

News Corp Australia

**SUBMISSION TO THE
AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**

**RESPONSE TO THE
DIGITAL PLATFORMS INQUIRY
PRELIMINARY REPORT**

1 MARCH 2019

1 Introduction

News Corp Australia welcomes the ACCC's Preliminary Report to the Digital Platforms Inquiry, released 10 December 2018 (the **Preliminary Report**). We commend the ACCC for the diligence and rigour with which it has examined extremely complex markets and equally complex issues. Despite this complexity, the Preliminary Report provides an in-depth, well-researched analysis of the issues at hand that seeks to balance a diverse range of stakeholder views. In this submission, News Corp Australia responds to the Preliminary Report, including feedback on the ACCC's preliminary recommendations and the ACCC's proposed areas for further consideration.

This submission is complemented by News Corp Australia's Remedies Paper (provided separately to the ACCC on the same date as this submission) which sets out additional remedies the ACCC could adopt or recommend to Government. These remedies seek to address directly the market power wielded by digital platforms which is responsible for the harm experienced by Australian publishers. News Corp Australia encourages the ACCC to consider both this response and the options proposed in the Remedies Paper as the ACCC continues to progress its Inquiry.

News Corp Australia agrees with the Preliminary Report's finding that 'Google and Facebook are the two largest digital platforms in Australia and are the most visited websites' and therefore the 'major focus of this Inquiry'.¹ News Corp Australia also commends the ACCC's findings as to market power, including that Google has substantial market power in relation to general search services, the supply of online search advertising, and the supply of news media referral services; and that Facebook has substantial market power in relation to the supply of social media services, the supply of online display advertising and the supply of news media referral services.² This substantial market power underpins the harms perpetuated by digital platforms against publishers such as News Corp Australia. We also strongly support the ACCC's finding that Google and Facebook play a significant role in the advertising supply chain.³

News Corp Australia's view is that the strongest recommendations in the Preliminary Report with the highest likelihood of addressing the harms perpetuated by digital platforms are those that directly address the competition issues associated with digital platforms. In particular, regulatory oversight of digital platforms' impact on news, advertising and related businesses (such as that envisaged in recommendations 4 and 5) is an important step to countering the market power exercised by digital platforms (particularly vis-à-vis publishers) and addressing the lack of transparency of algorithms. To that end we recommend that these powers be given to the ACCC, as the national competition enforcement agency, and should extend to regulatory oversight of ad tech (including setting pricing recommendations for ad tech services). News Corp Australia also suggests that the ACCC's expertise in the area should be boosted by the creation of a Digital Platforms Unit within the ACCC. Similar to the ACCC's Financial Services Unit and Agriculture Unit, the Digital Platforms Unit would develop the technical industry knowledge to provide enhanced competition scrutiny of Digital Platforms and respond to concerns raised by consumers, advertisers and publishers alike.

¹ ACCC, Digital Platforms Inquiry Preliminary Report (**Preliminary Report**), December 2018, page 21 <<https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>>. Although News Corp Australia agrees with the focus on Google and Facebook, we also consider that Apple News operates in similar ways, such that it also impacts publishers' abilities to monetise their own content.

² Preliminary Report, page 35.

³ Preliminary Report, page 24.

The Inquiry should focus on competition issues arising from the identified market power of digital platforms in the markets for media and advertising services, in particular in relation to the supply of news and journalistic content, as per the terms of reference.⁴ In light of this, our view is that there are a number of preliminary recommendations in the Preliminary Report that concern issues which, although they may be important and may warrant consideration, shift the focus away from the competition concerns which strike at the heart of digital platforms' impact on media and advertising services. In addition, some of the ACCC's preliminary recommendations and areas for future consideration are particularly broad; for example, making unfair contract terms illegal economy-wide and introducing a general prohibition against unfair practices. News Corp Australia is of the view that such recommendations will be of less material impact in addressing the underlying competition issues identified in the Preliminary Report.

News Corp Australia considers that arming the ACCC with regulatory oversight of digital platforms and creating a Digital Platforms Unit removes the need for a digital platform ombudsman, as flagged by the ACCC as an area for future consideration. In this role, the ACCC could deal with complaints about algorithm operation and ad tech. Also, in its existing role, the ACCC can already address consumer scams and misleading and deceptive conduct, and the Australian Small Business and Family Enterprise Ombudsman can assist small businesses dealing with unfair terms and conditions (as can the ACCC).

Finally, there are a number of recommendations and areas for future consideration that News Corp Australia does not oppose but questions the extent to which they provide any meaningful and material solutions. For example, improving consumers' news literacy shifts the burden to consumers and does not address the underlying cause of harm (ie, digital platforms' market power). Similarly, preventing the default installation of the Google Chrome browser on devices and Google Search within browsers is unlikely to have a significant impact on Google's entrenched market power in online search.

In this submission, we set out detailed responses to various issues raised in the Preliminary Report, as well as each preliminary recommendation made by the ACCC, and each area flagged by the ACCC as warranting further consideration and analysis.

The paper is structured as follows:

- **Section 2** provides general comments and feedback on particular points raised in the submission, including on:
 - **(Section 2.1, page 5) The ACCC's market power findings:**
 - **(Section 2.2, page 10) Harms relating to Google's ad tech services** (including bundling and tying; self preferencing; arbitrage in relation to pricing and misleading conduct in relation to delivery of, and reporting on, advertisements);
 - **(Section 2.3, page 15) Harms relating to Google Search** (including snippets and AMP);
 - **(Section 2.4, page 20) Further issues** (including filter bubbles and echo chambers and smart speakers);
- **Section 3** outlines News Corp's response to the 11 preliminary recommendations, including:
 - **(Section 3.1, page 21) Preliminary recommendations 1 and 2: Update to mergers legislation, and large digital platforms to provide prior notice of acquisitions;**
 - **(Section 3.2, page 22) Preliminary recommendation 3: Requiring options for consumers for browsers and search engines to address default bias;**

⁴ The Hon Scott Morrison MP, Inquiry into Digital Platforms Terms of Reference (*Terms of Reference*) (4 December 2017) <<https://www.accc.gov.au/system/files/Ministerial%20direction.pdf>>.

- (Section 3.3, page 24) Preliminary recommendations 4 and 5: Regulatory oversight of advertising, related businesses and news and digital platforms;
- (Section 3.4, page 38) Preliminary recommendation 6: Review of media regulatory frameworks;
- (Section 3.5, page 40) Preliminary recommendation 7: Introduction of a mandatory take-down standard;
- (Section 3.6, page 42) Preliminary recommendation 8: Amendments to the Privacy Act relating to use and collection of personal information;
- (Section 3.7, page 46) Preliminary recommendation 9: OAIC Code of Practice for digital platforms;
- (Section 3.8, page 46) Preliminary recommendation 10: Introduction of a statutory tort for serious invasions of privacy;
- (Section 3.9, page 48) Preliminary recommendation 11: Illegal unfair contract terms;
- **Section 4** provides News Corp's feedback in relation to the nine areas identified by the ACCC for further analysis and assessment, including:
 - (Section 4.1, page 50) Supporting choice and quality of news and journalism;
 - (Section 4.2, page 51) Improving news literacy online and improving the ability of news media businesses to fund the production of news and journalism;
 - (Section 4.3, page 52) Digital platform ombudsman;
 - (Section 4.4, page 53) Monitoring of intermediary pricing;
 - (Section 4.5, page 54) Third party measurement of advertisements served on digital platforms;
 - (Section 4.6, page 54) Deletion of user data;
 - (Section 4.7, page 55) Opt-in targeted advertising;
 - (Section 4.8, page 56) Prohibition against unfair practices.

2 General submission comments and feedback

2.1 The ACCC's market power findings

(a) Search and display advertising

The Preliminary Report makes a number of findings in relation to the market power of Google and Facebook, summarised in Table 1 below. In particular, the Preliminary Report concludes that Google and Facebook both have substantial market power in relation to the supply of news media referral services. Separately, the Preliminary Report concludes that Google has substantial market power in the supply of online search services and online search advertising, while Facebook has substantial market power in the supply of social media services and online display advertising.

Table 1: Preliminary Report's conclusions on Google and Facebook's market power

| | Google | Facebook |
|--|--------|----------|
| Supply of online search services | ✓ | |
| Supply of online search advertising | ✓ | |
| Supply of online display advertising | | ✓ |
| Supply of social media services | | ✓ |
| Supply of news media referral services | ✓ | ✓ |

News Corp Australia agrees with the ACCC's findings that Google has substantial market power in supplying search advertising, Facebook has substantial market power in supplying social media services and that both Google and Facebook exercise market power in relation to the supply of news media referrals. Both Google and Facebook enjoy significant advantages of scope through data accumulation and this, together with the provision of services by Google and Facebook for 'free', operate as significant barriers to new entrants.

We also strongly suggest that the significant role of Google as a supplier of online display advertising/intermediation services should be recognised as giving it substantial market power. While the Preliminary Report acknowledges Google's important role as an intermediary in the sale of display advertising in a number of places,⁵ there is no market power finding in relation to Google and display advertising. News Corp Australia does not dispute that Facebook is a key supplier of online display advertising and has substantial market power, but notes that the role (and significant presence) of Google in display advertising should also be reflected in the ACCC's findings on market power.

Google's presence in relation to display advertising is likely to be obscured due to its role in providing those services through indirect, as opposed to direct, channels. There are two ways to sell display advertising: directly or indirectly. Where display advertising is supplied directly, advertisements are bought and sold without the involvement of an intermediary (that is, the advertiser will liaise with the

⁵ Preliminary Report, pages 66–90.

publisher or website owner directly).⁶ While Facebook sells a significant amount of display advertising directly on its own properties,⁷ Google sells display advertising directly on its own properties as well as indirectly through its various intermediary ad tech services on an extensive network of non-Google sites (the Google Display Network).⁸

Analysing Google's presence in display advertising necessarily leads to the conclusion that Google also enjoys significant market power in this area. The majority of display advertisements are bought and sold through intermediaries, and as acknowledged in the Preliminary Report, the largest proportion of intermediated sales occur via Google-owned services.⁹ In these cases, advertisers pay Google for their ad to be delivered through the Google Display Network. The Google Display Network is the largest display advertising network in the world. As noted in both News Corp Australia's April submission and the Preliminary Report itself, the Google Display Network places display advertisements on more than 2 million webpages globally and reaches 90% of all internet users.¹⁰ The 'network' – where advertisements can appear – includes not only Google-owned websites (such as YouTube and Gmail), but also websites that use Google's ad tech products (including AdSense and DoubleClick). Where an ad appears on a non-Google owned website, Google passes a percentage of the price to the website owner. As discussed below in section 2.2, lack of transparency means the exact cut retained by Google is unknown, but evidence suggests that it could be as high as 70%.¹¹ Thus, the placement of display advertisements across the internet accounts for a significant proportion of Google's revenue.¹² It is clear that Google enjoys substantial market power in relation to the supply of display advertising, even though many ads in its network are placed indirectly on third party sites.

(b) Ad tech

As is clear from the discussion above, Google's position in the supply of display advertising is impossible to separate from its involvement in ad tech, since Google's various ad tech services facilitate its role as an intermediary between advertisers and publishers/other website owners. In addition to the sale and purchase of advertisements, Google's ad tech offerings provide other services on both the advertiser and publisher side. Therefore, even where advertising is bought and sold directly, without the use of an intermediary, publishers and advertisers need ad tech tools to manage ad inventory and campaigns, and analytics.¹³ News Corp Australia's view is that Google also dominates the ad tech chain, with around 85%

⁶ This distinction between advertising sold directly and indirectly was observed by the European Commission in its decision on Google's acquisition of DoubleClick: Decision of 11 March 2008 COMP/M.4731 *Google/DoubleClick*, paras 44 to 68 <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf>.

⁷ We note that Facebook also supplies some display advertising indirectly through Facebook Audience Network, as discussed in News Corp Australia's April submission to the ACCC. Facebook Audience Network only covers mobile display advertising (on mobile webpages and apps); in contrast, the Google Display Network is much larger as it also covers non-mobile content. See News Corp Australia, Submission to the Digital Platforms Inquiry, April 2018, pages 38-39 <<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>>.

⁸ Note that Google Ads allows advertisers to purchase ads on Google and non-Google properties simultaneously and, therefore, the distinction between direct and indirect is not always clear. This creates arbitraging opportunities for the platform, as discussed at section 2.2(c).

⁹ Preliminary Report, page 70.

¹⁰ Google Ads Help, 'About targeting for Display Network campaigns' 2019 <<https://support.google.com/google-ads/answer/2404191?hl=en-AU>>.

¹¹ Geradin, Damien and Katsifis, Dimitrios, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 34 <<https://ssrn.com/abstract=3299931>>. We note that Mssrs Geradin and Katsifis are retained by and provide advice to an affiliate of News Corp Australia.

¹² This is also acknowledged in the Preliminary Report, page 71.

¹³ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 12 <<https://ssrn.com/abstract=3299931>>.

market share of ad tech,¹⁴ and exercises that market power to benefit its own businesses (for example, by prioritising its own requests for advertising).¹⁵

Google's AdSense is the largest contextual advertising network in the world, with more than 2 million publishers using the platform to display ads on their own webpages.¹⁶ In addition, Google Analytics is ten times more widely used than its closest rival, used by more than two thirds of the top 10,000 websites.¹⁷ This provides Google with significant amounts of data that reinforces its market power in the ad tech stack, as well as in search. In our April Submission to the ACCC, we cited the online survey website W3Techs which reported that 85% of websites carrying ads use Google Ads.¹⁸ This has been steadily increasing throughout 2018. In September 2018 the same website reported that 93% of all websites carry ads use Google Ads¹⁹ and by February 2019 this figure had increased to 95.1%.²⁰ This is not surprising given the amendment to Google's privacy policy in 2016, which enabled it to merge DoubleClick's database with Google's other records to improve its targeted advertising product thereby in turn improving the attractiveness of its services to advertisers.²¹

This market for ad tech is a complex one and News Corp Australia believes it warrants further in-depth consideration in a separate review. The layers of the Google ad tech stack have been built through successive acquisitions, internal restructuring and merging of businesses/product lines.²²

The complexity of ad tech and the need for separate investigations is highlighted by the fact that other competition authorities around the world have opened or are being called to conduct their own investigations into ad tech. The UK's Competition and Markets Authority (CMA) has told a House of Lords Select Committee on Communications that the CMA is considering investigating digital advertising subject to resourcing constraints.²³ The House of Lords Select Committee on Communications recommended that the CMA conduct a market study into digital advertising. The Committee concluded that:

'The lack of transparency in the digital media advertising market hinders the ability of advertisers to ascertain whether they receive value for money. This is in part caused by the superfluity of ad tech intermediaries, but Google alone has control at all levels of the market. We recommend that the

¹⁴ Google operates at different levels of the ad tech stack through its DoubleClick business and now has an 80-85% share of the ad tech market: The House of Lords Select Committee on Communication, UK Advertising in a Digital Age, April 2018, para 58 <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/116/116.pdf>>.

¹⁵ See, eg, evidence given that Google prioritises its own requests for advertising which reflects Google's practices in relation to shopping services: The House of Lords Select Committee on Communication, UK Advertising in a Digital Age, April 2018, para 63 ff <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/116/116.pdf>>.

¹⁶ 'The Ultimate Guide to AdSense & Ad Networks', MonetizePros, 4 June 2015 <<https://monetizepros.com/ad-sales/guide-to-adsense-ad-networks/>>.

¹⁷ 'Google Analytics Usage Statistics', Built With, 2019 <<https://trends.builtwith.com/analytics/Google-Analytics>>; Matt McGee, 'As Google Analytics Turns 10, We Ask: How Many Websites Use It?', Marketing Land, 12 November 2015 <<https://marketingland.com/as-google-analytics-turns-10-we-ask-how-many-websites-use-it-151892>>.

¹⁸ News Corp Australia, Submission to the Digital Platforms Inquiry, April 2018, page 51 <<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>>.

¹⁹ W3Techs, Usage statistics and market share of Google Ads for websites <<https://w3techs.com/technologies/details/ad-google/all/all>> accessed on 17 September 2018.

²⁰ W3Techs, Usage statistics and market share of Google Ads for websites <<https://w3techs.com/technologies/details/ad-google/all/all>> accessed on 28 February 2019.

²¹ Julie Angqin, Google Has Quietly Dropped Ban on Personally Identifiable Web Tracking, ProPublica, 21 October 2016, <<https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>>.

²² See also News Corp Australia, Submission to the Digital Platforms Inquiry, April 2018, pages 60–63 <<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>>.

²³ Natasha Lomas, 'Call for social media adtech to be probed by UK competition watchdog', Tech Crunch, 18 October 2018 <<https://techcrunch.com/2018/10/18/call-for-social-media-adtech-to-be-probed-by-uk-competition-watchdog/>>.

*Competition and Market Authority (CMA) should conduct a market study of digital advertising to investigate whether the market is working fairly for businesses and consumers.*¹²⁴

Similar calls have been made in France²⁵, Germany²⁶ and the US.²⁷ While calling for a separate Inquiry, News Corp Australia notes the following in relation to the discussion of ad tech in the ACCC's Preliminary Report.

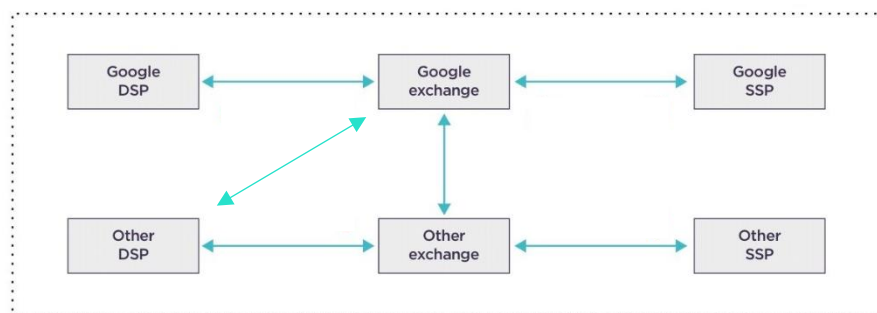
First, the ACCC's depiction of the ad tech stack in figures 3.3 and 3.4 of the Preliminary Report is not entirely accurate. This is because in practice, bids do not flow so easily between all layers. In News Corp Australia's view, in relation to figure 3.3:

- Google DSP supports other exchanges but Google Adwords, Google's main advertiser-facing platform, only sends bids to the Google Ad Exchange;
- Google merged its SSP with its ad exchange in 2012,²⁸ and industry experts increasingly use the term SSP and ad exchange interchangeably. Google's ad exchange (previously known as AdX, and now part of Google Ad Manager) does not send bids to other SSPs; and
- DoubleClick for Publishers does not allow equal access to bids from other exchanges (Google integrated its ad exchange, AdX, with its ad server, Double Click for Publishers, under the umbrella 'Google Ad Manager' in June 2018²⁹).

Accordingly, the lower part of the Figure 3.3 diagram in the Preliminary Report should in News Corp Australia's view depict the relationship shown in Figure 1 below.

Figure 1: Channels by which display advertising is purchased in Australia (News Corp Australia's view)

Figure 3.3: Channels by which display advertising is purchased in Australia



In relation to Figure 3.4 in the Preliminary Report, the ACCC has given disproportionate representation to ad networks, which in NCA's experience are decreasingly used. Additionally, the Preliminary Report did not discuss Google's integration of its ad tech tools in June 2018, as noted above.³⁰ Accordingly, the

²⁴ The House of Lords Select Committee on Communication, UK Advertising in a Digital Age, April 2018, para 76 <<https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/116/116.pdf>>.

²⁵ Andrew Orłowski, 'French competition watchdog aims probe at 'overwhelming' ad power of Google and Facebook', The Register, 7 March 2018 <https://www.theregister.co.uk/2018/03/07/french_watchdog_find_googlefacebook_hold_overwhelming_ad_power/>.

²⁶ Bundeskartellamt, 'Bundeskartellamt launches sector inquiry into market conditions in online advertising sector', 1 February 2018 <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html>.

²⁷ Harper Neidig, 'Hatch asks FTC to investigate Google's market dominance', The Hill, 30 August 2019 <<https://thehill.com/policy/technology/404400-hatch-asks-ftc-to-investigate-googles-market-dominance>>.

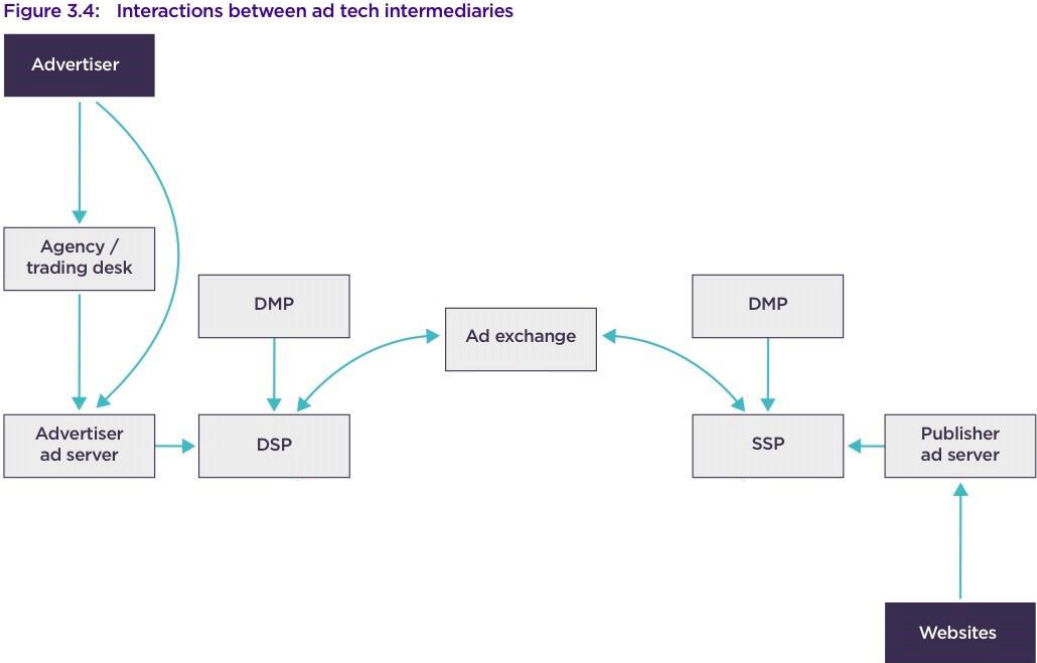
²⁸ 'Google integrates Admeld into DoubleClick AdX, preps 'unified' publisher solution', Ad Exchanger, 22 March 2012 <<https://adexchanger.com/ad-exchange-news/google-integrates-admeld-into-doubleclick-adx-preps-unified-publisher-solution/>>.

²⁹ Sridhar Ramaswamy, 'Introducing simpler brands and solutions for advertisers and publishers', Google Blog – The Keyword, 27 June 2018 <<https://www.blog.google/technology/ads/new-advertising-brands/>>.

³⁰ Sridhar Ramaswamy, 'Introducing simpler brands and solutions for advertisers and publishers', Google Blog – The Keyword, 27 June 2018 <<https://www.blog.google/technology/ads/new-advertising-brands/>>.

the Figure 3.4 diagram in the Preliminary Report should, in News Corp Australia's view, depict the relationship shown in Figure 2 below.

Figure 2: Interactions between ad tech intermediaries (News Corp Australia's view)



In Table 3.1 of the Preliminary Report, the ACCC lists other participants in the ad tech stack. However, News Corp Australia is not aware of these participants, at least at the levels which concern publishers (such as ad servers). The participants listed have no meaningful presence in the ad tech space and impose no competitive constraint on Google. As the ACCC acknowledges in the Preliminary Report on page 75, the smaller competing firms offer non-integrated offerings and cannot compete with the integrated nature of Google's product offering. In order for other suppliers to be viable at any level of the ad tech stack, they must have the critical mass to provide services and the only viable option for ad servers is Google. This is because in the ad tech space, providers play a match-making service and it is necessary to have a critical mass of consumers and suppliers to make the match-making possibilities real. This has largely been achieved in the ad tech area by offering services to customers (and in return collecting and using their data) to generate revenue on the advertising side of the market. Simply put, a nascent ad tech supplier does not have the troves of data that would help them provide the targeted, programmatic advertising products to a standard and at a volume which could effectively compete with Google or Facebook. Accordingly, only a platform that achieves the same critical mass of buyers and sellers will challenge the market power of Facebook or Google. However, since Google's data advantage is critical in crystallising its market power – and that data remains beyond the grasp of competitors – new entry is all but impossible.

In Box 2.1 on page 39 of the Preliminary Report, the ACCC characterises newspapers as a kind of 'multi-sided' platform, just like Facebook and Google. However, newspapers are not multi-sided in the way that Facebook and Google are. While it is true that increases in readers of newspapers can increase demand by advertisers for advertising space in those newspapers, unlike global digital platforms, there is no ability to lock users within the newspapers' platform. In contrast, the network effects of the Google

and Facebook platforms are exacerbated by the ability to lock users within the ecosystem and ensure that they constantly return to the platform (and never leave). Similarly, within the ad tech space cross-subsidisation ensures that Google and Facebook can leverage the lock-in effect in those neighbouring advertising markets ensuring that Google and Facebook are the number one destinations for advertisers and publishers alike.

