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& 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.

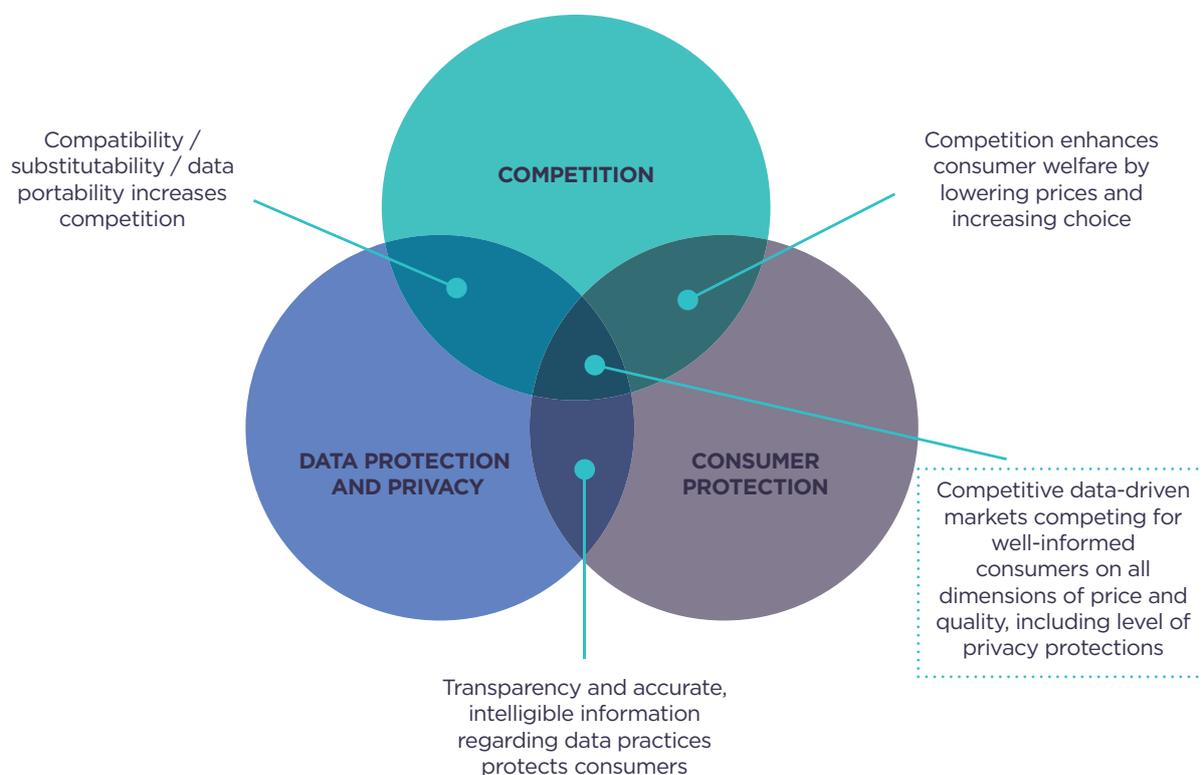
As required by the Terms of Reference, the ACCC has had particular regard to the impact of digital platforms on news and journalism, including their effects on the sustainability of the commercial news sector and their influence on the consumption, choice and quality of news in Australia.

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

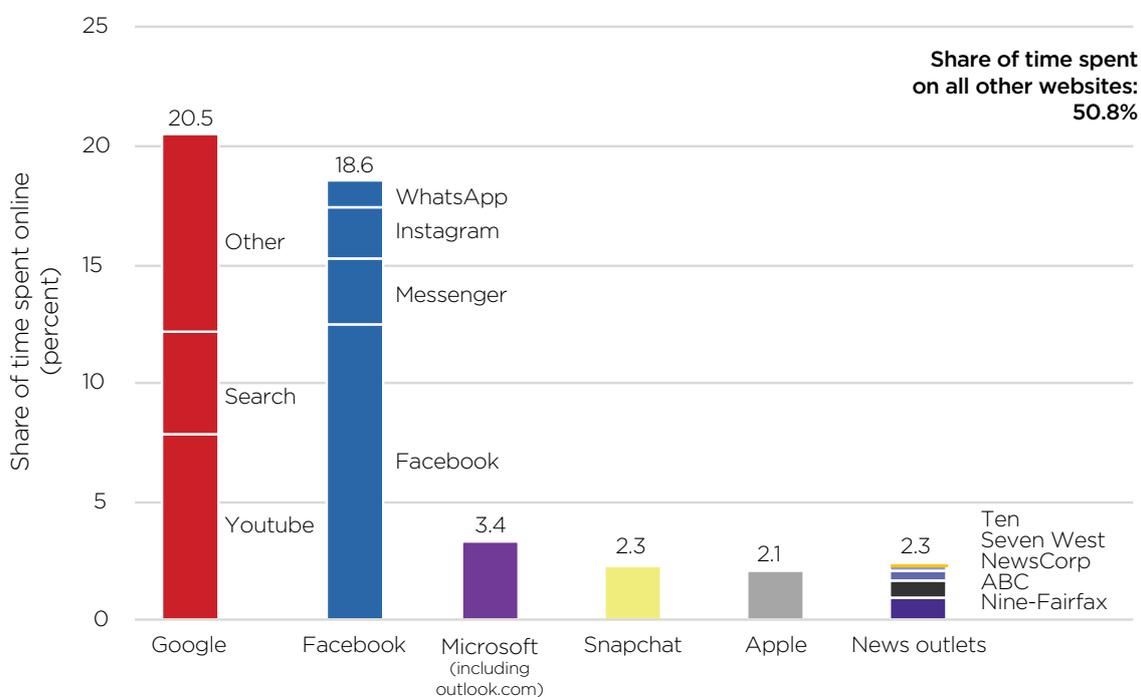
Chapter 1 of the Report documents the growth of the digital platforms. It finds that Australian consumers are frequent users of digital platforms and, in particular, the platforms operated by Google and Facebook. The use and significance of these platforms has grown substantially over the past ten years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

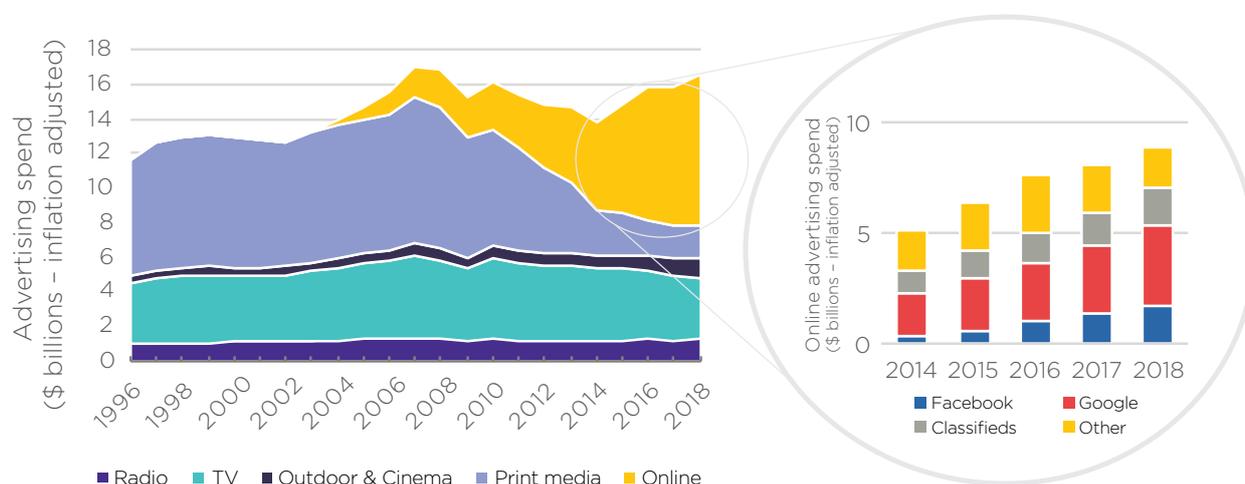
During this same period, Australian traditional print media (now print/online media) faced increased competition from international sources and other media providers, both commercial and publicly funded.

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.

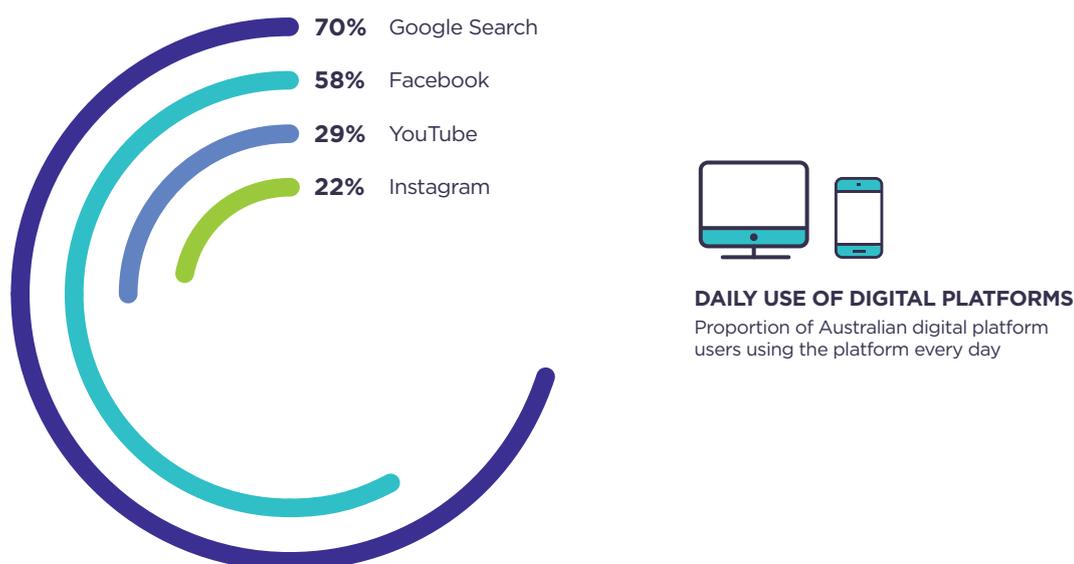
21 Facebook, [Facebook Unveils Facebook Ads](#), accessed 22 October 2018; Facebook, [Facebook Q4 2018 Results](#), accessed 24 April 2019.

