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Submission to the Australian Competition and Consumer Commission's Digital Platforms Inquiry

Chris Berg and Gus Hurwitz

Executive summary

The analysis in the Australian Competition and Consumer Commission's Preliminary Report for the Digital Platforms Inquiry is inadequate in several ways, most notably:

- It mischaracterises the relationship between changes in the economics of media advertising and the rise of digital platforms such as Facebook and Google.
- Its analysis of the dynamics of media diversity is misguided.
- Its competition analysis assumes its results and makes unsupportable claims about the division of advertising markets.
- It is recklessly unconcerned with the freedom of speech consequences of its recommendations.
- It fails to recognise, and proposes to supplant, the ongoing social negotiation over data privacy.
- It provides a poor analytic base on which to make policy recommendations, as it applies a static, rather than dynamic, approach to its analysis.

There is a real danger that if the policy recommendations outlined in the preliminary report were to be adopted, Australian consumers would be severely harmed.

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I. Introduction

The decision at the end of 2017 by the then-Treasurer Scott Morrison to choose the Australian Competition and Consumer Commission for an inquiry into the economic significance of digital platforms was unfortunate. By giving this inquiry to a competition and consumer watchdog, it imposed an analytic frame around consumer protection and competition concerns, focusing on the potential harm imposed by these platforms on consumers and news media.

The terms of reference for the inquiry have been written in this context – for the consideration of a competition regulator. Digital platforms "exercise market power" in their relationship to news media providers. They "impact" the choice and diversity of news media and advertising markets. Innovation and technological change "impact" competition, and there is an "information asymmetry" between digital platforms, advertisers and consumers that effects competition in news media.[1]

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[*] Dr Chris Berg is a Senior Research Fellow at the RMIT Blockchain Innovation Hub, Adjunct Fellow with the Institute of Public Affairs, and an Academic Fellow with the Australian Taxpayers' Alliance. Justin (Gus) Hurwitz, is assistant professor of law and co-director of the Space, Cyber, and Telecom Law program at the University of Nebraska College of Law, and Director of Law & Economics Programs at ICLE.

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[1] Scott Morrison, *Ministerial Direction*, 4 December 2017. Available at https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/terms-of-reference.

Yet, as the Preliminary Report unfortunately reveals, viewing the significance of the new digital platforms through the lens of the ACCC's regulatory domain has led to some misleading conclusions. Digital innovation including the creation and adoption of online services – social media, internet search, online advertising, and so forth – has had dramatic consequences across many areas of business, the media, and politics. The digital platforms under investigation have offered consumers a remarkable new array of services – usually made at zero-price to consumers – and represent a significant change to media and cultural consumption.

These products and services are subject to extremely rapid innovation and technological evolution. The market position of Google and Facebook has been acquired in the space of just a decade (propelled by complementary innovations such as smart phones and 3/4G wireless networks) and each operate in a technological space where it is easy to foresee similarly dramatic innovation in coming years. The dynamic nature of this sector should suggest modesty when analysing any potential market dominance. The IBM and Microsoft anti-trust actions reveal how fraught it is to try to impose competition policy – structured as it is around static models of equilibrium and market dominance – to a fast-moving sector. The Digital Platforms Inquiry would have been better vested with an agency that had a specialisation in long-run market dynamics, such as the Productivity Commission.

The most basic problem with the ACCC's analysis is its historic myopia. Trends in the advertising marketplace starting in 2003, for instance, are attributed to Facebook, which was founded in 2004 and did not begin operating in Australia until 2007. And these trends coincide with another, longer-seated trend, that consumers had been getting less and less of their news and information (and therefore advertising) through traditional media and an increasing amount of it from the Internet. For instance, looking at the American market, a 2004 report explained that:

> One of the few upward trends in media consumption in recent years has been the percentage of Americans who turn to Internet sources for news. As the public has moved away from traditional news sources – local and network television news, newspapers and, to a lesser extent, radio – online news consumption has increased dramatically.[2]

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[2] Pew Research Center, "News Audiences Increasingly Politicized," June 8, 2004, available at: http://www.people-press.org/2004/06/08/i-where-americans-go-for-news/.

