



SBS submission to Australian Competition and Consumer Commission Digital Platforms Inquiry: Preliminary Report February 2019

Key Points

- SBS welcomes the ACCC's *Digital Platforms Inquiry: Preliminary Report* (the Report).
- SBS is directly impacted by many of the issues raised in the Report, and as such, appreciates the opportunity to comment on the ACCC's preliminary findings.
- The Report notes that for news content creators, Google and Facebook are 'must-have' sources of news referrals. Together, they account for more than 50 per cent of traffic to news websites.¹
- As a content creator, SBS supports the emphasis the Report has placed on choice, transparency and education regarding news and journalistic content.
- As a multiplatform media organisation, SBS notes the challenges of the current regulatory system, and opportunities for modernisation and streamlining of this system.
- As a valued and trusted provider of online services to the Australian public, SBS supports consideration of information privacy issues for individuals, while noting that separate safeguards apply in relation to privacy matters that arise in the creation of journalistic content.
- As an advertiser on digital platforms, as well as a platform for advertisers, SBS notes the market power of the major digital platforms, and supports the ACCC's further investigation of how best to manage this market and its disparate levels of power.
- SBS looks forward to the ACCC's Final Report, and to any further consultations and discussions in the interim.

¹ The Report, page 6.

Introduction

The Special Broadcasting Service Corporation (SBS) welcomes the opportunity to comment on the ACCC's *Digital Platforms Inquiry: Preliminary Report* (the Report). This submission focusses on the 'Preliminary recommendations', and 'Proposed areas for further analysis and assessment', as outlined in the Report.

Independent public media delivers significant public benefits, particularly in a highly concentrated media landscape. SBS is consistently recognised as one of the most trusted media brands², and delivers content that enhances and enriches the Australian community through a more informed society. Unique connections and experience with multicultural and Aboriginal and Torres Strait Islander communities enable SBS to cover news and tell the stories of those communities with respect and dignity. In particular, the news, current affairs and information services provided by SBS inform and promote understanding among all Australians and maximise the opportunities for people from diverse backgrounds to engage in social, political and cultural discourse.

The Report rightly acknowledges the benefits of the 'immensely popular and profitable' major digital platforms, and their ability to address multiple groups' needs simultaneously.³ They are now key players in the supply and consumption of journalistic content, with Google and Facebook having substantial market power in search and social media respectively; they are key sources of news referrals, and are also noted in the Report as being extremely effective tools for journalists to gather information.

However, the major digital platforms are not actors in the production of this content – at the time of the Report, the ACCC noted that it was not aware of any relevant major digital platforms being involved in the commissioning of content that could be considered a substitute for Australian journalistic content⁴.

These platforms are, however, responsible for who, and how many people, see the journalistic content that is posted on their platforms, with parameters continuing to change for content creators.

The 'Preliminary recommendations', and 'Proposed areas for further analysis and assessment' are broad-ranging, and include detailed findings on issues raised in SBS's submission to the Inquiry in early 2018. In this submission, SBS responds to priority issues and the submission is structured as follows:

- Part A – Content creation – news and journalism
- Part B – Digital platforms in the Australian regulatory system
- Part C – Consumer issues – privacy
- Part D – Digital platforms and advertisers

Attachment A includes specific responses to each relevant recommendation and areas for further analysis.

² Essential Report – Trust in Media (October 2018) <https://www.essentialvision.com.au/trust-in-media-14>
Roy Morgan Net Trust Score (February 2018) <http://www.roymorgan.com/findings/7521-roy-morgan-net-trust-score-nts-201802270643>

SBS The Exchange, Brand Tracker Exchange Quarterly Dip (November 2018). SBS internal only – unpublished.

³ The Report, page 32.

⁴ The Report, page 128.

SBS welcomes this far reaching and in-depth analysis of the effects, positive and negative, of the major digital platforms on the Australian media industry.

