

Comments on Draft report on Digital Platforms

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Dear ACCC

This is a response to your Preliminary Report on Digital Platforms, released in December 2018.

Rationale

Care always needs to be taken when regulating new industries, but the issues with digital platforms are now well understood, and many regulators are taking firm action.

If users choose not to provide some consents, and businesses decline as a result, that is the free market at work, and it makes room for others who can do a better job.

Also, the role of platforms in distorting public debate is now having serious effects on everyone. For example, unchallenged attacks on vaccination are believed to be contributing to new outbreaks of measles in the US. ¹ And a doctor recently despaired of cancer patients who believe that alternative therapies will save them. ²

Facebook, in general, has been caught in many instances of deceptive conduct. For example, it deliberately charged fees to teenagers when they knew the teenagers and their parents had not consented to the charges. ³

¹ Taylor Telford, Anti-vaxxers are spreading conspiracy theories on Facebook, SMH, 14 Feb 2019 <https://www.smh.com.au/world/north-america/anti-vaxxers-are-spreading-conspiracy-theories-on-facebook-20190214-p50xmy.html>

² Ranjana Srivastava, My patient swapped chemotherapy for essential oils. Arguing is a fool's errand, The Guardian, 14 Feb 2019 <https://www.theguardian.com/commentisfree/2019/feb/14/my-patient-swapped-chemotherapy-for-essential-oils-arguing-is-a-fools-errand>

³ Nathan Halverson, Reveal News, 15 Jan 2019 <https://www.revealnews.org/blog/a-judge-unsealed-a-trove-of-internal-facebook-documents-following-our-legal-action/>

Facebook has also used technical measures to block external reviews of political ads, misused their Apple developer certificate to install spy apps and boasted about being able to manipulate teenagers' psychological wellbeing. (Sydney 2018)

Target predatory behaviour rather than privacy (Prelim Recs 8, 9, 10)

The issues generally captured under the term privacy are actually issues of predatory and deceptive behaviour, where platforms do things to people without their informed consent. The historical approach to privacy does not fully address this, and also tends to put the focus on users rather than on platforms.

I think measures to protect privacy would be better framed as prohibitions against misleading and deceptive conduct, with amendments to sections 18, 19, 20 and 21 of the Australian Consumer Law, or perhaps new sections directly targeting digital platforms.

Formally identify each behaviour

It would be better to explicitly identify the main ways users' trust is abused, and explicitly prohibit each of those usages. For example, the following practices should be explicitly prohibited

1. Using private information without gaining the user's explicit consent to each usage
2. Displaying advertising for sensitive topics such as alcohol, finance or politics without gaining the user's specific consent for each category. A regulator would define those categories
3. Enrolling users in a research program or having them install a research app without telling them who the research is for, prior to starting the installation process. Facebook would have been in breach of this provision when it installed its research app on users' phones
4. Using environmental data from the way an app is used, in order to tailor messages or campaigns to the user, without the user's consent. For example, platforms can deduce when users are drunk or tired. New computer vision techniques can also glean information about users' state of mind.
5. Using location data for reasons other than navigation, advertising or maps, without user consent. For example, platforms could use location data to make judgements about whether a user is attending medical treatment, and insurance companies might use that data to charge higher premiums or decline cover. In this case, the platform might have been wrong in its conclusion. Secondly, there is a social issue over how insurance should work.
6. Matching platform data with another company's data without gaining the user's consent
7. Using private data to discriminate against particular groups in housing, finance or jobs

Verifying consent

The new legislative framework should force platforms to formally store the user's consent, along with the agreement that he or she agreed to, and the information should be subject to audit.

Merger law (Prelim Recs 1, 2)

Preliminary Recommendations 1 and 2 are good. Platforms should be required to advise of potential mergers, including where the proposed acquisition is only a potential competitor.

If there was any doubt, recent news highlights the importance Facebook attaches to finding and removing potential competitors. Not only did it buy a VPN to secretly gather market intelligence; it engaged in deceptive practices to continue the practice when Apple stopped them.^{4 5}

Monitor conduct (Prelim Recs 4, 5, 6)

It can be very difficult to monitor digital platforms. Facebook, at least, does everything it can to escape scrutiny. For example, it recently blocked external reviewers who were trying to examine its use of political ads.⁶

Uber was caught feeding false information to government officials trying to test the platform. They didn't realise Uber could recognise them as government officials.

One of the problems with digital platforms is that, unlike media and some other industries, their staff generally do not belong to strong external professional communities. Unlike media, medicine, aviation and many other industries, there is no-one to say: "No. That is wrong."

