

## **Executive Summary**

Thank you for the opportunity to contribute to the inquiry.

The digital market is changing and growing at a rapid rate, such that perhaps the only current certainty is uncertainty. Moreover, digital platforms intervene in multiple markets, which are often interrelated. This makes it difficult to assess the power of digital platforms in light of current competition law frameworks. Nonetheless, there are dominant platforms and trends towards market concentration in Australia. I recommend a range of reforms around the use, handling and transfer of data. However, at this stage, I suggest the market remains too underdeveloped to engage in substantive intervention around competition

**Recommendation 1: Watch the sector closely over the next five years and prepare regulatory solutions that can be implemented if particular markets do not show signs of increased competition.**

**Recommendation 2: Consider the extent to which commercial companies should be empowered to collect significant amounts of data about consumers.**

There are significant barriers to entry in the search engine and social network services market. While consumers, content creators and advertisers have access to alternative services; many of them are of a lower quality because competitors do not have access to the same amount of data as major digital platforms. These competitors are also unable to invest in the significant amount of infrastructure and human capital required to engage in such data collection efforts. I also reject the claim that social networking services are functionally similar and that the general availability of social platforms allows for multi-homing. Facebook is arguably the only competitor in a sole-operator market.

While there may be a case to intervene with regard to social networks, the digital platforms market as a whole is too nascent and underdeveloped to engage in substantive intervention around competition. However, I recommend a range of reforms around the use, handling and transfer of data. The inquiry also needs to address a fundamental policy issue in this space: to what extent should commercial companies should be empowered to collect significant amounts of data about consumers, even with their presumed consent? The inquiry should consider whether the foundational operation of these companies conflict with the ACCC's own policy goals with respect to consumer protection. I suggest that there are real limits to the amount of meaningful protections that can be put in place due to the extent of the data being produced, collected and analysed.

**Recommendation 3: Provide Australians with an enforceable data portability right.**

Consumers find it difficult to transition across like for like services and suffer from "lock-in". I recommend that an enforceable data portability right be introduced to support competition and allow Australian consumers to transfer between services easily. Digital platforms should be part of an in-depth consultation process to ensure that the movement of data between services is as seamless and secure as possible.

**Recommendation 4: Conduct or support research into the merger and acquisition strategy of digital platforms.**

Digital platforms enhance their market position through acquisitions. This allows them to capture more data to ensure market dominance and stave off potential long-term threats to this dominance. Many of these acquisitions fall under the remit of the Federal Trade Commission but the ACCC should consider what potential harms may befall Australian consumers.

**Recommendation 5: Digital platforms should be required to engage in algorithm audits and make these systems as transparent as possible to regulators, creators and consumers. They should also be required to engage in good faith consultation before changes are made.**

Digital platforms change algorithms without notice, which harms content creators and media publishers. The lack of transparency around these algorithms also means that regulators and consumers are not privy to major decisions made around how these changes affect the distribution and diversity of media content.

**Recommendation 6: Companies that retain data about Australian citizens be subject to significant financial penalties for the mishandling and unnecessary collection of customer data.**

**Recommendation 7: Consumers should also have greater transparency around the use of their data and be provided with great legal protections relating to the access and control of their data.**

**Recommendation 8: Support the resourcing of the Office of the Australian Information Commissioner to support the ACCC in the ongoing protection of consumer rights.**

**Recommendation 9: Support the introduction for a statutory right to privacy.**

The unrestricted collection and analysis of consumer data and the exchange of it with third parties causes considerable consumer harm. Consent is not an adequate model for the digital economy and research across numerous disciplines has shown that people are not informed about how their private information is used, are not privacy literate and “struggle to apply their knowledge to complex situations — with regard to privacy”.<sup>1</sup> It is also important to recognise that if an individual’s privacy is the cost of using a service online then there is now significant crossover between the protection of an individual’s privacy and the protection of consumers. In short, privacy protection becomes a consumer protection issue. The already proposed statutory right to privacy would be a useful way to enhance Australia’s overall privacy framework.

**Recommendation 9: Incorporate digital platforms in new media regulation models and explore self and co-regulatory processes.**

Digital platforms also should fall under the auspice of media authorities. I recommend that these platforms should be regulated to some extent following the ongoing conceptual restructure of Australia’s media regulation framework.

**Recommendation 10: Australian data protection law needs to be reformed to better protect the interests of Australian consumers**

Australian data protection law needs to be reformed to better protect the interests of Australian consumers. If consumer data is of significant value then it should be better protected and consumers should have greater control around how it is exploited.

There are concerns about the current state of the industry but Australia should not aim to return to the old status quo. Australian broadcast media was already an incredibly

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<sup>1</sup> Solove, Daniel, 2012. “Introduction: Privacy self-management and the consent dilemma.” Harvard Law Review, vol. 126, no. 7, pp. 1880 – 1903.

concentrated sector and digital platforms have supported the emergence of new media players in this space. Moreover, digital platforms are not responsible for decades of inaction around Australia's privacy laws and Google in particular have been strong advocates for online privacy. However, inaction over the long-term may see a new era of concentration with more dramatic consequences for consumers. I encourage platforms to work towards ensuring a competitive marketplace for their own economic benefit. If the status quo continues or worsens over time, it could become more useful to view these platforms as infrastructure, which would warrant even more significant regulatory intervention from Government.

## **1.2. Should the Inquiry consider digital platforms that do not currently provide access to news and journalistic content in Australia but may either provide news and journalistic content in the future and/or have an impact in relevant markets (e.g. Amazon, instant messaging applications)?**

I support the Commission's plan to focus on digital platforms that "provide media content, social interaction or search functionality (or some combination of these)".<sup>2</sup> However, I recommend that the Commission remain open to considering digital platforms owned by relevant parent companies (i.e. WhatsApp is owned by Facebook). Firstly, the acquisition of these platforms is relevant to the broader discussion around competition and how digital platforms maintain market dominance.<sup>3</sup> Secondly, these messaging services are a source of news for a small portion of consumers (8% for Messenger; 7.5% for WhatsApp)<sup>4</sup> and 'dark social' (where people socialize and consume media through messaging apps rather than in public on social media) is a growing social phenomenon.<sup>5</sup>

## **1.3. What 'news and journalistic content' is particularly relevant to this inquiry? Should the ACCC consider a broad range of specialist suppliers of news and journalistic content?**

The ACCC should consider a broad range of specialist suppliers in order to capture the diversity of content available to consumers. People are accessing a range of news products beyond those offered by broadcast media and often getting updates from a variety of sources such as podcasts, YouTube videos and smaller publishers.<sup>6</sup>

## **1.4 Should the Inquiry focus on news and journalistic content supplied to consumers in Australia or news and journalistic content produced in Australia?**

I recommend that the Commission maintain its focus on supply. There is an ongoing (and important) policy debate about whether digital platforms function as neutral distributors or media publishers in their own right.<sup>7</sup> Subsequently, focus needs to be placed on these actors as there are significant issues relating to how digital publishers distribute content and their obligations under current regulatory frameworks. Establishing competitive markets in advertising and media will presumably have positive impact on the production of local news. The specific production of Australian content can be addressed at a later date.

## **Assessing the market power of digital platforms**

### **3.2. What are the relevant markets for assessing the market power of digital platforms? Who do digital platforms compete with?**

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<sup>2</sup> Australian Competition and Consumer Commission, 2018. Digital Platforms Inquiry, p. 5

<sup>3</sup> Wilken, Rowan, 2018. "Social Media App Economies", in Burgess, Jean; Marwick, Alice and Thomas Poell, "The SAGE Handbook of Social Media", SAGE Publications, California.