Part A – Content creation – news and journalism

Supporting choice and quality of news and journalism

Public broadcasters, commercial media and major digital platforms

The Report confirms the importance and value of public broadcasting, stating that '[p]ublic broadcasters will continue to have an important role to play in the production of reliable news and journalistic content in the public interest'.⁵ As such, it is essential that SBS be appropriately funded in order to continue to provide its services to the Australian public, particularly in those genres in which there are commercial challenges to production. As the Report notes,

News and journalism risk under-provision for a number of reasons, including the public nature of news and information and the general inability of commercial news media businesses to monetise societal benefits of journalism.⁶

Major digital platforms are also a key part of the news and journalism industry in Australia. The Report notes that they are 'must have' sources of traffic for news media businesses, and account for more than 50 per cent of traffic to news media websites.⁷ The Report also notes that:

[g]iven the magnitude of the referral rates from Google, [news media businesses...] would suffer substantial loss of traffic—and consequently, a considerable fall in revenue—if they did not allow referrals from Google to their websites.⁸

The Report, however, also finds that '[t]he ubiquity of the Google and Facebook platforms, and the lack of transparency in the operation of their algorithms, have had adverse effects on news publishers and their opportunities to monetise their content'.⁹ The transparency of algorithms remains an issue of concern for SBS.

As noted in SBS's April 2018 submission, news media organisations have no influence on changes to algorithms on the major digital platforms, and these changes are not easily understood by audiences. This can have a negative impact on audience choice for news, as well on the reach of SBS news and journalistic content. When an algorithm is changed and audiences no longer see (or see as much of) the trusted news services they followed, then the impacts and benefits of public interest journalism are diminished. The lack of ready access to reliable information and other effects of this can be damaging, given public interest journalism plays such a fundamental role in democratic society.

Transparency for audiences and consumers

SBS supports greater transparency for audiences and consumers about the news they consume on digital platforms. SBS has in place rigorous and enforceable Codes of Practice which underpin the delivery of its independent, balanced and quality news and current affairs services. In its April 2018 submission to the Inquiry, SBS outlined the robust framework under which it operates and its news services are provided, including:

⁵ The Report, page 240.

⁶ The Report, page 240.

⁷ The Report, page 61.

⁸ The Report, page 62.

⁹ The Report, page 7.

- the *Special Broadcasting Service Act 1991* (SBS Act);
- the SBS Codes of Practice;
- the SBS Editorial Guidelines; and
- the SBS Ombudsman.

These standards operate as safeguards against SBS running 'fake news', propaganda and public disinformation and establish SBS's credentials as a trusted provider of news and current affairs services.

The Report notes that a proposed new regulator, or existing actor within the regulatory system, could be tasked with monitoring, investigating and reporting on ranking of journalistic content, with a threshold applying to determine which providers are marked as 'trusted'.¹⁰ The ACCC has indicated that it will further assess whether digital platforms should inform consumers whether a news media business has signed up to a code of journalistic practice when displaying journalistic content. It notes that this recognition could be by way of a 'badge or signal' on the news content as it appears in search results or a user's news feed.¹¹ SBS supports further exploration of the proposed 'trust mark', however SBS would not support any recommendation that may affect SBS's independence, as established under the SBS Act.

It will be worth considering how trust marks have worked effectively in other contexts, including other industries the ACCC monitors.¹² The major digital platforms will have a very important role to play in identifying how best to reach audiences—including audiences of different ages and demographics, who may respond differently to different badges and signals. Mechanisms to flag original content (for the purpose of encouraging consumption of legitimate content over content that infringes intellectual property rights), and the authenticity of authors (for example, to note the 'real' account of public figures), will be instructive and the experience of major digital platforms in using these should be leveraged. The detailed knowledge the major digital platforms have about their users' information consumption habits and preferences will be an asset in this exercise and should assist platforms to engage meaningfully with news media organisations in developing badges and signals.

Improve news literacy online

SBS supports the ACCC's consideration of improved news literacy training. Given SBS's strong background in offering reliable news and current affairs (as above); as well as its background in education of young people (through the SBS Learn platform), SBS is ideally placed to have a key role in this training. SBS Learn forms part of the wider SBS Content Outreach initiative. SBS Learn creates freely accessible resources that stimulate learning and provide opportunities for schools to use SBS content in education settings. It is primarily aimed at upper primary and secondary students nationwide¹³.

¹⁰ The Report, page 125.

¹¹ The Report, page 290.

¹² Similar marks of trust have been used across other industries, including the Heart Foundation Tick of Approval; the Energy Rating Label; and, the ANCA safety rating. These consumer information services provide independent, verifiable information for the public to make choices about the services and goods that they purchase. These could, among others, be used as reference points in the development of a 'trust mark' for news and journalism.

¹³ SBS also supports education in media creation through the:

- SBS National Languages Competition – an annual, nationwide competition that encourages people to create video and images that celebrate learning languages and language retention in Australia.