In News Corp Australia's view, Google also has substantial market power in the supply of ad tech or programmatic advertising services, including ad exchanges, ad servers, ad networks, data management platforms and analytical services.

2.2 Harms relating to Google's ad tech services

The need for an in-depth investigation into the market for ad tech is highlighted by the fact that a number of harms identified in the Preliminary Report are directly attributable to the exercise by Google of its market power across the ad tech supply chain. In this section, we set out a number of these harms: bundling and tying; self-preferencing; and misleading conduct in relation to advertising.

(a) Bundling and tying

The ACCC has not yet reached a concluded view on bundling and tying, and invites further information and evidence from stakeholders. This is understandable, since the complexity of the manner in which ad tech operates makes it very difficult to conclusively identify bundling and tying abuses. As recently stated by Rod Sims:

*'[L]et me be clear here: there is no evidence that could be put before a court that this discrimination or favouritism is necessarily occurring in Australia. Equally, we don't know that it isn't. Google and Facebook want us to take them on trust.'*³¹

Thus, while News Corp Australia can point to instances where digital platforms – and Google in particular – have a strong incentive to engage in bundling and tying behaviour, the opacity surrounding the way in which digital platforms operate make it impossible to ascertain the full scale of the problem.

The ACCC notes that it requires more evidence about the extent to which advertisers 'multi-home' or use multiples of the same types of intermediaries, and the extent to which advertisers could switch between rival intermediaries.³² Google's vertically integrated ad tech offerings allow it to reinforce its market power through a higher level of operability between its own products. As discussed at 2.1, and in our April submission, Google has the world's largest digital advertising network which is tied to their trove of consumer data. This access to data coupled with the interoperability of Google's ad tech products means that advertisers are much more likely to 'single-home' on Google-owned intermediaries. For the same reason, advertisers are unlikely to choose to switch to non-platform owned intermediaries, even if the potential to do so exists.

Google designs its ad tech products to seamlessly integrate, creating an incentive for publishers and advertisers to use the suite of available products rather than just one. For example, even where a publisher and advertiser engage in a direct deal to buy and sell advertising, the publisher still needs ad serving technology tools to manage their inventory (publisher ad servers) and the advertiser still needs

³¹ Rod Sims, 'Examining the impact of digital platforms on competition in media and advertising markets', Speech to the ThinkTV & ANAA Top 50 CMO Event, 27 February 2019 <<https://www.accc.gov.au/speech/examining-the-impact-of-digital-platforms-on-competition-in-media-and-advertising-markets>>.

³² Preliminary Report, page 84.

ad serving technology tools to manage their ad campaigns (advertiser ad servers).³³ Google's intermediary technologies (ad servers, DSP, analytics, etc) are designed to integrate and work together, so once an advertiser or publisher uses a Google operated ad server (which they are highly likely to), there is an increased incentive to use other Google ad tech, including to buy and sell advertisements, rather than third party technology. Since Google's integrated ad tech services operate along the entire ad tech supply chain, and on both advertiser and publisher sides of the market, it creates the potential for anticompetitive conduct; for example, there have been allegations that Google is manipulating DoubleClick to favour its own ad intermediation services.³⁴

The potential for tying and bundling exists not only across different ad tech products, but also across different types of digital advertising. For example, the French Competition Authority recently found that Google has an additional competitive edge by being one of the only companies to offer both display and search advertising services to advertisers, allowing it to offer a dual-channel data analytics service.³⁵ Therefore, this suggests that Google has an incentive to bundle/tie search and display intermediary services, which it can market as able to be integrated with the Google-owned analytics software.

Even where Google implements initiatives designed to 'help' publishers, they are often tied to using other Google products or services. For example, Google has been developing a 'propensity to subscribe' signal for publishers, which relies on anonymised user data to indicate to a publisher where a particular user is more likely to subscribe. This allows publishers to target subscription offers, but the information is not made generally available to publishers. Reports on the new signal indicate that it will be tied to the use of Google products including Subscribe With Google and DoubleClick.³⁶ Additionally, some publishers (including, for example, the News Corp Australia affiliate-owned title, Wall Street Journal) have their own propensity to subscribe model, but Google does not allow it to work with AMP or the Google News app. Therefore Google's 'helpful' propensity to subscribe signal creates an incentive for publishers to sign up for the platform and sell subscriptions indirectly through Google.

(b) Self-preferencing

Google's vertical integration allows for self-preferencing behaviour between its services. An example of this is the European Commission's finding that Google abused its dominance in online search by giving preference to its own comparison shopping service. Google's ability to 'self-preference' also extends to its vertically integrated ad tech offerings. The interoperability and lack of transparency of Google's vertically-integrated ad tech services effectively foreclose competition for ad servers and ad exchanges, and results in harm to advertisers and publishers. With minimal competition and a comprehensive suite of offerings that cover the full ambit of the supply chain, there is a strong incentive for Google to engage in self-preferencing behaviour between its own ad tech products.

³³ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 12 <<https://ssrn.com/abstract=3299931>>.

³⁴ 'For nearly a decade, Google did in fact keep DoubleClick's massive database of web-browsing records separate by default from the names and other personally identifiable information.... But this summer, Google quietly erased that last privacy line in the sand.': Julia Angwin, 'Google Has Quietly Dropped Ban on Personally Identifiable Web Tracking', Propublica, 21 October 2016 <<https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>>.

³⁵ French Competition Authority, Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector, para 147 <http://www.autoritedelaconurrence.fr/doc/avis18a03_en.pdf>.

³⁶ See eg, Audrey Schomer, 'Google throws publishers a bone with News Initiative', Business Insider, 22 March 2018, <<https://www.businessinsider.fr/us/google-throws-publishers-a-bone-with-news-initiative-2018-3>>; and Ginny Marvin, 'Google News initiative kicks off with Subscribe With Google, other efforts', Search Engine Land, 21 March 2018 <<https://searchengineland.com/google-news-initiative-kicks-off-subscribe-google-efforts-294624>>.

There are multiple examples of Google self-preferencing among its ad tech services. One example is Google's move to merge data from DoubleClick with its extensive trove of personal user data, in order to improve the attractiveness of its offerings to advertisers. While Google initially kept DoubleClick data separate from personally identifiable user data that Google collected from elsewhere, this was subsequently changed, allowing DoubleClick ads to be targeted and personalised based on data collected through other Google services.³⁷ Concerns about the potential for Google's acquisition of DoubleClick to result in self-preferencing behaviour of this nature were dismissed by the European Commission when it cleared the acquisition in 2008. The European Commission believed that DoubleClick was of limited use because its ad-server data could not be made available to other publishers or advertisers to be used to improve ad targeting for other publishers or advertisers.³⁸ However, since then there has been a significant change in the industry with a shift to programmatic advertising which represents the vast majority of digital ad spending. Programmatic advertising fully automates ad targeting based on the identification of target audiences through analysis of user data, rather than the aggregation of attention within the specific content being consumed. This shift towards programmatic advertising advantages digital platforms because of their superior access to data and analytics. Google's data advantage has arguably crystallised DoubleClick's market power in relation to ad-serving and ad exchange services.³⁹ This example highlights the way in which the complexity of the technology, coupled with ongoing developments make it difficult to foresee opportunities for self-preferencing that may arise in the future.

A key source of potential abuse is the fact that Google operates the ad tech software that both organises (ad server), and then participates in (ad exchange), auctions for the sale and purchase of digital advertising.⁴⁰ Since almost all publishers use Google's ad server, DoubleClick for Publishers, Google can leverage this market power to benefit its other services, including its ad exchange, AdX. In a paper on the competitive landscape for display advertising, Belgian-based competition law academics Damien Geradin and Dimitrios Katsifis provide a number of examples of this type of behaviour, including:⁴¹

- DoubleClick for Publishers sheltering AdX from real-time competition, by allowing AdX to submit a real-time bid to DoubleClick for Publishers but prohibiting third-party ad exchanges from doing so, resulting in a lower purchase price for AdX; and
- AdX having the 'last look' at ad impressions, and therefore being able to use the highest estimated price of all ad exchanges as the price floor for its own auction, making it possible for AdX to beat any other exchanges by submitting a slightly higher bid.

³⁷ See Julia Angwin, 'Google Has Quietly Dropped Ban on Personally Identifiable Web Tracking', ProPublica, 21 October 2016 <<https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>>.

³⁸ Decision of 11 March 2008 COMP/M.4731 *Google/DoubleClick*, paras 185–190 <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf>.

³⁹ 'Data on users and their preferences and behaviour is the Holy Grail for most advertisers, and the reality is that Google and Facebook have orders of magnitude more data than their nearest competitors.': Matthew Ingram, 'How Google and Facebook Have Taken Over the Digital Ad Industry', Fortune, 4 Jan 2017 <<http://fortune.com/2017/01/04/google-facebook-ad-industry/>>.

⁴⁰ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 39 <<https://ssrn.com/abstract=3299931>>.

⁴¹ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 26 <<https://ssrn.com/abstract=3299931>>.

In mid-2018, Google announced they would be streamlining DoubleClick for Publishers and AdX into a unified product, 'Google Ad Manager'.⁴² Commenting on the move, Gavin Dunaway, the editorial director of advertising news blog 'Ad Monster', remarked that:

*'...The name change re-emphasizes that Google will leverage its near-monopolistic control of the publisher ad server market to shoo away other demand sources—whether or not that's good for the publisher or the advertiser.'*⁴³

(c) Arbitrage in relation to ad tech pricing

Google's comprehensive portfolio of ad tech services generates an ecosystem rife with significant conflicts of interest and lack of transparency. This creates the potential for pricing arbitrage. As noted above, Google's operation at key points across the ad tech supply chain (in particular, as both an ad server and an ad exchange) makes it possible for Google to influence the operation of auctions in a way that achieves an outcome to its benefit when determining the price that advertisers must pay. Specifically, Google has both the ability and incentive to engage in arbitrage pricing that minimises the revenue that flows to publishers while maintaining or raising the price taken from advertisers.⁴⁴ As News Corp CEO Robert Thomson explained in a recent earnings call, the potential for abuse – including arbitraging algorithmic ambiguity – is 'almost limitless' where dominant players control the majority of a market, have their own products in that market, and can tweak an algorithm at will.⁴⁵

As the Preliminary Report notes, revenue flows between advertisers and publishers through intermediary services are opaque. This opacity encourages arbitrage, since neither advertisers or publishers know the proportion of revenue retained by the intermediary.⁴⁶ While the Preliminary Report suggests that publishers may retain up to 70% of advertising revenue, other estimates put publishers proportion at as little as 20-30%.⁴⁷ Assuming these figures are accurate, this means that welfare is not allocated based on competition and that the profits of the intermediaries far exceed their marginal costs.

This potential for arbitrage, resulting from Google's market power in ad tech and lack of transparency over the supply chain, underscores the need for an in-depth review into ad tech (as discussed at 2.1), and regulatory oversight (as proposed at 3.3).

(d) Misleading conduct in relation to delivery of, and reporting on, advertisements

News Corp Australia agrees with the Preliminary Report's finding that advertisers are unable to verify the delivery and performance of advertisements delivered through Google and Facebook's services.⁴⁸ News Corp Australia considers this a key area where there is considerable scope for misleading behaviour by digital platforms.

⁴² Sridhar Ramaswamy, 'Introducing simpler brands and solutions for advertisers and publishers', Google Blog – The Keyword, 27 June 2018 <<https://www.blog.google/technology/ads/new-advertising-brands/>>; Ginny Marvin, 'Google is Rewriting the AdWords and DoubleClick Brands in a Major Rebranding Aimed at Simplification', Search Engine Land, 27 June 2018 <<https://searchengineland.com/google-is-retiring-the-adwords-doubleclick-brands-in-a-major-rebranding-aimed-at-simplification-301073>>.

⁴³ Gavin Dunaway, 'Death of DoubleClick, Birth of a Monster?' AdMonsters, 3 July 2018 <<https://www.admonsters.com/death-doubleclick-google-ad-manager/>>.

⁴⁴ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, pages 34–35 <<https://ssrn.com/abstract=3299931>>.

⁴⁵ News Corporation, 'CEO Robert Thomson on Q2 2019 Results – Earnings Call Transcript', Seeking Alpha, 7 February 2019 <<https://seekingalpha.com/article/4239296-news-corporation-nwsa-ceo-robert-thomson-q2-2019-results-earnings-call-transcript>>.

⁴⁶ Preliminary Report, page 84.

⁴⁷ Preliminary Report, page 86.

⁴⁸ Preliminary Report, page 77.

The Preliminary Report identifies three main ways that this can occur:

- First, digital platforms may report the performance or potential performance of advertisements in a way that is misleading. This could occur by the platform inflating the potential or actual performance of advertisements served on the platform (for example, by overstating the number of users on a platform, or the number of people who viewed a particular ad). Digital platforms certainly have an incentive to engage in this kind of misreporting, since advertisers will be willing to pay more if they think an advertisement is being viewed by more people. However, the opacity of the advertising supply chain makes it impossible to verify claims made by the platforms about advertising performance, so advertisers have no way of knowing if they are receiving the service and reach they are paying for. Additionally, it means that the true extent of the problem is unknown.
- Second, digital platforms may adopt standards that mislead advertisers into thinking more consumers have viewed their ads than actually did. Where these standards are not industry approved or broadly adopted outside of the platform, the resulting overinflated performance data and analytics cannot be integrated with data and analytics from non-platform sources. A recent example is Facebook's refusal to implement the new Nielsen video-qualifier measure, outlined in detail below.
- Third, advertising purchased through platforms may be viewed by 'bots' rather than humans. Since the platforms generate revenue regardless of whether the viewer is a bot or human, there is little incentive for the platforms to address the issue. This is bad for consumers (who are potentially exposed to fraudulent websites, viruses and malware) as well as publishers and other content creators (who lose out on money that advertisers could spend on legitimate advertising on their content).

News Corp Australia notes that in cases where a claim of misleading conduct can be substantiated, it could be prosecuted as misleading and deceptive conduct under existing provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Example: Nielsen video qualifiers

Nielsen's Digital Content Ratings provide publishers with audience measurement and insights across different devices and platforms. Currently, where a user views a video within a digital platforms' ecosystem, Nielsen's Digital Content Ratings count a 'view' as soon as the video starts playing. This means that a consumer who simply scrolls past an auto-play video could be included in view count.

The Interactive Advertising Bureau (**IAB**), Australia's peak advertising association, had concern with the accuracy of this measure. In mid-2018, the IAB withdrew its support for Nielsen's video metric, and said it would not endorse the metric until a two second qualifier was introduced (so that video content would only be counted as 'viewed' when it was played for two seconds or more).⁴⁹

⁴⁹ Zoe Samios, 'Facebook not implementing Nielsen's new video viewing qualifiers', Mumbrella, 15 February 2019, <https://mumbrella.com.au/facebook-not-implementing-nielsens-new-video-viewing-qualifiers-565549?utm_source=Adestra&utm_medium=email&utm_term=&utm_content=Read%20more&utm_campaign=Publish%20February%2020#omm>.

Nielsen subsequently announced that it would introduce a new video qualifier measure, including the two second qualifier. However, Facebook has indicated that it will not be implementing the new measure.⁵⁰ Therefore, Facebook will continue to count a 'view' even where the video has not been played for at least two seconds, leading to overinflated audience numbers in comparison to the industry standard measure.

Facebook's decision has important implications for Nielsen, which will be unable to go to market offering IAB-endorsed information about content that appears on digital platforms. Commenting on the decision, IAB stated it was 'disappointing not to be able to offer publishers endorsed data on their audience extension via Facebook for their video content'.⁵¹ As such, when Nielsen implements the change, Facebook will continue to report the unendorsed zero second video measurement.

2.3 Harms relating to Google Search

(a) Snippets

The Preliminary Report considers the use of snippets – that is, excerpts of publisher-created content (including text, images and video) – that appear in Google's search results. While News Corp Australia welcomes the Preliminary Report's finding that digital platforms, and not publishers, control the length and content of snippets,⁵² we disagree with the Preliminary Report's claims that:

- *'the ACCC has not received any evidence that Australian consumers are choosing to click through to news websites on Google Search due to snippets';⁵³ and*
- *'it is not clear to the ACCC that the length of snippets on Google Search significantly adversely affects click-through rates.'⁵⁴*

News Corp Australia's view is that this is an area in which the ACCC could increase regulation, and that this could be done by requiring digital platforms to compensate publishers for the use of content (including the reproduction of content in snippets). This proposal is discussed in more detail in News Corp Australia's remedies paper at section 3.1.

Snippets and referral traffic

News Corp Australia reiterates its view that both the existence and length of snippets is influential in determining whether a user clicks through to a webpage. As noted in our April submission, *'longer snippets effectively allow users to scan news articles and understand their substance, removing the need to click on the link and navigate to the full content article.'*⁵⁵ However, the Preliminary Report cited a

⁵⁰ Zoe Samios, 'Facebook not implementing Nielsen's new video viewing qualifiers', Mumbrella, 15 February 2019, <https://mumbrella.com.au/facebook-not-implementing-nielsens-new-video-viewing-qualifiers-565549?utm_source=Adestra&utm_medium=email&utm_term=&utm_content=Read%20more&utm_campaign=Publish%20February%2020#c_omm>.

⁵¹ Zoe Samios, 'Facebook not implementing Nielsen's new video viewing qualifiers', Mumbrella, 15 February 2019, <https://mumbrella.com.au/facebook-not-implementing-nielsens-new-video-viewing-qualifiers-565549?utm_source=Adestra&utm_medium=email&utm_term=&utm_content=Read%20more&utm_campaign=Publish%20February%2020#c_omm>.

⁵² Preliminary Report, page 112.

⁵³ Preliminary Report, page 113.

⁵⁴ Preliminary Report, page 114.

⁵⁵ News Corp Australia, Submission to the Digital Platforms Inquiry, April 2018, page 68

<<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>>.

lack of evidence showing that either the existence or length of snippets adversely affects click-through rates.⁵⁶

Contrary to the Preliminary Report's claim, there is a large body of evidence that shows snippets and their length have a direct impact on publishers' traffic. As indicated in our April Submission, a US survey by Outsell showed that 44% of visitors to Google News scan headlines without clicking and accessing publishers' sites.⁵⁷ This is corroborated by an EU Commission study, cited in our August submission, which found that 47% of surveyed users browse and read headlines and snippets without accessing the whole article when accessing news via aggregators, social media or search engines.⁵⁸ This clearly shows that users consider reading a snippet as a substitute for reading a full article in many cases.

Furthermore, evidence also shows that longer snippets are more likely to result in a user remaining within the digital platform, and not reading the publisher's full content. A 2016 study into the impact of news aggregators on traffic found the presence of a substitution relationship between the amount of information that an aggregator provides about an article and the probability that the user would click through to the full article on the publisher's site.⁵⁹ As more information is provided by an aggregator, the user will allocate more attention to the aggregator rather than the original article. The authors note:

*'Our results suggest that an article's headline provides all the information users need to decide if an article is close enough to their interests. Any additional information provided by the aggregators, in the form of text snippets or images, apparently satiates the appetite of some readers and can only serve to decrease click-through rates.'*⁶⁰

Therefore, there is sufficient evidence demonstrating a direct correlation or causation between snippets (and snippet length) and click through rates for content. This is again evidence of the way in which digital platforms, principally Google, negatively affect the ability of publishers to monetise their content.

Google's use of snippets for news content

In the Preliminary Report, the ACCC states that Google claims that Google News does not use snippets.⁶¹ We understand that this is correct, today. However, Google News (the aggregator) definitely used snippets up until very recently. For example, snippets were still appearing in June 2017, if not later.⁶² When Google eventually removed snippets from Google News, this change was not communicated to publishers. Again, this shows the high level of control that Google exerts over the way in which publishers' content is delivered to consumers through their services, and the way in which significant changes can be implemented immediately without notice or warning.

⁵⁶ Preliminary Report, page 114.

⁵⁷ '44% of Google News Visitors Scan Headlines, Don't Click Through', Tech Crunch, 20 January 2010 <<https://techcrunch.com/2010/01/19/outsell-google-news/>>.

⁵⁸ News Corp Australia, Submission to the Digital Platforms Inquiry – Response to Report by Henry Ergas et al, August 2018, page 6 <<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20Submission%202.pdf>>.

⁵⁹ Chrysanthos Dellarocas, Juliana Sutanto, Mihai Calin and Elia Palme 'Attention Allocation in Information-Rich Environments: The Case of News Aggregators' (10 December 2015) Management Science 62(9), page 2543 <<https://pubsonline.informs.org/doi/10.1287/mnsc.2015.2237>>.

⁶⁰ Chrysanthos Dellarocas, Juliana Sutanto, Mihai Calin and Elia Palme 'Attention Allocation in Information-Rich Environments: The Case of News Aggregators' (10 December 2015) Management Science 62(9), page 2544 <<https://pubsonline.informs.org/doi/10.1287/mnsc.2015.2237>>. We note that despite the study's finding that the existence of a snippet can harm publishers, the fact that snippets do exist means that users may be more likely to click through to a snippet that is longer than other snippets it appears with. However, Google controls the length of snippets, and all snippets in Google's SERP are of a similar average length.

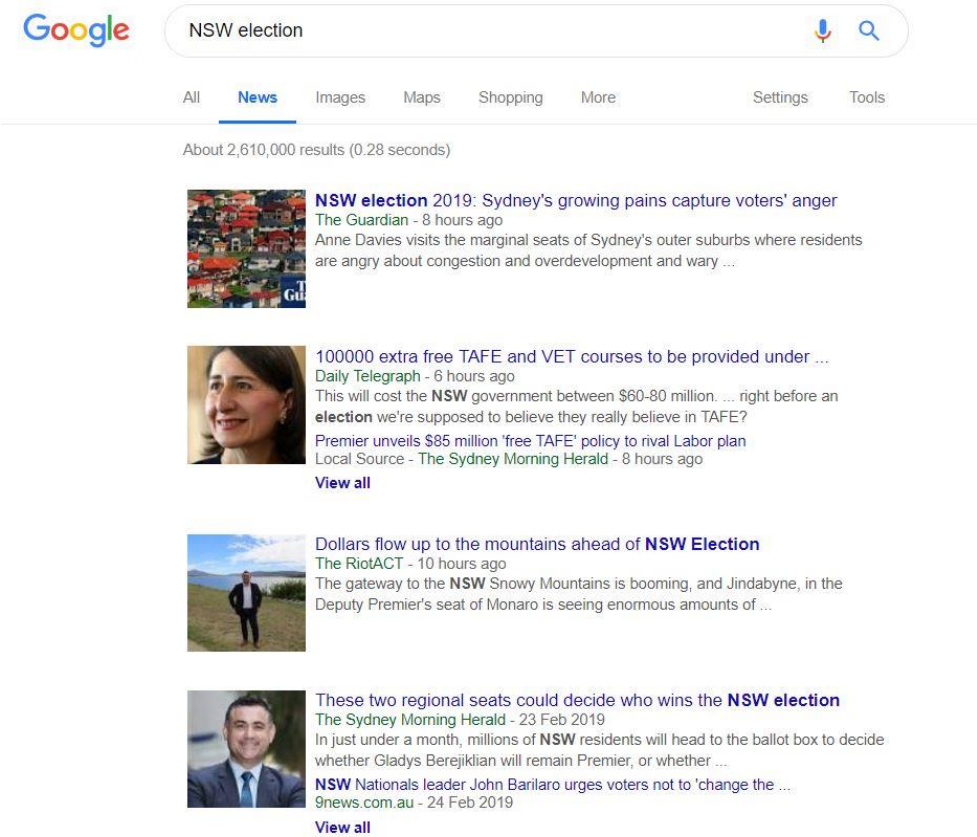
⁶¹ Preliminary Report, page 112.

⁶² At inception, Google News included regular snippets. In at least as recently as mid-2017, snippets did appear (in a shorter form) for at least some articles. See, eg, Frederic Lardinois, 'Google News gets a fresh coat of paint' (27 June 2017) Tech Crunch <<https://techcrunch.com/2017/06/27/google-news-gets-a-fresh-coat-of-pain/>>.

In any event, the fact that Google News no longer features snippets is not imperative. This is because Google News is only one of the ways that consumers search for and access news content using Google's sites. In fact, as we have explained in our previous submissions, Google Search is a key source of referral traffic for news media businesses and continues to display snippets. That Google Search is a key source of referral traffic for news publishers is acknowledged in the Preliminary Report, which states that direct traffic accounted for approximately 43% of visits to print and online media websites in 2017, and Google Search accounted for 28% of visits.⁶³ News Corp Australia considers that these estimates are likely to be conservative; both News Corp Australia's experience as well as other sources suggest the proportion of referral traffic from Google Search is even higher: the split between traffic from search and direct is closer to 50:50.⁶⁴ This effect is even stronger on mobiles, where the proportion of traffic from Google has consistently been increasing and now surpasses traffic from both Facebook and direct visits.⁶⁵

Similarly, the Google News tab (as distinct from Google News as a standalone website and app) that appears within Google Search still displays snippets in the same form as regular Google Search results, as shown in Figure 3.

Figure 3: Google news tab, February 2019



⁶³ Preliminary Report, page 96.

⁶⁴ See, eg, data on online traffic to Parse.ly network publishers (Parse.ly being a data and analytics software company) – as at February 2019, 21.8% of traffic is from direct visits and 22.0% is via search: 'External referrals in the Parse.ly network', 2019, Parse.ly <<https://www.parse.ly/resources/data-studies/referrer-dashboard/>>.