<sup>4</sup> Watkins, Jerry; Park, Sora; Fisher, Caroline; Blood, R. Warwick; Fuller, Glen; Haussegger, Virginia; Jensen, Michael; Lee, Jee Young and Franco Papandrea, 2017. Digital News Report: Australia. University of Canberra, Australia, p. 12.

<sup>5</sup> Deloitte, 2017. Media Consumer Survey: Australian Media and Digital Preferences – Sixth Edition, p. 20

<sup>6</sup> Watkins et al, *supra* note 4, p. 37; also see recent research conducted by ABC Audience Insights. Available at: <http://www.abc.net.au/xmlpublic/radio/podcasts/Podcast-Survey-2017-Final-External.pdf> (viewed 27 March 2018).

<sup>7</sup> Napoli, Philip, and Robyn Caplan, 2017. "Why media companies insist they're not media companies, why they're wrong, and why it matters." First Monday, vol. 22, no. 5. Available at: <https://journals.uic.edu/ojs/index.php/fm/article/view/7051> (viewed 27 March 2018).

**3.3. How should the market power of digital platforms be assessed? What are appropriate metrics for measuring any market power (e.g. market concentration, profits, prices, number of users, access to user data)?**

**3.4. Do digital platforms have market power? If so, which digital platforms and in which markets?**

I begin by noting that competition law has been found to be a deficient analytical framework with respect to digital platforms because it does not accurately account for the significant role that these platforms play in our everyday life.<sup>8</sup> This means that “when platforms do possess market power, they have several characteristics that present competitive concerns of greater complexity and ambiguity than those related to other kinds of goods and services”.<sup>9</sup>

Current competition law frameworks cannot help us accurately identify the markets digital platforms operate in or assess how much power they have. However, there are some clearly ‘dominant’ platforms and trends towards market concentration. Many competition law scholars advocate analysing the business ecosystem of digital platforms, rather than individual markets.<sup>10</sup> This is because digital platforms are multi-sided platform businesses, who “provide “services through the internet to two or more distinct groups of users”<sup>11</sup> and critically, usually provide free goods to consumers, such as online search or social networking.<sup>12</sup> Scholars have noted that standard analytic tools such as the SSNIP (Small but Significant and Non-transitory Increase in Price) test need to be modified before application and that “there is as yet no consensus on how to apply a multisided SSNIP test”.<sup>13</sup> Similarly, analyses of market power that focus on the ability to control prices or exclude competitors “is (at least in part) facially inapplicable to a market featuring zero prices”.<sup>14</sup> I am mindful of this and so my analysis should only be taken as an indicative (rather than substantive) identification of markets and market power, in light of the limitations of traditional methodological approaches common in competition law.

There are two critical points to make at the outset: 1) **digital platforms intervene in multiple markets and 2) these markets are often interrelated**. Therefore, the inquiry should acknowledge and examine “the inter-relationship between a venture’s successes in two or more markets, because dominance in two combined, or interdependent markets, may trigger new or greater risks for consumers”.<sup>15</sup> I outline my own tentative identification of the relevant markets below.

## **Online Search and Advertising**

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<sup>8</sup> Daly, Angela, 2016. *Private Power, Online Information Flows and EU Law: Mind the Gap*. Hart Publishing, Oxford, U.K.

<sup>9</sup> Shelanski, Howard, 2013. “Information, innovation, and competition policy for the Internet.” *University of Pennsylvania Law Review*, vol. 161, no. 6, p. 1676.

<sup>10</sup> Daly, *supra* note 8; Evans, David, 2011. “The Antitrust Economics of Free.” *CPI Journal, Competition Policy International*, vol. 7., no. 1. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1813193](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1813193) (viewed 27 March 2018).

<sup>11</sup> Martin-Laborda, Antonio Robles, 2017. “Merger Control and Online Platforms: The Relevance of Network Effects.” *Market and Competition Law Review*, vol. 2, p. 1. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3024225](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3024225) (viewed 27 March 2018).

<sup>12</sup> Gal, Michal and Daniel Rubinfeld, Daniel, 2016. “The Hidden Costs of Free Goods: Implications for Antitrust Enforcement.” *Antitrust Law Journal*, vol. 80, no. 3, pp. 521 – 562; Newman, John, 2015. “Antitrust in Zero-Price Markets: Foundations.” *University of Pennsylvania Law Review*, vol. 164, no. 1, pp. 149 - 206.

<sup>13</sup> Gürkaynak, Gönenc; İnanılır, Öznur; Diniz, Sinan and Ayşe Gizem Yaşar, 2017. “Multisided markets and the challenge of incorporating multisided considerations into competition law analysis.” *Journal of Antitrust Enforcement*, vol. 5, no. 1, pp. 100-129, see also Gal and Rubinfeld, *supra* note 12.

<sup>14</sup> Newman, *supra* note 12, p. 197, see also Martin-Laborda, *supra* note 11.

<sup>15</sup> Frieden, Rob, 2017. “The Internet of Platforms and Two-Sided Markets: Legal and Regulatory Implications for Competition and Consumers.” Available at SSRN: <https://ssrn.com/abstract=3051766> (viewed 27 March 2018).

A handful of digital platforms retain a dominant (and close to monopolistic) position in online search and advertising. **Google maintains a dominant position in the search engine market** in Australia, with a 93.85% market share against Microsoft's 4.6% (Bing).<sup>16</sup> However, Bing has seen ongoing growth in ad revenue.<sup>17</sup> There are a variety of multi-homing opportunities in the market so Google's dominance is most likely due to innovation and product quality rather than anti-competitive practices.<sup>18</sup> Digital platforms also only compete with each other in this market. However, the market cannot be analysed in isolation as Google's online search operations are closely tied to their online advertising business. Michael Gal and Daniel Rubinfeld note that "data on consumer preferences gained through the provision of free search services serve as inputs in the market for information on consumer preferences".<sup>19</sup>

This is why **Google forms part of the duopoly that dominates the online advertising market. The other platform is Facebook**, a company that offers consumers a social networking service for free and then on-sells the demographic data provided to advertisers. These two companies claim close to 75% of the global market share.<sup>20</sup> Their position within the Australian digital advertising market is somewhat unclear because neither company reveals the full amount of ad sales recorded in Australia, but it is presumed to be dominant.<sup>21</sup> The online advertising industry is growing and accounts for almost 50% of advertising spend in Australia<sup>22</sup> and one fifth of global spend.<sup>23</sup> Digital platforms compete with each other in this market through social media and search engine advertising. The entire digital advertising market competes with offline advertising markets (i.e. television), however digital is growth at a rapid pace.

There are barriers to entry in both markets because they are interdependent.

## Social network services

A number of digital platforms are part of the **social network services market**. There are opportunities for multi-homing here and numerous people undertake this practice, maintaining a variety of social media accounts.<sup>24</sup> **Facebook is the dominant player in this**

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<sup>16</sup> Search Engine Market Share Australia, 2018. Statcounter GlobalStats. Available at: <http://gs.statcounter.com/search-engine-market-share/all/australia/#yearly-2009-2018-bar>, (viewed 27 March 2018).

<sup>17</sup> Marvin, Ginny, 2017. "After Windows 10 bump & Yahoo deal, Microsoft's search revenue growth looks stagnant." Search Engine Land, July 21. Available at: <https://searchengineland.com/bing-revenue-growth-microsoft-earnings-q4-2017-279424> (viewed 27 March 2018).