Improving the ability of news media businesses to fund the production of news and journalism

The services provided by SBS deliver the Australian community quality and diversity in news and current affairs, with highly valued and trusted programming that cannot be found in other Australian media outlets. However, these activities cannot be sustained unless there are robust and consistent funding arrangements in place.

The Report suggests that support mechanisms could include: tax incentives for the production of journalism; a grants scheme; and, tax incentives for the consumption of journalism. SBS as a public broadcaster does not sit within the tax system like commercial news providers, and SBS news services are produced in-house rather than by third party production companies who might benefit directly from such arrangements. SBS has nevertheless supported review of tax arrangements to incentivise the production of high quality Australian drama for television given they strengthen the industry as a whole. SBS therefore supports this valid line of further inquiry by the ACCC.¹⁴

However, subsidies and incentives to commercial media to fund the production of news and journalism should not come at the expense of adequate funding to the public broadcasters. An inclusive and cohesive democracy requires ongoing commitment and investment in public media services, particularly for news and current affairs.

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- Diversity Talent Escalator – an initiative that promotes capability to create media among culturally and linguistically diverse communities by securing genuine, flexible, on-the-job, paid learning and immersion for emerging screen practitioners from diverse backgrounds.

¹⁴ Prominent industry commentator Megan Brownlow from PwC has commented recently on the success of the tax offset model for screen production and signals further incentives to consider. See 'The way ahead for funding Australian stories', 17 October 2018 – available at <https://www.if.com.au/the-way-ahead-for-funding-australian-stories/>.

Part B – Digital platforms in the Australian regulatory system

News and digital platform regulatory oversight

Current regulatory system

The Report notes that

the existing Australian media services regulatory framework has not adapted consistently to digitisation and the shift to online provision of media services, including not consistently capturing new media providers such as digital platforms.¹⁵

SBS supports the ACCC's finding that the current regulatory framework for the Australian media industry requires significant updates to accommodate technological changes.

A platform-neutral approach to regulation is preferred, noting that public broadcasters are currently subject to specific regimes designed to preserve their editorial independence.

As noted in the Report, very little media regulation applies to digital platforms. The Report states that '...even in a wholly self-regulated industry such as print publishing, media businesses in fact bear costs of regulatory compliance which are not borne by digital platforms'.¹⁶

The Australian Communications and Media Authority (ACMA) published in 2014 the *Contemporary community safeguards inquiry – Consolidated report*.¹⁷ While the report is from 2014, it included a number of attachments outlining the relative cost of code and other regulatory interventions on commercial broadcasters, subscription television broadcasters, and community broadcasters. This information may be used as reference when considering increased or amended compliance costs for digital platforms or the wider news and journalism industry.

SBS independence

A key principle of public broadcasting in Australia is its independence from Government. Under section 10 of the SBS Act, it is the role of the SBS Board to maintain the integrity and independence of SBS, and to develop codes of practice relating to programming matters.¹⁸ In addition, section 11 of the SBS Act limits the matters on which SBS can be directed by the Minister. SBS must be able to maintain its independence under any future regulatory changes, and the SBS Codes and Board-developed guidelines should continue to be the home of content rules applying to all SBS platforms.

¹⁵ The Report, page 148.

¹⁶ The Report, page 133

¹⁷ ACMA, *Contemporary community safeguards inquiry – Consolidated report*, March 2014 – available at <https://www.acma.gov.au/theACMA/Library/researchacma/Research-reports/contemporary-community-safeguards-inquiry-research>.

¹⁸ The SBS Act provides for the SBS Board to manage the operations of SBS, authorising the Board to decide the strategies to be followed by SBS in performing its functions, and to ensure that SBS performs its functions in a proper, efficient and economical manner and with maximum benefit to the people of Australia (section 9). Under the SBS Act, SBS has sole responsibility for determining its content, with the SBS Board being empowered to make decisions about the kinds of advertising SBS may run on its services (see sections 45(4) and (6) and 45A(2) and (4)).

Platform-neutral regulation

SBS has been a continuous leader in adapting to the evolving media consumption preferences of Australian audiences in the delivery of content, and using the latest technology to create a deeper audience experience.

While in other media sectors it may be the case that codes of practice are limited to regulating broadcast platforms, and not online platforms, this is not the case for SBS. The SBS Codes already cover both broadcast and online services (as relevant), other than for classification.