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.

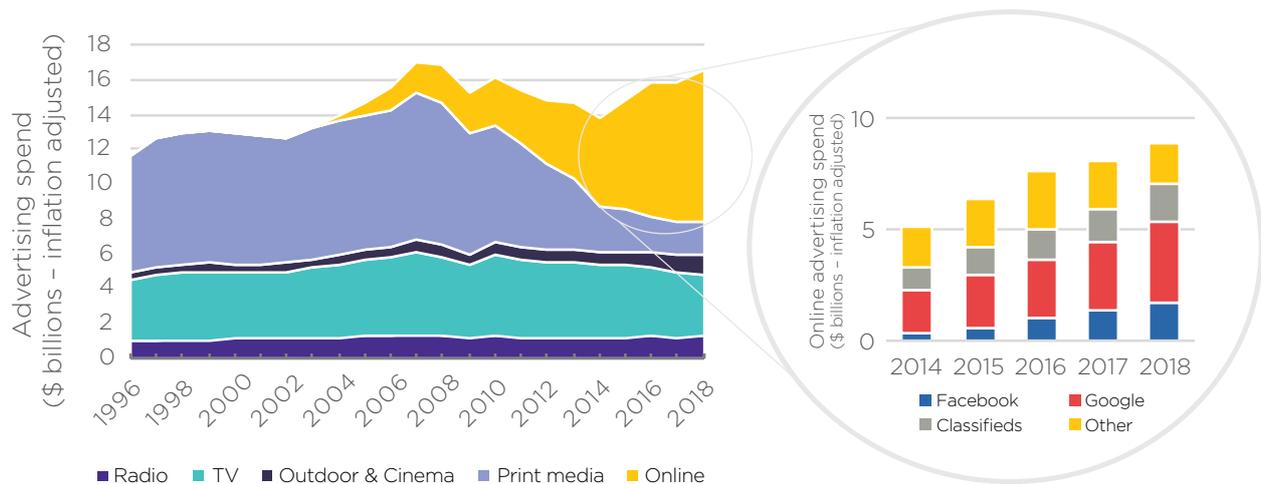
24 Australian Communications and Media Authority, [Communications Report 2017-18](#), 9 January 2019, p. 8.

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 – 2018²⁷, 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.

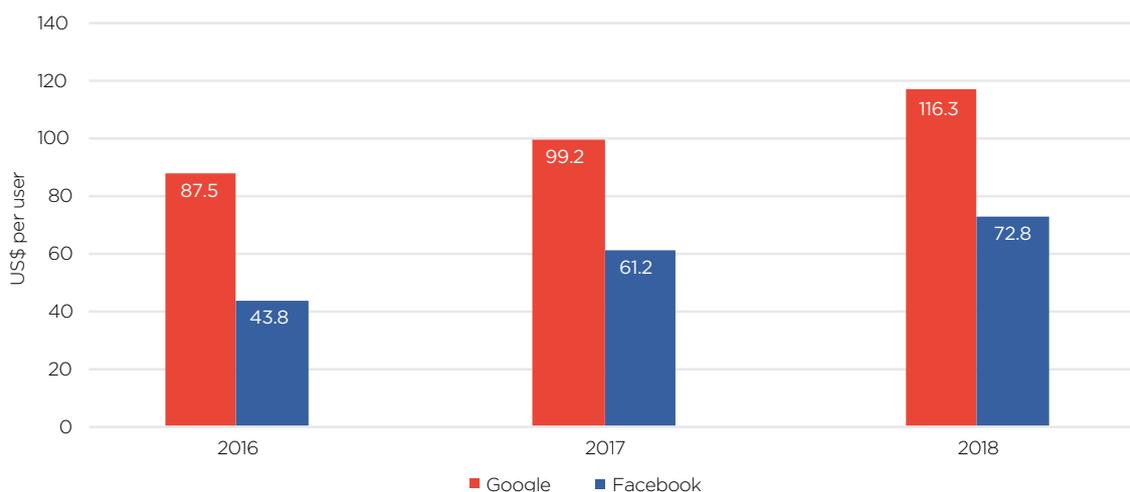
Value that consumers bring to platforms

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.

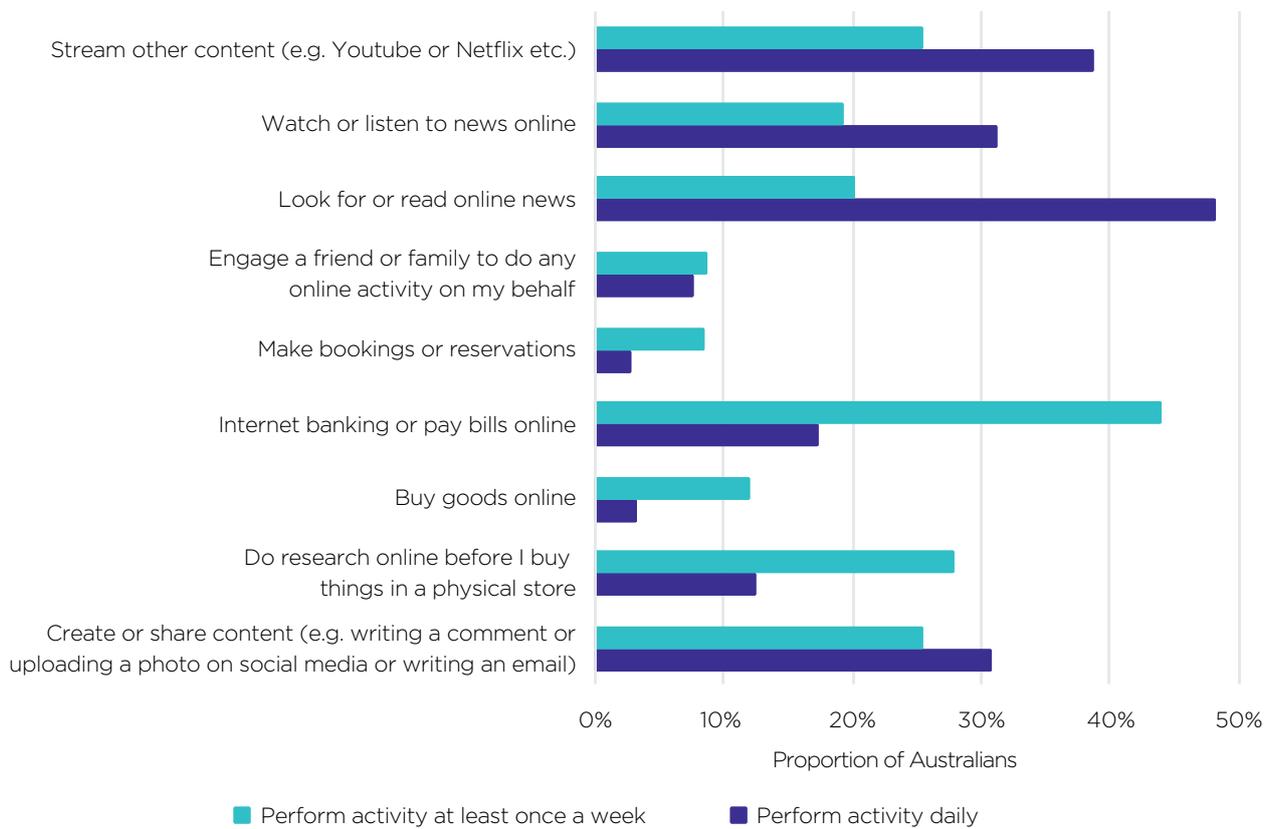
While the growth of online news has provided an *additional* source of news for many Australians, it has become the *primary* source of news for a large proportion of the population. The 2019 Digital News Report found that around 43 per cent of Australians use online sources as their primary source of 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

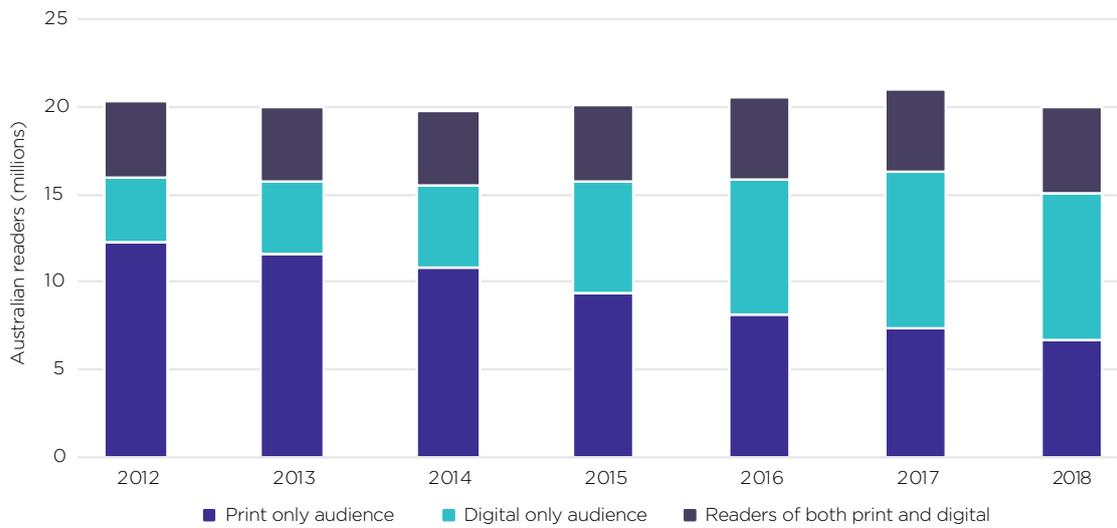


Source: Roy Morgan Research, Consumer Views and Behaviours on Digital Platforms, November 2018, p. 14.