Even more generally, the ACCC's preliminary report shows no awareness of the broader historical context and challenges that have defined the media industry over the past century. Looking to the American context, for instance, the advent of local broadcast television decimated the local newspaper industry in the United States in the 1960s. The advent of cable television decimated the broadcast television business model in the 1980s. The advent of the Internet began eroding what remained of the local newspaper business (which had been propped up by antitrust exemptions in the 1960s) with services like Craigslist in the 1990s. It is no wonder that as consumers have flooded to the newest, more advanced, media platforms the revenue base of the prior platforms has eroded. No condemnation of the newer platforms is warranted here, only introspection into the ongoing need for and viability of the older platforms.

This should not be read as a Pollyannic take on the status of our current media ecosystem. To the contrary, there are severe challenges posed by it, and serious debate is warranted whether it is up to the important tasks that we have historically looked to the media to perform. And, if it is not up to that task, even harder debate lies ahead of us as to how to ensure the performance of these tasks. But this discussion must be premised on a sound foundation – and the ACCC's preliminary report is anything but. Rather, it is a testament to the adage that when then only tool one has is a hammer every problem looks like a nail. Having been tasked with evaluating a complex media ecosystem, the competition and consumer protection authority has found rampant competition and consumer protection problems that it proposes remedying through heavy-handed competition and consumer protection regulations.

The Harper Competition Policy Review stated that in the context of technological change, regulation should be as "light touch" as possible:

> … we need to allow success to emerge in response to market-driven factors rather than prescribing rules that support firms of particular sizes at the expense of others. Doing the latter compromises the long-term interests of consumers. Success in the market should be driven by consumer interests, not the special interests of suppliers or providers.[3]

[3] Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan, *Competition Policy Review Final Report*, March 2015. p. 24.

The ACCC's Preliminary Report violates these principles. It proposes heavy handed regulation in response to the concerns of incumbent industries about their competitors, misdiagnoses the challenge to the Australian media,

In this submission we consider first the impact of digital platforms on the market for news in Australia and conclude that the ACCC has conflated two separate market changes – the move of classified advertising away from the traditional newspaper industry, and the growth of Google and Facebook in non-classified advertising. Section III explores conceptual issues with the ACCC's analysis of diversity in new media. Sections IV considers the freedom of speech consequences of some of the Preliminary Report's recommendations and contextualises them in recent freedom of speech debates. Section V considers the privacy findings as part of a social negotiation around new technologies. Section VI looks at deficiencies in the Preliminary Report's analysis of the digital platform markets. Section VII concludes.

II. The impact of digital platforms on the market for news in Australia

The ACCC was asked by the government to inquire into the "impact of platform service providers on the level of choice and quality of news and journalistic content to consumers".[4] The Preliminary Report concludes that "there are important questions to be asked about the role the global digital platforms play in the supply of news and journalism in Australia". It draws a causative relationship between the growth of Facebook and Google and the funding of the media: "Digital platforms are having a profound impact on Australian news media and advertising. The impact of digital platforms on the supply of news and journalism is particularly significant".[5]

Yet this relationship is not sustained by the evidence within the report. The Preliminary Report suggests that the emergence of Google and Facebook in online advertising markets had a direct effect on the funding streams of the businesses conducting

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[4] Scott Morrison, Ministerial Direction, 4 December 2017. Available at https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/terms-of-reference.

[5] Australian Competition and Consumer Commission, *Digital Platforms Inquiry Preliminary Report*, Australian Capital Territory: Australian Competition and Consumer Protection Commission, December 2018. Available at: https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf, at p. 1

journalism. It states that "the shift in advertising revenue online, and to digital platforms, appears to have reduced the ability of some media businesses to fund Australian news and journalism" [emphasis added].[6] The Preliminary Report spells out its historical narrative like so:

> Traditional media companies thrived throughout the 20th century. However, this changed because of competition for audiences and advertising from online services. First, online classifieds such as eBay, SEEK and Carsales.com.au removed a major revenue stream from print newspapers, though some publishers followed this trend and moved their classifieds online (Fairfax's flagship Domain real estate site is one key example). More recently, the success of the leading digital platforms has led to pressure on advertising revenue for news media. The main platforms are immensely popular and profitable, services such as Google and Facebook are ubiquitous in jurisdictions where access to the internet is unrestricted, such as Australia.[7]

