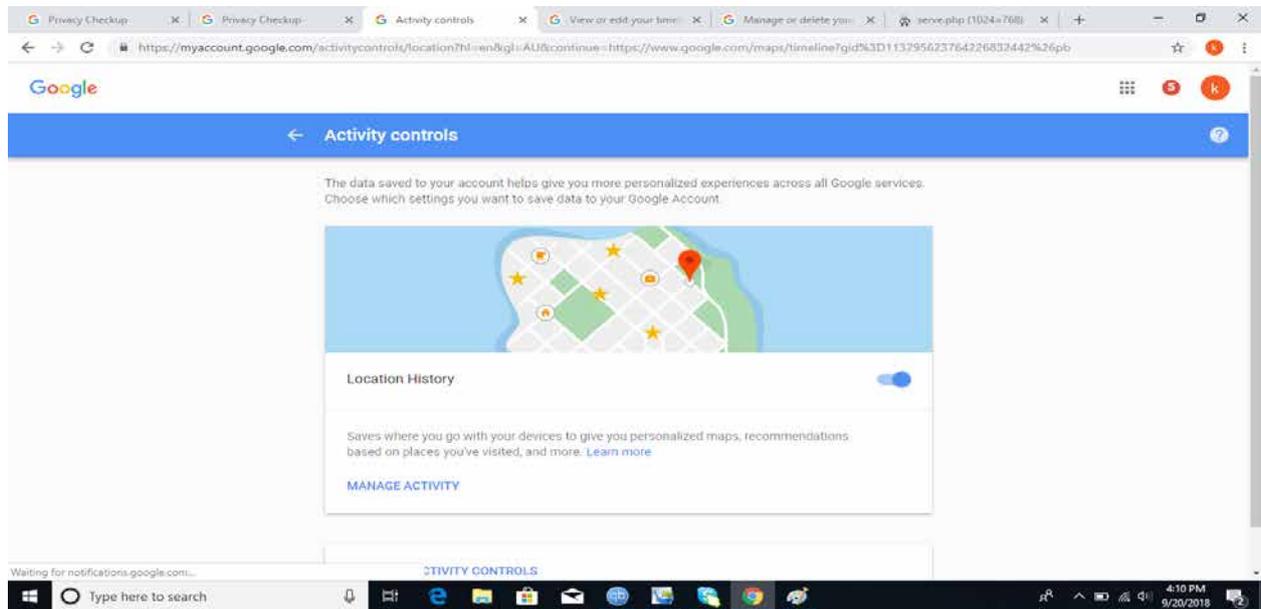
Turn on or pause Location History

When you enable Location History, Google records your location data and places in your Google Account, even when you're not using Google Maps. To turn on or pause your Location History, follow the steps below:

1. On your computer, go to [your timeline](#).
2. Click Settings  > **Enable Location History** or **Pause Location History**.

Learn more about how to [manage](#) or [delete your Location History](#).

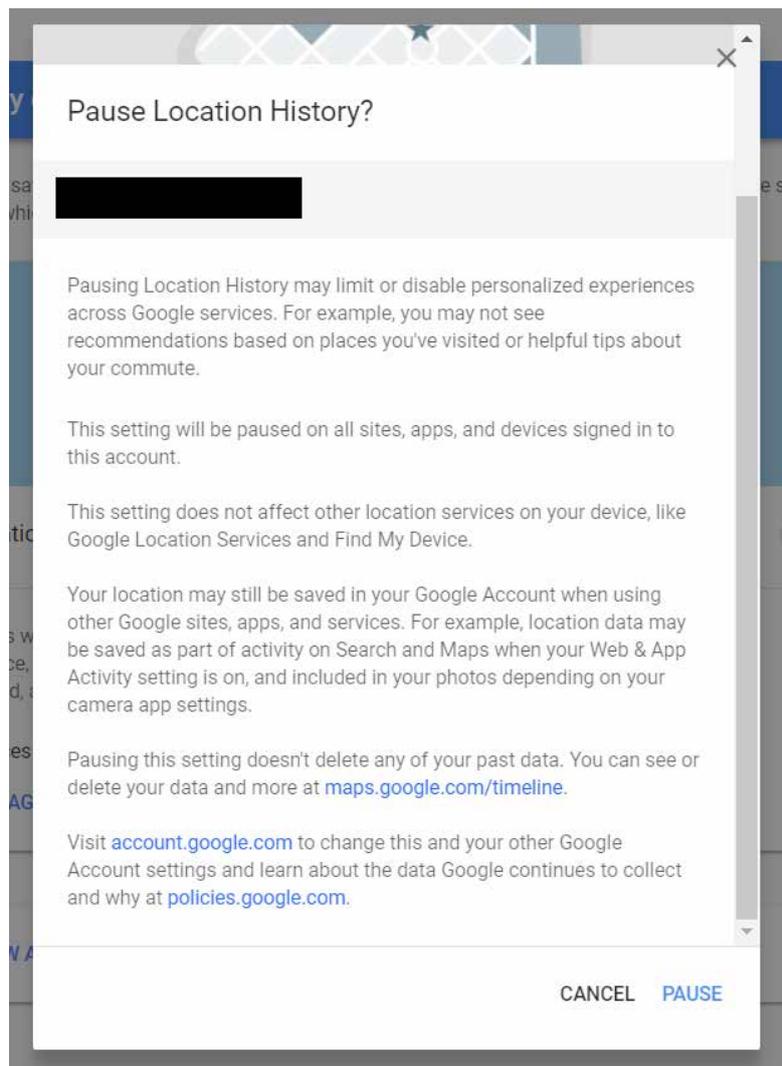
Figure 26: Google's 'Location History' page²³⁵⁷



2356 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More, accessed 20 September 2018.

2357 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More > Settings, accessed 20 September 2018.

Figure 27: Google's 'Pause Location History?'²³⁵⁸



ACCC observations

The ACCC found a number of design features that either introduce potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of Distractions- A user who uses Google's 'Privacy Checkup' function to 'Manage Location History' is faced with numerous options before being provided with information on how to turn off location history. Clicking on 'Manage Location History' takes the user to their timeline with a pop-up titled 'explore your timeline' (see figure 5.20 above). There is also a much more prominent 'Start Exploring' button below the smaller 'learn more' link that takes the user to a webpage with instructions on how to turn off their Location History setting.
- Framing- Google uses wording that emphasises the privacy of a user's Location History, stating that 'Google creates a *private map* of where you go with your signed-in devices, even when you aren't using a specific Google service. *This map is only visible to you*' (emphasis added) (see figure 5.22 above). However, Google's privacy policy also states that 'We use the information we collect from all our services for the following purposes', which would include the use of location information for the purpose of providing 'personalised services, including content and ads'.²³⁵⁹

²³⁵⁸ Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More > Settings > toggle off, accessed 20 September 2018.

²³⁵⁹ See [Google Privacy Policy](https://policies.google.com), accessed 20 November 2018.

- Lack of clarity- Google suggests to users that its services may be less useful with Location History disabled by stating 'Pausing Location History may limit or disable personalized experiences across Google services. For example, you may not see recommendations based on places you've visited or helpful tips about your commute' (see figure 5.27 above). However, Google does not provide any expanded detail about how and to what extent pausing Location History will 'limit or disable' a user's experiences across Google's services.

Opting-out of the collection of Web & App Activity data

Steps for opting-out

The ACCC documented the process for opting-out of the 'Web & App Activity' setting on an existing user's Google Account:

- When visiting <https://myaccount.google.com/> and after signing in, users are not provided with a direct menu option to edit their 'Web & App Activity' setting.
- However, users may manage their location information by selecting 'Privacy Checkup'. This displays the following settings to users:²³⁶⁰
 - Web & App Activity (see figure 5.24 above)
 - Location History
 - Device Information
 - Voice & Audio Activity
 - YouTube Search History
 - YouTube Watch History
- A user may complete the following steps to turn 'Web and App Activity' off:
 - Select 'Manage Web & App Activity' (see figure 5.28 below)
 - Select 'Change setting' (see figure 5.29 below)
 - Turn the toggle to turn 'Web & App Activity' off (see figure 5.30 below)
 - A pop-up is displayed titled 'Pause Web & App Activity?' Users then choose between 'Cancel' or 'Pause' (see figure 5.31 below).

²³⁶⁰ Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed 19 November 2018.

Figure 28: Google's Privacy Checkup displaying the 'Web & App Activity' setting²³⁶¹

