Submission by Free TV Australia

Digital Platforms Inquiry
Australian Competition & Consumer Commission

April 2018

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1 Executive Summary

This ACCC inquiry is a watershed moment for the Australian media sector.

Google and Facebook have become virtual monopolies in search and social media and have become seemingly essential to our personal lives and in business. However, despite the influence and power they enjoy, these platforms have achieved this position with very little oversight from Government or regulators.

The rise of Facebook and Google has had a significant and irreversible effect on traditional media companies. The diversion of advertising revenue to these dominant digital titans away from newspapers, radio and television directly impacts the delivery of local, trusted, fair, accurate and impartial news content that is vital to our democracy. It also impacts the local entertainment, sport and drama programs that contribute so much to our sense of national identity.

Digital advertising, driven by Google and Facebook, has captured more than half of all Australian advertising revenue in a little over a decade. This in itself is not a cause for regulatory action. However, Google and Facebook have in part been able to achieve this outcome based on unsubstantiated and exaggerated claims around reach, viewability and effectiveness. They write their own standards and force advertisers to use their vertically integrated products to get access to their platforms.

Free TV argues that this amounts to a distortion in the advertising market. The ACCC must intervene to ensure that the competition for advertising revenue is occurring in a fair and effective manner.

The top priority for this inquiry must be to address the absence of independently verifiable metrics to provide reliable information on the true reach and viewability of advertising on the Facebook and Google platforms. The ACCC should require Facebook and Google to implement third-party Software Development Kits (SDK) and transparent measurement of web traffic to allow robust and reliable measurement and verification. It is not acceptable for these dominant platforms to set and supposedly verify their own measurement tools.

Facebook and Google have also been able to take advantage of their almost completely unregulated status in competing with commercial television broadcasters, who remain the most heavily regulated media platform in Australia. From local content quotas, captioning obligations, advertising content restrictions, Code of Practice requirements, licence conditions and ownership restrictions, we are playing on a very unbalanced field. In many cases the regulations applicable to commercial television were conceived in the 1980’s, when we were operating in a totally different competitive environment. The Turnbull Government took some important steps to remedy this through removal of television licence fees and some media ownership rules in 2017. However, a reconsideration and modernisation of the full range of regulatory burdens and constraints on commercial television is now well overdue.

Google and Facebook are not merely platforms, they are also media companies. They monetise content. However, unlike commercial television broadcasters that invest in the creation of content, Google and Facebook monetise content created by others, without meaningfully investing in its creation or licensing its use. To add insult to injury, these platforms earn significant revenue by facilitating access to illegal pirated content.

More must be done to assist local media companies negotiate fair terms and conditions with Google and Facebook. Whether through authorising collective bargaining, ensuring greater transparency in the operation of algorithms, or acting as a dispute resolution body, there is a role here for the ACCC. And Facebook and Google must be held accountable for and required to hinder rather than help access to stolen content.

The scale of personal data collected and stored by Facebook and Google is now a significant barrier to entry. It has also given rise to serious concerns around privacy and misuse of that data. The ACCC must seriously consider the need for greater transparency and controls around data collection and use.

2 Recommendations

Restoring balance to the regulatory framework - consider the extent to which the existing regulations that apply to local media companies are still required in the modern media environment, where local companies compete against entirely unregulated digital media companies.

Establishing independent digital advertising metrics – require Google and Facebook to establish transparent measurement of web traffic and the inclusion of SDKs across all of their advertising products to allow robust, verifiable and consistent measurement against independently set standards for reach and viewability.

Increasing transparency of marketing conduct – recommend legislation to require that the marketing practices of digital advertising platforms be regulated by a Code of Conduct authorised by the ACCC.

Enabling genuine negotiation on terms and conditions - provide guidance on the terms under which the ACCC would authorise collective bargaining by local media outlets with Google and Facebook and consider how a dispute resolution role could be administered by the ACCC, including in relation to regulated pricing or character limits for third party content.

Bringing greater transparency to algorithms – require that Google and Facebook publish clear information on how their algorithms function and provide time to consult with affected parties and explain the impact of any changes on related businesses in the supply chain.

Addressing vertical integration competition issues – fully map out the digital supply chain and closely investigate bundling and potential full-line forcing competition issues.

Requiring independence and minimum service levels in setting technical standards – where the digital supply chain involves buyers and sellers with common ownership, interoperability and technical standards must be set independently and with minimum service levels.

Applying the right market definition and collaborating with international regulators – ACCC and other counterpart regulators should review the market definition and competition tests they apply to protect new entrant innovators from being acquired by already dominant digital players.

Holding digital media companies to account for piracy – recommend law changes to ensure that the party that facilitates access to pirated material is liable for the loss to the rights holder.

Maintaining the integrity of Australia's copyright system - find that the current safe harbour framework strikes the right balance and that there should be no further extension of the scheme to digital media companies

Bringing transparency to data collection by Google and Facebook - Review whether the current privacy framework is sufficient for the scale of data collection undertaken by Google and Facebook and whether consumers are given adequate information on the full extent of the data they are handing over.

3 Introduction

Free TV Australia thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to submit to this critical inquiry. We would welcome further opportunities to engage as the ACCC moves towards its interim report in December and again when forming final findings by July 2019.

Free TV represents all of Australia's commercial television networks, covering metropolitan, regional and remote areas. Some networks will also be making individual submissions to this inquiry. This submission sets out the industry-wide position on the impact of Google and Facebook—the "digital duopoly[1]"—on the local media industry. Submissions from individual broadcasters will provide their own experiences and more detailed description of the commercial realities of continuing to invest in engaging local content in the face of the distortions created by the digital duopoly.

This submission is broken into 5 sections:

- **Context** – The changes that have occurred in the advertising market over the last decade. The pivotal role of commercial television in providing local programming; including news, live sport, entertainment and Australian drama. The massive regulatory and social responsibility imbalance between commercial networks and the digital duopoly.
- **Distorting the market** – How the behaviours of the digital duopoly have skewed the advertising market towards digital, despite significant issues with measurement, viewability, transparency and brand safety.
- **Market power –** The vertical integration of the duopoly means that they can exert control of every element of the supply chain. This dominance across the supply chain results in little or no ability to bilaterally negotiate terms and conditions. The duopoly can also impose their own technical standards that have the potential to advantage their own products and clients.
- **Copyright and monetising other people's content** – The duopoly monetise content. This is what makes them media companies, rather than just platform providers. But beyond not investing in that content, the duopoly facilitates access to pirated material through lists of proxy servers to get around site blocking, misuse of live streams on Facebook through to links to illegal streams in search results.
- **Data –** Strong data network effects have led to Google and Facebook collecting, sharing and using personal information on a previously unimaginable scale. Controls are needed to set appropriate limits on how that data can be used. Data has become a currency and a major barrier to entry in the markets controlled by Google and Facebook.

3.1 Why focus on them?

This submission focusses on Google and Facebook. There are of course other platforms that could fit within the remit of the ACCC in undertaking this inquiry.

For example, our journalists are prolific users of Twitter to share and disseminate news stories. Similarly, many of our audience choose to engage with our content through discussions on Twitter (#MKR #MAFS #ImACelebrityAU). Snapchat also has a loyal following, particularly among the younger demographic and has recently announced partnerships with content creators to provide more video services.

However, for two reasons we consider that the scope of the inquiry should focus on Google and Facebook.

[1] The term "Digital Duopoly" is used here and at various points in the submission. However, we acknowledge that Google is dominant in search whereas Facebook is dominant in social media, which we do not assert are the same market. The term duopoly is used by reference to fact that together Google and Facebook account for the lion's share of all digital advertising.

First, Google and Facebook dominate the search and social markets respectively.

They have a level of ubiquity and scale that provides immense capital and unprecedented ability to collect data and to leverage their market power into additional areas. This is particularly concerning when combined with the degree of vertical and horizontal integration these two businesses already have, in part as a result of their practice of acquiring potential competitors

Secondly, the digital duopoly dominates the entire advertising market with a quarter of all global advertising spending going to just those two companies alone. The duopoly account for over 60% of all digital advertising.[2] They are also forecast to capture 90% of the growth of digital advertising in 2018.[3] In short, given most of the digital advertising market revenue accrues to just those two players, they alone have the biggest impact on the Australian media sector.

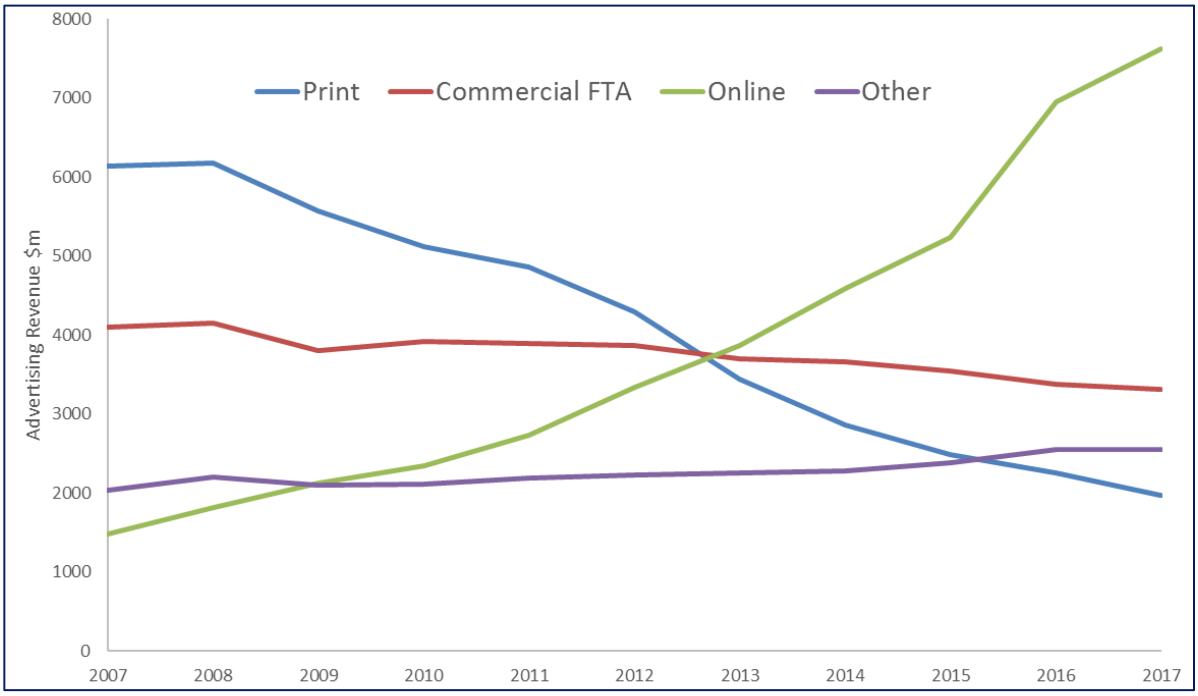
Thirdly, Google and Facebook are the key players in monetising other people's content. Unlike other media companies such as Netflix or Amazon Prime that pay licence fees for content, Google and Facebook rely on free content derived from third-parties, such as commercial television.

Taken together, it is clear that Google (including YouTube) and Facebook are the digital platforms that are having the greatest impact on the local media landscape, with other platforms having a marginal impact in comparison. As discussed in the submission, the issues posed by the two are not identical but related to their respective areas of dominance.

3.1.1 They take the lion's share of advertising revenue

In real terms, the total expenditure on advertising in Australia has been relatively static over the last decade. In 2016/2017 total expenditure was just under $15.5 billion, compared to just over $15.7 billion in 2006/2007.

FIGURE 1: A DECADE OF GROWTH IN ONLINE ADVERTISING REVENUE



Source: CEASA, 2017

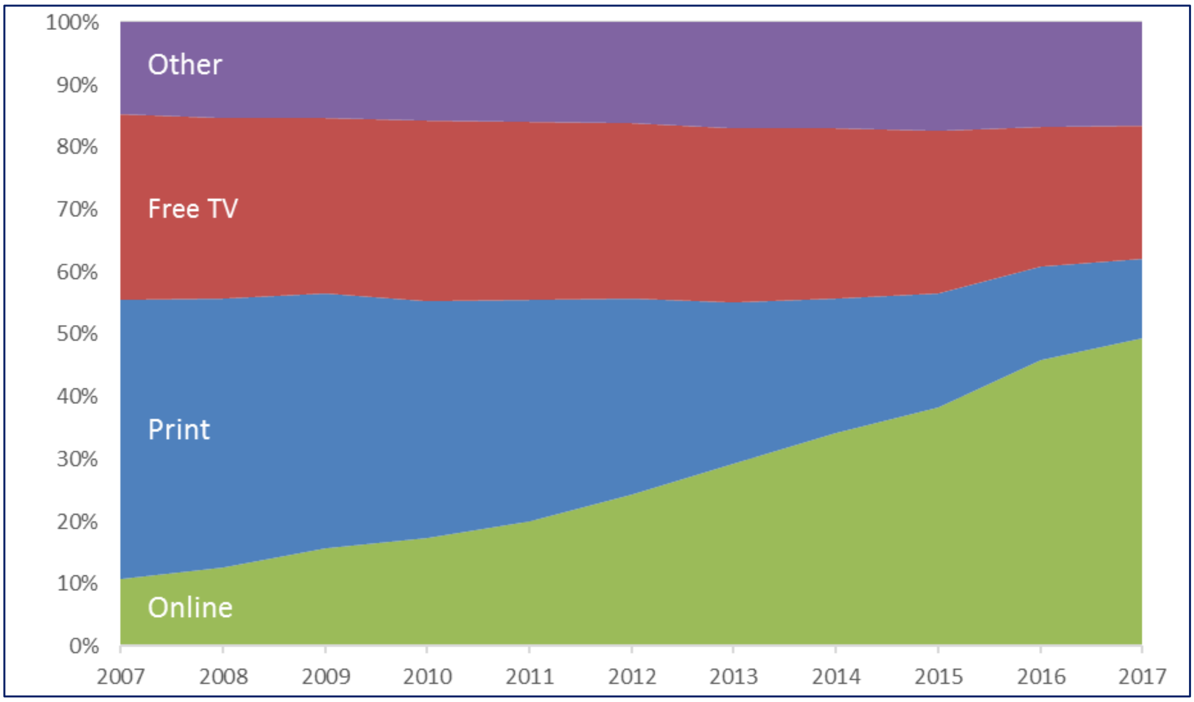
What has changed dramatically over this period is how much of this advertising revenue is taken by the online players, including the dominant Google and Facebook. Over the last decade, there has been (in real terms) over 400% growth in online advertising revenue. Given that the overall

2 https://www.warc.com/newsandopinion/news/mobile_is_the_worlds_secondlargest_ad_medium/39673
3 https://www.emarketer.com/Article/Google-Facebook-Tighten-Grip-on-US-Digital-Ad-Market/1016494

“size of the pie” has not changed, all of this growth has come at the expense of local media companies.

While the most dramatic decline has been felt by the print news sector, commercial television has experienced flat or declining revenues over the last decade.

FIGURE 2: A GROWING DOMINANCE OF THE ADVERTISING MARKET



Source: CEASA, 2017

3.1.2 Relative size of companies

In considering the potential for the digital duopoly to distort the advertising market as discussed in the following sections of this submission, it is instructive to consider the sheer scale of these businesses and the resources that they have at their disposal. This is an important consideration given that this size and scale is a key part of their ability to exert control over the advertising market and their relationship with other media companies. This distortion directly relates to our ability to fund local content—including journalistic content.

Australian media companies are completely outsized in the fight for advertising dollars. The digital duopoly has a market capitalisation of $AUD1.5 trillion. The figure below put this into some perspective in the Australian market. Collectively our ‘big four’ banks have a market capitalisation of $385 billion, almost a quarter of the value of the entire ASX 200.

But these companies are not just big in an Australian context, they have access to capital that is unprecedented in most companies worldwide. In America, setting aside the other internet giants of Apple and Amazon, the next biggest company on the Nasdaq is Cisco, which is half the size of Facebook and less than a third of the size of Google (Alphabet).[4] In the context of Google and Facebook, this access to capital has given them the ability to buy out potential competitors and start-up innovators as we discuss in section 6.4.

[4] NASDAQ Valuation as at 26 March 2018, Google $US712B, Facebook $US463B, Cisco $204B

FIGURE 3: GOOGLE AND FACEBOOK – UNPRECEDENTED SCALE

Source: Yahoo Finance, 26 March 2018

3.2 Our relationship with the digital duopoly

Free-to-air broadcasters have a complex relationship with Google and Facebook because we are not simply competing against these technology-driven media giants for advertising revenue. Because of their near total domination of search and social, we are their customers too.