This is a two-step narrative that undermines one of the major arguments of the Preliminary Report. In the early 2000s, classified advertising in print first moved to classified advertising on the internet. This was the "most significant" source of revenue of newspapers, according to the Fairfax Media submission to the ACCC.[8] These were the so-called 'rivers of gold' that had historically sustained print journalism in Australia. Yet critically, many of the new digital classified services are (or were) owned by the newspaper publishers – i.e. Domain.com.au. Nonetheless, the unbundling of classifieds and journalism was the major shock to newspaper revenues. A second shock was the Global Financial Crisis, which as Figure 1.8 shows presented a major blow to total advertising revenue.[9]

Later ("more recently") two-sided digital platforms came to dominate the digital advertising market. But this occurred after the shock to newspaper revenues – after the end of the rivers of gold. If classified advertisements are, as the ACCC suggests, "not a close substitute for Google's search advertising", then the relationship between the

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[6] *Ibid.* at p. 3.

[7] *Ibid.* at p. 32.

[8] ACCC Digital Platforms Inquiry – Fairfax Media response to issues paper, 20 April 2018. Available at https://www.accc.gov.au/system/files/Fairfax%20Media%20%28April%202018%29.pdf.

[9] *Supra* note 5 at p. 33.

collapse of the rivers of gold and the emergence of new digital platforms is hard to sustain.[10] In other words, the digital platforms of concern to the ACCC are not meaningful competitors in the market for advertising – classified advertising – that have historically sustained journalism.

It is striking in this context that the arguments within the Preliminary Report that Facebook and Google dominate advertising markets seem to exclude classified advertising. The Preliminary Report estimates that Google accounts for 38 per cent of the online advertising spend in Australia and Facebook 17 per cent. If classifieds are excluded those numbers jump to 47 per cent and 21 per cent respectively.[11] However if the ACCC is interested in the effect of digital platforms on the news media, it is not appropriate to exclude classifieds, as it was classifieds that sustained the news business models.

In a key sense, the online advertising market was developed by Google and Facebook as an entrepreneurial enterprise. Google has taken a dominant position in a market that did not exist – or only existed in a small way – before Google created it. Google's advertising service, Google Ads, was established in 2000, and online advertising only came to dominate print advertising in Australia around 2012-2014. The Preliminary Report seems to be driven by a belief that the creation of new markets by new firms represents an anti-competitive threat to older firms operating in older markets. Newspapers and digital journalism have no normative claim over the online advertising revenue. These are markets that did not exist before they were established by Google. This observation is even stronger in the case of Facebook, which sells advertising space for display on Facebook's own properties. This market did not exist until it was developed by Facebook. It is notable that in Figure 1.8 of the Preliminary Report that the total advertising spend in Australia has been trending upwards since 1996.[12]

It is instructive to compare similar analysis done by a government inquiry just six years ago with that presented by the ACCC's Preliminary Report. In 2011, the Gillard government's Independent Inquiry into Media and Media Regulation was asked to investigate the impact of "technological change on the business model that

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[10] *Ibid.* at p. 56.

[11] *Ibid.* at p. 33.

[12] *Ibid.* at p. 33.

has supported the investment by traditional media organisations in quality journalism and the production of news".[13] In that inquiry's final report, which was released in February 2012, Ray Finkelstein QC identified that the attractiveness of newspaper websites for digital advertising was limited because of greater competition for eyeballs online, the separation of online advertising from 'content' (that is, the shift in advertising from services that create content to those who provide search tools to navigate content), and the changing consumption patterns engendered by technological change.[14]

In retrospect, the timing of the Finkelstein Inquiry was fortuitous. The advertising spend data presented in the ACCC's Preliminary Report makes it clear that the Finkelstein Inquiry was released just as online advertising began to surpass print advertising. It was also just before Fairfax announced one of the biggest restructures in Australian media history in June 2012, with 1,900 redundancies from across its content and production functions. Yet in this context, the Finkelstein Inquiry was clearer about the demand drivers for the shifts in advertising markets. The fact that Google and Facebook have, between the publication of the Finkelstein Inquiry report and the ACCC's Preliminary Report, come to be significant players not only in online advertising but in the advertising market overall, is a consequence, rather than a cause of those changes.

