Australian Competition & Consumer Commission's
Digital Platforms Inquiry, Preliminary Report,
Comment of the Global Antitrust Institute,
Antonin Scalia Law School, George Mason University

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This Comment is submitted to the Australian Competition & Consumer Commission (ACCC) for consideration in relation to its *Digital Platforms Inquiry, Preliminary Report* (2018)—hereinafter "Preliminary Report." We submit this Comment based upon our extensive experience and expertise in antitrust law and economics.[1] As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy, the Global Antitrust Institute ("GAI") commends the ACCC for inviting discussion in regard to the important topics covered in the report.

In this Comment, we detail several fundamental methodological shortcomings and analytical gaps in the Preliminary Report. First, the economic evidence in the

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Preliminary Report is insufficient to support its policy recommendations. The quality and quantity of evidence required to support a substantial expansion of regulatory authority and oversight, as well as the creation of new regulatory authority, must be sufficient to show that the benefits from the proposed changes—to consumers and to competition—are likely to exceed the costs. In the case of the type of competition and consumer protection regulations analyzed and proposed in the Preliminary Report, evidence of systematic market failure is required.[2] The Preliminary Report does not

[2] The need to identify a market failure in order to justify a regulatory intervention is central to best practices and guidelines issued by the OECD, the ICN, the World Bank, and many governments and competition authorities. *See, e.g.,* The Gov't of W. Austl., *Regulatory Impact Assessment Guidelines for Western Australia* 4 (2010) , https://www.treasury.wa.gov.au/uploadedFiles/Site-content/Economic_Reform/RIA_Program/ria_guidelines.pdf ("Although Government intervention may be justified, the RIA process is designed to provide an assessment of the costs and benefits in order to justify such action. The commonly understood reasons to regulate include…Regulatory Failure…[and] Market Failure.") Also crucial is the consideration of alternative means that can equally meet the desired social and economic goals while having a less restrictive effect upon competition. *See* Department of the Prime Minister and the Cabinet Australian Government, *Guidance Note Competition and Regulation* (2016) at 1, https://www.pmc.gov.au/sites/default/files/publications/010-Competition-Regulation.pdf (stating that, for a proposal that restricts competition, there should be no alternative means of achieving the government's objectives and the regulatory proposal should generate net benefit to the community.) *See also* OECD, *Competition Assessment Toolkit: Volume 2, Guidance* 16 (2017), http://www.oecd.org/daf/competition/45544507.pdf (*referencing* the Australian Competition Principles Agreement of 1995, "The guiding principle is that rules and regulations should not restrict competition unless it can be demonstrated that: The benefits of the restriction to the community as a whole outweigh the costs; The objectives of the legislation can only be achieved by restricting competition"). *See also* ICN, *Recommended Practices on Competition Assessment* 1 (2014), https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-on-competition-assessment ("Through the competition assessment, competition agencies can urge policymakers to consider the policy's likely impact on competition, identify whether justifications exist for any restrictions on competition, and assess whether less restrictive alternatives would achieve the intended public policy goal"); Tanja Goodwin & Martha Martinez Licetti, *Transforming Markets Through Competition: New Developments and Recent Trends in Competition Advocacy* 40 (World Bank Group 2016), http://documents.worldbank.org/curated/en/640191467990945906/Transforming-markets-through-competition-new-developments-and-recent-trends-in-competition-advocacy (commending government programs that limit their interventions to correcting market failures); Autorité de la Concurrence, *Guide for Competition Impact Assessment of Draft Legislation* (2012), http://www.autoritedelaconcurrence.fr/doc/guide_concurence_uk.pdf

present such evidence. At the heart of the shortcoming is a misapplication of the term "market power."[3]

Second, the Preliminary Report suffers from what Harold Demsetz (1969) called the "nirvana fallacy,"[4] comparing the current market-based outcomes to an idealized regulatory alternative.[5] Demsetz warned that, "those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient."[6] This is not to suggest that the current market outcomes in regard to Google, Facebook, and other digital platforms are perfectly efficient; indeed, competition economists and scholars have long agreed that the model of perfect competition is not a useful benchmark for competition policy.[7] Nor is it to suggest there is not a possibility of improving those outcomes by regulatory

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Competition and Markets Authority, *Guidance Competition Impact Assessment: Guidelines for Policymakers Part 1: Overview* 1 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/460784/Competition_impact_assessment_Part_1_-_overview.pdf.