<sup>18</sup> See Lerner, Andres V., The Role of 'Big Data' in Online Platform Competition (August 26, 2014). Available at SSRN: <https://ssrn.com/abstract=2482780> or

<sup>19</sup> Gal and Rubinfeld, *supra* note 12.

<sup>20</sup> Wallbank, Paul, 2017. "Google and Facebook continue to dominate global digital ad spend says Forrester." Mumbrella, September 28. Available at: <https://mumbrella.com.au/google-facebook-continue-dominate-global-digital-ad-spend-says-forrester-474526> (viewed 27 March 2018).

<sup>21</sup> Hickman, Arvind, 2017. "The digital media black hole: A look at ad spend and bookings through Google and Facebook", AdNews, 15 December. Available at: <http://www.adnews.com.au/news/the-digital-media-black-hole-a-look-at-ad-spend-and-bookings-through-google-and-facebook> (viewed 27 March 2018); Meade, Amanda, 2018, "Google says it supports ACCC inquiry into digital threat to Australian news media", The Guardian, 21 March, Available at: <https://www.theguardian.com/technology/2018/mar/21/google-says-it-supports-accq-inquiry-into-digital-threat-to-australian-news-media> (viewed 27 March 2018).

<sup>22</sup> Interactive Advertising Bureau Australia, 2017. "Online advertising spend reaches \$7.6 billion in 2017 financial year", IAB Press Release, 5 September. Available at: <https://www.iabaustralia.com.au/news-and-updates/iab-press-releases/item/22-iab-press-releases/2374-online-advertising-spend-reaches-7-6-billion-in-2017-financial-year> (viewed 27 March 2018).

<sup>23</sup> Kolloewe, Julia, 2017. "Google and Facebook bring in one-fifth of global ad revenue", The Guardian, 2 May. Available at: <https://www.theguardian.com/media/2017/may/02/google-and-facebook-bring-in-one-fifth-of-global-ad-revenue> (viewed 27 March 2018).

<sup>24</sup> Yellow Social Media Report 2014; Sensis Social Media Report, 2015; Sensis Social Media Report, 2016; Sensis Social Media Report 2017.

**market** with 67 – 83%<sup>25</sup> or 94 – 95% of Australians using Facebook across 2014 – 2017<sup>26</sup> (depending on the data source). A looser definition of the market would also encompass blogs, forums and messaging services.

It is important to note that people *often use different social media platforms for different functions* (see 3.4b)<sup>27</sup> and platforms are fundamentally different in their operation. For example, Instagram functions as a photo-sharing service, Twitter as a source of news and information and Facebook as an established social graph and information source. Therefore, the issue of market dominance is a complicated one. With regard to social network services *en masse*, Facebook has a dominant but not monopolistic position and there are a range of multi-homing options available. However, if the market is narrowed to **social network services that operate with a functional social graph**, Facebook retains an entirely dominant position here. While their growing user base was originally due to market innovations, their ongoing dominance is due to significant barriers to entry and the phenomenon of “lock in”, which will be discussed in more detail below. Although this issue of potential dominance is only an issue if the market is construed in this fashion, I suggest this construction provides a more accurate account of the types of services Facebook are providing (and so, the sort of services they are competing against).

## Users

Social media platforms compete against each other for users and user base growth is a critical step towards profitability.<sup>28</sup> What is unique about this market is that it is zero-price because users do not pay for social media services. Treating the zero-price market of users seriously would help to address some of the market concentration occurring amongst social networking services. For example, John Newman notes that Facebook’s acquisition of Instagram would have not have impacted “positive-price markets [as] Instagram had not yet been monetized”.<sup>29</sup> However, the move could also be clearly viewed as “a strategic acquisition designed to eliminate competition in the (zero-price) market for users”.<sup>30</sup> A similar criticism could be advanced with reference to Facebook’s acquisition of Whatsapp.<sup>31</sup> Market concentration is a risk in these interconnected markets (social network services and users) and regulators should treat such acquisitions with greater suspicion.

## Data or information market

The most critical market for digital platforms is the **market for data**, which is the “primary profit-making market” for Google and Facebook.<sup>32</sup> The markets mentioned above intersect with this market and are where digital platforms make their money. This market must be accounted for when assessing competition. For example, it is impossible to analyse “Google’s dominant market share in the Internet search marketplace, without fully appreciating that search dominance also extends into the market for broadband network

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<sup>25</sup> Social Media Stats Australia, 2018. Statcounter GlobalStats. Available at: <http://gs.statcounter.com/social-media-stats/all/australia/#yearly-2009-2018> (viewed 27 March 2018).

<sup>26</sup> Sensis *supra* note 24.

<sup>27</sup> This is common knowledge in digital marketing and scholarship. See Bucher, Taina and Anne Helmond, 2018 “The Affordances of Social Media Platforms.” in Burgess, Jean; Marwick, Alice and Thomas Poell, “The SAGE Handbook of Social Media”, SAGE Publications, California; Baym, Nancy, 20156. Personal Connections in the Digital Age, Polity Press, Cambridge, U.K., p. 74; The Beginners Guide to Social Media, 2018. Moz.com Available at: <https://moz.com/beginners-guide-to-social-media> (viewed 27 March 2018).

<sup>28</sup> Spangler, Todd, 2017. “Twitter Reports Zero Subscriber Growth in Q2, Stock Takes Dive”, Variety, July 27. Available at: <http://variety.com/2017/digital/news/twitter-q2-zero-subscriber-growth-1202508387/> (viewed 27 March 2018).

<sup>29</sup> Newman, *supra* note 12, p. 194.

<sup>30</sup> *Ibid.*

<sup>31</sup> For an analysis of this decision see Martin-Laborda, *supra* note 11, p. 8.

<sup>32</sup> Gal and Rubinfeld, *supra* note 12, p. 80.

delivered advertising and the development of markets for the large volume of consumer data the company acquires, processes and analyzes".<sup>33</sup>

This is a complex market and is difficult to assess and there are numerous competitors. A range of digital platforms collect some sort of data from Google and Facebook to Amazon and Pinterest.<sup>34</sup> Data brokers also operate in this space and collect and on-sell personal data.<sup>35</sup> Finally, and most critically, data is a non-rivalrous resource. As Andres Lerner points out, "collection and use by one provider does not detract from collection and use by others".<sup>36</sup>

Despite these qualifications, competitive issues emerge once the intersecting nature of markets is considered. While digital platforms like Facebook or Google do not maintain a monopoly on data, significant barriers to entry can be established in adjacent market sectors through data collection efforts. These two platforms rely on data to support their business model in adjacent markets and the scale and scope of data collection efforts can only be supported by "enormous computing capacity and storage".<sup>37</sup> Moreover, as Howard Shelanski notes, "[i]f the benefits of additional information begin to decline only at a very high volume of information, and if relative differences in access to customer data matter, then control of the largest share of customer data could contribute to market dominance".<sup>38</sup> Scholars in competition law have argued that there are significant infrastructural costs associated with entering the social networking and search markets.<sup>39</sup> Moreover, the prominence of data creates "a two-level entry problem, with a rival required to enter more than one market, even if it can provide a high quality product only in one".<sup>40</sup> While there is no major market barrier to starting a search or social networking company, current consumer expectations around efficiencies in search and social networking means that any company that cannot eventually make significant investments in infrastructure and data collection efforts is not going to achieve significant market share.<sup>41</sup>

To end I note that claims about the supposed dynamism of the sector should be treated with some caution.<sup>42</sup> While the early years of the Internet saw a significant amount of transition, we are reaching a point of stasis within a maturing market. Early search engines and social network services were basic products, which were quickly improved upon. They also did not make use of data in a sophisticated fashion to entrench their market position. It is therefore inaccurate to suggest that a new player could easily appear and challenge the sophisticated services and products offered by Facebook and Google. However, this period of stasis is still too recent to warrant dramatic regulatory intervention at this stage. The ACCC should continue to watch the sector closely over the next five years and prepare regulatory solutions that can be implemented if particular markets do not show signs of increased competition. The inquiry should consider whether the foundational operation of these companies conflict with the ACCC's own policy goals with respect to consumer protection. I

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<sup>33</sup> Frieden, *supra* note 15.