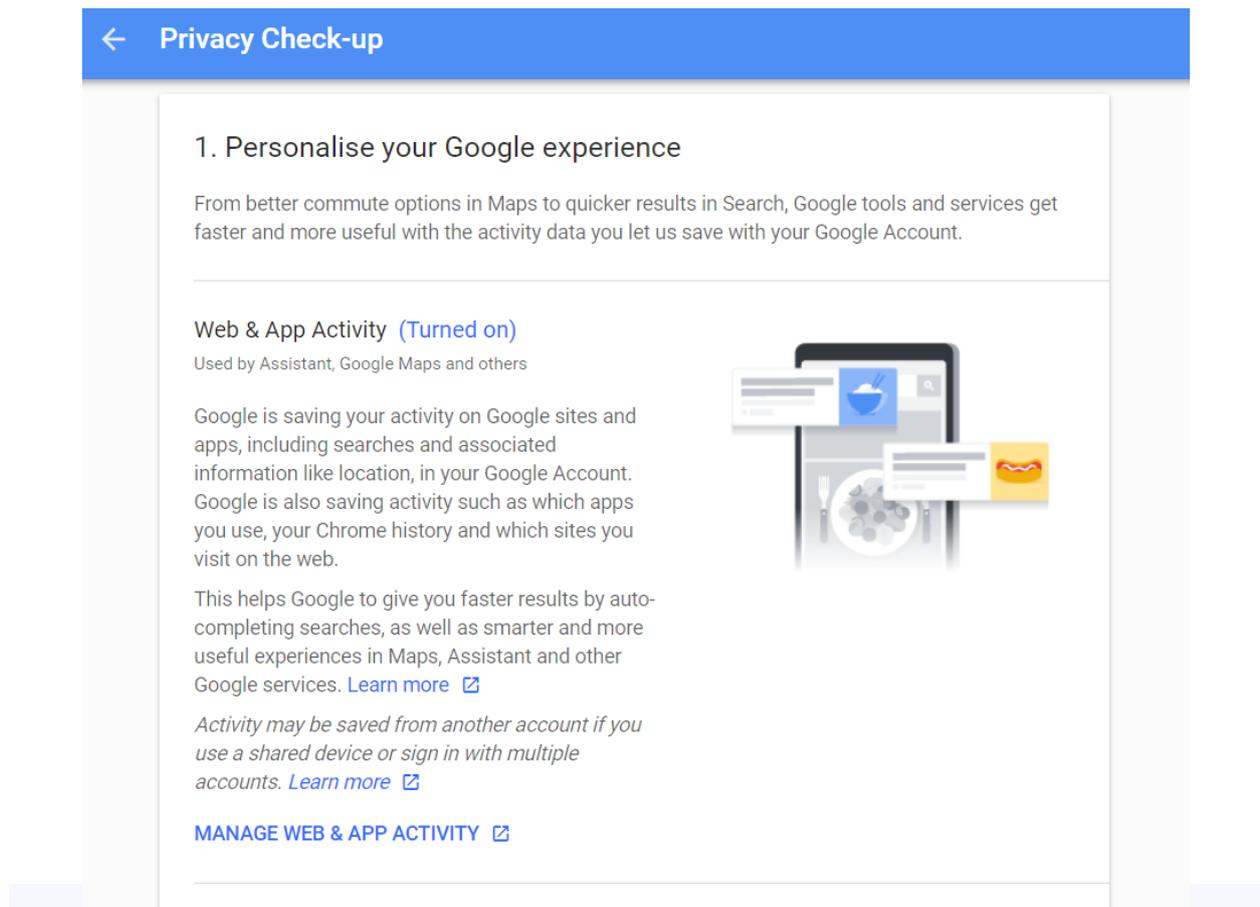
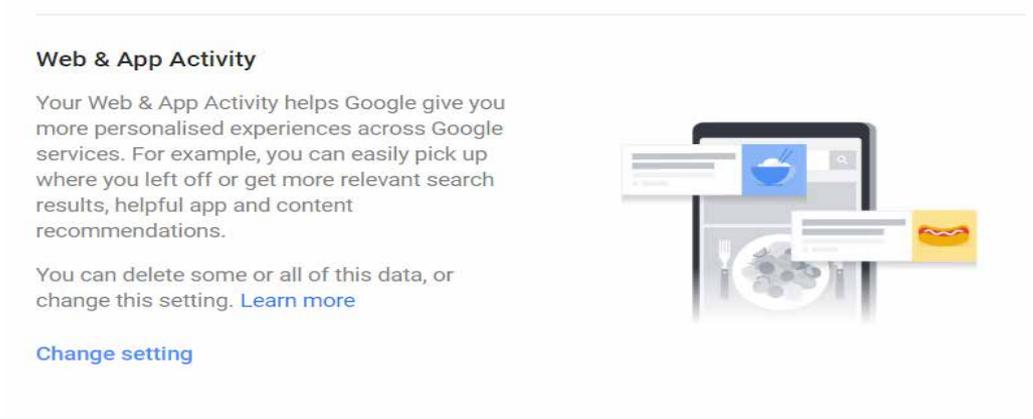


Figure 29: Google's My Activity > 'Web & App Activity'²³⁶²



2361 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed 20 November 2018.

2362 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity, accessed 20 November 2018.

Figure 30: Google's 'Web & App Activity' control²³⁶³

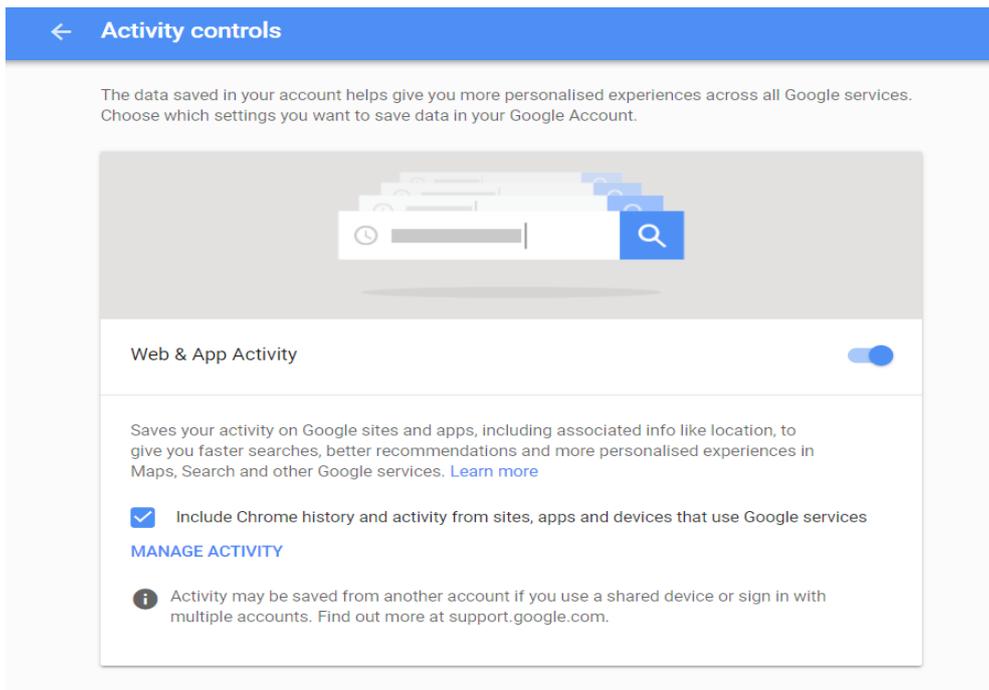
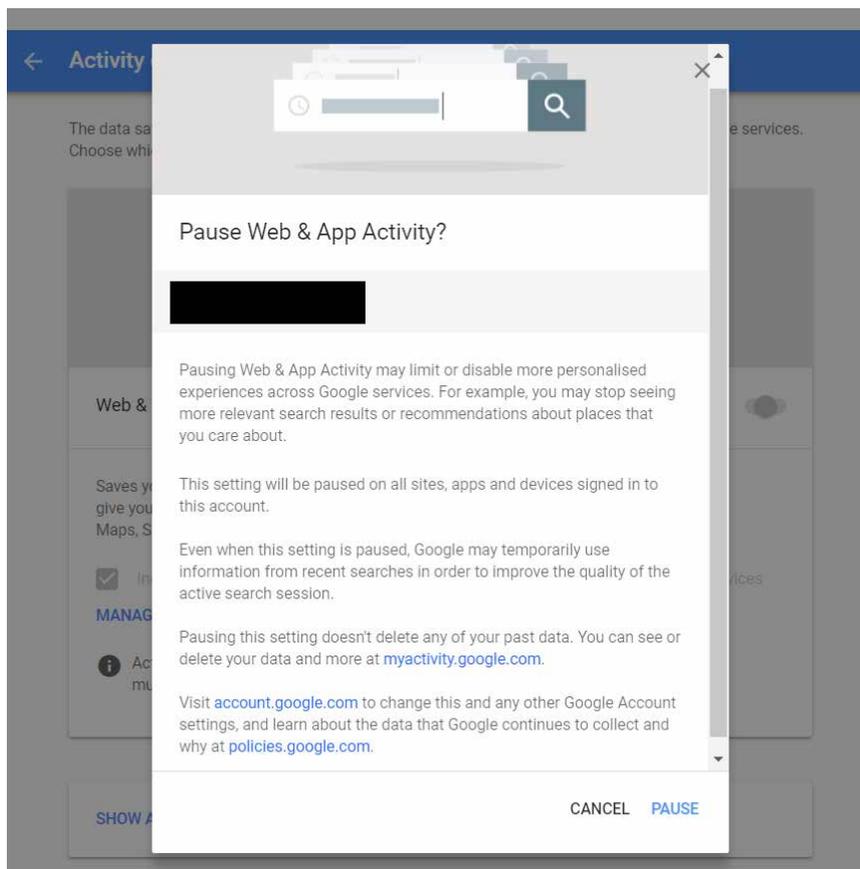


Figure 31: Google's 'Pause Web & App Activity?' pop-up²³⁶⁴



2363 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity > Change Setting, accessed 20 November 2018.

2364 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity > Change setting > toggle off, accessed 20 November 2018.

ACCC observations

The ACCC found a number of design features that either introduce potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of pre-selections - 'Web & App Activity' is turned on by default for new users. In addition, when a user visits the webpage for 'Web & App Activity', they will also see that the setting has the option 'Include Chrome history and activity from sites, apps and devices that use Google services' pre-selected (see figure 5.30 above). As noted above, default pre-selections can impact consumer decision-making as consumers are more likely to remain with a default.
- Framing - the description of the Web and App activity setting highlights its potential benefits for the user in helping Google 'to give you faster results by auto-completing searches, as well as smarter and more useful experiences in Maps, Assistant and other Google services' (see figure 5.31 above). This may encourage users to permit the saving of 'Web & App Activity' to their Google Account.
- Lack of clarity - it may also be unclear to some users that, after they have turned off 'Location History', they must also turn off 'Web & App Activity' to turn off Google's collection of 'associated info like location' to their Google Account (see figure 5.30 above).

Review of terms of use and privacy policies

During June and July 2018, ACCC staff undertook a research project to examine the terms and conditions in consumer agreements with digital platforms that were in effect as at 31 July 2018, in order to inform the ACCC's consideration of the extent and impact of any information asymmetry between digital platforms and consumers.

The purpose of the review was to inform the ACCC's analysis as to how digital platforms communicated their data practices to users and, combined with other research, whether there were features of privacy policies and terms of use²³⁶⁵ that may make it less likely for consumers to be able to make an informed choice about their use of different digital platforms.