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

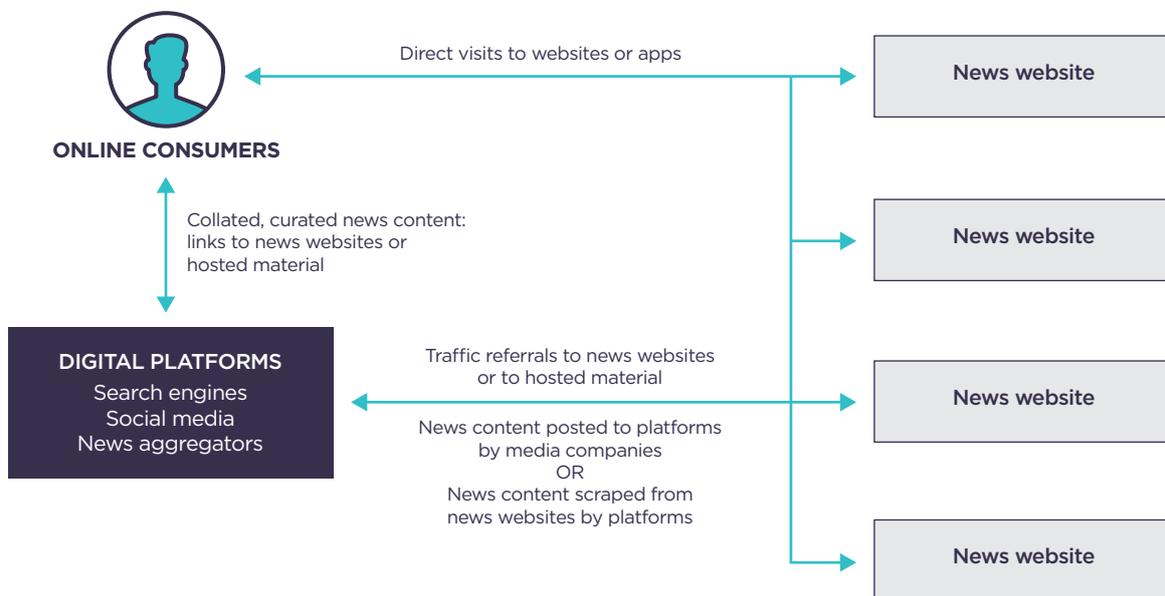


Source: Roy Morgan Single Source Australia: 2012 – 2018.

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

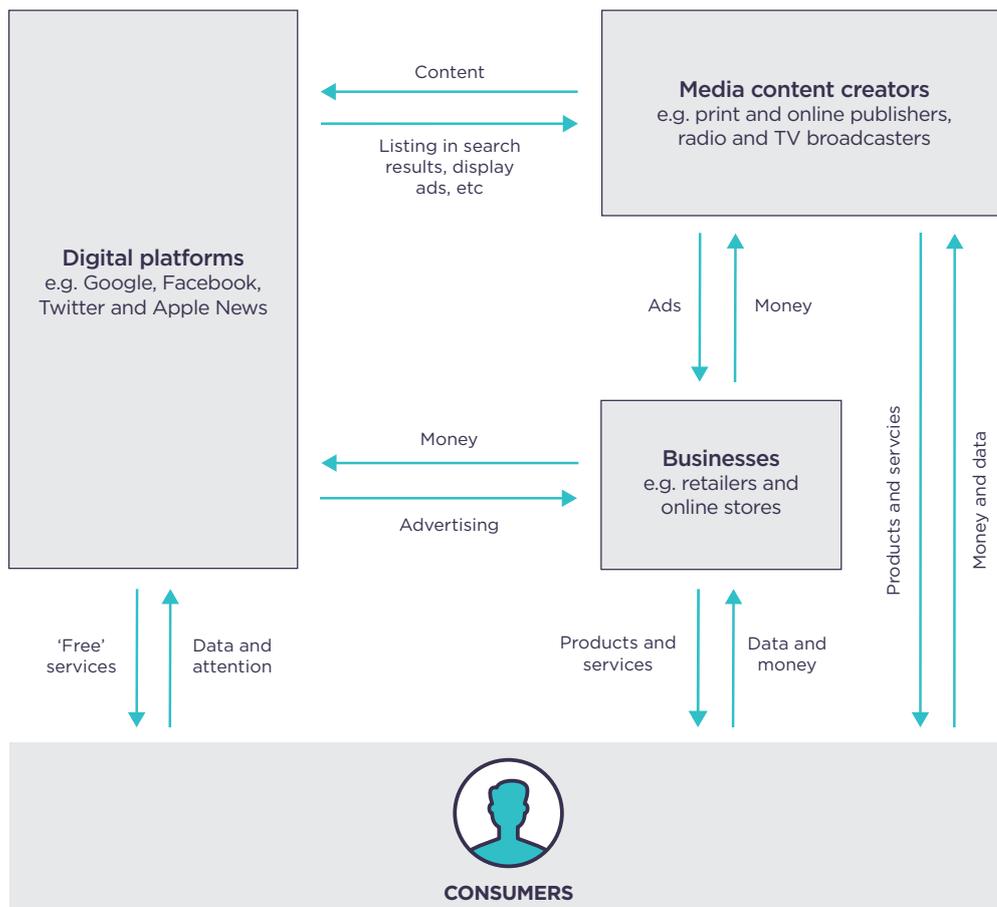
2.2.1 Digital platform business model

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 turns 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.

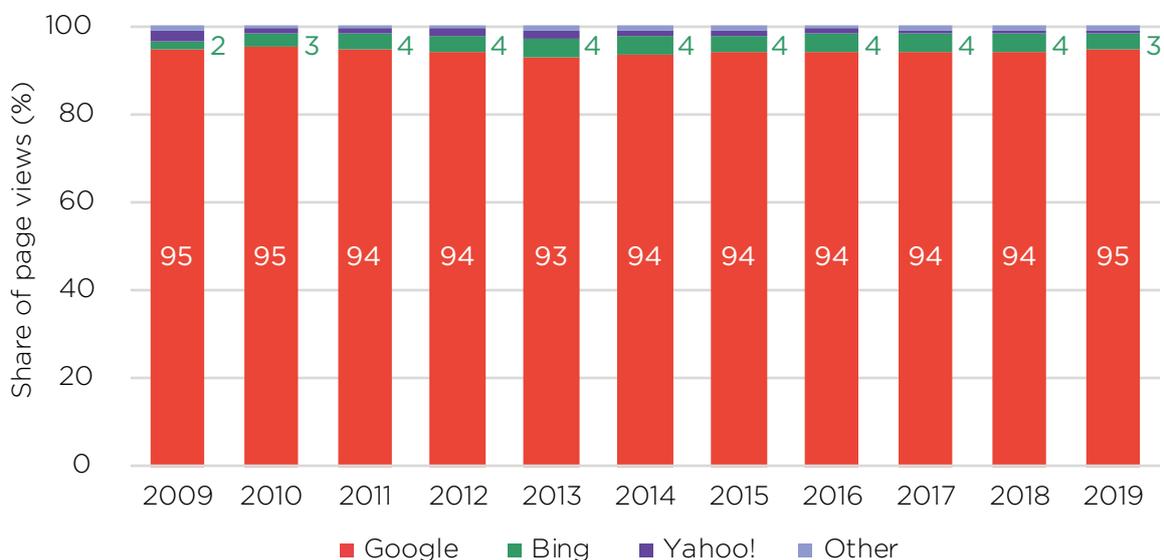
2.3.2 Google’s market share and dynamic competition

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.