⁶⁵ Terri Walter and Su Hang, 'Mobile Direct Traffic Eclipses Facebook', Chartbeat, 29 May 2018, <<http://blog.chartbeat.com/2018/05/29/mobile-direct-traffic-eclipses-facebook/>>.

Therefore, while Google News no longer uses snippets, the use of publishers' content in snippets without compensation continues in Google Search (and the Google News tab within Google Search), which remains a significant source of referral traffic for news media businesses.

Snippet length

Google regularly changes snippet length as it desires. This is reflective of Google's tendency to regularly implement unilateral changes that affect publishers, without prior notice or consultation. For example, snippet length was made longer in December 2017 and shortened again in early 2018.⁶⁶ This conduct creates confusion and frustration for publishers, who dedicate significant time and resources to optimising their content for search engine results.⁶⁷ The impact of changes in snippet length for search engine optimisation are highlighted in the case study below.

Case Study: Search Engine Optimisation (SEO)

Moz, an SEO software development company, regularly discusses the challenges associated with trying to optimise content for Google search on its blog.

Following changes in late 2017 that saw Google lengthen snippets, Moz co-founder Rand Fishkin explored the implications this had for users and click-through rates on the Moz Blog.⁶⁸ Using the example of a user wanting to understand more about the principle of 'net neutrality', he explains:

'So, imagine a searcher is querying for something in your field and they're just looking for a basic understanding of what it is. So they've never heard of net neutrality. They're not sure what it is. So they can read here, "Net neutrality is the basic principle that prohibits internet service providers like AT&T, Comcast, and Verizon from speeding up, slowing down, or blocking any . . ." And that's where it would cut off. Or that's where it would have cut off in November.

Now, if I got a snippet like that, I need to visit the site. I've got to click through in order to learn more. That doesn't tell me enough to give me the data to go through. Now, Google has tackled this before with things, like a featured snippet, that sit at the top of the search results, that are a more expansive short answer. But in this case, I can get the rest of it because now, as of mid-November, Google has lengthened this. So now I can get, "Any content, applications, or websites you want to use. Net neutrality is the way that the Internet has always worked."'

In speculating what this means for SEO, Fishkin notes that content creators will have to write different. With more space, they will want to leave people enticed to click, while also trying to answer as much as possible in the search result itself because doing so makes it more likely that Google will rank the page higher in results. Fishkin describes this as 'sacrificing clicks by helping the searcher get the answer they need in the search result.'

(b) AMP

⁶⁶ Barry Schwartz, 'Google rich snippets not impacted by shorter search result snippets', Search Engine Roundtable, 16 May 2018, <<https://www.seroundtable.com/google-rich-snippets-shorter-25743.html>>.

⁶⁷ Barry Schwartz, 'Google's Danny Sullivan defends reducing length of search snippets', Search Engine Roundtable, 15 May 2018 <<https://www.seroundtable.com/google-defends-reducing-length-of-search-snippets-25738.html>>.

⁶⁸ Rand Fishkin, 'What do Google's new, longer snippets mean for SEO? – Whiteboard Friday' Moz Blog, 8 December 2018 <<https://moz.com/blog/googles-longer-snippets>>.

Google's AMP strategy is an example of Google leveraging its market power in general search to coerce publishers to adopt conduct for the benefit of Google.⁶⁹ In the case of AMP, publishers are compelled to make their mobile pages compliant with the AMP standard, even though this may undermine their own interests. When a publisher conforms to the AMP format, they can no longer effectively track the performance of their pages and they lose the creative freedom of designing innovative pages to increase their brand recognition.

Attribution

The ACCC says that the extent to which attribution of audience traffic from AMP pages remains an issue and is 'unclear'.

However, publishers remain dependent on Google for access to data on the performance of their own content and ads that appear in AMP. Google claims to have introduced AMP technology to improve loading speed of pages on mobile and insists that AMP is 'open source'. However, as at the date of this submission, only Google and Cloudflare offer an AMP cache (ie, platform for AMP pages to be deployed),⁷⁰ and the technology industry overwhelmingly views AMP as an initiative developed for Google's benefit.⁷¹ Furthermore, it has been estimated that 90% of contributions to the AMP project have come from Google engineers.⁷²

Although it is now technically possible for publishers to attribute traffic on AMP pages, there are several limitations that remain, as outlined in our April Submission. In particular:

- Although publishers have been able to use a Nielsen Software Development Kit tag this is time consuming and although it attributes audience to the publisher, it is unable to prevent audiences being attributed to the platform as well, meaning there is double counting, thereby diluting publishers' figures relative to the platforms.
- There are restrictions on the ability of publishers to obtain unique audience figures. Although there were recently changes to allow first party tracking, so that the behaviour of a consumer reading an article in AMP format and then non-AMP format can be tracked as a single user ID, a publisher must use Google-served tracking software, forcing use of Google Analytics, and Google does not allow the use of third party analytics software providers.
- There is no ability to track ad performance at all. It is unclear why it is not possible to track users and ads on AMP given the technology required to do so is very similar to the analytics used for normal webpages. The reasons are likely to be that restricting such access improves Google's advertising business by reducing the relative attractiveness of competing direct advertising businesses.

Branding

The ACCC similarly says that the extent of AMP's influence on a news publisher's brand is unclear and difficult to quantify, noting that publishers retain their branding in the actual news article and in the Top Stories carousel linking to the content. In prior submissions, News Corp Australia explained how the

⁶⁹ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, page 41 <<https://ssrn.com/abstract=3299931>>.

⁷⁰ AMP, 'How AMP pages are cached' AMP Docs <https://www.ampproject.org/docs/fundamentals/how_cached>.

⁷¹ Mordy Oberstein, 'Has AMP hit a wall?', Rank Ranger Blog, 31 October 2018 <<https://www.rankranger.com/blog/amp-hitting-a-wall>>.

⁷² Mordy Oberstein, 'Has AMP hit a wall?', Rank Ranger Blog, 31 October 2018 <<https://www.rankranger.com/blog/amp-hitting-a-wall>>.

AMP format, coupled with the subscription models adopted by News Corp Australia's national and metro publications negatively impacted News Corp Australia's brands. [Confidential]

Google's preference for AMP-compliant material in the algorithm for organic search results means that consumers are more likely to click on an AMP article, and therefore be drawn into the Google eco-system. This further inhibits publishers' ability to retain consumers on their own sites and hence, build brand recognition. While AMP now dominates the Google news carousel, in recent times AMP pages has naturally been falling in the search engine results page (**SERP**) for organic results on Google. On the days in which AMP has resurged with positive SERP growth for organic results, this has coincided with a change to Google's algorithm.⁷³ This shows that Google is consciously manipulating its algorithm to increase the prevalence of AMP-compliant content in organic search results, which in turn, maximises the number of users that are likely to stay within the Google eco-system.

2.4 Further issues

(a) Filter bubbles and echo chambers

The Preliminary Report concludes there is not yet strong evidence of effects of filter bubbles and echo chambers in Australia. However, News Corp Australia emphasises the fact that conclusive evidence is difficult to obtain due to the lack of transparency over what is shown on the platforms and the levers which drive how algorithms of the digital platforms curate content. This lack of transparency is a key reason that the regulatory oversight proposed in recommendation 5 (discussed below at 3.3) is necessary.

(b) Smart speakers

News Corp Australia expects that as voice-activated home devices (smart speakers) continue to grow in popularity, digital platforms will play an increasingly important role in the market for such devices. Google, Amazon and Apple are already positioned as dominant players, and we expect their market power to only strengthen. As noted in the Preliminary Report, these devices can be used to play excerpts of audio news content and podcasts. It is clear from public comments made by Google that it intends to control the curation of audio content on these devices, and the marketing and advertising that accompanies the content. As such, News Corp Australia expects that many of the concerns identified in this submission (particularly in relation to monetisation and licensing of content) will apply with equal force to voice activated devices in coming years.

⁷³ Mordy Oberstein, 'Has AMP hit a wall?', Rank Ranger Blog, 31 October 2018 <<https://www.rankranger.com/blog/amp-hitting-a-wall>>.

3 Preliminary Recommendations

3.1 Preliminary recommendations 1 and 2: Update to mergers legislation; large digital platforms to provide prior notice of acquisitions

ACCC Preliminary Recommendation 1

The ACCC considers that section 50(3) of the Competition and Consumer Act 2010, which identifies the factors to be taken into account in assessing the likely competitive effects of a merger or acquisition, could be amended to make it clearer that the following are relevant factors:

- a) the likelihood that an acquisition would result in the removal of a *potential* competitor, and
- b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

ACCC Preliminary Recommendation 2

The ACCC is also intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.

If such a commitment were not forthcoming from the major digital platforms, other options could be considered to address this issue.

News Corp Australia does not oppose the ACCC's proposal to recommend amendments to section 50(3) of the CCA, to make it clearer that the likelihood that an acquisition would result in the removal of a *potential* competitor, and the amount and nature of data which the acquirer would likely have access to as a result of the acquisition, are both relevant factors when assessing the likely competitive effects of a merger or acquisition.

However, we acknowledge (as noted in the Preliminary Report⁷⁴) the ACCC is currently not prevented from taking these factors into account. We consider it likely that the ACCC would already turn its mind to these factors where necessary, particularly if a merger involved a large digital platform. Therefore, while we do not oppose amending the law to clarify the relevance of these factors, we do not believe this change will have a meaningful impact on the operation of section 50(3) of the CCA.

Also, we do not oppose the ACCC's proposal to request undertakings from large digital platforms (namely Google and Facebook at present) to provide advance notice of proposed acquisitions that involve acquiring a business with activities in Australia.⁷⁵

We disagree with criticisms that imposing this requirement on large digital platforms is likely to have a chilling effect on investment. Requiring Google and Facebook to provide advance notification of acquisitions does not necessarily mean that such acquisitions will be blocked, but that the ACCC will have the opportunity to assess them within the existing merger framework. Also, many start-ups and investments are made with the intention of creating a new provider of services, not just with an eye to

⁷⁴ Preliminary Report, page 63.

⁷⁵ Preliminary Report, page 64.

acquisition. Finally, even if some start-ups do have an eye on acquisition, other potential buyers will remain in the market (eg, smaller digital platforms, start-ups, and other tech companies).

News Corp Australia also notes that this move is in line with changes in some overseas jurisdictions that have introduced 'transaction value' notification thresholds alongside more traditional turnover thresholds. For example, in 2014, Facebook acquired WhatsApp in a global deal worth \$19 billion.⁷⁶ Despite the size and significance of the transaction, it did not meet mandatory notification thresholds in many jurisdictions due to the relatively low turnover of WhatsApp (a messaging app available to users free of charge and not monetised by advertising). In the wake of this deal, questions were raised about the appropriateness of turnover-based thresholds for mergers in the digital sector, where turnover may be low but other factors such as access to data and user base may render the transaction valuable.⁷⁷ Both Germany and Austria subsequently amended their merger legislation to introduce transaction-value thresholds that apply even where turnover-based thresholds are not met. The European Commission launched a consultation into the issue in 2016 and is considering similar reforms.⁷⁸

While News Corp Australia does not oppose these changes to the ACCC's practice in the informal merger control regime, we note that in isolation these changes are unlikely to have any meaningful impact on the competition issues that already exist. This is because the current market structure, including Google and Facebook's market power, will not be changed. Therefore, while it may go some way to preventing further harm, it will not address the harms identified in the Preliminary Report.

Moreover, requiring notification, as some of the large international transactions did in overseas jurisdictions, does not necessarily mean that the merger was prevented from proceeding. Without being armed with the expertise to interrogate such future mergers, changes to the ACCC's practice may not be sufficient. In 2007 the ACCC considered Google's proposed acquisition of DoubleClick and decided not to oppose the transaction because it did not consider Google and DoubleClick to be close competitors in the provision of ad-serving.⁷⁹ News Corp Australia suggests that a Digital Platforms Unit, which develops specialised knowledge of digital platforms, including the importance of data to these businesses, may assist in future merger reviews. Such a unit will enhance the regulator's understanding of relevant markets so that it can better detect competition concerns in relation to mergers and other antitrust areas.

3.2 Preliminary recommendation 3: Requiring options for consumers for browsers and search engines to address default bias

ACCC Preliminary Recommendation 3

The ACCC is considering recommending that:

- a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and

⁷⁶ Parmy Olson, 'Facebook Closes \$19 Billion WhatsApp Deal' Forbes, 6 October 2014

<<https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/#18e6aa6d5c66>>.

⁷⁷ Eleonora Ocello, Cristina Sjödin and Anatoly Subočs, 'What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case', Competition Merger Brief, February 2015, page 2 <http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf>.

⁷⁸ European Commission, Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control, October 2016 – January 2017 <http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html>.

⁷⁹ ACCC, 'ACCC not to intervene in Google's acquisition of DoubleClick', ACCC Media Releases, 30 October 2017, <<https://www.accc.gov.au/media-release/accc-not-to-intervene-in-googles-acquisition-of-doubleclick>>.

b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine)

The ACCC considers that where options for internet browsers and search engines are presented, no option should be pre-selected.

News Corp Australia understands the rationale behind prohibiting pre-installation of default browsers and search engines. As the Preliminary Report notes, the pre-installation of Google Search in many browsers and Google Chrome on many devices has been a contributing factor to the market power of Google Search and its continued use by Australian consumers.⁸⁰ Theoretically, with no pre-installed browser or search engines, consumers would be more likely to select alternative browsers or search engines.⁸¹

As the Preliminary Report notes, the European Commission recently found Google in breach of EU antitrust laws due to tying conduct that included, among other things, requiring manufacturers to pre-install Google Search and Google Chrome on Android devices if those manufacturers wanted access to the 'must-have' Google Play Store app.⁸²

Since the Google Play Store app was a functional necessity for Android devices, the European Commission found this behaviour had led to the pre-installation of the Google Search app and the Google Chrome browser on almost all Android devices sold in Europe.

In addition to being fined, the decision required Google to cease engaging in the tying conduct within three months. This included the conduct involving pre-installation of Google's search engine and browser. Although Google has appealed the fine, they did not seek an extension or pause to the requirement to cease the anticompetitive conduct and therefore remain obliged to comply with the ruling in the meantime.⁸³ As such, in October 2018 Google introduced licensing options that allow device manufactures in the European Economic Area to license Google Search and Google Chrome independently from each other, and independently from the Google Play Store app.⁸⁴

The ACCC's preliminary recommendation would in effect impose the same requirement in Australia but would also go one step further by actively requiring suppliers of operating systems and internet browsers to provide options to consumers.

However, News Corp Australia believes that Google's significant brand power and entrenched market position in both search and internet browsers make it likely that consumers will continue to use Google

⁸⁰ Preliminary Report, page 65.

⁸¹ We also note that this extends to certain licensing agreements with other third parties. For example, internet browser Mozilla Firefox (Google Chrome's closest competitor) makes almost all of its revenue from royalty payments for Google Search being the default search engine spot in the browser: Gregg Keizer, 'Mozilla's 2017 expenses grew twice the rate of revenue', Computerworld, 28 November 2018 <<https://www.computerworld.com/article/3322912/web-browsers/mozillas-2017-expenses-grew-twice-the-rate-of-revenue.html>>. Though financial details of the current deal have not been publicly disclosed, royalties from Google accounted for 98% of Mozilla's revenue under a previous deal in 2014: Frederic Lardinois, 'Mozilla terminates its deal with Yahoo and makes Google the default in Firefox again', Tech Crunch, 14 November 2017 <<https://techcrunch.com/2017/11/14/mozilla-terminates-its-deal-with-yahoo-and-makes-google-the-default-in-firefox-again/>>. Google is reportedly paying Apple \$12 billion to remain the default search engine on the Safari browser in 2019: Lisa Marie Segarra, 'Google to pay Apple \$12 billion to remain Safari's default search engine in 2019', Fortune, 29 September 2018 <<http://fortune.com/2018/09/29/google-apple-safari-search-engine/>>.

⁸² European Commission, 'Antitrust: Commission fines Google 4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine', European Commission Press Release Database, 18 July 2018 <http://europa.eu/rapid/press-release_IP-18-4581_en.htm>.

⁸³ Isobel Asher Hamilton, 'Google is appealing its \$5 billion EU antitrust fine over Android', Business Insider, 10 October 2018 <<https://www.businessinsider.com.au/google-appeals-its-5-billion-eu-antitrust-fine-over-android-2018-10?r=US&IR=T>>.

⁸⁴ Hiroshi Lockheimer, 'Complying with the EC's Android decision', Google Blog, 16 October 2018 <<https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/>>.

Search and Google Chrome even when given a choice. Google's clear market power in search means that when presented with a list of search engine options, consumers would still be inclined to select Google over a lesser-known competitor, such as Duck Duck Go or Bing. Accordingly, News Corp Australia does not consider that such prohibitions on their own will address the positions of market power that Google occupies. While not discouraging the recommendation, we note that it will have no impact in the device, browser or search engine that is already in the hands of consumers.

3.3 Preliminary recommendations 4 and 5: advertising and related business regulatory oversight and news and digital platform regulatory oversight

ACCC Preliminary Recommendation 4

A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses. These functions could apply to digital platforms which generate more than AU\$100 million per annum from digital advertising in Australia. The regulatory authority could consider the digital platform's criteria, commercial arrangements and other circumstances which impact competition between advertisers, suppliers of advertising services and digital platforms.

This may include:

- the ranking and display of advertisements and also organic content (when advertisements are displayed alongside the organic content)
- whether the acquisition of any other product or service from the same digital platform (or a related business) affects the display or ranking of advertisements or content
- the impact of any related business of a digital platform (e.g. how referral links appear in the search engine results page or social media news feed).

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

ACCC Preliminary Recommendation 5

The ACCC considers that the regulatory authority could also monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses. These functions could apply to digital platforms which generate more than AU\$100 million per annum in revenue in Australia and which also disseminate news and journalistic content, including by providing hyperlinks to news and journalistic content, or snippets of such content.

In performing its functions, the regulatory authority could consider the digital platform's criteria, commercial arrangements and other factors that affect competition in media markets or the production of news and journalistic content in Australia. This may include:

- (a) the rankings of news and journalistic content presented to consumers
- (b) the referrals of consumers to media businesses.

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

News Corp Australia supports giving powers to a regulatory authority to provide oversight of digital platforms' behaviour in relation to advertising, intermediary businesses and the display of news and journalistic content. The focus of any regulatory oversight should be the fair and competitive operation of algorithms used by digital platforms⁸⁵ both in relation to advertising and related businesses and in relation to the ranking and display of content on the platform (eg, in SERPs). News Corp Australia's strong view is that the appropriate regulatory authority to undertake this task is the ACCC.

Responsibility for this work could sit within the responsibility of the Digital Platforms Unit that we support the creation of within the ACCC (as outlined in section 1).

In this section we outline:

- (a) why the ACCC is the appropriate regulator to provide such oversight;
- (b) the form, nature and principles of any regulatory oversight;
- (c) the scope of activities requiring regulatory oversight, including both (i) ranking in results pages as well as (ii) intermediary activities such as programmatic advertising (including price monitoring).

(a) The ACCC is the appropriate regulator

The role of regulator should be carried out by the ACCC, rather than a newly established body or authority, another existing body (eg, the Australian Communications and Media Authority (**ACMA**)), or an ombudsman. The oversight function would be to address potential anti-competitive practices and effects by Google and Facebook and would therefore fall clearly within the ambit of the ACCC. Some may claim that this is a role that could be assigned to a content regulator, such as ACMA. However, News Corp Australia disagrees with this. The purpose of the regulation is to monitor the role of digital platforms as intermediaries of news content, and the way that content is ranked and displayed rather than monitor the content itself. The ACCC performs a similar monitoring function in a range of other contexts, including broadband performance monitoring, monitoring of access agreements, petrol pricing monitoring, electricity pricing monitoring, container stevedoring and airports, to name a few. Given this extensive monitoring experience and the purpose of the monitoring, the ACCC is best placed to perform

⁸⁵ The authority should clearly define the subjects of any regulation in order to avoid inadvertent regulatory overreach. The inquiry Terms of Reference defines digital platforms as falling within three categories: digital search engines, social media platforms and digital content aggregators. 'Digital search engines' and 'social media platforms' may be self-explanatory, but the term 'digital content aggregator' is more ambiguous. The Issues Paper lists some examples of digital platforms: Google, Facebook, Instagram, Twitter, Snapchat and Apple News. The reference to Apple News suggests that 'digital content aggregators' means third party platforms that aggregate online news and journalistic content from various sources. Beyond Apple News, other aggregators would also include Google News, Feedly, Flipboard and News360.

such functions in relation to digital platforms and their algorithms. As suggested above, responsibility could sit with a newly created 'Digital Platforms Unit' within the ACCC, which would have the requisite technical industry knowledge.

Regulatory oversight will only be effective when it is backed by appropriate powers and sanctions. We note that digital platforms have already expressed strong opposition to any regulation or oversight of their functions. For example, Facebook called the regulation proposed in the Preliminary Report as unnecessary and unworkable, and Google has said it will push back against it.⁸⁶ Any monitoring or oversight would necessarily need to be accompanied by powers to compel the provision of evidence to the ACCC, backed up by fines for non-compliance. The ACCC already performs such functions, including by issuing notices under section 155 of the CCA where the ACCC suspects there might be a contravention of the CCA and in the context of price inquiries under section 95H of the CCA, such as the digital platforms Inquiry. Given the expertise the ACCC has in such matters, it is appropriate for such functions to be extended to the ACCC in respect of oversight of digital platforms and their algorithms.

News Corp Australia considers that this is preferable to the creation of a digital platforms ombudsman as proposed in the Preliminary Report.⁸⁷ An ombudsman does not address the market power that digital platforms occupy and cannot ensure that the digital platform will engage in the dispute resolution process. As the ACCC acknowledges:

'one effect of Google and Facebook's substantial market power in the markets for search and display advertising respectively, is that some advertisers, particularly small businesses, appear unable to negotiate the terms on which they do business with Google and Facebook. This can be evident in the difficulties businesses may encounter when attempting to seek effective dispute resolution'.⁸⁸

The market power that Google and Facebook occupy makes it difficult even for sophisticated and experienced businesses like News Corp Australia to negotiate any terms of business. Nothing in the ombudsman model (if it follows existing models in Australia) would necessarily improve this, since it does not address the market power that is the source of the concern. An ombudsman would also not benefit from the expertise the ACCC has in identifying the anti-competitive effects of the exercise of market power or the knowledge the ACCC has acquired of this complex industry during the course of this Inquiry.

(b) The form, nature and principles of any regulatory oversight provided by the ACCC

News Corp Australia envisages that the regulatory oversight provided by the ACCC would perform a number of different functions. The two main functions would be to:

- (i) administer a regime for investigating complaints from third parties about the operation of algorithms (principally in relation to ranking and display of search results) based on the principle of 'burden shifting'); and
- (ii) administer a regime for registering intended changes to the algorithm so that these changes can be investigated should complaints be lodged.

⁸⁶ Max Mason, 'Facebook lashes algorithm regulatory oversight as 'unworkable'', Australian Financial Review, 12 December 2018 <<https://www.afr.com/business/media-and-marketing/advertising/facebook-lashes-algorithm-regulatory-oversight-as-unworkable-20181212-h191da>>; Paul Smith, 'Google rejects regulator checks on search algorithms', Australian Financial Review, 29 January 2019 <<https://www.afr.com/technology/technology-companies/google/afr28techgoogleleacc-20190123-h1aec9>>.

⁸⁷ Preliminary Report, page 88.

⁸⁸ Preliminary Report, page 87.

(i) Burden shifting regime which balances the desire of platforms to maintain secrecy over their algorithms

The reason why regulatory oversight is required in this area is because, while publishers or businesses affected by a change in the algorithm will sometimes be able to detect that a change of an algorithm has had an impact on their rankings, there is reluctance among digital platforms to disclose the details of the way their algorithm operates publicly. Similarly, in relation to the operation of programmatic advertising, there is no understanding of how auctions and prices are determined or allocated and there is complete opacity as to whether these are operated fairly for advertisers and publishers or are operated to benefit a platforms own businesses. As the ACCC rightly notes in the Preliminary Report:

*'This lack of transparency makes it difficult for advertisers to understand the factors influencing the display of their advertising to consumers and, in particular, to identify whether Google or Facebook are favouring their own business interests at the expense of advertisers.'*⁸⁹

Notwithstanding this, News Corp Australia does not envisage a regulatory oversight regime which would mandate complete public transparency of algorithms which News Corp Australia agrees could '*conflict with long-standing legal protections for trade secrets and other intellectual property*'.⁹⁰ Instead, the oversight regime should be modelled on the core principle of '**burden-shifting**', characterised as follows:

- digital platforms should be put to a rigorous standard to justify their conduct;
- the ACCC would be able to receive complaints from users, advertisers and publishers in relation to any digital platform with market power (as stipulated by the ACCC);
- where complaints received by the ACCC or evidence collected by the ACCC show that output of a platform's algorithm disproportionately demotes certain results (either in relation to advertising, or rankings and referrals), this would provide the ACCC with prima facie evidence that a case exists requiring a response by the relevant platform;
- the ACCC would then be empowered to undertake an investigation in which the burden shifts to the platform to prove to the ACCC:
 - (a) that its algorithms are not discriminatory; and
 - (b) that there is no less restrictive alternative available;
- close review and interrogation of the underlying algorithm is not required because any review would focus on the objective effects or consequences of the algorithm or changes to it, and not design and priorities;
- in circumstances where the platform itself considers it beneficial to its interests to voluntarily disclose details about its algorithm to illustrate its alleged pro-consumer purpose, such disclosure could be made pursuant to confidentiality and non-disclosure orders that would address the platform's intellectual property and trade secret concerns. Any information that is released publicly would not disclose full specifications of a particular algorithm. The need to prevent public disclosure

⁸⁹ Preliminary Report, page 5.