Key findings

- The review of the privacy policies and terms of use found:
- There were a number of common terms and data practices that are featured in many digital platforms' terms of use.
- A number of these features may discourage consumers from reading digital platforms' privacy policies and terms of use; or could impede users from understanding the actual data practices of digital platforms even if they did read the privacy policies and terms of use.
- All digital platforms reviewed had, in some form, terms that granted the digital platforms rights over user data, including personal information.

Methodology

ACCC staff conducted reviews of the terms of use and of privacy policies of key digital platforms in order to help consider how digital platforms and consumers interact. The ACCC reviewed privacy policies that were in effect at 31 July 2018 for Facebook, Google, Twitter, Microsoft, Apple, WhatsApp, Instagram, and Snapchat and terms of use for Facebook, Google, Twitter, Apple, WhatsApp, Instagram, and Snapchat.

The review also covered the most recent previous versions of the terms and policies to compare changes to these previous versions. The privacy policies and terms of use of a number of media businesses were also included in the review. A list of terms and policies from key digital platforms that formed part of the review are found below.

²³⁶⁵ The platforms examined have varying names to describe their Terms of Use. For consistency, this paper will refer to them by the catch-all 'Terms of Use'.

ACCC staff read each privacy policy and terms of use and noted terms and features that may affect a consumer’s ability to understand the terms and policies presented to them. These reviews included looking at the length of each document, the number of links within the documents, and the language used in describing how personal information is collected, used and shared by digital platforms. The review also involved analysing each policy and term to produce an estimated reading time,²³⁶⁶ and an indication of complexity of the language using the Flesch-Kincaid reading score.²³⁶⁷ In undertaking the review, ACCC staff took note of features individually, as well as in the context of features from the other terms of use, to determine whether there were terms and features that appear across multiple digital platforms. The team also noted common provisions present in the terms of use and privacy policies of different digital platforms and media businesses (referenced in Chapter 5).

Findings

Length and complexity of language

The ACCC review of terms and policies found that each of the digital platforms’ privacy policies reviewed (excluding the numerous links to separate webpages) were between 2 500 and 4 500 words and would take an average reader between 10 and 20 minutes to read.

Combined with the Flesch-Kincaid reading score, the review also estimated that the language used within most of the policies was complex, with the exception of Snapchat. The policies and terms reviewed required at least a US college level of reading to understand.

Table 1: Estimated reading time and reading level

Digital Platform	Word count (current policy)	Est. reading time	Flesch readability score
Google	4,047	20 minutes	44.5
Facebook	4,266	21 minutes	42.4
Instagram	4,266	21 minutes	42.4
WhatsApp	2,475	12 minutes	45.9
Twitter	4,364	22 minutes	39.1
Apple	3,642	18 minutes	31.8
Snapchat	3,906	20 minutes	51.5
Microsoft	2,523	13 minutes	38.0

Incorporation of documents and navigability

The review found that, of the digital platforms reviewed, privacy policies and terms of use were often difficult to navigate, with numerous separate, interlinked policies that all contain important information regarding the digital platform’s data practices. Examples of interlinked documents include:

- Google’s Privacy Policy states ‘This Privacy Policy doesn’t apply to services that have separate privacy policies that do not incorporate this Privacy Policy’,²³⁶⁸ but it was only by reading each of the eight separate privacy policies for other Google services (Chrome and Chrome OS, Play, Books, Payments, Fiber, Project Fi, G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link) that a user would identify that each of those separate privacy policies do incorporate Google’s main policy and therefore Google’s privacy policy does apply to all of its services.²³⁶⁹

²³⁶⁶ Using an estimated average reading speed of 200 words per minute.

²³⁶⁷ The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 50.0-60.0 are classified as ‘fairly difficult to read’, which translates to around a US 10th to 12th grade school level; documents scoring between 30.0-50.0 are ‘difficult to read’, at a US college reading level.

²³⁶⁸ Google, [Privacy policy](#).

²³⁶⁹ Google, [Privacy policy](#).

- Facebook’s Terms of Service states ‘To provide these services, we must collect and use your personal data. We detail our practices in the Data Policy, which you must agree to in order to use our Products’.²³⁷⁰ The Terms of Service also contains a section in its table of contents to ‘other terms and policies that may apply to you’, including Facebook’s ad controls, Privacy Basics and Cookies Policy.

The review also found that of the digital platforms reviewed, some policies and terms contained hyperlinks that resulted in pop-up additional information or new pages, taking users away from the primary document. For example, Facebook’s Data policy contains over 70 hyperlinks, which link to other Facebook policies and terms, definitions of terms that are within the data policy, Facebook ‘help centre’ articles and other pages.

Ambiguous or unclear language

The review found that the language within privacy policies of digital platforms reviewed was often ambiguous to the reviewers, either because of unclear, or very broad, language. One example of broad language used in multiple privacy policies reviewed was the use of the word ‘may’ in relation to how digital platforms collect, use and share users’ data. Instances included:

- Twitter’s Privacy Policy states - ‘We may also disclose personal data about you to our corporate affiliates in order to help operate our services and our affiliate’s services, including the delivery of ads’.²³⁷¹
- Instagram’s Cookies Policy states - ‘Third-party cookies may be placed on your device by someone providing a service for Instagram’²³⁷²
- WhatsApp’s Privacy Policy states - ‘As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We may use the information we receive from them, and *they may use the information we share with them*, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings’.²³⁷³ (emphasis added)’

The review also found some ambiguity in what the digital platforms reviewed considered was ‘personal information’ under their terms of use. Often a definition was not included in the terms of use, and digital platforms often only provide examples of what is encompassed by the term.

Source	Definition of ‘personal information’?
Google’s Privacy Policy	‘information that you provide to us which personally identifies you, such as your name, email address, or billing information, or other data that can be reasonably linked to such information by Google, such as information we associate with your Google Account’. ²³⁷⁴
Facebook’s Data Policy	‘information such as your name or email address that by itself can be used to contact you or identifies who you are’. ²³⁷⁵
Twitter’s Privacy Policy	including ‘a display name (for example, “Twitter Moments”), a username (for example, @TwitterMoments), a password, and an email address or phone number’. ²³⁷⁶
Apple’s Privacy Policy	‘Personal information is data that can be used to identify or contact a single person.’ ²³⁷⁷

2370 Facebook, [Terms of Service](#).

2371 Twitter, [Privacy policy](#).

2372 Instagram, [About Cookies](#).

2373 WhatsApp, [Privacy policy](#).

2374 Apple, [Privacy Policy](#).

2375 Facebook, [Data Policy](#).

2376 Twitter, [Privacy policy](#).

2377 Apple, [Privacy Policy](#).

The review also found that the ambiguity regarding personal information in the policies reviewed lead to ambiguity regarding the circumstances, and the types of information, the reviewed digital platforms may share with third parties:

- Google - 'We do not share your personal information with companies, organizations, or individuals outside of Google except in [specific] cases'.²³⁷⁸
- Facebook - 'We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing, but we don't share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are)'.²³⁷⁹
- Apple - 'personal information will only be shared by Apple to provide or improve our products, services and advertising; it will not be shared with third parties for their marketing purposes'.²³⁸⁰

Large variety of data collected

The terms of use of the digital platforms reviewed often gave broad discretion as to the data the digital platform can collect from a user, and in some cases, from someone who is not a user of their services.²³⁸¹ Some examples of these types of data collection are outlined below.

Location Data

- Google's Privacy Policy covers the collection of user location data via GPS, IP addresses, sensor data from the user's mobile device, and information from Wi-Fi access points, cell towers, and Bluetooth-enabled devices.²³⁸² A footnote in the policy further discloses that sensor data from a mobile device can provide granular data on the user's movement: 'an accelerometer can be used to determine your speed and a gyroscope to figure out your direction of travel'.²³⁸³
- Facebook's Data Policy (which covers Facebook, Instagram and Messenger) discloses that information it obtains from users' devices includes 'Bluetooth signals, information about nearby Wi-Fi access points, beacons and mobile phone masts', 'the name of your mobile operator or ISP, language, time zone, mobile phone number, IP address, connection speed and, in some cases, information about other devices that are nearby or on your network'²³⁸⁴, and GPS location information.
- Twitter's Privacy Policy states: 'Subject to your settings, we may collect, use, and store additional information about your location - such as your current precise position or places where you've previously used Twitter - to operate or personalize our services including with more relevant content like local trends, stories, ads, and suggestions for people to follow'.²³⁸⁵

Placement of cookies

- Google - 'In some cases we may also collect your personal information through the use of cookies and other tracking devices. This enables us to recognise your computer and greet you each time you visit our website, without bothering you with a request to register or log-in. It also helps us keep track of products or services you view, so that we can send you news about those products or services. We also use cookies to measure traffic patterns, to determine which areas of our websites have been visited, and to measure transaction patterns in the aggregate. We use this to research our users' habits so that we can improve our online products and services'.²³⁸⁶

2378 Google, [Privacy policy](#).

2379 Facebook, [Data Policy](#).

2380 Apple, [Privacy Policy](#).

2381 For example, Facebook's Cookie Policy (which is linked to from its Privacy Policy) states 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in. Facebook, [Cookies Policy](#).

2382 Google, [Privacy Policy](#).

2383 Google, [Privacy Policy](#).

2384 Facebook, [Data Policy](#).

2385 Twitter, [Privacy Policy](#).

2386 Google, Privacy Policy, [Key Terms](#).

- Facebook - 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in.'²³⁸⁷
- Twitter - 'When your browser or device allows it, we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences.'²³⁸⁸

Broad or unclear discretion regarding use, combination and sharing of user data

As stated above, the policies of the digital platforms reviewed generally required users to allow a large amount of data to be collected. That is, the terms of use of the digital platforms' reviewed generally included broad discretions to collect, use, and disclose user data for targeted advertising purposes. Further, the policies reviewed did not generally inform users about the specific purposes for which each type of user data is collected.