In 2019, how journalism should be funded is a significant challenge. There are debates about the best means to do so. For the most part, this is an entrepreneurial question. New media organisations have to discover business models that will allow them to produce products in response to consumer demands. The parliament has also investigated potential policy approaches to subsidising or otherwise supporting journalism.[15] The Australian government already supports journalism through its

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[13] Department of Broadband, Communications, and the Digital Economy, *Independent Media Inquiry*, 2011. web.archive.org/web/20130421040913/http://www.dbcde.gov.au/digital_economy/independent_media_inquiry. (Last modified 12 April 2013).

[14] Ray Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation, Australian Government*, February 2012. Available at https://web.archive.org/web/20120316183515/http://www.dbcde.gov.au/digital_economy/independent_media_inquiry.

[15] See for instance the Senate Select Committee on the Future of Public Interest Journalism, *Report*, February 2018. Available at

public broadcasters, as well as smaller programs such as the Regional and Small Publishers Jobs and Innovations Package. Google and Facebook are convenient scapegoats for changed consumer behaviours and the possibilities of new technology. But the evidence presented in the Preliminary Report does not sustain the claim that there is a direct relationship between the growth of these digital platforms and the ructions that Australian media industry has suffered through in the last decade.

While it is possible to imagine a situation in which print classified advertising was over time replaced by digital non-classified advertising to support journalism, it is not clear that the media industry has any normative claim over this new stream of revenue. The ACCC should emphasise to the government in its final report that Facebook and Google's position in the non-classified online advertising market and the loss of classified advertising by print media are separate concerns. Public policy should not attempt to fix the latter by targeting the former.

III. Concerns about media diversity

The Preliminary Report goes further out of the domain of competition policy and consumer protection when it considers the effect of Digital Platforms on media diversity. Media diversity is a highly contested value. As the ACCC recognises, in Australian public policy ownership has typically been seen as either proxy for diversity, or the relevant diversity metric itself. Concerns about media diversity have been tied up in political economy disputes about the appropriate role of government and the market, and claims about the dominance of media 'moguls'. The ABC's journalism function was established specifically in order to counter the allegedly conservative bias of the newspaper industry.[16] One of us has observed that regulators and policymakers worries about diversity is a perennial feature of Australian public policy, apparently immune to the effect of new technology.[17] It is welcome that the Preliminary Report recognises the great diversity and pluralism brought about by online sources.

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https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Public_Interest_Journalism/PublicInterestJournalism/Report.

[16] See Chris Berg and Sinclair Davidson, *Against Public Broadcasting: Why we should privatise the ABC and how to do it*, Connor Court Publishing, 2018.

[17] Chris Berg, "Media Diversity Fears Are Absurd And Obsolete," *The Drum*, 14 June 2012. Available at http://chrisberg.org/2012/08/media-diversity-fears-are-absurd-and-obsolete/.

What the Preliminary Report does not adequately examine is the economic role that digital platforms play in helping consumers navigate this diversity of sources. In the pre-digital environment consumers received content on a limited number of platforms – local and national newspapers, radio, and television stations. That content was 'curated' by a limited number of editors and producers who chose what would be displayed or aired based on their (and their company's) beliefs about what was important, or newsworthy or otherwise desirable. Editors and producers therefore performed a dual role – facilitating both the content production and providing a 'search' function for consumers.

By contrast, the enormous array of potential content available online is disintermediated. How users can navigate online content – distributed among millions of servers connected to a non-hierarchical network – has been one of the key entrepreneurial questions of the internet age.[18] Various approaches, such as walled-garden (i.e. AOL) and curated directory (i.e. Yahoo) have provided this function. Google's algorithmic search approach (where websites are 'spidered' automatically and their content made available for keyword search, ranked by the popularity of their links) is one approach. The social media model is another approach. On Facebook, content curation is disaggregated to an individuals' social media contacts, mediated by algorithms that are intended to make the experience more valuable to consumers.