With 95% of the search market, Google is effectively the gatekeeper to the internet. However, Google does not contribute anything towards the cost of the content that is scraped by its crawlers and made available through its search results. The increasing use and length of “Featured Snippets” (explained in section 4.6) negatively impacts on click-through rates and our ability to monetise the content that we have invested in.

This creates a problematic relationship between media companies with digital assets and Google. Media companies can opt to block Google’s crawlers and not be indexed. While this would stop Google from monetising our content, given Google’s gateway position it would close an important channel to market. Most media companies therefore accept that they have no choice other than to allow Google to scrape their content, despite not paying anything for it.

On social, commercial broadcasters contribute the content that research has shown drives the most engagement with the site (see section 7.2). But the material that we contribute to Facebook is not just promotional material, for a media company, the content *is* the product. So while being on Facebook allows our audience to find new ways to engage with our content, Facebook is the ultimate beneficiary from higher engagement with its platform and can monetise this free content.

3.3 This is about more than news

The ACCC’s issues paper places a heavy focus on the digital platforms’ impact on local media’s ability to produce news and journalistic content. Certainly, there is a significant case to be made into how the practices of the duopoly have skewed the advertising market and the consequent impact on how news content is funded. In addition, Governments and regulators around the globe are concerned about the power that Google and Facebook have to determine which facts and opinions are given priority on digital platforms.

However, it is important to maintain a broad focus when looking at competitive impacts on the media market and not solely focus on news and journalistic content. Commercial TV networks operate by monetising content by selling advertising spots around programming. In 2016/2017, commercial networks spent almost $2 billion on content, with 80% of this spending on local content. This investment puts us at the centre of the content production eco-system in Australia, supporting over 15,000 jobs and invests a total of $2.8 billion each year into the Australian economy.[5]

The local content we broadcast delivers enormous cultural and social value by creating and reinforcing our national identity. Our capacity to continue to deliver Australian stories is crucial whether that is through scripted drama, or in popular entertainment programming formats like *Little Big Shots*, *Australian Ninja Warrior* and *MasterChef Australia*.

The importance of local content has long been recognised in public policy, with strict requirements on commercial broadcasters to meet minimum Australian content quotas across a range of genres. Consistent with our view that Australian content is central to our offering, we continue to support these requirements and have reiterated that support in the ongoing Australian and Children's Content Review, subject to some reforms to reflect how the modern audience is engaging with television.

Commercial TV invests significantly in news, and local journalistic content production is a very important part of our businesses. Our high quality, accurate and impartial news services, which are accessed by millions of Australians each week, provide an important counter-balance to the click bait and fake news served up by digital platform algorithms. It is important to recognise, however, that it is not possible to analyse the impact of the conduct of the digital duopoly on our news services in isolation. Our ability to continue to invest in news and journalistic content is dependent on the viability of all parts of our businesses and across all programming categories.

For our regional members, their local news services are the main, if not only, content that they produce. The ability of these smaller regional television networks to continue to provide local news services (see section 4.4) is dependent on their ability to monetise all types of programming from their affiliate partners, together with their own news services.

Further, TV schedules are developed in an integrated fashion with inter-related genres designed to build and hold the highest possible audience throughout the peak evening period. Our ability to hold eyeballs through this period is directly linked to the advertising revenue that we can generate. News and current affairs programming plays an important part as a lead-in for the evening programming. But ultimately it is the entire programming offering in a schedule that generates the eyeballs and therefore the advertising revenue.

We would therefore urge the ACCC to maintain a broad inquiry that looks at not only the impact of the digital platforms on news and journalistic content, but on our ability to fund all Australian content through advertising revenue. This is crucial, as it is not just about the viability of the commercial broadcast sector, but the thousands of jobs in the broader production environment that we support.

5 Venture Consulting, The Value of Free TV, May 2015.

4 The commercial TV value proposition

Why this matters?

Commercial free-to-air television is a highly regulated, safe environment that delivers significant social and cultural value to the Australian community. This value is only possible to the extent we are able to effectively monetise content through advertising revenue.[6] Our business model relies on a well-functioning, transparent and robust advertising market that has the confidence of our clients. In later sections we describe how the unregulated duopoly of Google and Facebook are undermining the advertising market. This matters because it has a direct impact on our ability to employ Australians in delivering the local services that the community relies on.

4.1 Economic value

The value of commercial free-to-air television to the Australian public remains high. At no cost to the public, we provide a diverse range of channels and content across a broad range of genres, as well as rich online and mobile offerings. These programs are provided free of charge into 99% of Australian households and commercial television reaches 13 million Australians on average every day. Average viewing per day of live or time-shifted TV stands at 2 hours and 27 minutes and has been steady for the past few years. [7]

Our industry is proudly the largest producer and commissioner of Australian content, responsible for $6 out of every $10 spent on domestic content. The latest financial reports by the ACMA show that local content investment continues to grow and now stands at 80% of all content spending.[8] We are deeply committed to ensuring Australian audiences continue to see Australian faces, voices and stories on their screens.

Exports of Australian television productions also help showcase Australia to the world. These direct exports have been valued by Deloitte at $252 million a year, with a further $725 million a year coming from related tourism.[9]

4.2 We are the home of local content

Despite all the recent changes in the Australian media landscape, commercial free-to-air broadcasters remain the largest investors in the Australian screen production sector. Six out of every ten dollars spent in the local production industry comes from commercial television.

This programming includes national and local news and current affairs programs, which play a critical role in providing information to Australians. It also includes extensive live and free coverage of sporting matches, entertainment programs that give viewers a glimpse into the lives and personalities of other Australians and iconic, high-quality dramas.

The latest ACMA compliance report reveals that every year in a typical market with three commercial TV services, Australians benefit from:

- 13,784 hours of local content on the primary channels from 6am to midnight;
- 9,207 hours of local content across the multi-channels;
- 428 hours of first release Australian dramas; and

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6 Under the Broadcasting Services Act, commercial television broadcasters are expected to primarily generate their income from advertising (see Section 14, *Broadcasting Services Act 1992*(Cth))
7 OzTAM Video Viewing Report, Q4 2017, pg 7
8 https://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-financial-results-report
9 Deloitte Access Economics, 2016, “What are our stories worth? Measuring the economic and cultural value of Australia’s screen sector”.

- 139 hours of first release Australian documentaries.[10]

The commercial television industry is also a vital training ground for screen production professionals who go on to work in TV, film, advertising and related creative areas in Australia and around the world. Many of the Australians who are succeeding in Hollywood and other markets began their careers in the free-to-air TV industry.

4.3 Accurate, impartial and trusted news services

Every week commercial free-to-air television networks create over 430 hours of news and current affairs programming.

We employ hundreds of journalists and support staff to create this volume of news and current affairs content and play an important role in employing and training journalists throughout Australia.

Our commitment to accuracy and fairness in news and current affairs programming is enshrined in the Commercial Television Industry Code of Practice. The Code requires that commercial free-to-air broadcasters present factual information accurately and ensures that viewpoints included in new and current affairs programming are not misrepresented.[11]

The Code is developed by Free TV in consultation with the public and registered with the Australian Communications and Media Authority (ACMA). Before registering the Code, the ACMA must be satisfied that it:

- provides appropriate community safeguards for the matters it covers;
- is endorsed by a majority of commercial television stations; and
- members of the public were given adequate opportunity to comment.

3.3	***Accuracy and fairness***
3.3.1	In broadcasting a news or Current Affairs Program, a Licensee must present factual material accurately and ensure viewpoints included in the Program are not misrepresented.
3.3.2	Clause 3.3.1 applies to material facts and material misrepresentations of viewpoints only.
3.3.3	Licensees must make reasonable efforts to correct or clarify significant and material errors of fact that are readily apparent or have been demonstrated to the Licensee's reasonable satisfaction in a timely manner.

Our Code of Practice also requires that news programs be presented fairly and impartially. This underlines our commitment to quality news programming that sets our programming apart from the 'fake news' that is prevalent on the digital platforms.

10 ACMA, Compliance with Australian Content Standard and Children's Television Standards, 17 March 2017 (Sydney TV1)
11 Commercial Television Industry Code of Practice, Clauses 3.3 and 3.4

3.4	***Impartiality***
3.4.1	In broadcasting a news Program, a Licensee must: a) present news fairly and impartially; b) clearly distinguish the reporting of factual material from commentary and analysis.

The requirements and obligations set out in the Code are strictly enforced by the independent ACMA. Clearly, no such obligation exists for digital platforms. They will monetise any news content, regardless of its provenance, accuracy or veracity.

Our commitment to high quality journalism is rewarded by the Australian public every night. News and current affairs services produced by our members are consistently among the highest rating shows across all television programming. Over 11 million Australians (11,181,000) tune in to at least one of the commercial free-to-air broadcasters' news programs each week.[12]

Beyond the ratings, consumer research has consistently shown that Australians value, rely on, and trust commercial free-to-air news services. Research undertaken for Free TV Australia revealed that an overwhelming 70 per cent of respondents agreed with the statement that commercial free-to-air TV is "what I turn on first when major news events happen". A further 66 per cent of respondents agreed that commercial free-to-air television is "my most trusted source of news and current affairs."[13]

4.4 Local regional news

The commercial television networks provide extensive news services across Australia. If Google and Facebook continue to distort the advertising market, these local regional news services will be at risk of being lost. These services will not be replaced by Google or Facebook, or indeed any other media organisation.

In metropolitan areas, the amount of news broadcast has increased in recent years with the main evening news bulletins now being supplemented with morning and afternoon editions. These bulletins cover issues of national importance and matters that are specific interest to communities around these capital cities.

Just as important as these services are the local regional news services that we provide in regional Australia. The commercial television sector employs hundreds of Australians as journalists and production staff and plays a crucial role in delivering news services across regional, rural and remote Australia.

If these services go, they will not be replaced. The digital duopoly does not invest in local news nor engage in the community services that we are proud to be involved with such as Carols by Candlelight, Royal Far West, Act for Kids, Surf Life Saving Australia, Black Dog Institute and the WA Telethon.

In recognition of the existing investment in regional and rural programming, a 2017 ACMA survey in regional Australia found that commercial free-to-air TV was the most preferred source for local news. In addition, commercial free-to-air TV was found to the most trusted media news source for regional Australians across all platforms.[14]

12 OzTAM (Metro), RegionalTAM (Regional). Network National Reach Estimate for Metro + Regional for minimum of 5 consecutive minutes viewed of Sun-Sat news across the day (incl Morning, Afternoon, Sunrise/Today, excl Specials) on Commercial Primary channels (and regional affiliates). Wks 7-23 2017. Data: Consolidated (LIve + As Live + TSV7).

13 Research conducted by independent researchers Crosby|Textor on behalf of Free TV Australia amongst n=1,000 randomly selected Australian adults nation-wide in February 2015.

14 ACMA, Local content in regional Australia 2017 report, May 2017, pg 9

Box 1 summarises these services. Again, each one of these services is entirely funded from advertising revenue.

BOX 1: COMMERCIAL TV'S REGIONAL NEWS SERVICES

PRIME7 NEWS
GWN7
	• 30-minute weeknight bulletins and updates for each of the following:
	  ○ north coast of NSW and south-east Queensland (crews based in Taree, Lismore, Port Macquarie, Ballina & Coffs Harbour);
	  ○ north west of NSW (crews based in Tamworth);
	  ○ central west of NSW (crews based in Orange and Dubbo);
	  ○ regional Victoria (based in Albury/Wodonga)
	  ○ the Riverina (based in Wagga Wagga);
	  ○ regional WA Australia (crews based Bunbury, Albany, Kalgoorlie, Geraldton, Broome and Perth);
	• Local news updates to the Newcastle/Hunter areas in northern NSW, the Wollongong and Canberra areas of southern NSW, and the Shepparton, Bendigo, Ballarat, and Gippsland areas of regional Victoria.

Southern Cross NEWS 9 NEWS	• Weekday 60-minute bulletins in fifteen areas across regional Queensland, southern NSW, and regional Victoria (sourced from locally based crews); • A 60-minute news bulletin, 7 nights a week in Tasmania; • A weekday 30-minute bulletin in Broken Hill, and the Spencer Gulf (sourced from reporters in Port Pirie, Port Augusta, Port Lincoln, Whyalla and Broken Hill); • News updates for remote Central and Eastern Australia and Darwin.
7 Queensland	• Weekday 30-minute news bulletins across Cairns, Townsville, Mackay, Wide Bay, Toowoomba, the Sunshine Coast and Rockhampton.
NBN NEWS	• Six 60-minute local news bulletins in the northern NSW licence area and the Gold Coast.
WIN NEWS	• Fourteen 30-minute weekday bulletins in regional Queensland, southern New South Wales, and regional Victoria; • A 60-minute news bulletin, 7 nights a week in Tasmania; and • Local news updates in Mt Gambier and the Riverland.

Other key findings from the ACMA study include:

- Commercial free-to-air television is the most preferred source of local news (34 per cent compared to the next highest at 21 per cent for print)
- Over 85 per cent of regional Australians consider local content and news important
- Almost 90 per cent of regional Australians are satisfied with the overall quality of local news available in their local area across all platforms.

The recently announced "Google News Initiative" that came on the eve of this inquiry, demonstrates how tokenistic Google's efforts have been at addressing their impact on local media service providers. In fact, in some cases their proposals, such as *Subscribe with Google*, merely seek to entrench their gateway position and ensure their continued access to the data of private citizens.

4.5 Our contribution to a better democracy

The free-to-air sector's employment of high calibre, award winning investigative journalists plays a key role in providing important checks and balances on our political and legal processes by facilitating transparency and accountability.

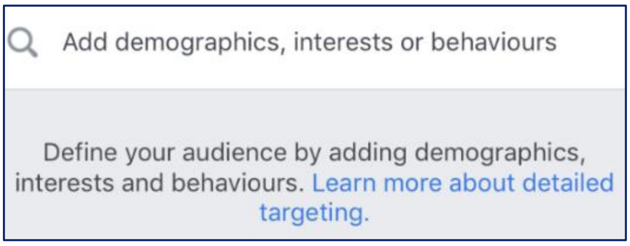
From matters such as challenging non-publication orders, reporting on court cases and investigating instances of alleged corruption, Australians rely on us to be their eyes and ears. In doing so, our public interest journalism plays a crucial role in a healthy functioning democracy.

Importantly, the plurality of the news and current affairs services shown across the free-to-air networks provides a diversity of viewpoints to the community. This encourages public discourse by challenging pre-conceptions and has the potential to increase the acceptance of diversity across the community.

This compares starkly to the news that is served on the digital platforms, particularly on Facebook, where algorithms serve up and give prominence to news based on content that you or your friends network have previously engaged with.

For example, if you read an article suggesting that trade barriers should be increased, the algorithm may pigeon hole you into a group that has a trade protectionist leaning. From there, rather than being exposed to alternative viewpoints discussing the case for more liberal trading arrangements, you may be served articles based on the algorithm's understanding of your political and policy beliefs. The result is a "filter-bubble" where users are only served articles that accord to one particular world view.

As discussed in section 6, Facebook has recently made unilateral changes to its algorithm to reduce the amount of news content that is seen by users. However, users can still be targeted using user data that allows targeting based on Facebook's understanding of your political views.