<sup>34</sup> For an example see Huthcinson, Andrew, 2015 " see Pinterest Updates Privacy Policy to Cover Ad Targeting, Data Collection", Social Media Today, Available at: <https://www.socialmediatoday.com/social-networks/pinterest-updates-privacy-policy-cover-ad-targeting-data-collection>, (viewed 27 March 2018).

<sup>35</sup> "FTC Recommends Congress Require the Data Broker Industry to be More Transparent and Give Consumers Greater Control Over Their Personal Information", Federal Trade Commission, Available at: <https://www.ftc.gov/news-events/press-releases/2014/05/ftc-recommends-congress-require-data-broker-industry-be-more>, (viewed 27 March 2018).

<sup>36</sup> Lerner, *supra* note 18, p. 5.

<sup>37</sup> Pasquale, Frank, 2012. "Privacy, antitrust, and power." *George Mason Law Review*, Vol. 20, No. 4, pp. 1015.

<sup>38</sup> Shelanski, *supra* note 9, p. 1681.

<sup>39</sup> *Ibid*. See also Frieden, *supra* note 15; Newman, Nathan, 2014. "Search, antitrust, and the economics of the control of user data." *Yale Journal on Regulation*, vol. 31, no. 2, pp. 401 - 454.

<sup>40</sup> Gal and Rubinfeld, *supra* note 12.

<sup>41</sup> Newman, *supra* note 38, p. 419.

<sup>42</sup> Lerner, *supra* note 18; O'Connor, Daniel, 2016. "Understanding Online Platform Competition: Common Misunderstandings." *Internet Competition and Regulation of Online Platforms*, Competition Policy International. Available at SSRN: <https://ssrn.com/abstract=2760061>, (viewed 27 March 2018).

suggest that there are real limits to the amount of meaningful protections that can be put in place due to the extent of the data being produced, collected and analysed.

**Recommendation 1: Watch the sector closely over the next five years and prepare regulatory solutions that can be implemented if particular markets do not show signs of increased competition.**

**Recommendation 2: Consider the extent to which commercial companies should be empowered to collect significant amounts of data about consumers.**

### **3.3. How should the market power of digital platforms be assessed? What are appropriate metrics for measuring any market power (e.g. market concentration, profits, prices, number of users, access to user data)?**

Accounting for the market share of a single market can provide some insight. However, one market cannot be used as the sole identifier of market power because of the novel and interdependent nature of digital markets. I support the approach of Antonio Robles Martín-Laborda, who argues that “market dominance should be assessed giving a particular weight to the specifics of platform and network markets, notably the relevance of direct and indirect network effects, the economies of scale, the prevailing types of use on the opposite market side (single-homing/ multi-homing) and the degree of differentiation, the access to data and the innovation potential of digital markets”.<sup>43</sup>

### **3.4. (a) What realistic alternatives are available to users (i.e. consumers, advertisers and media content creators) of digital platforms? Do these alternatives effectively constrain the behaviour of digital platforms?**

For consumers, there is a broad diversity of digital platforms in a general sense but as mentioned above there are limited options in specific ‘genres’ such as search engines and social networking services. If these ‘genres’ are narrowed down further (i.e. to ‘photo based social networking service’), options are limited once again.

There are some options for consumers ‘opt-out’ of using dominant digital platforms. Instead of searching through Google people can use Bing or Duck Duck Go and Amazon has a range of competitors in terms of large and small businesses (although Amazon’s comparative purchasing power may be greater). These companies may be viewed as providing a lesser service because they do not have access to the amount of data that Google and Amazon do, which can inform service provision, pricing and customer experience.<sup>44</sup>

The only option with regards to ‘opting out’ of social networking services oriented around a social graph like Facebook is to stop using the service. Numerous alternative social network sites have failed to gain traction<sup>45</sup> due to network effects<sup>46</sup> and user-developed and maintained sites are unrealistic short-term options for reasons associated with infrastructure and governance.

Content creators have a range of relatively diverse locations available. They could post content on their own websites and could make use of a variety of popular and unpopular

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<sup>43</sup> See Martin-Laborda, *supra* note 11, p. 2.

<sup>44</sup> See Frieden, *supra* note 15, p. 25. “Amazon can pursue a “loss leader” pricing strategy, because its platform activities extend well beyond serving as an intermediary for books and other consumer products”.

<sup>45</sup> See ello.co; diasporafoundation.org; mastodon.social

<sup>46</sup> Newman, *supra* note 38.

digital platforms. While content creators have been attracted to Facebook because of the opportunity of reaching a large audience, this has arguably created a culture of dependency on Facebook and other major digital platforms. As stated by Joshua Topolsky of The Outline, moving beyond Facebook presents an opportunity for:

[p]ublishers who have diversified their traffic sources, who have pushed back on Facebook's News Feed carrots, who have built (or are building) brands that resonate with audiences beyond what can be bought or given. Value not gifted by Facebook could be a very good thing for publishers.<sup>47</sup>

Major social media platforms like Facebook offer a substantial audience for content creators. Unlike consumers, only commercial risk stops established content creators from making use of alternative methods of distribution and publication.

Similarly, advertisers have been committed to working with Facebook and Google because of the significant efficiency gains provided by platforms like AdWords. There are some alternatives for online advertising in native advertising (Outbrain, Taboola), paid search (Bing) and in-feed (Twitter), however Facebook and Google have become dominant in space (largely because of the quality of their data). This dominance is not so different from the broadcast era, where advertisers had a limited number of print, radio and television stations to work with. The issue is that the shift to online offered a possibility of significant market diversity, which has not been realised. The current status quo presents advertisers with a similar issue to content creators. The alternatives capture less granular data and target a much smaller audience and so the combined issues of commercial risk and presumed effectiveness stops established advertisers from making use of them.

**(b) Do users use multiple digital platforms for similar functions? Do you have any evidence or observations on switching between platforms or the growth of new platforms?**

People **use different social media platforms for different functions.**<sup>48</sup> For example “Instagram tends to foster larger, more public networks in which people maintain a more polished profile, while Snapchat encourages a smaller, more intimate network”.<sup>49</sup> Academic research points to a similar divergence of use amongst individuals, with “[c]ontinual and infrequent checkers [showing] different preferences of social media sites”.<sup>50</sup>

This evidence challenges the claim that social networking services are functionally similar and that the general availability of platforms allows for multi-homing. Subsequently, the inquiry should “consider the potential for lock-in beyond simply assessing whether a specific market segment has multiple platform operators. The existence of alternatives, by itself, does not evidence ample multi-homing options”.<sup>51</sup>

Use of Facebook has either grown or remained steady across 2014 – 2017.<sup>52</sup> The use of Instagram (owned by Facebook), Snapchat and Twitter has grown across 2016 – 2017.<sup>53</sup>

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<sup>47</sup> Topolsky, Joshua, 2018. “Facebook killing news is the best thing that ever happened to news.” The Outline, January 15. Available at: <https://theoutline.com/post/2936/facebook-news-feed-changes-are-actually-good-for-news> (viewed 27 March 2018).