The ACCC would be better to view digital platforms as competitors to traditional media properties, rather than up- or down-stream the value chain. Media consumers face a choice as to which 'service' to use to curate content – a newspaper, television program or news website where each piece of content has been deliberately chosen by a human editor or producer, one which is chosen by algorithm (Google News) or one which is chosen by one's social network (Facebook – possibly supplemented by an algorithm).

In this context, the Preliminary Report's tentative concern about 'filter bubbles' is misplaced. The Preliminary Report suggests that there is no Australian evidence for the existence of filter bubbles, and empirical evidence around the world supports

[18] See Brian McCullough, *How the Internet Happened: From Netscape to the iPhone*, Liveright Publishing Corporation, 2018.

this. In addition to the literature cited by the ACCC, a recent study in Digital Journalism "found no support for the filter-bubble hypothesis".[19] Another study found that basing recommendations on the history of prior consumption increases, rather than decreases, content diversity.[20] The argument that a "high propensity towards sharing content" is one of the environmental factors required to cause filter bubbles is peculiar, and can only be sustained if we assume that social media friends and follows are only chosen on the basis of one margin - political agreement.[21] This does not accord to how most people build their social media networks, where social media relationships are chosen on the basis of work, education and family relationships, and mutual hobbies, in addition to political preferences. Only a small fraction of media consumers filter their consumption on the single dimension of politics.[22]

But even if we grant the possibility of significant filter bubbles in the future, their existence will be a reflection of deliberate consumer decisions to satisfy their own content preferences. Filter bubbles are not a reflection of information asymmetries between digital platforms and consumers, or monopolistic control of the media. In fact, the ability of consumers to choose their content with a high degree of specificity represents the opposite trend – a shift in power from media producers to media consumers. In the pre-digital era, editors and producers were able to present whatever content they chose to consumers because they could exercise market power over content curation. Few alternatives existed to the two major metropolitan newspapers, four or five television networks, and dozen or so radio stations. That power over content curation has been disintermediated – something which the ACCC should be welcoming, not worrying about. It should not be the role of a competition

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[19] Mario Haim, Andreas Graefe & Hans-Bernd Brosius "Burst of the Filter Bubble? Effects of personalization on the diversity of Google News," *Media and Democracy*, August 23, 2018, Available at: https://mdn.ssrc.org/2018/08/23/burst-of-the-filter-bubble-effects-of-personalization-on-the-diversity-of-google-news-researchgate/; See also Zuiderveen Borgesius, Frederik, et al. "Should we worry about filter bubbles?" *Internet Policy Review*, 2016.

[20] Möller, Judith, Damian Trilling, Natali Helberger, and Bram van Es. "Do not blame it on the algorithm: An empirical assessment of multiple recommender systems and their impact on content diversity." *Information, Communication & Society* Vol. 21 (7), 2018: 959-77.

[21] p. 289-90.

[22] Flaxman, Seth R., Sharad Goel, and Justin M. Rao., "Filter Bubbles, Echo Chambers, and Online News Consumption." *Public Opinion Quarterly*, Vol. 80 (Special issue), 2016: 298–320; Guess, Andrew M., "(Almost) Everything in Moderation: New Evidence on Americans' Online Media Diets," Princeton University Center for the Study of Democratic Politics, 2018. Available at https://webspace.princeton.edu/users/aguess/Guess_OnlineMediaDiets.pdf.

regulator and consumer watchdog to try to second-guess what sort of content – or what mix of content – consumers should access.

IV. Freedom of speech and media quality

As the previous section suggests, several of the recommendations and concerns of the ACCC raise concerns around freedom of speech. Digital platforms allow for a much larger range of expression than was possible in the technological constrained environment of the past. This goes long past the rise of 'citizen journalists' and the new phenomenon of prominent opinion leaders with substantial followings who nonetheless operate outside the mainstream media. The voracious political and cultural debates which now occur

The last decade of political debate in Australia has underlined the significance of freedom of speech as a focal point of public policy. In that context it is unfortunate that the ACCC has not fully taken into account many of the policy lessons that have been drawn from the debates over Section 18C of the Racial Discrimination Act, the Finkelstein Inquiry and the Gillard government's 2013 media reform package, and the draft Human Rights and Anti-Discrimination Bill 2012.

