

Submission on the ACCC's Inquiry into Digital Platforms

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The NSW Young Lawyers Communications, Entertainment and Technology Law Committee make the following submission in response to the ACCC's Digital Platforms Inquiries.

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The Communications, Entertainment and Technology Law Committee (**CET Committee**) of NSW Young Lawyers aims to serve the interests of lawyers, law students and other members of the community concerned with areas of law relating to information and communication technology (including technology affecting legal practice), intellectual property; advertising and consumer protection; confidential information and privacy; entertainment; and the media. As innovation inevitably challenges custom, the CET Committee promotes forward thinking, particularly about the shape of the law and the legal profession as a whole.

Introduction

The emergence of Digital Platforms (as defined in the ACCC's issue paper) has created a new global marketplace. Many of the questions in the ACCC's issues paper overlap to some degree with other questions in the issues paper. To address this overlap, the Committee has chosen to respond to the ACCC in the following manner:

1. First the Committee will address the fact that the Digital Platforms created a new marketplace.
2. Secondly, the Committee will address how two distinct groups, mainly *consumers* and *advertisers*, interact with this new marketplace and the impacts the marketplace imposes on these groups.
3. Thirdly, the Committee will address how the interaction between Digital Platforms, *advertisers* and *consumers* impacts *traditional media organisations* and *media content creators*. Specifically looking at:
 - Impacts on the creation of news and journalism;
 - Impacts on distribution; and
 - How traditional media organisations and media content creators are dealing with the new, interactive manner of their industry.

For simplicity, *consumer*, *advertisers*, *traditional media organisations* and *media content creators* will be collectively referred to as **Secondary Parties**.

The Committee acknowledges that the Secondary Parties does not constitute an exhaustive list of parties affected by the emergence of Digital Platforms. It also notes that, for the purpose of this submission, references to:

- **“Advertisers”** will be limited to *advertising agencies* and *businesses*;
- **“Consumers”** will be limited to private individuals using Digital Platforms for private use;
- **“Traditional Media Organisations” (TMOs)** will be limited to major media organisations such as Fairfax Media Ltd, News Corp Australia and Bauer Media Ltd.

The Committee asks that the findings in our submission be considered as an **example** of how Digital Platforms have and continue to impact Secondary Parties.

A. The Creation of the New Digital Marketplace

1. The Committee acknowledges that the rapidly evolving, dynamic nature of Digital Platforms has made market boundaries difficult to define. Their incremental innovation has allowed them to expand and apply their services upon different industries such as the media, entertainment, hospitality and retail industries. For example, TMOs were once in control of all functional levels of the supply of news and journalism. Now, Digital Platforms have impacted the supply of news by not only making information faster to access but allowing Secondary Parties to interact with Consumers. In the Committee's view, consideration should also be given to Digital Platforms that are not presently operating in the market but may enter the market in the foreseeable future.]
2. The Committee is of the view that an assessment of the market power of Digital Platforms requires consideration of the following elements:
 - a) Number of Consumers on each platform;
 - b) The frequency of Consumers switching between platforms; and
 - c) The value of Consumer data.

Number of Consumers: understanding its strength and value

3. Digital Platforms are not solely competing based on price. They compete for the Consumer's attention.
4. A Digital Platforms' value increases as more Consumers join or interact with its services. A platform's value increases with more active users. Conversely, as more users leave a platform, the less attractive that platform is to Secondary Parties. This phenomenon is called "**network effects**". An example of network effects **shifting** a market power in the digital space was seen between 2008 to 2009 when Facebook surpassed Myspace as the preferred social network.¹ This historical example suggests that the digital market in its infancy could not sustain multiple social media platforms that performed largely the same function.² However, the increase in consumers in the current social media marketplace has given room for the emergence of multiple, competing social media platforms to co-exist. This demonstrates that the phenomenon of network effects still rings true as a determinant of market power.

The "cost" of switching between Digital Platforms

5. Reviewing the extent to which Consumers use a platform exclusively may also assess a Digital

¹ Nestor Duch-Brown, 'The Competitive Landscape of Online Platforms' (JRC Digital Economy Working Paper 2017-04, European Commission, 2017) 20.

² Gwangjae Jung and Byungtae Lee, 'How did Facebook Outpace Myspace with Open Innovation? An Analysis of Network Competition with Changes of Network Topology' (Paper presented at the *Pacific Asia Conference on Information Systems*, Queensland University of Technology, 9 July 2011) 10 <<http://aisel.aisnet.org/pacis2011/88/>>.

Platform's market power. The cost to switch between Digital Platforms is often relatively low for Consumers when compared to switching between other services, given how easy it is to transition from one Digital Platform to another (though the Consumer's perception of the value of any content curated on one Digital Platform may operate as a disincentive to transition, if that content would be lost in the process).