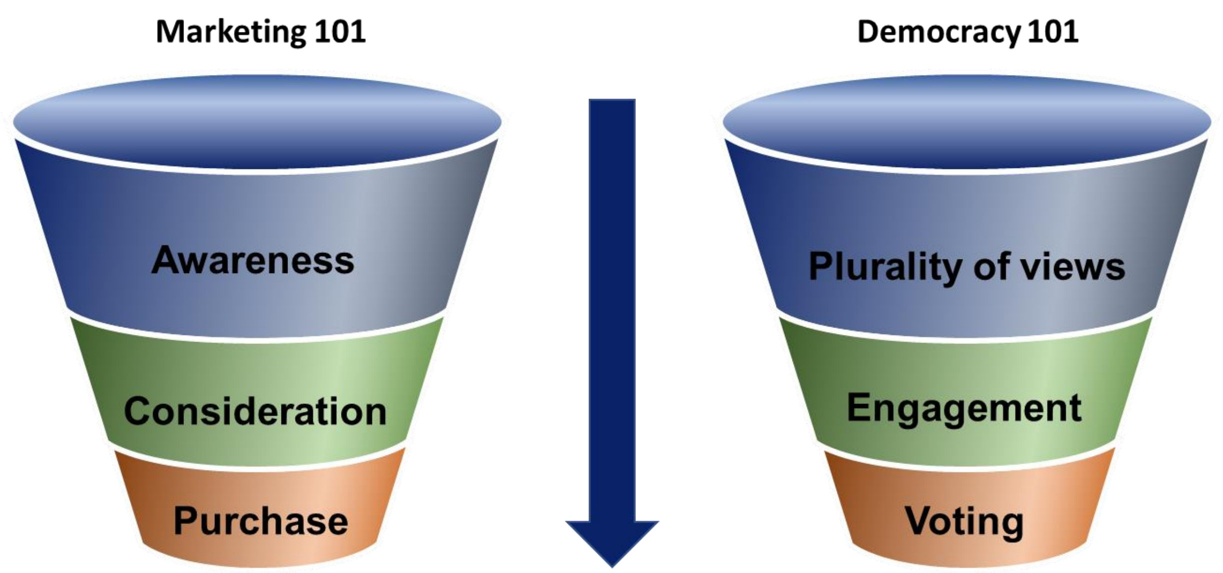


So rather than providing a platform for the discussion of a range of viewpoints, the digital duopoly provides a series of highly segregated echo-chambers where no genuine public policy debate occurs. Rather than presenting the world as it actually is, these platforms serve content to consumers based on their data informed preferences and ensures that the world view of each consumer is consistently reinforced, not challenged. This leads to a weaker democracy as the community disengages in genuine public policy debate. The skills necessary for robust yet respectful debate are de-prioritised in the harsh tribal environment of the digital platforms. Indeed, studies have shown that 'fake news' tends to be more widely and quickly shared across social media.[15]

There is a useful analogy that can be drawn here with the "marketing funnel" that describes the decision-making process of consumers from brand awareness through to purchase decision. Below we map out a similar funnel construct, but instead use it to describe the process of forming voting intention.

15 http://www.sciencemag.org/news/2018/03/fake-news-spreads-faster-true-news-twitter-thanks-people-not-bots

FIGURE 4: FREE TV INFOGRAPHIC – NARROWING EXPOSURE TO DIFFERENT VIEWS



In the same way that commercial television is exceptional at building brand awareness at the top of the marketing funnel, television provides a wide array of public policy viewpoints to the community. By contrast, the filter-bubble created by the digital platforms can only ever narrow the funnel.

Therefore, just as a reliance on digital advertising can lead to a loss of brand awareness, reliance on Facebook for news dramatically narrows the funnel and your exposure to a plurality of viewpoints and encourages more extremist views that are more likely to generate a reaction. In this environment, it has never been more important to ensure the viability of the local media industry. Only the local media industry consistently provides a diversity of viewpoints and is committed to the critical analysis required to call out fake news for what it is.

4.6 The filter is only going to get more narrow

Looking forward, the expected increase in the use of voice search in coming years will make the filter-bubble and gatekeeper issues of today more extreme. Comscore forecasts that in less than two years, 50% of all searches will be voice searches. This is a dramatic number, as with voice search there is generally only one source of information provided in response to a search. To illustrate, Free TV asked Google Home, “is Malcolm Turnbull a good Prime Minister?” The device delivered a result from a single news source in equating the current Prime Minister with Billy McMahon. The full audio clip is available on our website. This is just one example of the narrowing of the funnel that can destroy brand value and limit exposure to a plurality of points of view.

Similarly, Google is continuing to make greater use of its “OneBox” and “Feature Snippets” which give prominence to one answer out of all the possible organic search results and in some cases channel all search requests to a single destination. This limits the user’s exposure to different points of view, even on the most subjective of matters. Searching Google for another subjective point of view—who was the best Prime Minister of Australia—resulted in Google’s algorithm drawing on one source of information in a Featured Snippet to inform the user that Bob Hawke holds that title, as shown below.

BOX 2: FEATURED SNIPPETS AND ONEBOX—NARROWING EXPOSURE

Bob Hawke | Kevin Rudd | John Howard | Gough Whitlam | Malcolm Fraser | Tony Abbott

Highest Nielsen Poll ratings for each Prime Minister since 1972:

- Bob Hawke – 75% (November 1984)
- Kevin Rudd – 74% (March 2009)
- John Howard – 67% (January 2005)
- Gough Whitlam – 62% (February 1973)
- Malcolm Fraser – 56% (April 1976 and May 1978)
- Julia Gillard – 56% (July 2010)
- Tony Abbott – 47% (November 2013)

4.7 The most socially responsible and heavily regulated platform

Commercial television is the most heavily regulated of all media platforms. This puts us at a competitive disadvantage to other businesses, like Google and Facebook. This is because they are free to meet changing audience demands and acquire new businesses and technologies immediately, rather than being locked into delivering regulated content hours and ownership structures.

The following sections highlight just a few areas of regulatory impost on commercial TV broadcasters that the digital duopoly is not subject to.

4.7.1 The Code of Practice development process

The regulatory regime for television services is established at the federal level through the *Broadcasting Services Act 1992* (BSA) and the regulatory and enforcement powers of the ACMA. The BSA requires that the commercial networks develop a Code of Practice relating to their broadcasting operations.

The Code is co-regulated by industry and the ACMA. The ACMA is empowered under the BSA to enforce compliance with the Code and Free TV members can face significant penalties for breaches of the Code.

The Code is reviewed regularly and was last updated in March 2018. As part of each review, it is the role of the regulator to register the Code after ensuring that it reflects community standards.

There are important safeguards built into the Code review process, ensuring that the ACMA is only permitted to register a Code where it is satisfied that:

- it provides adequate consumer safeguards for the matters covered by the Code;
- it is endorsed by the majority of the commercial television stations; and
- members of the public were given an adequate opportunity to comment through a public consultation process.

4.7.2 Brand safety

An important function of the Code is to regulate the content and placement of programming and advertisements on commercial television. Primarily, this ensures that community expectations around what type of programming content is appropriate for the time of day, taking into account the likely audience. This is based on the well understood G, PG, M or MA15+ classification system set out in the Code. Nothing above an MA15+ rating can be shown on commercial television. The Code also imposes significant limitations on advertising in children's and family viewing periods.

The result is a platform that provides the safest environment for families to come together to be entertained. Similarly, advertisers can connect with this audience in the knowledge that their product or service is going to be placed around appropriate programming that is targeting the appropriate age group. In short, television provides the safest media environment for both brands and families.

Again, the contrast to the digital platforms could not be starker. As has been recently revealed, brands can have little confidence what type of content their ads are being placed next to.[16] In the worst example of this, brands have been accused of funding terrorism because they, without their knowledge, have been paying for impressions on websites hosting extremist material.[17]

Following the revelations about advertisements appearing next to extremist videos, YouTube reportedly removed 150,000 videos.[18] This highlights that when there is a commercial pressure, the digital duopoly has the technical capacity to undertake wide-scale takedowns of infringing material. This is relevant for Section 7 which discusses the efforts of the duopoly to remove material that infringes copyright from their channels.

Ensuring that advertisers have full knowledge of what they are paying for is a key topic of this submission. Addressing the lack of transparency around advertising on Google and Facebook should be a focus of the ACCC's inquiry and findings.

BOX 3: EXAMPLES OF ADVERTISING NEXT TO EXTREMIST CONTENT

16 https://www.smh.com.au/business/companies/bunnings-foxtel-and-caltex-join-youtube-ad-boycott-20170327-gv7d3m.html
17 https://www.thetimes.co.uk/article/big-brands-fund-terror-knnxfgb98
18 AdNews, 19/11/17

4.7.3 Other regulatory restrictions and controls

Australian and local content requirements

Commercial television broadcasters must meet the requirements set out in the Broadcasting Services Act and the Australian Content Standard. This includes a requirement that 55% of all programming on the primary channel between 6am and midnight is Australian. Additionally, across the multi-channels 1,460 hours of Australian content must be broadcast every year. Beneath these headline requirements, there are detailed sub-quota requirements covering Australian drama, documentaries, children's drama and general children and pre-schooler programming.

While we accept that there will be some level of ongoing requirement to continue to produce Australian content for our broadcast platform, the existing system is outdated and needs modernisation. The inflexibility of the current quota system means that commercial broadcasters are unable to respond quickly to changes in today's audience demands. For example, children's programming is broadcast to a negligible audience, despite the millions invested in award winning content. This inflexibility places us at a distinct commercial disadvantage when compared to the digital platforms that face no such regulations.

Captioning

Commercial free-to-air broadcasters recognise that captioning is a valued service within the deaf and hearing-impaired community. We continue to work hard to provide high-quality captioning services, in line with the extensive obligations:

- Captions must be provided for 100% of programs between 6 am and midnight on the primary commercial television broadcasting service[19];
- All news and current affairs programs on the primary commercial television broadcasting service must be captioned, regardless of the time they are shown[20];
- All programs shown on multi-channel services that have aired with captions on the primary commercial television broadcasting service must be captioned when aired on the multi-channel service;[21]
- All captioned programs must comply with the *Broadcasting Services (Television Captioning) Standard 2013* (Quality Standard).[22]

Advertising Restrictions

Unlike Google and Facebook, commercial TV broadcasters are heavily restricted in both the amount of advertising and what types of advertising can be shown at specified times of the day. For example, with very limited exceptions, the promotion of alcoholic drinks is not allowed between 5am and 8.30pm.

These types of restrictions are becoming more onerous. As a further example, in March 2018 new restrictions were introduced that banned the promotion of gambling products and services during live sporting events before 8.30pm.

Corporate income tax

The Australian Government has passed two separate pieces of legislation in an attempt to force the digital platforms to pay corporate income tax.[23] But even with these two measures, questions

19 Subsection 130ZR(1) of the BSA
20 Subsection 130ZR(2) of the BSA
21 Section 130ZS of the BSA
22 Section 130ZZA of the BSA
23 Diverted Profits Tax Act 2017, Tax Laws Amendment (Combating Multinational Tax Avoidance) Act 2015

remain as to how much of the revenue generated from within Australia is being reported by the digital platforms to the ATO.[24]

By contrast, commercial television broadcasters are not only transparently paying the required corporate income tax, we also fund Australian content, meet the other regulatory obligations discussed above and pay approximately $40 million annually for access to spectrum.

Ownership restrictions

Every company undertaking business operations in Australia is subject to the *Competition and Consumer Act 2010*, including the controls on mergers and acquisitions that may lead to a substantial lessening in competition.

However, on top of these general economy-wide merger and acquisition restrictions, Australian media companies continue to operate under additional ownership restrictions in the Broadcasting Services Act. While recent changes have removed some of these, there are still restrictions in place that prohibit:

- control of more than one commercial TV licence in the same licence area (one to a market–TV rule);
- control of more than two radio licences in the same license area (two to a market–radio rule); and
- mergers or acquisitions that would result in less than five independent media operators in a metro licence area and four in a regional area (5/4 voices test).

While the Australian media sector faces these additional layers of competition law prohibitions, none apply to the digital platforms. Indeed, given that the general anti-trust provisions globally have been unable to stop a series of acquisitions by the digital duopoly, a relevant area for the ACCC to explore further is whether it currently has the appropriate tools to assess acquisitions by the digital duopoly of much smaller players and the potential for a stifling of innovation and competition.

Recommendations

The ACCC should consider:

- the extent to which the existing regulations that apply to local media companies are still required in the modern media environment, where local companies compete against entirely unregulated media companies like Facebook and Google; and
- whether specific rules around mergers and acquisitions may be appropriate given the near monopoly status of Google and Facebook.

24 http://www.afr.com/technology/social-media/google/how-google-facebook-dodged--12-billion-maal-tax-bullet-20170428-gvuzjd

5 Distorting the advertising market

Why this matters?

Measurement systems that overstate the effectiveness of digital advertising provided by Google and Facebook are a key part of the trend towards digital away from other forms of advertising such as TV, radio and print. Unlike TV audience measures, the biggest players in digital advertising—Google and Facebook—have been reluctant to adopt uniform, independent and transparent systems for measuring digital impressions. Measurement of a digital impression can be counted when the ad is dispatched from a server and may count even when the impression is not seen by humans. This lack of transparency around Google and Facebook advertising creates an environment where false and misleading claims can be made about the reach of digital advertising. In turn this distorts the advertising market in favour of the digital platforms. This distortion starves the local media industry of advertising dollars, reducing the funding available for Australian content, local services including news and current affairs and local jobs.

Given the market domination of Facebook and Google, advertisers have little choice but to accept their metrics. This lack of transparency is a clear competition issue that should be a key consideration for the ACCC as part of this inquiry.

5.1 Digital advertising as a product

Digital advertising may appear complex in the way that it is discussed, written about and traded. But at its core, digital advertising is just another product where a seller, predominately Google or Facebook, offers to display advertisements to consumers for a fee.

This section looks at the digital advertising product, how it is measured, sold and what rights the consumer has if the publisher fails to deliver the product. Throughout this section comparisons are drawn to advertising on commercial TV as a platform that has matured over the last 62 years, is well trusted by consumers and has world class measurement systems that ensure the robustness of the product for advertisers.

5.2 Reach—the currency on which advertising is traded

When designing an advertising campaign and planning its execution, a critical consideration is: "how many people will my campaign reach and on which supply channels?" When that is the opening question for all media buyers, it is crucial that all forms of media have robust audience reach measurement systems to enable credible purchasing decisions, made with the benefit of unbiased information.

Despite the critical nature of this metric, much like viewability discussed in the next section, Google and Facebook set and mark their own exam papers.

Between September 2016 and May 2017, there were ten documented cases of Facebook making measurement claims that were false and misleading to advertisers.[25]

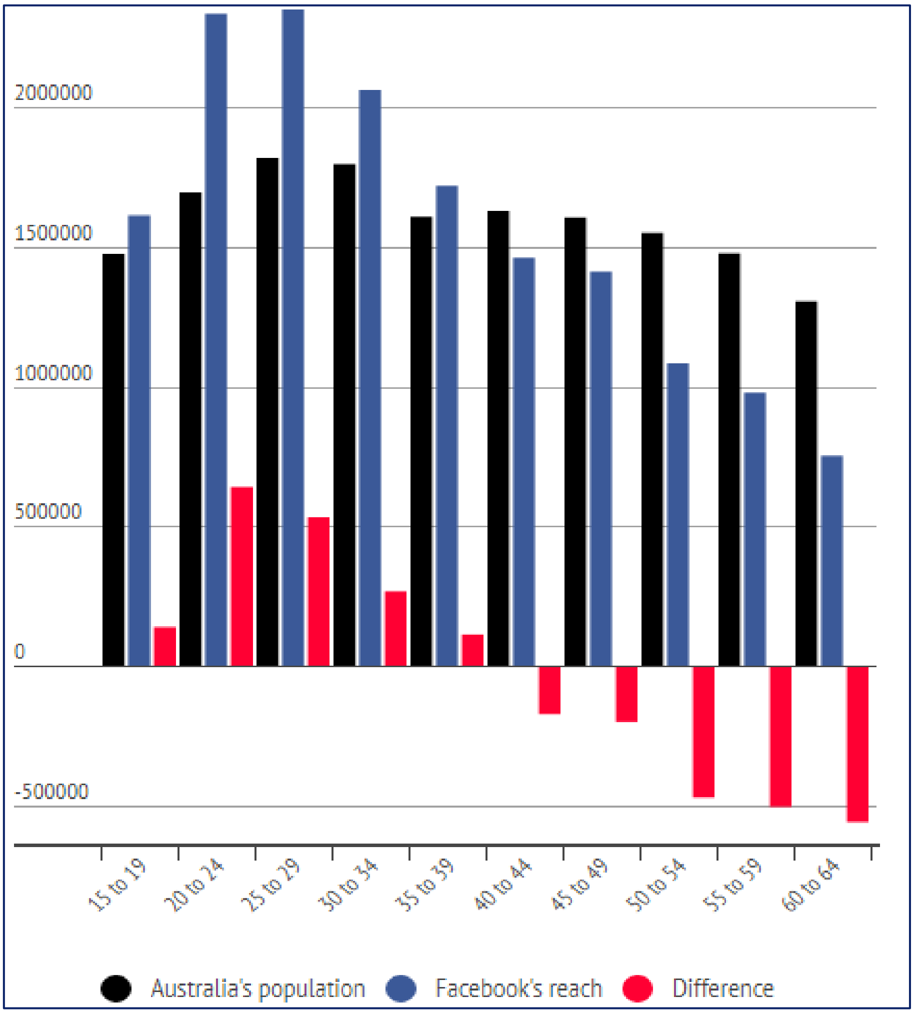
For example, Facebook:

- wrote its own metric for time spent watching a video, but excluded video views less than 3 seconds—artificially increasing the average view length (some by up to 80%);[26] and
- counted every single page view over a 7-day or 28-day reporting period, even if the view was by the same user—once the double count "bug" was removed organic reach of pages fell by 33% on the 7-day metric and 55% on the 28-day metric;[27]

25 https://marketingland.com/heres-itemized-list-facebooks-measurement-errors-date-200663
26 https://www.wsj.com/articles/facebook-overestimated-key-video-metric-for-two-years-1474586951
27 https://www.facebook.com/business/news/metrics-reporting-update

In Australia, Facebook has been caught claiming that its platform can reach 1.7 million more people in the 15-40 year old bracket than were recorded in the ABS census. Following this discovery, AdNews investigated Facebook's audience reach tool to compare its claims across a number of different cohorts. It found that for every demographic up to 35-39, Facebook claimed audience reach above the number of people in the population, as shown below.

