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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.

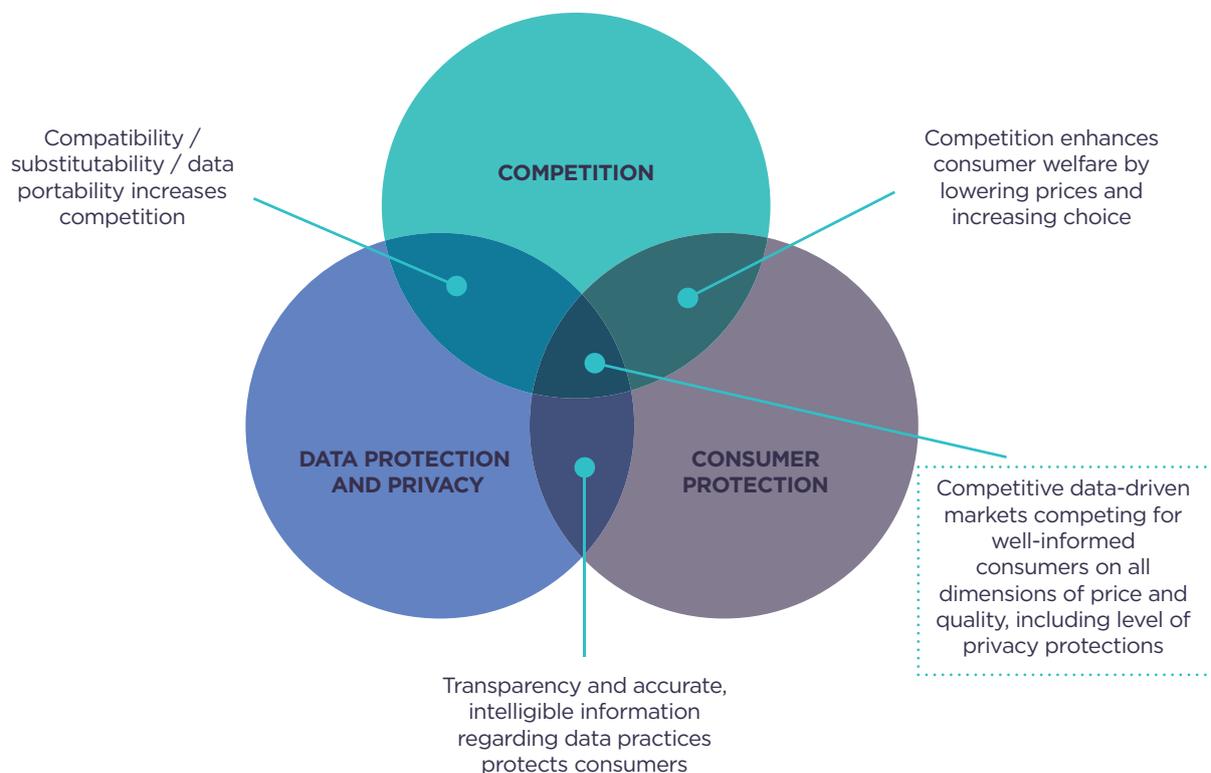
As required by the Terms of Reference, the ACCC has had particular regard to the impact of digital platforms on news and journalism, including their effects on the sustainability of the commercial news sector and their influence on the consumption, choice and quality of news in Australia.

