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## ACCC Digital Platforms Inquiry

### Response to ACCC Digital Platforms Inquiry Preliminary Report

**Professor Terry Flew (Creative Industries Faculty, Queensland University of Technology)  
and Associate Professor Tim Dwyer (Department of Media and Communications,  
University of Sydney)**

15 February 2019

We thank the ACCC for providing the opportunity to respond to the Digital Platforms Inquiry – Preliminary Report, released on 10 December 2018.

In this short submission, we wish to focus upon two recommendations that were made by the ACCC in the Preliminary Report:

- Preliminary Recommendation 5—news and digital platform regulatory oversight;
- Preliminary Recommendation 6—review of media regulatory frameworks.

We do so in the context of a larger research project that has been funded by the Australian Research Council (ARC) through its Discovery-Projects program. The project is titled *Platform Governance: Rethinking Internet Regulation as Media Policy* (DP190100222), and involves Professor Terry Flew and Associate Professor Nicolas Suzor (Queensland University of Technology), Dr. Fiona Martin and Associate Professor Tim Dwyer (University of Sydney), Professor Philip Napoli (Duke University, US) and Professor Josef Trappel (University of Salzburg, Austria).

The project is commencing in 2019, and will address the question of whether digital platform companies are best understood as media companies, and the implications of this

potential redefinition for policy, regulation and platform governance as they relate to media content.

We also draw upon other relevant work in this submission. Associate Professor Dwyer has recently completed an ARC Linkage-Project on *Sharing News Online: Analysing the Significance of a Social Media Phenomenon*, and has a forthcoming book (co-authored with Fiona Martin) titled *Sharing News Online* (Palgrave, 2019). He leads the ARC Discovery Project *Media Pluralism and Online News*.

Professor Flew led the ALRC National Classification Scheme Review, which considered the issue of convergent media policy and 'platform neutral' media regulation. He is currently completing a book titled *Regulating Platforms*, to be published by Polity in early 2020.

### **Comments in relation to Recommendations 5 and 6**

There is a growing awareness of the possibilities, and indeed need, for regulating digital and social media platforms. A steady stream of scandals in relation to Facebook and Google sharing personal data with third parties, the growing evidence of Russian hacking of the 2016 US Presidential elections, and the role of the boutique data analytics firm, Cambridge Analytica contributed to this shift in awareness of the role these platforms are playing in our lives.

As the ACCC have found in its inquiry, there are now multiple triggers for the turn towards regulatory solutions. On the one hand, this has been prompted by both US Congressional and European Commission investigatory hearings, and on the other hand, there is a growing understanding of the market power of these media-tech platforms, and how this is underwritten by a reliance on opaque algorithms which amass personal data for achieving various objectives.

There's a pervading sense that the 'Tech Giants' have betrayed our trust arising from their role in spreading misinformation and the manipulation of breaking news. This failure of trust has been seen most acutely in algorithmic news provision and its implications for media pluralism. Examples include the ways in which third party actors are involved in online news manipulation and strategies of disinformation the context of elections, or the more prosaic practices of news recommender algorithms, including YouTube's 'Up Next' recommender.

The role of platforms in algorithmically selecting and promoting particular hosted stories is not widely understood. However, the ways that news is discovered, liked and shared, its commenting cultures and commodification strategies, are all central to these changes. There is mounting evidence of a power struggle for the control over the distribution of news and to what extent a more broadly diverse, pluralistic, and generalist news agenda can be sustained. As argued in Martin and Dwyer *Sharing News Online* (Palgrave, 2019), for citizens, a key

concern is that this capacity of social media companies to select, filter and personally profile our news is eroding traditional journalistic power to connect directly with audiences and to deliver what we need to know.

Therefore, we support the recommendation (5) for the establishment of a regulatory authority to ‘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’. In addition, we support recommendation (6) to ‘conduct a separate, independent review...to ensure...regulations are applied effectively and consistently’, in relation to the production and delivery of news and journalistic content.

### **Towards unified and modernised media laws and regulations**

The Preliminary Report discussed in some detail the extent to which media regulations do not apply to digital platforms, in contrast to publishing and broadcast media, and the regulatory disparities this raises (ACCC, 2018, pp. 129-150). This raises a bigger question, beyond the scope of the current Inquiry, as to whether digital platforms now perform similar functions to other media businesses, such as selecting, curating and organising content, and that this has made them active participants in the media ecosystem, rather than mere intermediaries and conduits for distributing content created by others.