<sup>48</sup> See note 27.

<sup>49</sup> Manjoo, Farhad, 2017. “Why Instagram is becoming Facebook's next Facebook.” The New York Times, April 15. Available at: <https://www.nytimes.com/2017/04/26/technology/why-instagram-is-becoming-facebooks-next-facebook.html> (viewed 27 March 2018).

<sup>50</sup> Wang, Yiran; Niiya, Melissa; Mark, Gloria; Reich, Stephanie M. and Mark Warschauer, 2015. “Coming of age (digitally): An ecological view of social media use among college students.” In Proceedings of the 18th ACM Conference on Computer Supported Cooperative Work & Social Computing, pp. 571 - 582.

<sup>51</sup> Frieden, *supra* note 15.

<sup>52</sup> <http://gs.statcounter.com/social-media-stats/all/australia/#yearly-2009-2018>, Sensis

<sup>53</sup> Sensis, 2016; 2017 *supra* note 24.

These numbers suggest that consumers are using different platforms for different activities rather than leaving dominant platforms (i.e. Facebook) for new entrants.

**(c) What difficulties do users encounter in switching between platforms? Do digital platforms engage in behaviour that makes switching between platforms more costly or more difficult for users?**

Users can switch between a range of social networking services but find it difficult to transition across like for like services. The growth of Instagram alongside Facebook has shown that numerous people can switch between services, however the lack of a viable Facebook alternative (for example) despite the presence of numerous possible potential competitors<sup>54</sup> shows that transitioning to an analogous service is difficult. This is because “few alternatives exist, the ongoing preference by most consumers for the incumbent venture and the difficulty and inconvenience in migrating to a less abusive option”.<sup>55</sup>

Disconnection from Facebook is also difficult to achieve with the company employing questionable methods to retain customers. Tero Karppi notes that:

Facebook in fact emphasizes that if one leaves Facebook, offline social relationships will also be negatively affected. When a user wants to deactivate their user account Facebook shows pictures of one’s Facebook friends and throws in a sentimental request to not to disconnect because “Your 305 friends will no longer be able to keep in touch with you.” It would in fact seem that the platform has a significant role in preventing the users from disconnecting.<sup>56</sup>

There are also issues around the phenomenon of lock-in on social networks, where “networks which cause high switching costs due to their resulting links with specific individual users and can thus have a strong lock-in effect. In such cases new suppliers may have to poach users from the platforms or networks already in place”. As Frank Pasquale notes, “it is very difficult to ask one’s “social graph” (or network of friends) to transfer themselves to a new platform”.<sup>57</sup> While product quality also plays a significant role in this phenomenon these network effects partially occur because people want to maintain their social connections online and gain a benefit from a growing number of users on their side of a multi-sided market.<sup>58</sup> Switching is also hard because of the lack of data portability. If data portability was enabled on platforms “Facebook users could take their profile and message history to Google+ and open a new Google+ account based on this information”.<sup>59</sup> This would also lower the sense of “investment” that people have with platforms. Currently, because “contacts cannot be transferred to another platform and information that has once been shared” people are “more likely to stay with the platform that [they] initially provided [their] data to, although rival platforms might otherwise be more attractive to [them]”.<sup>60</sup> Data portability will be enforced under the European General Data Protection Regulation and I recommend that similar rights be provided to consumers in Australia.

**Recommendation 3: Provide Australians with an enforceable data portability right.**

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<sup>54</sup> See ello.co; diasporafoundation.org; mastodon.social

<sup>55</sup> Frieden, *supra* note 15.

<sup>56</sup> Karppi, Tero, 2014. “Disconnect.Me: User Engagement and Facebook.” Thesis Narrative for PhD by Publication, Turku, p. 35.

<sup>57</sup> Pasquale, *supra* note 37, p. 1016.

<sup>58</sup> Engels, Barbara, 2016. “Data portability among online platforms.” Internet Policy Review, vol. 5, no. 2.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

It is relatively easy to switch search engine platforms, however quality of service may be lower on competing platforms because Google's data collection efforts across a variety of services can provide more accurate results (as discussed earlier).

**(d) Does increasing the number of users increase the attractiveness of that digital platform for other users? Does this mean that it is only viable for one or two digital platforms providing a similar service to consumers to operate at the one time?**

Yes. These network effects recede once people have established their social networks, however the *potential* of future connections presents an attractive market proposition.<sup>61</sup>

Both the current and historical market show that a variety of search engines are viable. In terms of social networking services writ large, a variety of services are viable but it appears that it is currently only viable for one company to provide a specific 'service' in a specific region i.e. (sharing photos through Instagram, organising social connections through Facebook, organising professional connections through Linked In). However, this is only the status quo in an emerging market. It is hypothetically possible that other social networks could be seen to be viable, particularly if they take contrasting approaches to handling data and profit-making and there could be up to three or four players in the space.

If only one or two companies are viable in a market, it is unclear why they should not be regulated closely and treated more like private companies providing a critical service rather than a wholly independent private company.

**(e) What difficulties are faced by providers in establishing competing platforms? Does the threat of new entry limit the market power of digital platforms? Over what timeframe should the threat of new entry be assessed?**

The intersecting nature of these markets means that there are significant barriers to entry in establishing competing platforms. It is important to recognize that following a significant period of dynamism across the digital economy from ~1995 – 2008, there has been a recent period of stasis with Apple, Amazon, Google and Facebook all dominant in the broader technology sector.<sup>62</sup>

As discussed throughout the submission, the barrier to entry for new competitors is large and "[t]he combination of high startup costs and low incremental costs to add additional subscribers favors market concentration and dominance by few firms".<sup>63</sup> The other issue is acquisition, where already dominant companies like Facebook have purchased competitors (i.e. Instagram and Whatsapp) who currently only offer adjacent social networking services (i.e. photo sharing and messaging) but could potentially grow to compete as a foundational social network service.

**(f) Are there examples where digital platforms have engaged in behaviours that indicate the exercise of market power? What types of users are most at risk from any exercise of market power by digital platforms?**

Potential competitors can suffer from the exercise of market power. Major digital platforms are able to use their large volumes of customer data to ensure a competitive advantage.<sup>64</sup> While the use of this data may not be viewed as strictly anti-competitive under current

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<sup>61</sup> *Ibid.*

<sup>62</sup> Galloway, Scott, 2017. "the four: The hidden DNA of Amazon, Apple, Facebook and Google." Penguin, New York.

<sup>63</sup> Frieden, *supra* note 15; Gal and Rubinfeld, *supra* note 12. Note that I do not support view that concentration is occurring in all identified markets.

<sup>64</sup> Shelanski, *supra* note 9.

readings of competition law, it effectively stands as use of market power to retain a dominant position.