FIGURE 5: FACEBOOK'S REACH VS POPULATION



Source: Adnews.com.au, 30 August 2017

The results for the older demographics are more difficult to interpret as it is not known how many people in each demographic have a Facebook account—so these results may just indicate the smaller footprint Facebook has among the older demographics.

Audience reach is the "currency" that advertising is traded on. As described in the introductory section, the size of the total advertising market in Australia is relatively stable, with revenues of around $15.7 billion annually. If dominant players like Google and Facebook in one sector of the market are making systemic overestimations of reach, this will distort the advertising market by misleading media buyers into overvaluing one sector ahead of others with robust measurement systems.

Recommendation

The ACCC should find that the lack of acceptance by Google and Facebook of independent standards for the calculation of audience reach claims across their products has the potential to be misleading and deceptive for advertisers and should recommend that claims about their digital audience reach be subject to an independently set and verifiable standard.

5.3 Impressions and viewability

5.3.1 What do these terms mean?

At the most basic level, an “impression” occurs when a webpage calls an ad server and an advertisement (an image or a video for example) is served and displayed.

The critical component to impressions is understanding viewability. Viewability is an advertising metric that describes what proportion of the advertisement can actually be seen by the viewer. Unlike TV advertisements that are always 100% rendered for their full duration, 100% of the time, the viewability of online advertisements is, amongst others, a function of the:

- behaviour of the user—scrolling up and down a webpage or news feed quicker than an advertisement can render;
- size and position of the ad on the page;
- speed of calling from the ad server and rendering on the webpage; and/or
- the content of the ad, whether video or images.

These metrics are important for two distinct reasons. Firstly, they define whether the supply of the product that is being sold has been delivered (an advertisement that has no or very low viewability is worthless to an advertiser).

Second and more importantly, they define the basis upon which media platforms are compared for competitive evaluation. A webpage with a higher impression count (audience) will be more appealing to a buyer than a website with a lower impression count.

Without transparent and independent measurement of these metrics, it is difficult for advertisers to understand whether what they are buying has been delivered, and have any degree of confidence that what they are paying for is effective. Accordingly, there is a real risk that without clear and consistent measurement, the delivery of purchased services remains unclear, and the evaluation against competitive offerings is misleading.

5.3.2 How are they measured?

Despite the importance of these measurements, Google and Facebook have not accepted one single standard across their products for how to measure a viewable impression.

At present, the Media Rating Council (MRC), in collaboration with the Interactive Advertising Bureau (IAB), publish a guideline that suggests that the criteria for counting an ad impression should be:

- **Images** - greater than or equal to 50% of the pixels in focus on the viewable space of the browser for at least one continuous second; and
- **Videos –** same pixel requirement but the ad should play for two continuous seconds.[28]

As recently noted in AdNews “This means that a digital ad that has been cropped in half would currently count as a chargeable 'viewable' impression even if the cropped-out part contained branding and important messaging.”[29] As a result, it is challenging for advertisers to accurately know what they are getting for their advertising money as it remains unclear which 50 percent of pixels were displayed.

Following recent debates within the MRC and IAB, a change to the guideline has been flagged to increase the pixel count to 100%, but with the same time period of 1 second for images and 2 seconds for videos.

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28 http://www.mediaratingcouncil.org/063014%20Viewable%20Ad%20Impression%20Guideline_Final.pdf
29 AdNews, 22 March 2018

Moreover, the current digital measurement standard, which many digital platforms disregard in favour of their own bespoke measurement, requires only 50% of a video ad to only be viewed for 2 seconds. Table 1 shows the current time viewed for digital platforms. Once the low thresholds below are reached an advertiser is charged for the advertisement presented.

That it has taken four years since the publication of the current MRC guidelines to the recent announcement of the requirement for all of the advertisement to be shown before being chargeable is an indication of the governance issues surrounding digital advertising.

The small change that has been announced is a positive step for advertisers, but it does not address other critical matters like for how long the ad is shown and the coverage of the screen in digital environments.

In addition to the measurement standard being ill-defined, companies that supply verification services on viewability rarely match each other's results. The three major global providers in this space Integral Ad Science (IAS), Comscore and MOAT can return different levels of viewed impressions when verifying the same piece of inventory.

Such limited delivery and verification does not provide competitive platform providers an even playing field upon which to compete for advertising revenue.

TABLE 1: COMPARISON OF WHEN A VIEW IS COUNTED ACROSS PLATFORMS

	Initiation	Time Spent	Viewability	Platform
	Autoplay	3 seconds	100% on desktop, 50% on mobile	Both in-app and embedded posts
	User initiated (but subsequent videos autoplay)	Upon opening	100% on mobile only	In-app only
	In feed: Autoplay Instagram Stories: Upon opening	In feed: 3 seconds Instagram Stories: Upon opening	100% on mobile only	In-app only
	Autoplay	3 seconds	100% on any device	All platforms and embedded posts
	User initiated	Indeterminate % of total viewing time	50% on any device (only for advertisers)	All platforms and embedded posts

Recommendation

The ACCC should find that the lack of robust, independent, and verifiable measurement of digital advertising provided by Google and Facebook distorts the market. The final report should recommend that an independent measurement and verification standard should be developed by Standards Australia that must be used for all online advertising sold in Australia.

Further, Google and Facebook must be required to install SDKs across all of their advertising products to allow genuine third-party measurement and verification of their effectiveness.

5.3.3 OzTAM and RegionalTAM – world class audience measurement systems

Australian television broadcasters don't 'mark their own homework', as some digital platforms do. Our television audience measurement system is open, transparent and independently verified, and is acknowledged internationally as being world class.

OzTAM (in metropolitan areas, and nationally for subscription television) and Regional TAM (in regional areas) electronically measure minute-by-minute viewing of more than 100 channels across dozens of demographic variables, 24 hours a day, 7 days a week, 365 days a year. With representative panels comprising a combined 8,448 households, OzTAM and Regional TAM capture the actual viewing of over 15,000 individuals daily, and Australia is the world's largest per capita people metered market. Nielsen TAM is the current service provider.

Households are recruited to the panels through a large-scale Establishment Survey that defines the population to be represented and its characteristics. Random dialling ensures every private household in OzTAM and Regional TAM’s coverage areas has a chance of being selected for interview. The Establishment Survey is conducted to a high standard via approximately 50,000 telephone interviews (with both landline and mobile phone-only households) throughout the year. Panel characteristics are also monitored against external benchmarks such as Australian Bureau of Statistics data. The recruitment process and panel turnover are carefully managed and monitored to ensure the panel remains an accurate representation of the overall population.

Consistent with an undertaking given to the ACCC in 2010, OzTAM has an independent, non-executive chairman. OzTAM also retains an independent, external technical auditor who ensures the metropolitan and national subscription television panels perform to specification. Regional TAM data is independently audited.

Subject to obtaining an OzTAM data usage licence, anyone can access the TV audience data on the same terms. OzTAM has accredited a range of third-party software providers (“the Gold Standard software accreditation system”) who can provide software that interfaces directly with the OzTAM database. The Gold Standard specifies the arithmetical procedures to deliver uniform calculations as well as the standard industry terms and language to use, enhancing transparency.

In February 2016 OzTAM extended its measurement service to its Video Player Measurement (VPM) Report, capturing viewing of internet-delivered TV content. VPM reports live-streamed and catch-up viewing of to the free-to-air and subscription TV (Foxtel) broadcasters’ internet-delivered video services.

Through Software Development Kits (SDKs) and OzTAM-developed code embedded in broadcasters’ video players, and unique content identifiers attached to each piece of participating broadcasters’ online content, OzTAM can correctly attribute every minute of this content played on individual connected devices. User data is fully anonymised, and OzTAM collects no information that can identify the person(s) that owns or uses individual devices.

In an environment where free-to-air digital services are competing directly against the digital duopoly, it is increasingly important that the reach claims of Google and Facebook are independently tested and verified.

5.3.4 Do advertisers know what they are paying for?

In TV, for an advertiser that procures an audience estimate of 1 million in the 18-39 demographic, television will deliver 1 million viewable ‘impressions’ of an ad that is 100% viewable for a period an average of 30 seconds. If a viewer fast-forwards through an ad (the TV equivalent of scrolling down), the advertiser is not charged.

Google and Facebook have previously been reluctant to allow third-party verification of their own data. In the absence of robust third-party measurement and verification, advertisers can have little confidence that their adverts are being seen by real people. The inventory is deemed to be delivered when it hits the stated level (eg. 50% pixel rendering for a minimum of 2 seconds) irrespective of whether it was actually seen. Bots and other types of fraudulent activity (otherwise known as ‘click fraud’) can push up the chargeable impression count without the ad ever being exposed to a human.

A recent study by Professor Karen Nelson-Field, published by ThinkTV in 2017, identified that of out of 18,219 executions on Facebook, YouTube and television, only 6% of ads on YouTube were viewable to the same standard as television (100% viewable for 30 seconds) and no ads on Facebook were 100% viewable for 30 seconds.

BOX 4: PROPORTION OF INVENTORY THAT WAS DELIVERED

				AS SEEN ON TV
Digital Standard	50% pixels & 2 secs	56%	78%	100%
10sec Standard	50% pixels & 10 secs	30%	59%	100%
100% Pixel Standard	100% pixels & 2 secs	21%	48%	100%
10sec & 100% Standard	100% pixels & 10 secs	4%	30%	100%
TV Standard	100% pixels & 30 secs	0%	6%	100%

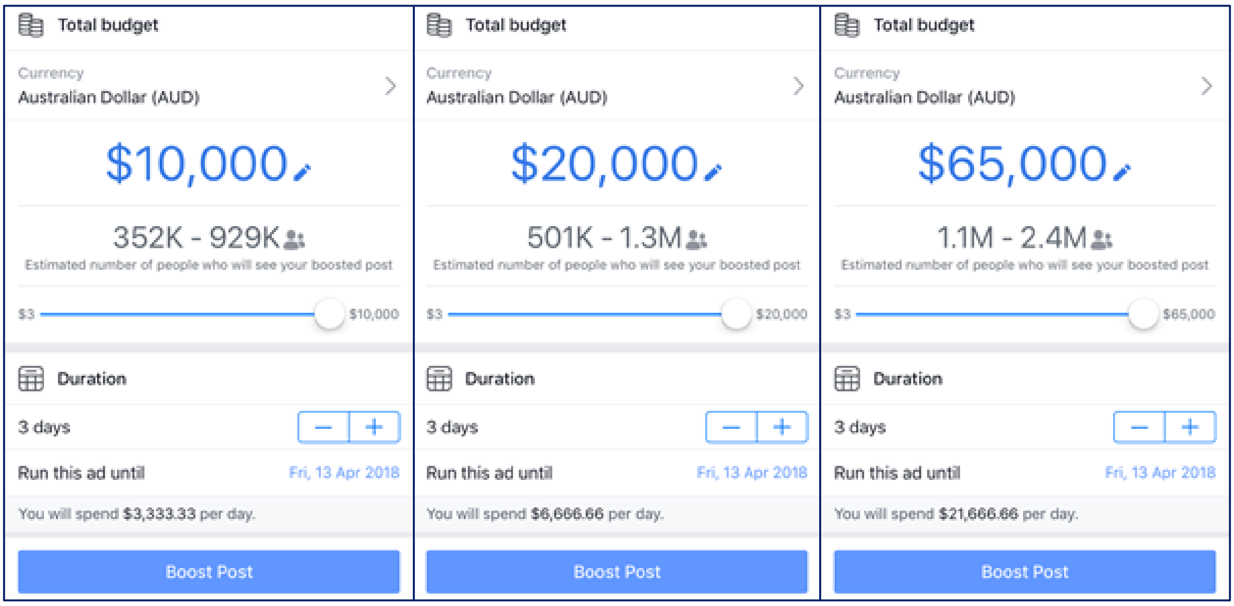
THE BENCHMARK SERIES

think TV

The lack of transparency on reach and viewability is compounded by reach estimates that vary so wildly that it is unclear what the advertiser is paying for. As shown in Box 5 taken directly from Facebook, a 3-day campaign will buy you the following reach in Australia:

- $10,000 budget – somewhere between 325,000 – 929,000 people
- $20,000 budget – somewhere between 501,000 – 1,300,000 people
- $65,000 budget – somewhere between 1,100,00 – 2,400,000 people.

BOX 5: REACH ESTIMATES EXAMPLE ON FACEBOOK



It is hard to imagine another product where the purchaser has to accept that the effective unit cost may vary by over 160% depending on the performance of the service provider and that the service provider writes the standard against which the product is measured. As discussed further below, the fact that advertisers accept these conditions is an indication of the market power held by Google and Facebook.

5.4 Blurring the lines between marketing and education

Both Google and Facebook run programs where staff are placed within advertising agencies, ostensibly under the banner of "educating" clients on how to use the digital platforms.

Very little is known about these programs. Free TV received an invitation from Facebook to participate in one of these programs, as shown in Box 6 below.

BOX 6: EXAMPLE INTRODUCTION TO FACEBOOK'S MARKETING PROGRAM

> Our aim here is to work with businesses like Australia Needs Free TV that are looking to scale their business. It's exciting to see how much potential your business has, in the digital marketing space. What I'd like to do now is connect with you to give us the opportunity to help grow Australia Needs Free TV further. During that conversation I would like to:
>
> - Offer a tailored advertising strategy by understanding your marketing objectives and brand
> - Optimise your campaigns to help you get better ROI out of your Facebook advertising
> - Develop the ideal advertising formula for your objective, using the top ad products and tools
> - Provide you with insight into the latest tools and features
>
> Our goal is to work with you to leverage the highly effective tools and ad products available on the Facebook advertising platform - Ultimately, to help grow your business, and this is available at no commitment to you.

However, Facebook lacks transparency on which of their clients can access these education and marketing programs, as the landing page to their "Facebook Marketing Expert" program shows below shows.

> Thanks for your interest, but the Facebook Marketing Expert program is available only to select advertisers who have received an invitation. To see if you've been selected to participate in the program, log into Facebook or check your email.

When combined with the issues described above regarding the efficacy of measurement of reach claims and viewability, these marketing programs have the potential to be providing false and misleading information to advertisers.

In other sectors where there is the potential to blur the lines of "marketing" and "education" there are clear guidelines or Codes of Conduct that regulate the marketing behaviour. For example, the Medicines Australia Code of Conduct is authorised by the ACCC and sets the standard for the ethical marketing and promotion of medicines.

Recommendation

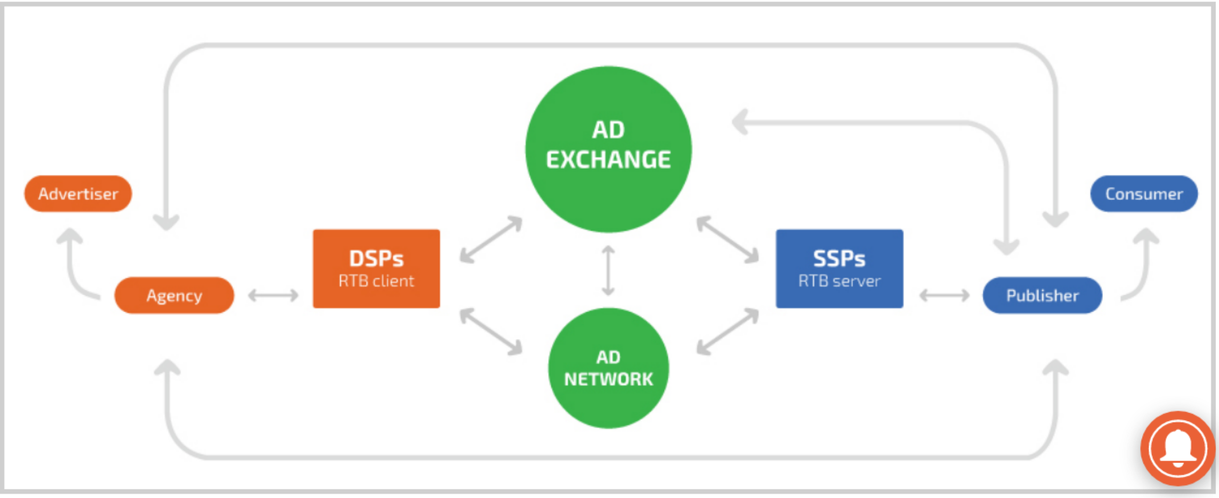
The ACCC should find that the marketing practices of the digital duopoly have the potential to mislead advertisers and consumers into the effectiveness of their digital advertising. Legislation should be introduced to require that the marketing of digital advertising be regulated by a Code of Conduct authorised by the ACCC.