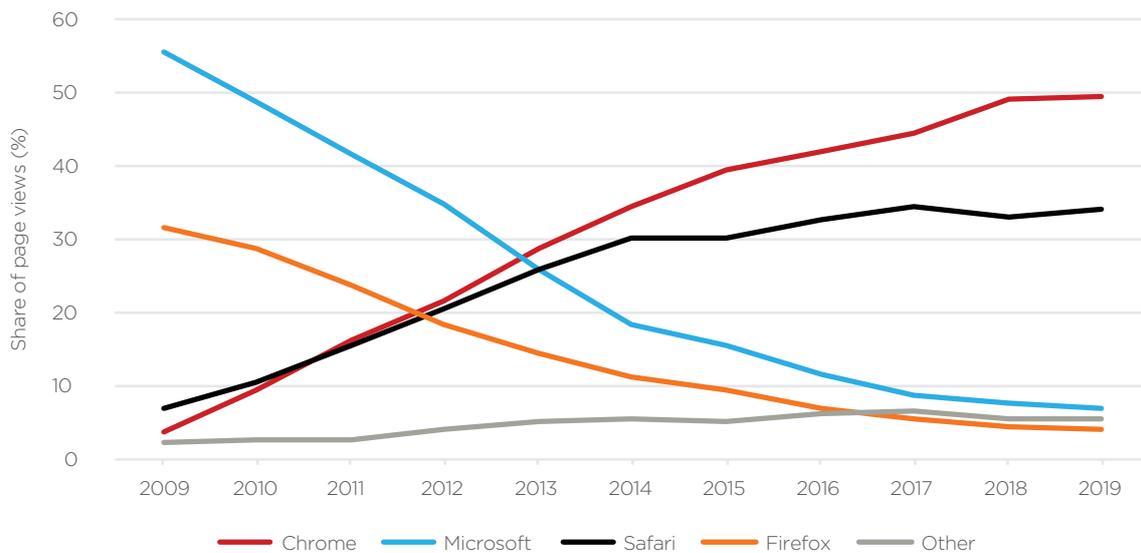
99 Statcounter, [Browser market share](#), accessed 1 April 2019.

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.

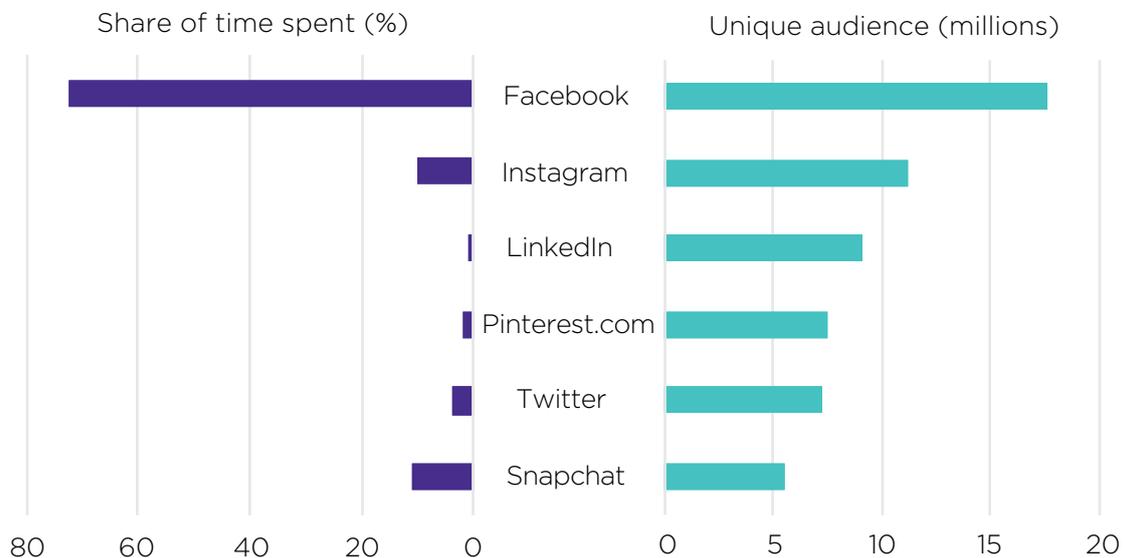
The ACCC considers that suppliers of social media services include the Facebook platform, Instagram (owned by Facebook), Snapchat and Twitter.

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.

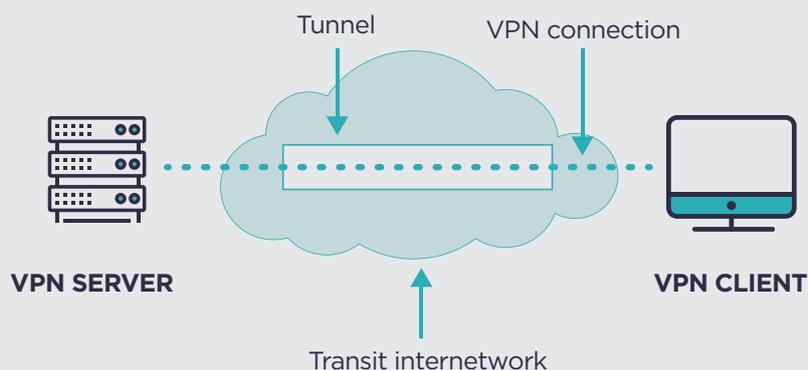
It also allows users to hide their location and internet activities from their internet service provider and to bypass geographic restrictions on websites.

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](#), *Endgaget*, 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.

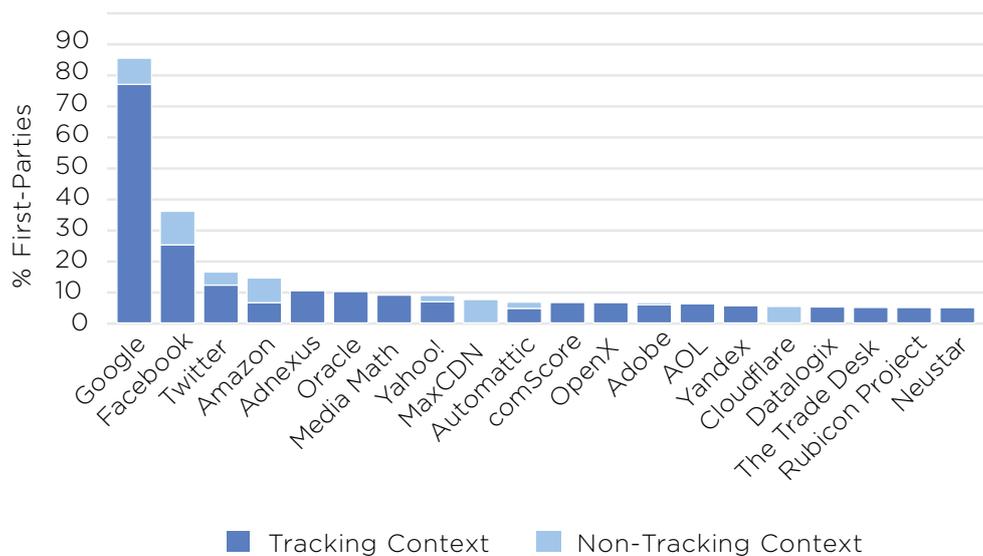
As depicted in figure 2.6, more than 70 per cent of websites had a Google tracker, and over 20 per cent of websites had a Facebook tracker. In addition, only 123 of these 81 000 trackers were present on more than one percent of websites.

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

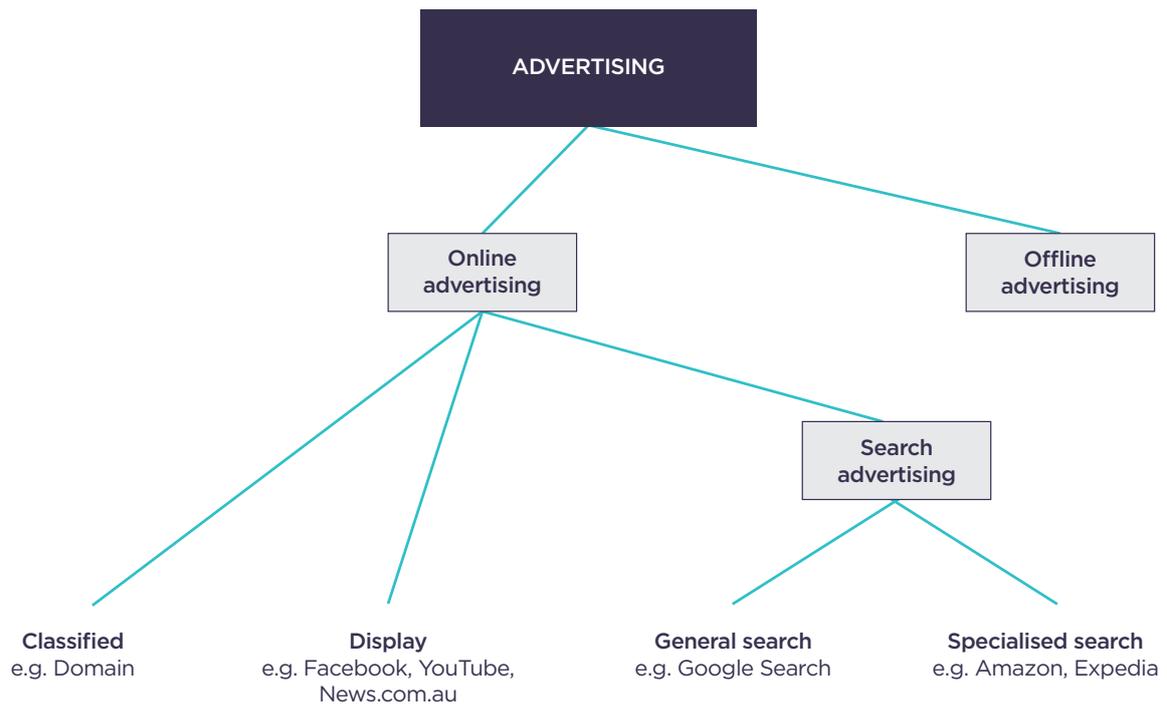
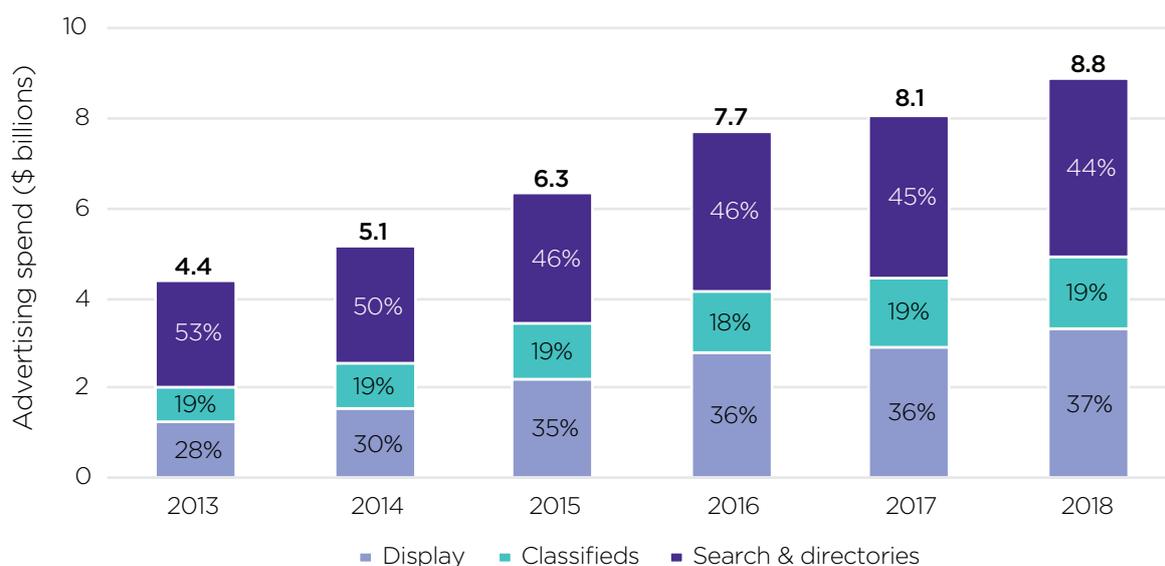