Combining of data

- Google's privacy policy - 'We may combine the information we collect among our services and across your devices for the purposes described above'.²³⁸⁹
- Twitter - 'we may also associate your account with browsers or devices other than those you use to log into Twitter (or associate your logged-out device or browser with other browsers or devices)'.²³⁹⁰
- Facebook - 'We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their Terms and Policies.'²³⁹¹

Sharing with third parties for advertising purposes

The majority of policies reviewed included a broad discretion regarding sharing data with third parties, or using data from third parties, for the purposes of advertising. The review found that within these policies, the identity and types, of third parties with whom user data may be shared were often high-level or vague:

Company	Third parties who may receive user data	Third parties who may provide user data
Google	'our advertising partners' 'trusted businesses or persons'	'our advertising partners' 'trusted partners, including marketing partners ... and security partners' 'our partners'
Facebook	'partners' 'measurement partners' 'partners who use our analytics services' 'advertisers' 'partners offering goods and services in our Products' 'vendors and service providers' 'research partners and academics'	'partners' 'select group of third-party data providers' 'third-party partners' 'website owners and publishers, app developers, business partners (including advertisers)'
Twitter	'advertisers' 'partners'	'ad partners and affiliates' 'partners (including ad partners), or our corporate affiliates' third parties who are not our ad partners', 'partners who help us evaluate the safety and quality of content on our platform'

²³⁸⁷ Facebook, [Cookies Policy](#).

²³⁸⁸ Twitter, [Privacy Policy](#).

²³⁸⁹ A different webpage provides some additional information: 'Many websites and apps use Google services to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google': Google, Policy, [How Google uses information from sites or apps that use our services](#).

²³⁹⁰ Twitter, [Privacy Policy](#).

²³⁹¹ Facebook, [Data Policy](#).

Company	Third parties who may receive user data	Third parties who may provide user data
Apple	'strategic partners that work with Apple to provide products and services, or that help Apple market to customers' 'our partners'	'other persons' 'datasets such as those that contain images, voices or other data that could be associated with an identifiable person'
Snapchat	'Snapchatters' 'third parties' 'business partners' 'the general public'	'third-party services'
WhatsApp	'third-party providers' 'Facebook family of companies'	'third-party providers' 'Facebook family of companies'

This lack of clarity means that users are not able to identify who they are agreeing to have their information shared with.

For instance, when agreeing to Twitter's terms of use, a user accepts that 'We may also disclose personal data about you to our corporate affiliates in order to help operate our services and our affiliate's services, including the delivery of ads'²³⁹² Similarly, Snapchat's terms of use requires a user to 'agree that we, Snap Inc., our affiliates, and our third-party partners may place advertising on the Services, including personalised advertising based upon the information you provide us or we collect or obtain about you'.²³⁹³

Targeted advertising purposes

The review found that some digital platforms may also describe the purpose of targeted advertising within a long list of other purposes beneficial to users, rather than stating it at the outset:

- Google's Privacy Policy states that it collects data from its users to: provide its services; maintain and improve its services; develop new services; *provide personalised services, including content and ads*; measure performance; communicate with users; and protect Google, its users, and the public.²³⁹⁴
- Facebook's Data Policy states that it collects user data to: 'provide, personalise and improve its products (*including to select and personalise ads, offers and other sponsored content*); provide measurement, analytics and other business services, promote safety; integrity and security; communicate with its users; and research and innovate for social good' (emphasis added).²³⁹⁵
- Twitter's Privacy Policy states 'we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, *personalizing the content we show you including ads*, and remembering your language preferences' (emphasis added).²³⁹⁶

Take-it-or-leave-it terms and bundling consent

In addition to the inclusion of other documents and pages into terms and policies (discussed above as part of information asymmetry), all the terms and policies reviewed required a user to accept the terms of use and privacy policy on take-it-or-leave-it terms.

Some digital platforms' policies reviewed also bundled consents, including:

- Google's privacy policy states that it collects user information across its services and that 'We may combine the information we collect among our services and across your devices for the purposes described above'.²³⁹⁷ As stated above, Google's Privacy Policy is incorporated into the terms of use.

²³⁹² Twitter, [Terms of Service](#).

²³⁹³ Snap, [Terms of Service](#).

²³⁹⁴ Google, [Privacy Policy](#).

²³⁹⁵ Facebook, [Data Policy](#).

²³⁹⁶ Twitter, [Privacy Policy](#).

²³⁹⁷ Google, [Privacy Policy](#).

- WhatsApp's Privacy Policy (which users must agree to as part of its terms of use) states that WhatsApp collects information that it shares with Facebook.²³⁹⁸

Granting of licenses to user-uploaded content

All of the terms of use reviewed state that, as part of the agreement to use the service, a user grants a broad license to the digital platform to store, display, or otherwise use any content uploaded by the user.

Some platforms include a further agreement for the user to license their name and likeness for use in advertising:

- Facebook - 'you give us permission to use your name and profile picture and information about actions that you have taken on Facebook next to or in connection with ads, offers and other sponsored content that we display across our Products'²³⁹⁹
- Snapchat - 'when you appear in, create, upload, post or send Public Content, you also grant Snap Group Limited, Snap Inc. and our affiliates and business partners the unrestricted, worldwide right and licence to use your name, likeness, and voice'²⁴⁰⁰
- Google - 'we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1's, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts'²⁴⁰¹.

Changes to terms and conditions and services.

The terms of use reviewed each contained a term that allowed digital platforms to changes to the terms of use without user's consent. Across all platforms reviewed, a user's continued use of the service following any change was taken as acceptance of the change.

The majority of the digital platforms' terms of use also include terms that allow the platform to unilaterally vary the services provided under the contract, including adding or removing functions or services:

- Google - 'Google may also stop providing Services to you, or add or create new limits to our Services at any time'²⁴⁰²
- Snapchat - '.we may add or remove features, products, or functionalities, and we may also suspend or stop the Services altogether. We may take any of these actions at any time, and when we do, we will try to notify you beforehand - but this won't always be possible.'²⁴⁰³

Transfer of user data

Each of the digital platforms reviewed, either within the privacy policy or terms of use, required users to grant the digital platform the right to transfer the user's data to a third party in the event of change to the digital platform's' existence, such as merger, acquisition or bankruptcy.

- Apple - 'in the event of a reorganization, merger, or sale we may transfer any and all personal information we collect to the relevant third party'²⁴⁰⁴
- Facebook - 'All of our rights and obligations under these Terms are freely assignable by us in connection with a merger, acquisition or sale of assets, or by operation of law or otherwise'²⁴⁰⁵
- Twitter - 'In thse event that we are involved in a bankruptcy, merger, acquisition, reorganization, or sale of assets, your personal data may be sold or transferred as part of that transaction. This Privacy Policy will apply to your personal data as transferred to the new entity'²⁴⁰⁶

2398 WhatsApp, [Privacy policy](#).

2399 Facebook, [Terms of Service](#).

2400 Snap Group, [Terms of Service](#).

2401 Google, [Terms of Service](#).

2402 Google, [Terms of Service](#).

2403 Snap Group, [Terms of Service](#).

2404 Apple, [Privacy Policy](#).

2405 Facebook, [Terms of Service](#).

2406 Twitter, [Privacy Policy](#).

- WhatsApp - 'All of our rights and obligations under our Privacy Policy are freely assignable by us to any of our affiliates, in connection with a merger, acquisition, restructuring, or sale of assets, or by operation of law or otherwise, and we may transfer your information to any of our affiliates, successor entities, or new owner'.

Google's privacy policy does not explicitly state that data would be transferred in such events, but implies that this is the case:

- 'If Google is involved in a merger, acquisition, or sale of assets, we'll continue to ensure the confidentiality of your personal information and give affected users notice before personal information is transferred or becomes subject to a different privacy policy'.²⁴⁰⁷

List of terms and policies reviewed

Digital Platform (version current as at 31 July 2018 except where otherwise indicated)	Link
Google	https://policies.google.com/terms
Facebook, Instagram, Messenger	https://www.facebook.com/legal/terms/update?ref=old_policy
WhatsApp	https://www.whatsapp.com/legal/#terms-of-service
Apple	https://www.apple.com/au/legal/internet-services/itunes/au/terms.html
Twitter	https://twitter.com/en/tos#update-intlTerms
Snapchat	https://www.snap.com/en-US/terms/#terms-row
Google	https://policies.google.com/privacy?hl=en&gl=AU
Chrome and Chrome OS	https://www.google.com/intl/en/chrome/privacy/
Google Play Books	https://play.google.com/books/intl/en/privacy.html
Google Payments	https://payments.google.com/payments/apis-secure/get_legal_document?ldo=0&ldt=privacynotice&ldl=en
Google Fiber	https://fiber.google.com/legal/privacy/
Google Project Fi	https://fi.google.com/about/tos/#project-fi-privacy-notice
G Suite for Education	https://gsuite.google.com/terms/education_privacy.html
YouTube Kids	https://kids.youtube.com/t/privacynotice
Google Accounts Managed with FamilyLink	https://families.google.com/familylink/privacy/child-policy/
Facebook, Instagram, Messenger	https://www.facebook.com/about/privacy/update?ref=old_policy
Facebook Cookies Policy	https://www.facebook.com/policies/cookies/
Instagram Cookies Policy	https://help.instagram.com/1896641480634370?ref=ig
WhatsApp	https://www.whatsapp.com/legal/
WhatsApp	https://www.whatsapp.com/legal?eea=1#privacy-policy
Apple	https://www.apple.com/au/legal/privacy/en-ww/
Twitter	https://twitter.com/en/privacy
Twitter (Previous version)	https://twitter.com/en/privacy/previous/version_13
Snapchat	https://www.snap.com/en-US/privacy/privacy-policy/

²⁴⁰⁷ Google, [Privacy Policy](#).