The question of whether digital platforms are increasingly taking the form of media companies was considered by Australian policymakers in the early 2010s. The Convergence Review, released in 2012, proposed that media regulation in Australia needed to shift from being based on the platform that content was carried on, to the size of the enterprise and its influence as measured by audience share. The Australian Communication and Media Authority (ACMA) has identified the legacy framework whereby different laws apply to media content based upon how it is carried (in print, over the airwaves, or online) as a ‘broken concept’, instead proposing that content should be treated in a similar way regardless of the device used to access it or the business in which the carrier is considered to operate (ACMA, 2013). The ALRC Review of media content classification also recommended a move towards platform-neutral regulation that focused on media content rather than upon the platforms through which it is accessed.

Whether Australia requires reform of media laws that move towards a platform-neutral regulatory framework is therefore back on the policy agenda. Such measures would also have important legal implications. Section 230 of the US Communication Act (1996) has given digital platform companies legal indemnity from the content they host. It classifies such companies as intermediaries rather than as publishers, and hence not legally liable for content uploaded onto their sites, but also allow them to regulate, monitor or delete content hosted on their sites without losing ‘safe harbour’ provisions (Gillespie, 2018). This provision has been highly influential globally in enabling the expansion of US digital platforms into other parts of the world.

There is merit in considering the pros and cons of bringing digital platform companies such as Google and Facebook into the ambit of media policies and regulations carefully. The ACCC discussed this in the Preliminary Report, observing that ‘there are significant benefits to be derived from a fundamental reform of the Australian media and communications regulatory frameworks to adequately address the challenges of digitalisation and convergence’ (ACCC, 2018, p. 150).

Four main arguments can be made for such regulatory changes:

1. **Digital platform companies are increasingly acting as ‘media-like’ companies.** With regards to news, the ACCC argued that while digital platforms are not directly producing journalistic content, they ‘have an active role in the supply of news media content in Australia’ through shaping consumer access to online news, evaluating content for its suitability and potential audience, and ranking and arranging content on their sites. Companies such as Google and Facebook are also increasingly producing and funding content through ventures such as YouTube Originals and Facebook Watch, which compete with streaming sites such as Netflix and Amazon Prime, as well as with conventional broadcasters.
2. **Regulatory imbalance.** The ACCC noted that traditional media companies bear costs associated with regulatory compliance that do not apply to digital platforms. Most notably, industry codes and standards relating to broadcasting content and advertising apply to the holders of TV and radio broadcasting licences that do not apply to digital platforms. Notable examples of content regulations include Australian content and children’s programming requirements. Most news publishers are also subject to the self-regulatory framework of the Australian Press Council, which digital platforms are not members of.
3. **Regulatory certainty.** The current approach to media law reform has typically involved ‘patching up’ existing legislation to respond to new technologies, thereby rendering it more complex. This generates uncertainty for the providers of new services, as the likely requirements for regulatory compliance are difficult to gainsay. A unified legal and regulatory framework could be more flexible, less *ad hoc* and fragmented, and more technology-neutral, enabling the elimination of redundant legislation, and enabling businesses that perform comparable functions to be regulated in the same way.
4. **Public interest.** A unified, platform-neutral regulatory framework could also be principles-based, giving greater confidence to the public that media laws and regulations are aligned to what the ACMA (2011) has termed ‘enduring concepts’ of media policy, such as quality, diversity, access, confidence in the accuracy of news, and ethical standards. It could also give voice to current priorities such as digital citizenship and safeguards around the uses of data acquired through online services. The Preliminary Report observed that ‘a unified and platform-neutral legal framework that covers both online and offline delivery of media content to Australian consumers could create significant benefits for consumers and for participants in the Australian media and communications industries’ (ACCC, 2018, p. 149).