6. Using Apple's digital content aggregator application, 'News' as an example (the **News App**), a Consumer can easily decide to stop using this application either by:
 - a) Opting to use another application providing a similar service; or
 - b) Access the content directly from the TMO's website.
7. However the more the Consumer frequents the News App, the more data the application can collect about the consumer's preferences. Apple then uses this data to provide the Consumer with a personalised news service. This personalised service may have the ability to deter the Consumer from abandoning the News App. This does not mean that Consumers cannot engage and use multiple Digital Platforms. In fact, a survey conducted by the Pew Research Centre in the USA found that 73% of Twitter and 77% of Snapchat Consumers also used Instagram.³ Additionally, the 2017 Sensis Social Media Report found that of the 94% of Consumers who used Facebook between 2013-2017, roughly 86% of those Consumers also used Instagram or Snapchat respectively.⁴
8. Digital Platforms have recognised that it is valuable for Consumers to be able to switch between platforms, which is reflected in the functionality of those platform; users are able to connect their Instagram accounts to their Facebook accounts, for example. Additionally, digital subscribers of print media sources have cross-subscription access across the mastheads. For example, *Daily Telegraph* Subscribers can also access *Heard Sun* and *Courier Mail* online. Furthermore, Digital Platforms cross-promote other Digital Platforms, to further enhance and enable cross-customer access between one another. This is illustrated by the use of Facebook, Twitter and Google accounts as shortcuts for the creation of new online accounts with digital print subscriptions.

The value of data

9. Data on consumer behaviours and preferences is a valuable asset. Accordingly, new entrants to the digital marketplace are less appealing to advertisers given an established platform's access to data.⁵
10. Established platforms such as Facebook and Google have a more sophisticated catalogue of Consumer data. Established platforms can therefore leverage their catalogue of Consumer data to Advertisers and further provide Consumers with targeted advertising.⁶ New entrants to the digital marketplace may limit

³ Aaron Smith and Monica Anderson, *Social Media Use in 2018* (1 March 2018) Pew Research Centre <<http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>>.

⁴ Sensis, *Sensis Social Media Report 2017* (22 June 2017) 17 <<https://www.sensis.com.au/about/our-reports/sensis-social-media-report>>.

⁵ Florence Thepot, 'Market Power in Online Search and Social Networking' (2013) 36(2) *World Competition* 195, 204.

⁶ Jonathan Crowl, 'In the Future of Social Media, Will Every Platform Look the Same?' (12 October 2017) *ContentStandard*, 12 October

the power of existing platforms, on the condition that those new entrants can provide competitive services.

11. The Committee notes that Consumer data is non-exclusive, and the use of such data by one Digital Platform does not extinguish the data's value. However, Consumer data can be time sensitive. Therefore the value of data has the potential to diminish rapidly.
12. The value of data has also been recognised by legislative and regulatory bodies as an uncapped source of transferable and commercially valuable content – pertinently exemplified by the EU General Data Protection Regulation (**GDPR**).⁷ The GDPR has expanded the rights of Consumers' by allowing a right to data portability – that is, a right for the personal data provided by Consumers to 'controllers' (e.g. Digital Platforms) to be transmitted to other 'controllers'. Notably, there is no equivalent right in Australian privacy laws.⁸ The GDPR therefore has recognised the value of data to both Digital Platforms *and* Consumers but has empowered Consumers to take control of their personal data – through enabling requests for erasure and greater transparency – creating a greater awareness of what Consumer information is available to 'controllers' and by facilitating easier ways to 'switch' between platforms.
13. Conversely, this means that 'controllers', including Digital Platforms, may lose valuable Consumer data when requested to 'port' this over to other 'controllers' – equating to a significant commercial loss. The GDPR's enactment will undoubtedly affect Australian organisations that provide goods or services in the EU. It is therefore not unlikely that similar data protections may soon need to be addressed in the Australian Digital Platform marketplace.

Submissions:

14. The Committee notes that the ongoing investigation by Germany's Federal Cartel Office in relation to Facebook's terms of service for gathering user data is likely to provide insights relevant to the Commission's inquiry. The Committee is of the view that user agreements, which permit exclusive licensing or access to user data should be given further scrutiny.
15. Market power in the digital marketplace should be assessed over the course of several years, as it can take time for a Digital Platform to attract enough users to be a viable competitor to existing Digital Platform.

B. Impacts on Consumers

Terms and Conditions of using Digital Platforms

2017 <<https://www.skyword.com/contentstandard/marketing/future-social-media-will-every-platform-look/>>.