Appendix I: Overview of third party data sharing with app developers



Third party data-sharing occurs when user data is passed on from one entity to another. Further to the discussion in chapter 7 (section 3.3), this Appendix provides further discussion on the sharing of user data between digital platforms and app developers.

I.1 Overview

App developers collect user data from their apps for a range of different reasons including research and development, usage analysis, diagnostics and troubleshooting as well as in connection with their business models. App developers use a range of different business models to generate revenue, which impact the types of user data collected from their apps. These business models include:²⁴⁰⁸

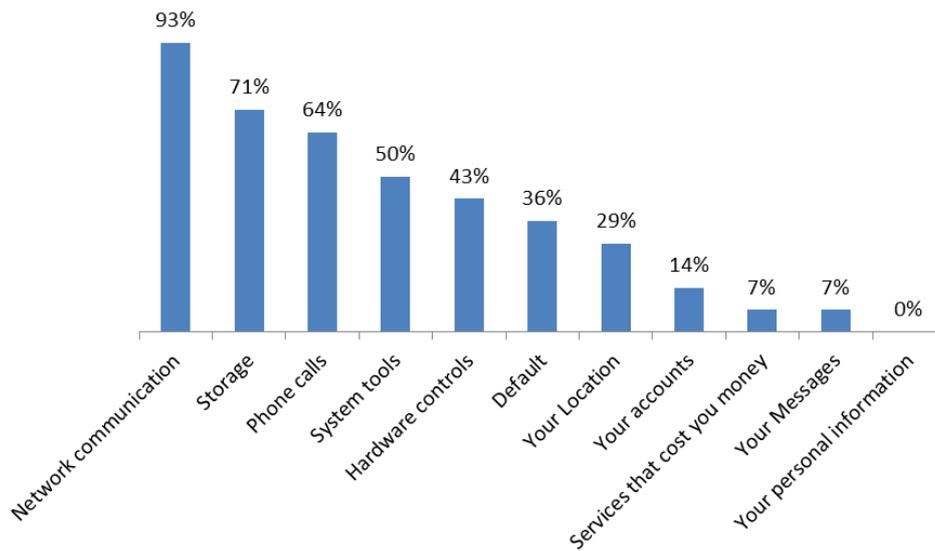
- **paid downloads:** charging a fee to users to download the app
- **freemium / free-to-premium:** provide users with a free version of the app with less functionality and charge users who choose to upgrade to a paid version of the app with more functionality (e.g. Dropbox)
- **in-app purchases:** charging users for in-app purchases (e.g. games, digital content)
- **in-app advertising:** charging advertisers to supply in-app advertisements to users
- **sale of data:** charge third parties for sale of user data collected via app use
- **promotion:** not charging anyone but using the app to promote other products and services (e.g. Nike, Comedy Central, restaurants, grocery stores).

Although these business models may overlap, apps that generate revenue by charging users are generally likely to have less incentive to collect user data than apps that generate revenue by supplying advertising or selling user data. This is supported by OECD research that *free* apps are generally more likely to request permissions to access user data in almost all categories examined (except phone calls). As illustrated in figures 1 and 2 below, zero per cent of top-rated paid Android apps requested a user's personal information, compared with 50 per cent of top-rated free Android apps; top-rated free apps were also more than twice as likely to request location information as top-rated paid Android apps – see figures 1 and 2 below regarding the number and types of permissions requested by top-rated paid and free apps on Android devices.²⁴⁰⁹

2408 OECD, The App Economy, 2012, page 22.

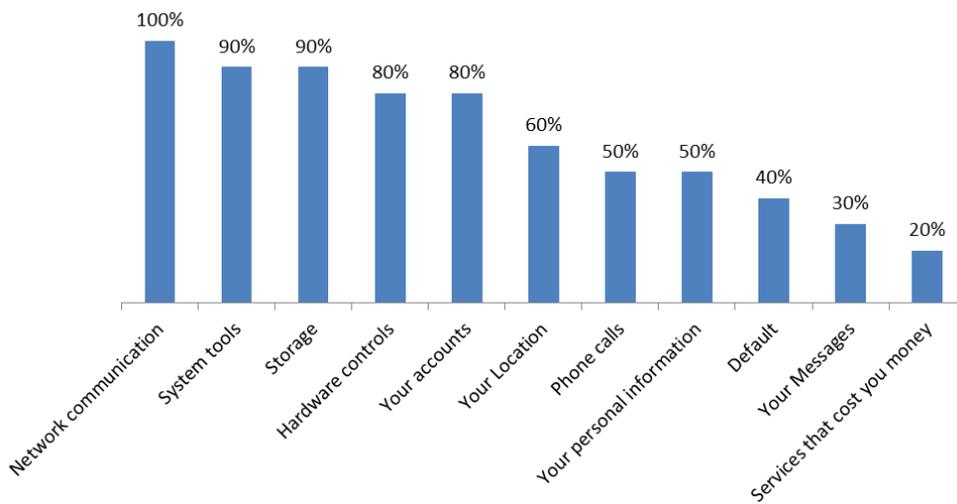
2409 OECD, The App Economy, 2012, page 40, Figures 24 and 25.

Figure 1: Number of permissions requested by Android's top-rated *paid* apps²⁴¹⁰



Source: OECD based on data from Play Market (September, 2012)

Figure 2: Number of permissions requested by Android's top-rated *free* apps²⁴¹¹



Source: OECD based on data from Android Market (September, 2012)

The collection of data via apps benefits both app developers and digital platforms, allowing them both to utilise the data collected.

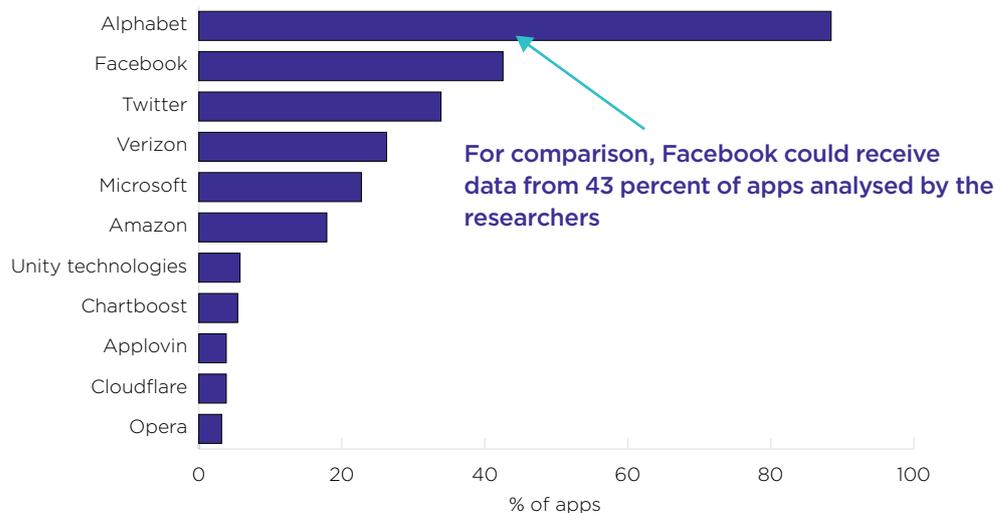
2410 OECD, The App Economy, 2012, page 40, Figure 24.

2411 OECD, The App Economy, 2012, page 40, Figure 25.

I.2 Sharing of user data from app developers to digital platforms

App developers can share the user data collected from their mobile apps with numerous third parties, including digital platforms. A number of reports and studies have shown that Google and Facebook have the ability to collect significant amounts of user data from third-party apps. For example, researchers from Oxford University examined 959 000 apps from the US and UK Google Play Stores and found that most of the apps reviewed contain third-party tracking.²⁴¹² In particular, the study found that 88 per cent of the apps were sending user data back to Google and between 19 and 43 per cent of the apps were sending user data to each of Amazon, Microsoft, Verizon, Twitter and Facebook (see figure 3 below).²⁴¹³

Figure 3: Third party data flows from mobile apps²⁴¹⁴



Source: Oxford University, *Third Party Tracking in the Mobile Ecosystem*, 2018 at p5.

Privacy International has specifically examined the transmission of data from third-party apps to Facebook. Its December 2018 report found that at least 61 per cent of apps tested automatically transferred data to Facebook the moment a consumer opens the app, regardless of whether the consumer has a Facebook account and whether they are logged-in to Facebook.²⁴¹⁵ In March 2019, Privacy International re-tested all of the apps and found that two-thirds have updated their apps so that they no longer contact Facebook when a consumer opens the app (including Spotify, Skyscanner and KAYAK).²⁴¹⁶ The remaining third of apps re-tested, however, still sent data to Facebook as soon as they are launched and many may collect sensitive information such as information regarding a user's religious beliefs.²⁴¹⁷ A similar study by MobilSicher examined several iOS versions of popular apps tested by Privacy International and found that many of these apps also share information with Facebook as soon as they are opened.²⁴¹⁸ These include apps which may transmit sensitive personal information about a

2412 Oxford University, [Third Party Tracking in the Mobile Ecosystem](#), 2018 p. 5

2413 Oxford University, [Third Party Tracking in the Mobile Ecosystem](#), 2018 p. 5

2414 Oxford University, [Third Party Tracking in the Mobile Ecosystem](#), 2018 p. 5

2415 Privacy International, [How Apps on Android Share Data with Facebook \(even if you don't have a Facebook account\)](#), 29 December 2018, accessed 17 April 2019.

2416 Privacy International, [Guess what? Facebook still tracks you on Android apps \(even if you don't have a Facebook account\)](#), 5 March 2019, accessed 17 April 2019.

2417 For example, the [King James Bible app](#), [Qibla Connect app](#), and [Muslim Pro app](#): see Privacy International, [Guess what? Facebook still tracks you on Android apps \(even if you don't have a Facebook account\)](#), 5 March 2019, accessed 17 April 2019.