At the same time, and noting the ill-fated attempt of the Gillard Labor government to enact media reforms in 2012, it is important to be aware of the potential obstacles to such media policy reform. In particular, there are four critical issues that need close consideration:

1. **User-created content.** Digital platforms retain a fundamental difference from media companies in their primary reliance upon user-created content to which they do not have an editorial function. They can only be accountable for most of the content on their sites after it is posted, whereas media companies have traditionally had editorial control in advance of publication or broadcast.
2. **Digital platforms operate differently.** A site such as YouTube has over 300 hours of content uploaded per minute. 350 million photos a day are uploaded to Facebook. While authors such as Tarleton Gillespie (2018) have rightly pointed out that digital platforms have always been involved in content moderation, the manner in which this is undertaken has no equivalent in traditional media. Greater public oversight over how such decisions are made, which has been increasingly demanded (see e.g. Napoli & Caplan, 2017), needs at the same time to factor in the unique and distinctive nature of these platforms and the basis of their appeal to users, which lies in their relative openness as compared to other media. This may require the application of 'soft law' or the development of co-regulatory frameworks between the major platforms and the ACMA (Flew, 2018).
3. **Risks to innovation.** One challenge of the digital age is that companies tend to have radically different business models and approaches to content. While one can speak of the broadcasting industry, the newspaper industry, or the publishing industry, identifying an 'internet industry' or a 'platform industry' is much harder. Google is different to Facebook, and both are very different to Apple, Microsoft, Amazon and Netflix. The term 'platform' can be further broadened out to non-media businesses such as Uber, AirBnB, Airtasker and others. There is a need to be aware that competition in this dynamic sector is as likely to involve the development of new products and services as the entry of new participants into established markets.
4. **Global norms and enforcement.** Australia is a small country and a 'policy taker' in the international arena. For Australian laws and regulations to have provenance, they require some alignment with comparable arrangements in other major jurisdictions (such as the United States or the European Union). Earlier internet regulations, such as the 1998 amendments to the Broadcasting Services Act that aimed to regulate online content, have foundered on the impossibility of establishing what online content is or is not 'hosted' in Australia. More generally, as the ACCC has already noted in the Preliminary Report (pp. 9, 20), regulatory changes in one nation with regards to global digital platforms need to be cognisant of developments in other jurisdictions, in order to avoid the problem of a global 'splinternet', or geographical fragmentation of the internet from a user perspective.

### **Proposed Areas for Further Analysis and Assessment**

We support the merit of conducting further analysis and assessment into the 9 identified areas of impact of digital platforms. In particular, we support the further analysis of areas impacting on news and journalism, viz., areas 1-4 inclusive: choice and quality; news literacy; funding models; and a digital platforms ombudsman.

In our opinion such a multi-pronged regulatory package is more likely to be successful in ameliorating the adverse impacts of the digital platforms in Australia.

### About the authors

**Terry Flew** is Professor of Communication and Creative Industries, Creative Industries Faculty, Queensland University of Technology, Brisbane, Australia, and a researcher with the Digital Media Research Centre. He is the author of 11 books (three edited), including *Understanding Global Media, Politics, Media and Democracy in Australia*, *Media Economics* and *Global Creative Industries*. He has authored 59 book chapters, 86 refereed journal articles, and 16 reports and research monographs. He is the President of the International Communications Association (ICA) (May 2019-2020), and organizer of the 69<sup>th</sup> ICA Annual Conference in Washington DC, May 24-28, 2019. He has been an Executive Board member of the International Communications Association since 2013, and was President of the Australian and New Zealand Communication Association (ANZCA) in 2009-10.

He is on the Editorial Board of 13 academic journals, and was the founding Editor-in-Chief of *Communication Research and Practice*, an ANZCA journal established in 2016 and published by Taylor & Francis. In 2011-12, Professor Flew chaired the Australian Law Reform Commission Review of the National Media Classification Scheme, and he has recently advised the Australian Department of Communication and the Arts on reforms to media classification laws. He served on the Australian Research Council (ARC) College of Experts for Humanities and Creative Arts (HCA) from 2013-15, and was on the Research Evaluation Committee for Humanities and Creative Arts in the 2012 Excellence in Research for Australia research evaluation exercise.

**Tim Dwyer** is an Associate Professor in the Department of Media and Communications at the University of Sydney. His publications include the authored books *Media Convergence*, *Legal and Ethical Issue in the Media*, *Convergent Media and Privacy* and with Fiona Martin, *Sharing News Online*. He is the lead chief investigator of the ARC Discovery Project 'Media Pluralism and Online News'. His current research interests focus on how news practices are evolving in multi-platform media organisations, and analysing the implications of these transformations for media diversity and pluralism.

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