[3] In this comment, the term "market power" is in reference to antitrust market power or monopoly power—not just the control over a seller's own price enjoyed by nearly every firm in the modern economy derived from downward sloping demand curves. *See* Benjamin Klein, *Market Power in Antitrust: Economic Analysis after Kodak*, 3 SUP. CT. ECON. REV. 43 (1993).

[4] Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW ECON 1 (1969). *See also* Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033 (2012).

[5] *See* Demsetz, *supra* note 4, at 1 ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing 'imperfect' institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements.")

[6] *id.*

[7] *See, e.g.,* Paul J. McNulty, *Economic Theory and the Meaning of Competition*, 82 Q. J. ECON. 639, 641 (1968) ("That perfect competition is an ideal state, incapable of actual realization, is a familiar theme of economic literature. … But that perfect competition is a state of affairs quite incompatible with the idea of any and all competition has been insufficiently emphasized.")

intervention. Rather the point is that competition regulators cannot achieve "perfection by incantation."[8] Again, the appropriate comparison is not between the current market-based outcome, with all its flaws, and an idealized regulatory approach with all its presumed benefits; the relevant compactor is the regulatory approach—with all its benefits *and flaws*—which are well-documented in the economic literature and historical experience. At its heart, the nirvana fallacy is a regulator's choice of an unrealistic counterfactual in assessing the costs and benefits of a potential intervention.

A third and critical point is that it is necessary to clarify the criteria used in the Preliminary Report for comparing the costs and benefits of various regulatory proposals. In the context of competition and consumer protection, measures such as economic efficiency and welfare are generally the appropriate currency.[9] The Preliminary Report, however, appears in some places to reject those criteria when analyzing proposed changes, in favor of achieving progress toward other policy

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[8] Demsetz, *supra* note 4, at 3.

[9] *See, e.g.,* OECD, *Global Forum on Competition* 3 (2003), https://www.oecd.org/competition/globalforum/GlobalForum-February2003.pdf, ("the generally accepted 'core' competition policy objectives of promoting and protecting the competitive process, and attaining greater economic efficiency.") *See also, id*. at 2 ("The inclusion of multiple objectives, however, increases the risks of conflicts and inconsistent application of competition policy. The interests of different stakeholders may severely constrain the independence of competition policy authorities, lead to political intervention and in a relatively minor way, compromise and adversely affect one of the major benefits of the competitive process namely, economic efficiency.").
See also Council of Austl. Gov'ts, *Best Practice Regulation A Guide for Ministerial Councils and National Standard Setting Bodies* 1 (2007), https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf ("(…) the Guide reflects the commitment to establish and maintain effective arrangements to maximise the efficiency of new and amended regulation and avoid unnecessary compliance costs and restrictions on competition.").

objectives, such as protecting competitors; helping traditional media sources; and promoting journalism. Thus, the recommendations appear to abandon solutions and concepts focused on the welfare of consumers and to favor rent-seeking by various interest groups. Though it is not unusual for a regulatory body to promote policy objectives that would sacrifice economic welfare to achieve other goals, it is unusual for a competition authority to recommend steps that would achieve those goals to the detriment of competition.

Ultimately, we find that the scope and content of the Preliminary Report are insufficient to justify its policy recommendations. Perhaps the most problematic of those policy recommendations is the establishment of a new regulatory body to oversee Google's and Facebook's pricing decisions and algorithmic choices affecting advertisers, news, and journalism.[10] The Report does not itself establish—nor even seek to