2418 MobilSicher.de, [Auch iOS-Apps senden unbemerkt Daten an Facebook](#), 6 January 2019.

user's religious beliefs or affiliations, sexual orientation or practices, or health information such as Tinder, Grindr, OK Cupid, ForDiabetes, and Migraine Buddy.²⁴¹⁹

Facebook and Google's developer agreements contain provisions for the sharing of data which are binding on developers who wish to distribute apps via the Facebook platform or the Google Play Store. In particular, Clause 9 of the Google Play Developer Distribution Agreement states that:²⁴²⁰

Privacy and Information

- 9.1 Any data collected or used pursuant to this Agreement is in accordance with Google's *Privacy Policy*.
- 9.2 In order to continually innovate and improve Google Play, related products and services, and the user and Developer experience across Google products and services, *Google may collect certain usage statistics from Google Play and Devices including, but not limited to, information on how the Product, Google Play and Devices are being used.*
- 9.3 The data collected is used in the aggregate to improve Google Play, related products and services, and the user and Developer experience across Google products and services. Developers have access to certain data collected by Google via the Play Console.

Clause 8 of the Facebook Platform Policy imposes an additional obligation on the developers to 'obtain adequate consent' from consumers before the developer uses any Facebook technology that allows Facebook to collect and process data about them:²⁴²¹

Obtain adequate consent from people before using any Facebook technology that allows us to collect and process data about them, including for example, our SDKs and browser pixels. When you use such technology, provide an appropriate disclosure:

- a) That *third parties, including Facebook, may use cookies, web beacons, and other storage technologies to collect or receive information from your websites, apps and elsewhere on the internet and use that information to provide measurement services, target ads and as described in our Data Policy;* and
- b) How users can opt-out of the collection and use of information for ad targeting and where a user can access a mechanism for exercising such choice.

Both Google and Facebook incorporate their privacy and data policies in their developer agreements.²⁴²² Importantly, both of these policies allow Google and Facebook to combine user data across their services:

- **Facebook Data Policy:** 'we collect information from and about the computers, phones, connected TVs and other web-connected devices you use that integrate with our Products, and we combine this information across different devices that you use'.²⁴²³
- **Google Privacy Policy:** 'we may combine the information we collect among our services and across your devices for the purposes described above'.²⁴²⁴

This ability to combine information from different sources in relation to a single user is significant because apps can collect a range of identifiers from a user's device such as device serial numbers and unique advertising IDs. Some of these identifiers, such as the advertising IDs, are anonymous and may be collected and transmitted without notifying or seeking consent from the user, but these identifiers will cease to be anonymous as soon as it is associated with the personal information in a user account.²⁴²⁵

2419 MobilSicher.de, [Auch iOS-Apps senden unbemerkt Daten an Facebook](#), 6 January 2019.

2420 [Google Play Developer Distribution Agreement](#), effective as of 15 April 2019, accessed 17 April 2019 (emphasis added).

2421 See Facebook for developers, [Facebook Platform Policy](#), accessed 17 April 2019 (emphasis added).

2422 See clause 9.1 of the [Google Play Developer Distribution Agreement](#) effective as of 15 April 2019, accessed 17 April 2019 and clause 8.2 of the [Facebook Platform Policy](#).

2423 <https://www.facebook.com/policy.php>

2424 <https://policies.google.com/privacy?hl=en-US>

2425 See further discussion in AppCensus blog, [Ad IDs behaving badly](#), 14 February 2019; MobilSicher.de, [How Facebook knows which apps you use – and why this matters](#), 20 December 2018; and Tech Crunch, [Many popular iPhone apps secretly record your screen without asking](#), 7 February 2019.

I.3 Sharing of user data from digital platforms to app developers

Digital platforms can also share user data from their users with third-party app developers. Facebook states that it has given third parties access to Facebook users' personal information for purposes like enabling Facebook integrations to be built on to other companies' devices or platforms and enabling users to have social experiences (like seeing recommendations from Facebook friends) on other apps and websites.²⁴²⁶

Information presented by the UK Department of Communications, Media and Sport Committee (DCMS) Committee in its inquiry on 'Disinformation and Fake News' (DCMS Final Report) suggests that Facebook may give app developers preferential access to information on its users in exchange for reciprocal access to the app developer's data or to attract more developers to build apps using the personal information of Facebook's users.²⁴²⁷ For instance, the DCMS Final Report found that the 'Reciprocity' agreements used by Facebook 'enabled Facebook to gain as much information as possible, by requiring apps that used data from Facebook to allow their users to share their data back to Facebook.'²⁴²⁸

The DCMS Committee also published selections of documents ordered from Six4Three, which included a 'Private Extended API Addendum' setting out clauses that give Facebook the 'sole discretion' of making available certain APIs to app developers that enables the developer 'to retrieve data or functionality relating to Facebook that is not generally available under the Platform'.²⁴²⁹ The relevant clauses 4 and 6 and the definition of 'Private Extended API' are extracted below in figure 4.

Figure 4 Relevant extracts from Facebook 'Private Extended API Addendum'²⁴³⁰

4. Access to the Private Extended APIs. Subject to the terms of the Agreement, FB may, in its sole discretion, make specific Private Extended APIs available to Developer for use in connection with Developer Applications. FB may terminate such access for convenience at any time. The Private Extended APIs and the Private Extended API Guidelines will be deemed to be a part of the Platform and the Platform Policies, respectively, for purposes of the Agreement.

5. Facebook Brand Features.

a. **License to Facebook Brand Features.** Subject to the terms and conditions of the Agreement, FB's written approval prior to each use and with Facebook's Brand Resources Guidelines available at <https://www.facebookbrand.com/>, or successor URL

Developer of Facebook Brand Features (including any goodwill associated therewith) will inure to the benefit of FB.

6. Confidential Information. Developer agrees that the existence and content of the Private Extended APIs, the Private Extended API Guidelines and its use of Private Extended APIs is deemed to be confidential information of FB and Developer will maintain the same in strict confidence and not disclose the same to any third party (other than agents and contractors for the sole purpose of providing services to Developer hereunder) or use the same for any purpose other than its performance under the Agreement. The obligations contained in this paragraph will survive any termination or expiration of the Agreement.

"Private Extended APIs" means a set of API's and services provided by FB to Developer that enables Developer to retrieve data or functionality relating to Facebook that is not generally available under Platform, which may include persistent authentication, photo upload, video upload, messaging and phonebook connectivity.

"Private Extended API Guidelines" the guidelines, technical specifications and protocols located at <https://developers.facebook.com> (or such successor URLs as may be designated by FB) or any other guidelines, technical specifications or protocols as may be provided by FB to Developer from time to time.

2426 Facebook Newsroom, [Let's Clear Up a Few Things About Facebook's Partners](#), 18 December 2018.

2427 DCMS, [Disinformation and 'fake news': Final Report](#), 14 February 2019, pp. 33-35.

2428 DCMS, [Disinformation and 'fake news': Final Report](#), 14 February 2019, pp. 35.

2429 DCMS, [Further selected documents ordered from Six4Three](#), 19 February 2019, pp. 15 and 16.

2430 DCMS, [Further selected documents ordered from Six4Three](#), 19 February 2019, pp. 15 and 16.

In December 2018, Facebook published a release in response to the release of these documents indicating that they omit important context, including:

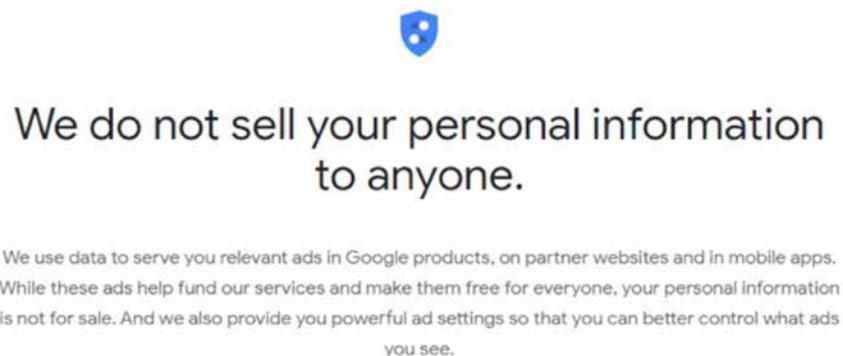
- that the documents subject to the release were ‘cherry picked’ by Six4Three in an attempt to force Facebook to share information on friends of the app’s users²⁴³¹
- though they had considered requiring developers to buy advertising, Facebook ultimately settled on a model that did not require this²⁴³²
- the ‘reciprocity’ provision (discussed above) was an optional feature for consumers that required developers to give people the option to share information back to Facebook through the developer’s app.²⁴³³

I.4 Do digital platforms ‘sell’ personal information to third parties?

Digital platforms often make statements that they do not sell user information, in particular ‘personal information’, to third parties. For example:

- A Facebook Help page states: ‘Does Facebook sell my information? No, we don’t sell any of your information to anyone and we never will. You have control over how your information is shared’²⁴³⁴
- Google’s mobile Ad Settings (where users can choose whether to turn off Ad Personalisation) contains the statement: ‘Google doesn’t sell your personal information to anyone’²⁴³⁵ and a Google ‘safety centre’ page on ads and data states: ‘We do not sell your personal information to anyone’ (see Figure 5).

Figure 5 Screenshot of Google web page on ‘How Ads Work’²⁴³⁶



The ACCC’s information-gathering in the Inquiry has not found any examples of digital platforms directly selling information to third parties. However, the Inquiry has found that:

- Some digital platforms and app developers share user data collected via APIs (as discussed above).
- Digital platforms collect user data, including personal information, from Australian consumers, such as gender, age and interests, in order to create detailed profiles of consumers to enable advertisers (using that platform) to target advertising to particular segments of the population. Generally, the more specific the segments are, the more the digital platform is able to charge for the advertising opportunity.