5.5 Clipping the programmatic ticket: the true price of digital advertising

5.5.1 How it works

Programmatic advertising essentially just means that an automated process is run to determine which ad is shown on any given webpage that a user visits. When a user clicks on a webpage of a publisher, it starts a real-time bidding process on both the supply side platform (SSP) and on the demand side platform (DSP). The part of the picture that is referred to as "programmatic" is the automated process on the left of the Figure 6—where ads are bought and sold through an ad exchange.

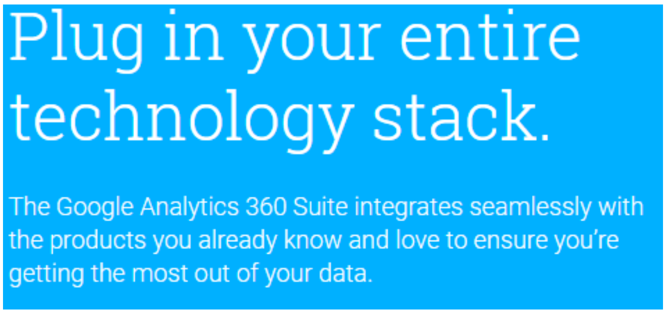
FIGURE 6: THE PROGRAMMATIC AD PROCESS



Source: Mobidea Academy

As explained by Mobidea:

> *"What happens here is simple: while an ad spot is loading on a user's browser, the info about the webpage where it's being displayed in and the info about the user are passed on to an ad exchange.*
>
> *Then, the ad is auctioned to the advertiser who has the highest bid and the corresponding ad is displayed on the webpage."*[30]



The process of attempting to target an ad to a particular user occurs by supplementing the DSP with a Data Management Platform (DMP). A DMP is a piece of software that manages a database of user data.

Google is a supplier across the ad tech supply chain (see right). The competition issues associated with this degree of vertical integration are discussed in section 6.3.

5.5.2 Cost per thousand online is much higher than quoted

Like Google's AdWords, Facebook's CPM rates are determined through a real-time auction. This can lead to surprising results, for example there have been recent reports that Australia has the world's most expensive Facebook ads ($6.40 CPM compared to $1.80 globally).[31]

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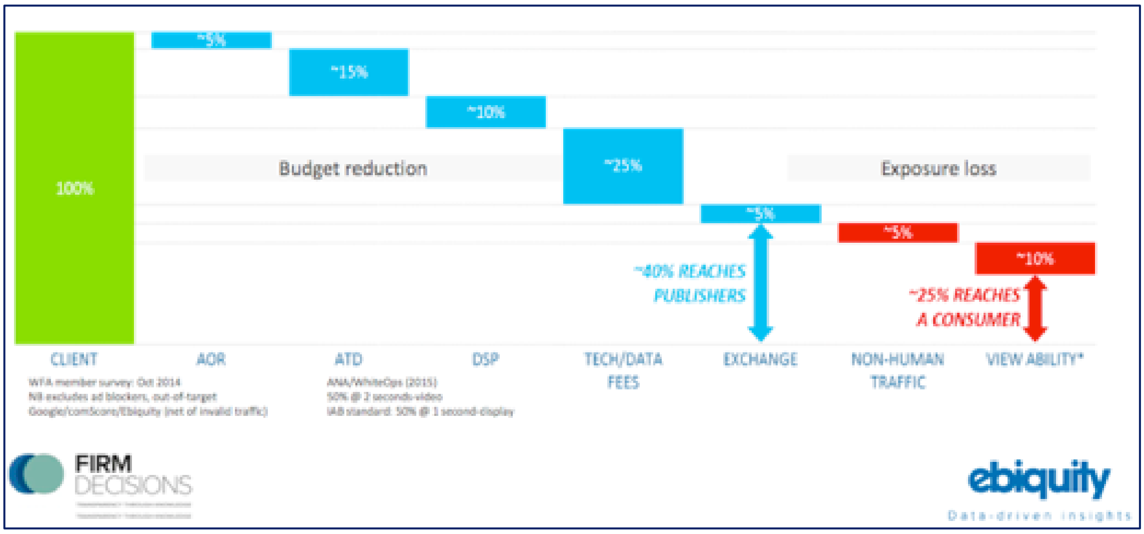
30 https://www.mobidea.com/academy/demand-side-platforms/
31 http://www.adnews.com.au/news/australia-has-the-most-expensive-facebook-ads-in-the-world-study-finds

The programmatic digital advertising process itself has very high overheads, with multiple parties who provide the technology platforms to enable the delivery and display of digital advertising to "clip the ticket" through the value chain, as demonstrated in the chart below. From the initial 100% commitment from the client, there are multiple parties in the chain that reduce that budget through varying system costs by 25% before it even reaches an ad exchange. In summary, the spend is actually 75% less efficient than the client had intended.

FIGURE 7: THE COST OF CLIPPING THE AD TECH TICKET



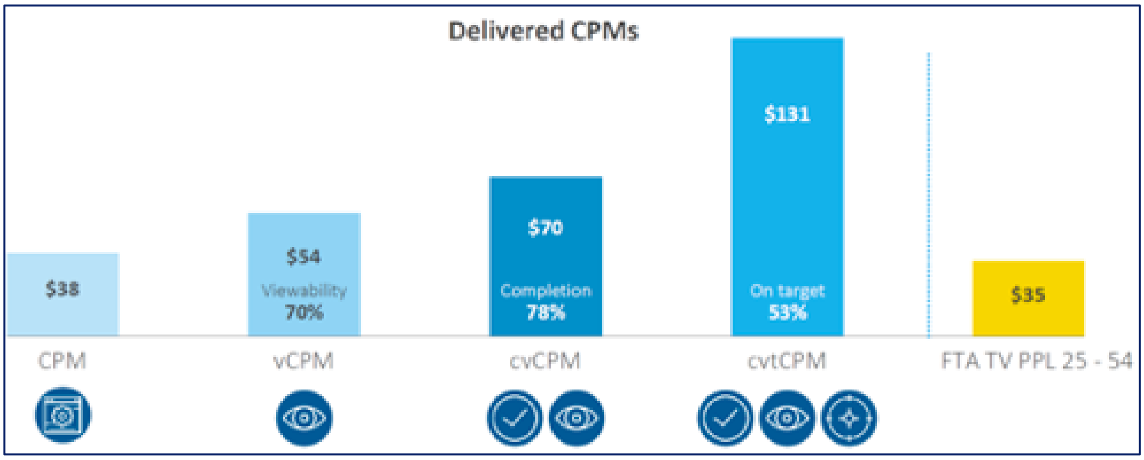
Source: Ebiquity

When the various issues with viewability and human behaviour are taken into account, the effective cost of reaching a digital audience can be much higher than clients are led to believe. For example, the diagram below ads up the true cost of digital advertising, based on an initial claim that reaching the 25-54 year old demographic on digital costs $38 (CPM).

Given the arguments posed already in this submission, viewability might only be 70% which effectively increases the CPM to $54. Add in the completion and viewing metrics, which are very low, seen and viewed in entirety could be as low as 78% which raises the CPM to nearly double to $70. Finally, add in the wastage because the targeting has not been exposing just 25-54 and only 53% of people in the study were reached and on target.

Taking all of those factors into account, the actual delivered CPM on target, completed and viewed is $131. Compare this to FTA TV in the same demographic, successfully delivered on target at $35, the difference between the claim and reality of on line advertising is almost 3.5 times more expensive, a significant CPM price premium.

FIGURE 8: PREMIUM FOR COMPLETE, VIEWABLE AND TARGETED DIGITAL ADS



Source: Ebiquity, Digital Pool FY2017 Benchmarks

5.6 Why is the advertising industry itself not demanding changes?

Section 6 explores the issues with the market dominance of Facebook and Google. A key product of this market dominance is the reluctance shown by Google and Facebook to allowing third-party verification of their own measurement systems. In this environment, advertisers have had little choice but to accept the data provided by Google and Facebook.

Recent changes to submit to MRC (Google and Facebook are the largest members) verification and auditing came only in response the placement of advertisements next to extremist material (see section 4.7.2) and a large number of data errors by Facebook (see section 5.2). While an improvement, these changes do not go far enough in allowing robust third-party measurement and verification through SDKs installed across all Facebook and Google products and transparent measurement of web traffic that is on par with how other publishers who do not operate walled gardens allow their inventory to be measured.

In the absence of independent, transparent and audited reach and viewability metrics for digital advertising sold by Google and Facebook, media buyers, regulators and policy makers fall back on anecdotal claims about the value of digital advertising.

Indeed, the ACCC's own issues paper falls into this trap where it says:

> *"… digital platforms provide advertisers with significant reach and greater precision in targeting consumers with particular interests or purchasing patterns. Advertising has consequently become much more efficient."*[32]

The ACCC is wrong to conclude that this amounts to advertising becoming more efficient. This conclusion is not supported by the evidence. As highlighted above, a lack of independent measurement, issues with viewability and concerns around click fraud mean that digital advertising offered by Google and Facebook can be much less efficient than other platforms.

Research has shown that the advertising industry also overestimates the general population's engagement with social media and online platforms. Professor Karen Nelson-Field PhD surveyed over 1,600 professionals in the media buying/creative industries and over 1,000 in the general population to identify differences and similarities in the two groups' lifestyles and their usage of – and attitudes towards – different media.

The results (shown in Table 2) demonstrate a significant gap between the advertising industry and the rest of the population. The ad industry overestimated the general population's use of social media and online platforms, in some cases by over 350%.

32 ACCC, Digital Platforms Inquiry—Issues Paper, February 2018, pg 7

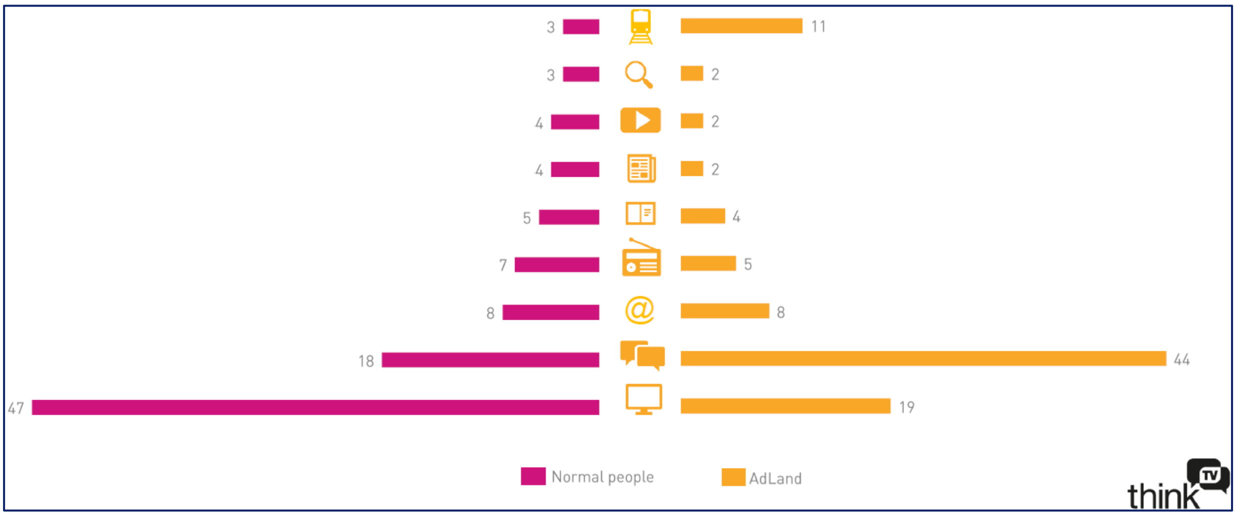
TABLE 2: ADVERTISING INDUSTRY USAGE OF DIGITAL MEDIA

Used in last 7 days?	AdLand %age estimate of normal people	Normal people %age self-reported	AdLand overestimates by…
Facebook	100%	79%	27%
YouTube	94%	61%	54%
Instagram	89%	33%	170%
Netflix	78%	28%	179%
Snapchat	76%	25%	204%
Twitter	53%	13%	308%
WhatsApp	51%	13%	292%
ABCiView	24%	10%	140%
Buzzfeed	32%	7%	357%
Reddit	14%	4%	250%

Source: ThinkTV, AdNation 2017

Similarly, as shown in Figure 9, the general population recorded almost twice as many people (47%) who said they were likely to find advertising that draws attention to a product/brand/service on TV, compared to the advertising industry (19%). In contrast, the study found that the advertising industry dramatically overestimates the impact of social media advertising, (18% to 44%).

FIGURE 9: ADVERTISING INDUSTRY OVERESTIMATES DIGITAL IMPACT



Source: ThinkTV AdNation Study 2017. Q20: "In which, if any, of the following places are you most likely to find advertising that draws attention to a product/service/brand that you had not heard of"

Combined with the overwhelming market power and access to data enjoyed by Google and Facebook (see section 6), they are therefore seen as unavoidable advertising channels by a captive advertising industry.

It is vital that this inquiry lead to the mandatory acceptance of SDKs and transparent measurement of web traffic across all Google and Facebook advertising products to enable genuine third-party measurement and verification of the effectiveness of their digital advertising. This is the standard approach for most other media outlets and online businesses (see section for the OzTAM's approach 5.3.3). This will provide the advertising industry, along with policy makers and regulators, the tools necessary to make informed purchasing decisions, backed by independent, robust reach and viewability metrics. In the absence of this data, the advertising industry will continue to be distorted by two dominant players who, despite recent announcements, are still effectively marking their own homework.

6 The impact of total market dominance

Why this matters?

It is well understood that Google and Facebook are dominant in search and social. This section highlights that as a result of this domination, negotiation with Facebook and Google on their terms and conditions by local media companies is almost impossible. In addition, we explain how the extent of vertical integration and horizontal acquisitions of Google and Facebook means that their dominance in one market segment can have implications throughout the supply chain.

In addition, the all-important algorithms that drive these companies are entirely hidden from view, despite the potential for their misuse and the significant impact that changes can have on local media companies.

6.1 Platforms as natural monopolies

There has been much debate as to whether or not the ubiquity of Google and Facebook mean that they are natural monopolies and hence whether and how they should be regulated. It is true that they are not traditional national monopolies, in that they do not possess insurmountable infrastructure scale advantages. New entrants can buy social media platform software off the shelf and there are numerous competing search engines to Google. Consumers are free to join any social media platform or to use any search engine. And yet, they each dominate their market. The ACCC Issues Paper highlights that Google has a 95% market share for search in Australia, equalling the share of social enjoyed by Facebook.

They dominate their markets because they deliver a better service proposition to their customers than the competition. This is in part because they possess first (or early) mover advantages that a new competitor could not easily replicate. They benefit from network effects, data effects and economies of scale as described below.

Key concepts

- Network effects – The value of the service increases exponentially with the number of customers connected to the network. Just as a phone network is more valuable if everybody is connected to it, so is a social network. In the world of telephony, this problem was managed through regulated interconnection agreements that forced dominant players to 'open their networks' to new entrants. By contrast, Facebook, for example, does not offer other social networks the ability to 'interconnect' with it (other than its own services such as Instagram).
- Data effects – As the largest company grows, so does its dataset. This larger data set confers advantages by allowing it to offer better services to customers (e.g. through better algorithms) and to advertisers (by being better able to match specific ad messages to specific customer characteristics).
- Economies of scale – Platforms also benefit from classic economy of scale effects. As the largest players, they collect the most revenues and hence are able to invest the most in research and development, sales and marketing, etc. Of course, this is true in every industry, but it has certainly allowed the global platform players to enter new markets where they have a small market share and to sustain losses for many years until they are able to grow scale.

Thus, even though these platforms are not classically defined natural monopolies, the impact of these scale and/or first mover advantages mean that the markets in which they operate trend towards monopolies (or at least towards market dominance by single players). They are in other words, virtual monopolies.

Advertisers that want to advertise in a social media or a search environment have little or no choice. They have to advertise with Google and/or Facebook. That explains why they are currently securing such a high proportion of digital advertising dollars globally, including in Australia.