⁷ Deloitte, *GDPR Top Ten #1 Data Portability, Legal Obstacle or Opportunity* (8 May 2017)

<https://www2.deloitte.com/nl/nl/pages/risk/articles/gdpr-top-ten-1-data-portability.html>

⁸ Office of the Australian Information Commissioner ("OAIC"), *Australian businesses and the EU General Data Protection Regulation*, (March 2018) <https://www.oaic.gov.au/resources/agencies-and-organisations/business-resources/privacy-business-resource-21-australian-businesses-and-the-eu-general-data-protection-regulation.pdf>

1. Digital Platforms are not gifting their services to Consumers. Whilst one of the benefits of Digital Platforms is that they are normally relatively available and free, Consumers are effectively 'paying' for their services with data and the time that they are exposed to branded and sponsored content.
2. The terms and conditions of Digital Platforms generally cover privacy rights, intellectual property rights and data collection. In most instances, Consumers agree to use Digital Platforms in exchange for giving Digital Platforms access to certain data. For example, Google collects information including device information, log information, location information and local storage data as a condition of use of the application.⁹
3. Even if collection of data is considered part of the effective price paid by Consumers to use the Digital Platforms, without completely understanding what data and how their data is being used and to what end, Consumers may not completely understand the trade-off they make by giving up their data (and privacy) to use the Digital Platforms.

Privacy Implications

4. Consent, under the *Privacy Act 1988* (Cth) (**Privacy Act**) means "express consent or implied consent".¹⁰ The Office of the Australian Information Commissioner (**OAIC**) in its guidelines to the Australian Privacy Principles (**APPs**) provides that the four key elements of consent are:
 - a) The individual is adequately informed before giving consent;
 - b) The individual gives consent voluntarily;
 - c) The consent is current and specific; and
 - d) The individual has the capacity to understand and communicate their consent.¹¹
5. In order for there to be informed consent, the Consumer must be aware of the implications, in this context, providing their personal data, or withholding consent for such data to be used as an asset to digital platforms. The OAIC states that an organisation should ensure that an individual is "properly and clearly informed about how their personal information will be handled so that they can decide whether to give consent. The information should be written in plain English, without legal or industry jargon".¹²
6. However the premise that there is a requirement for Digital Platforms to obtain consent to collect and use Consumer's data, appears to be faulty.
7. Under APP 6 of the Privacy Act, an organisation can use or disclose a Consumer's personal information if it is for the *primary purpose* for which it was collected.¹³ An organisation will only need to obtain

⁹ Google, *Privacy Policy* (18 December 2017) <<https://policies.google.com/privacy>>.

¹⁰ *Privacy Act 1988* (Cth) s 6(1) (definition of 'consent') (*Privacy Act*).

¹¹ Office of the Australian Information Commissioner ("**OAIC**"), *Chapter B (Key Concepts) of the APP Guidelines* (March 2015) 9 <<https://www.oaic.gov.au/resources/agencies-and-organisations/app-guidelines/chapter-b-app-guidelines-v1.2.pdf>>.

¹² *Ibid* 11.

¹³ *Privacy Act* sch 1 APP 6.1.

consent if it wishes to use or disclose personal information for *purposes other than the primary purpose* (known as secondary purpose).¹⁴ This generally means that if the primary purpose is to provide content or advertising services, there is no need for the organisation to obtain consent. Instead, they are only required to notify Consumers of these primary purposes along with other specific matters in accordance with APP 5.

8. Compliance with APP 5 usually requires 'collection statements' to be provided at the time of or as soon as practicable after the personal information has been collected. The collection statement should also refer to and include a link to the organisation's privacy policy.
9. The Privacy Act only applies to agencies and organisations.¹⁵

Whether Consumers are entering into unfair contracts

10. Chairman of the ACCC, Rod Sims, in a recent speech at the Global Food Forum in March 2018, reportedly suggested that by signing up to Facebook, Consumers may be unwittingly signing unfair contracts.¹⁶ This is not the first time a competition regulator has criticised the Digital Platforms of unfair contract practices. The European Commission has requested that Google, Facebook and Twitter amend their Terms of Services to address unfair terms and conditions.¹⁷
11. The 2017 Australian Community Attitudes to Privacy Survey found that only a third of people were willing to readily trade personal information for benefits such as rewards or better customer service and nearly six in ten Australians have decided not to deal with an organisation due to privacy concerns.¹⁸ No doubt there will be an increase in the latter due to the recent Facebook Cambridge Analytica scandal.¹⁹ Facebook announced its intention to make its privacy settings more accessible to Consumers and provide explanations about how data tools are used in future.²⁰

Consumers slowing turning their minds to use of their personal data

12. The Committee also acknowledges that Consumers are collectively turning their minds to *how their data is used* and *to what extent* the Digital Platforms exploit their data for commercial gain. This was seen in a

¹⁴ Ibid sch 1 APP 6.1(a).

¹⁵ *Privacy Act 1988* (Cth) s 7(1).

¹⁶ Caleb Triscari, *Sims Suggests Facebook Users Enter into Potentially Unfair Contracts* (28 March 2018) Smart Company <<https://www.smartcompany.com.au/marketing/social-media/accc-chair-rod-sims-suggests-facebook-contracts-unfair/>>.