2431 Facebook, [Response to Six4Three Documents](#), 5 December 2018, accessed 25 April 2019.

2432 Facebook, [Response to Six4Three Documents](#), 5 December 2018, accessed 25 April 2019.

2433 Facebook, [Response to Six4Three Documents](#), 5 December 2018, accessed 25 April 2019.

2434 Facebook, Help Centre, [Does Facebook sell my information?](#), accessed 31 October 2018.

2435 Google, Ad Settings, accessed 21 November 2018.

2436 Google, Safety Centre, [Ads and data](#), accessed 21 November 2018.

- This creates an incentive to collect detailed user data, including personal information, from consumers, and digital platforms use a growing array of mechanisms to passively collect information from users (see chapter 7, section 4.4(b)). This includes data collected across multiple digital platforms, via different devices and browsers, and through products which some users may not know are used for this purpose,²⁴³⁷ which further increases their ability to create detailed profiles of consumers.
- Some digital platforms also collect information on consumers who are not registered as users of their services, such as through web tracking practices (see chapter 7, section 4.3(g) on '*Disclosures regarding online tracking of non-users*').
- Some digital platforms supplement their user data with data purchased from other data holders, such as data analytics firms,²⁴³⁸ to create more detailed profiles of Australian consumers.
- There is evidence that some third parties with which digital platforms have contracted, such as app developers or 'partners', have used information of users obtained through digital platforms to on sell for other commercial purposes.²⁴³⁹ See, for example, discussion of Cambridge Analytica in chapter 7, box 7.15 on '*Data-sharing with third-party app developers*'.

Findings from overseas investigations indicate that Facebook has considered selling app developers access to personal data. In particular, the DCMS found that Facebook linked data access for third-party app developers with spend on advertising.²⁴⁴⁰ That is, the DCMS found that Facebook pursued a strategy of requiring developers to spend substantial sums on Facebook 'as a condition of maintaining preferential access to personal data'.²⁴⁴¹ In support of this, the DCMS extracted an internal Facebook email that outlined 'the need for app developers to spend \$250,000 per year to maintain access to their current Facebook data'.²⁴⁴² However, the ACCC notes that Facebook's response to the DCMS report states that the emails considered by the DCMS did not tell the full story and that, although Facebook had considered requiring developers to buy advertising in exchange for access to personal data, Facebook ultimately settled on a model that did not require this.²⁴⁴³

The ACCC's findings are relevant when considering what a reasonable consumer may expect from the headline statements provided by digital platforms such as those extracted above.

- First, as noted in chapter 7, section 4.2(b), the ACCC's survey found that digital platform users may have a wide range of data they perceive to be personal information. This includes not just name, age and financial information but also browsing history, location and personal preferences. Such information is increasingly collected and used to create in-depth profiles of users by digital platforms.
- Second, the headline statements provided by digital platforms about the 'sale' of personal information may provide a false sense of certainty that information collected by digital platforms is not being monetised. This may therefore facilitate users not to take steps to protect or reduce the amount of information they would otherwise provide to platforms.
- Finally, the passive collection of information and the joining of third party data sets may not be reasonably expected by a consumer when they pass data on to one party. It is noted, however, that the inquiry has found that these data sharing practices are not limited to digital platforms.

2437 For example, until June 2017, Google indicated it used the content of Gmail to inform targeted advertising to users. D. Green, [As G Suite gains traction in the enterprise, G Suite's Gmail and consumer Gmail to more closely align](#), Google, 23 June 2017, accessed 31 October 2017.

2438 R Baker, '[Facebook makes data deal with Quantum, Acxiom and Experian to fuse offline and online data](#)', *Ad News*, 21 July 2015, accessed 31 October 2018; Quantum, [Quantum announces data partnership with Facebook](#), 23 July 2015, accessed via wayback machine (26 March 2016 snapshot). It was announced in 2018 that Facebook would seek to roll back these partnerships: Facebook, [Shutting Down Partner Categories](#), *Newsroom*, 28 March 2018, accessed 31 October 2018.

2439 D MacMillan '[Tech's 'Dirty Secret': The App Developers Sifting Through Your Gmail](#)', *The Wall Street Journal*, 2 July 2018, accessed 31 October 2018.

2440 DCMS, [Disinformation and 'fake news': Final Report](#), 14 February 2019, pp. 30-33.

2441 DCMS, [Disinformation and 'fake news': Final Report](#), 14 February 2019, p. 30.

2442 DCMS, [Disinformation and 'fake news': Final Report](#), 14 February 2019, p. 32.

2443 Facebook, [Response to Six4Three Documents](#), 5 December 2018, accessed 25 April 2019.



Glossary



Term	Description
AANA	Australian Association of National Advertisers
ABAC	Alcohol Beverages Advertising Code
ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACCC consumer survey	Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms' prepared for the ACCC, November 2018
ACCC news survey	Roy Morgan Research, 'Consumer Use of News' prepared for the ACCC, November 2018
ACCC questionnaire	An online consumer questionnaire conducted by the ACCC as part of this Inquiry in February to April 2018 to provide a streamlined process for individual consumers to make a submission
ACCC review of terms and policies	ACCC review of the privacy policies and terms of use for several large digital platforms
ACCC review of sign-up processes	ACCC's review of the sign-up processes of Google's Gmail, Facebook, Twitter and Apple's Apple ID
ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
ADAA	Australian Digital Advertising Alliance
ADMA	Association for Data-driven Marketing and Advertising
Addressable television advertising	Targeted advertising that appears on smart televisions, via set-top boxes or on online television catch-up services
Ad inventory	Advertising space on a website or app that is made available for advertisers to purchase
Ad exchange	An advertising marketplace that connects and matches supply from websites and apps selling advertising inventory and demand from advertisers purchasing advertising inventory
Ad fraud	Fraudulently creating clicks, impressions and/or conversions in order to generate digital advertising revenue
Ad network	A network that purchases digital advertising inventory from different websites and, repackages and sells these opportunities to advertisers, directly or through Ad exchanges
Ad tech	Ad tech is a common abbreviation for 'advertising technology'. It refers to intermediary services involved in the automatic buying, selling and serving of some types of display advertisements
Ad tech stack	Ad tech stack is a common abbreviation for 'advertising technology stack'. It refers collectively to the combination of ad tech involved in the whole online advertising supply chain between advertisers and websites/apps. For example, this may include DSPs, SSPs, ad servers and ad exchanges
Ad verification	Services which verify whether advertisements appear on intended websites or apps and/or reach the targeted audience
Advertiser ad server	A server used by advertisers to manage and track all online advertising and campaign information in one location
AFCA	Australian Financial Complaints Authority
Aggregated data	Data created by aggregating the personal or non-personal data of multiple individuals
AHRC	Australian Human Rights Commission
AI	Artificial intelligence – the ability of computer software to perform tasks that are complex enough to simulate a level of capability or understanding usually associated with human intelligence
Algorithm	A sequence of instructions that performs a calculation or other problem-solving operation when applied to defined input data. In this report 'algorithm' generally refers to the algorithms used by major digital platforms to rank and display content on their services
ALRC	Australian Law Reform Commission
AMP	Accelerated Mobile Pages, an open-source publishing format for mobile devices that enables the near-instant loading of content

Term	Description
Android fork	An independently developed operating system that uses the Android operating system as its base, but is not certified by Google
APC	Australian Press Council
APIs	Application programming interfaces – tools for building software that interacts with other software, for example, how apps interact with operating systems
APP entities	Entities that are regulated under the Privacy Act and includes which include any private and public organisations with an annual turnover of more than \$3 million and all data companies
APPs	Australian Privacy Principles as set out in the <i>Privacy Act 1988</i> (Cth)
ASB	Advertising Standards Bureau
B&C Package	The Australian Government's 'Broadcast and Content Reform Package', which made changes to Australian media law in 2017
BSA	<i>Broadcasting Services Act 1992</i> (Cth)
CAANZ	Consumer Affairs Australia and New Zealand
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CDR	Consumer Data Right
CEASA	Commercial Economic Advisory Service of Australia
Chatbots	Machine learning algorithms that interact with humans by simulating conversations through natural language. They are commonly used in client and customer service, but also include conversational intermediaries with cloud services such as Apple's Siri, Microsoft's Cortana, Google Assistant and Amazon's Alexa
Clickwrap agreements	Online agreements that use digital prompts which request users to quickly provide their consent to online terms and policies without requiring them to fully engage with the terms and policies of use
CNIL	Commission nationale de l'informatique et des libertés, the French data protection authority
Coalition for Better Ads	The Coalition for Better Ads is a group of associations and companies involved in online media that aims to improve consumers' experience with online advertising
COMPPS	Coalition of Major Professional & Participation Sports
Content Code	Content Services Code 2008
Content creation	The creation of news and journalistic content based on research, investigation and analysis of current events by journalists, photographers and news agencies, plus a range of copy-editing, editing, rearranging and graphics work
COPPA	Children's Online Privacy Protection Act (US)
Copyright Act	<i>Copyright Act 1968</i> (Cth)
CPA	Cost-per-acquisition – the amount an advertiser pays when an online ad leads to a sale/conversion. This is also referred to as cost-per-conversion
CPC	Cost-per-click – the amount an advertiser pays every time an internet user clicks their online ad
CPM	Cost-per-mille – the amount an advertiser pays each time their online ad is displayed, with the amount measured per one thousand impressions
CPRC	Consumer Policy Research Centre
CPRC Survey	'Consumer data and the digital economy' survey, published 13 May 2018
Crawling	The process by which search engines systematically and continuously search the internet for new pages and add them to their index of known pages so they can be surfaced in search results
Cross-side network effects	Present when the number of users in one type of user group increases (or decreases) the value of the platform for users in another type of user group on the platform
Cross-subsidisation	In the context of multi-sided platforms, cross-subsidisation refers to the practice of setting a relatively low price for a product or service supplied on one side of the platform, in order to increase the revenue earned from a product or service supplied on another side of the platform