A regulatory framework that applies a platform-neutral approach to the regulation of broadcast and online platforms¹⁹ would be more efficient, and clearer for audiences as it standardises rules, complaint and compliance processes. Any such framework should retain the independence of the public broadcasters.

Review of media regulatory frameworks

Any review of media regulatory frameworks be based on principles of public interest and freedom of expression, and should place the Australian public (as content consumers) at the centre of considerations, to ensure that the roles and responsibilities of regulatory agencies are clear, and meet their needs. Any review must also ensure that public broadcasters retain their independence. The Review of the Australian Communications and Media Authority (the ACMA Review), in 2017, noted that 'Ig]ood regulatory outcomes in the communications sector are a combination of two factors – how regulation is administered and the regulatory regime itself'.²⁰ The ACMA Review proposed principles to guide a regulatory reform process,

Firstly, high level intervention principles that guide decisions about when and how governments should intervene in the market. Secondly, where it is decided that regulation is the appropriate form of intervention, a set of regulatory design principles are proposed to help guide the way regulation is used.²¹

The ACCC proposes a 'digital platforms ombudsman' to regulate certain activities, as an area for further analysis and assessment. The Report notes that '[t]he ACCC does not intend for any of the functions to duplicate those proposed elsewhere for a regulatory authority'.²² SBS supports further consideration of whether an ombudsman would be best placed to carry out the activities outlined in this section, or if they are better placed with an existing regulator, or another type of regulator.

The Report notes the ACMA's *Broken Concepts*²³ thought leadership series,²⁴ and that the developments associated with convergence have resulted in a situation where

¹⁹ In its submission to the Australian and Children's Screen Content Review¹⁹, SBS noted that NZ On Air had implemented a new, platform-neutral funding strategy. This platform-neutral approach provides broadcasters and platforms with flexibility in funding projects that reach new and emerging audiences. In order to encourage this innovation in content delivery further. SBS recommended that the Review take a similarly platform-neutral approach to supporting the development of quality Australian content.

²⁰ *Review of the Australian Communications and Media Authority | Final Report*, page 5.

²¹ *Review of the Australian Communications and Media Authority | Final Report*, page 87.

²² The Report, p16

²³ <https://www.acma.gov.au/theACMA/About/The-ACMA-story/Connected-regulation/broken-concepts>

²⁴ The Report, page 149.

separate regulators, or no regulators, apply. Therefore, the streamlining of regulation through the proposed review is of additional benefit, and should consider the option of a digital platforms ombudsman alongside other regulatory options.

Over the last five to 10 years, extensive reviews have been undertaken of the Australian screen industry; public broadcasting; classification; and public interest journalism. Stakeholders have submitted recommendations on principles; extent of regulation; content rules; and appropriate enforcement. SBS recommends that any review first takes into account the recommendations and findings of these reviews, and extensive stakeholder contributions.²⁵

²⁵ As noted in SBS's submission on gambling advertising regulation²⁵, the ACMA has completed a body of work on optimal conditions for self- and co-regulatory (the occasional paper *Optimal conditions for effective self- and co-regulatory arrangements* was first published in June 2010, and updated in September 2011 and April 2015). Citing *The Australian Government Guide to Regulation*, the 2015 edition noted that:

*self- and co-regulation are promoted by key international and government organisations as alternatives to direct regulation. The Australian Government encourages the use of light-handed regulatory options, such as self- and co-regulatory mechanisms as part of its best-practice regulation agenda (emphasis added).*²⁵

In the Department of Communications and the Arts' recent *Review of the Australian Communications and Media Authority – Final report* it was noted that:

*(b)est practice regulatory design...suggests that in the communications sector, with its fast pace of change and innovation, greater reliance on co-regulatory and self-regulatory models should lead to better outcomes for consumers and industry.*²⁵

Part C – Consumer issues - privacy

Use and collection of personal data

Audiences' ability to trust in media organisations has never been more vital—in both presenting impartial and in-depth analysis, and in holding government, business and non-government organisations to account. It is important that SBS remains accountable and transparent to audiences and communities—and the way personal information is collected, handled and stored has an enormous impact on audience trust.

SBS has a robust privacy policy and practices and is transparent with audiences through its information privacy policy. As a Corporate Commonwealth Entity, SBS is also subject to the *Australian Government Agencies Privacy Code* which commenced on 1 July 2018 and provides additional obligations and safeguards.