Figure 2.8 shows the levels of expenditure on the various types of online advertising in Australia.¹⁹⁶ While search and directories advertising (noting that advertising on directories can be expected to be a relatively small component of this type of advertising) continues to increase in value, it has 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.

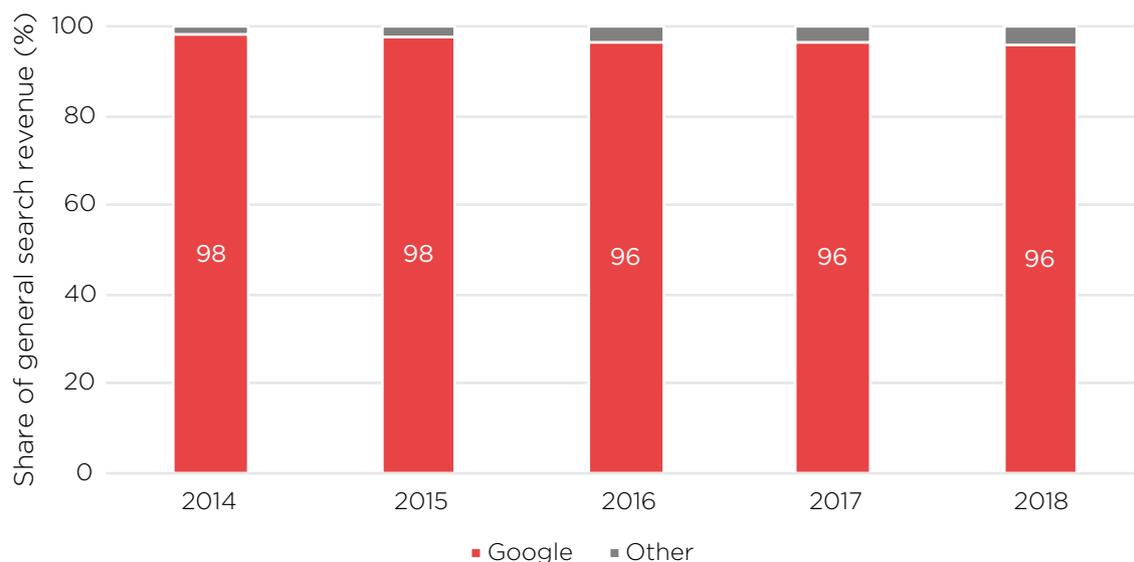
212 Information provided to the ACCC.

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.

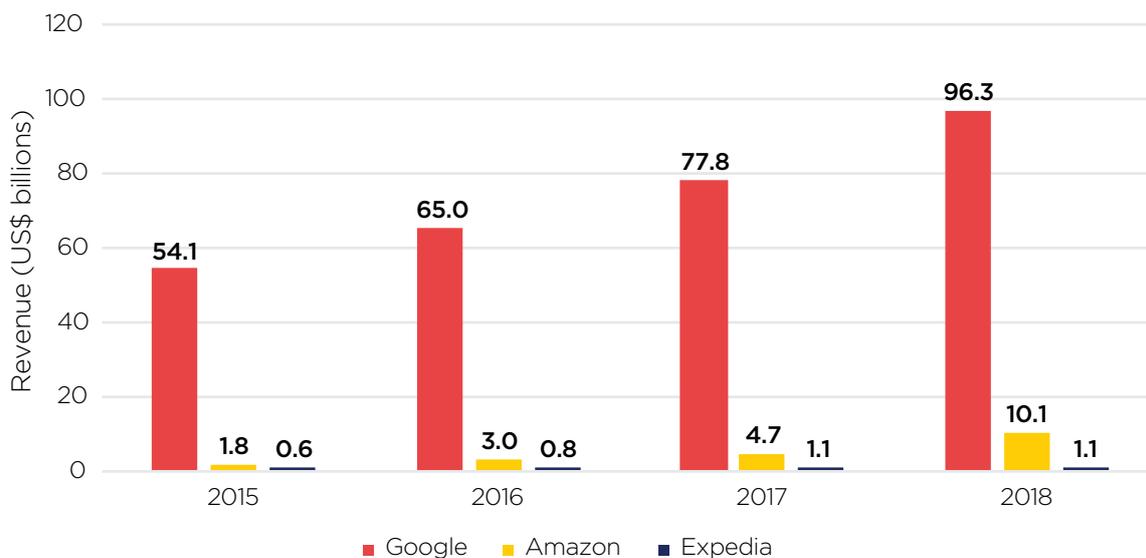
219 Google, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 36.

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.

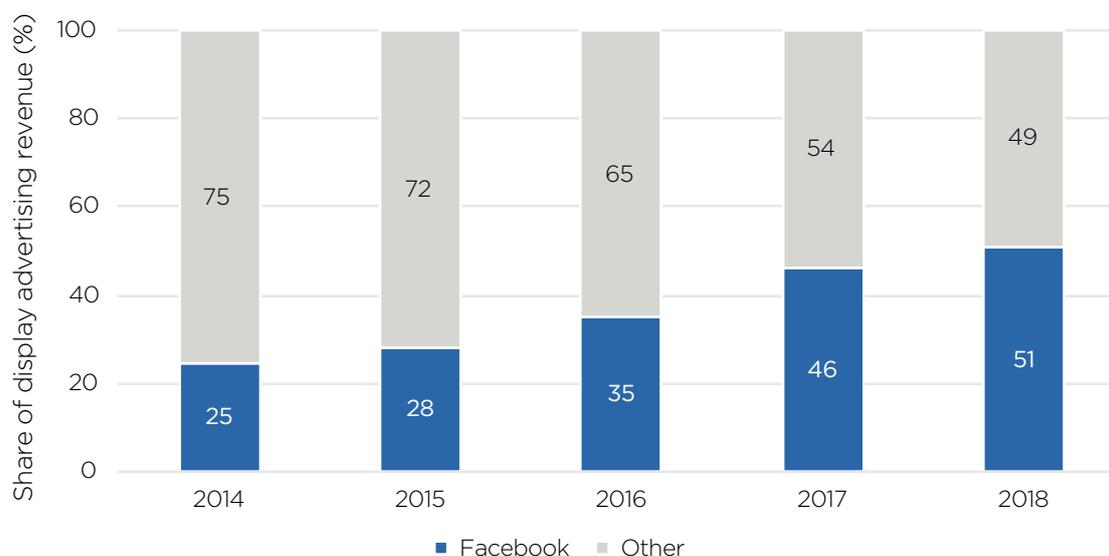
²²³ See ACCC, [Merger Guidelines](#), November 2008, p. 44, for the relevance of such bypass opportunities for the assessment of market power.