The absence of alternatives creates a perfect environment for monopolistic pricing, allowing for these platforms to auction their inventory to the highest bidders without any competitive or market pricing to act as a counterforce. This in turn has resulted in a higher and higher share of advertising spend going to these two players. This is supported by analysis that shows that in 2017, Google and Facebook accounted for 83% of the growth in the US digital advertising market.[33] As noted section 3.1.1, in 2018, their share of growth is forecast to be 90%.

In fact, a recent study by the Economist suggested that the stock market valuation of the largest platform players implied that they would take close to 100% of the American advertising market[34]. Whilst this seems unlikely, it demonstrates that the markets believe that these players will dominate the advertising marketplace.

Arguably, in a market where there is no competition as a result of structural issues (in this case the markets for search and social media-based marketing), the provision of those services should be regulated.

Similarly, it is arguable that monopoly rents are being extracted from users, in the form of data rather than price. In return for the provision of 'free' services, consumers enter into a contract with the platform that allows the platform to collect and monetise their data. This includes, but is not limited to, (depending on the platform) name, address, demographic data, likes and dislikes, friends and relatives, spending history, location history and search history as well as posts, images and videos. The platforms have privacy policies and privacy settings, but they are arguably not clear and transparent and have been changed unilaterally overtime. The consumer is still, in every case, providing a large amount of personal data to the platform.

It is only now becoming clear to consumers both the scale of the data that they are providing and the ways in which this data can then be used both legitimately and, in the case of breaches, illegitimately. However, it is not easy for customers to switch provider or to cease using a provider if they disagree with this contractual situation as they may:

- consider the service a utility – in other words an essential service that they cannot do without;
- consider the service to be the only service to use (based on the effects described above that led to their initial market dominance);
- not be able to withdraw or delete their history creating barriers to switching providers.

In summary, whilst neither Google or Facebook is a natural monopoly under the classical definition, they would each qualify as a 'natural digital monopoly' that may be defined as:

> *'the dominant player in a digital market place where structural factors such as network, data, algorithmic and / or other scale advantages that accrue to first or early movers result in the emergence of a single, dominant player.'*[35]

In such cases, we would argue that there is a strong, prima facie case for regulation.

6.2 No bilateral negotiation

This level of market dominance has further knock on effects beyond pricing for advertisers. It exposes all customers, including local media companies, to changes in policy or terms and

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[33] https://www.cnbc.com/2017/12/20/google-facebook-digital-ad-marketshare-growth-pivotal.html

[34] https://www.economist.com/news/business/21735029-stockmarket-investors-are-wrong-expect-enormous-surge-advertising-revenues-something

[35] Venture Consulting Group, 2018

conditions without the possibility of the bilateral negotiation that accompanies normal business-to-business relationships.

In section 7 we explain how both Google and Facebook monetise other people's content without fair remuneration. The market dominance of Google and Facebook means that there is no concept of bilateral negotiation on terms and conditions. As a local media company, you can either accept the terms and conditions, or block Google's crawlers and/or elect not to open and maintain a Facebook page. There have been recent well documented examples of the impact that this dominance and lack of bilateral negotiation can have.

First, Google had a policy of "first-click free" for many years that circumvented paywalls and undermined the subscription-based news model. Despite the significant damage that Google was inflicting on local print news services and jobs, this policy was only amended after a global public relations campaign shone a light on the practices of the impact on journalistic content. That campaign was one of the precursors to the establishment of this inquiry. But rather than the fact that the first-click free policy was abandoned pointing to the responsiveness of Google, it highlights their complete indifference until the point that their reputation is drawn into question. This is not bilateral negotiation at work. This is a damaging, slow and inefficient process that at very best will take years to remove even the most egregious of terms and conditions.

Second, Facebook recently amended its secretive algorithm to demote pages. In announcing the change Mark Zuckerberg said:

> *As we roll this out, you'll see less public content like posts from businesses, brands, and media. And the public content you see more will be held to the same standard -- it should encourage meaningful interactions between people.*
>
> *For example, there are many tight-knit communities around TV shows and sports teams. We've seen people interact way more around live videos than regular ones. Some news helps start conversations on important issues. But too often today, watching video, reading news or getting a page update is just a passive experience.*[36]

The importance of organic reach needs to be explained to understand the impact of such changes, particularly to smaller news organisations, as this Featured Snippet in Box 7 explains.

BOX 7: FROM THE HORSE'S MOUTH—UNDERSTANDING ORGANIC REACH

Organic reach is the number of people who had an unpaid post from your Page enter their screen, and paid **reach** is the number of people who had a paid post from your Page enter their screen. If your post **reaches** someone through both paid and **organic** distribution, they're counted toward each.

What's the difference between organic, paid and post reach? - Facebook
https://www.facebook.com/help/285625061456389

Building organic reach is hard. It takes a substantial resource investment in creating content that your audience will engage with and want to share with their networks. While resource intensive, TV networks are very good at it. As shown in section 7.2, the most engaging content on social media has previously comes from commercial television.

However, this substantial investment in creating engaging content can be undermined at any moment by Google and Facebook changing their algorithms in ways that dramatically reduces organic reach. As the recent announcement from Facebook shows, they can with no consultation or forewarning, demote the pages of businesses, brands, news providers and TV shows. There have been reports of the engagement on some pages dropping by up to 50% following these changes.[37]

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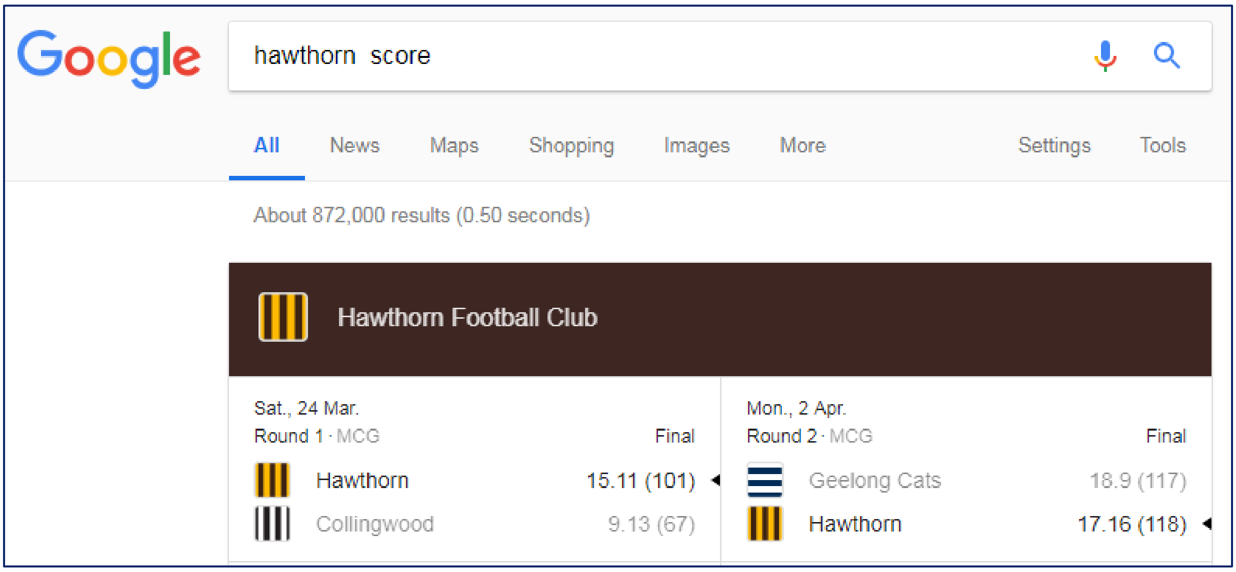
36 https://www.facebook.com/zuck/posts/10104413015393571
37 http://www.adnews.com.au/news/australia-has-the-most-expensive-facebook-ads-in-the-world-study-finds

Similarly, the introduction of Google's "Featured Snippets" has had an effect on the click through rates or referrals to a site, including for news sites. For example, Google scrapes sports results from websites and presents them as a Featured Snippet—reducing what was a significant source of referrals for news sites.

BOX 8: SCRAPING CONTENT AND REDUCING CLICKS – AFL SCORES EXAMPLE



A recent study found that the click through rate for the first organic search result fell from 26% without a snippet to 9.6% with a snippet.[38] This is particularly damaging for journalistic content where the long snippet reduces the potential for the user to click through to the full story.

The ability to change the algorithms at will highlights the enormous power held by the digital duopoly, who between them act as gatekeepers to the internet. With hastily implemented changes, lacking any consultation or regard for the impact on businesses, Google and Facebook can destroy brand value or simply force businesses to pay to achieve the same reach previously achieved organically. Some reports suggest that coincident with the recent algorithm changes, Facebook has also increased the cost of advertising by 35%.[39]

For content-based businesses, the impact of these algorithm changes can be especially severe as they often use the platforms (such as Facebook and YouTube) as distribution channels. The content they are distributing is their product, so they look to build loyal communities of customers. However, when algorithms change, their content can rapidly drop out of sight, with a consequent major impact on their businesses.

This creates an unsatisfactory dynamic for local media companies where they rely on the platforms for marketing and distribution (they have to go where their customers are) but at the same time, they have little or no control over how their content is managed or distributed by those platforms. Nor is there any real ability to negotiate terms and conditions bilaterally with Google and Facebook.

6.2.1 Countering the impact on local media companies

In addition to the more radical regulation options of structural separation or other access regulations, it is clear that more needs to be done to assist local media businesses negotiate with the digital duopoly.

One potential option is the creation of a role for the ACCC as a binding dispute resolution body for the digital media sector. In this capacity, the ACCC could have the power to issue binding

[38] https://searchengineland.com/another-featured-snippet-study-shows-steal-significant-traffic-first-organic-result-275967
[39] https://digiday.com/marketing/organic-reach-facebook-dead-advertisers-will-spend-reach-facebooks-feed-purge/

arbitration decisions on matters relating to the terms and conditions under which companies like Google and Facebook could access content and other services. Alternatively, a binding service level agreement could be established that sets out minimum terms and conditions.

Alternatively, the ACCC could issue an authorisation for collective bargaining by local media companies with the digital duopoly. This is a more light-handed approach, but one that still has the potential to redress some of the power imbalance currently experienced by individual media companies in trying to negotiate with businesses of the size and scale of Google and Facebook.

6.2.2 Algorithm transparency needed

The lack of transparency over the algorithms makes it difficult for competition regulators around the world to assess anti-competitive conduct. It is unclear exactly how the algorithms are used and altered over time to maximise the commercial positions of Google and Facebook.

While the potential for market manipulation clearly exists, in the absence of transparency around the algorithms, action can only be taken when the abuse of market power is in plain sight. This was the case for Google's shopping comparison service that the European commission found:

- systematically given prominent placement to its own comparison shopping service; and
- demoted rival comparison shopping services in its search results.[40]

Given the market dominance and gateway position that Google and Facebook have and the significant economic impact that changes to the algorithms can have, the ACCC inquiry should determine how greater transparency over the algorithms should be enforced.

Recommendations

- To address the inability of local media businesses to bilaterally negotiate with the digital duopoly, the ACCC should provide guidance on the terms under which it would authorise collective bargaining by local media outlets with Google and Facebook.
- The ACCC inquiry should find that the algorithms should be made more transparent, with changes subject to a minimum disclosure period and requirements to identify and consult with impacted stakeholders.

6.3 Potential for preferential treatment and interoperability issues

While the level of market dominance discussed above should be alarming for competition regulators worldwide, it is also important to consider the extent of vertical integration of the digital advertising supply chain. For example, Google owns a range of products at each layer of the programmatic advertising supply chain, including:

- DBM – the leading demand side platform by market share;
- DCM – one of the two largest advertiser ad servers and rich media vendors in the world;
- DFP – the largest display and video publisher ad server in the world;
- Active View – a top 3 global viewability measurement vendor by market share;
- YouTube – largest video publisher in the world;
- Google Audience 360 – a data management platform;
- Google Analytics – one of the largest analytics providers in the world; and
- The Google Display network – Google's network of owned and third-party websites that show AdWords advertising.

[40] http://europa.eu/rapid/press-release_IP-17-1784_en.htm

Google even makes a point of promoting the integrated nature of its products (see right).[41] This means that Google has the capacity and incentive to bundle various products in the supply chain.

Indeed, to advertise on Google's YouTube, you are forced to use Google's AdWords. As the below screenshot from Google's own FAQs explains.

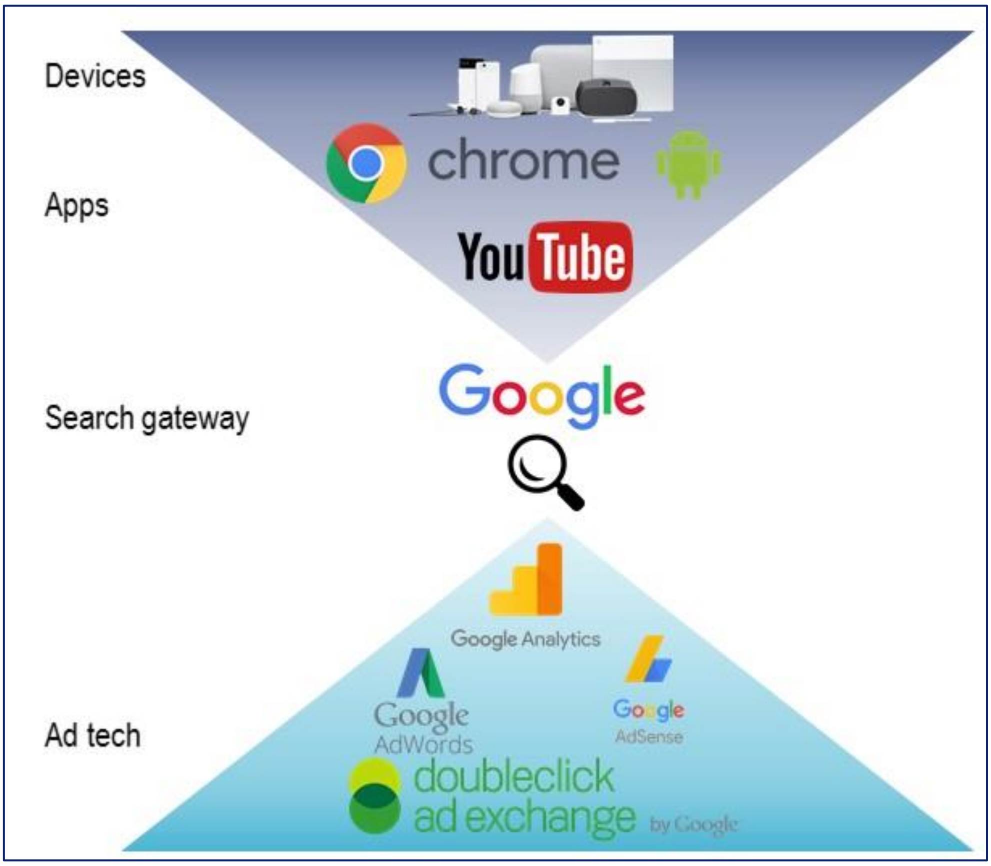
> Reach the right customers with Google integrations.
>
> The Google Analytics 360 Suite integrates with Google media solutions, such as AdWords, the Display Network, and DoubleClick, so you can start using your website data to find new and high-value customers — then automatically remarket to them across Google media properties. Start increasing your brand's relevance (and revenue) today.

BOX 9: FAQ – YOU MUST USE GOOGLE'S SERVICES TO ADVERTISE ON YOUTUBE

> Do I need a Google AdWords account to advertise on YouTube?
>
> Yes, your video campaigns are set up on Google AdWords, an advertising platform used by businesses running ads on Google and its advertising network – which includes YouTube. AdWords is where you'll set up, run and manage your YouTube ads. Sign up for an AdWords account.

As shown below, Google's domination of search means it acts as a gateway to other elements of the supply chain. As explained in the following sections, the result of this is that Google has the potential to use technical standards and associated policies to advantage its own related businesses.

BOX 10: VERTICALLY INTEGRATED GOOGLE



Recommendation

The ACCC should fully map out the Google supply chain and closely investigate the potential bundling and full-line forcing competition issues.

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41 https://www.google.com/analytics/360-suite/integrations/

6.3.1 Writing their own standards

Similar to the digital advertising metrics provided by Google and Facebook that lack independence and transparency, the technical specifications that enable the supply chain to operate also lack independence. There have been two recent examples where Google has authored technical specifications that have the potential to benefit its own products and services and exclude or otherwise disadvantage its competitors.

First, Google has developed Accelerated Mobile Pages (AMP), a new standard for the coding of mobile web pages.

BOX 11: WHAT IS AMP?