¹⁷ European Commission, 'The European Commission and Member States Consumer Authorities Ask Social Media Companies to Comply with EU Consumer Rules' (Press Release, 17 March 2017) <http://europa.eu/rapid/press-release_IP-17-631_en.htm>.

¹⁸ OAIC, *Australian Community Attitudes to Privacy Survey 2017* (May 2017) 25 <<https://www.oaic.gov.au/engage-with-us/community-attitudes/australian-community-attitudes-to-privacy-survey-2017>>.

¹⁹ CBS News, *#DeleteFacebook Trends amid Cambridge Analytica Scandal* (21 March 2018) <<https://www.cbsnews.com/news/deletefacebook-trends-amid-cambridge-analytica-scandal/>>.

²⁰ Aric Jenkins, 'Facebook Just Revealed 3 Major Changes to Its Privacy Settings', *Time* (online), 28 March 2018 <<http://time.com/5218395/facebook-privacy-settings-changes-cambridge-analytica/>>.

recent survey conducted by Deloitte in 2017, where more than 80% of participants believed that Digital Platforms use their personal data.²¹

13. This is not to say that the collection of data does not provide benefits to Consumers. The inherent Consumer “benefit” in collecting such data is to provide the Consumer a more personalised experience, such as the personalisation of what news stories appear on their chosen news application. However, the personalisation of journalistic content through data collection may mean the Consumer is exposed to a narrower range of content. The effect of this personalisation depends on the preferences of the Consumer. Firstly, there is a class of Consumer who is aware that their exposure to content is narrowed and is content only put forward to them as a consequence of their selective engagement with content. By contrast, there is a class of Consumer who is not aware that their data is being used to personalise their Consumer experience in such a way that they are only exposed to one side of a debate or issue. The issue with this form of news consumption is that a Consumer will only see content that appeals to their already formed pre-conceived view - they do not get the opportunity to be subjected to other viewpoints and objective contents. For example, before Digital Platforms entered the news and journalism industry, Consumers could purchase the newspaper and select which articles to read. Sometimes they may see articles, the content or thesis of which they would not have turned their mind to but for leafing through the actual pages in the publication. The personalisation of content for Consumers on Digital Platforms mitigates the chance of the Consumer informing themselves on issues that are not a part of their existing reading habits.
14. As of 5 April 2018, the OAIC has “opened a formal investigation into Facebook, following confirmation from Facebook that the information of over 300,000 Australian users may have been acquired and used without authorisation”.²²

Submissions:

15. In an environment where there is often no express requirement for Digital Platforms to obtain explicit consent to use Consumer data, and where any purported notification or consent is often flawed in the proliferation of click-sign contracts, giving Consumers greater control over the use of their data, and more transparency in how their data is used, is necessary to protect the interests of Consumers.

C. Impacts on Advertisers

Change in expenditure & profits

1. The arrival of this new digital marketplace has also brought with it a new digital advertising space. As a result, Australian advertising expenditure has seen a significant shift from traditional media platforms, such as television and print media (i.e. newspapers and magazines) to Digital Platforms, which are accessible via computers, tablets and mobile devices.

²¹ Business Insider Australia, *You're Not Alone, No One Reads Terms Of Service Agreements* (15 November 2017)

²² OAIC, *Facebook and Cambridge Analytica* (5 April 2018) <<https://www.oaic.gov.au/media-and-speeches/statements/facebook-and-cambridge-analytica#statement-from-the-australian-information-and-privacy-commissioner-on-facebook-and-cambridge-analytica>>.

2. In Australia, printed newspaper revenue rapidly declined from \$1.5 billion in 2009 to \$1.2 billion in 2014 and, accordingly, advertising revenue declined from \$2.9 billion to \$2.1 billion during this period.²³ This shift is largely attributable to traditional readership switching from print to online and digital news content, which has diminished the interest of media buying agencies and businesses in print advertising given the significant shift in potential audience reach.²⁴ A report by PwC has estimated that newspaper industry revenue will continue to diminish by 8.9% p.a. until 2021.²⁵
3. The emergence of Digital Platforms has provided advertisers with a range of additional channels to reach the desired target audience via their marketing mix. Advertisers are now able to generate 'transmedia' campaigns spanning across multiple media platforms²⁶ enhanced by the ease with which digital platforms work in conjunction with traditional media to increase marketing effectiveness.²⁷ For example, data from a 2004 ACMA survey showed as many as 56% of participants preferred being able to skip advertising on digital media services.²⁸ Some advertising agencies have shifted towards online advertising market such as Facebook and Google with, not only a potential larger audience, but also greater flexibility in style of advertisements and not being restricted by traditional advertising constraints, such as timeslots on a free to air networks.
4. Advertisers in agencies now have more options for their marketing ideas and strategies through effective use of such 'transmedia' campaigns, which has also boosted employability of creative professionals such as copywriters and art directors.²⁹ Moreover, new technical skills and specialisations have emerged as a result of increased demand for Digital Platform based skills. Examples of such skills are search engine optimisation, digital campaign strategy, content management and marketing, new training programs and education platforms have been created.
5. The Committee acknowledges that the impact on advertisers is ongoing, as online advertising continues to hold its place as the fastest-growing channel of advertising.³⁰ Digital Platforms have provided not only a new stage for advertising to take place but also an impetus for traditional advertisers to grow with, and adapt to, these new trends to "build cross-functional and multi-disciplinary" marketing and advertising strategies across traditional and emerging platforms.³¹
6. However, some businesses have questioned the desirability of advertising through these Digital

²³ PriceWaterhouseCoopers, *Australian Entertainment and Media Outlook* (2014) PWC) <<https://outlook2017.ezimerchant.com/>>.