⁹⁰ Google, Submission to the Digital Platforms Inquiry, October 2018, page 7
<<https://www.accc.gov.au/system/files/Google%20Submission%2020%20%28October%202018%29.pdf>>.

of such information is an additional reason why external regulation from an independent authority is required; and

- it would not be sufficient that the platform points to some immeasurable, esoteric or vague (possibly self-serving) notion of 'consumer/user interest' to justify such discriminatory effects. Instead, the platform would need to show that the discriminatory effect is outweighed by consumers' interests or other non-discriminatory factors.

The burden shift is justified because of the difficulty, if not impossibility, of proving algorithm bias extrinsically, and the objective of balancing the interests of the platform owner in maintaining secrecy over its algorithm. Burden shifting will also aid the ACCC's oversight and enforcement functions because relevant, if not critical, information will reside only with the platform and the platform will be required to use this information to conclusively prove that the operation of their algorithms is not anticompetitive.

(iii) Register of algorithm changes to assist review and investigation of the impact of changes

Another element of the oversight functions of the ACCC would be to administer a register of algorithm changes (where information is provided confidentially, and any public version of the register would not disclose algorithm specifics). This would address the concern summarised in the ACCC's key findings that *'Google and Facebook do not provide sufficient notice about changes to algorithms that affect referral traffic'*.⁹¹ It is clear that, as the ACCC has found, *'digital platforms are the gateways to online news media for many consumers and provide news referral services for media businesses'*.⁹² The little transparency around algorithms that is available is often undermined by frequent changes to the allocated weight or calculation method, which makes it difficult for publishers to keep up (see, for example, recent changes to the speed signal discussed in the box below).

Accordingly, News Corp Australia proposes that where a platform intends to change an algorithm and that change will, or is likely to, substantially impact the results of the algorithm (eg, SERP results), platforms should be required to register this proposed change with the ACCC a specified period of time (eg, 12 weeks) prior to the proposed change, outlining the purpose of the change and the expected consequences of the change.

If the ACCC is concerned that the change may raise competition concerns, it will be empowered to commence an investigation, and receive feedback from third parties likely to be impacted by the change. The ACCC could maintain an 'Algorithm Transparency Register' of such proposals, with a public version available online. The public version would include a brief description of the purpose or goal of the algorithm change and the planned implementation date, providing an opportunity for third parties, including users and publishers who may be impacted, to lodge a submission with the ACCC setting out how the change may impact a dependent business or use of the internet. Again, information provided to the ACCC would be provided confidentially, and any information that is released publicly would not disclose full specifications of a particular algorithm, allowing digital platforms to retain the comparative advantage of their commercial algorithm design. The ACCC must be empowered to direct the digital platform to abandon the proposed change if the effect was deleterious and objectionable (for example, because it was prima facie anticompetitive), or agree an amendment to the proposed change which remedies the ACCC's objections.

⁹¹ Preliminary Report, pages 91, 108.

⁹² Preliminary Report, page 98.

The overall impact will be to improve the predictability and neutrality of ranking mechanisms that platforms use. This will benefit publishers and advertisers, since the ranking of content and display of advertisements in search results or in feeds is determined on the basis of transparent and objective factors. The increased transparency will also benefit advertisers, who will have a clearer understanding of the parameters that determine where advertisements are placed and how pages that display advertisements are returned or ranked. Users will also benefit from improved accuracy of results, based on objective measures such as relevance and provenance rather than the commercial interests of the platform.

Example: Speed as quality indicator in Google algorithm

In the Preliminary Report, the ACCC noted that on the basis of information provided to the commission, it understood that the speed signal in Google algorithms only affects 'a small percentage of queries', because it is only relevant to pages that are considered 'slow'.⁹³

However, News Corp Australia submits that speed is given considerable weight in Google's algorithms. In fact, it is News Corp Australia's understanding that recent changes in the Google algorithm have strengthened the priority given to speed as a signal when prioritising search results, with the result that significantly more webpages will be affected. This is to the detriment of publishers and consumers, since 'speed' as a ranking factor does not incentivise investment in original content.

In previous performance thresholds ('version 4') published by Google, sites ranked in the top 33% for speed were considered 'fast' and sites ranked in the bottom 33% were considered 'slow'.⁹⁴ However, these thresholds were deprecated in November 2018, and will be obsolete from May 2019. They have been superseded by updated performance thresholds ('version 5'), under which only the top 5% - 10% will be considered 'fast', and the bottom 50% will be deemed 'slow'.⁹⁵

This example highlights two reasons why external regulation is necessary:

1. Google did not inform publishers about this change, highlighting the lack of transparency with which these platforms operate; and
2. Google wields arbitrary power over which factors are most 'valuable' in determining which content a user sees. It is likely that these factors will not align with the interests of consumers; for example, increasing emphasis on speed will come at the expense of emphasis on other factors consumers care about, such as provenance.

(c) Scope of matters that the authority would regulate

News Corp Australia considers that it would be appropriate for the regulatory authority to be tasked with responsibility for regulatory oversight of both advertising and the ranking and display of news and journalistic content and referral services to news media businesses. In essence, preliminary recommendation 4 appears to be aimed at oversight of a digital platforms' vertical services (including ad

⁹³ Preliminary Report, page 119.

⁹⁴ Google, 'About [v4] PageSpeed Insights', PageSpeed Insights, 7 February 2019 <<https://developers.google.com/speed/docs/insights/v4/about>>.

⁹⁵ Google, 'About the [v5] PageSpeed Insights API', PageSpeed Insights, 7 February 2019 <<https://developers.google.com/speed/docs/insights/v5/about>>.

tech and programmatic advertising) and preliminary recommendation 5 appears to be aimed at the relationship between digital platforms and news and journalistic content in relation to display on the digital platforms' SERP or news feeds, or the platform feature which is customer facing. News Corp Australia agrees that it would be appropriate for the ACCC as the relevant regulator to have oversight of both of these areas of activity. There are likely to be efficiencies stemming from one body having oversight of both functions, particularly in terms of developing and leveraging knowledge and expertise of these areas.

We respond to each of these two broad areas of functionality in turn: (i) **vertical services (including ad tech/programmatic advertising)** and (ii) **display of news and journalistic content and referrals to media businesses** below.

(i) vertical services (including ad tech/programmatic advertising)

The purpose of preliminary recommendation 4 is to identify instances where platforms engage in discriminatory conduct by favouring their own business interests above those of advertisers or potentially competing businesses.⁹⁶

News Corp Australia strongly agrees that the digital advertising supply chain needs to be subject to regulatory oversight, in particular the 'ranking and display of digital advertisements'. As we have outlined at 2.2(c) above, where a player has market power across the ad tech supply chain (for example, owns the dominant digital advertising tools and also sells advertising inventory), the potential arises for digital ad auctions to be manipulated to minimise the revenue that flows to publishers, while maximising or raising the price taken from advertisers. The opportunity also arises for platforms to treat their own advertisements or content differently to that of competitors; for example, see Google's conduct in relation to the Better Ad Standards outlined below. Similarly, digital platforms may preference referral links to their own vertical services over competing businesses. One example of this is the European Commission's finding that Google gave Google Shopping preferential treatment over competing comparison shopping services, as discussed in the Preliminary Report.⁹⁷

We have already outlined conduct engaged in by Google that, in our view, raises concerns from a competition perspective. As discussed earlier in section 2.2(c), Google has substantial market power in the supply of ad tech and has both the ability and incentive to favour its own vertical ad tech services. One way it can do this is by engaging in arbitrage pricing, due to the interaction between its AdX and AdWords technologies.⁹⁸ Due to the lack of transparency and absence of any regulation in this space, it is difficult for advertisers or publishers to determine where money goes and whether auctions are conducted competitively. There is considerable scope for advertisers and publishers to be misled. While the ACCC's Preliminary Report indicates that Google claims to pass on approximately 70% of advertising revenue to publishers, this figure is almost certainly overinflated; other evidence indicates that publishers receive as little as 20-30%.⁹⁹ It is impossible for any external third party to prove whether or not Google is engaging in arbitrage with anticompetitive effects. Thus, the potential harm perpetuated

⁹⁶ Preliminary Report, page 81.

⁹⁷ Preliminary Report, page 325; European Commission, 'Antitrust: Commission fines Google 2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', Press Release Database, 27 June 2017 <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>.

⁹⁸ Damien Geradin and Dimitrios Katsifis, 'An EU Competition law Analysis of Online Display Advertising in the Programmatic Age', Social Science Research Network, 12 December 2018, pages 34–35 <<https://ssrn.com/abstract=3299931>>.

⁹⁹ Preliminary Report, page 86.

by digital platforms' ad tech is not just the size of the commission they extract, but the fact that market power across the supply chain creates opportunities for arbitrage.

The ACCC has said:

*'...it is clear that from the perspective of advertisers and website owners, the pricing of the intermediary services is opaque. The lack of transparency means that advertisers and websites lack visibility and are not empowered to seek out better or more competitive deals.'*¹⁰⁰

News Corp Australia agrees with this conclusion and considers that this is grounds for regulatory oversight and intervention.

Example: Global expansion of Better Ads Standards

Our April submission discussed Google's move to block ads on any page viewed in Google Chrome that do not comply with the Coalition for Better Ads' Better Ad Standards (including, among other things, auto-play video ads).¹⁰¹ In February 2018, Google began implementing this policy in North America and Europe and stopped selling violating ads through its intermediary services.

Importantly, Chrome did not apply these restrictions to video content sites including Google-owned YouTube (the second most visited webpage globally after Google Search, and the leading video streaming site).

Google is motivated by a desire to prevent consumers using third-party ad blocking services; however, the policy also has the effect of reducing the opportunities that publishers can offer advertisers, and subsequently [Confidential].¹⁰²

From July 2019, Google will expand this policy globally.¹⁰³ YouTube will remain unaffected.

In relation to Preliminary Recommendation 4, News Corp Australia considers that further clarity is needed around what constitutes 'ranking' and 'display'. The ranking and display of advertisements is determined by digital ad algorithms; therefore, it is essential that regulatory oversight extend to the functioning of the platforms' algorithms (applying the principles of 'burden shifting' set out above). Specifically, this must include the algorithms that determine the purchase and sale of digital ad inventory, including through automated auction systems, since this is a key way that ad tech businesses are able to favour their own vertical business interests.

The ACCC said that it is continuing to investigate whether or not the '*regulatory authority should be able to monitor prices of intermediary services and investigate complaints with public reporting obligations to increase transparency in this market.*' News Corp Australia considers that the ACCC's regulatory oversight role in relation to digital advertising intermediaries should also extend to oversight of the price charged for such services (being the revenue percentage retained by the intermediary) and the way in

¹⁰⁰ Preliminary Report, page 86.

¹⁰¹ News Corp Australia, Submission to the Digital Platforms Inquiry, April 2018, page 75 <<https://www.accc.gov.au/system/files/News%20Corp%20Australia%20%28April%202018%29.pdf>>.

¹⁰² [Confidential].

¹⁰³ Google, 'Building a Better World Wide Web', Chromium Blog, 9 January 2019 <<https://blog.chromium.org/2019/01/building-better-world-wide-web.html>>.

which buy and sell prices are determined by intermediaries (including identifying and preventing arbitrage opportunities).

However, as discussed in detail in section 2.1, the ad tech industry is so complex that News Corp Australia considers that it warrants an independent review by the ACCC separate from this Inquiry. Therefore, while the ACCC should begin oversight of this industry immediately, the role and function of any regulatory oversight may need to be informed by additional information about specific harms perpetuated by ad tech intermediaries that a separate ad tech Inquiry may reveal.

(ii) Display of news and journalistic content and referrals to media businesses

Preliminary recommendation 5 proposes regulatory oversight of the ranking of news and journalistic content, and the provision of referral services to news media businesses, by large digital platforms. The need for this oversight is clear, due to the opacity of the digital platforms' algorithms that determine what content a consumer sees. The ACCC acknowledges this in the Preliminary Report, which notes that lack of transparency from digital platforms in relation to the operation of, and changes to, algorithms was a key concern for news publishers (including News Corp Australia, as articulated in our April submission), due to the impact algorithms have on the ranking and display of search results and referral traffic. We agree with this, and note that even small changes can drastically decrease traffic, and in turn, advertising revenues, for publishers. An example of the impact of algorithm changes on news publishers is the change to the Facebook algorithm in 2018 that implemented Facebook's 'family and friends first' policy discussed below.

Example: Facebook 'friends and family' algorithm change

As outlined in our April Submission, Facebook announced an immediate change to its algorithm on 12 January 2018 that would prioritise posts shared by a user's friends and family over business and media posts in the News Feed.¹⁰⁴

The algorithm change reduced the amount of news content in a user's Facebook Newsfeed by 20 percent.¹⁰⁵ This change carried significant implications for publishers, who adjust their editorial strategies based on the type of content promoted by Facebook's Newsfeed algorithm.¹⁰⁶

Had an Algorithm Transparency Register been established, Facebook would have been required to register this change in advance, giving publishers and other online content creators notice and therefore time to prepare for the impact of the change on publishers' business strategies. In addition, if publishers or other third parties believed the algorithm change would be unfair, discriminatory, anti-competitive or otherwise harmful in its application, the ACCC would provide a forum to lodge a complaint prior to the algorithm's release.

We also respond to the following points raised by Google:

¹⁰⁴ Mark Zuckerberg, 'Facebook announcement', Facebook, 12 January 2018 <<https://www.theguardian.com/technology/2018/jan/22/ruPERT-murdoch-facebook-should-pay-news-publishers>>.

¹⁰⁵ Julia Carrie Wong, 'Rupert Murdoch tells Facebook: pay 'trusted' publishers for their content', The Guardian, 23 January 2018 <<https://www.theguardian.com/technology/2018/jan/22/ruPERT-murdoch-facebook-should-pay-news-publishers>>.

¹⁰⁶ Julia Carrie Wong, 'Facebook overhauls News Feed in favor of 'meaningful social interactions'', The Guardian, 12 January 2018 <<https://www.theguardian.com/technology/2018/jan/11/facebook-news-feed-algorithm-overhaul-mark-zuckerberg>>.

- First, despite what Google claims, as the ACCC has found, there is insufficient information available publicly about how Google's search algorithms operate. In determining where to rank news results in search results, Google claims that its algorithm is based '*solely on the objective of providing users with the most relevant and useful results*', analysing and weighing '*more than 200 signals*'.¹⁰⁷ The official list of these signals, and their interaction and operation in practice, remains known only by Google.¹⁰⁸ Some insight into Google's signals is provided in publicly available '*Search Quality Rater Guidelines*'.¹⁰⁹ These guidelines are used by a global team of 10,000 'search quality raters' employed by Google to rate the quality of pages that appear in Google Search results in particular experiments. However, the ratings provided to Google by search quality raters do not determine the rankings of individual pages. Rather, Google uses the feedback from the quality raters to improve Google's search algorithm.¹¹⁰ Therefore, while these guidelines provide some insight into the factors Google may consider indicative of 'quality', they do not provide any material insight into what the '200 plus' general search signals actually are, let alone their static or dynamic relative input in the algorithm that determines search rankings.
- Second, the secrecy surrounding the input signals to Google's search algorithms makes it impossible to verify the authenticity of any claims that Google makes about search algorithm signals. For example, Google claims that '*[c]ontent does not receive any ranking advantages... merely because it is AMP*'.¹¹¹ However, recent spikes in AMP page results coinciding with algorithm changes have led industry experts to speculate that AMP format is a ranking factor that the Google algorithm takes into account.¹¹² This is particularly problematic in light of the negative implications AMP format has on publisher attribution and branding, discussed in detail at 2.3(b).

We therefore agree with the ACCC's conclusion that '*the lack of transparency on the part of Google and Facebook has some effect on news publishers' ability to monetise their news content and consequently, their ability to compete more broadly in the supply of news media*'¹¹³ although our position is that the impact on our business is significant.

News Corp Australia therefore supports the ACCC's recommendation to establish regulatory oversight of digital platforms' ranking of news and journalistic content and digital platforms' provision of referral services. In addition, any regulatory oversight should ensure that in 'ranking and displaying' news media content, the digital platform/algorithm:

- should not give preference to content according to whether or not it is available to a user for **free or at a cost**; and

¹⁰⁷ Preliminary Report, page 120.

¹⁰⁸ Blue Corona, 'Google's ranking factors in 2019', Blue Corona Blog, 9 January 2019 <<https://www.bluecorona.com/blog/google-ranking-factors-2018>>; Brian Dean, 'Google's 200 ranking factors: The complete list (2019)', Backlinko, 28 December 2018 <<https://backlinko.com/google-ranking-factors>>.

¹⁰⁹ Google, Search Quality Rater Guidelines, July 2018

<https://static.googleusercontent.com/media/www.google.com/en/_/insidesearch/howsearchworks/assets/searchqualityevaluatorguidelines.pdf>.

¹¹⁰ Chris Sherman, 'Google updates its search quality rating guidelines', Search Engine Land, 25 July 2018

<<https://searchengineland.com/google-updates-its-search-quality-rating-guidelines-302553>>

¹¹¹ Preliminary Report, page 119.

¹¹² Mordy Oberstein, 'Has AMP hit a wall?', Rank Ranger Blog, 31 October 2018 <<https://www.rankranger.com/blog/amp-hitting-a-wall>>.

¹¹³ Preliminary Report, page 111.

- should give prominence in its search results or platform display (ie, wherever news/media content is customer facing on the platform) to **original content and material**.

The ACCC has noted concerns, saying that it will further explore the impact of policies and formats which affect the ranking of original content in light of subsequent news stories and considers that this stems from lack of transparency as to the operation of the digital platforms' algorithms.¹¹⁴ As the ACCC has acknowledged, given the market power that digital platforms enjoy as a source of referral services for media businesses, it is crucial that algorithms are not structured to limit the ability of publishers to monetise their content in an attempt to recoup the costs of their investments in creating that content. Although the ACCC has indicated that it would be reasonable for the originality of content to be a factor in digital platforms' algorithms, the ACCC expressed reservations about the practicality of doing so.¹¹⁵

News Corp Australia notes that digital platforms may object to the above proposals on the basis that it is not something they do or is not something that is possible, but News Corp Australia disagrees, as explained below.

First, News Corp Australia considers that digital platforms, such as Google, do favour free content over paid content since this supports Google's own business and keeps users within the Google ecosystem. Among the '200 plus' signals that go into the general search algorithm, News Corp Australia believes that at least one of those signals considers whether content is available free of cost to the consumer (prioritising content where it is free). This is because Google concedes that it does demote pages that 'trick the bots' by showing content that is 'not available' to a user who clicks on the link. As content behind a paywall is similarly 'not available' it must also be caught by this algorithmic demotion. Google clearly does this as it promotes and supports the model that better serves Google and helps keep users within the Google ecosystem (thereby further contributing to its data collection activities and ability to target users). For example, as discussed in our April submission, the First Click Free policy refused to crawl and return any publisher content behind a paywall. Similarly, Google has sought to downplay the relevance of load speed as a signal in the Preliminary Report, claiming it is only relevant for a small percentage of queries,¹¹⁶ but information published by Google suggests speed is growing in importance as a signal (see example below). However, without regulatory intervention, the impact of such effects on publishers like News Corp Australia will remain unaddressed, as Google's market power removes any incentive to respond to concerns raised by publishers.

Second, as to originality and provenance, the Preliminary Report notes that it is *'not clear to the ACCC whether the status as "originator" or source of a story is a variable that promotes a higher ranking'*.¹¹⁷ However, News Corp Australia strongly believes, based on its own experience, that provenance is not a factor that Google's algorithms take into account. The Preliminary Report acknowledges the significant and growing problem of online sources re-writing or re-publishing journalistic content originally created by a third party.¹¹⁸ Digital platforms have facilitated rapid spread of this behaviour, by incentivising publishers to maximise referral clicks. Where a publisher has a greater volume of news content, they are more likely to appear in search results. Since there is no way for a consumer to know whether a news story that appears in search results is original, and no ranking benefit to the publisher for publishing

¹¹⁴ Preliminary Report, page 125.

¹¹⁵ Preliminary Report, page 278.

¹¹⁶ Preliminary Report, page 119.

¹¹⁷ Preliminary Report, page 278.

¹¹⁸ Preliminary Report, page 278.

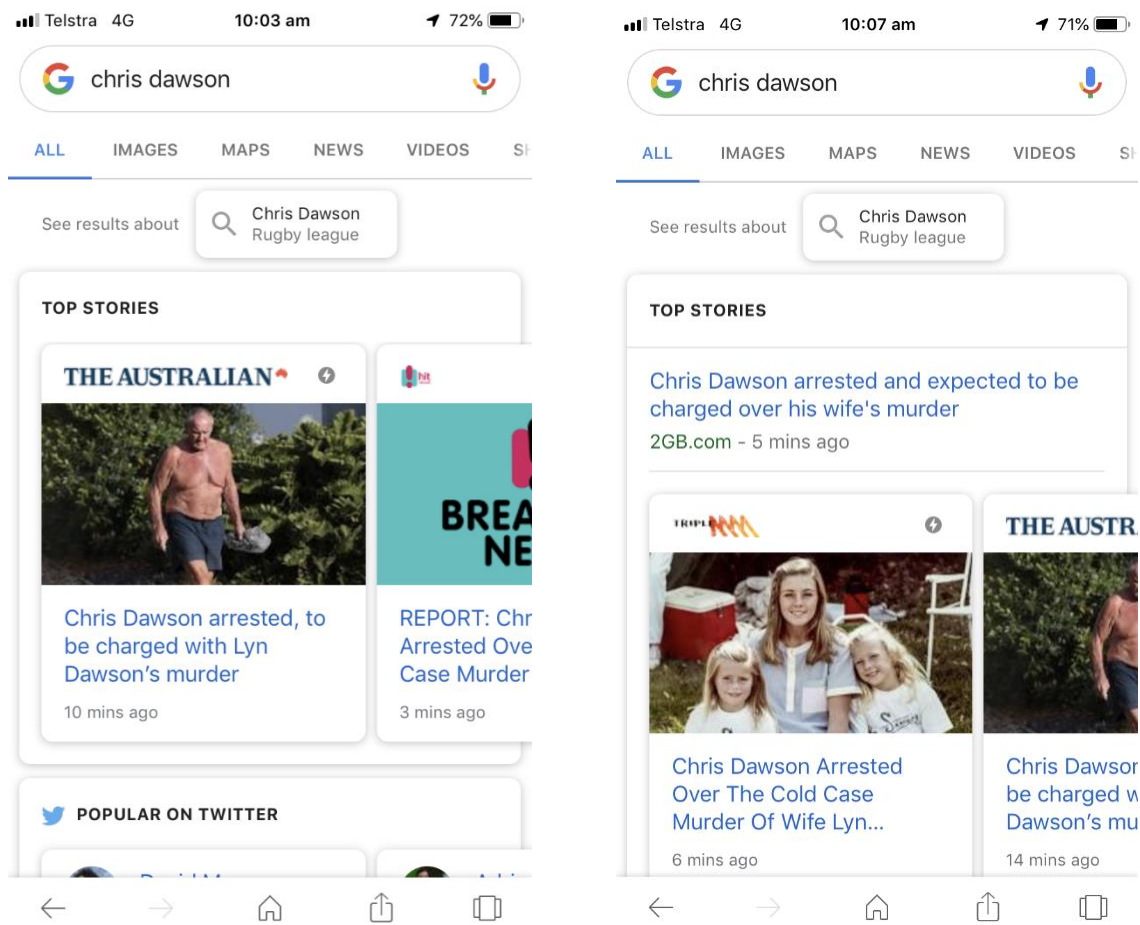
original content, publishers are incentivised to 'free ride' off the work of others rather than invest in original content.