> **AMP Test**
>
> Accelerated mobile pages (AMP) is a standard for creating fast-loading pages that look good on mobile devices. Having a mobile-friendly website is a critical part of your online presence. In many countries, smartphone traffic now exceeds desktop traffic. You can use the AMP Test to check the validity of an AMP page, and to verify that it has the proper configuration to appear in Google Search results.

On its face, AMP is a simplified version of the standard webpage authoring HTML language that will improve load times of mobile web pages. Mobile pages that follow Google's AMP standard will be prominently displayed in the search results.

Studies have shown that people will generally not look past the first five search results and that 67% of all clicks on the search results page are captured by the first five links.[42] Therefore the prospect of being demoted in the search rankings essentially forces businesses to invest in adopting the new standard (see Box 12). Given Google's vertically integrated structure, the ability for it to write its own standards, such as AMP, is a potential competition issue. Such standards need to be set independently of those that can gain a commercial advantage.

BOX 12: THE IMPACT OF NOT ADOPTING GOOGLE'S OWN STANDARD

> **Accelerated Mobile Pages**
>
> Fix applicable issues in your Accelerated Mobile Pages (AMP) in order to have them prominently served to mobile users. Learn more.

> If the page is not a valid AMP page, it might not appear in Google Search results with all possible features. For example, it might not appear with a graphical image, or in a carousel.

A further example of Google writing its own standards is the Chrome ad filtering that commenced in the US and Europe on 15 February 2018. This will enable Google's own browser Chrome to filter ads that breach the standards set by the Coalition for Better Ads (Google and Facebook are board members).[43]

There is the clear potential here for the setting of technical standards that benefit Google's own ad server network, to the detriment of other service providers. There should be clear and transparently established technical standards that are set independent of the dominant players in the market place.

As was noted in the previous section, there are various regulatory options that are available for addressing the conflict issue that arises from vertical integration, all of which the ACCC is already involved in administering. In telecommunications, with the creation of NBNCo, there is a structural separation between network owner and retail service providers. Similarly, in

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[42] https://www.theleverageway.com/blog/how-far-down-the-search-engine-results-page-will-most-people-go/
[43] https://www.betterads.org/members/

electricity and gas, strict ring-fencing and reporting arrangements are in place and there is a prohibition against transmission companies owning generators.

BOX 13: CASE STUDY UNLOCKD

Unlockd is an Australian-developed mobile phone app, established in 2014, that serves advertisements to users when they unlock their phones. In return, users earn credits for viewing those ads. The app is available from the Google Play Store and receives at least some of its advertising from Google's AdMob service (purchased by Google in 2009).

Recent reports have highlighted that Google is potentially using its market position and vertical integration to restrict the ability of Unlockd to continue to compete and innovate. The Australian Financial Review and The Australian have both reported that Google is threatening to remove the app from its Play Store and to disable its ability to receive ads through Admob.

The reports also note that the ACCC is aware of this issue and will investigate the conduct of Google as part of this inquiry. It is a matter for the ACCC to determine whether it considers that this conduct breaches any of the provisions of the *Competition and Consumer Act 2010.* However, we highlight the alleged conduct here as a recent example of the clear potential for Google to act across the supply chain and significantly impact competitors.

While these are options that should be considered by the ACCC, structural options are likely to be lengthy protracted solutions that will require a high degree of international coordination across regulators. In preference, we consider that arrangements should be put in place to ensure that technical standards cannot be set by the players in the market.

Recommendation

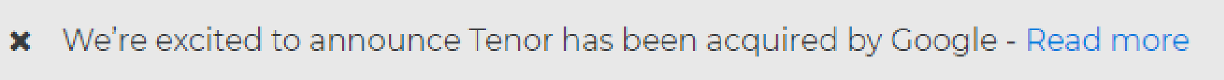
The ACCC inquiry should find that the market dominance and vertical integration of Google and Facebook means that technical standards that underpin interoperability across the digital supply chain should be set by an independent third party.

6.4 Protect new entrant innovators from being acquired and shut down

In a market with low barriers to entry and a limited degree of capital intensity, it could be argued that it should be left to the market to address the issues that we have raised across this submission. In fact, it is often argued that Google and Facebook are not monopolies and that they do face a competitive discipline from new entrants or even the threat of new entrants.

However, a further implication of the size, scale and access to capital enjoyed by the digital duopoly is that they have the means to buy out any potential competitors before they become a meaningful threat. Alternatively, Google and Facebook may use their vast capital resources to develop and duplicate the services offered by a potential competitor.

But it is not simply about buying out competition, it also relates directly to curbing innovation. In the time since the ACCC published its issues paper, we have already seen a further acquisition by Google. On 28 March 2018, Google acquired Tenor, a relatively new search company specialising in GIF images. Tenor had been successful in its short lifetime and had already amassed a monthly following of around 300 million people.[44]



Tenor joins a very long list of acquisitions by both Google and Facebook across the length of the supply chain. From user applications like YouTube ($1.65 billion in 2006), WhatsApp ($19 billion 2014), and Instagram ($1 billion, 2012) to ad tech firms like DoubleClick ($3.1 billion 20007) and Admob ($750 million 2009). A number of components of the programmatic supply chain were purchased by Google and integrated into the Google advertising infrastructure, including Invite Media (a demand side platform) and Admeld (a supply side platform) that were both subsequently rebranded. A potential competitor to Google Maps, Waze, was also bought by Google in June 2013.[45]

Some companies are rolled into Google and Facebook and continue to operate under the original branding. Others are purchased and immediately closed, such as Lightbox.com.

In light of these acquisitions and the impact that they have in entrenching the position of Google and Facebook, the effectiveness of competition law in preserving and promoting competition in this sector needs to be investigated. The ACCC inquiry should examine what the extent to which there is sufficient international collaboration by competition regulators in protecting against Google and Facebook buying out any firm that has the potential to compete against them.

BOX 14: SWALLOWING UP THE POTENTIAL COMPETITION

Recommendation

The ACCC should review how it approaches merger clearances in the digital sector and determine whether the market definition it applies continues to be appropriate given recent evidence of the impact on competition from acquisition activity.

Beyond the merger guidelines, the ACCC should consider what additional legislative powers and international collaboration that is necessary to protect and promote digital start-up companies from being acquired.

44 https://www.bloomberg.com/news/articles/2018-03-27/google-buys-tenor-a-gif-search-tool-that-advertisers-love
45 https://blog.waze.com/search/label/Company%20News

7 No contribution to the cost of content and piracy facilitation

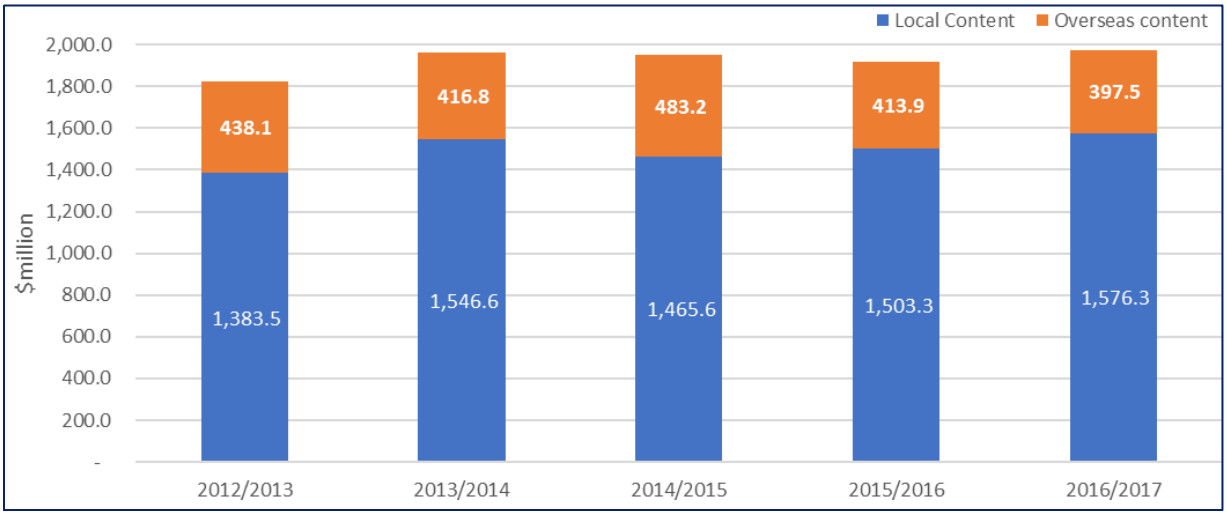
Why this matters?

Google and Facebook are media companies—because they monetise content. But unlike other media companies that pay copyright licence fees and invest significantly in content creation, the digital media companies monetise content that have not contributed towards. This is compounded by their facilitation of access to pirated content and circumvention of lawful site blocking initiatives.

7.1 Commercial TV networks are the main investors in Australian content

Commercial broadcasters are major creators, licensors and licensees of copyright material. We invest over $1.5 billion in Australian content every year, which underpins much of the Australian creative sector. This equates to a total investment of nearly $10 billion in programming over the last 5 years, with almost 80% of this on local content. 6 out of every 10 dollars invested in local production comes from the commercial TV sector. In contrast, neither Google nor Facebook contribute in any meaningful way towards the cost of the content that they monetise.

FIGURE 10: FREE TV PROGRAMMING EXPENDITURE



Source: ACMA Broadcasting Financial Results

7.2 No payment for content – despite our content being the most engaging

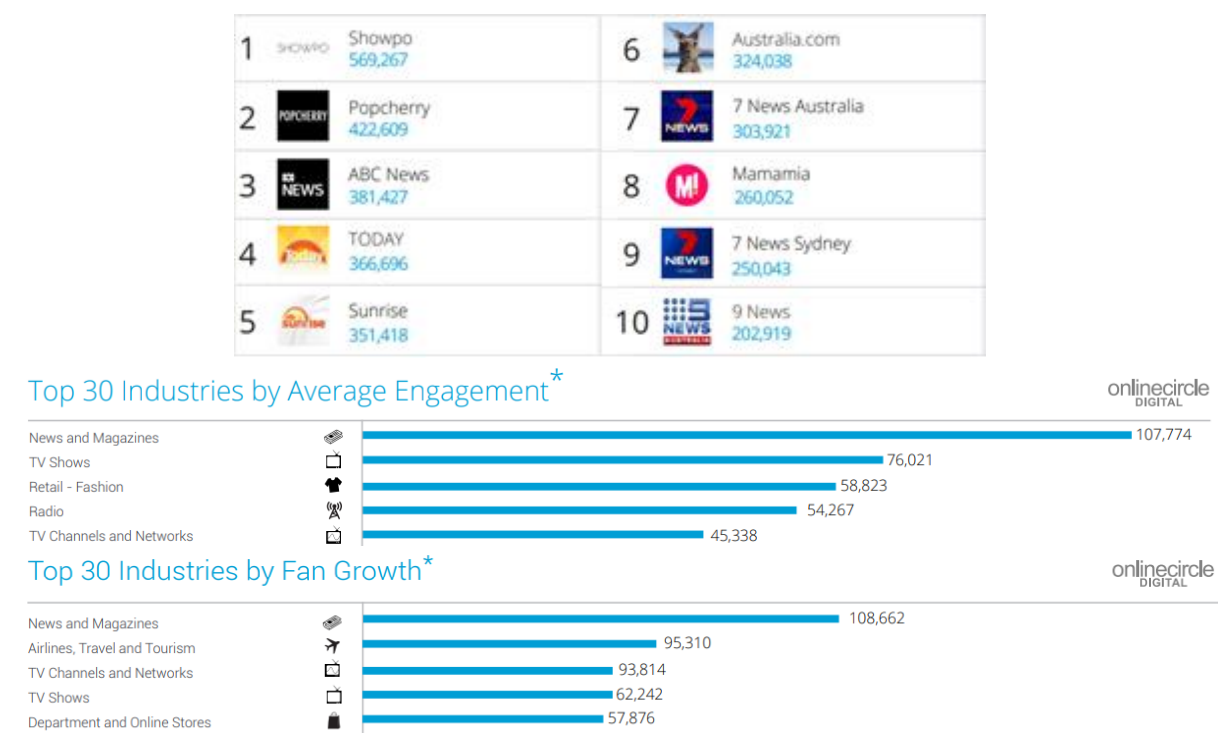
According to a recent report by Onlinecircle Digital, programming provided by commercial TV is some of the most engaging content on Facebook. As shown in Box 15, in 2017, six of the top 10 most engaging Facebook Pages were related to TV programs. Similarly, the most engaging industries are news and magazines, followed by TV shows. TV channels and networks round out the top 5.

Our content is also driving the most growth, with news and magazines, TV channels and networks and TV shows all featuring in the top 5 industries by fan growth.

The ultimate message in all of this is that our content is extremely valuable to the digital duopoly. Facebook in particular uses as its key success metric ‘time spent on site’. Clearly as producers of the some of the most highly engaging content, our content is a large part of their success.

However, not only do the digital duopoly not provide any contribution towards this content that users are engaging with, they are actively undermining it through facilitating piracy, as explained in the next sections.

BOX 15: TV DRIVES SOCIAL MEDIA ENGAGEMENT



Source: *Onlinecircle Digital, Facebook Performance Report, 2017 The Year in Review*

7.3 Circumvention of site blocking

On 18 August 2017, the Federal Court of Australia issued orders for the blocking of 59 internet sites that provided illegal access to copyrighted content. The orders, sought by Foxtel (17 sites)[46] and Village Roadshow (42 sites)[47] were made under section 115A of the *Copyright Act 1968*.

Research conducted by Incopro found that these site blocking measures had:

- resulted in a 53.4% usage reduction of blocked piracy sites when comparing usage recorded in November 2017 to usage before blocking took effect;
- decreased the usage of the top 50 piracy sites in Australia by 35.1% between October 2016 and November 2017 and that the two site blocking measures were the driving force behind these changes;
- reduced overall piracy (usage of the top 250 unauthorised piracy sites identified in the research) by 25.4% in November 2017 compared to October 2016.[48]

While the success of these measures is encouraging, the success rate could have been higher had it not been for the circumvention measures promoted by Google's search results. As shown below, a simple Google search on how to circumvent these measures not only provided many search results explaining how to continue to access the illegal content, but also Google's "OneBox" result provided "12 useful methods!"

Google clearly does not actively block pirate sites, nor proxy sites that show work-arounds to reach blocked sites. As noted by Mr Graham Burke AO, Chairman of Creative Content Australia,

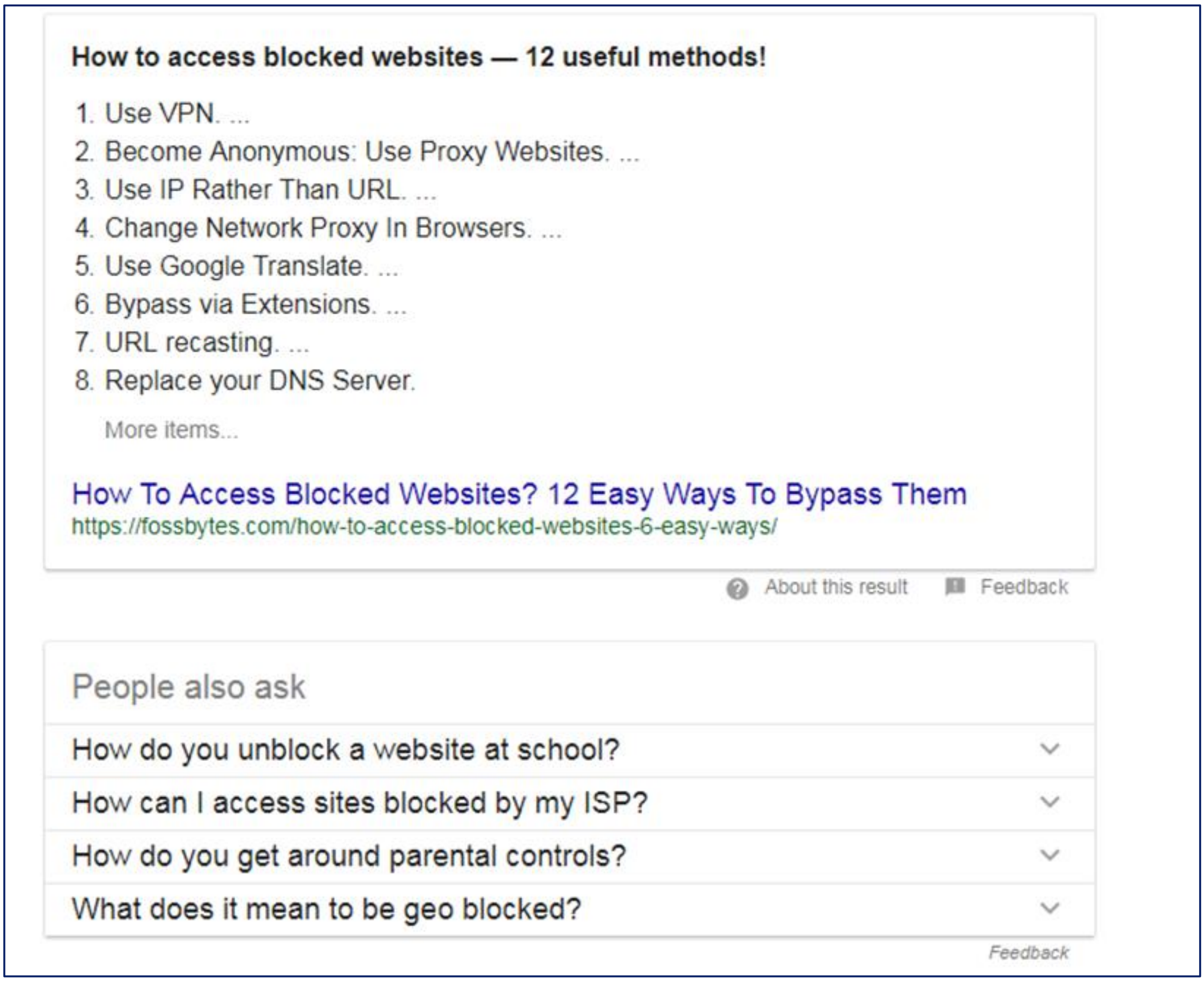
46 https://www.comcourts.gov.au/file/Federal/P/NSD663/2017/3787886/event/29056799/document/1018339
47 http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2017/2017fca0965
48 Incopro – Australian Site-Blocking Efficacy Report, December 2017

search providers in other jurisdictions, such as Korea, proactively remove links to pirated material themselves.[49]

Google's claim that it down-ranks sites with takedown notices is of little comfort when its search results are readily providing a step-by-step guide on how to access illegal material. In addition, Google also provides search results to pages that maintain lists of proxy servers, used to host pirated material when the main site has been blocked (see Box 16 and Box 17 below). This may amount to facilitating copyright infringement.