²⁴ Ibid.

²⁵ Rose Baker, *PWC: Slow Ad Market Offers 'Grim and Terrifying' Outlook for the Economy* (5 June 2017) AdNews <<http://www.adnews.com.au/news/pwc-slow-ad-market-offers-grim-and-terrifying-outlook-for-the-economy>>.

²⁶ Gali Einav, 'Introduction - "Back to the Future": Consumer and Business Trends in the Digital Age' in Gali Einav (eds) *The New World of Transitioned Media – Digital Realignment and Industry Transformation* (Springer International Publishing, 2015) 1, 5.

²⁷ Gulnara Z. Karimova, 'Interactivity and Advertising Communication' (2011) 3(5) *Journal of Media and Communication Studies* 160.

²⁸ Australian Communications and Media Authority, *Supply & Demand: Catch Up TV Leads Australia Online Video Use*, (10 February 2015) <<https://www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Supply-and-demand-Catch-up-TV-leads-Australians-use-of-catch-up>>.

²⁹ Madalina Moraru, 'Professionals' View on Nowadays Creativity in Online Advertising' (2017) 10(2) *Journal of Media Research* 37.

³⁰ Amin Sayedi, Kinshuk Jerath and Kannan Srinivasan, 'Competitive Poaching in Sponsored Search Advertising and Its Strategic Impact on Traditional Advertising' (2014) 33(4) *Marketing Science* 586.

³¹ McKinley Marketing Partners, *2016 Marketing Hiring Trends* (2016) 2 <http://pages.mckinleymarketingpartners.com/BD_WC-2016FEB19-ALL-WPHiringTrends_ContentRequestPage.html>.

Platforms. Examples include:

- a) Unilever, the world's second biggest marketing spender, recently warning that it will withdraw its advertising from Facebook and Google if Facebook fails to eradicate content which "create division in society and promote anger and hate",³²
 - b) The YouTube scandal in 2017 where businesses pulled their advertisements from YouTube and Google over concerns about their brand names appearing next to extremist content;³³
 - c) In 2017, Facebook was made to refund businesses for measurement errors in its metrics.³⁴
7. Using digital data to determine return on investment and cost of advertisements has also proven risky for businesses due to increased advertising fraud, with an estimated global cost to businesses of \$16.4 billion in 2017.³⁵
 8. Digital Platforms' ability to capture and analyse massive amounts of structured and unstructured data from their users has boosted their effectiveness in providing business with greater actionable insights that can be used to inform marketing and advertising strategies and decisions. The ability to access and analyse this data gives Digital Platforms a competitive advantage over traditional advertising agencies and publishers. Businesses also are able to implement their advertising on Digital Platforms to better target users with more personalised advertising and more focused and relevant audience reach.
 9. Disintermediation, or "cutting out the middleman", is a phenomenon that has evolved with the rise of technology. Amazon and eBay have long held the role of the "middleman" in connecting suppliers and Consumers in a more streamlined way, which has significantly impacted the way in which brick-and-mortar stores have shifted their own operations. Similarly, Google and Facebook, backed by their vast catalogue of data relating to user insights, demographics and data-based return on investment quantification, have inserted themselves as the "new middleman" in advertising and are providing agency-like functions by making it more convenient for businesses to join and interact over the advertising marketplace, a marketplace previously accessed only by ad agencies.
 10. For example, Google's *DoubleClick* marketplace helps businesses buy and sell display advertising across the Internet including programmatic advertising backed by Google's user database on both the supply side and the demand side. *DoubleClick bid manager* helps businesses find the right audience and *DoubleClick for publishers* helps publishers offer advertising inventory to multiple businesses simultaneously. Facebook also leverages the same targeting data used on Facebook and Instagram in their *Facebook Audience Network*, which helps businesses take native advertising on their platforms to

³² Julia Kollwe, 'Marmite Maker Unilever Threatens to Pull Ads from Facebook and Google', *The Guardian* (online), 13 February 2018 <<https://www.theguardian.com/media/2018/feb/12/marmite-unilever-ads-facebook-google>>.

³³ Marketing Land, *Major US Brands Now Pulling Ads from YouTube & Google over Extremist Content* (22 March 2017) <<https://marketingland.com/american-brands-stop-advertising-google-youtube-extremist-209998>>.