Term	Description
DAB	Digital audio broadcasting
Data analytics	Tools used by websites and advertisers to measure and track the performance of advertising, as well as the behaviours of users online
Data practices	The collection, use and disclosure of user data
DBCDE	Department of Broadband, Communications and the Digital Economy. The DBCDE performed functions generally now undertaken by DOCA
DCCA	Danish Competition and Consumer Agency
De-identified data	Data collected from individuals that has been stripped of any personally-identifying information
Deloitte Privacy Index	Deloitte consumer survey titled 'Trust: Is there an app for that?: Deloitte Australian Privacy Index 2019', 14 May 2019
Digital content aggregation platforms	Online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product. Users may be able to customise or filter their aggregation, or to use a search function. Examples include Google News, Apple News, and Flipboard
Digital native	A news outlet that only publishes content online and not in print or via broadcast
DIGI	Digital Industry Group Inc.
Digital platforms	Digital search engines, social media platforms and other digital content aggregation platforms
DIIS	Department of Industry, Innovation and Science
Disinformation	False or inaccurate information that is deliberately created and spread to harm a person, social group, organisation or country
Distribution	The circulation of newspapers by wholesalers and retailers, with newspapers either being sold at individual sales points or via subscription
DMCA	<i>Digital Millennium Copyright Act 1998 (US)</i>
DMP	Data Management Platform – a platform used by websites and advertisers to store, manage and analyse data collected which can then be used in the selling and buying of advertising
DOCA	Department of Communications and Arts
DP Privacy Code	An enforceable code of practice to be developed by the OAIC in consultation with industry stakeholders to regulate digital platforms' data practices (see recommendation 18).
DPC Ireland	Data Protection Commission of Ireland
DSP	Demand Side Platform – a platform used by advertisers to optimise and automate the purchase of online advertising
Dynamic competition	Competition resulting from the potential for development of innovative products and services that allow a competitor to enter and/or expand in a market
EC	European Commission
Echo chamber	Repeated exposure to perspectives that affirm a person's own beliefs, either through algorithms or public discourse
EPC	European Publishers Council
EU	European Union
Facebook Ad Manager	Facebook's self-service interface to purchase ads that can be placed on Facebook, Instagram, Messenger and third party websites and applications that sell advertising inventory through Facebook Audience Network
Facebook Audience Network	A service where websites and applications make advertising inventory available via Facebook. Advertisers can purchase this ad inventory through Facebook Ad Manager
FCF	First Click Free – a policy Google discontinued in October 2017 which required news publishers to provide a certain number of subscription articles free of charge to consumers
Filter bubble	A situation where users of digital platforms are repeatedly exposed to the same perspectives, as a result of algorithms curating presenting content users might prefer to see
Finkelstein Review	'Report of the Independent Inquiry into Media and Media Regulation' conducted by the Honourable Ray Finkelstein QC, published 28 February 2012

Term	Description
Flexible Sampling	Google's policy that allows publishers to choose the number of free news articles provided to users of Google Search
Freemium	A model where both free and paid content is provided by a supplier. In the case of news publishers, news publishers provide a certain number of news articles for free before requiring consumers to pay for additional content beyond the provided number of news articles
FTC	Federal Trade Commission
FTC Act	Federal Trade Commission Act
GDPR	General Data Protection Regulation, established by the European Union
Google Ad Manager	The Google platform which houses a number (but not all) of the website-facing Google products used for the selling of advertising inventory via the ad tech supply chain, though each product can be used separately.
Google AdMob	Google's service offered to mobile application developers to help monetise their applications by allowing Google to sell advertising inventory on their applications on their behalf
Google Ads	Google's service offered to advertisers which allows them to create and purchase both search and display advertising. Advertisements can appear on Google owned and operated sites and third party websites that sell inventory through Google AdSense or AdMob
Google AdSense	Google's service offered to websites which involves websites supplying advertising inventory to the Google Display Network or Google Search Network. Google sells advertising inventory on those websites on their behalf and shares the revenue generated with the website
Google Marketing Platform	The Google platform which houses a number (but not all) of Google's advertiser-facing products used for the purchasing and measurement of advertising inventory via the ad tech supply chain, though each product can be used separately.
Hashing	A process in which identifying details of personal information are removed by assigning a unique identifier to an individual using a hashing encryption process
IAB	Interactive Advertising Bureau
ICCPR	International Covenant on Civil and Political Rights
ICN	International Competition Network
ICPEN	International Consumer Protection and Enforcement Network
Information disorder	The inability of consumers to rely on news and journalistic content as a result of disinformation, malinformation and misinformation
Instant Articles	A publishing format offered by Facebook that is designed to allow pages to load faster on the Facebook app. It is only accessible on mobile devices
Internet Code	Internet Industry Codes of Practice 2005
IoT	Internet of Things – the use of internet-connected technology in physical devices that have not traditionally featured such technology, such as cars, household appliances and speakers. This allows these devices to collect, share and make use of data
IP address	Internet Protocol address, a numeric address assigned to each device connected to a local network or the internet via the Internet Protocol
IPEC	UK Intellectual Property Enterprise Court
ISP	Internet Service Provider
ITAA	Internet of Things Alliance Australia
Machine learning	The ability of some computer software to autonomously improve knowledge and processes through the repetition of tasks, without the manual entry of new information or instructions
Malinformation	Accurate information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to the operation of democratic processes.
Manufacturing	Refers broadly to the physical printing process
MEAA	Media, Entertainment and Arts Alliance
MRC	Media Rating Council
Misinformation	False or inaccurate information that is not created with the intention of causing harm.

Term	Description
Multi-sided platform	A platform which is characterised by the following pair of properties: <ul style="list-style-type: none"> ■ two or more distinct types of users or parties ('economic agents') interact on the platform, and ■ an increase in usage by one type of user or party increases the value of the platform to users or parties of another type.
National Defamation Law	The national uniform defamation legislation enacted by each of the States and Territories in 2005 to 2006, supplemented by the common law
Natural language processing/natural language generation	Technology that allows computer software to collect, analyse, interpret and produce 'natural' language in the form of text and speech ¹
NBN	National Broadband Network
NDB Scheme	Notifiable Data Breaches Scheme in Part IIIIC of the <i>Privacy Act</i>
Network effects	The effect whereby the more users there are on a platform, the more valuable that platform tends to be for their users. Precise definitions are provided for the two types of network effects that are of concern for this report (cross-side network effects and same-side network effects)
OAIC	Office of the Australian Information Commissioner
OAIC survey	'Australian Community Attitudes to Privacy Survey 2017' conducted by the OAIC and published in May 2017
Online Infringement Bill	<i>Copyright Amendment (Online Infringement) Bill 2018</i> (Cth)
Paywall	A feature of a website where users must subscribe and/or pay to access content on the website
Personal information	Defined within the <i>Privacy Act</i> as <ul style="list-style-type: none"> ■ 'Information or an opinion about an identified individual, or an individual who is reasonably identifiable: ■ whether the information or opinion is true or not; and ■ whether the information or opinion is recorded in a material form or not.'
Preliminary Report	The Digital Platform Inquiry Preliminary Report dated December 2018
Price discrimination	Identical or very similar goods are priced differently based on the supplier's belief regarding a consumer's willingness to pay for the goods
Privacy Act	<i>Privacy Act 1988</i> (Cth)
Programmatic advertising	Automated buying, selling and serving of advertising, which occurs in real time and allows advertisers, websites and intermediaries to utilise various data sources for targeting users
Pseudonymous data	Data collected from individuals where the personally-identifying information has been replaced with artificial identifiers
Public broadcaster	A broadcaster which is established under federal legislation and receives the majority of its funding from public sources. In Australia and many other countries, public broadcasters are not state broadcasters and are independent of government
Publisher ad servers	A server used by websites to organise and manage advertising inventory on their website. It determines what advertisements will be shown, serves them, and collects information on their performance
PwC Report	A Price Waterhouse Coopers Report commissioned the by ACMA in 2014 on 'The cost of code interventions on commercial broadcasters'
RA	<i>Radiocommunications Act 1992</i> (Cth)
Referral	Where a user is directed from one website to another via a hyperlink
Rightsholder	A holder of copyright under copyright law
Same-side network effects	Present when the number of users in one type of user group increases (or decreases) the value of the platform for users in that same type of user group
SBS	Special Broadcasting Services Corporation
SCA	Southern Cross Austereo
SEO	Search Engine Optimisation

Term	Description
SMEs	Small and medium-sized enterprises
snippet	The small amount of text, an image, or a short video that is provided in addition to a hyperlink generated in response to a search query. The purpose of a snippet is to provide context to the hyperlink and an indication of the contents of the relevant website to the user
SSP	Supply side platform – a platform used by websites to optimise and automate the sale of online advertising inventory
Subscribe with Google	A service that allows users to buy subscriptions, using their Google account, on participating news websites. This allows users to ‘Sign in with Google’ to access the publisher’s products, with the payments processed through Google
TCP Code	Telecommunications Consumer Protections Code
Telecommunications Act	<i>Telecommunications Act 1997 (Cth)</i>
Third party data	Information from an entity that does not have a direct relationship with the person the data has been collected about. Common types of third party data that may be purchased by websites or advertisers include purchasing history, geographic data and sociodemographic data
TIO	Telecommunications Industry Ombudsman
Top Stories	A specialist search result offered by Google that displays sets of related results horizontally with images and includes articles, live blogs and videos on breaking news stories. Top Stories can contain news articles from different publishers, or from one news publisher
Trading desk	An entity that specialises in the purchasing of digital advertising. Trading desks are often in-house departments found in the major advertising agencies
TSC	Technical Steering Committee
UCTs	Unfair contract terms
UDHR	Universal Declaration of Human Rights
UN Special Rapporteur	UN Special Rapporteur for the Right to Privacy
Universal Search	A form of specialised search offered by Google that utilises a specialised content-specific algorithm, designed to provide relevant results for a particular content category, such as images, videos, maps and news. This algorithm considers two main criteria in displaying and ranking specialised search results – user intent and the quality and relevance of potential results
Vertical search	Search engines that specialise in different types of search. For example, Expedia provides vertical search services for travel
VLRC	Victorian Law Reform Commission
VPN	Virtual private network – services which create a virtual encrypted tunnel between users and a remote server operated by the VPN service