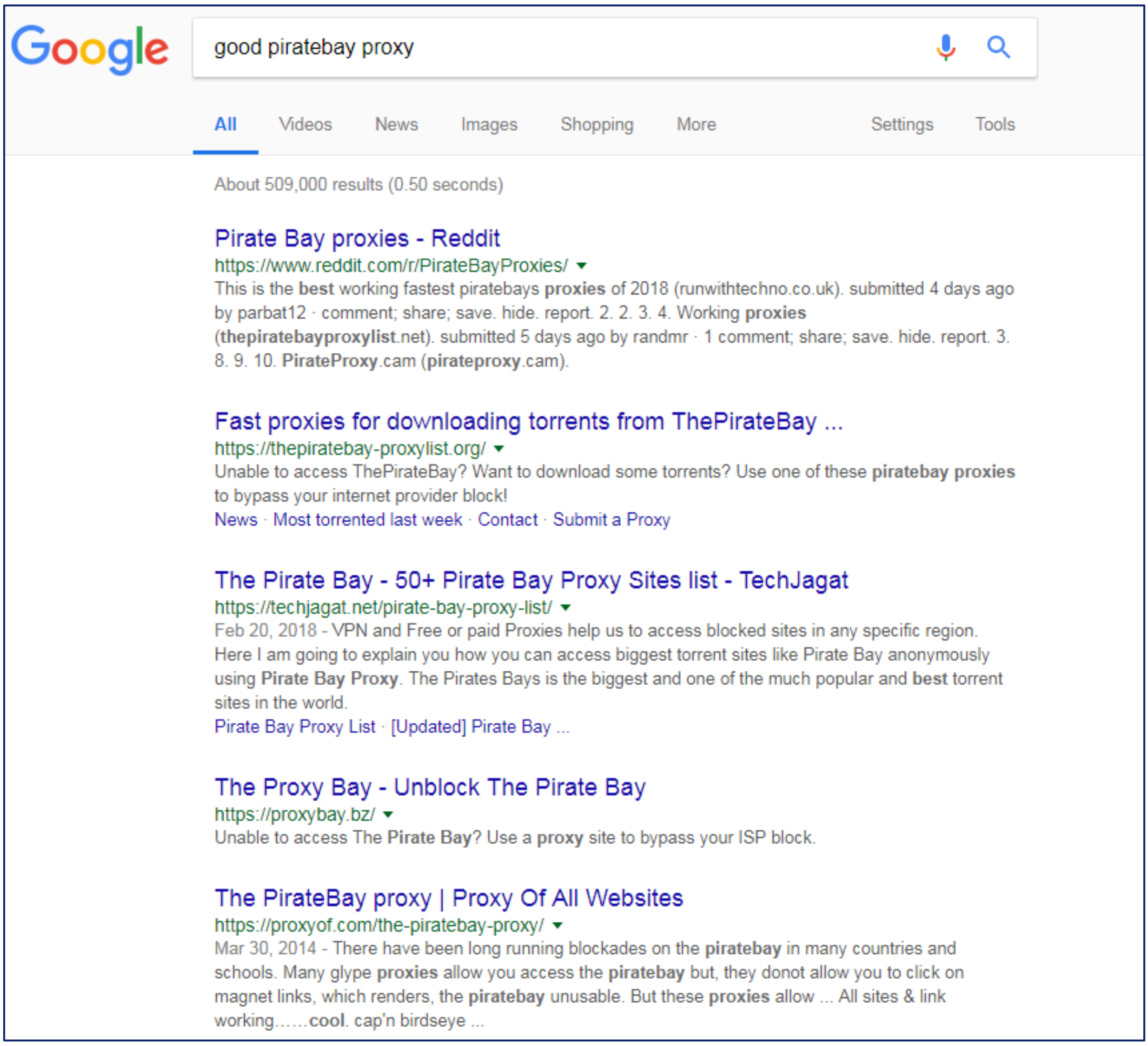
In the face of arguments from Google and Facebook that they are just a platform, it must always be remembered what was possible when there was a commercial imperative on them. As set out in section 4.7.2, when brands started to discover their advertisements running next to violent and extremist material, large amounts of material were removed from their sites very quickly. The only thing stopping Google and Facebook from genuinely taking action to address piracy is a lack of will and commercial imperative. Indeed, the commercial incentive may operate in reverse as Google may profit from pirate sites buying search keywords.

BOX 16: STEP BY STEP GUIDE TO PIRACY



[49] https://www.smh.com.au/business/companies/sue-me-village-roadshow-chief-slams-google-for-facilitating-crime-20180214-p4z0c4.html

BOX 17: GOOGLE'S GUIDE TO EVADING SITE BLOCKING



7.4 Takedown procedures put the onus on the wrong party

Facebook has also had its well-publicised issues with providing access to pirated material. For example, in early 2017 the Facebook Live Video feature was used to illegally transmit the light-heavyweight boxing match between Anthony Mundine and Danny Green.

An underlying problem with the copyright protections for online video is that they rely on content owners becoming aware of the infringing material and issuing a notice to the Google or Facebook requesting that the material be taken down. This process places the onus on the rights holder, rather than the party that is hosting the illegal content and potentially profiting from it via advertisement placements.

Recommendations

The ACCC should find that:

- copyright protections are inadequate to protect the investment made by local media companies.
- the media company (such as Google or Facebook) that is hosting the infringing material and has the potential to profit from the infringement should be the party liable for the loss to the rights holder.

7.5 Safe harbour framework totally inappropriate for digital platforms

The ACCC's inquiry should recognise the interlinkages between the copyright framework and the incentives on the digital duopoly to remove infringing content or material that circumvents lawful attempts to block access.

There have recently been calls for the existing copyright safe harbour scheme in Part V Div 2AA of the Copyright Act to be extended to cover the digital duopoly. Such a move would remove any incentive for Google or Facebook to remove infringing content and to work with rights holders to reduce online piracy.

Claims that the digital duopoly are just technology platforms fails to recognise the fact that they monetise other people's content and that extending a safe-harbour to such companies would entirely undermine Australian's copyright framework. This would do irreparable damage to the value of the content that local media companies invest in.

Recommendation

The ACCC should find that the current safe harbour framework strikes the right balance and that there should be no further extension of the scheme to media companies like Google and Facebook.

7.6 Passing off – competitors buying to trademark as a keyword

Lastly on copyright issues, the ACCC should investigate the ability of businesses to bid for keywords in Google's adword auction using registered trademarks of competing firms.

First, allowing competing firms to bid using each other's registered trademarks allows Google to effectively monetise other people's trademarks as they are collecting the AdWord auction revenue. Second, this process allows businesses to benefit from the brand value that their competitors have invested in by bidding for the top spot in search results despite the user searching for the original business specifically.

Google notes that "it is not in a position to mediate third-party disputes, and we encourage trademark owners to resolve their disputes directly with advertisers."[50] However, given the lack of transparency around the AdWords auction process, it is not clear whether trademark owners would have sufficient information to take action against trademark infringements.

Recommendation

The ACCC should propose to Government the changes necessary to ensure that the advertising platform provider is responsible for ensuring that only the registered trademark owner can use that trademark. Alternatively, the ACCC could propose changes to the law to make it illegal for the digital platforms to monetise registered trademarks.

50 https://support.google.com/adwordspolicy/answer/2562124?hl=en-AU

8 Mass data aggregation by the platforms

Why this matters?

Data is a valuable commodity. It underpins the businesses of 'big data' companies such as Facebook and Google and has led to their market dominance. This section discusses the data practices of these companies that has led to their current market dominance and the negative consequences of these practices for consumers, businesses and the economy.

As discussed in section 6.1 above, Facebook and Google have created and continue to benefit from data network effects. The greater the number of users on their platforms, the greater the value of the platform to each individual user. This leads to a 'feedback loop' whereby the value and market power of the business increases, attracting more users, further increasing the value of the business to individual users.[51]

In the case of Google and Facebook, this value is created by the sheer scale of the data they collect and store. The more users they have, the more data they collect, the greater uses that can be made of that data, and the greater the commercial advantage that accrues. The result is as we have seen that these platform industries are likely to be dominated by virtual monopolists.

The critical mass of data achieved by Facebook and Google serves as a major barrier to entry for new entrants and increases competitive pressure on existing market participants. The dominant position of Facebook and Google removes any impact that natural forces of competition would have in driving compliance with privacy laws and engaging in good information management practices. In effect, as we have also seen in relation to advertising measurement, these entities become a law unto themselves.

There is a clear role for regulators to play in understanding the behaviour of these two dominant players in data collection and management and to impose a suitable regulatory framework.

8.1 Large-scale privacy breaches by the platforms

Once personal information has been published or released it ceases being private and can be very difficult to subsequently contain. Concerningly however, a number of recent examples of privacy breaches suggest that Google and Facebook are not sufficiently incentivised to comply with the law and take a 'risk-based approach' to privacy which is harming consumers.

The case studies below demonstrate the lack of incentive to comply with privacy obligations that has arisen from the market dominance of these platforms and the serious consequences for consumers that this has given rise to. They also highlight the fact that the regulatory framework currently does not appear to be sufficiently equipped to deal with 'big data' privacy issues.

Case study - Scanning content of Gmail accounts

In 2013, advocacy group Consumer Watchdog initiated legal proceedings against Google in the US for scanning emails to/from over 425 million Gmail users and mining valuable information from those emails for its commercial purposes. In the proceedings Google made submissions that people using Gmail do not have any 'reasonable expectation' of privacy stating that users 'expect that their emails will be subject to 'automatic processing' and that this was part of 'ordinary business practices'. The significant media backlash against Google confirmed that practices including monitoring of personal messages, collection and use of information to deliver targeted ads, and retention of data for an unlimited period, were not transparent to consumers.[52]

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51 ACCC, Digital Platforms Inquiry Issues Paper, 26 February 2018.

52 For example see: https://www.theguardian.com/technology/2013/aug/14/google-gmail-users-privacy-email-lawsuit ; http://www.cbc.ca/news/technology/google-lawsuit-stirs-debate-over-email-privacy-rights-1.1413906

The Productivity Commission in its Report, *Data Availability and Use*, recognised this, noting:

> *"Australian consumers have little capacity to choose how personal data about them is used; and too often, organisations and governments make decisions about the use of individuals' data on behalf of the individuals concerned. In the face of the ubiquity of data collected, the scope to provide consumers with a greater say – within limits – on the handling of data that is sourced from them, is considerable.*[53]

Case study - Cambridge Analytica

In March 2018 a former director of research at Cambridge Analytica revealed a number of documents indicating the firm had access to the personal data of Facebook user accounts which had been obtained for the purpose of creating targeted political campaigns including the Trump presidential campaign and the Brexit movement. The scale and extent of these data breaches, which occurred in many cases without the knowledge of the people affected, has sparked worldwide concern and resulted in a number of government inquiries worldwide.

Evidence has been provided to a House of Commons committee that the breach of privacy involved 'far more' than 87 million Facebook user's data,[54] that 'both Cambridge Analytica and other unconnected companies and campaigns were involved in these activities,[55] and that 'all kinds of people had access to the data',[56] therefore suggesting the occurrence of a huge number privacy breaches facilitated by Facebook. A US congressional committee launched a similar inquiry and investigations have also been launched by the Australian, UK and Canadian privacy commissioners in relation to the privacy breaches.[57] The Australian privacy commissioner is investigating revelations that Facebook had improperly shared the personal information of more than 300,000 Australians.[58]

8.2 Does 'big data' require specific regulation?

The issue of compliance with privacy laws is complicated by the lack of transparency of the practices in the data practices of Google and Facebook. Practices such as data matching, linking and mining are not new concepts and are used by many companies to the benefit of consumers. What is new is the scale at which Facebook and Google can access data on users as a consequence of their near monopoly position in their respective markets, and the nature of the data they have access to draws into question whether the existing regulatory regime is sufficient to protect the interests of individuals, of other businesses and of our free and democratic society.

Case study – Google Play

A US study conducted at the International Computer Science Institute at UC-Berkley, analysing 5,855 of the most popular free children's apps available for download on Google Play, found that Google may be violating privacy laws by collecting the personal data of children under the age of 13 without their parent's permission. The study identified the potential privacy breaches as arising from tracking software whose terms of service actually prohibit their use for children's apps.[59]

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53 Productivity Commission, Draft Report, Data Access, at 17.
54 http://www.abc.net.au/news/2018-04-18/cambridge-analytica-employee-testifies-before-uk-committee/9670192
55 Ibid.
56 For example, see: https://www.theaustralian.com.au/news/world/the-times/facebook-data-used-for-brexit-poll-whistleblower/news-story/8e4a94136a3a64625b205c15382fe0ac
57 https://www.smh.com.au/business/companies/facebook-s-regulatory-reckoning-is-fast-approaching-20180405-p4z7wk.html
58 https://www.oaic.gov.au/media-and-speeches/statements/facebook-and-cambridge-analytica
59 https://petsymposium.org/2018/files/papers/issue3/popets-2018-0021.pdf

Internationally (and particularly in Europe), a number of court decisions have attempted to deal with the challenges of applying privacy laws in the context of modern technologies and the practices of Facebook and Google. For example, in Germany, a court found that a dynamic IP address, while not itself personal information, can become personal information when linked with other data. It recognized that linking data held by one party with datasets held by another party would result in the information becoming 'personal information' because the relevant individual would come identifiable.[60]

In another case in 2016, the European Court of Justice found that holding traffic and location data en masse allowed "very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained", and on that basis, found the mass retention of such data to be in breach of EU privacy laws. It considered that such interference with people's privacy could only be justified in certain limited circumstances.[61]

While Australian privacy law already requires organisations to manage personal information in an open and transparent way and obtain consent at the time data is collected,[62] the regulatory framework should be re-visited in light of the scale of the data held Google and Facebook.

Recommendation

That the ACCC review whether Australia's current privacy framework is sufficient for the scale of data collection currently undertaken by Google and Facebook and whether any additional regulatory measures are required. The Terms and Conditions under which users consent to the use of their data by Facebook and Google should also be reviewed to ensure that consumers can easily understand how their data is being used by these dominant players.

https://www.washingtonpost.com/news/the-switch/wp/2018/04/16/thousands-of-android-apps-may-be-illegally-tracking-children-study-finds/?utm_term=.1e1662ad4061

60 For example, see The Conversation, Australia's privacy laws gutted in court ruling on what is 'personal information'.

61 See https://www.reuters.com/article/us-eu-court-privacy/eu-court-says-mass-data-retention-illegal-idUSKBN14A13I

62 Australian Privacy Principles, APP 1.