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[10] *See* Preliminary Report at 10-11, ("Given the significance of these issues, the preliminary recommendation below calls for a regulatory authority to be tasked with monitoring, investigating and reporting on the criteria, commercial arrangements or other factors used by relevant digital platforms...to impact…the ranking and display of advertisements…the ranking and display of news and journalistic content"); *id.* at 11 ("A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses"); *id.* at 16 ("The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising"). This measure is not only unjustified but would imply enormous compliance and enforcement costs contrary to the recommendations contained in the Council of Australian Governments' Best Practice Regulation Guide. *See* Council of Austl. Gov'ts, *Best Practice Regulation A Guide for Ministerial Councils and National Standard Setting Bodies* 5 (2007), https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf ("Good regulation should attempt to standardise the exercise of bureaucratic discretion, so as to reduce discrepancies between government regulators, reduce uncertainty and lower compliance costs. Regulatory measures should contain compliance strategies which ensure the greatest degree of

establish—that digital platforms such as Google and Facebook are misusing their market power or violating Australian competition laws.[11] Given the systematic shortcomings in the evidence gathered and presented, we believe the recommendations should be reconsidered in drafting the Final Report.

Brief Summary of the Preliminary Report and Key Recommendations

On December 4, 2017, the Hon. Scott Morrison MP, then-Treasurer of Australia, directed the ACCC to hold an inquiry into the effect of: (i) online search engines, (ii) social media, and (iii) digital content aggregators (digital platforms) on competition in the media and advertising services markets. The focus of the inquiry was to be on Google and Facebook because they are the two largest platforms in Australia, and almost all submissions from consumers and interested parties concerned those two companies.

In the resulting Report, the ACCC preliminarily makes recommendations applicable chiefly to Google and Facebook, which deal with (i) their market power, addressed by a potential amendment to merger control rules, preliminary notice of acquisitions, and unbundling obligations; (ii) risks for advertisers and news media

compliance at the lowest cost to all parties").

[11] *See* Preliminary Report, at 5 ("the Terms of Reference for this Inquiry are broad and do not focus on whether digital platforms have misused their market power but, instead, pose broader questions; including whether the digital platforms are exercising their market power in their dealings with advertisers and content creators.")

organizations, addressed by regulatory oversight; (iii) regulatory imbalance, addressed by a regulatory reform aimed at platform neutrality; (iv) risks of copyright infringement, addressed by take-down obligations; (v) risks for consumers, addressed by data collection regulation and/or restrictions, practice codes, and the creation of a statutory cause of action for invasion of privacy, making "unfair contract terms" unlawful.

The ACCC also proposes as Areas for Further Analysis: (i) supporting choice and quality in journalism; (ii) improving news literacy; (iii) increasing funding for investigative journalism; (iv) creating a digital platform ombudsman; (v) monitoring intermediary pricing; (vi) third party measurement of advertisement; (vii) deletion of user data; (viii) opt-in for targeted ads; and (ix) prohibition of unfair practices.

The Preliminary Report's Economic Evidence Does Not Support its Policy Recommendations or Conclusions

Sweeping policy recommendations that dramatically affect an important sector of the economy require appropriate, sound economic evidence—absent which policy changes may be based upon unfounded opinions, political favoritism, and rent-seeking.[12] The type of evidence required to support the creation and expansion of

[12] *See, e.g.*, William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. LAW ECON 247, 251–52 (1985) ("antitrust and regulatory institutions have shown themselves to be sources of substantial incentives and opportunities for such rent-seeking activity. Whenever a competitor becomes

regulatory authority and oversight must be sufficient to show that the benefits to consumers and competition from the proposed changes are likely to exceed the costs. Without the discipline of weighing those benefits and costs to correct a perceived market failure, regulations are likely to lead to greater inefficiencies and harm to consumers.

In this section, we highlight some key areas where the Preliminary Report falls short in terms of analysis and evidence. For instance, the Report assumes without a basis in economic theory or evidence that "market power" gives one the ability and incentive to favor certain content on a platform. That fundamental assumption runs throughout the Report but is never substantiated with economic theory or evidence. Indeed, the Report betrays a misunderstanding of antitrust market power. Market power does not give a firm the "ability and incentive" to favor its own content.[13] Favoring one's own content or products happens in a wide variety of firms—from those with effectively zero market power to those with absolute monopoly power. For example, studies have shown that digital platforms with significantly less market

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too successful or too efficient, whenever his competition threatens to become sufficiently effective to disturb the quiet and easy life his rival is leading, the latter will be tempted to sue on the grounds that the competition is 'unfair'."). *See also* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, No. 133 NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER SERIES (1976); and Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 THE Q. J. ECON. 371 (1983).