In reference to consumer data provision to the major digital platforms, the Report notes that,

In exchange for the many and varied digital platforms' services provided, consumers provide (and effectively 'pay') digital platforms with their attention, user data and rights to user-uploaded content.²⁶

This creates a unique relationship between personal information, advertising and access to services. As the Report found, this data collection can benefit consumers, as it allows for personalisation, improvements to products and services, and for problems to be fixed.²⁷ However, the Report notes that 'user data can also be viewed as an asset for digital platforms that can be sold, licensed, disclosed or exchanged with third parties'.²⁸

In reviewing the current privacy and data protection regulatory framework, the ACCC has noted that

these overlaps between privacy, competition, and consumer protection, digital platforms' supply of services to consumers and their data practices are accordingly governed under both privacy laws and competition and consumer protection laws.²⁹

The ACCC then proposes a number of significant amendments to these laws, which are further considered below.

If the government is minded to make changes to privacy law, it would be vital to ensure that existing media exemptions relating to journalistic practice in the *Privacy Act 1988* (Privacy Act) be maintained.³⁰

Proposed amendments to privacy and consumer laws

Code of Practice for major digital platforms

The Report outlines a number of proposed changes to privacy and consumer laws, some of which are broadly similar to regulation in the European Union's *General Data Protection Regulation* (GDPR).³¹

²⁶ The Report, page 166.

²⁷ The Report, page 167.

²⁸ The Report, page 168.

²⁹ The Report, page 215.

³⁰ section 7B, Privacy Act 1988 (Cth)

If government is minded to introduce new or extended regulation, SBS would support the Office of the Australian Information Commissioner (OAIC) first engaging with the major digital platforms operating in Australia to develop an enforceable code of practice. This may consider specific obligations on: how digital platforms inform consumers and how to obtain consumers' informed consent; appropriate consumer controls over digital platforms' data practices; and an appropriate consumer complaint handling process.

Developing such a code of practice with the assistance of the ACCC would provide a range of benefits to consumers and industry by providing consumer safeguards established by industry experts while also providing an alternative to legislative changes in the first instance. This would also align with the Department of Communications and the Arts' stated preference for co- and self-regulation for the industry.³²

This approach would allow industry and government time to learn from the relatively new GDPR regime and the number of cases awaiting adjudication that are currently being brought under the GDPR against digital platforms.³³ Given the Report's findings of the significant market dominance of the major digital platforms, it is reasonable that any code application would be subject to a threshold, such that the code focusses on large businesses rather than smaller organisations and businesses with an online presence.

Notwithstanding the preference for the introduction of a code of practice for the major digital platforms prior to regulatory change, some specific comments on the proposed regulatory changes are below.

Third-party certification

The proposed third-party certification scheme would require certain businesses '...to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations, through the use of a privacy seal or mark'.³⁴ If government is minded to implement this change, suitable research should be undertaken into successful trust marks used in other industries, to establish their benefit in this context. For example the Australian Market and Social Research Society announced in November 2018 that '[a] new consumer trust mark is helping companies provide

³¹ The recommendation to strengthen consent requirements has notable similarities to the certification scheme currently in operation under Article 42 of the GDPR. The proposal to introduce an independent third-party certification scheme is broadly similar to the principles outlined in Article 17 GDPR.

³² In the Department of Communications and the Arts' recent *Review of the Australian Communications and Media Authority – Final report* it was noted that '*best practice regulatory design...suggests that in the communications sector, with its fast pace of change and innovation, greater reliance on co-regulatory and self-regulatory models should lead to better outcomes for consumers and industry.*' (page 90 – available at <https://www.communications.gov.au/file/27286/download?token=eKDxvclv>.)

³³ In January 2019, the French National Data Protection Committee (CNIL) fined Google 50 million euros in accordance with GDPR, for lack of transparency, inadequate information and lack of valid consent regarding personalisation of advertisements. The penalty is the largest to date under the European Union privacy law. It is still unclear, however, what the true effect of this action will be to Google's data practices in Europe or the rest of the world. Facebook is also a subject of several investigations by the data protection authorities in Europe. (Review of the Australian Communications and Media Authority – Final report, page 90, available at <https://www.communications.gov.au/file/27286/download?token=eKDxvclv>)

³⁴ The Report, page 13.

consumers with confidence that when they hand over their data, it will be handled ethically, securely and in line with privacy law'.³⁵

The ACCC's proposed certification scheme's 'privacy seal or mark' also has similarities to the ACCC's proposed 'trust mark' for news and journalism content providers which have signed up to an industry code of practice. There may be an opportunity to jointly consider the value of these two proposed 'marks' of trust.