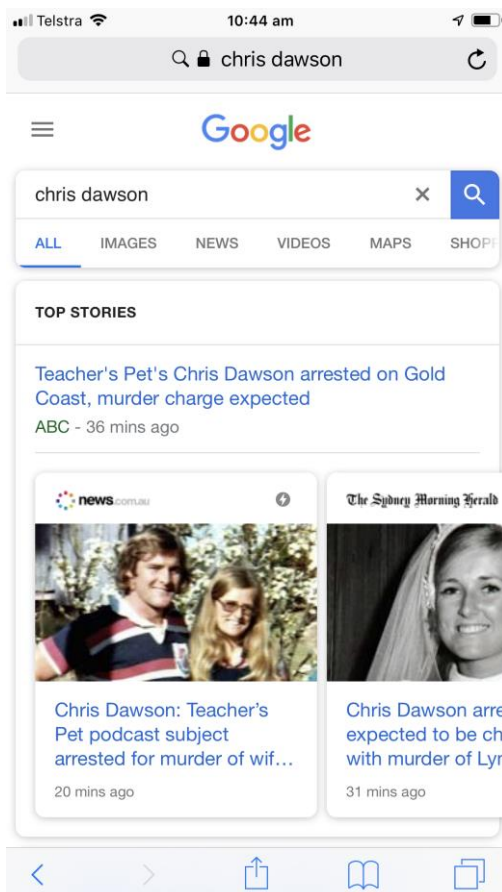
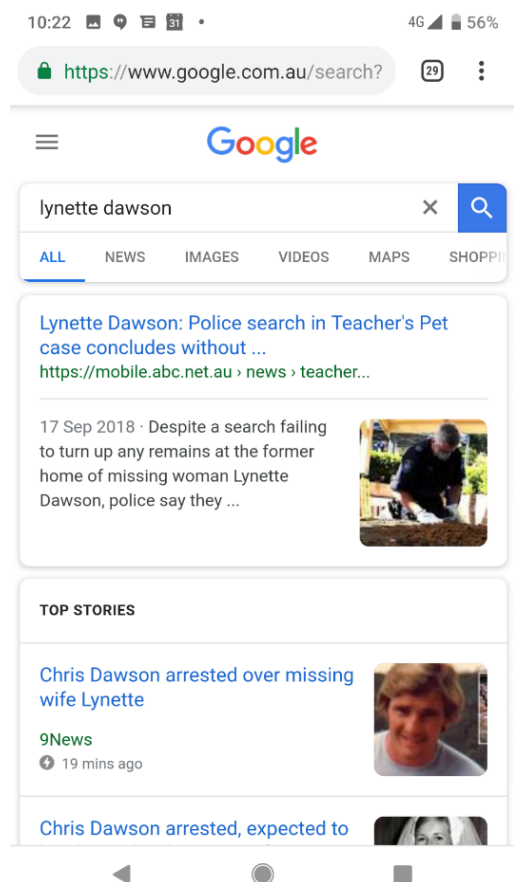
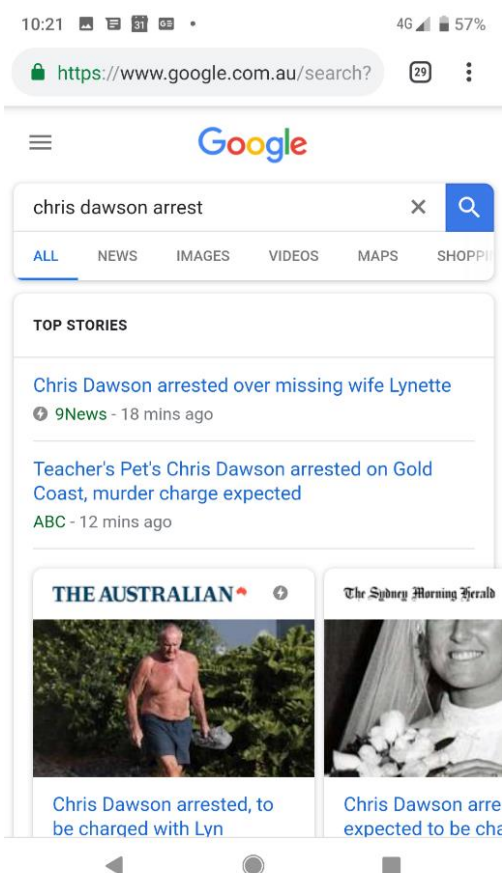
In previous submissions, News Corp Australia provided a number of examples showing that our original journalism quickly loses search equity to copycat outfits. This was particularly acute in the example of *The Australian's* Newspoll results.¹¹⁹ Since Newpoll is *The Australian's* brand and *The Australian* is the first to be published each time it is released, there is no dispute about provenance, originality or whether *The Australian* is the first to publish. However, in the example shown for the Newpoll released on 9 April 2018, while *The Australian* featured prominently in Google search results for Newpoll on desktop searches, results from AMP-enabled publishers were prioritised on mobile search results and not a single article from *The Australian* was displaced in the Top Stories carousel because *The Australian* (at that time) did not provide premium (subscriber-only) content in AMP format. *The Australian* was therefore penalised in search results for having subscriber-only content despite being the originator of the Newpoll material.

In a more recent example, in May 2018 *The Australian* released a 16-episode investigative podcast series, 'The Teacher's Pet', reporting on the disappearance and probable murder of Lyn Dawson by her then-husband, Chris Dawson. The podcast quickly gained popularity, and has registered more than 42 million downloads to date. It also won a Gold Walkley award (the highest accolade in Australian journalism). By December 2018, *The Australian* had published more than a quarter of a million words about the case. *The Australian* employed an additional full-time senior investigative reporter, a full-time producer, a part time digital producer and a part-time crime reporter for more than a year, purely for the purposes of reporting on the investigation. Other existing employees of *The Australian* also contributed to the investigation. When *The Australian* broke the story of Chris Dawson's arrest for murder on 5 December 2018 it was subscriber-only content, but one-click free was available via Google. Initially, *The Australian's* article appeared first in Google SERP. However, other media outlets began covering *The Australian's* original story, and within 15 minutes, rewrites from other media outlets (most of which provided the content completely free) began appearing more prominently than *The Australian's* breaking story in Google's SERP so that users had to scroll through results before reaching *The Australian's* breaking story. This is illustrated in the time-stamped screenshots contained in Figure 4 below. This occurred even though *The Australian's* story (though accessible as subscriber-only content) did qualify for 'one click free' for visits via Google.

¹¹⁹ See page 76.

Figure 4: Time-stamped screenshots showing the rapid demotion of The Australian's original breaking story in relation to Chris Dawson's arrest on 5 December 2018 in Google's SERP





Finally, as to the practicality of requiring platforms to be agnostic as to the cost of accessing content and give preference to original content, News Corp Australia doubts that this would be complicated. The ACCC is concerned that digital platforms would need clear signals as to whether an article is 'original' (which may not exist) and originality may be difficult to ascertain in some cases. This led the ACCC to conclude that requiring digital platforms to unilaterally determine originality of journalistic content would likely be 'problematic'.

While Google's algorithms are shrouded in relative secrecy, it is known that current search rankings are based on more than 200 signals.¹²⁰ Given the vast number of factors that Google is currently capable of taking into account, it is difficult to believe that Google has no capacity to gauge the origin of a news article. Google acknowledges that 'duplicate content' on a website (for example, blocks of similar or identical content appearing across different pages hosted on the same website) can be a demoting factor for search rankings.¹²¹ If it is possible to identify duplicate content within the pages of one website, it would seem logical that duplicate content across websites can also be identified (particularly as the date and time of original publication is something that can be detected by Google's algorithms). Google has indicated in the past that recently updated or published content is favoured in the search algorithm.¹²² Thus, if Google is able to distinguish between recency of publication and identify content similarity or duplication, it follows that its algorithm should be able to make a distinction between journalistic content published originally and that which is subsequently reproduced. This challenges the notion that originality cannot be ascertained. Moreover, we note that Google uses the 'highly cited' tag and therefore appears to be able to identify original reporting, but provides no economic reward for this.

News Corp Australia acknowledges, as the Preliminary Report does, that originality could be considered alongside other factors and may not necessarily be decisive.¹²³ However, the algorithm already takes a significant number of factors into account, assigning them relative weights to produce the final rankings. The existence of other relevant factors does not preclude the search algorithm favouring original content; there is no reason that provenance cannot be given a substantial weight and taken into account alongside other factors.

3.4 Preliminary recommendation 6: Review of media regulatory frameworks

ACCC Preliminary Recommendation 6

The ACCC proposes to recommend the Government conduct a separate, independent review to design a regulatory framework that is able to effectively and consistently regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia, including news and journalistic content, whether they are publishers, broadcasters, other media businesses or digital platforms.

Such a review should focus on content production and delivery and consider the following matters:

¹²⁰ Preliminary Report, page 120.

¹²¹ Google, 'Duplicate content', Google Console Help, 2019 <<https://support.google.com/webmasters/answer/66359?hl=en>>.

¹²² Google, 'Our new search index: Caffeine', Google Official Blog, 8 June 2010 <<https://googleblog.blogspot.com/2010/06/our-new-search-index-caffeine.html>>.

¹²³ Preliminary Report, page 278.

- Underlying principles: creating clear guiding principles for an overarching platform-neutral regulatory regime that can apply effectively across media formats and platforms with common rules applying to online and offline activities, and which is adaptable to new services, platforms and technologies.
- Extent of regulation: setting objective factors to determine whether regulations should be imposed on certain enterprises and determining appropriate roles for self-regulation and coregulation.
- Content rules: creating a nationally-uniform classification scheme to classify or restrict access to content regardless of the format of delivery.
- Enforcement: implementing appropriate enforcement mechanisms and meaningful sanctions, including whether it is appropriate to establish or appoint a single agency responsible for monitoring, enforcing, complaints handling, and administering the unified regulatory framework.

The implementation of a unified, platform-neutral framework will affect and simplify existing regulations across different media, communications, and telecommunications industries.

The ACCC would intend to contribute its knowledge and expertise to such a review.

The Preliminary Report concludes that some existing legislative and regulatory media frameworks require reform and proposes to recommend that the Government conduct a separate, independent review into regulation of entities with media functions.¹²⁴

News Corp Australia acknowledges that disparities exist between regulatory media frameworks; while some of these reflect differences in form and function, there may be cases where more streamlined regulation could be appropriate, which a review could identify. However, the process of review, design and implementation would take considerable time and require extensive consultation with stakeholders. Accordingly, this is a longer-term measure that does not address the immediate harms identified in the Preliminary Report. Furthermore, a specific Inquiry into the ad tech market (as discussed above at 2.1(b)) should be prioritised, due to the strong evidence suggesting anticompetitive conduct.

If, however, a review of media regulatory frameworks is to be pursued, any reform must be mindful of the role that digital platforms play in the media landscape. The ACCC's preliminary view is that the role of digital platforms in the Australian media market sits somewhere between that of a publisher/media business that creates news content and that of a pure intermediary.¹²⁵ Although a digital platform may not itself create news content, it makes decisions about how to rank and display that content to users (often in a way that is targeted or personalised).¹²⁶ This can significantly influence the content a consumer is exposed to, making digital platforms more than mere intermediaries.

News Corp Australia agrees that digital platforms increasingly perform media-like functions that extend beyond passive distribution of content. In particular, News Corp Australia supports the ACCC's assessment that:

¹²⁴ Preliminary Report, page 151.

¹²⁵ Preliminary Report, page 126.

¹²⁶ Preliminary Report, page 128.

'...digital platforms perform increasingly important functions that are part of the supply of news and journalistic content to Australians. That is, digital platforms have an active role in the supply of news media content in Australia and should not be regarded as pure distributors or mere intermediaries in Australian media markets.

Digital platforms also have considerable influence in shaping Australian consumers' online news choices. This results from the combination of digital platforms' role as online intermediaries for news content and their media-like functions in selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display to their users. That is, the role of digital platforms as gateways to news media or the internet for a large number of Australian increases the impact and importance of their media-like functions on Australian media markets.¹²⁷

Overseas jurisdictions have recognised the increasingly editorial nature of digital platforms, including the European Commission and the UK House of Commons.¹²⁸ The UK House of Commons' Interim Report on Disinformation and 'Fake News' observes that digital platforms 'continually change what is and is not seen on their sites, based on algorithms and human intervention'; therefore, while they differ from a traditional publisher, they also cannot be said to have 'no role' in regulating content on their sites.¹²⁹ As such, the Interim Report recommends that digital platforms be treated as a new category of tech company that is subject to more stringent liability in regulatory frameworks. News Corp Australia is of the view that this is worth further consideration.¹³⁰

3.5 Preliminary recommendation 7: Introduction of a mandatory take-down standard

ACCC Preliminary Recommendation 7

The ACCC proposes to recommend that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright infringing content to enable effective and timely take-down of copyright-infringing content. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital platforms under Part 6 of the Telecommunications Act.

News Corp Australia does not believe the proposal addresses the root of the problem – that the law regarding the authorisation liability of digital platforms for copyright infringement is unclear and requires legislative amendment to clarify that liability. Without authorisation reform, News Corp Australia is of the view that this proposal is not sufficient to address the underlying issues.

News Corp Australia considers that the ACCC should not recommend the development of a Mandatory Standard regarding digital platforms' take-down procedures and should instead recommend that the authorisation liability provisions of the *Copyright Act 1968* (Cth) (**Copyright Act**) be amended to make it crystal clear that digital platforms are liable for infringing content on their platforms.

(a) Extending authorisation liability of online service providers for copyright infringement

¹²⁷ Preliminary Report, page 129.

¹²⁸ See Bertin Martens, Luis Aguiar, Estrella Gomez-Herrera and Frank Mueller-Langer, The digital transformation of news media and the rise of disinformation and fake news, European Commission Joint Research Centre Digital Economy Working Paper 2018-02, April 2018, page 50 <<https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>>; House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Interim Report, 24 July 2018, page 66 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmumed/363/363.pdf>>.

¹²⁹ House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Interim Report, 24 July 2018, page 66 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmumed/363/363.pdf>>.

¹³⁰ House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Interim Report, 24 July 2018, page 66 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmumed/363/363.pdf>>.

The ACCC should recommend amending the authorisation provisions under the Copyright Act to clarify that digital platforms will be held liable for authorising copyright infringement where they are on notice of infringing conduct and fail to take efficient and effective steps to discourage or reduce that conduct. As the authorisation provisions of the *Copyright Act* currently stand, there is a lack of incentive for digital platforms to take steps to prevent infringing behaviour on their platforms, and a lack of incentive to cooperate with copyright owners – because there is no explicit liability for failing to do so.

Sections 36 and 101 of the Copyright Act¹³¹ provide the circumstances in which a person may be liable for authorising an act of copyright infringement (**Authorisation Provisions**). The Authorisation Provisions are 'technology neutral' and do not limit the type of conduct that could be captured. The Authorisation Provisions provide that a court must take certain factors into account in determining whether a person has authorised an act of copyright infringement, including the extent of the person's power to prevent the doing of the act and whether the person took any reasonable steps to prevent or avoid the doing of the act.

In *Roadshow Films Pty Ltd & Ors v iiNet Ltd*,¹³² (**iiNet**) the High Court determined that the ISP iiNet was not liable under the Authorisation Provisions for the infringing acts of its subscribers using the file-sharing website BitTorrent. The majority of the Court considered that iiNet was not liable because iiNet's power to prevent the user's primary act of copyright infringement was limited to an indirect power to terminate the contractual relationship between them.¹³³ In making that conclusion, the High Court remarked that 'the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system'.¹³⁴ That statement applies equally to digital platforms.

In 2014, in the wake of *iiNet*, the Attorney-General's Department issued a discussion paper on online copyright infringement (**Copyright Discussion Paper**)¹³⁵ that canvassed a proposal to amend the Authorisation Provisions so that the 'power to prevent' an act of infringement would no longer be a separate element, but only one of a number of factors in determining whether 'reasonable steps' had been taken to prevent or avoid the infringement. The proposed amendments were intended to clarify that the absence of a direct power to prevent primary infringing conduct (as was the case in *iiNet*) does not preclude an ISP from taking reasonable steps to prevent or avoid an infringing act.

To date, the Government has not pursued that proposal or any of the alternative proposals put forward in response to the Copyright Discussion Paper. In our view, the ACCC should recommend the Government re-engage on this issue for legislative amendment, which should include a review of the authorisation provisions so as to clarify the circumstances in which digital platforms will be held liable for the infringing acts of their users.

Content-sharing platforms like YouTube and Facebook that are rife with unauthorised copyright material are currently doing very little to prevent this activity. The sharing of copyright material often attracts

¹³¹ *Copyright Act 1968* (Cth), sections 36(1), 101(1).

¹³² (2012) 286 ALR 466.

¹³³ At para 78.

¹³⁴ At para 79.

¹³⁵ Attorney-General's Department, Online Copyright Infringement Discussion Paper, July 2014 <<http://apo.org.au/system/files/40630/apo-nid40630-71931.pdf>>.

significant user views and presents a valuable opportunity for these sites to collect data, sell ads and keep users engaged with the platform.

Unless digital platforms are at risk of copyright infringement for displaying infringing content on their platforms, there will be no incentive on them to implement efficient and effective technological solutions – fit for the digital age and not anchored in an analogue era – to pro-actively deal with infringing content hosted on their platforms.

Amending the Authorisation Provisions to clarify the legal liability of digital platforms for the conduct of their users would incentivise digital platforms to ensure that unauthorised news and other content – such as live and non-live sports events and programmes and content – is not distributed on digital platforms. Consumers would also benefit from knowing that the content they receive has been lawfully distributed.

(b) Opposing new take down procedures

We consider that the introduction of a take-down standard under the *Telecommunications Act 1997* (Cth) will impact on the current systems and actions of the digital platforms in removing infringing content on their sites. We respectfully disagree with the views of the digital platforms' regarding the performance of their systems and processes. They are not fit-for-purpose in the digital age. The current state, and continuation of such in the absence of legislative clarity, is suboptimal and unpalatable. The continuation of the current state will continue to undermine content creation in Australia.

The ACCC has noted in its Preliminary Report that 'enforcement difficulties create detriments for rights holders because they lower the incentives for digital platforms to respond promptly to take-down requests and erode the value of their copyrighted content'. News Corp Australia considers that enforcement is not the key issue. As noted above, the real issue is that the lack of clarity in the law on authorisation liability provides little incentive to digital platforms to address the acts of copyright infringement they facilitate – efficiently and effectively.

The ACCC has also noted that 'digital platforms are likely to have more power than ISPs to identify and prevent the infringing behaviour of their user'. News Corp Australia agrees, however, believes that amending the authorisation provisions of the Copyright Act would provide the necessary incentive for digital platforms to actively undertake efficient and effective risk mitigation measures to avoid copyright infringement.

3.6 Preliminary recommendation 8: Amendments to the Privacy Act relating to use and collection of personal information

ACCC Preliminary Recommendation 8

The ACCC proposes to recommend the following amendments to the Privacy Act to better enable consumers to make informed decisions in relation to, and have greater control over, privacy and the collection of personal information. In particular, recommendations (a) and (b) are aimed at reducing information asymmetries to improve the transparency of digital platforms' data practices.

Recommendations (c) and (d) seek to provide consumers with stronger mandated controls over the collection, use, disclosure and erasure of their personal information to lessen the bargaining power

imbalance between consumers and digital platforms. Recommendations (e) to (g) are measures to increase the deterrence effect of the Privacy Act.

- a) Strengthen notification requirements: Introduce an express requirement that the collection of consumers' personal information directly or by a third party is accompanied by a notification of this collection that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge.
- b) Introduce an independent third-party certification scheme: Require certain businesses, which meet identified objective thresholds regarding the collection of Australian consumers' personal information, to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations through the use of a privacy seal or mark. The parties carrying out such audits would first be certified by the OAIC.
- c) Strengthen consent requirements: Amend the definition of consent to require express, opt-in consent and incorporate requirements into the APPs that consent must be adequately informed (including about the consequences of providing consent), voluntarily given, current and specific. This means that settings that enable data collection must be pre-selected to 'off'. The consent must also be given by an individual or an individual's guardian who has the capacity to understand and communicate their consent.
- d) Enable the erasure of personal information: Enable consumers to require erasure of their personal information where they have withdrawn their consent and the personal information is no longer necessary to provide the consumer with a service.
- e) Increase the penalties for breach: Increase the penalties for breaches of the Privacy Act to at least mirror the increased penalties for breaches of the ACL.
- f) Introduce direct rights of action for individuals: Give individual consumers a direct right to bring actions for breach of their privacy under the Privacy Act.
- g) Expand resourcing for the OAIC to support further enforcement activities: Provide increased resources to equip the OAIC to deal with increasing volume, significance, and complexity of privacy-related complaints.

While News Corp Australia agrees that the rise of digital platforms has created unique privacy concerns for consumers, News Corp Australia believes (as discussed in the introduction to this submission) that the terms of reference for this Inquiry mean that the focus be on competition issues facing media and advertising markets. As such, News Corp Australia considers that recommendations relating to Australian privacy law (including this recommendation, as well as recommendations 9 and 10) are not strictly within the scope of the terms of reference. News Corp Australia is concerned that a focus on these recommendations could shift attention away from reforms that could more effectively address the competitive harms perpetuated by digital platforms.

News Corp Australia notes that the ACCC is proposing that the *Privacy Act 1988* (Cth) (**Privacy Act**) be amended by strengthening its notification and consent requirements, introducing a third-party certification scheme, enabling the erasure of personal information, increasing penalties, introducing direct rights of action for individuals, and expanding the resourcing of the Office of the Australian Information Commissioner (**OAIC**). It appears that the ACCC envisages these reforms applying economy-

wide (not just to digital platforms), with the reforms being complemented by a privacy code applying to digital platforms only.¹³⁶

As a general comment, News Corp Australia agrees that privacy regulation in Australia should be periodically assessed to ensure it remains appropriate in light of the constant evolution of the digital economy and consumer expectations. However, News Corp Australia believes that to the extent privacy reforms are considered in this Inquiry, the focus should be on regulating digital platforms' unique data handling practices, rather than seeking to impose broad-ranging reforms that would apply to all entities economy-wide. This is for two main reasons. Firstly, the privacy-related consumer harms identified by the ACCC *directly relate* to the data handling practices of digital platforms, rather than the practices of publishers or other entities. Secondly, the collection and use of consumer data in ways that are inconsistent with consumer expectations is an issue that is far more pronounced in relation to digital platforms, as opposed to publishers or other entities more generally.

(a) Privacy-related consumer harms are directly related to the data handling practices of digital platforms

News Corp Australia notes that the privacy-related consumer harms identified by the ACCC and outlined in the Preliminary Report *directly relate* to the data practices of digital platforms, and, in particular, how digital platforms are able to exploit their substantial market power to maintain such data practices. In light of this, News Corp Australia's view is that these privacy-related consumer harms would be best addressed by privacy reforms specific to digital platforms and their particular data practices (as contemplated by preliminary recommendation 9), rather than through the introduction of sweeping reforms that apply economy-wide.

News Corp Australia notes the Preliminary Report's findings of the privacy-related harms caused by digital platforms, in particular:

- the 'information asymmetries' between digital platforms and consumers mean that most consumers are unaware of the extent to which digital platforms are harvesting data about them (for example, many consumers are unaware that digital platforms collect information about them that goes far beyond the information those consumers actively provide);¹³⁷ and
- consumers are often effectively forced to consent to problematic data handling practices (even where consumers may be aware of, yet uncomfortable with, such practices) given that:
 - interacting with digital platforms is becoming an increasingly important part of life, and community engagement, for many consumers;¹³⁸ and
 - despite this, consumers genuinely lack choice when it comes to selecting providers of digital platforms' services.¹³⁹

News Corp Australia further notes the Preliminary Report's findings that:

¹³⁶ Preliminary Report, page 234

¹³⁷ Preliminary Report, pages 7, 164, 174

¹³⁸ Preliminary Report, page 224

¹³⁹ Preliminary Report, page 213

- the existing regulatory framework does not effectively deter the data practices of digital platforms that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers,¹⁴⁰ and
- the substantial market power of digital platforms thwarts the rise of genuine competitors, which could be preventing the kind of innovation that could potentially result in digital platforms finding ways to continue to extract value from consumers' data, but in a way that is more respectful of individual privacy and more in line with consumer expectations.¹⁴¹

In light of the above, News Corp Australia's view is that the specific Privacy Act reforms referred to in preliminary recommendation 8 would be best implemented as reforms applying specifically to digital platforms (for example, by incorporating such reforms into the proposed code of practice for digital platforms proposed by preliminary recommendation 9).

(b) The handling of consumer data in ways that are inconsistent with consumer expectations is an issue that is more pronounced in relation to digital platforms

News Corp Australia notes that the disconnect between consumer expectations and the way consumer data is often handled is an issue that is more pronounced in relation to digital platforms, rather than publishers or other entities.

Publishers collect and handle consumer data via the operation of their websites and applications. In these circumstances, individual consumers engage directly, and deliberately, with publishers to access the publishers' content. Publishers collect and use consumer data for the purposes of delivering the relevant content, and for secondary purposes, such as targeted advertising purposes. However, the direct relationship between the consumer and the publisher, and the fact that the consumer has actively chosen to engage with that particular publisher, means that the publisher is accountable to the consumer, and able to ensure that its use of consumer data is in line with consumer expectations (including in the ways required by the Privacy Act).

Digital platforms, on the other hand, often act as ad tech intermediaries. Through the sale of advertising on publishers' websites and applications, they are able to take advantage of the publishers' direct relationships with consumers, by:

- harvesting vast amounts of consumer data via publishers' websites and applications; and
- using such data for their own secondary purposes, including to generate deep user profiles for the purposes of furthering their business interests.

News Corp Australia's view is that, in contrast to the collection and use of consumer data by publishers, many consumers *do not* expect the collection and use of their data by digital platforms in these circumstances, and may not even be aware that digital platforms are collecting their information at all.

In light of this, News Corp Australia's view is that the proposals in preliminary recommendation 8, particularly the proposals to strengthen the notification and consent requirements in the Privacy Act, would be more appropriately applied to digital platforms than to publishers and other entities.

¹⁴⁰ Preliminary Report, page 164

¹⁴¹ Preliminary Report, page 217

Please see section 3.7 below for our further comments regarding implementing privacy reforms that are specific to digital platforms.