[13] *See* Preliminary Report, at 5 ("This ability and incentive derives from their market power, their presence across the multiple levels of the advertising supply chain as well as the opacity of key algorithms.").

power than Google "bias" their results more than Google does.[14] More broadly, marketing a store brand, *i.e.*, private label, through which a retailer favors its own "content," is a popular method for supermarkets and retailers with little if any market power to increase sales and improve profitability.[15]

The ACCC's recommendation that "where options for internet browsers and search engines are presented, no option should be pre-selected,"[16] is based upon the assumption that selection of defaults is a symptom of market power rather than a ubiquitous feature of the modern economy also common in competitive markets. But antitrust market power does not give a firm the ability to set defaults, which is common to virtually every type of industry from consumer electronics to software to online services. As the Nobel economist Richard Thaler has pointed out, "Defaults are ubiquitous and powerful. They are also unavoidable in the sense that for any node of a choice architecture system, there must be an associated rule that determines what happens to the decision maker if she does nothing."[17] Default settings allow a provider

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[14] *See, e.g.*, Joshua D. Wright, *Defining and Measuring Search Bias: Some Preliminary Evidence*, INTERNATIONAL CENTER FOR LAW & ECONOMICS (2011).

[15] According to some reports, private labels account for more than 20% of global grocery sales and, in some categories, up to 70%. *See* Kimberly A. Whitler, *How Do Private Label Products Impact The Consumer Shopping Experience?*, FORBES, Feb. 9, 2017, https://www.forbes.com/sites/kimberlywhitler/2017/02/09/how-do-private-label-products-impact-the-consumer-shopping-experience/. *See also* Pamela N. Danziger, *Growth In Store Brands And Private Label: It's Not About Price But Experience*, FORBES, Jul. 28, 2017, https://www.forbes.com/sites/pamdanziger/2017/07/28/growth-in-store-brands-and-private-label-its-not-about-price-but-experience/.

[16] Preliminary Report, at 10.

[17] Richard H. Thaler et al., *Choice Architecture*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 430 (2014).

to better control the consumer experience and can save significant transaction and usage costs associated with a service or product. The ACCC's unfounded conclusion that the selection of defaults is likely to harm rather than benefit consumers does not appear to be based in economic theory or evidence and should be reconsidered.

The ACCC mentions the "role of behavioural biases" and the "default and status quo effects" involved when firms set defaults.[18] Certainly defaults are intended to steer consumers to certain options and experiences while using a service or product—yet, the entire point of setting defaults—rather than having fixed features—is to allow the consumer to make changes if desired. Setting defaults is based upon a weighing of benefits and costs. The benefits are reducing transaction costs, for example, by allowing the consumer to use a product immediately; improving the consumer experience by allowing the firm to optimize the "set up;" and creating some basic uniformity in consumer experiences while at the same time providing the consumer with the ability to tailor the experience to his or her particular preference. Costs can involve researching the default that provides the best experience; creating a product robust to changes in defaults; and so forth. Firms internalize these tradeoffs and make a decision. In fact, a lack of defaults and ability of the consumer to tailor a product are generally not signs of competition and consumer choice but likely quite the opposite.

[18] *See id.* at 209.

The Report recommends that "when a consumer purchases a new mobile device, computer or tablet and goes through the initial process of setting up the relevant device, the consumer would be presented with a number of options for their preferred internet browser and preferred search engine, with no options having been pre-selected for the consumer"[19] That might achieve the objective of "choice," but it might just as likely, if not be more likely, result in a systematic consumer dissatisfaction and confusion. As Wright & Ginsburg (2012) state: "even if a particular default rule meant to offset a cognitive bias will reduce some individual errors in decisionmaking, failure to calibrate the default rule to the distribution of true preferences may impose social costs upon rational decisionmakers that are greater than any benefits in error reduction."[20]

Ultimately, we are not disputing whether Google or Facebook have market power within a well-specified antitrust product market. It is entirely possible. Reaching that conclusion, however, requires concrete evidence and specific analysis—beyond simply calculating market shares. Yet, as the Report acknowledges, "the Terms of Reference for this Inquiry are broad and do not focus on whether digital platforms have misused their market power but, instead, pose broader questions; including

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[19] Preliminary Report, at 65.