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

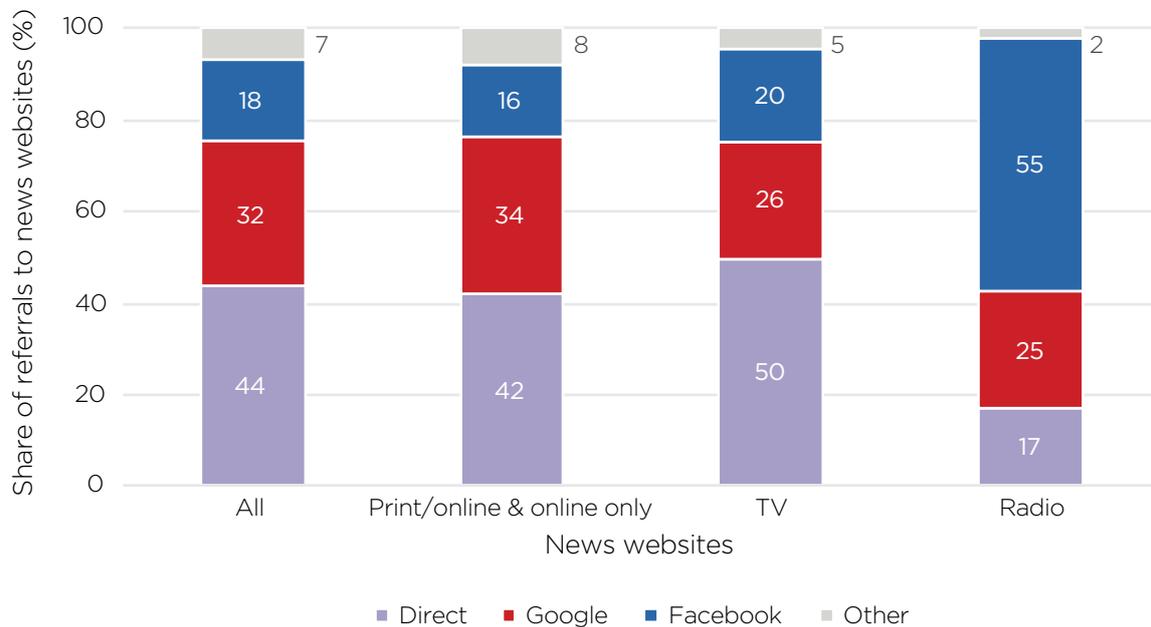
In order to assess whether the digital platforms have substantial bargaining power in dealings with creators of journalistic content, it is necessary to consider the quantity of referrals that news media businesses obtain from Google and Facebook (and the consequences of losing these referrals), as well 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.

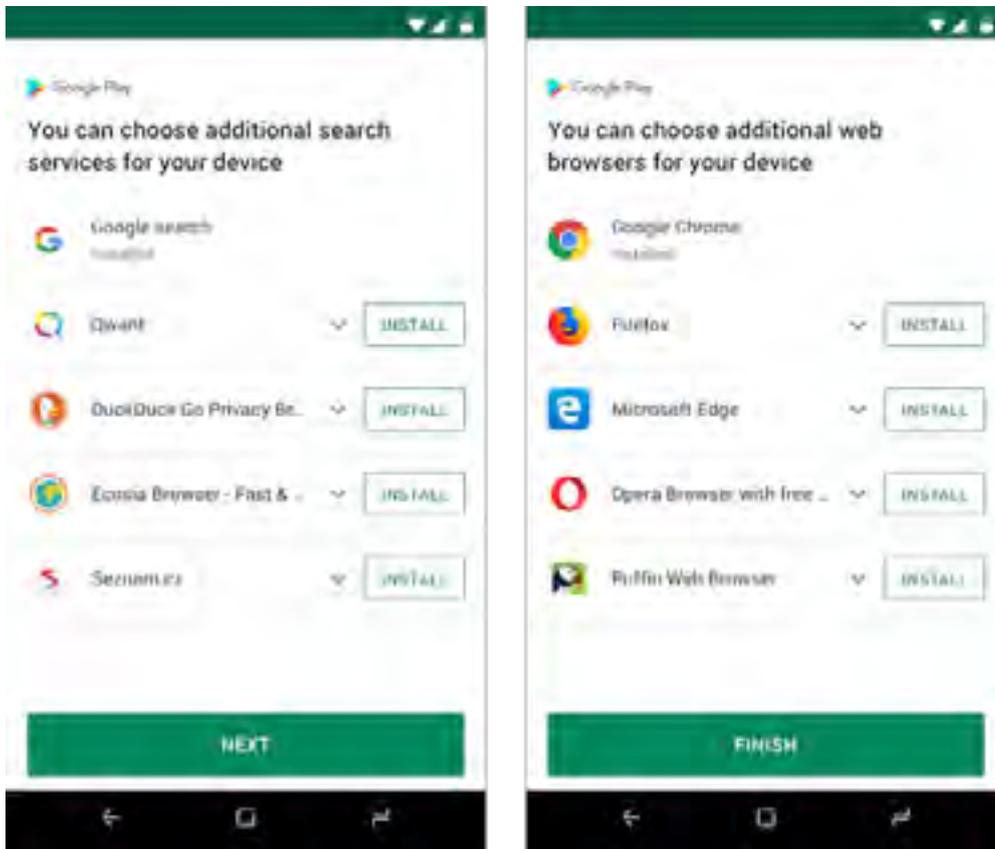
270 DuckDuckGo, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), March 2019, p. 2.

271 Microsoft, [Submission to the ACCC Digital Platforms Inquiry Preliminary Report](#), February 2019, p. 3.

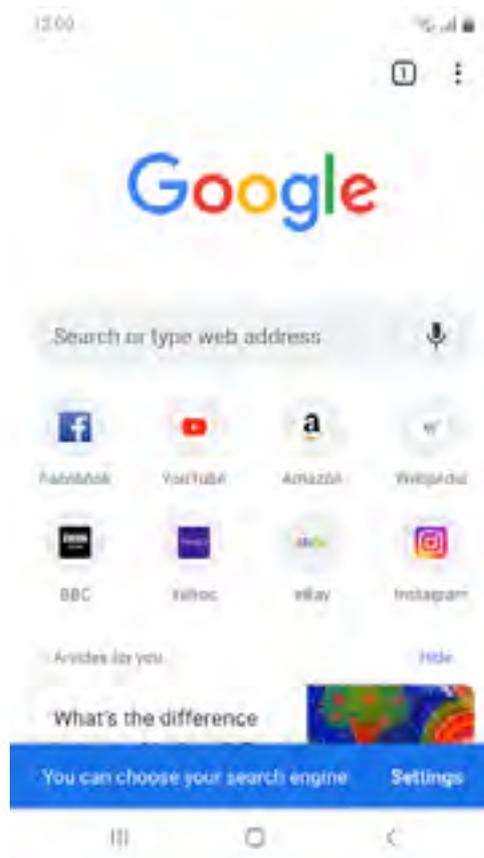
272 K Walker, [Supporting choice and competition in Europe](#), *The Keyword (Google Blog)*, 19 March 2019, accessed 6 May 2019.

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.



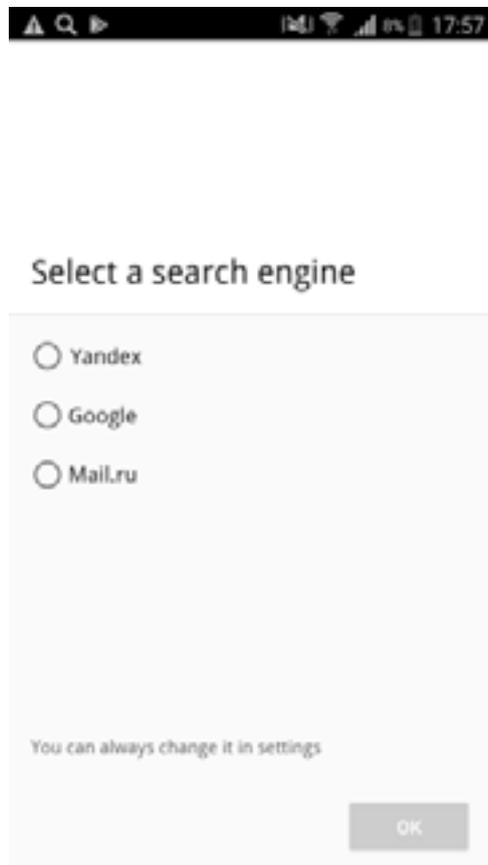
Users can tap to install as many apps as they want. If an additional search app or browser is installed, the user will be shown an additional screen with instructions on how to set up the new app (e.g., placing app icons and widgets or setting defaults). Where a user downloads a search app from the screen, 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

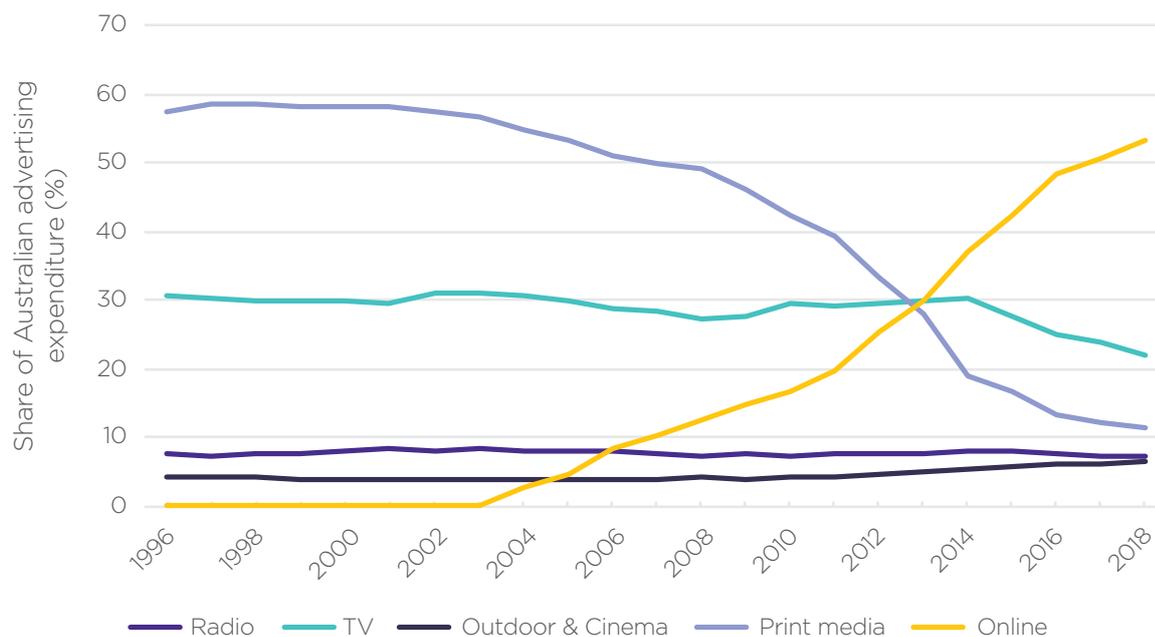
- Online advertising makes up an increasing portion of the total advertising spend in Australia.
- Google and Facebook are the channels by which most online advertising is purchased and sold in Australia.
- Google and Facebook receive the majority of online advertising revenue in Australia; and have 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.