3.7 Preliminary recommendation 9: OAIC Code of Practice for digital platforms

ACCC Preliminary Recommendation 9

The ACCC proposes to recommend that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part IIIB of the Privacy Act to provide Australians with greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. A code would allow for proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act.

The code of practice should contain specific obligations on how digital platforms must inform consumers and how to obtain consumers' informed consent, as well as appropriate consumer controls over digital platforms' data practices. The ACCC should also be involved in the process for developing this code in its role as the competition and consumer regulator.

As mentioned above, News Corp Australia's view is that the focus of this Inquiry should be on competition issues facing media and advertising markets, and that the recommendations relating to Australian privacy law are not strictly within scope.

However, News Corp Australia does not oppose the ACCC's proposal to work with key digital platforms operating in Australia to develop and introduce an enforceable code of practice applicable to digital platforms.

Preliminary recommendation 8 above sets out News Corp Australia's views in relation to this issue. In particular, News Corp Australia:

- notes the ACCC's findings regarding the considerable privacy-related harms being caused to consumers by digital platforms; and
- points out that the handling of consumer data in ways that are inconsistent with consumer expectations is an issue that is more pronounced in relation to digital platforms, rather than publishers or other entities.

As such, News Corp Australia suggests that these privacy-related harms would be best addressed by additional regulatory oversight applying to digital platforms, in particular through the introduction of a privacy code of practice for digital platforms.

However, News Corp Australia would like to point out that any privacy code of practice for digital platforms will need careful consideration to ensure that it does not perpetuate the competitive imbalances that digital platforms currently enjoy. As an example, News Corp Australia notes that the proposed requirement for digital platforms to obtain express consent in order to collect consumer data would be unlikely to have a material impact on the larger digital platforms, since:

- such entities would be likely to push the responsibility for obtaining consent onto site publishers (as we have seen in Europe with the introduction of the Global Data Protection Regulation);

- in some circumstances, browser activity data collected by large digital platforms may not be subject to privacy regulation at all if it is collected on an anonymous basis and not linked, or capable of being linked, to specific individual accounts; and
- it is likely that the large digital platforms will still be able to take advantage of their unrivalled market power, and the lack of viable alternatives for the services they provide, to effectively force consumers to consent to problematic data handling practices.

Further, the introduction of a requirement to obtain express consent is far more likely to have a significant impact on smaller digital platforms, which in turn could further entrench the significant market power of the large digital platforms, by discouraging entities from attempting to compete.

In light of this, News Corp Australia reiterates its position that these privacy-related reforms are unlikely to address the underlying competition issues facing media and advertising markets, which are the focus of this Inquiry. News Corp Australia suggests that attention be focussed on reforms that could more effectively address the competitive harms perpetuated by digital platforms.

3.8 Preliminary recommendation 10: Introduction of a statutory tort for serious invasions of privacy

ACCC Preliminary Recommendation 10

The ACCC proposes to recommend that the Government adopt the ALRC's recommendation to introduce a statutory cause of action for serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

As mentioned above, News Corp Australia believes that the focus of the Preliminary Report should be on the competition issues facing media and advertising markets. News Corp Australia's view is that the Inquiry is not the right forum for the consideration of broad-ranging reforms that go beyond the specific issues raised by the rise of digital platforms (as these questions warrant economy-wide stakeholder engagement).

In any case, News Corp Australia is strongly opposed to the introduction of a statutory cause of action for serious invasions of privacy. As we have submitted to previous inquiries on this matter, including to the Australian Law Reform Commission's (**ALRC**) *Serious Invasions of Privacy in the Digital Era* Inquiry, News Corp Australia's view is that no case has been made for a proposed new statutory tort.

The Preliminary Report recommends a statutory tort as recommended by the ALRC be introduced to offer individuals an 'additional way of seeking redress for poor data practices by digital platforms', stating that it will deter poor data practices. However, the ALRC in the *Serious Invasions of Privacy in the Digital Era* Inquiry was not directed to examine whether a cause of action will improve data handling practices, nor was the ALRC tasked with examining digital platforms. We also note that the ALRC's recommendation was made almost five years ago, and as such does not take into account the way the digital economy and regulatory landscape has evolved during that time.

As stated in previous inquiries and consultations, News Corp Australia considers a cause of action a disproportional response to an ill-defined problem, which not only lacks evidentiary support but also threatens freedom of speech and communication and, if enacted, would have unintended and burdensome consequences.

News Corp Australia emphasises the same points made in its previous ALRC submission:

- there is no evidence of a problem, so a cause of action is a disproportional response;
- creating policy where there is no evidence, particularly where there is evidence to the contrary, is not best practice policy making;
- existing protections are adequate (eg, harassment);
- a cause of action threatens freedom of speech (which is particularly important given that Australia does not have a legal right to free speech such as exists in many overseas jurisdictions);
- a cause of action will have unintended consequences; and
- people's expectations of privacy are changing. For example, people are more willing to share their private lives and personal information in the digital age.

The likelihood of such a tort negatively impacting free speech has implications for journalism. For example, it is highly likely that it would be used to stop reporting which is in the public interest, and which may later be proven to be true. This gives rise to the unintended consequence of a less informed community. This effect is the direct opposite of what the terms of reference seek to achieve – that is, investigating behaviour of digital platforms that has anticompetitive and harmful impact on news, media and journalism.

3.9 Preliminary recommendation 11: Illegal unfair contract terms

ACCC Preliminary Recommendation 11

The ACCC proposes to recommend that unfair contract terms should be illegal (not just voidable) under the ACL, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies.

News Corp Australia submits that recommending broad reform to the unfair contracts regime is not directly addressing the terms of reference of the Digital Platforms Inquiry, which are focused on the impact of digital platforms on the supply of news and journalistic content. Reforming the unfair contracts regime would have economy-wide impacts, affecting all consumer contracts and small business contracts across Australia. Reform of this nature requires broad stakeholder engagement and impact assessment beyond the scope of the Digital Platforms Inquiry.

News Corp Australia notes that Treasury is already conducting a review into the recent extension of the unfair contracts regime to small businesses.¹⁴² As part of this review, the effectiveness of the current framework will be considered. Introducing civil penalties to the unfair contracts regime is more appropriately considered as part of that review process, rather than the Digital Platforms Inquiry.

In any event, News Corp Australia does not believe that the unfair contracts regime should be amended to include civil pecuniary penalties. Applying civil pecuniary penalties to the unfair contracts regime is problematic for two reasons:

¹⁴² Australian Treasury, Review of Unfair Contract Term Protections for Small Businesses, Discussion Paper, November 2018 <https://consult.treasury.gov.au/market-and-competition-policy-division-internal/c2018-t342379/supporting_documents/Discussion_Paper_Review_of_UCTs%20%20Final.pdf>.

- First, the concept of 'unfair' is inherently uncertain, being both subjective and contextual. Whether a term is 'unfair' is determined case-by-case, taking into account the contract as a whole and its context. The court must make a subjective judgement as to whether the term is legitimate commercial conduct or 'unfair', and a particular term may be deemed unfair in certain contexts but not others. Against this background of uncertainty, it is not appropriate for pecuniary penalties to attach to unfair contract terms.
- Second, the remedies currently available provide adequate protections against unfair contract terms. Where a court deems a term unfair, it is considered void and cannot be relied upon or enforced. Where a consumer suffers loss as a result of an unfair term, they can seek compensation or the ACCC can seek compensation on their behalf. In some cases, an unfair contract term may also be false or misleading, or reliance on an unfair term may amount to unconscionable conduct; in these cases, pecuniary penalties can already be sought.

The Australian Consumer Law Review recently considered the operation of the unfair contracts regime.¹⁴³ It made a number of recommendations, including expanding the investigatory powers of regulators when investigating potentially unfair terms. This was accepted and incorporated into the ACL in October 2018.¹⁴⁴ Notably, the review considered whether the ACCC should have the power to seek monetary penalties against businesses in breach of unfair contract term provisions but deemed this unnecessary in the final report.¹⁴⁵

¹⁴³ Australian Consumer Law Review, Australian Consumer Law Review Final Report, March 2017, page 52 ff <https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf>.

¹⁴⁴ *Treasury Laws Amendment (ACL Review) Act 2018* (Cth).

¹⁴⁵ See consideration of this proposal in the interim report: Australian Consumer Law Review, Australian Consumer Law Review Interim Report, October 2016, page 127 ff <<https://cdn.tspace.gov.au/uploads/sites/86/2016/12/ACL-Review-Interim-Report.pdf>>.

4 Areas for Further Analysis and Assessment

The ACCC has identified nine areas for further analysis and assessment. News Corp Australia provides its responses to those areas earmarked for further review below.

4.1 Supporting choice and quality of news and journalism

Area for Further Analysis and Assessment – Improving the ability of consumers to make informed choices about news and journalism accessed via digital platforms

The ACCC is considering whether digital platforms and media businesses should be required to take steps to increase the ability of consumers to make informed choices about news and journalism accessed via digital platforms. This proposal would not interfere with how the algorithms select and display news and journalism, the news stories which consumers may choose to access (consumer choice) or press freedom. Elements of an approach the ACCC is considering would include:

- (a) Digital platforms would be required to signal, in their display of content to consumers, content from news media businesses that have signed up to certain standards for the creation of news and journalist content by complying with recognised codes of journalistic practice. This signalling could be by way of a 'badge' on the news content as it appears in search results or a user's news feed.
- (b) The ACMA would recognise codes of journalistic practice from news media representative groups that contain principles and processes, including but not limited to accuracy (fact-checking), clarity, and avoidance of harm.
- (c) Digital platforms would be required to inform consumers about their accountability system and to better inform consumers about how their news and journalistic content is curated and displayed to them.
- (d) The obligations on digital platforms to take these steps, could be contained in separate ACMA approved code(s) submitted by the digital platforms, or be mandated by the ACMA.

The ACCC acknowledges that the growth of digital platforms has led to the atomisation of news and a level of disconnect between news content and its source creating potential for consumers to be exposed to filter bubbles, echo chambers and/or unreliable information. The ACCC proposes:

- a) to require digital platforms to signal content from sources which have signed up to certain standards for the creation of news and journalistic content by way of a 'badge' in the search results or news feed;
- b) for ACMA to recognise codes of journalistic practice; and
- c) to require digital platforms to inform consumers about how news and journalistic content is curated and displayed (eg, via a badge) monitored by ACMA.

News Corp Australia does not support a number of aspects of these proposals. More importantly, we note that the digital platforms could already 'signal' or 'badge' content by media companies that abide by registered codes of practice or are members of the Australian Press Council. In particular:

- regarding (a), signalling via a badge: News Corp Australia is not opposed to imposing this requirement on digital platforms, but does not support the additional burden, direct or indirect, regulatory or otherwise, that would fall on news media organisations to achieve this outcome;

- regarding (b), ACMA recognition of codes of conduct: News Corp Australia does not support Government oversight of news media organisations, including any suggestion that the ACMA or any other government body ‘recognise’ the Australian Press Council and its general principles and standards; and
- regarding (c), requiring digital platforms to inform consumers: News Corp Australia does not oppose requiring digital platforms to increase transparency to consumers about the curation and display of news and journalistic content, but does note that digital platforms could already do this.

Further, News Corp Australia considers that the proper acknowledgement of provenance and originality in content discoverable through online platforms must be improved. These concerns could be dealt with through the regulatory and algorithm oversight authority envisaged in preliminary recommendations 4 and 5. As discussed in section 3.3 of this submission, regulatory oversight should include oversight of digital platforms' algorithms, which should be required to give consideration and weight to the provenance of a story when ranking and displaying results. Where algorithms favour the original source of a story, not only are publishers incentivised to make investment in original content, but consumers are able to make a value judgement in relation to quality because news is curated and presented in a way that is competitive and fair. This judgement as to quality is subjective, and may differ between consumers; therefore, it is crucial that algorithms operate in a way that allows consumers to make this decision in an informed manner. We acknowledge the ACCC's concern with respect to the ability of algorithms to account for provenance and originality; however, as explained in section 3.3, evidence suggests that Google's algorithms are capable of making a judgment as to the provenance of news content.

4.2 Improve news literacy online and improving the ability of news media businesses to fund news and journalism

Area for further analysis and assessment – Improving digital media literacy

The ACCC considers there is a need to improve the media literacy of all Australians and is considering how this might best be done. We are focusing analysis and assessment on ways to raise understanding of how news and journalism is curated and displayed on social media and other platforms, and awareness of the presence of mal-information, dis-information and mis-information in media content accessed through both online and traditional means.

Area for further analysis and assessment – Improving the ability of news media businesses to fund the production of news and journalism

The ACCC is continuing to consider approaches to improve the ability of news media businesses to fund the production of quality news and journalism. The ACCC has identified three potential options on which it would like feedback:

- (a) A review of the impacts of the measures comprising the Regional and Small Publishers' Jobs and Innovation Package in 2018–19 to determine whether the Package should be continued beyond its current three year funding profile (and potentially modified or expanded).

- (b) Tax offsets for the costs incurred by news media organisations to produce particular types of journalism that have high public benefits and are at risk of under-production. The ACCC recognises the difficulties in determining the scope of such a subsidy and the risk of misappropriation or fraud.
- (c) Making personal subscriptions for publications by media businesses that are signatories to an approved ACMA code of practice as set out in the potential proposal described above, tax deductible to encourage production and consumption of news and journalism.

News Corp Australia does not oppose measures to increase the online news literacy of consumers, or the options put forward in the Preliminary Report for improving the ability of news media businesses to fund news and journalism through funding and tax offsets.

However, News Corp Australia does not consider that such measures are likely to have a significant impact on the underlying issues identified in the Preliminary Report. The market power wielded by digital platforms like Google and Facebook is a structural market problem that is unlikely to be addressed through measures like education and funding alone.

Both consumers and publishers will benefit most from measures that prevent digital platforms engaging in anticompetitive conduct in the long term. For consumers, education shifts the burden to them rather than holding digital platforms accountable for their conduct. Instead, consumers would benefit far more from measures that require digital platforms to take into account provenance when ranking and displaying news content, so they can make an informed judgment as to the news they value and wish to view (as discussed above at 4.1).

For publishers, however, as with increasing consumers' news literacy, these measures cannot and do not address the underlying competition issues that facilitate anticompetitive conduct by large digital platforms, which harm publishers' ability to monetise content and invest in original content. For example, Google's algorithm gives preference to stories that it can find multiple sources for. When the New York Times broke the story of Donald Trump's involvement in suspect tax schemes, the story was not originally surfaced by Google because it was not reported by other sources.¹⁴⁶ This discourages news outlets from investing in 'breaking' news stories. Greater oversight of digital platforms' algorithms and structural remedies (such as the regulatory oversight proposed at 3.3, and measures proposed in News Corp Australia's Remedies Paper) are necessary to empower publishers to sustainably fund, and grow, news and journalism.

4.3 Digital platforms ombudsman

Area for Further Analysis and Assessment – A digital platforms ombudsman

The ACCC is giving consideration to whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms.

For example, an ombudsman may have the power to resolve some or all of the following:

- (a) disputes from businesses that consider digital platforms' representations about the performance or likely performance of purchased advertising to be inaccurate or unsubstantiated

¹⁴⁶ UK Cairncross Review, p29.

- (b) disputes from consumers relating to scams and the removal of such content
- (c) disputes from media companies relating to the surfacing and ranking of news content
- (d) disputes from businesses relating to false or misleading advertising.

An ombudsman could investigate complaints that are unable to be resolved by the internal dispute resolution mechanisms of digital platforms and make decisions that are binding on digital platforms. Terms of reference could set out the types of disputes the ombudsman can consider, how the ombudsman will resolve disputes, and remedies the ombudsman can recommend or implement.

As noted below, the ACCC considers that an ombudsman could have a role in resolving issues about the removal of content associated with scams. The ACCC does not intend for any of the functions to duplicate those proposed elsewhere for a regulatory authority.

The Preliminary Report proposes the establishment of an ombudsman to hear disputes between digital platforms and users, advertisers, media companies and other businesses.¹⁴⁷

Without further information about how this would operate and the scope of the ombudsman's powers, it is difficult to see how this proposal could assist consumers (and other stakeholders), particularly in light of existing bodies that already have the potential to address the types of disputes discussed in the Preliminary Report. For example, the ACCC can already receive complaints (and initiate proceedings) in relation to misleading and deceptive conduct and unfair contract terms; the Small Business Ombudsman can hear complaints from small businesses relating to terms and conditions.

Rather than creating a new authority to deal with complaints, News Corp Australia is of the view that it would be more efficient and effective to equip the ACCC with the skills and knowledge to deal with such disputes. This could be carried out by a specialised unit within the ACCC, not unlike the recently established Financial Services Unit. Placing this role with the ACCC (rather than a new body) has a number of advantages: the ACCC already has detailed knowledge and skills relating to anticompetitive conduct and markets generally; the ACCC has a broad range of existing investigatory and enforcement powers; and it would complement the ACCC's regulatory oversight role in relation to digital platforms as discussed above in section 3.3.

4.4 Monitoring of intermediary pricing

Area for Further Analysis and Assessment – Monitoring of intermediary pricing

The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising. To achieve this, businesses offering these services earning revenue exceeding a certain threshold (e.g. revenue in Australia greater than AUD 5 million) could be required to provide a regulatory authority with details on:

- (a) the median price charged for each product offered
- (b) an explanation of how that price is determined
- (c) the revenue received for supplying each product or service
- (d) any discounts, rebates or other incentives offered to customers.

¹⁴⁷ Preliminary Report, page 88.

This information should be provided at least once a year, or as required by the regulatory authority. The regulatory authority could be required to report publicly on this information.

As noted above at 2.2(c), News Corp Australia considers the lack of transparency that surrounds the determination of pricing by digital advertising intermediaries to be a serious issue warranting further investigation, and therefore supports regulatory oversight of intermediary pricing (including both the absolute pricing of intermediary services, and the way in which those prices are determined). This role should fall within the ambit of the regulatory oversight discussed at 3.3; for example, the regulator could require platforms with market power to undergo external verification of auction systems at regular specified intervals.

4.5 Third party measurement of advertisements served on digital platforms

Area for Further Analysis and Assessment – Third party measurement of advertisements served on digital platforms

The ACCC is considering whether there is an ability for advertisers to verify whether advertisements on Google and Facebook are delivered to their intended audience and whether there may be instances where the performance of digital advertising is overstated; or advertisers are misled into thinking more consumers viewed their ads than actually did. The ACCC is examining the extent to which the current level of third party measurement overcomes these problems. The ACCC is seeking further feedback on the effectiveness of current mechanisms for verifying whether advertisements are served to their intended audience. If current mechanisms are not sufficient, the ACCC would be assisted by feedback and suggestions for mechanisms that are needed to address this issue.

As also noted above at 2.2(d), News Corp Australia agrees with the Preliminary Report's finding that advertisers are unable to verify the delivery and performance of advertisements delivered through Google and Facebook's services.¹⁴⁸ This includes conduct that may involve the misreporting of advertisement performance or potential performance; employing reporting standards that overinflate performance metrics; and 'ad fraud' where advertisements are viewed by bots rather than people.

This warrants a greater degree of transparency and scrutiny. One possibility would be to extend the regulatory oversight relating to digital advertising proposed in preliminary recommendation 4 (above at 3.3) to measurement of advertisements. The regulator could require the platforms provide audience data for specific ads or specific ad campaigns over a specific period, which would then be subject to external verification. Where verification indicates discrepancies in actual and reported advertisement performance, the regulator could be empowered to investigate and the pursue enforcement remedies (for example, the ACCC could pursue proceedings under section 46 of the CCA).

4.6 Deletion of user data

Area for further analysis and assessment – Deletion of user data

Due to the dynamic nature of data collection and use, what a digital platform or a third party can do with user data may change dramatically following on from a consumer consenting to the data collection in exchange for use of the services. In effect, this means the consumer does not necessarily know the cost of these services, as future use of the data has not been factored into the non-monetary price.

¹⁴⁸ Preliminary Report, page 77.

Consideration may therefore need to be given to whether an explicit obligation to delete all user data should be in place when a user ceases to use the services and/or whether data should automatically be deleted after a set period of time. This obligation would seek to go further than preliminary recommendation 8(d) as it would not require a user to actively request the deletion of the data and would prevent open ended retention of data.

ACCC invites views on the feasibility of such an obligation, and the appropriate timeframe for such deletion.

News Corp Australia does not support the introduction of a requirement for digital platforms to delete all user data associated with a consumer once that user ceases to use the digital platform's services, whether or not the user has actively requested such deletion.

This is because News Corp Australia expects that the introduction of a privacy code applying to digital platforms only, which requires digital platforms to delete a user's data on request (as opposed to a requirement to delete all user data upon the termination of the user's relationship with the digital platform, whether or not the user has requested this deletion), would be a better way to address the ACCC's concerns regarding the lack of meaningful consent provided by consumers to digital platforms' data practices. Introducing a privacy code for digital platforms that includes a requirement to delete a user's data on request removes the possibility of a broad interpretation of when someone 'ceases' to use a digital platform's services, which would in turn bypass the need to delete the data.

4.7 Opt-in targeted advertising

Area for further analysis and assessment – Opt-in targeted advertising

An alternative way of strengthening consumer consents specifically in relation to the use of their personal information for targeted advertising purposes is to make legislative amendments that prohibit entities from collecting, using, or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in consent.

Under such a proposal, consumers receiving advertising-funded services (including via a social media platform or search engine) could still be required by the platform to consent to view advertisements, but the user must not be required to consent to view targeted advertisements based on their user data or personal information in order to use the platform. This differs from the proposed amendment above in that it would not be limited to the Privacy Act and APP entities and would focus narrowly on the use of personal information for targeted advertising purposes.

Such an amendment could significantly decrease the bargaining power imbalance between consumers and digital platforms and other firms undertaking similar activities in relation to the use of personal information for targeted advertising purposes and the disclosure of personal information to third parties for targeted advertising purposes, both of which are areas of particular concern for consumers (as discussed in sections 4.3 and 4.4). Providing consumers with a high-privacy default that they may alter according to their preferences may also incentivise digital platforms to better inform consumers in relation to how their data is collected, used, and disclosed for targeted advertising, thereby decreasing the information asymmetry.

The ACCC recognises that such a step could have significant impacts on the businesses in the advertising services markets. The ACCC invites stakeholder feedback on this proposal.

As mentioned above, News Corp Australia is of the view that the focus of this Inquiry should be on the competition issues facing media and advertising markets, and is concerned that privacy-related inquiries may distract from this. However, to the extent that privacy concerns are considered, News Corp Australia notes that the particular privacy concerns noted by the ACCC in the Preliminary Report are specific to digital platforms, and therefore considers that these privacy concerns would be best dealt with by enhanced privacy regulation of digital platforms, rather than any broad-ranging reforms that would apply economy-wide with unknown impact. Refer to the comments in section 3.6 above in relation to preliminary recommendation 8, where News Corp Australia's comments regarding these concerns are set out more completely.

Section 3.6 above also sets out News Corp Australia's views that the handling of consumer data in ways that are inconsistent with consumer expectations is an issue that is more pronounced in relation to digital platforms, rather than publishers or other entities. In particular, News Corp Australia notes that the circumstances regarding the collection and use of consumer data by publishers, on the one hand, and digital platforms, on the other hand, is very different.

Publishers generally collect and use consumer data in circumstances where the relevant individuals have directly and purposefully engaged with such publishers to access news content. This direct relationship allows publishers to ensure that the ways in which the consumer data is handled (including for the purposes of targeted advertising) is in line with consumer expectations (including in the ways required by the Privacy Act). Digital platforms, on the other hand:

- collect consumer data indirectly (via publishers' websites and applications); and
- use such data for unrelated purposes to further their own business interests,

in circumstances where consumers have not chosen to engage with that data collecting digital platform and therefore may well not expect such collection or use.

As such, News Corp Australia's view is that a requirement to obtain express, opt-in consent to targeted advertising should be considered in the context of a privacy code applying to digital platforms only, as part of the consideration of preliminary recommendation 9. This is because it is digital platforms, rather than publishers, that are exploiting the information asymmetries between digital platforms and consumers (outside of a direct customer relationship and almost invisibly to the consumer) to harvest large amounts of consumer data and use it for targeted advertising purposes.

4.8 Prohibition against unfair practices

Area for further analysis and assessment – Prohibition against unfair practices

In its 2017 review of the Australian Consumer Law, Consumer Affairs Australia and New Zealand recommended to governments that exploration be undertaken as to how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices. The Final Report into the ACL Review had found that the value of introducing an unfair trading prohibition was 'uncertain', but stated that exploring an unfair trading prohibition in Australia would be an ongoing priority, in particular, in its capacity to address market-wide or systemic unfair conduct.

The ACCC is considering whether its exposure to issues through this Inquiry support a general prohibition against the use of unfair practices in the ACL to deter digital platforms (and other businesses) from engaging in conduct that consumers are uncomfortable with or that falls short of societal norms but which is not currently captured under the ACL.

The ACCC has suggested one area for further review is exploring how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices (page 17).

News Corp Australia considers that an unfair trading prohibition would be very broad prohibition and have implications far beyond digital platforms alone and would therefore require much broader consultation beyond this Inquiry.