³⁴ Marketing Land, *Facebook Refunds Advertisers for Mobile Video Ads Played out of View* (6 November 2017) <<https://marketingland.com/facebook-refunds-advertisers-mobile-video-ads-played-view-227834>>.

³⁵ CNBC, *Online Ad Fraud is a 'Widespread' Problem, Google and Other Big Ad Platforms Admit* (21 July 2017) <<https://www.cnbc.com/2017/07/21/google-oath-others-ad-fraud-widespread-problem.html>>.

third party publishers.

11. Arguably, Google may have contributed in changing the advertising industry's mindset on return on investment quantification by offering *cost per click* data through its *Google Analytics Solution*, which can be linked with *DoubleClick* and fed back directly and almost instantaneously to businesses.³⁶ Facebook also measures and reports on conversions and impressions, i.e. how many users the ads on their platforms are reaching through *Facebook Pixel*. Traditionally, advertising agencies calculated the success of an advertising campaign with focus groups, with the key criterion being likability, rather than conversion.³⁷ With improved data quality, advertising campaigns and single ads can be more accurately measured for their impact and overall effectiveness. The end result for businesses is the ability to have better budget allocations and even the potential to secure a substantial budget increase.
12. Size or the ability to quash competitors are not themselves anti-competitive behaviour but using market dominance to leverage own services and reduce choice, can be. For instance, Google has been ordered to set aside €2.42 billion to pay a record European Union antitrust fine for favouring its shopping service in search results.³⁸ This case is currently under appeal by Google.

Submissions:

13. Digital Platforms such as Google and Facebook's ability to access Consumer data has created a powerful market in the digital advertising space. Whilst business advertising expenditure continues to grow from year to year, Google and Facebook continue to account for most of that spending. The shift in reliance to online data metrics and analytics been sculpted by the disintermediation of advertising agencies. The duopoly of Google and Facebook as rich sources of advertiser data will likely continue to reduce choice and increase costs, not only for advertising publishers but also for businesses looking to advertise. The Committee acknowledges that Google and Facebook are not the only Digital Platforms participating in such conduct, i.e. Apple Inc or Twitter Limited. Therefore, the Committee recommends that Google and Facebook be treated as leading examples as to the types of conduct Digital Platforms engage in and the affect such conduct is having on Consumers.
14. However, the Committee submits that Digital Platforms' are receptive to change and will continue to innovate to suit the needs of their Consumer base. As key players in advertising metrics and data, Digital Platforms will continue to drive innovation in this sector in order to remain a viable option for advertisers and businesses.
15. Whilst businesses must find the right combination of online and offline advertising, a greater level of vigilance is required when exploring new advertising platforms. This places greater incentive on

³⁶ Vivek Sharma, 'How is digital disruption hurting advertising agencies?' on *USC Marshall School of Business* (18 September 2017) <<https://www.marshall.usc.edu/blog/how-digital-disruption-hurting-advertising-agencies>>.

³⁷ *Ibid.*

³⁸ European Commission, *Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service – Factsheet* (27 June 2017) <http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm>.

advertisers and businesses to ensure they do their due diligence before enthusiastically delving into the Digital Platform advertising space. The Committee submits that this is the responsibility of the private sector, and regulator intervention is not currently appropriate.

D. Impacts on Traditional Media Organisations and Media Content Creators

1. The 2017 Deloitte Media Consumer Survey found that 37% of respondents most frequently use digital sources, including social media sites and news aggregators as their primary source of news, down slightly from 40% in 2016.³⁹ Accordingly, TMOs have experienced higher levels of competition on Digital Platforms from search engines (Google News, Bing News), social media platforms (Facebook, Twitter), government websites (ABC and SBS News), information sharing websites (Wikipedia) and blogs due to the growth opportunities within the industry and the absence of barriers to entry such as restrictive licensing regulations and high capital requirements.
2. The proliferation of Digital Platforms has increased choice of content by giving Consumers greater access to more content and via new modes of delivery, such as on demand videos and podcasts. Digital Platforms have also changed the way Consumers interact with content and even give Consumers a platform and opportunity to become content creators.
3. The Committee recognises three distinct impacts of Digital Platforms on TMOs and media content creators, which are outlined and explained below.

Impacts on the creation of news content

4. Digital Platforms are transforming the creation of news and journalistic content (that is, the process of newsgathering). This, in turn, can and has affected the quality of news and journalistic content. However, increased content and increased access to content has not necessarily coincided with an increase in diversity of content. This is largely due to Digital Platforms' constant need to provide 'relevant' content to their Consumers, using algorithms built from their users' clicks, likes, comments and shares.
5. Online news content, especially content created by aggregators, has, in some cases, tended to lack the depth of research, journalistic integrity and provocative commentary in comparison to a paid subscription service, as those provided by TMOs. Freely available online news is often 'soft news' centered upon sports, entertainment, gossip and advice columns, partly due to positive feedback from user data and the higher costs associated with investigative journalism.⁴⁰

³⁹ Deloitte, *Media Consumer Survey 2017* (2017) 25 <<https://www2.deloitte.com/au/en/pages/technology-media-and-telecommunications/articles/media-consumer-survey-2017.html>>.