For instance, one of us has raised potential freedom of speech concerns with mechanisms to support journalism through tax incentives or direct subsidies.[23] To do so would require clear categorization of who counts as a 'journalist' and who does not, at least to the extent that journalism would maintain its privileged position in other legal frameworks (such as privacy law). This raises the risk of press licensing that was of such a concern during the debate over the Finkelstein inquiry's proposed News Media Council and Gillard government's proposed Public Interest Media Advocate.

There is a significant debate about 'fake news' and the reliability of content on the internet. This debate is not as novel as it seems: low quality, unreliable information about current events has been a perennial concern of human society. The presence of "emotive 'click bait'"[24] changes potentially the dynamic but that needs to weighed

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[23] Chris Berg, *Submission to the Senate Select Committee on the Future of Public Interest Journalism*, June 2017. Available at http://chrisberg.org/wp-content/uploads/2017/07/BERG-Public-interest-journalism-inquiry-submission.pdf.

[24] *Supra* note 5 at p. 240.

against the countervailing capacity of media consumers to access, almost instantly, and almost ubiquitously, alternative viewpoints.

The first conclusion we might draw is that the Preliminary Report's analysis here is undercooked, and hard to reconcile with its mandate to foster competition in the economy. More significantly, however, the ACCC – or any government agency – should not be trying to insert itself into the structures of public discourse, whether through regulation or any other means. The determination of what constitutes 'fake news', 'clickbait', and more broadly the reliability of journalistic output is not a regulatory matter; to treat it as such raises significant freedom of speech questions.

V. Privacy

Similar undercooked is the Preliminary Report's approach to privacy. The Report leaps briefly through some brief observations about the economics of data and consumer attitudes to privacy before a more detailed examination of the levels of user consent and awareness of the privacy policies of each individual platform.

Globally, consumers and firms are going through a rapid and deep social negotiation about the collection and use of data. The Preliminary Report's description of the privacy policies and approaches to data permissions are a snapshot of state of these policies and approaches at the time the report was written, they do not represent the static equilibrium result of a bargaining between consumers, platforms and advertisers. These policies are rapidly changing. In part that rapid change is the result of technological development – the new uses of data (such as geolocation services) require changes to how services interact with their consumers. But it is also in a significant way a response to changing consumer attitudes about how data should be used and secured. In recent years, controversies about data loss and data privacy have led to changes in data policy. For example, Facebook made major changes to its privacy settings to encourage usability in the wake of the Cambridge Analytica scandal.[25] It is possible, as the Preliminary Report does, to be critical of the current privacy policies and approaches of digital platforms, and in some circumstances that criticism is

[25] Erin Egan and Ashlie Beringer, "It's Time to Make Our Privacy Tools Easier to Find," Facebook.com, March 28, 2018. Available at: https://newsroom.fb.com/news/2018/03/privacy-shortcuts/.

appropriate. But this is an evolving, rapid and unpredictable negotiation at the nexus of consumers, platforms, advertisers and technological change.

Such negotiations are around privacy are a common feature of the evolution of new social technologies – from the invention of physical homes to the development of telephony.[26] Early stage social technologies tend to expose their users to the visibility of others – fellow occupants, telegraph and telephone operators, parallel users of shared computers and so forth. Only once the value of privacy (for instance, for commercial in-confidence communication, or for medical advice over the telephone) has become apparent to consumers is there significant pressure for privacy development. The importance of data to the economy is a relatively recent development, and individual engagement with digital platforms at scale even more so. The ACCC's investigation could be seen as a contribution to the social negotiation, by joining other reports and analyses that outline the current state of privacy and data protection, but it would be premature and inappropriate to develop new regulation on those grounds.

VI. Competition policy

The preliminary report's competition analysis is conclusory to an extent that raises concerns that it assumes its results. The approach taken seems to be premised on little more than an inchoate idea conflating concerns of bigness with presumptive badness.

As an initial matter, it should reasonably be acknowledged both that the report indicates that it is preliminary,[27] and, as noted, that it is undertaken in response to specific Terms of References directed to the ACCC. These Terms of Reference may unduly limit the scope and approach of inquiry available to the ACCC in how it identifies and analyses markets. To the extent that this is the case, however – that is, that the prompt to which the ACCC is responding is dictated to fall outside of the

[26] Chris Berg, *The Classical Liberal Case for Privacy in a World of Surveillance and Technological Change*, Palgrave Macmillan, 2018.