Furthermore, an unfair trading prohibition would not address the specific problems at hand arising from the positions of market power which digital platforms such as Google and Facebook currently enjoy. In News Corp Australia's view, the far more pressing issue is the operation of Google's algorithms within its SERP and within its ad tech functions, since this directly impact the viability of publishing businesses. News Corp Australia would therefore encourage the ACCC to focus its resources and Inquiry efforts on those issues, instead of any others.

5 Conclusion

News Corp Australia welcomes the ACCC's Preliminary Report in the Digital Platforms Inquiry and commends its efforts in grappling with an extremely complex industry and equally complex issues.

News Corp Australia agrees with many of the ACCC's findings, particularly in relation to market power held by Google and Facebook. News Corp Australia strongly supports the findings that Google has substantial market power in supplying online search services, online search advertising, and news media referrals (though, as discussed above at 2.1(a), News Corp Australia submits this market power also extends to supply of online display advertising). Similarly, News Corp Australia also supports the findings that Facebook has substantial market power in supplying online social media services, online display advertising, and news media referrals. The finding that Google and Facebook play a significant role in the advertising supply chain is also important, and News Corp Australia urges the ACCC to consider recommending a separate Inquiry into this complex market.

In terms of the recommendations in the Preliminary Report, News Corp Australia considers that the ACCC should maintain its focus on recommendations which directly address the market power held by digital platforms such as Google and Facebook and those recommendations which aim to deal with the impact of the exercise of that market power on the viability of Australian news and publishing businesses. In this respect, News Corp Australia considers that the most powerful recommendations in the Preliminary Report that the ACCC should take forward is the proposal to establish regulatory oversight for digital platforms and their algorithms. As discussed above, News Corp Australia recommends that these functions be carried out by the ACCC. Given its background, knowledge of the industry and the equivalent monitoring functions it provides in other contexts, the ACCC is the most appropriate body to perform this role. News Corp Australia considers that the ACCC's work would be supported by establishing a subject matter specific expert unit within the ACCC – the Digital Platforms Unit – with additional Government funding, similar to the ACCC's Financial Services Unit. News Corp Australia also sets out additional proposals in its separate remedies paper.

News Corp Australia considers that the other preliminary recommendations and areas for further consideration would not directly address the main issues at play and would draw unnecessarily from the ACCC's and Government's finite resources and distract further the ACCC's investigations from what should remain in focus. However, News Corp Australia encourages the ACCC to consider recommending and conducting a more in depth review into the operation of programmatic advertising in the ad tech space. Given the complicated way programmatic advertising works, it warrants a separate and detailed review to compliment the ACCC's work to date.

News Corp Australia has separately provided to the ACCC a Remedies Paper setting out other possible remedies the ACCC could recommend to Government which directly address the market power occupied by digital platforms underpinning the harm experienced by publishers in Australia. These options – from structural remedies like divestment or structural separation – to algorithm and regulatory oversight – are all available to the ACCC and would provide comprehensive solutions to the concerns identified by the ACCC and publishers alike. News Corp Australia strongly encourages the ACCC to earnestly consider these options as it progresses its Inquiry.

News Corp Australia would welcome the opportunity to provide further information to support the ACCC's ongoing work in this Inquiry.

* * * * *

News Corp Australia

**SUBMISSION TO THE
AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION**

DIGITAL PLATFORMS INQUIRY
REMEDIES PAPER

1 MARCH 2019

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1 Introduction

The Digital Platforms Inquiry Preliminary Report, released by the ACCC on 10 December 2018 (***Preliminary Report***) sets out a number of preliminary recommendations to address the harms associated with the market power held by both Google and Facebook.

The purpose of this document is to set out some additional remedy options that News Corp Australia considers that the ACCC should adopt, or recommend be adopted by the Government, in order to address the harm being caused by digital platforms to the sustainability and, importantly, growth of news and journalism in Australia.

The harms relating to digital platforms' market power in ad tech, online search and digital advertising are explored in detail in News Corp Australia's submissions to the ACCC in April 2018 (***April Submission***), 23 August 2018 (***August Submission***) and 1 March 2019 (***Response to Preliminary Report***) (collectively, ***Submissions***).

This submission is structured as follows:

- **Section 2 (page 4)** summarises why the ACCC should take action now and why the ACCC is well-placed to do so.
- **Section 3 (pages 7 to 17)** examines the particular non-structural remedies that News Corp Australia recommends be adopted, including the following:
 - **(Section 3.1, page 7) prohibiting digital platforms from using publishers' content for traffic generation or data collection without fair compensation:** creating a regime by which digital platforms pay for use of publishers' content; and
 - **(Section 3.2, page 11) imposing limits on digital platforms data:** prohibiting digital platforms from using data from a publisher's site to sell advertising on a third party website, and requiring digital platforms to give a publisher access to data generated from visits to that publisher's sites.
- **Section 4 (pages 14 to 21)** examines the structural remedies that News Corp Australia recommends be adopted, including one of the following:
 - **(Section 4.2, page 16) requiring functional separation and access to data on fair, reasonable and non-discriminatory (FRAND) terms:** requiring the functional separation of each component of Google's ad tech functions, including Google Search, and access to the data Google holds on FRAND terms; and
 - **(Section 4.3, page 17) requiring divestments:** requiring digital platforms to make certain divestments; specifically, that Alphabet Inc, the parent company of Google, should divest Google Search or Google Ad Manager (formerly known as DoubleClick for Publishers and DoubleClick Ad Exchange).

In addition to the remedies set out in this document, News Corp Australia strongly supports the ACCC's proposal for regulatory oversight of digital platforms.¹ Our specific feedback on preliminary

¹ ACCC, Digital Platforms Inquiry Preliminary Report (***Preliminary Report***), December 2018, pages 11-12, <<https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>>.

recommendations 4 and 5 is set out in our Response to the Preliminary Report, which includes a proposed framework for implementing regulatory oversight of digital platforms. As discussed at section 3.3 of our Response to the Preliminary Report, the ACCC should be responsible for ongoing monitoring of digital platforms and managing complaints in relation to their use of algorithms. Our Response to the Preliminary Report also sets out guiding principles that we propose should be adopted in the regulation of digital platforms, including the concept of *burden-shifting* in relation to algorithms that have a prima facie anticompetitive effect.

For each remedy proposed in this submission, we set out an overview of the remedy and how it aims to address the harm caused. We also appreciate that more work needs to be done to refine these recommendations. We would therefore welcome the opportunity to engage further with the ACCC on these proposed remedies.

2 The ACCC is well placed to act and should take action now

As recognised by the ACCC in its Preliminary Report, there is overwhelming evidence that the conduct of digital platforms, particularly Google and Facebook,² is causing irreparable harm to the sustainability of news and journalistic content in Australia. This is highlighted by many of the findings made by the ACCC in its Preliminary Report, including the ACCC's finding that Google and Facebook have substantial market power and that steps need to be taken to remove impediments to compete with these platforms. This conduct warrants enforcement action by the ACCC and, where necessary, legislative change.

Google's market power in online search and ad tech

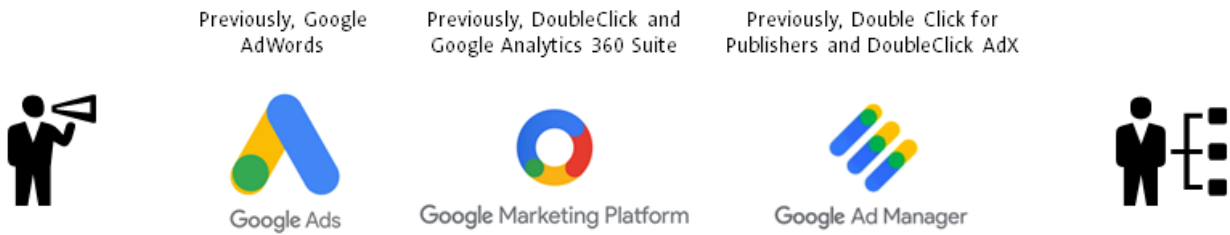
As acknowledged by the ACCC in the Preliminary Report, Google's overwhelming market power in general search (through Google Search) means that it is the most important gateway to the internet for all users, which in turn means that it is the most important place for advertisers seeking to place digital advertisements. The demand for Google's services has a suction effect on publishers on the supply-side. In other words, since most buyers (advertisers) use Google's ad tech services to acquire advertising services, publishers have little choice but to supply advertising inventory via Google's supply-side services. Google also requires, or strongly encourages, advertisers and publishers to use Google's entire range of intermediary ad tech products. The tying and bundling practices of Google in relation to its ad tech stack are set out in further detail in section 6 of our April Submission.

Since advertising represents the vast majority of Google's revenues (around 90 percent³), Google has a strong ability and incentive to favour its ad tech products and leverage its market power in general search for the benefit of its own ad tech functions. As explained in our April Submission and Response to the Preliminary Report, through acquisition and expansion, Google now controls the dominant technologies at every point in the ad tech supply chain, allowing it to dictate the entire trading process (see Figure 2). Market intervention is therefore required to separate the dominant ad tech functions in order to create more choice and thereby restore competition in the supply of digital advertising.

² Although the focus of the ACCC's Preliminary Report is Google and Facebook, News Corp Australia considers that Apple News operates in similar ways such that it also impacts on publishers' abilities to monetise their own content.

³ Eric Rosenberg, the Business of Google, Investopedia, 13 November 2017
<<https://www.investopedia.com/articles/investing/020515/business-google.asp>>.

Figure 1: Google's ad tech stack



In our Submissions, News Corp Australia has provided detailed analysis of the harm digital platforms, particularly Google and Facebook, are causing to our business as a result of their misuse of market power. Other third party submissions to the ACCC's Digital Platforms Inquiry raised similar concerns and encouraged the ACCC to take action. The purpose of this submission is to outline a number of remedy options that News Corp Australia considers the ACCC should either take itself or actively support and recommend to the Government in order to address the harm being caused. This is particularly the case in relation to Google. Google has become an 'unavoidable trading partner' for consumers, media content providers and advertisers alike. Google's intermediation of the relationship between consumers and news publishers has undermined the 'virtuous cycle' that had previously sustained news and journalism. The ACCC's view in the Preliminary Report is that Google has substantial market power in supplying general search services in Australia, and that it is likely to retain this power in the short to medium term.⁴ The report also finds that Google has market power in relation to search advertising. As stated in section 2.1 of our Response to the Preliminary Report, there are compelling reasons for finding that Google also has overwhelming market power, not only in general search and search advertising, but also in display advertising and in the supply of ad tech services. Google's position as 'gatekeeper' via Google Search and its market power in the ad tech stack creates real and serious threats to the ability of publishers such as News Corp Australia to generate sufficient returns in order to viably fund news and journalism. Threatening and undermining the security of funding of news and journalism strikes at the heart of our system of democracy.

Google's impenetrable dominance in relation to its ad tech services, and ability to undermine innovation efforts of all entities irrespective of size, is outlined below in relation to Apple's measure designed to limit the data that Google can access.

Apple's iOS Intelligent Tracking Prevention feature

In 2018, Apple released a new version of its iOS operating system which included an update to the Intelligent Tracking Prevention feature (*ITP*) on its Safari browser. After 24 hours, ITP now deactivates any type of cookie designed to track users across sites. This has the effect of hampering advertisers' ability to collect browsing behaviour data and notionally restricts advertising platforms such as Google from tracking and attributing conversions (ie, when a consumer is directed by an ad to a publisher's site) to the correct advertiser. While ITP would

⁴ Preliminary Report, page 41.

seem to pose a significant threat to Google's Ad Manager capabilities, it is unlikely to do so for the following reasons:

1. Chrome remains the leading web browser in Australia with approximately 50% market share. Safari is the next most popular browser with approximately 35% market share. It is therefore still possible to track user behaviour over most web browsers, despite the introduction of ITP.⁵
2. Google collects inordinate amounts of data about consumer behaviour from its other products (eg, Google Search, YouTube etc) and will therefore continue to maintain its impregnable position in the supply of targeted advertising capabilities.
3. Google has already designed products that effectively circumvent Apple's ITP policy. When Apple first began to restrict the use of third party cookies in 2017, Google responded within one month by designing a new type of cookie to capture campaign and conversion data from Safari in a way that conformed with ITP.⁶ More recently, in response to the latest ITP amendments which block all types of cookies, Google developed 'Global Site Tags' which allows advertisers to send their conversion data to Google's ad tech products to allow advertisers to continue tracking conversions coming in from Safari browsers. Not only does this evade Apple's policy, it also strengthens advertisers' reliance on Google's ad tech stack.⁷

Remedies should target digital platforms' market power

As set out at page 2 in our Response to the Preliminary Report, the ACCC should support remedies that target the competition concerns arising from the market power of digital platforms in markets for media and advertising services.

In this paper we set out a number of non-structural remedies in **section 3** that we believe address aspects of the harm perpetuated by Google (and other digital platforms). These remedies seek to limit the ability of digital platforms from abusing their market power without mandating a structural change to their businesses or the market. The remedies set out in **sections 3.1** and **3.2** could be used in combination with one another. One remedy which would address the most significant harm faced by publishers such as News Corp Australia is the requirement for digital platforms to be required to fairly compensate publishers for the use of their content.

Section 4 sets out structural remedies that News Corp Australia considers appropriate given the serious impact of Google's conduct on publishers and advertisers. In particular, the ACCC should consider proposing divestment remedies. We set out in **section 4.3** the divestments that the ACCC could consider. Specifically, divestment would require Google to separate Google Search from the rest of Google's business units. As explained in sections 2.2 and 2.3 in the Response to the Preliminary Report, Google leverages its market power in both general search services and ad tech services to the detriment of consumers, advertisers and news publishers. To remedy these harms, Google could either sell Google Search, or retain Google Search and divest the rest of its businesses to a third party. Divestment

⁵ See, Statcounter GlobalStats, Browser Market Share Australia <<http://gs.statcounter.com/browser-market-share/all/australia>>.

⁶ See, Semetis, 'How Google shut up the Apple ITP announcement', 28 November 2017, <<https://www.semetis.com/en/resources/publications/how-google-shut-up-the-apple-itp-announcement>>.

⁷ See, Semetis, 'How Google shut up the Apple ITP announcement', 28 November 2017, <<https://www.semetis.com/en/resources/publications/how-google-shut-up-the-apple-itp-announcement>>.

remedies are the most comprehensive type of remedy that would 'clearly and effectively [address]' the harm caused by Google. News Corp Australia recognises that divestment is a significant remedy, which may involve global coordination, however the ACCC should support it in light of the overwhelming market power that Google holds in relation to online search and its advertising businesses. If the ACCC were to recommend divestment, News submits that the ACCC should still recommend or pursue the other remedies set out in this document (eg, in sections 3.1 and 3.2) in respect of other digital platforms, such as Facebook and Apple News.

The ACCC's ongoing role in implementing change

News Corp Australia further recommends that the ACCC carries out ongoing and regular monitoring of the activities and conduct of the major digital platforms to ensure that (if adopted) the remedies operate in the intended manner, so that regulatory responses can be developed to any outstanding and/or new issues that arise at the earliest stage possible. A holistic and ex-ante response is needed to address the pervasive and pernicious market power of the major digital platforms and to detect and address otherwise irreparable harm to the market and businesses dependent on their fair and proper functioning.

The ACCC has not shied not shy away from the challenges that regulating global companies such as Google and Facebook present. News Corp Australia commends the ACCC's efforts in demonstrating leadership among competition agencies around the world through its Digital Platforms Inquiry and the Preliminary Report. The Federal Trade Commission in the United States and the European Commission have followed the lead set by the ACCC and are now also conducting equivalent hearings into issues similar to those being investigated by the ACCC in the Digital Platforms Inquiry. While we recognise that some of the remedies discussed below may require broader global cooperation from regulators, we believe that the ACCC is capable of making such recommendations on the global stage. The ACCC now has a unique opportunity to demonstrate its leadership on these important issues and shape the operation and functioning of the market for the benefit of Australians.

3 Proposed non-structural remedies

3.1 Prohibiting digital platforms from using publishers' content without fair compensation

Google became dominant in supplying general search services by offering free services to publishers and consumers. With respect to publishers, Google provided a matchmaking function, connecting publishers with readers. Publishers understood the *quid pro quo* to be that in return for free access to their content, Google would provide publishers with access to new readers and, by extension, increased subscription and advertising opportunities. However, as the digital advertising industry evolved, and the critical value of user data in the sale of advertising became apparent, Google Search migrated away from its pure matchmaking role. It changed and tweaked (and continues to change and tweak) the functionality of its search product to keep users within the Google environment, decreasing the number of users who are referred out to publishers.

Publishers have tried various means to counteract the ill effects of Google's change in its search practices, but to no avail. Having obtained market power, and cementing its position as an unavoidable trading partner, Google has locked in publishers and is free to unilaterally change the terms of trade

without any realistic threat of a revolt. The ACCC recognises this unequal bargaining power.⁸ Google has obtained (and exercises) the power to punish publishers who try to regain control over their content and audience. For example, publishers who establish a 'paywall' in order to encourage readers to buy subscriptions find their articles deeply demoted in Google's search results, not because articles are deemed irrelevant, unreliable, or untimely, and thus of lesser value to search customers. While Google claims that these results are demoted because search customers prefer free content, this is an empty tautology because of course all consumers would like to receive valuable goods and services without paying for them. What really underlies Google's demotion of this content is not customer preference but Google's preference that customers and content creators be tied into a business model that does not require Google to pay for a key input that drives the value of this search product.

As explained in News Corp Australia's April Submission to the ACCC, digital platforms derive enormous financial benefits from the news that they reproduce on their sites. Not only do platforms monetise instantaneously by selling display advertising space, which appears alongside news articles (including on desktop, AMP and social media apps), they also amass valuable data about consumers who access news on these platforms. The Preliminary Report acknowledges the challenges that publishers face in monetising their operations, noting that 'the public nature of [news]...limits total consumer willingness to pay for news and journalism which, in turn, reduces incentives to invest in original journalistic content'.⁹ The expropriation of publishers' content by digital platforms for their own financial gains exacerbates these difficulties. Publishers are effectively forced to forego opportunities to monetise content that they would otherwise have if they had unique control over their own content (eg, by selling their content or collecting data). Although the ACCC considers that there is insufficient evidence to demonstrate that digital platforms' use of snippets has inhibited media companies' ability to compete in the supply of news and journalism,¹⁰ News Corp Australia's experience is that digital platforms' conduct more broadly (including the reproduction of content, and constant changes to their algorithms) has indeed severely hampered the ability of publishers to compete.

Given the above, new laws and rules are required to restore a healthy news market – one in which readers are best served by (a) receiving search results ordered based on relevance, provenance and reliability, and (b) restoring a healthy flow of revenues to publishers that can be re-invested in quality news production.

Digital platforms such as Google and Facebook profit from publishers' content in different ways, including through the reproduction of snippets and headlines and by embedding entire articles directly onto their platforms (eg, Facebook's Instant Articles and Google's AMP project).

Platforms have a strong incentive to encourage users to access content via their platform format, rather than the original source, because they are able to collect user data and advertising revenues. However, both users and publishers are entitled to an expectation of provenance; that is, that original sources of content will be prioritised in search results or other content aggregation services. As noted in several submissions to the Digital Platforms Inquiry, Google and Facebook are 'unavoidable trading partners' for

⁸ See, eg, Preliminary Report, page 12.

⁹ Preliminary Report, page 246.

¹⁰ Preliminary Report, page 91.

publishers,¹¹ and without a legislative requirement it is highly unlikely that these platforms would accept a fee imposed by publishers for the right to display their content. Rather, it is more likely that Google and Facebook would refuse to display any content that attempted to impose such a condition.

It is undeniable that platforms such as Google should be sharing their mammoth profits with the publishers that provide the content and the credibility that digital platforms monetise to generate those profits. The current state of affairs – which allows platforms to gain from the significant financial investments and risks taken by publishers, without providing them with any compensation or share of profits – is unsustainable. In an ordinary supply chain for the sale of goods, a retailer will pay the producer for the goods that are then on-sold to the end consumer. In the digital realm, platforms like Google and Facebook profit from displaying news without compensating publishers for their integral role in producing the content that attracts audiences to those platforms.

Suggested action and practical implementation

The current Australian legal framework does not provide publishers with adequate means to address the large volume of their content that is monetised by digital platforms in search results, social media and news aggregation services through the reproduction of snippets and headlines. A law that obliges digital platforms to acknowledge the significant investments made by original content creators by prohibiting digital platforms from using such content without compensating the original creator would be a step toward addressing the unequal bargaining power between media outlets and tech companies. This would create a basis for negotiations (either bilaterally or through a licensing framework), which would enable publishers to secure remuneration for the significant financial investment publishers make which underpins the platforms' businesses. A right to compensation in the form of licence fees is crucial; Google's role as an 'unavoidable trading power' renders a requirement for consent alone inadequate since publishers have little choice but to provide it. Licences for the use of news articles could be granted via a licence scheme, established under a statutory framework. The licence fees should be fair, reasonable and equitable, and should reflect the financial benefit digital platforms derive from using snippets on platforms' sites (including to generate traffic and collect data). This may require an independent economic inquiry into the importance of news content to digital platforms' business models to establish an appropriate fee.

Google has publicly stated, in the context of the EU Copyright Directive, that it is unrealistic to require digital platforms to put commercial licence fee agreements in place with all news publishers.¹² However, a collecting society model (whereby a designated body collects and distributes licence fees) would eliminate this impracticality. A similar model already exists in Germany, where the collecting society VG Media manages and distributes royalty payments for commercial media enterprises.¹³ A licensing regime under a collecting society model for the use of news content and headlines by Google would negate any concerns relating to negotiations and dealings with individual publishers.

¹¹ See, eg, Nine Submission to ACCC Digital Platforms Inquiry, April 2018, page 18 <<https://www.accc.gov.au/system/files/Nine%20%28April%202018%29.pdf>>; MEAA submission to the ACCC's Digital Platforms Inquiry, April 2018, page 13.

<<https://www.accc.gov.au/system/files/Media%2C%20Entertainment%20and%20Arts%20Alliance%20%28April%202018%29.pdf>>.

¹² Kent Walker, 'Now is the time to fix the EU copyright directive', *Google*, 7 February 2019, <<https://www.blog.google/around-the-globe/google-europe/now-time-fix-eu-copyright-directive/>>.

¹³ VG Media, Facts & Figures <<https://www.vg-media.de/en/facts-figures.html>>.

As noted above, in some cases platforms appropriate an article in its entirety within platform-owned formats. Therefore, any such law must also extend beyond just snippets to the entirety of the content itself so as to catch the hosting of articles from the platforms' servers (such as in the case of AMP and Facebook Instant Articles). It is also important that the law encompasses the totality of Google's activities. If the prohibition on the use of original content applies just to one service, such as Google News, Google's track record indicates Google will simply remove that service from the Australian market. As the ACCC will be aware, Google responded to a law in Spain that prohibited platforms republishing headlines and short snippets in Google News by simply shutting down Google News in Spain, to the detriment of consumers. Google would be much less likely to repeat such behaviour if any remedies applied across all of its businesses, particularly since Google does not monetise directly from Google News as it does with other services such as Google Search. Accordingly, the opportunity cost of shutting down would be much higher than agreeing to pay for content sourced from third party publishers.

News Corp Australia notes that the introduction of this would require consultation with relevant stakeholders and careful drafting to avoid any unintended consequences, such as adversely affecting the rights of users to make legitimate non-commercial use of news content. A similar proposal is currently before the European Parliament (see detailed summary below).¹⁴

Anticipated benefits and advantages

This measure would aid consumers by fostering investment in news and journalism by enabling news publishers to be remunerated fairly for the subsequent monetisation of that content by digital platforms. In turn, publishers will be able to reinvest in journalism to ensure a steady flow of content/output quality and quantity for consumers. The measure would not 'punish' dominant platforms, which would still profit from the platforms they have created; rather, it would return a fair balance in the news market that would allow *all* contributors in the value chain, including publishers, to receive fair compensation for their contributions. It would also support marginal publishers who would otherwise have few means of monetising content.

An obligation on digital platforms to pay for use of publishers' content through snippets and headlines would be directly linked to the actual losses that digital platforms incur for each article that they are currently unable to effectively monetise. This measure would create a commercial incentive for publishers to invest in news and journalism and the creation of content.

Background: EU Digital Single Market Directive

On 13 February 2019, the European Parliament, the Council of the EU and the European Commission reached an agreement to adapt the Directive on Copyright in the Digital Single Market (**Copyright Directive**).¹⁵

Article 11

Under the Copyright Directive, publishers of journalistic content would be granted an exclusive right to allow or restrict the distribution of their publications, so that publishers may obtain 'fair

¹⁴ European Parliament, Press Release: Digital Single Market: EU negotiators reach a breakthrough to modernise copyright rules, 13 February 2019 <http://europa.eu/rapid/press-release_IP-19-528_en.htm>.

¹⁵ European Commission, Press Release: Digital Single Market: EU negotiators reach a breakthrough to modernise copyright rules, 13 February 2019, <http://europa.eu/rapid/press-release_IP-19-528_en.htm>.

and proportionate remuneration for the digital use of their press publications by information society service providers.' Publishers' rights would be protected under the Copyright Directive for a period of 2 years.

'Information society' is defined as a society where a significant degree of activity focuses on the creation, distribution, use and reuse of information and takes place as information and communication technologies.