Content creators and media publishers are dramatically impacted when social networking platforms change algorithms. For example, Facebook recently tested removing posts from Pages (which are used by numerous publishers) from people's News Feeds to another news feed called Explore in six markets: Sri Lanka, Bolivia, Slovakia, Serbia, Guatemala, and Cambodia. This move limited the ability for content to go viral organically (i.e. without paying Facebook to promote posts), drastically affecting the distribution of content for media organisations in each country and subsequently lowering their online audience numbers. While Facebook emphasised that the Explore news feed was just a test, this change highlights the extent to which media publishers are having to decipher (and even second guess) these companies who now sit at the heart of the media landscape in most countries. The example also shows that platforms can change algorithms to motivate publishers to pay for advertising in order to ensure visibility.<sup>65</sup>

The YouTube 'Adpocalypse' stands as another example of the exercise of market power with reference to content creators. YouTube (owned by Google) used artificial intelligence to demonetise content that was deemed not advertiser friendly. However, the guidelines were so vague that the process "struck a major blow to any creator who even tangentially touched on controversy. Fairly mainstream commentary, unbiased reportage, comedy, PSAs, and world history were all demonetized with little attention paid to nuance or context".<sup>66</sup>

Consumers arguably suffer the most harm as a result of the market power of digital platforms. The European Commission has fined Google for prioritising its own Shopping product over competitors and Google's proposed remedy has been criticised by competitors.<sup>67</sup> The intertwined nature of the Google Search and Google Shopping platforms means that there is significant consumer confusion around the advertising practices of major digital platforms.<sup>68</sup> Consumers also suffer major privacy harms (which discussed later on) and have a limited understanding of how their private information is shared between digital platforms and third parties.<sup>69</sup> Because of the limited options available to consumers with regards to product quality (i.e. search engines) and viable competitors (social networking services, specifically foundational social networking platforms like Facebook), there is respectively little motivation or opportunity to turn to competitor services.

### **3.5. Do digital platforms engage in any behaviour that enhances their market position by excluding competitors or potential competitors, e.g. through the acquisition of rivals or restrictive contract terms?**

Digital platforms enhance their market position through acquisitions. This allows them to capture more data to ensure market dominance and stave off potential long-term threats to this dominance. For example, Facebook's purchase of WhatsApp and Instagram allowed the company to counter existential threats of customer loss to messaging services or photo-

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<sup>65</sup> Flynn, Kerry, 2017. "Facebook tests removing publishers from News Feed—unless they pay." Mashable, Oct. 24. Available at: <https://mashable.com/2017/10/23/facebook-explore-publisher-post-organic-reach-drop/#QvQYpNj0dPqi>, (viewed March 27).

<sup>66</sup> Dunphy, Rachel, 2017. "Can YouTube Survive the Adpocalypse.", *select/all*, December 28. Available at: <http://nymag.com/selectall/2017/12/can-youtube-survive-the-adpocalypse.html> (viewed March 27).

<sup>67</sup> Marvin, Ginny, 2018. "Google's antitrust infringement continues 'unabated', Google Shopping competitors tell European Commission." *Search Engine Land*, March 1. Available at: <https://searchengineland.com/googles-antitrust-infringement-continues-unabated-google-shopping-competitors-tell-european-commission-293273> (viewed March 27).

<sup>68</sup> Scardamaglia, Amanda and Angela Daly, 2016. "Google, online search and consumer confusion in Australia." *International Journal of Law and Information Technology*, vol. 24, no. 3, pp. 203-228; Daly, Angela and Amanda Scardamaglia, 2017.

"Profiling the Australian Google consumer: implications of search engine practices for consumer law and policy." *Journal of Consumer Policy*, vol. 40, no. 3, pp. 299-320.

<sup>69</sup> Solove, *supra* note 1.

based social networks.<sup>70</sup>The interconnected nature of these markets means that such acquisitions enhance Facebook's market proposition to advertisers and also allow these platforms to make use of Facebook's advertising system.<sup>71</sup>

Alphabet's acquisitions (the parent company of Google) are wide ranging and underline their participation in a variety of markets beyond search. While the company has not acquired direct competitors, they have purchased a range of advertising companies that will enhance their core products<sup>72</sup> as well as various other companies in order to bring innovations "in-house". The amount of market capital at Alphabet's disposal means that they can continually innovate and improve products, lengthening the distance between themselves and potential competitors in core markets like search and online advertising. Moreover, these purchases can harm innovation as Alphabet simply purchases technology instead of innovating to solve problems and also removes incentives for the purchased company to keep innovating within that market.<sup>73</sup> Competition analyses that assess the harms that merger and acquisitions cause to innovation would contribute towards a potential solution to this problem.

**Recommendation 4: Conduct or support research into the merger and acquisition strategy of digital platforms.**

**3.11 If so, how much do media content creators value access to such user data? How does the access to or control over user data impact the relationship between digital platforms and media content creators? For instance, how transparent are digital platforms about how content reaches consumers via their algorithms and how much notice do media content creators receive when significant changes are made?**

As noted earlier, digital platforms are not transparent about their algorithms and make changes without adequate consultation with publishers, creators or consumers (3.4 (f)). It is impossible to examine 'an algorithm'. However, it is possible to generally audit how algorithms operate on digital platforms and leading legal scholars have recommended that regulators explore this option.<sup>74</sup>

**Recommendation 5: Digital platforms should be required to engage in algorithm audits and make these systems as transparent as possible to regulators, creators and consumers. They should also be required to engage in good faith consultation before changes are made.**

**3.18. Describe the nature of the impacts (positive and negative) that digital platforms are having on consumers? What causes these impacts? Are these impacts temporary or ongoing?**

**3.19. What are the advantages and disadvantages of using digital platforms for consumers?**

**3.20. What terms and conditions govern consumers' use of digital platforms? How do they differ from those, which apply when consumers obtain news and journalistic content from other sources?**

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<sup>70</sup> Constine, Josh, 2015. "A Year Later, \$19 Billion For WhatsApp Doesn't Sound So Crazy." TechCrunch, February 20. Available at: <https://techcrunch.com/2015/02/19/crazy-like-a-facebook-fox/>; "Facebook buys Instagram for \$1 billion, turns budding rival into its standalone photo app.", TechCrunch, April 10. Available at: <https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/> (viewed March 27).

<sup>71</sup> See <https://business.instagram.com/advertising/>

<sup>72</sup> See <https://www.geckoboard.com/blog/acquisitions-mergers-big-five-tech-companies/#.Wrrdbz-sZPY>

<sup>73</sup> Shelanski, *supra* note 9.

<sup>74</sup> Cohen, Julie, 2016. "The regulatory state in the information age." *Theoretical Inquiries in Law*, vol. 17, no. 2, pp. 369 - 414.

**3.21. Are consumers generally aware of these terms and conditions? Specifically, do Australian consumers understand the value of the data they provide, the extent to which platforms collect and use their personal data for commercial purposes, and how to assess the value or quality of the service they receive from the digital platforms?**

**3.23. If you consider the collection of data part of the effective price paid by consumers for use of the digital platforms, to what extent are consumers aware of and provide informed consent for the collection and use of their data?**

Digital platforms make it easier for consumers to purchase goods, find information online, facilitate and maintain relationships, organise events and sort through reams of information, from finding the cheapest flight to identifying the fastest route home. However, these amazing benefits cause considerable consumer harm: the unrestricted collection and analysis of consumer data and the exchange of it with third parties.