[20] Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1052 (2012); *see also* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (2002) (characterizing the policy prescriptions of behaviorists as relying upon the empirically false assumption that people uniformly suffer from certain cognitive biases); Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1627–28 n.20 (2006).

whether the digital platforms are exercising their market power in their dealings with advertisers and content creators."[21] The Report also points out that

> Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skillful or less efficient. This conduct is part of the competitive process, which drives firms to develop and offer products that are more attractive to customers, and should not be deterred."[22]

In sum, the Inquiry does not focus upon whether Google and Facebook have "misused their market power"—but rather asks whether they are "exercising their market power." The ACCC states that it is entirely lawful to possess, and—presumably—to exercise substantial market power. If, however, the Inquiry is going to avoid the critical questions of misuse and other violations of antitrust laws, then the Preliminary Report's recommendations are based simply upon the premise that the firms are exercising market power—which is entirely lawful in Australia. Nonetheless, the report calls for, *inter alia*, (1) a new regulatory body to supervise algorithm and

[21] Preliminary Report at 5.
[22] *Id.* at 63.

pricing decisions for Google and Facebook;[23] (2) the need to implement policies to "remove some of the potential impediments to growth and independence of potential competitors;"[24] and (3) the elimination of the potentially efficiency enhancing practice of setting defaults for operating systems and web browsers.[25]

While the Preliminary Report acknowledges that the ACCC did not investigate misuse of market power, it certainly invokes this possibility with repeated reference to the European Commission's decisions against Google in its Shopping and Android cases. Oddly, the report makes no reference to the fact that the U.S. Federal Trade Commission closed its investigation into search bias by Google, as did two U.S. state attorneys general, Canada, and Brazil.[26] Further, the FTC noted that, "While some of

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[23] *See id.* at 10 ("Given the significance of these issues, the preliminary recommendation below calls for a regulatory authority to be tasked with monitoring, investigating and reporting on the criteria, commercial arrangements or other factors used by relevant digital platforms"); p. 11 ("A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses"); p. 16 ("The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising").

[24] *id.* at 9.

[25] *id.* at 10. This recommendation harkens back to the EC's remedy for Microsoft in a number of past cases. Whatever the merits of those cases, they were implemented after full phase investigations and the weight of years of evidence.

[26] *See* FED. TRADE COMM'N, *Statement of the Commission Regarding Google's Search Practices*, Matter No. 111–0163 (Jan. 3, 2013) , https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. The states of Texas and Ohio closed their respective investigations in 2014. *See* Zach Miners, *Ohio Closes Google Antitrust Investigation*, PC WORLD (Feb. 9, 2015), https://www.pcworld.com/article/2882072/ohio-closes-google-antitrust-investigation.html. *See also* Competition Bureau, Gov't of Can., *Competition Bureau Completes Extensive Investigation of Google* (April 19, 2016), https://www.canada.ca/en/competition-bureau/news/2016/04/competition-bureau-completes-extensive-investigation-of-google.html. *See* Press Release, *General Superintendence Recommends the Filling of Two Proceedings Against Google* (May 16, 2018),

Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of 'competition on the merits' and the competitive process that the law encourages."[27] Further, in his separate statement, Commissioner J. Thomas Rosch noted that "[t]he totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose."[28] These findings are completely at odds with the decision of the European Commission and, more to the present point, they are at odds with the sweeping regulations called for in the report.

Likewise, some of the evidence offered for Google's and Facebook's entrenched market power is not very compelling. First, the ACCC mentions that Google and Facebook have engaged in strategic acquisitions that "have contributed to the market power they currently hold."[29] This is pure speculation, devoid of any evidence to support the assertion.

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http://en.cade.gov.br/general-superintendence-recommends-the-filling-of-two-proceedings-against-google.