The Report suggests an appropriate accreditation threshold may be APP entities³⁶ that collect the personal information of a certain number of Australian consumers. SBS suggests that due consideration should also be given to the threshold considering type and sensitivity of data. For example, the Privacy Act includes a definition of personal information³⁷, while the Office of the Australian Information Commissioner (OAIC) provides a definition of 'sensitive information' as a subset of personal information, and notes that '[s]ensitive information is generally afforded a higher level of privacy protection under the APPs than other personal information'.³⁸

Direct right of action

The Report proposes a 'direct right of action for individuals' which is intended to increase the deterrence effect of the Privacy Act. However, the existing Notifiable Data Breach scheme is an effective mechanism for addressing these concerns, the benefits of which the Australian Information Commissioner and Privacy Commissioner, Angelene Falk, has described in the following way:

a data breach notification provides individuals with the chance to take steps that reduce their risk of experiencing harm, such as changing relevant passwords for online accounts. This can reduce the overall impact of a breach. More broadly, the transparency provided by the [Notifiable Data Breaches] scheme reinforces Australian Government agencies' and businesses' accountability for personal information protection and encourages a higher standard of security.³⁹

Additionally, the introduction of a direct right of action may have significant effects on journalistic investigation and reporting, similarly to regulation around serious invasions of privacy, as discussed below. Should the government be minded to implement a direct right of action there should be an expectation that individuals have engaged with the digital platforms and the regulator beforehand through an escalated complaints process. An appropriate threshold for commencing action should also be established.

Serious invasions of privacy

SBS maintains the views expressed in its submissions to the Australian Law Reform Commission's (ALRC) 2013 inquiry into serious invasions of privacy⁴⁰; and remains of the

³⁵ <https://www.amsrc.com.au/amsrcnews/new-consumer-trust-mark-to-benefit-companies-government-and-charities>

³⁶ APP entity <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/chapter-b-key-concepts#app-entity>

³⁷ ...information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable.

³⁸ <https://www.oaic.gov.au/agencies-and-organisations/app-guidelines/chapter-b-key-concepts#sensitive-information>

³⁹ www.oaic.gov.au/media-and-speeches/news/notifiable-data-breaches-first-quarterly-report-released

⁴⁰ Issues Paper 43 – Serious Invasions of Privacy in the Digital Era, www.alrc.gov.au/sites/default/files/subs/59_org_sbs_submission.pdf; Discussion Paper 80 – Serious Invasions of Privacy in the Digital Era, www.alrc.gov.au/sites/default/files/subs/123_org_sbs_submission.pdf

view there should not be a statutory cause of action for serious invasion of privacy for the following reasons:

- the existing co-regulatory scheme applying to SBS and to the media generally already protects individual rights to privacy to an adequate level in relation to the risks of media intrusions;
- the range of current federal and state laws which already provide protection of individual privacy including the Privacy Act in relation to data privacy; and
- the lack of any counterbalancing protection of freedom of speech under Australian law.

SBS raised a number of concerns with the ALRC's proposed statutory right set out in *Discussion Paper 80 – Serious Invasions of Privacy in the Digital Era*, SBS's position is as outlined in its submission to the Paper which is available on the ALRC website.⁴¹

⁴¹ www.alrc.gov.au/sites/default/files/subs/123_org_sbs_submission.pdf

Part D – Digital platforms and advertisers

Bargaining power and third party measurement of advertisements served on digital platforms

The Report notes that digital advertising makes up an increasing portion of Australian advertising expenditure and that Google and Facebook are the channels through which most digital ads are bought and sold. It finds that Google and Facebook account for the majority of recent growth in online advertising in Australia,⁴² and have substantial market power in the search advertising and display advertising markets respectively.⁴³

On the broader issue of general bargaining power, SBS notes the ACCC's findings that:

While some larger advertisers have been able to negotiate pricing discounts from Google for search advertising, advertisers generally have little bargaining power in negotiations with Google because of their small size relative to Google. Moreover, advertisers have little opportunity to bypass Google's search advertising service, either by vertical integration with a search service or by sponsoring a new entry.⁴⁴

Similarly, in relation to Facebook, the ACCC notes that:

Given the significance of the Facebook's platforms for advertisers looking to reach an online Australian audience, advertisers have little bargaining power. Further, advertisers have little opportunity to bypass Facebook's display advertising services, by vertical integration or by sponsoring a new entry.⁴⁵

Given this dominance, it is reasonable to consider how increased transparency might address bargaining power imbalances between the major digital platforms and advertisers and news media.