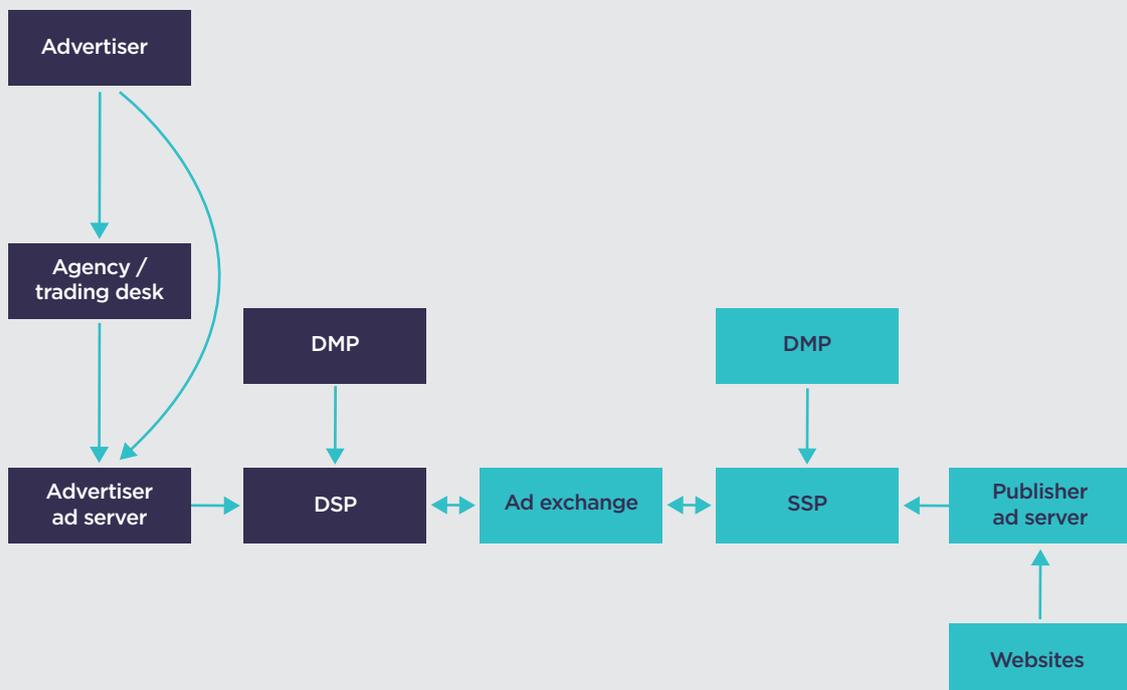
Figure 3.3: Interaction between users and websites



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

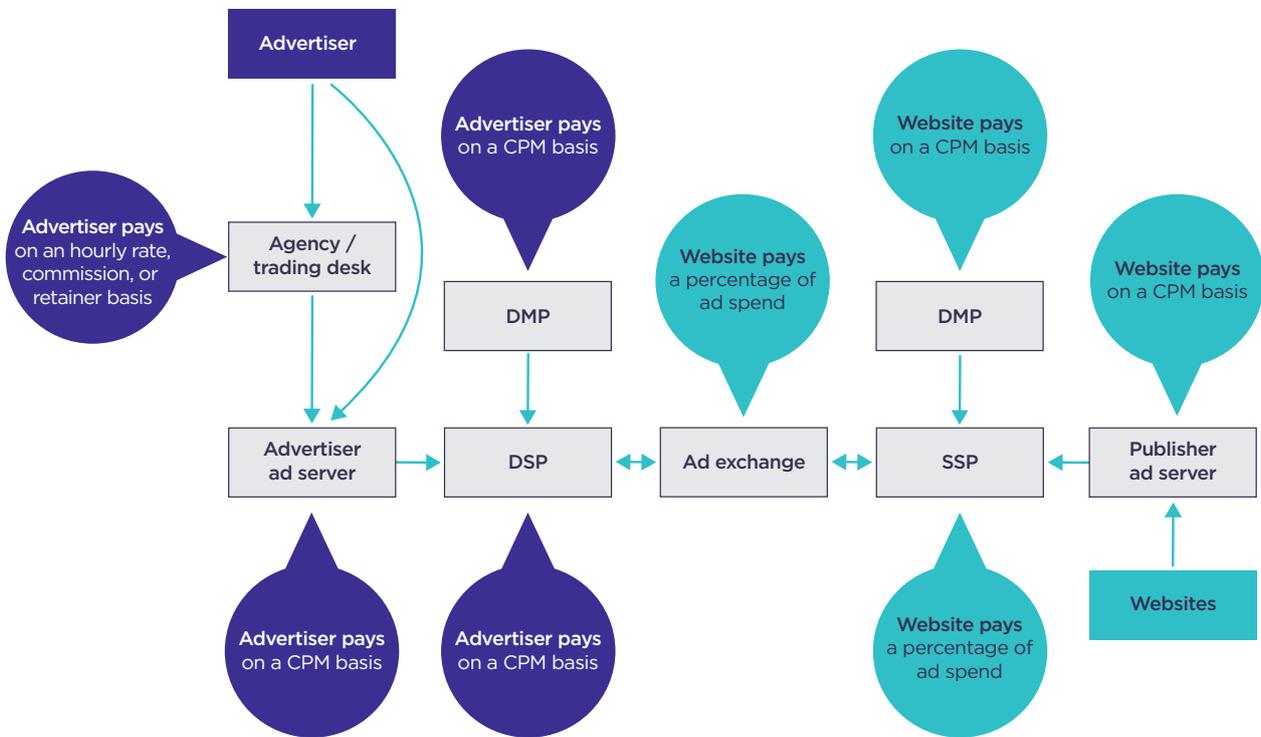
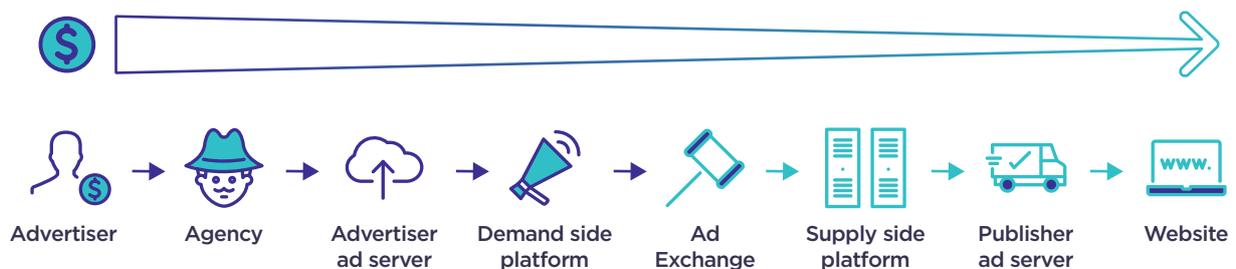


Figure 3.6: Ad spend taken by the ad tech supply chain



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

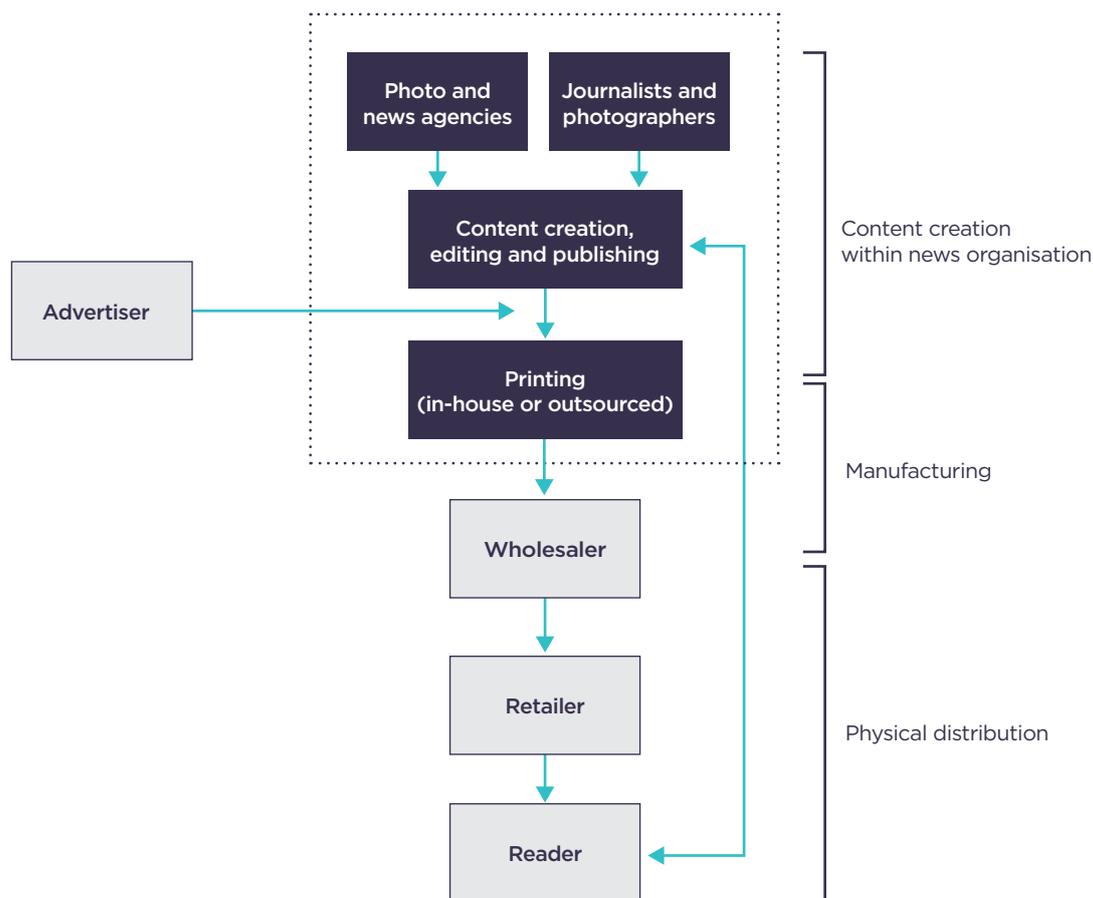
The functions in a traditional newspaper value chain are depicted in figure 4.1.