Consent is not an adequate model for the digital economy. Research across numerous disciplines has shown that people are not informed about how their private information is used, are not privacy literate and “struggle to apply their knowledge to complex situations — with regard to privacy”, due to unavoidable cognitive issues as individuals have a limited ability to truly conceptualise their own privacy.<sup>75</sup> Therefore, truly informed consent does not exist with regards to consumer data. Privacy expert Daniel Solove has summarised this problem simply:

(1) people do not read privacy policies; (2) if people read them, they do not understand them; (3) if people read and understand them, they often lack enough background knowledge to make an informed choice; and (4) if people read them, understand them, and can make an informed choice, their choice might be skewed by various decisionmaking difficulties.<sup>76</sup>

These issues are compounded by the psychology associated with zero-price goods. A variety of researchers have noted that when individuals are deciding on whether to use an ostensibly “free” product, “consumers are affective rather than rational decision makers, perhaps due to an emotional response or to a cognitive bias”.<sup>77</sup> It is also important to note that the intermediary role of the zero-price market side of digital platforms means that their own policies are ignored because consumers are focused on the end-product (i.e. flight prices, email, social networking). Political economist Frank Pasquale sums up this problem, noting that while “consumers may want to learn about the ultimate services they are looking for, consumers are unlikely to want to spend much time learning about the privacy policies (among other features) of the services they use to find the services they are looking for”.<sup>78</sup>

Digital platforms contribute to this limited consumer understanding through their lack of transparency, as seen through the confusing presentation of Google Shopping results and the secrecy surrounding algorithms more generally.<sup>79</sup> This poor understanding is also enhanced in some cases through the use of “dark pattern”<sup>80</sup> user interface design that

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<sup>75</sup> Solove, *supra* note 1.

<sup>76</sup> Solove, *supra* note 1, p. 1888.

<sup>77</sup> Gal and Rubinfeld, *supra* note 12.

<sup>78</sup> Pasquale, *supra* note 37, p. 1015.

<sup>79</sup> Scardamaglia and Daly, *supra* note 69; Daly and Scardamaglia, *supra* note 69; Van Loo, Rory, 2017. “Rise of the digital regulator.” *Duke Law Journal*, vol. 66, no. 6, pp. 1267 - 1329. Pasquale, Frank, 2015. *The Black-Box Society: The Secret Algorithms That Control Money and Information*. Cambridge, Harvard University Press.

<sup>80</sup> See [darkpattern.org](http://darkpattern.org)

encourages consumers to share more data through confusing interfaces.<sup>81</sup> Subsequently it becomes “virtually impossible for people to weigh the costs and benefits of revealing information or permitting its use or transfer” because they do not have “an understanding of the potential downstream uses”.<sup>82</sup>

Consumers face more serious harms through the exchange of data for services. The overall exchange can carry long-term harms as explained by Frieden:

In the short term, ventures like Amazon enhance consumer welfare by offering a growing inventory of products and services at lower prices, the product of operational efficiencies and the willingness to eschew profits in exchange for increasing market share and scope. However, in the longer term, consumers may suffer from the loss of competition when bricks and mortar, local vendors shut down as well as the broader harms from increased unemployment and reduced incomes. Additionally, consumers may lose when platform operators can more accurately assess their price sensitivity and increasingly employ invasive collection of data about their consumption behavior and the brokering of such data in a largely unregulated marketplace.<sup>83</sup>

More damaging short-term harms are also possible through the collection of consumer data as seen in the recent Cambridge Analytica scandal, which revealed that private data was easily accessible through Facebook’s Graph API 1.0 from 2010 to 2014. During this period users who allowed third party developers to access their personal data also unwittingly allowed third parties to access their ‘friends’ data, underlining the serious consumer harms that can occur through the monetisation of data. “Friends” were not informed that their data had been accessed without authorisation and Facebook users as a whole were not informed that their data was available for mass collection and analysis. Moreover, “once the data passed from Facebook’s servers to the developer, Facebook lost all insight into or control over how the data was used”.<sup>84</sup> I recommend that any company that retains data about Australian citizens be subject to significant financial penalties for the mishandling and unnecessary collection of customer data. Consumers should also have greater transparency around the use of their data and be provided with great legal protections relating to the ownership and control of their data.

It is important to recognise that if an individual’s privacy is the cost of using a service online then there is now significant crossover between the protection of an individual’s privacy and the protection of consumers. In short, privacy protection becomes a consumer protection issue. The Office of the Australian Information Commissioner stands as another important piece of the regulatory puzzle and should be fully resourced and empowered to support the ACCC in the ongoing protection of consumer rights.<sup>85</sup> The statutory right to privacy (already proposed by the Australian Law Reform Commission) stands as another useful addition to an overarching legislative framework oriented towards consumer protection.<sup>86</sup>

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<sup>81</sup> See

[https://twitter.com/CraftyDeano/status/975322185031208960?ref\\_src=twsrc%5Etfw&ref\\_url=https%3A%2F%2Fthreadreaderap.p.com%2Fthread%2F975322185031208960.html%3Frefreshed%3Dyes&tfw\\_creator=CraftyDeano](https://twitter.com/CraftyDeano/status/975322185031208960?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fthreadreaderap.p.com%2Fthread%2F975322185031208960.html%3Frefreshed%3Dyes&tfw_creator=CraftyDeano)

<sup>82</sup> Solove, *supra* note 1, p. 1881.

<sup>83</sup> Frieden, *supra* note 15, p. 14.

<sup>84</sup> Parakilas, Sandy, 2018. “I worked at Facebook. I know how Cambridge Analytica could have happened.” The Washington Post, March 20. Available at: [https://www.washingtonpost.com/opinions/i-worked-at-facebook-i-know-how-cambridge-analytica-could-have-happened/2018/03/20/edc7ef8a-2bc4-11e8-8ad6-fbc50284fce8\\_story.html?utm\\_term=.e16a2f607de8](https://www.washingtonpost.com/opinions/i-worked-at-facebook-i-know-how-cambridge-analytica-could-have-happened/2018/03/20/edc7ef8a-2bc4-11e8-8ad6-fbc50284fce8_story.html?utm_term=.e16a2f607de8) (Viewed March 28).

<sup>85</sup> Easton, Stephen, 2018. “Last man standing: information and privacy commissioner Timothy Pilgrim to retire.” The Mandarin, February 20. Available at: <https://www.themandarin.com.au/88709-last-man-standing-information-and-privacy-commissioner-timothy-pilgrim-to-retire/> (Viewed March 28).

<sup>86</sup> Australian Law Reform Commission, 2014. Serious Invasions of Privacy in the Digital Era, Report No 123.

**Recommendation 6: Companies that retain data about Australian citizens be subject to significant financial penalties for the mishandling and unnecessary collection of customer data.**

**Recommendation 7: Consumers should also have greater transparency around the use of their data and be provided with great legal protections relating to the access and control of their data.**

**Recommendation 8: Support the resourcing of the Office of the Australian Information Commissioner to support the ACCC in the ongoing protection of consumer rights.**

**Recommendation 9: Support the introduction for a statutory right to privacy.**

**3.22. Have digital platforms changed the price of media content supplied to Australian consumers?**

**3.24. Have digital platforms changed the quality or choice of media content supplied to Australian consumers? Has the use of algorithms to select content changed the diversity of news supplied to consumers?**

**3.27. How have the types of news and journalistic content accessed by Australian consumers' changed in the past five to ten years? How will this change in the next five to ten years?**

Digital platforms have had limited impact on the pricing of online media content as news has historically been free for people to consume online until quite recently.