Both Google and Facebook provide very important services for SBS to reach audiences with information about programs and services that are relevant and of interest to them, and to drive users to consume content on our platforms such as SBS On Demand and the SBS website (where, it is acknowledged, revenue can be gained from SBS-hosted advertising). However, relative to other advertisers SBS is not a large player and has experienced the market power imbalance mentioned above—for example where:

- SBS has not been included in certain products or initiatives of the major digital platforms because of its small size; and
- in relation to the use of products such as Google One Box, SBS would have benefited from more leeway in negotiations.

Some suggest that major digital platforms 'mark their own homework' in relation to audience metrics. While it is acknowledged that the major digital platforms contest this suggestion—pointing to a range of third party partners with which they work to verify audiences reached on their platforms—the ACCC has ultimately made a preliminary finding that advertisers are unable to verify for themselves whether advertisements on Google and Facebook are delivered to their intended audience.⁴⁶

⁴² The Report, page 33.

⁴³ The Report, pages 54 and 59.

⁴⁴ The Report, page 59.

⁴⁵ The Report, page 61.

⁴⁶ The Report, page 66.

Increased transparency across the activities of the major digital platforms—whether that is in relation to algorithms that surface content or metrics on the delivery of advertising services—is likely to be a remedy to negative effects arising from the power imbalance the ACCC has identified between platforms and advertisers. In the context of viewer metrics, SBS's supports the ACCC's proposal to further consider whether third party auditing may overcome concerns.

Advertisers may feel more confident in the accountability measures that apply to advertising services on other platforms—for example, the measurement of ratings on broadcast services. Therefore, it would be worth doing a side-by-side analysis of the checks and balances that apply to advertising on traditional media platforms to determine whether similar accountability mechanisms should be required of major digital platforms.

Attachment A – Response to recommendations and areas for further analysis and assessment

Preliminary recommendations

<p>Preliminary Recommendation 1—merger law</p> <ul style="list-style-type: none"> Amend the <i>Competition and Consumer Act 2010</i> to make clear that in a merger or acquisition, the following are relevant factors: likelihood that an acquisition would result in the removal of a <i>potential</i> competitor; and the amount and nature of data which the acquirer would likely have access to as a result of the acquisition. 	<p>SBS has no comment.</p>
<p>Preliminary Recommendation 2—prior notice of acquisitions</p> <ul style="list-style-type: none"> 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. 	<p>SBS has no comment.</p>
<p>Preliminary Recommendation 3—choice of browser and search engine</p> <ul style="list-style-type: none"> That suppliers of operating systems be required to provide consumers with options for internet browsers and that suppliers of internet browsers be required to provide consumers with options for search engines. 	<p>While the specific issue of computer operating systems and search engines is not of direct relevance to SBS, an analogy may be drawn with operators of other platforms—such as connected televisions, on which SBS provides the SBS On Demand app.</p> <p>Emerging business practices in the media market by manufacturers of connected televisions should be monitored to ensure equitable access to content providers' apps, including those provided by SBS.</p> <p>The issue is whether failure to agree certain commercial arrangements with the device manufacturers—such as advertising revenue—will affect the prominence of positioning of apps within the user interface of devices. For example, whether failure to agree a revenue sharing model would mean that a content provider's app is no longer pre-loaded on the 'Home' page menu, or listed as 'recommended'.</p> <p>In addition to the direct impact on</p>