[27] *FTC, supra* note 26, at 2.

[28] FED. TRADE COMM'N, COMM'R J. THOMAS ROSCH, *Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Google's Search Practices – In the Matter of Google Inc.*, (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/concurring-and-dissenting-statement-commissioner-j.thomas-rosch-regarding-googlessearch-practices/130103googlesearchstmt.pdf.

[29] Preliminary Report, at 9.

Central to the narrative that strategic acquisitions have entrenched market power is Facebook's acquisition of Instagram in 2012, from which some commentators have inferred that competition authorities are missing potential competition cases. At the time of the acquisition, Instagram had zero revenues and a handful of employees.[30] Since Facebook's acquisition, Instagram has grown from 30 million users to well over one billion.[31] During the same period, Facebook grew from approximately 900 million users to over two billion users.[32] This substantial expansion in users and output is hardly indicative of an anticompetitive outcome. Of course, one could argue that, but for the acquisition, Instagram would have been just as successful, if not more, and would have remained an independent competitor. While this type of "nirvana" counterfactual is frequently asserted, without more it is not a sufficient basis upon which retrospectively to condemn an acquisition. To treat the success and associated output expansion of an acquired product as evidence of an anticompetitive acquisition severely twists the meaning of "anticompetitive." When properly formulated, the central forces driving anticompetitive conduct are reductions in output and transfers away from consumers to producers. Facebook's acquisition of Instagram is certainly

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[30] *See* Kurt Wagner, *Here's Why Facebook's $1 Billion Instagram Acquisition Was Such a Great Deal*, RECODE (Apr. 9, 2017), https://www.recode.net/2017/4/9/15235940/facebook-instagram-acquisition-anniversary.; Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, DEALBOOK, (Apr. 9, 2012), https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/.

[31] *See* Wagner, *supra* note 30; Ashley Carman, *Instagram Now Has 1 Billion Users Worldwide*, THE VERGE (Jun. 20, 2018), https://www.theverge.com/2018/6/20/17484420/instagram-users-one-billion-count.

[32] *See* STATISTA, *Facebook users worldwide 2018* (as of 3d Q. 2018), https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.

not that. And, most certainly, the acquisition of Instagram, Google's acquisition of YouTube, and the like are an insufficient basis upon which to recommend a special obligation on Google and Facebook to provide advance notice of all acquisitions, no matter how small.[33]

Similarly, the Report mentions that Google has maintained its market power through its position as the default search engine on major web browsers.[34] Specifically, we are told "a barrier to expansion arises from the prevalence of Google Search as the default option on Australian browsers. In 2018, Chrome comprised 49 per cent of the browser market and Safari 33 per cent. As figure 2.3 illustrates, Chrome and Safari's share of the market has grown steadily since 2009."[35] What Figure 2.3 also indicates is that, in 2009, Google's Chrome and Apple's Safari had a combined share of a little over 10 percent. The dominant browser at the time was Microsoft's Internet Explorer at approximately 55 percent—which was and is defaulted to Live Search/Bing.[36] Despite the dramatic swing in the share of the various web browsers—with different search defaults—Figure 2.2 indicates Google's market share remained constant at 90%+. Taken

[33] *See* Preliminary Report, at 64.
[34] *See id.* at 9 ("The ACCC is also of the preliminary view that Google's position as the current default search engine on the major browsers underpins its market power.")
[35] Preliminary Report at 44.
[36] *See, e.g.*, Barry Schwartz, *Internet Explorer 8 Search Now Showing Instant Answers From Live Search*, SEARCH ENGINE LAND (Feb. 4, 2009), https://searchengineland.com/internet-explorer-8-search-now-showing-instant-answers-from-live-search-16453; https://www.zdnet.com/article/internet-explorer-9-beta-review-microsoft-reinvents-the-browser/.

together, these figures contradict the assertion that Google's market success is because it is the default search engine on Chrome and Safari.