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

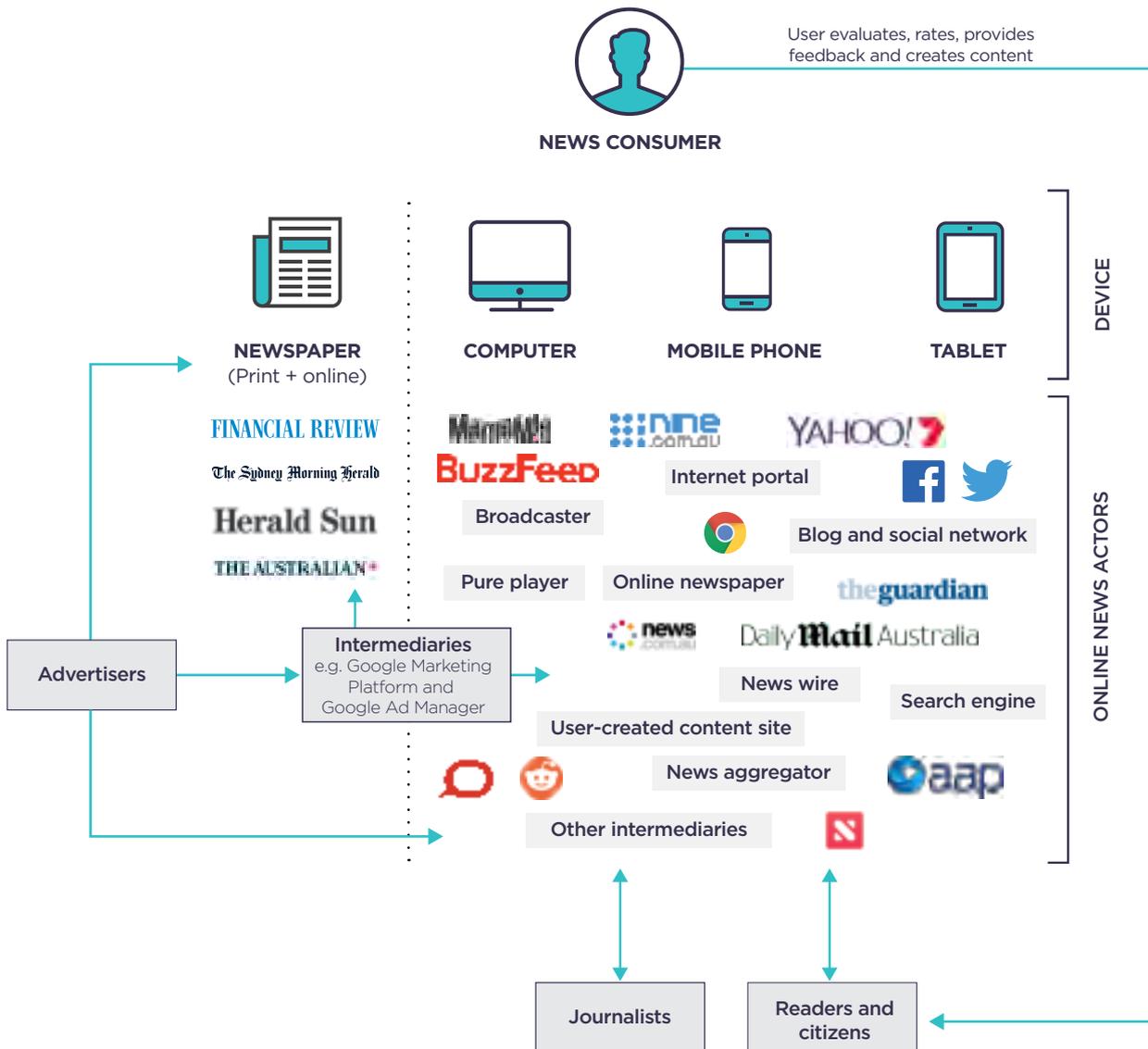
A stylised illustration of the online news value network is shown at figure 4.2.

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:

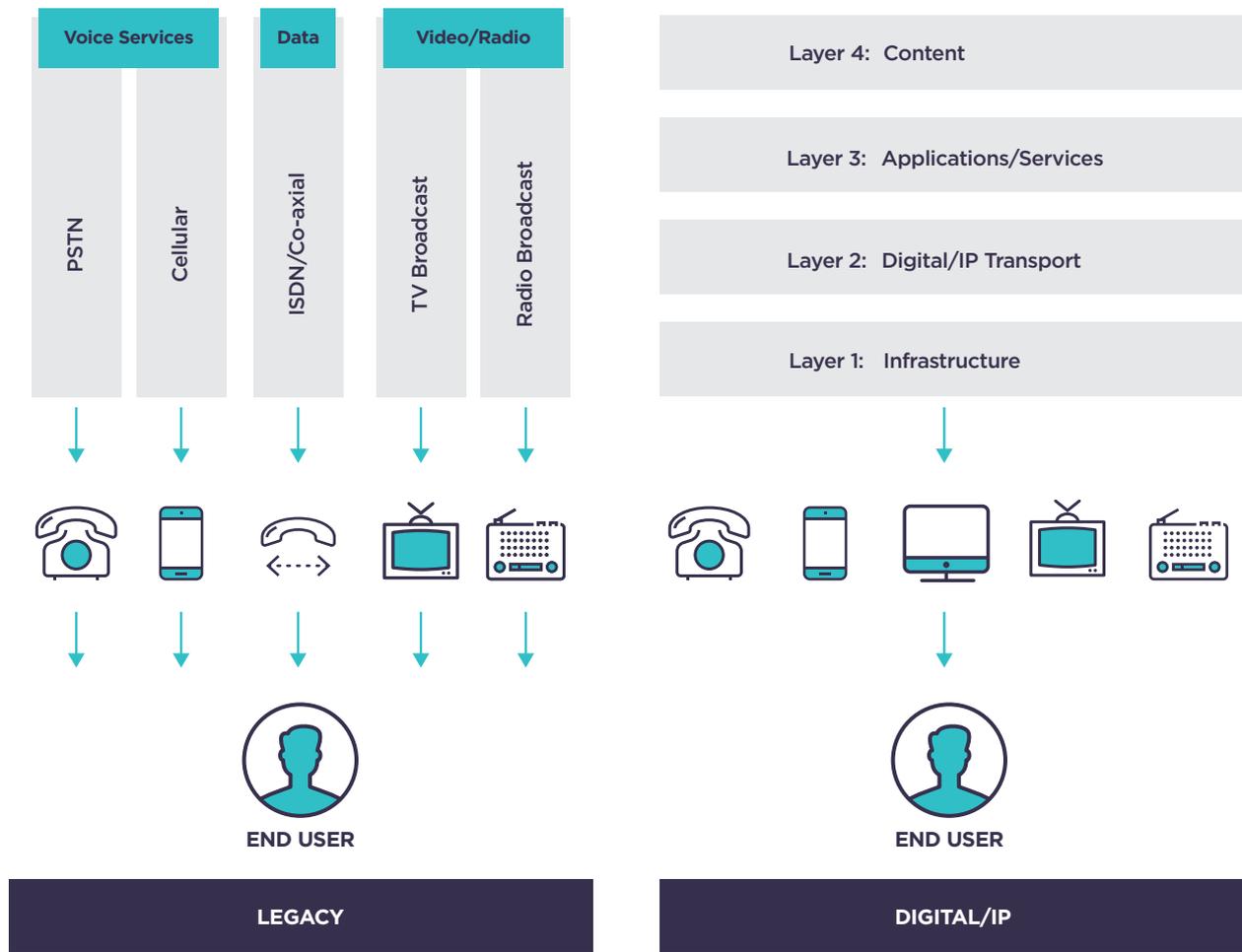
- **Print:** Digital platforms are not governed by the self-regulatory regime supervised by the Australian Press Council (APC), which only governs publishers who have opted-in to become APC members and accordingly does not apply to all news publishers.
- **Broadcasting:** Digital platforms are not governed 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 Backgrounder: 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.