⁴⁰ Victor Pickard and Alex T. Williams, 'Salvation or Folly?' (2014) 2(2) *Digital Journalism* 195, 197.

6. By filtering the information Consumers receive based on algorithms and preferences, Digital Platforms effectively reduce the viewpoints Consumers receive, thereby leading to 'echo chambers' and 'filter bubbles' that reinforce their own biases. Consumers rely heavily on Digital Platforms as their sources of news and content, where despite having a greater choice of content than ever before, many Consumers are not exposed to or do not choose to take the extra step to access the alternate views or news that have not been curated and readily presented to them on a 'Newsfeed'.

Impacts on distribution of news content

7. For most, the Internet has become the first-place people look for information.⁴¹ As such, TMOs have been forced to adapt their business models, as reflected in the rollout of Digital Platforms subscriptions, hard and metered paywalls, industry initiatives and business restructures.
8. Despite TMOs experiencing revenue growth from distributing through Digital Platforms, there remains a larger gap in earnings from the lost revenue for print media, which has led to widespread print closures and cost cutting measures. For example, Seven West Media reported a \$40 million reduction in its cost base in 2016-17 and a cost rationalisation target of \$125 million across 2017-19.⁴²
9. The Committee proffers that freely available news on the internet may have influenced the Australian Broadcasting Corporation's decision to launch the first 24-hour news channel in 2010, which provides audiences with the opportunity to watch breaking news as it happens with quality reporting and analysis rather than waiting for watch the news at pre-assigned time slot.⁴³ This is in addition to access to news through multiple platforms such as ABC News Online, ABC News Radio and ABC Mobile.

Impact on interaction with news content

10. Finally, it is evident that Digital Platforms are transforming how Consumers *interact* with news and journalistic content. For example, Consumers now often have the ability to interact with and critique news material by leaving comments on social media platforms. This gives Consumers the ability to offer opinions in response to the news that is being provided and even at times, make corrections to information. This has transformed how news is reported, through an expectation that stories need to attract Consumer interaction in order to be deemed successful – particularly in terms of generating revenue as 'clicks' generally equate to greater advertising revenues. This in turn, has impacted Consumers' expectations of news coverage, and has transformed the nature, quality and format of news reporting.

⁴¹ Andrea Carson, 'Behind the Newspaper Paywall – Lessons in Charging for Online Content: A Comparative Analysis of Why Australian Newspapers are Stuck in the Purgatorial Space between Digital and Print' (2015) 37(7) *Media, Culture & Society* 1022, 1023.

⁴² Max Mason, 'Seven West Media Cuts Dividend to Focus on Balance Sheet', *Australian Financial Review* (online), 19 February 2018 <<http://www.afr.com/business/media-and-marketing/tv/seven-west-media-cuts-dividend-to-focus-on-balance-sheet-20180219-h0wc7i#ixzz59crHxok1>>.

⁴³ Australian Broadcasting Corporation, *ABC to Launch 24-Hour News Channel* (21 January 2010) <<http://www.abc.net.au/news/2010-01-21/abc-to-launch-24-hour-news-channel/1217150>>.

11. In light of the above, it should be noted that free-to-air networks have maintained high ratings for news coverage every day of the week. This is evidenced by news programs accounting for three out of the five highest rating programs and ratings for news program ranging from 600,000 to 1,000,000 viewers.⁴⁴ The Committee acknowledges that the shift in Consumer expectations and consumption of journalistic content has more directly impacted print media services – which have needed to shift their business practice models to include greater online accessibility and digital interactions and functionality.
12. The constant drive to emphasise relevant and Consumer engaging above quality content (noting that quality is of course, a subjective concept), is telling of the ways Digital Platforms calculate relevance. The success of content is measured on its interactions, ranging from basic behavioural metrics and automatic impulsive reactions such as scrolling speed or the duration of page views to the level of interaction among multiple users in a social network.⁴⁵ Further, clicking on a like button or sharing a link demands little cognitive effort, and many users are evidently happy to indulge this lack of effort. This ease of interaction can promote cognitive distortions such as the "availability" heuristic, where if an event or memory can easily be recalled, it is assumed to be particularly probable or common.⁴⁶
13. Arguably, if Digital Platforms did not exist, Consumers would still subscribe to and only consume content that predominantly reaffirms their opinions and interests. Digital Platforms simply augments this capacity however this content may have otherwise available via TMO's. Surveys also suggest that internet users trust search engines to find the best information, check other sources and discover new information in ways that can burst 'filter bubbles' and open 'echo chambers'.⁴⁷
14. In the same 2017 Deloitte Survey mentioned above, 65% of respondents who access news through online sources are concerned about being exposed to 'fake news' online although 80% believe they are capable of discerning it, with 76% claiming they take the time to consider the author and source of the news.⁴⁸
15. If this is the case, then concern should not be directed to the diversity or quality of content, but on Digital Platforms' use of algorithms to influence how public opinion is formed, rather than in the pursuit of relevance. These are uncharted waters for the legislature and judiciary, as in the past, TMOs' delivery of accurate news was their key to profitability, rather than gaining advertising revenue driven by 'clicks'.
16. The Facebook/Cambridge Analytica scandal illustrates one example of the emerging issue, in which a Digital Platform and its access to Consumer data combined with algorithms gave a third party the ability to influence public debate. This follows a controversy earlier in 2016; after Facebook deployed algorithms to replace its human 'Trending News' team, Facebook started to see fake stories showing up