Beyond issues of market power, the report also falls short of evidence on the issue of privacy. Troubling are statements such as, "A key preliminary finding of the Inquiry is that consumers are unable to make informed choices over the amount of data collected by the digital platforms, and how this data is used. This reflects the bargaining power held by the digital platforms visa-à-vis consumers, and the information asymmetries that exist between digital platforms and consumers."[37] As reflected in this statement, the Report is too quick to dismiss the vast and well-documented literature on the privacy paradox.[38] At its core, the privacy paradox is that there is a significant gap between the stated privacy concerns of consumers—as expressed, for example, in questionnaires—and actual consumer choices regarding privacy. Economic studies almost universally find that, despite stated preferences in surveys and questionnaires, consumers are willing to provide personal information for small amounts of compensation or are willing to pay very little to avoid personal data collection.[39]

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[37] Preliminary Report at 13.

[38] *See, e.g.*, James C. Cooper & Joshua Wright, *The Missing Role of Economics in FTC Privacy Policy*, *in* THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY 465 (Evan Selinger et al. eds., Cambridge Law Handbooks, *in* Cambridge Core, 2018); *see also* Alessandro Acquisti et al., *The Economics of Privacy*, 54 J. ECON. LIT 442 (2016).

[39] *See Cooper & Wright*, *supra* note 38.

The Nirvana Fallacy

In a seminal article, Demsetz (1969) responded to Kenneth Arrow who was comparing an *idealized* version of government intervention with the alleged shortcoming and inefficiencies of *actual* market-based outcomes.[40] In the Preliminary Report, the ACCC commits the same error, reasoning that, because there are flaws with market-based outcomes, government regulation, considered without regard to its flaws, will lead to better outcomes.

Additionally, some of the ACC's recommendations are not based upon measures of market performance, such as welfare and efficiency, but on objectives such as protecting competitors; helping traditional media sources; and promoting journalism. In doing so, the recommendations ignore economic efficiency and market-based solutions to competition problems in favor or rent-seeking by certain interest groups at the expense of consumers. For instance, the ACCC states that "The ubiquity of the Google and Facebook platforms, and the lack of transparency in the operation of their algorithms, have had adverse effects on news publishers and their opportunities to monetise their content."[41] Whether publishers monetize their content is a producer, not a consumer, welfare concern.

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[40] *See, e.g.*, Demsetz, *supra* note 4, at 12. ("to compare a real socialist system with a real capitalistic system the advantages and disadvantages of each would stand out, and it would be possible to make some overall judgment as to which of the two is better…but compar[ing] the workings of a capitalistic system with a Pareto norm that lends itself to static analysis of allocation but, nonetheless, that is poorly designed for analyzing dynamic problems of production").

[41] Preliminary Report, at 7.

Indeed, when the ACCC turns back to the welfare of consumers it acknowledges that "the use of digital platforms to access news appears to be borne largely out of consumer preference."[42] Further, the

> ACCC recognises the transformational innovation provided by digital platforms such as Google and Facebook. The widespread and frequent use of digital platforms by consumers is an indication of the benefits that they derive from the platforms. Google Search, for example, has transformed the way consumers access information. . . . Each month, approximately 19 million Australians use Google Search, 17 million access Facebook, 17 million watch YouTube (which is owned by Google) and 11 million access Instagram (which is owned by Facebook)."[43]

Additionally, the Report acknowledges that "Google and Facebook provide advertisers with numerous and significant benefits through an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers."[44] Further, "The NSW Business Chamber submits that in response to a survey of its members, 71 per cent had utilised digital platforms to advertise and indicated digital advertising had positively affected their business; 62 per cent of respondents indicated digital advertising had increased customers; 43 per cent

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[42] *id.* at 30.
[43] *id.*
[44] *id.* at 66.

indicated it had increased sales; and 34 per cent indicated it helped reduce costs."[45] Because of this, the "ACCC considers that digital platforms, and in particular Google and Facebook, provide significant benefits to businesses."[46] Yet, in face of this overwhelming market-based evidence regarding the benefits that digital platforms provide both consumers and advertisers, the ACCC considers the interest of competitive rivals, traditional media conglomerates, such as the News Corporation, and the supply of traditional media journalists as countervailing and more important policy concerns.