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

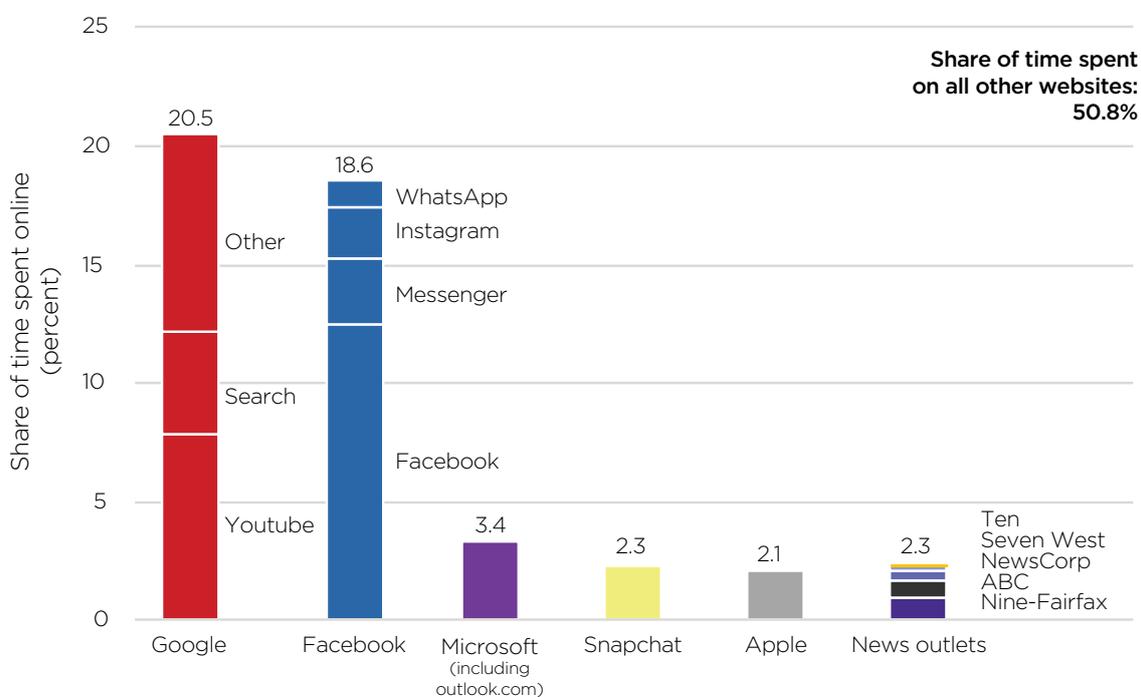
Chapter 1 of the Report documents the growth of the digital platforms. It finds that Australian consumers are frequent users of digital platforms and, in particular, the platforms operated by Google and Facebook. The use and significance of these platforms has grown substantially over the past ten years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

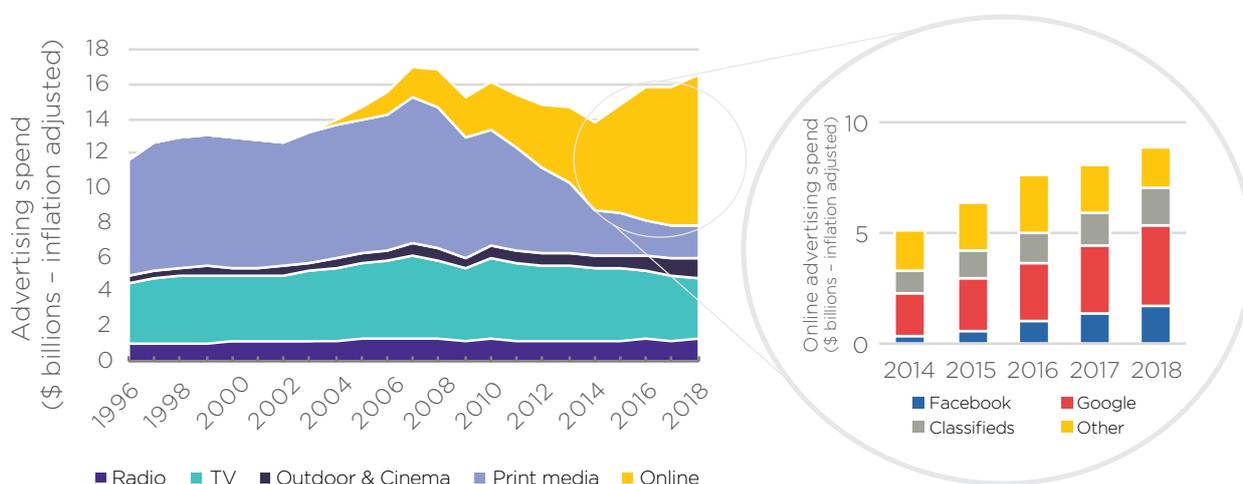
During this same period, Australian traditional print media (now print/online media) faced increased competition from international sources and other media providers, both commercial and publicly funded.

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.