

ACCC'S GAME CHANGING DIGITAL PLATFORMS FINAL REPORT: 5 THINGS YOU NEED TO KNOW

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Legal Briefings – By **Annalisa Heger** and **Sarah Benbow**

The ACCC is at the forefront of the global debate on the implications and consequences of digital platforms for competition and consumers.

In its [final report](#), the ACCC has approached the challenges and opportunities presented by digital platforms by adopting a holistic approach that takes account of the close links between competition, consumer and privacy issues. The 23 recommendations span competition law, consumer protection, media regulation and privacy law.

In recent weeks both the US Department of Justice and UK Competition and Markets Authority have followed the ACCC's lead and launched similar digital platform inquiries.

ACCC MAKES MARKET POWER FINDINGS AND LAUNCHES ENFORCEMENT ACTION

The ACCC has found both Facebook and Google have substantial market power in a number of markets.

The ACCC considers that:

- Google has substantial market power in general search services and in search advertising services in Australia;
- Facebook has substantial market power in social media services and in display advertising services in Australia.

The ACCC also considers that both Google and Facebook have substantial bargaining power in their dealings with news media businesses in Australia.

The ACCC has used the report to highlight the 'special responsibility' of firms with market power under competition policy and law, that smaller, less significant businesses do not have. This means that firms with market power may not behave in the market in the same way as those without market power. We see the ACCC's language as reflecting a new emphasis on the role and restrictions on firms with market power.

The ACCC has also taken enforcement action against Google, Facebook and an unnamed digital platform for potential breaches of both competition and consumer law. The ACCC has acknowledged that the proactive examination made possible by its digital platform inquiry facilitated this action, reflecting a global trend of non-contentious market studies or inquiries leading to follow-on enforcement action.

OVERHAUL OF AUSTRALIA'S PRIVACY REGIME

The ACCC is concerned that Australians are not fully aware of or do not feel empowered to exercise their privacy rights, particularly online.

The ACCC is seeking to redress this imbalance by proposing, in consultation with Office of the Australian Information Commissioner (**OAIC**), an overhaul of Australia's privacy regime which seeks to place consumer rights at the centre of data-related regulation in Australia.

The ACCC has recommended a suite of measures including:

- amendments to the Privacy Act to enable consumers to make informed decisions on, and have greater control over, their personal information, reduce information asymmetries and increase deterrence (Recommendation 16);
- calling for broader reform of Australian privacy law to ensure it continues to effectively protect consumers' personal information in the digital economy (Recommendation 17);
- developing an OAIC enforceable code of practice for digital platforms to enable proactive and targeted regulation of digital platforms data practices (Recommendation 18); and
- creating offences for serious invasions of privacy to increase firm's accountability for data practices (Recommendation 19).

The ACCC's wide reaching recommendations are focused on economy-wide concerns raised by current data practices (and engage with issues of consumer trust in digital platforms and such platforms' social licence to operate) and are likely to increase the regulatory burden and costs for all businesses – not just digital platforms.

CHANGES TO MERGER LAW APPLYING TO ALL TRANSACTIONS

The ACCC has recommended (Recommendation 1) the inclusion of two factors that *should* be taken

into account in assessing whether a merger has the effect or likely effect of substantially lessening competition:

- the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
- the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.

As drafted, these factors will apply to all transactions – not just those involving digital platforms. The ACCC believes that making it clearer that these factors should be taken into account signals their importance to the merger parties, the courts and the Australian Competition Tribunal. It will facilitate the ACCC's ability to take these factors into account in undertaking a prospective review of a proposed merger.

The ACCC will also require 'large' digital platforms to provide advance notice of any proposed acquisitions potentially impacting competition in Australia (Recommendation 2). The ACCC has not clarified which firms are considered to be 'large' digital platforms. This in effect introduces a mandatory regime for 'large' digital platforms (the merger control regime in Australia is voluntary).

AN EMPOWERED ACCC TO MORE PROACTIVELY SCRUTINISE THE CONVERGENCE OF DIGITAL MARKETS AND ADVERTISING

The ACCC has recommended (Recommendation 4) that a specialist digital platforms branch be established within the ACCC to build on and develop expertise in digital markets and the use of algorithms in advertising and consumer engagement. This proposal reflects similar developments globally as competition authorities seek to position themselves to be able to investigate and respond in fast-moving technology markets. It also indicates increased recognition by the ACCC of the particular challenges posed by new and emerging technologies and the use of consumer data by businesses. This focus by the ACCC may have broader implications for other businesses that also use such data and technologies.

The ACCC is also seeking the power to hold:

- an extended public inquiry into markets in which digital platforms operate. This will enable the ACCC to periodically and systematically collect data and compel information on an ad-hoc basis to assess whether these markets are functioning well and support any future enforcement action; and
- an 18 month inquiry into competition for the supply of ad tech services and the supply of online advertising services by advertising and media agencies (Recommendation 5).

The ACCC has also indicated its intention to focus on data portability and interoperability in the future. The ACCC will consider whether the application of the Consumer Data Right (aka Open Banking, Open Energy) could improve competition by facilitating competitive entry and consumer switching.

The broad nature of the ACCC's proposals, which will result in further proactive investigation, monitoring and enforcement in the digital space, is consistent with the ACCC looking to expand its specific sectorial focus and powers.

INTRODUCTION OF SEARCH ENGINE AND BROWSER CHOICE SCREEN FOR AUSTRALIAN CONSUMERS

The ACCC has found that Google Search is effectively the pre-installed default search engine for over 95% of Australian mobile devices regardless of browser or device platform. It is also noted that the Google Chrome browser and Apple Safari browser combined accounted for 80% of the market for browsers across desktop, mobile and tablet devices (with Chrome the default for Android and Safari the default for Apple devices).

To address the barriers to entry presented by consumer default bias and the entrenched market power of the incumbents, the ACCC has recommended Google provide Australian users with the ability to choose their default search engine and default internet browser from a number of options.

Google has implemented similar measures in Europe and Russia. Consumer choice screens have proved to be effective at driving consumer choice and competition. Microsoft offered European consumers a similar browser choice screen from 2009-2014 to address competition concerns. During which time 84 million alternative browsers were chosen and Microsoft's market share was estimated to have fallen from 90% in 2009 to around 17% in 2014.

NEXT STEPS

The Federal Government has declared that digital platforms need to be held to account and announced a 12 week consultation process with industry before delivering its final response to the ACCC's report later this year.

The ACCC will be keen to stay at the forefront of the global debate and we can expect to see an empowered ACCC continue to adopt a more holistic approach to address potential competition and consumer issues in the digital platforms arena and beyond.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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