One of the justifications for the proposed regulation of digital platforms is that they are not subject to the same regulations as print, television, radio, and other media.[47] This is described as a "regulatory disparity" and the lack of a "level playing field," which implicitly acknowledges that traditional media companies and digital platforms are competing for advertising. The policy recommendations therefore seek to help advertising rivals to Google and Facebook, in part by increasing the cost of doing business for those two firms,[48] to the detriment of both consumers and producers. In

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[45] *id.* at 76.

[46] *id.*

[47] *See id.* at 7 ("However, virtually no media regulation applies to digital platforms. This creates regulatory disparity between some digital platforms and some more heavily-regulated media businesses that perform comparable functions, which could provide some digital platforms with an unfair advantage in attracting advertising expenditure because they operate under fewer regulatory restraints and have lower regulatory compliance costs.").

[48] This follows because the Preliminary Report explicitly asserts that, currently, Google and Facebook "operate under fewer regulatory restraints and have lower regulatory compliance costs." Preliminary Report at 7.

other words, rather than seeking to lower the regulatory burden on all the competing firms, the Report proposes to impede digital platforms with more regulatory burdens and restraints in order to increase their costs of operation—all in the name of parity. Actually, the result would not be parity because the regulations proposed for Google and Facebook are significantly more onerous than those the Report says apply to other media. Print media, for instance, are "regulated" through self-regulation,[49] defined as regulation "by an industry body representing the interests of its members."[50] In contrast, Google and Facebook would have a governmental regulatory body overseeing their algorithmic changes and pricing. Moreover, some of the issues identified in the Preliminary Report, including the use of "clickwrap agreements," "take-it-or-leave-it" terms, and a general asymmetry in consumer versus producer knowledge of the precise terms of service, apply across many industries—including other online services, student loans, mortgages, supermarket loyalty cards, and fitness tracking devices.

To illustrate the likely costs and difficulties of imposing a regulatory solution to a problem that has not been proven to exist, consider this recommendation in the Preliminary Report that the proposed "regulatory approach would provide assurances to both businesses and consumers that algorithms are not being used to favour certain businesses or, in the case of news stories, are operating in such a way as to cause

[49] *See* Preliminary Report, Table 4.1 at 131.
[50] *Id*. at 132.

significant detriment to the production of news and journalistic content or media markets."[51] This statement is loaded with ambiguities and truisms that would make compliance and enforcement a vague and difficult affair. First, seeking an assurance that a platform's "algorithms are not being used to favour certain businesses" is a fool's errand: All algorithms, implicitly or explicitly, favor certain businesses over others—which is the fundamental nature of ranked search results. Somebody has to be in the first slot, second slot, etc. Even a simple alphabetical listing favors businesses that start with "A"—hence all the businesses starting with "AAA" in yellow page listings. Second, experience with regulation in a myriad of fields suggests the definition of a "significant detriment to the production of news and journalistic content or media markets" is almost inevitably going to be based upon complaints by news organizations, which will likely favor the most well-funded. This is rent-seeking, not efficiency, enhancing.

The following directive is similarly fraught with difficulties: "a regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or

[51] *id.* at 11.

potentially competing businesses."[52] As previously noted, favoring one's own content is a business practice that is found among firms across the entire spectrum of market power from none to monopoly. That fact, in of itself, proves that self-favoring is not a practice that can be broadly classified as harmful to consumers or to efficiency. Rather, it is most likely the very opposite. Moreover, the idea that a business cannot favor it "own business interest" above those of "potentially competing businesses" is not only regulatorily indefinable, it is literally the antithesis of a free market system or any system based upon private ownership and enterprise.

Policy Implications and Conclusions

Ultimately, the Preliminary Report is not about antitrust enforcement or evidence developed to assess specific or general allegations of misconduct. Rather, it is about implementing industry and firm-specific regulations to counter the lawful exercise of market power—given that the Report purposefully did not look for the misuse of market power or other anticompetitive conduct.

We believe that, without substantial evidence that Google and Facebook are in violation of Australian competition laws, the policy recommendations in the Report are not justifiable. Further, the Report will likely harm Australian consumers through

[52] *id.*

policies intended to benefit specific interest groups, *e.g.*, rivals to Google and Facebook as well as traditional media firms.