

Article Information

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ACCC releases preliminary report on the Digital Platforms Inquiry

On 10 December 2018, the ACCC released its preliminary report on the inquiry into the impact of search engines, social media and digital content aggregators (digital platforms) on competition in the Australian media and advertising services markets.

The ACCC was directed in December 2017 by the then Treasurer, Scott Morrison, to undertake this inquiry.

Whilst the inquiry is targeted at digital platforms, the recommendations put forward by the ACCC in its preliminary report are broad in scope and have the potential to impact on a wide range of businesses operating in Australia. Amongst other recommendations, the ACCC proposes making changes to privacy and consumer protection laws as well as competition laws.

Competitiveness in the media and advertising services markets

Although a range of digital platforms were looked at generally, the ACCC acknowledges that Google and Facebook were the principal focus of the inquiry due to their influence, significance and size. The ACCC found that both Google and Facebook have substantial market power in a number of relevant markets (including online search and social media services respectively) and that their powers are unlikely to be eroded in the short and medium term.

The ACCC identifies a number of concerns arising from Google's and Facebook's market power, including the ability and incentive for them to favour their own business interests, the negative impact they have on content creators (such as news media) to monetise their content and consumers' lack of informed and genuine choice in how their data is collected and used. The ACCC considers it is important for governments to be proactive in addressing these issues and has made 11 preliminary recommendations in response to the concerns identified.

Measures to address Google's and Facebook's market power

The ACCC's preliminary view is that strategic acquisitions by Google and Facebook have contributed to their market power and that the dynamic competition in the relevant markets is likely to continue to be weak due to the size of the barriers to entry and expansion. In light of those findings, the ACCC has made the following recommendations with the intention of removing potential impediments to growth and independence of potential competitors:

Amending merger laws, specifically section 50(3) of the *Competition and Consumer Act 2010* (Cth), such that when assessing the likely competitive effects of a merger or acquisition, consideration must be given to: (a) the likelihood that an acquisition would result in the removal of a potential competitor; (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

Requiring prior notice of acquisitions of any business activities in Australia by large digital platforms to provide sufficient time to enable a thorough review of the likely competitive effects of proposed acquisitions.

Enabling browser and search engine choice by requiring suppliers of operating systems for electronic devices, and suppliers of internet browsers, to provide consumers with options for internet browsers and search engines (rather than by default) and requiring that no options be pre-selected.

Measures to monitor the activities of digital platforms and the potential consequences of those activities for news media organisations and advertisers

The ACCC identifies that there is a lack of transparency in the algorithms and policies adopted by Google and Facebook

which determine the content surfaced and displayed to consumers. The ACCC views that this lack of transparency, coupled with Google's and Facebook's market power, gives rise to concerns that Google and Facebook could favour their own related business (or businesses with which they have a particular commercial relationship) in selecting the content surfaced and displayed. The ACCC is also concerned that Google's and Facebook's algorithms and policies may operate in a way that affects competition in media markets and the production of news and journalistic content. To address these concerns, the ACCC recommends:

Regulatory oversight over advertising, news and digital platforms by requiring a regulatory authority to monitor, investigate and report on whether large, vertically integrated digital platforms (that generate over \$100 million per annum from digital advertising in Australia) are engaging in discriminatory, including anti-competitive behaviour, by favouring their own business interest above those of advertisers or potentially competing businesses.

Regulatory oversight of news and journalistic content by requiring the regulatory authority to also monitor, investigate and report on the ranking of news and journalist content by large digital platforms (that generate over \$100 million per annum in Australia) and the provision of referral services to news media businesses.

Measures to address regulatory imbalance

The ACCC recognises that publishers, broadcasters, other media businesses and digital platforms all operate under different regulatory frameworks. The ACCC recommends conducting a separate, independent review of these frameworks to identify unnecessary regulation and to design a single regulatory framework which applies across different business types (both online and offline) where practicable.

Measures to assist with a more effective removal of copyright infringing material

The ACCC identifies that rights holders in Australia face difficulties requesting take-down of copyright infringement content in a timely way due to enforcement complexities. The ACCC is concerned that this erodes the value of copyrighted content. A recommendation has been put forward for the ACMA to determine a Mandatory Standard setting out the procedures for take-down of copyright infringing content by digital platforms.

Measures to better inform consumers when dealing with digital platforms and to improve their bargaining power

A preliminary finding of the ACCC's inquiry is that consumers are unable to make informed choices over the amount of data collected by the digital platforms and how this data is used. The ACCC considers that the current regulatory framework, including the privacy laws, does not effectively deter certain data practices that exploit the information asymmetries and the bargaining power imbalances that exist between digital platforms and consumers. The ACCC's preliminary recommendations to address these concerns are:

Increased control over use and collection of personal information by amending the Privacy Act to incorporate measures that strengthen notification requirements, strengthen consent requirements, enable the erasure of personal information and giving individuals direct rights to bring actions for breaches of privacy.

Development of an enforceable OAIC Code of Practice between the Office of the Australian Information Commissioner (the Commonwealth privacy regulator) and key digital platforms that provide targeted regulation of digital platforms' data collection practices.

Adoption of a statutory cause of action for serious invasions of privacy consistent with the Australian Law Reform Commission's previous recommendation.

Making unfair contract terms illegal (and not just voidable and unenforceable) under the Australian Consumer Law to prevent digital platforms from continuing use of terms, which the ACCC views to be unfair contract terms, in their terms of use or privacy policies.

Next steps

The ACCC is now seeking written submissions on its preliminary report and preliminary recommendations by **15 February 2019** and a final report is due on **3 June 2019**.

The ACCC has outlined 9 areas for further analysis and assessment including giving consideration to the establishment of an ombudsman to handle complaints about digital platforms, introducing an explicit obligation for digital platforms to delete all user data after a user ceases use of a digital platform and introducing a general prohibition against use of unfair trading practices in the Australian Consumer Law to address conduct falling short of societal norms that are not protected under current Australian Consumer Laws.

Given the breadth of the recommendations proposed, it is unclear at this stage whether any of the recommendations would be ultimately adopted. There is also the possibility that the ACCC may seek to pursue a more limited set of reforms in its final report following further consultation.

However, this preliminary report does indicate that there will be increasing regulatory focus on digital platforms and their related industries. It would be prudent for digital platform operators and businesses interacting with digital platforms to keep informed and be prepared to respond to changes in their regulatory environment.