⁴⁴ TVTonight, *Australian Television Ratings from 4 March 2018 to 15 March 2018* <<https://tvtonight.com.au/category/ratings>>

⁴⁵ Konrad Lischka and Christian Stocker, *Digital Public: Looking At What Algorithms Actually Do* (7 February 2018) The Conversation <<https://theconversation.com/digital-public-looking-at-what-algorithms-actually-do-91119>>.

⁴⁶ Ibid.

⁴⁷ William H Dutton, *Fake News, Echo Chambers and Filter Bubbles: Underresearched and Overhyped* (6 May 2017) The Conversation <<https://theconversation.com/fake-news-echo-chambers-and-filter-bubbles-underresearched-and-overhyped-76688>>.

⁴⁸ Deloitte, above n 40, 28.

in the trending box, as the algorithm was not sophisticated enough to distinguish an accurate news story from an inaccurate one.⁴⁹

17. Google's search algorithm has also been criticised for systematically promoting information that is either false or influenced by political bias on subjects as varied as climate change to homosexuality.⁵⁰

Submission:

18. It is the Committee's view that ensuring diversity and quality in media content, in particular news, requires transparency and increased Consumer awareness of the algorithms and mechanisms being used to influence public discourse. Additionally, regarding content creation, the ACCC should consider recommending reaffirming or strengthening current codes and guidelines designed to ensure journalistic integrity.

E. Proposed Regulations

1. The Committee considers the laws and regulations mentioned in Attachment B of the Issues Paper as adequate and the Committee is unaware of any further existing or proposed law or regulations which it deems should be taken into account by the ACCC in this Inquiry.
2. The Committee notes the repeal of the two media control and ownership rules by the *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017* (Cth).
3. The Committee also further notes that there is no positive obligation on Digital Platforms for the verification of its news or journalistic content. However there have been recent efforts by Digital Platforms which have taken steps in the verification of its content. Facebook notably permits business owners to verify their pages through providing a mobile phone number or other information which the platform matches with public records.⁵¹ By contrast, Consumers are no longer able to use telephone numbers to connect with other Facebook Consumers.
4. Recent efforts in Europe have demonstrated how both government policy and regulations can create obligations incumbent on Digital Platforms to ensure the veracity of their content.⁵² Of note is the German Network Enforcement Law, which permits the government to penalise unlawful behaviour of social media networks of more than 2 million registered users.⁵³

⁴⁹ Timothy B. Lee, *Facebook's Fake News Problem, Explained* (16 November 2016) Vox <<https://www.vox.com/new-money/2016/11/16/13637310/facebook-fake-news-explained>>.

⁵⁰ Olivia Solon and Sam Levin, 'How Google's Search Algorithm Spreads False Information with a Rightwing Bias', *The Guardian* (online), 16 December 2016 <<https://www.theguardian.com/technology/2016/dec/16/google-autocomplete-rightwing-bias-algorithm-political-propaganda>>.

⁵¹ Sarah Kimmorley, *Australian Businesses Can Now Have a 'Verified' Facebook Page* (7 October 2015) Business Insider Australia <<https://www.businessinsider.com.au/aussie-businesses-can-now-have-a-verified-facebook-page-2015-10#6hSSBhLp1j20T.99>>.

⁵² Yasmeen Serhan, 'Italy Scrambles to Fight Misinformation Ahead of Its Elections', *The Atlantic* (online), 24 February 2018 <<https://www.theatlantic.com/international/archive/2018/02/europe-fake-news/551972/>>.

⁵³ Linda Kinstler, 'Can Germany Fix Facebook?' *The Atlantic* (online), 2 November 2017

5. The Committee notes recent public concerns on the security and veracity of material on social media. The Committee notes that the German Network Enforcement Law targets the dissemination of false information with the initial concern that false information could influence an election result. The German regulation also targets the dissemination of 'unlawful information' which includes hate speech and defamatory remarks.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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<<https://www.theatlantic.com/international/archive/2017/11/germany-facebook/543258/>>.