[27] "This is a preliminary report and the ACCC's views on the relevant markets and the extent to which digital platforms hold market power are preliminary and will be considered further following public consultation." *Supra* note 5 at p. 36.

norms of typical competition analysis – the ACCC should be careful to indicate as much.

The market analysis offered by the ACCC falls well outside of the norms of typical competition analysis. It arbitrarily defines separate markets, including "social media services," "search advertising," "display advertising," and "news and media referral services." These "markets" appear to be defined around specific business lines carried out by specific firms – rather than by using established analytic frameworks such as looking to consumer substitution between firms, diversion ratios between firms or products, or metrics like upward pricing pressure. It is, for instance, entirely arbitrary to define search and display advertising as separate markets without consideration whether they are in fact substitutes for one another. Similarly, and puzzlingly, the report concludes that Facebook and Google, together comprising "more than 50 per cent" of the market for news and media referral services, have significant market power. That *may* be sufficient to conclude that a combined or collusive Facebook-Google entity has market power (though a finding of "more than 50 per cent" of a market alone would ordinarily be insufficient for that) – *but* the more specific finding in the report that Facebook and Google have 25 and 28 per cent of this market each, respectively, falls far, far, short of establishing significant market dominance.

Even more problematic are the preliminary report's discussions of multi-sided markets and dynamic competition. Take the report's presentation of the concept of multi-sided markets, which is peculiar to say the least. The report asserts:

> Typically, multisided platforms have an incentive to cross-subsidise. That is, the platforms have an incentive to set a relatively low price to users on one side of the platform, in order to increase the revenue earned on another side of the platform. The prices charged by Google and Facebook involve a cross-subsidy, with individual users being charged a zero monetary price so as to enable them to increase the revenue earned from advertisers.[28]

This explanation seemingly treats the use of low prices on one side of the market as a cross-subsidy to increase revenue on the other side of the market. This conflates the concepts of cross-subsidization (which transfers revenue from one side of the market to the other) with cross-side network effects (which increases participation on one

[28] *Ibid.* at p. 39.

side of the market by increasing participation on the other side of the market). This is not only a misstatement of the dynamics of these markets, but it demonstrates a lack of appreciation for their importance. The cross-subsidy dynamic is a mere wealth transfer that affects the quantity demanded by each side of the market. The cross-side network effect, on the other hand, affect demand directly, increasing the overall value of the market for consumers.

While it is true that platforms charge lower (often zero) prices to users on one side of the market, they do so in order to *increase use of* the platform, which *indirectly* enables the platform to generate more revenue from the other side of the market. This is an indirect cross-side network effect; it is *not* a direct "cross-subsidisation" effect. It may be the case that cross-subsidization can in some contexts raise concerns about foreclosure, but in the context of multi-sided markets those concerns (which are often not valid on their own) need to be offset by the value created by cross-side network effects.

By conflating direct and indirect effects (and mislabelling them both as "cross-subsidisation"), the report at the very least underemphasizes the importance of network effects such as these. Yet, they are incredibly important, as they increase the value of the platform by facilitating transactions that otherwise would not be possible. That is, they *create* new value – a factor that the report fails to recognise in its consideration of dynamic competition.

Thus, for instance, the report's concern that "a fall in referrals resulting from a media business's decision not to obtain referrals from Google would not be likely to be fully offset by gains in referrals from substitution by users"[29] is wholly inapposite to any competitive concerns. The relevant counterfactual world to which such a decision not to obtain referrals from Google must be compared is one in which Google does not exist – one in which the value created by Google's platform has not been created – as opposed to a hypothetical Nirvana in which the social welfare created by Google exists independent from Google's having created it.

[29] *Ibid.* at p. 62.