Three ways of overcoming this ethical wasteland in digital platforms are to:

⁴ Josh Constine, Apple bans Facebook research app, 30th Jan 2019, TechCrunch, <https://techcrunch.com/2019/01/30/apple-bans-facebook-vpn/>

⁵ Josh Constine, We dismantle Facebook's memo defending its "Research," TechCrunch, 31st Jan 2019, <https://techcrunch.com/2019/01/31/facebook-researchgate>

⁶ Kieren McCarthy, Facebook cuts off independent political ad reviewers, claims security concerns, The Register, 30 Jan 2019, https://www.theregister.co.uk/2019/01/30/facebook_cuts_political_ad_reviewers/

1. provide legal protections to platform staff who become aware of unethical conduct and wish to report it. The risk of being reported by insiders would be a powerful brake on unethical and illegal conduct.
2. create a statutory requirement that large platforms maintain an officer with statutory responsibility to prevent algorithmic abuse. Ideally this would be someone with engineering expertise, rather than legal or accounting. They would be required to sign off on platform activities, making this a senior, well paid role. At the same time, they would be subject to criminal sanctions if they breached their statutory duties.
3. make it a criminal offence to present fake information to users with the intention to frustrate regulatory oversight, as Uber did with the users it identified as government officials

Item 3 is really nothing more than bringing digital platforms into line with the standards that apply generally to corporate conduct.

Hardening platform APIs (Not part of any Prelim Rec)

An issue not addressed in the draft report is the role of companies that manage and control platforms on mobile and other devices. Apps running on iPhones, Android phones and Windows devices can gain access to the user's location, photos, messages and contacts.

The companies that provide the operating systems for these platforms – Apple, Google and Microsoft - have the power to control that access. To their credit, they generally do this well. They restrict access to the APIs that deliver that information, and require that developers explicitly gain the user's consent before they can access them.

This is an important protection, and the law should require that platform providers enforce consent in relevant APIs.

A related issue that has emerged recently is the practice of Google, Facebook and others in misusing Developer certificates to distribute unverified apps to iPhone users. (See the Constine references on p3.) In that case Apple blocked the apps.

Let user choose initial selections (Prelim Rec 3)

Requiring platforms to have the user choose a search engine and browser is a useful move. Some refinements:

1. Require platforms to renew the user's selection every six months. This would encourage rivals to innovate, and incumbents to behave
2. Require that search engines be listed equally, and perhaps in randomised order, to prevent platforms manipulating users' choices

3rd party certification schemes (Prelim Rec 8.b)

Third party certification schemes would be useless. These sorts of schemes are typically taken over by the big accounting firms and run with more attention to revenue than to compliance.

In this case the platforms would also probably start to hire selected staff from the certifiers to create unhealthy links between certifiers and certified.

As well, third party certification would probably involve high charges, thus creating a barrier to emerging new platforms, perhaps in niche areas.

I believe a better approach is to require large platforms to have a statutory officer charged with compliance, as discussed in the section, Monitor conduct.

Returning revenue to news and reporting (Journalism ideas 1, 3)

In my view, the solution to funding professional news, journalism and reporting is very simple. It is to strengthen the rights of professional media organisations and creators to claim rightful payments from platform giants who earn billions from their work. That includes snippets.

For the past 15 years, the platforms have successfully lobbied against copyright and other measures that might impact their profits. It is time to change this.

I understand that Google and Bing dropped their news services in Spain as retaliation against this measure. I don't see that as a big loss, to be honest.

News literacy (Journalism idea 2)

The call to train users to evaluate news is pointless, and is a standard part of lobbying by the digital platforms. It suggests the problem is with users, rather than the platforms. The fact is that youtube and Facebook deliberately present the most provocative material they can, to keep users engaged.

For example, when WhatsApp was implicated in violence in India, Facebook's only response was to suggest training for journalists and working with fact checkers.⁷

Fact checking organisation Snopes and others have resigned from working with Facebook, in frustration at what they claim is a lack of genuine interest by Facebook.^{8 9}

Similarly, Google was prepared to let the Chinese government present false weather and air pollution measurements, to mask the extent of air pollution in Chinese cities.¹⁰

The way to fix this problem is to explicitly address the conduct of Facebook and youtube rather than wasting time on silly news literacy exercises. Both these companies have the expertise to fix their news services.

Conclusion

The ACCC's inquiry is an overdue initiative. Digital platforms should not be exempted from social norms of behaviour and honesty.

⁷ Timothy McLaughlin, Wired, 12 Dec 2018 <https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/>

⁸ Sam Levin, The Guardian, 13 Dec 2018 <https://www.theguardian.com/technology/2018/dec/13/they-dont-care-facebook-fact-checking-in-disarray-as-journalists-push-to-cut-ties>

⁹ Sam Levin, The Guardian, 02 Feb 2019 <https://www.theguardian.com/technology/2019/feb/01/snopes-facebook-factchecking-program-false-news>

¹⁰ Giri Sreenivas, It's time to take back your data from Google and Facebook's server farms, The Guardian 12 Dec 2018 <https://www.theguardian.com/commentisfree/2018/dec/12/its-time-to-take-back-your-data-from-google-and-facebooks-server-farms>