There will be exceptions under the Copyright Directive that will allow for reproduction without compensation of 'individual words and very short extracts', as well as for private or non-commercial uses of press publications by individual users. However, the recital to the Copyright Directive emphasises that: '*[t]aking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts should be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive*'.

The Explanatory Memorandum to the Copyright Directive¹⁶ states the following:

*'Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, **rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works**. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders **receive a fair share of the value that is generated by the use of their works and other subject-matter**. Against this background, this proposal provides for measures aiming at **improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services** giving access to user-uploaded content. A **fair sharing of value** is also necessary to ensure the **sustainability of the press publications sector**. Press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate. This could ultimately affect citizens' access to information. This proposal provides for a new right for press publishers aiming at facilitating online licensing of their publications, the recoupment of their investment and the enforcement of their rights. It also addresses existing legal uncertainty as regards the possibility for all publishers to receive a share in the compensation for uses of works under an exception.'*

As at the date of this submission, the Copyright Directive is subject to a full vote of the European Parliament.

3.2 Limits on digital platforms' data

News Corp Australia considers that the following two limits should be placed on digital platforms' data:

- (a) digital platforms should be prohibited from using data collected from a publisher's site to sell advertising on other third party websites; and

¹⁶ See European Commission, Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593>>.

- (b) digital platforms should be required to give a publisher access to data generated from visits to that publisher's sites.

We consider these recommendations below.

News Corp Australia accepts that these measures would logically apply to all third party websites, but as we are concerned with the effects of digital platforms' practices on news and journalism, we discuss their potential impact in relation to publishers here.

(a) *Digital platforms should be prohibited from using data from a publisher's site to sell advertising on other third party websites*

Dominant digital platforms should be prohibited from using data collected in relation to a user's visit to a publisher's website to sell advertising on other third party sites.

The current practice of collecting data from internet users' activity outside a digital platform's ecosystem entrenches the platforms' market power and alters the incentives for producers of news. Digital platforms, particularly Google and Facebook, track users' entire online experiences and activities, even once they have left the platform, through the use of cookies and other technologies.¹⁷ Google and Facebook then use this data, and sometimes sell specific segmentation services, to sell display advertising on third party websites (ie, through Facebook's Audience Network and Google's AdSense), thereby removing the incentive and benefits of investing in quality content from an advertising perspective.

Taking Google as an example, when a user visits a website that uses Google's services such as Google Analytics or AdSense, or displays a video from YouTube, the web browser sends certain information to Google, including the user's IP address, together with very rich data about what the user has viewed and clicked on.¹⁸ This practice is exceptionally powerful and valuable for Google considering, as discussed at page 7 in our Response to the Preliminary Report, Google's AdSense is the largest contextual advertising network in the world, and its use by advertisers is growing. The collection of data from third party websites entrenches Google's market power in ad tech by exponentially increasing its access to data. This provides another example of how digital platforms monetise material produced from the investments that publishers have made without permission and without compensation.

Google may argue that its policy simply forms part of the terms of use of its advertising services that a website-owner agrees to share or forgo its data. However, Google is already rewarded from this contractual arrangement by receiving a percentage of revenue for all ads that are displayed on its network. This also demonstrates Google's market power in that it is able to retain all data and use it how it wishes (including by exploiting it for its own commercial advantage), even where the data is from third parties.

Publishers should be given the legal right to retain control of the data that is generated from consumers visiting their own websites, even where it chooses to use Google Ads or Facebook Audience Network, without having to share or agree to share this information for use by these platforms to display advertising on any third-party site, which would include a publisher's competitors. Publishers have

¹⁷ See eg, Thomas Konrad, 'Websites Globally are Secretly Tracking Your Personal Data', 6 December 2017, <<https://www.ghostery.com/press/ghostery-global-tracking-study/>>.

¹⁸ Google's Policy on 'How Google uses information from sites or apps that use our services' accessed on 17 September 2018 <<https://policies.google.com/technologies/partner-sites?hl=en&gl=US>>.

sustained severe losses in revenues from advertising, and publishers' inability to control the use of data on users visiting publishers' own websites hampers publishers' financial positions further.

Anticipated benefits and advantages

This initiative (combined with the proposal discussed at 3.2(b) below) would allow news publishers to regain control over their own data, and this would improve the ability of publishers to commercialise their original content. News Corp Australia has invested in the content which attracts readers to its sites. The data surrounding visits made by a reader to a News Corp Australia site should therefore belong to News Corp Australia and it alone should be given sole control over how that data is monetised.

The proposal would not prevent Google from maintaining its successful search advertising business. Google would also be able to sell data obtained from its own properties (eg, Google Search, YouTube, Gmail and Android) for advertising on third party sites (ie, through the Google Display Network).

Suggested action and practical implementation

News Corp Australia submits that the ACCC should recommend that the Government enact legislation which prohibits digital platforms from using data obtained from displaying content from one publisher's site to sell targeted advertising to another third party website.

(b) *Digital platforms should be required to give a publisher access to data generated from visits to that publisher's sites*

In addition to the prohibition on collecting data about visits to third party sites, the ACCC should also recommend that any data held by digital platforms, particularly Google and Facebook, collected from publishers' own sites should be accessible to those publishers, in a useable format. Specifically, digital platforms with market power should be required to:

- (a) grant publishers and other content providers access to the entirety of the data that the platform collects from visits to that publisher's pages (whether via desktop, mobile or platform-owned formats such as AMP) for them to use how they see fit. This includes any data related to the page visit, including data collected from platform pages used to navigate to that page;
- (b) ensure that the data made available to publishers and other content providers is in a form that allows for identification of user profiles across sources, so that the publisher or content provider can utilise the data in a meaningful way; and
- (c) allow publishers to opt out of sharing data with the digital platform if content is pre-loaded through a platform-owned cache (eg, AMP pages).

These proposals recognise that publishers and other content creators have a right to data collected by a platform from users visiting or navigating to publishers' pages (eg, by clicking on content that appears in search results or news feeds), since it is the publisher's content that generates the data for the platform. This proposal could be introduced in addition to the right to access data held by platforms on terms that are fair, reasonable and non-discriminatory (**FRAND**).

Objectives

Requiring platforms to grant publishers and content providers access to data collected from publishers' pages and allowing them to opt out of data sharing where content is loaded through a platform-owned

cache addresses in part the unfair advantage that platforms currently hold. Without the content that publishers provide, digital platforms would be unable to collect the vast amount of user data that they currently do. This proposal recognises that publishers have an inherent ownership right to the data generated by the publishers' own content, and allows publishers to utilise that data.

Digital platforms provide publishers with varying degrees of access to data collected from their pages. Google, for example, does not provide publishers with any data relating to user interaction with their content. Other platforms, including Facebook, Snapchat and Apple News, do provide publishers with some data. However, even where data is provided, there are limitations with what it can be utilised for, since there is no interface that allows publishers to integrate platform-provided data with other existing data sources (and therefore no ability to track a user across platforms).

The true value of a rich data set is not just access to the data itself, but the ability to map the preferences and behaviour of a particular user across different web pages over time, allowing for precise audience targeting. Therefore, digital platforms must not only be required to provide publishers and content creators with data, but to do so in a form that is meaningful and compatible with other data sources. Consider the way that Google can track a single user's 'Google ID' across its suite of products (eg, AMP, Google Analytics, DoubleClick for Publishers, DoubleClick Ad Exchange). If Google were to provide publishers with data without the Google ID, publishers' functional use of the data would be severely limited; the Google ID is necessary both to link data internally between data sets provided by Google, and externally between Google data sets and data collected by the publisher. For example, if a user views a publisher's content both in AMP format and on the publisher's own website, the publisher has no way of mapping the data to the same user without the Google ID.

Anticipated benefits and advantages

Publishers will benefit from meaningful access to data collected and generated from publishers' own content. Giving publishers access to data collected from their sites by digital platforms will not 'level the playing field', since Google would still have significant data advantages. However, by giving publishers access to a tiny corner of the world, being their data, publishers will have an opportunity to compete more effectively with digital platforms, since they would also be able to offer advertisers detailed targeting information without needing to rely on platform-owned advertising technology. The publisher will also be less reliant on platform-owned analytics products,¹⁹ allowing them to directly analyse their own data or select an independent third party analytics service. Not only does this benefit the publisher through more choice, but could also facilitate competition in the market for ad tech products.

4 Proposed structural remedies

4.1 Introduction

News Corp Australia has set out in sections 2.1 to 2.3 of its Response to the Preliminary Report that Google enjoys overwhelming market power in both online search and ad tech services, and that it is abusing its dominant position to the detriment of consumers, advertisers and publishers.

¹⁹ See eg, section 2.3 of the Response to the Preliminary Report which notes that publishers must use Google Analytics to track AMP format traffic.

To deliver effective targeted ads, online advertisers require access to advertising technology and data. Google provides advertisers with both. As explained in the April Response, and in our Response to the Preliminary Report, Google's market power across the ad tech services supply chain is overwhelming. Google has designed its intermediary ad technologies to integrate and work together, which encourages users (both advertisers and publishers with advertising space) to buy into all levels of Google's suite of ad tech products.

Google offers advertisers the ability to use data retrieved from its platforms, and most importantly Google Search, in conjunction with its ad tech services. In this way, Google has established an impenetrable offering for advertisers through its dominance in both ad tech and data. The barriers to entry for the supply of ad tech services are considerable, since newcomers need to have strong offerings in both ad tech and a considerable amount of data to offer a legitimate competitive alternative, and thereby threat, to existing players (particularly Google), which is not foreseeable.

While News Corp Australia recognises that divestment is a very serious step, and not a foregone conclusion in cases where there is a finding of market power, News Corp Australia considers that divestment is necessary in the case of Google, due to the unparalleled power that it currently exerts over news publishers and advertisers alike. The ACCC has itself conceded that its power is unlikely to be challenged or undermined in the near term. Indeed, Rod Sims has said that Facebook's and Google's *'current share prices reflect a little of their current market position, but they also incorporate a huge margin for projected growth... In Google's case, 40-60% of their current share price can be attributed to future growth.'*²⁰

If the ACCC considers that the above remedies are insufficient to address the anticompetitive harm currently perpetuated by Google, but nonetheless thinks that divestment (as outlined in **section 4.3**) is inappropriate, News Corp Australia submits that the ACCC should recommend the functional separation of each component of Google's ad tech functions, as well as Google's Search business, to restore a level-playing field in the supply of digital advertising services and related services. To facilitate functional separation, digital platforms should be required to grant third parties access to the data digital platforms hold on FRAND terms.

News Corp Australia envisages that a marketplace with a divested or functionally separated Google would breed competition, innovation and ultimately benefit consumers and advertisers. First, with increased competition in the ad tech space, the prices for advertising services will decrease. Second, Google will no longer be driven by the desire to cross-subsidise its data troves with its advertising business. This will compel it to monetise its Google Search functionality by other means (eg, by selling its data). Finally, with increased access to Google's trove of data, innovation will increase more generally.

Divestment or functional separation would also help consumers. The Preliminary Report acknowledges that the number of journalists employed in Australia has decreased significantly in the past five years.²¹ The result is reduced quality, choice, originality and diversity of content for consumers. This is also harmful to society more broadly, since, as the ACCC acknowledges, the production and consumption of news and journalism provide significant benefits to society, since journalism often holds public

²⁰ See, Rod Sims, *Regulating for competition: stepping up for platforms & stepping back from media?*, Speech delivered at the International Institute of Communications – Telecommunications and Media Forum, 3 July 2018.

²¹ Preliminary Report, page 265.

institutions to account, campaigns for social or policy changes, reports on public forums and provides a forum for debate and exchange of ideas and opinions.²²

4.2 Functional separation

Functional separation would achieve the objectives and secure the benefits of full divestment, but would also require ongoing monitoring. The effect of functional separation coupled with requiring access to the platforms' data on FRAND terms would be to foster conditions in which a market for the supply of ad tech services could thrive. This market would enable buyers (advertisers) and sellers (publishers) to have genuine choices beyond Google available to them which will drive more competitive outcomes and provide choice between alternative suppliers of ad tech services.

Objectives

As outlined in **section 4.3** with respect to the divestment remedy, functional separation would achieve equivalent objectives but require ongoing monitoring by the ACCC or a third party overseen by the ACCC. In particular, those objectives include providing an enduring remedy which addresses incentives conclusively and addresses the risk that behavioural remedies could be circumvented or otherwise only partially effective.

The separation of Google's ad tech functions and a requirement to grant access to their data on FRAND terms will create a competitive market for the acquisition and supply of ad tech products. Following functional separation, the ad tech pipeline would become multilayered, with publishers on the supply-side and advertisers on the demand-side able to choose from a mix of ad tech products offered by a range of suppliers. The ability to choose, switch and create an optimal mix of ad tech products will also encourage new entry and innovation, ultimately driving more competitive outcomes.

For example, in a multilayered ad tech market, advertisers could bid for keywords from a demand-side supplier; once successful in the bid, the advertiser could use another provider as a broker in an ad exchange; meanwhile, a publisher could use a supply-side provider as a broker in the ad exchange; once the advertiser and publisher reached a deal, the publisher could use a fourth provider to serve the advertisement on its website. Functional separation would allow for transparent and non-conflicted auctions where advertisers/buyers and publishers/sellers benefit from the economic surplus created by programmatic advertising. Most of the economic surplus now benefits the intermediary (Google).

As explained at section 2.1 of the Response to the Preliminary Report, Google has market power in the provision of ad tech services, bolstered by its access to data which allows it to offer a targeted advertising opportunities to advertisers. As discussed above, it is not enough for a challenger to develop new ad delivery technologies, but they must also have access to data, whereas the digital platforms usually do not share their data with third parties.

Breaking down the monopoly power held by Google, and compelling Google to share its data on FRAND terms will benefit publishers and other content creators in two main ways. First, it will facilitate the entry of new ad tech providers, since they will be able to compete on a more even playing field with incumbent ad tech providers that are owned by a dominant platform. This increase in ad tech competition throughout the ad tech stack will benefit publishers and content creators through greater

²² Preliminary Report, pages 243-245.

innovation, price competition and choice. Publishers will also be better placed to negotiate fair terms relating to platforms' use of content created by publishers.

Suggested action and practical implementation

- Functional separation could include:
 - information barriers between each entity;
 - separate personnel;
 - strong internal governance;
 - arm's length transactions between each entity (ie, non-discrimination); and
 - equivalence between internal and external transactions (eg, where Google user data is acquired by a competing ad tech service, Alphabet should supply that data on FRAND terms and on the same terms as for internal transfers).

The benefit of functional separation of this kind is to create a quasi-structural change to the market without requiring full divestment that will require limited ongoing monitoring by the ACCC. Google's overwhelming market power in search and reliance on advertising revenues means that it will always have the ability and incentive to discriminate in favour of its own ad tech services. Accordingly, some behavioural measures may not provide a satisfactory remedy alone, but may be enhanced or underpinned by a quasi-structural remedy such as functional separation.

The overall impact should be to create a genuine market for the supply of ad tech services. This will in turn encourage new entry, innovation, and price competition. The beneficiaries of this change will be advertisers, publishers and ad tech service providers.

4.3 Divestment

Finally, News Corp Australia submits that divestment may represent the most effective and conclusive remedy the ACCC could recommend, since structural remedies provide an enduring solution with relatively low monitoring and compliance costs.²³

Accordingly, the most effective way of addressing the harm caused by digital platforms is to require divestments where competition is found to be weak or ineffectual in particular markets. Divestments will work to correct the market structure, by replacing common ownership with separate ownership, where each separate owner has incentives to compete to gain the business of customers. News Corp Australia recognises that divestment in a non-merger context is a highly interventionist measure and will have significant ramifications. Accordingly, News Corp Australia recommends that this remedy should take the form of an ACCC recommendation to Government, following the conclusion of the Inquiry, and should be limited to Google.

As set out in our April Submission, the main digital platforms have achieved dominance in one market and then extended that dominance, through acquisition and expansion, to other markets. Each business is underpinned by user data and the platform can cross-pollinate the data from one business for the benefit of its other businesses. The degree of horizontal and vertical integration of the major digital

²³ ACCC, Merger Guidelines, November 2008, Appendix 3, para 11.

platforms represents a significant barrier to entry and shields digital platforms from the competitive forces that would otherwise be brought to bear on these platforms through customer switching.

At present, Google dominates the ad tech pipeline: from the demand side (Google Ads), through to ad networks and ad exchanges (Google Marketing), to the supply side (Google Ad Manager). Google operates in a 'walled garden' whereby its related businesses, particularly in the ad tech pipeline, secure and entrench Google's dominance in general internet search. Advertisers are drawn to Google's unrivalled trove of personal data and this in turn ties publishers to Google's services in the ad tech pipeline.

Google's dominance in search also allows it to further promote its other business functions beyond just advertising, including specialised search functions like Google News and Google Shopping. The European Commission is already considering the break-up of Google's specialised search functions from its general search functions, following the decision in June 2017 that Google abused its dominance in search to preference its dedicated shopping service, Google Shopping. In March 2018, the European Parliament adopted the annual report on competition policy of the Committee on Economic and Monetary Affairs, which called for structural separation (which we understand to mean the functional separation) of Google to ensure equal treatment between Google's own services and competing services.²⁴

Case Study: European Parliament, Committee on Economic and Monetary Affairs, Excerpt from the Report on the Annual Report on Competition Policy, March 2018

"The European Parliament...Takes note of the Commission's statement of objections and its preliminary conclusion that Google has abused its market dominance as a search engine by giving an illegal advantage to another of its products: its comparison shopping service; calls on the Commission to ensure that the company implements the remedy effectively and promptly to prevent further abuse of a dominant position; stress the need for the Commission to carry out an in-depth analysis and to monitor how the Google proposal would work in practice in order to restore the level playing field required for competition and innovation to thrive; **notes that without a full-blown structural separation between the company's general and specialised search services, an auction-based approach might not deliver equal treatment;** invites the Commission and the Google CEO to attend a joint public hearing of the Committees on Economic and Monetary Affairs (ECON) and the Internal Market and Consumer Protection (IMCO); is of the opinion that all companies, including in the digital sector, should closely cooperate with Parliament, including by attending public hearings;..."

News Corp Australia considers that the ACCC should recommend a divestment remedy be applied to 'Google Search', the key online business and part of 'Google', which in turn is the largest subsidiary of Alphabet Inc (which is the umbrella company for all of Alphabet's online service businesses). As set out in the April Submission, News Corp Australia considers that Google Search dominates many of the markets in which it participates and is able to leverage its market power into adjacent markets.

The divestment of Google Search will create a competitive market for search engines, mobile operating systems, internet browsers, the supply of digital advertising, and the supply of ad tech. Google has substantial market power in each of these markets and benefits from significant network effects.

²⁴ See, European Parliament, Annual Report on Competition Policy, 1 March 2018, para 42, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2018-0049+0+DOC+PDF+V0//EN>>.

Source: News Corp Australia

| The Google Business Unit | | |
|--------------------------|---|--|
| Market | Google service | Market share |
| Search | Google | >90% ²⁵ |
| Video content | YouTube | 77% ²⁶ |
| Ad tech | Google Ads, Google Ad Manager, Google Marketplace | 82% ²⁷ |
| Mobile operating systems | Android | 40% ²⁸ (76% globally) ²⁹ |

As set out in the April Submission and the Response to the Preliminary Report, the dominance of Google Search has been severely detrimental to competition, particularly to the advertising market, to the detriment of publishers, technology providers, advertisers and consumers. The anti-competitive practices of Google Search have foreclosed publishers from the ability to generate advertising revenues and, thereby, the sustainability of the news industry. A divestment remedy which requires Google Search to be divested (or for Alphabet to retain Google Search and divest all other online businesses) would directly and structurally improve the state of competition in a number of digital markets and create the conditions for more effective competition.

Case Study: BAA Airports Market Investigation (UK)

In the United Kingdom, the Competition and Market Authority (CMA) has the power to conduct market investigations into whether there are features of a market that restrict, distort or prevent competition, and require market participants to take specified remedial action to address any adverse effects on competition.

The UK regime is relatively novel as it provides the CMA with the ability to implement structural changes or behavioural remedies as a result of a market investigation. Historically, the UK competition authority could recommend action to the UK government pursuant to a market investigation, but could not impose remedies itself.

The CMA and its predecessor, the UK Competition Commission, has imposed divestiture remedies in a small number of cases. The most prominent example followed the market investigation into the supply of airport services by BAA, the largest airport operator in the UK. At the time BAA's airports controlled 81% of London's runway capacity and serviced 62% of UK passengers.

²⁵ Statcounter GlobalStats, 'Search Engine Market Share Worldwide', <<http://gs.statcounter.com/search-engine-market-share>> accessed on 28 February 2019.

²⁶ Datanize, 'Online Video Platforms', <<https://www.datanyze.com/market-share/online-video>> accessed on 28 February 2019.

²⁷ For AdSense - 35.41%, see Datanize, 'Advertising Networks – AdSense (Australia)', <<https://www.datanyze.com/market-share/advertising-networks/Australia/google-adsense-market-share>> accessed on 28 February 2019; for Google Ads - 47.51% - see Datanize, 'Advertising Networks – Google Ads (Australia)', <<https://www.datanyze.com/market-share/advertising-networks/Australia/google-ads-market-share>> accessed on 28 February 2019.

²⁸ Statcounter GlobalStats, 'Mobile Operating System Market Share Australia', <<http://gs.statcounter.com/os-market-share/mobile/australia>> accessed on 28 February 2019..

²⁹ Statcounter GlobalStats, 'Mobile Operating System Market Share Worldwide', <<http://gs.statcounter.com/os-market-share/mobile/worldwide>> accessed on 28 February 2019.

In 2009, the Competition Commission concluded its market investigation and identified substantial competition problems. In particular, the Competition Commission concluded that there was 'no competition' between the airports owned by BAA. One of the remedies sought by the Competition Commission was the divestment of three of BAA's then seven airports, as it considered that the market characteristics underpinning the adverse effects on competition found were unlikely to change absent divestiture.

In May 2016, the CMA released a report³⁰ evaluating the Competition Commission's market investigation remedies imposed on BAA. The CMA found 'strong evidence' of positive changes resulting from the divestments. The benefits arose from the new and separate ownership of the airports, which also acted as a catalyst for changes at the BAA airports that were not subject to divestment. The positive changes were primarily derived from the new commercial strategies implemented at the airports directly and indirectly affected by the divestments, and an increased focus on passenger experience.

The CMA observed the following changes at the divested airports, which represented increased competition and benefits to passengers:

- growth in passenger numbers;
- increased efficiency of capital investment in facilities and services and improved operational efficiency;
- improved service quality to passengers and airlines;
- increased efforts to attract additional airlines, routes and flight frequencies;
- changes to the level and structure of airport charges;
- more efficient use of existing capacity; and
- better engagement with the airport community and stakeholders.

As part of its analysis, the CMA also examined the costs incurred by BAA in selling the airports, and any potential unintended consequences. The CMA found that the benefits associated with the divestment remedies clearly outweighed the associated costs.

Anticipated benefits and advantages

Divestment seeks to remedy an adverse effect on competition by either creating a new source of competition or strengthening an existing source of competition. The key benefit of the remedy is that it requires limited ongoing regulatory oversight. With the exception of approving and monitoring any initial sale, and ensuring compliance with any conditions contained in undertakings, divestment is unique in its ability to provide a 'once and for all' solution. It also has an immediate, long-term structural impact on the market, mitigating the potential for future abuses.

In summary, divestment will create a more competitive market structure which will in turn benefit:

³⁰ See, UK CMA, BAA airports: Evaluation of the Competition Commission's 2009 market investigation remedies, 16 May 2016 <https://assets.publishing.service.gov.uk/media/57399d43ed915d152d00000b/evaluation_of_baa__market_investigation_remedies.pdf>.

- **publishers** – who will be better placed to develop and manage their businesses and remuneration strategies;
- **technology providers** – who will face lower entry barriers;
- **advertisers** – who will face greater choice in providers of competing ad tech products (eg, ad exchanges); and
- **consumers** – who will have genuine choices and unleashed innovation available.

5 Conclusion

It is clear from News Corp Australia's Response to the Preliminary Report that the competition issues associated with digital platforms are significant, and must be addressed. Google continues to find new ways to keep consumers within its own ecosystem, generating data that further strengthens its ability to dominate the supply of targeted advertising. For publishers, the result is eroding margins from an inability to monetise content through publishers' own advertising and reduced ability to convert readers to subscriptions. This continues to threaten the overall sustainability of news and journalism as an industry, lowering the incentive for publishers to invest in original content to the detriment of consumers and society more broadly.

Any solution must be bold. As we previously explained in our previous Submissions, Google's prior conduct reveals a pattern of avoiding and undermining regulatory initiatives and ignoring private contractual arrangements. Furthermore, even where Google does appear to change its conduct in response to investigation or regulation, it is often not long before the conduct is replaced with something similar that creates equivalent problems for publishers under the guise of a different name. This track record shows that any solution must be comprehensive, lasting, involve adequate oversight, and be backed by legal sanctions.

While we recognise that the truly global nature of digital platforms like Google mean that some of the proposed remedies in this submission may require some coordination among governments internationally to be truly effective, we do not believe the ACCC should shy away from taking action or making such recommendations.

We would welcome the opportunity to engage with the ACCC further on the remedy proposals outlined in this document or other proposals that the ACCC is considering, including those that are set out in the ACCC's Preliminary Report.

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