There is no substantive research available around how algorithms have impacted media diversity in the Australian context, which is largely down to the lack of transparency around these algorithms. However, there is evidence that the company is able to tweak its algorithm to privilege some news content over others.<sup>87</sup> For example, broad trends around algorithmic preferences, which can be identified over the past 5 years, have seen Australian media companies privilege the production of video content on Facebook.<sup>88</sup>

**3.25. How do consumers value digital platforms' access to their data? Do consumers see it as a cost or a benefit (e.g. it enables customisation of the content displayed)? How does the access to or control over user data impact the relationship between digital platforms and consumers?**

Research shows that consumers view the access, analysis and retention of their data as a cost. A recent study by the Office of the Australian Information Commissioner found that online services and social media sites are the greatest risk to privacy and only 12% of Australians viewed the social media industry as trustworthy.<sup>89</sup> The consistent use of digital platforms by the Australian population does not mean that Australians feel comfortable about how their data is being used.

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<sup>87</sup> Griffith, Erin, 2017. "Facebook can absolutely control its algorithm." Wired, 26 September. Available at: <https://www.wired.com/story/facebook-can-absolutely-control-its-algorithm/> (viewed March 28).

<sup>88</sup> Flynn, Kerry, 2017. "Facebook is giving your longer videos a bump in your News feed." Mashable, January 27. <https://mashable.com/2017/01/26/facebook-video-watch-time/#hshA6WFIsZql> (viewed March 28).

<sup>89</sup> Office of the Australian Information Commissioner, 2017. Australian Community Attitudes to Privacy Survey. Australian Government, Canberra.

**3.26. How have the channels used by Australian consumers' to access news and journalistic content (e.g. TV, newspapers, social media, search engines) changed in the past five to ten years? How will this change in the next five to ten years?**

Social media has become a key source of news for younger demographics (18 - 24) and risen to become an important (but not yet central) news source for Australians. Television still plays an important role in news consumption. Sora Park notes that in 2017 “[a]bout a quarter of Australian news consumers cited television as their main source of news, followed by social media (16%) and websites or apps of newspapers (13%)” and that 46% of people accessed a news story through social media in the past week.<sup>90</sup> A major 2010 survey assessing the impact of the internet across Australia did not discuss social networking services as a news source, which underlines the growth of social media in this space over the past decade.<sup>91</sup>

If major social platforms like Facebook are treated as media publishers they may start to avoid prioritising news within News Feeds in order to limit their liability with respect to media laws. It is more likely that search engines will retain their central role in sourcing information as they have done since the commercialisation of the internet. Newspapers will continue to be printed but continuing losses may see a move to weekend only editions for some publishers.

**3.29. Have innovation and technological change increased or decreased competition in the media and advertising services markets?**

Despite the dominance of digital platforms, competition has increased in the sector. The presence of new players like Junkee and Pedestrian as well as print publications like The Saturday Paper are a welcome addition to Australia’s previously concentrated media market. While these new companies have not presented any ongoing solutions to the ongoing financial crisis in Australian journalism they highlight an increased competitiveness amongst local media publishing business.

**3.30. Have the markets that digital platforms operate in changed over time and are they likely to change further in the future? For example, to what extent can digital platforms now be considered to be publishers rather than distributors of content, and is this likely to evolve in the future?**

**3.34. Should digital platforms be subject to the same laws and regulations as other market participants in the media and advertising services markets (e.g. news and journalistic content creators or distributors)?**

Digital platforms are dynamic and move across various markets over time. This is partly a strategic move as companies search for ways to make new platforms profitable and partly a result of being an intermediary, which means that companies allow a variety of activities to place on the platform. Google and Facebook look likely to continue their growth strategy and continue to move into further markets, barring significant regulatory intervention. That being said, it is unlikely that they will abandon their core business model of collecting and on-selling user data to advertisers and other third parties (again barring regulatory intervention).

Digital platforms have long argued that they are technology companies and neutral platforms who should not be involved in the regulation of content on their platforms. They have used this argument to avoid being subject to various regulatory frameworks, such as those that regulate the media. Robyn Caplan and Philip Napoli note that digital platforms retain some

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<sup>90</sup> Watkins et al., *supra* note 6, p. 7

<sup>91</sup> See Thomas, Julian and Scott Ewing, 2010. CCI Digital Futures 2010: the Internet in Australia.

level of editorial control. They go on to argue that historically a range of companies, which have not produced content, have been found to fall under the regulatory auspices of media authorities.<sup>92</sup>

However, these comparatively new platforms should not be simply transplanted into the existing media regulation framework. Numerous reviews have pointed out that the current Australian framework is flawed and that a substantial re-thinking of regulatory concepts is required in order to better serve Australians.<sup>93</sup> Digital platforms are addressed as part of this process. Some may be viewed as media publishers (to some extent) and may have obligations in terms of assurances with regard to distribution, content diversity and content quality. However, I note that a new regulatory model may look substantially different to what exists today. I also encourage stakeholders to think about co-regulatory models, which have a long and productive history within Australian media regulation.

**Recommendation 9: Incorporate digital platforms in new media regulation models and explore self and co-regulatory processes.**

**3.35. What steps have been taken by digital platforms to address any competition and consumer concerns that have been raised (e.g. self-regulatory codes or guidelines). To what extent have these initiatives addressed concerns?**

Google has made a significant contribution towards battling “fake news” through the Google News Initiative.<sup>94</sup> It has also introduced Subscribe with Google.<sup>95</sup> With respect to privacy, companies have engaged in some efforts to make consumers aware of their rights and responsibilities. However, the scope and nature of their data collection, analysis and onselling makes it impossible to adequately inform any one consumer.

**3.36. Are the existing laws and regulations sufficient to address the activities of digital platforms? Is there a case for the specific regulation of digital platforms and, if so, what issues would proposed regulation seek to address?**

Australian data protection law needs to be radically reformed to better protect the interests of Australian consumers. There is a weak enforcement regime for companies that breach our comparatively weak privacy laws, individuals have no right to privacy and consumers have little protection with respect to their data. The introduction of a serious data breach notification is a good initial step. The commission should examine the forthcoming reforms that will be introduced as part of the General Data Protection Regulation, both in terms of enforcement powers and the rights granted to individuals such as the right to access, the right to be forgotten, data portability and privacy by design. If consumer data is of significant value then it should be better protected and consumers should have greater control around how it is exploited.

**Recommendation 10: Australian data protection law needs to be reformed to better protect the interests of Australian consumers.**

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<sup>92</sup> Robyn Caplan and Philip Napoli, 2017. “Why media companies insist they’re not media companies, why they’re wrong and why it matters.” *First Monday*, vol. 22, no. 5.

<sup>93</sup> See for example, Department of Communications and the Arts, 2017. *The final report on the Review of the Australian Communications and Media Authority (ACMA)*. Australian Government, Canberra.

<sup>94</sup> Sorrentino, Mike and Roger Cheng, 2018. “Google takes on fake news with \$300 million News Initiative.” *CNET*, March 20. Available at: <https://www.cnet.com/google-amp/news/google-news-initiative-launches-to-boost-better-journalism/> (viewed March 28).

<sup>95</sup> Albrecht, Jim, 2018. “Introducing Subscribe with Google.” *Google News Initiative*, March 20. Available at: <https://blog.google/topics/google-news-initiative/introducing-subscribe-google/> (viewed March 28).

As noted earlier, I also encourage regulators to look more closely at ways of auditing algorithms to ensure transparency around decision-making and bring digital platforms under the remit of media regulation frameworks where appropriate to better ensure content diversity and quality.