	<p>advertising revenue, SBS is concerned about the impact of this conduct on:</p> <ul style="list-style-type: none"> • consumers, to whom apps are 'recommended'; and • competition, as consumer access to certain apps is relegated behind those apps which have a revenue sharing agreement in place. <p>Apps without a commercial agreement in place may also be given less priority for approval of new app releases and updates. This directly impacts the quality of consumer experience of apps which are increasingly used by the Australian public to view television content; and which, in the case of SBS, have been substantially funded by the tax payer.</p> <p>Provision should be considered for public broadcasters, who are specifically funded to provide public interest journalism to Australians, to be carried on these platforms without charge.</p>
<p>Preliminary Recommendation 4—advertising and related business oversight</p> <ul style="list-style-type: none"> • 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. 	<p>SBS supports further exploration of this recommendation, while underlining the need to maintain independence of the public broadcasters.</p>
<p>Preliminary Recommendation 5—news and digital platform regulatory oversight</p> <ul style="list-style-type: none"> • 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. 	<p>SBS supports this recommendation, noting detailed discussion of this issue in the main submission.</p>
<p>Preliminary Recommendation 6—review of media regulatory frameworks</p> <ul style="list-style-type: none"> • That the Government conduct a separate, independent review to design a regulatory framework that is able to 	<p>SBS supports this recommendation, noting detailed discussion of this issue in the main submission.</p>

<p>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.</p>	
<p>Preliminary Recommendation 7—take-down standard</p> <ul style="list-style-type: none"> 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. 	<p>SBS supports further consideration of measure to ensure that infringing content is efficiently and expeditiously removed.</p>
<p>Preliminary Recommendation 8—use and collection of personal information</p> <ul style="list-style-type: none"> Amend 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 	<p>SBS has made detailed comments on aspects of this recommendation in the main submission.</p>
<p>Preliminary Recommendation 9—OAIC Code of Practice for digital platforms</p> <ul style="list-style-type: none"> 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. 	<p>SBS supports the recommendation, noting detailed discussion of this issue in the main submission.</p>
<p>Preliminary Recommendation 10—serious invasions of privacy</p> <ul style="list-style-type: none"> that the Government adopt the Australian Law Reform Commission'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. 	<p>SBS does not support this recommendation noting detailed discussion of this issue in the main submission.</p>
<p>Preliminary Recommendation 11—unfair contract terms</p> <ul style="list-style-type: none"> That unfair contract terms should be illegal (not just voidable) under the 	<p>SBS has no comment.</p>

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Proposed areas for further analysis and assessment

<p>Supporting choice and quality of news and journalism</p> <ul style="list-style-type: none"> The ACCC is considering proposals to provide greater transparency to consumers about the news they consume on digital platforms. 	<p>SBS supports further consideration of this proposal, noting detailed discussion of this issue in the main submission.</p>
<p>Improve news literacy online</p> <ul style="list-style-type: none"> The ACCC is considering measures aimed at increasing news literacy and is considering recommending that the ACMA work with the leading digital platforms to develop a broad campaign targeted at all Australians, to improve their understanding of how news and journalism is curated and displayed on social media and other digital platforms. 	<p>SBS supports this proposal, noting detailed discussion of this issue in the main submission.</p>
<p>Improving the ability of news media businesses to fund the production of news and journalism</p> <ul style="list-style-type: none"> A review of the impacts of the measures comprising the Regional and Small Publishers' Jobs and Innovation Package in 2018–19 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. Making personal subscriptions for publications by media businesses that are signatories to a registered ACMA code of practice, as set out in the potential proposal described above, tax deductible to encourage production and consumption of news and journalism. 	<p>SBS largely supports this proposal, noting detailed discussion of this issue in the main submission.</p>
<p>A digital platforms ombudsman</p> <ul style="list-style-type: none"> whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of 	<p>SBS supports further consideration of this noting detailed discussion of this issue in the main submission.</p>

digital platforms.	
<p>Monitoring of intermediary pricing</p> <ul style="list-style-type: none"> 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. 	SBS has no comment.
<p>Third party measurement of advertisements served on digital platforms</p> <ul style="list-style-type: none"> whether there is an ability for advertisers to verify whether advertisements on digital platforms, including 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 advertisements than actually did. 	SBS supports further consideration of this, and other regulatory options, noting detailed discussion of this issue in the main submission.
<p>Deletion of user data</p> <ul style="list-style-type: none"> whether there should be an explicit obligation to delete all user data associated with an Australian consumer once that user ceases to use the digital platform's services or whether user data should automatically be required to be deleted after a set period of time. 	SBS has no comment.
<p>Opt-in targeted advertising</p> <ul style="list-style-type: none"> whether consumer consents in relation to targeted advertising should be further strengthened by prohibiting entities from collecting, using, or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in consent. 	SBS has no comment.
<p>Prohibition against unfair practices</p> <ul style="list-style-type: none"> whether the ACCC's exposure to issues through this Inquiry considerably strengthens the need for a general prohibition against the use of unfair practices in the Australian Consumer Law. 	SBS has no comment.