This basic analytical error is further seen in the report's discussion of dynamic competition. The report's following conclusion as to Google, for instance, demonstrates a fundamental lack of comprehension of the concept of dynamic competition:

> Further, suppose that a rival search platform were able successfully to enter and expand. It is plausible that the new search platform would then become the dominant platform in the market because of same-side network effects, cross-side network effects, and economies of scale. In the absence of changes to the regulatory environment, any problems associated with the market power of Google would, potentially, re-emerge as the new platform attained its dominant position.[30]

First, in a multi-sided market, it is those very effects being lamented in this paragraph and the discussion leading up to it that allow a platform to create value for its users. The report's discussion is tantamount to saying, "the successful firm, having more effectively served its customers, developed new products, and benefitted society, has an unfair advantage over those rivals that lack customer loyalty, have lower quality products, and have done less of benefit to society deserving of reward."

Even more troubling, however, is this conclusion's failure to appreciate the competitive dynamics of dynamic competition. The very fact that the ACCC recognised the possibility that Google could be displaced by a competitor demonstrates the legitimacy of potential competition as a constraint on Google's conduct. Google surely knows the precariousness of its position better than does the ACCC, which is among the best competitive constraints a firm can face – especially one in industries such as these where efficient scale dictates a relatively small number of firms.

If the ACCC is to engage in a competition analysis of this market, it should do so using the standard methods of analysis used in competition analysis and not forego them because it has been giving a too-narrow charge. To the extent that its charge is too narrow or otherwise not compatible with sound application of competition principles, the ACCC should adopt the role of competition advocate – as its peer agencies around the world regularly do – and respond to any convening or charging authority in terms that defend and champion the importance of sound competition policy in improving the functioning of markets of flourishing of consumers.

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[30] *Ibid.* at 50.

VII. Conclusion

The last decade has seen some revolutionary changes in the media, in advertising markets, and the digital economy. Policymakers and advisors have a critical role to play to reassess and potentially revise existing regulatory frameworks in order to adapt to new market conditions and new policy challenges. These changes are likely to accelerate as data becomes even more central to the Australian economy, as technologies such as artificial intelligence and blockchain are adopted by Australian industries, and as consumers come to rely even further on new media and new media consumption patterns.

In that sense, the government and the ACCC's interest in the new digital platforms is a positive step. However, the Preliminary Report reveals the challenge of applying static regulatory frameworks not only to markets that are rapidly changing, but policy issues, like privacy, that are rapidly changing. Many of the recommendations seem to reflect the ACCC's uncertainty about the principles that should be applied to these new technologies. The proposal to have a regulator monitor the algorithms used by digital platforms for advertising and news ranking is under-examined, under-justified and fraught with serious consequences for business autonomy and freedom of speech.

In addition, Australian policymakers should be modest in trying to impose Australian policy on global entities. For example, the proposal to require Google and Facebook to provide advance notification of acquisitions of businesses that have activities in a small regional economy like Australia is impractical and could harm Australian consumers. While Google and Facebook have offices and Australian business operations in Australia, their strategic acquisitions are made at a global level. Previous regulatory approaches have encouraged the move of global firms outside Australia – encouraging mobile capital to maintain only a minimal presence in Australia, with cost to jobs and government revenue.[31] There is precedent for large American firms to withdraw service from Australian markets in response to Australian policy changes

[31] Berg, C and S Davidson, '"Stop this greed": The political campaign against base erosion and profit shifting in the OECD and Australia', *Econ Journal Watch*, vol. 14, no. 1, 2017, pp. 77-102; Berg, C and S Davidson, *Submission to the Productivity Commission Inquiry into Collection Models for GST on Low Value Imported Goods*, August 2017.

– for example, Amazon.com's decision in July 2018 to prevent Australian consumers from using its American website.

As the economy changes in response to forthcoming waves of technological change, the Australian parliament faces decades of potential regulatory reform. This is an opportunity for political leaders and policymakers not simply to apply existing frameworks to new challenges, but to seriously consider what the role of government is in the digital world. Challenges like privacy should not be reverse-engineered into existing frameworks. Enduring principles – such as freedom of speech – should be brought to the forefront of policy analysis. Finally, policymakers need to recognise the enormous benefits not only that individual digital platforms have brought consumers, but that this innovation has only been possible because of an open, dynamic and competitive market. Impeding that dynamism will have deleterious consequences for consumer welfare that are unpredictable, but nonetheless certain.