

ACCC INQUIRY INTO DIGITAL PLATFORMS

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Legal Briefings - By **Annalisa Heger**

The Australian Competition and Consumer Commission (**ACCC**) has conducted a broad-reaching inquiry to consider the impact of digital platforms – particularly Google and Facebook – on consumers, advertisers and the media. The ACCC’s Preliminary Report makes 11 preliminary recommendations across competition, regulation, privacy, copyright and unfair contract terms. The ACCC has also announced that it is taking enforcement action for potential breaches of both competition and consumer law against digital platforms.

Digital platforms – search engines, social media and digital content aggregators – have changed the way consumers communicate with each other, access news and information, and interact with businesses.

The ACCC has conducted a broad-reaching inquiry considering the impact of digital platforms – particularly Google and Facebook – on consumers, advertisers and the media. On Monday, the ACCC presented its Preliminary Report outlining a number of recommendations and areas for further analysis as a basis for engagement on the key issues. Feedback is requested by 15 February 2019 and a final report is due by 3 June 2019.

The importance of the ACCC’s focus on digital platforms cannot be underestimated. It also contributes to the global debate on the impact of digital platforms, playing out across the UK, Germany, France and the US, amongst others.

In the press conference to announce the report, Rod Sims referred to the 'special responsibility' of firms with market power under competition policy and law. The concept of 'special responsibility' is well known in European competition law, referring to the obligation on firms with market power not to allow their conduct to impair genuine undistorted competition by excluding competitors or exploiting customers. This term reflects a higher standard than what has traditionally been applied in Australia and may be indicative of a shift in mindset and attitude by the ACCC. This may already be evidenced by the ACCC's enforcement activities in this area.

THE ACCC'S PRELIMINARY RECOMMENDATIONS AND AREAS FOR FURTHER ANALYSIS

The ACCC has made 11 preliminary recommendations and identified nine areas for further analysis.

RECOMMENDATIONS 1 AND 2: AMENDMENTS TO EXISTING MERGER CONTROL TO CAPTURE AND BETTER ASSESS DIGITAL TRANSACTIONS

The ACCC proposes to amend the factors relevant to assessment of the competitive impact of mergers under the *Competition and Consumer Act (CCA)* to clarify that such factors include the possibility that the acquisition will remove *potential* competitors, and the amount and nature (scale and scope) of data the acquirer would have access to as a result of the acquisition. The ACCC also intends to require large digital platforms to provide advance notice of any acquisition of any business with activities in Australia.

The ACCC's proposals clarify existing ACCC practice but also in effect introduce a mandatory regime for large digital platforms (the merger control regime in Australia is voluntary).

RECOMMENDATION 3: MEASURES TO MITIGATE DEFAULT BIAS BY INTRODUCING BROWSER AND SEARCH ENGINE SETUP CHOICE SCREENS

Suppliers of operating systems for mobile devices, computers and tablets (including Apple and Google) would be required to provide consumers with options for internet browsers (rather than providing a default browser). Further, suppliers of internet browsers would be required to provide consumers with options for search engines (rather than providing a default search engine). None of the options presented to consumers could be pre-selected.

This recommendation mirrors commitments offered by Microsoft in 2009 in response to a European Commission investigation into an alleged abuse of a dominant position in the market for client PC operating systems through the tying of Internet Explorer to Windows. Microsoft committed to make available for five years in the European Economic Area a "choice screen" enabling users of the Windows operating system to choose in an informed and unbiased manner which web browser(s) they wanted to install in addition to, or instead of, Microsoft's web browser. The choice screen was very successful with 84 million browsers downloaded between March and November 2010. Microsoft's market share was estimated to have fallen from 90% in 2009 to around 17% at the expiry of the commitments (in 2014).

RECOMMENDATIONS 4 AND 5: MEASURES TO INCREASE OVERSIGHT AND REGULATION OF DIGITAL PLATFORMS

The ACCC proposes establishing a regulatory authority to monitor, investigate and report on discriminatory conduct by vertically integrated large digital platforms. Any such authority would not itself take enforcement action but would make referrals to other government agencies (including potentially the ACCC).

The ACCC proposes that discriminatory conduct would include, but not be limited to, conduct which may be anticompetitive. As a result it could potentially preclude comparable situations from being treated differently or different situations from being treated the same way unless the difference in treatment was objectively justified. There would be no requirement for firms to be placed at a competitive disadvantage. This significantly simplifies any possible enforcement action.

The ACCC considers that Facebook and Google are each likely have the ability and incentive to favour their own related businesses or existing business partners. The European Commission has recently reached a similar conclusion against Google, finding that Google had abused its dominant position in general internet search by stifling competition in comparison shopping markets. Google did so by systematically giving prominent placement to its own comparison shopping service and demoting rival comparison shopping services in its search results.

Third parties such as advertisers or online media sites may not be aware of such discrimination due to the lack transparency in Google and Facebook's operations. However, the ACCC recognises that increased transparency may result in gaming or manipulation of search results or news feeds and as such has recommended the establishment of a regulatory authority to mitigate this risk and address the broader concern.

The ACCC has also identified three areas for further analysis in relation to oversight and regulation of digital platforms including:

- **Digital platforms ombudsman:** the ACCC supports an ombudsman with the power to mediate and resolve disputes between businesses, consumers, media companies and others,
- **Monitoring of intermediary pricing by a regulatory authority** (i.e. pricing of intermediary services supplied to advertisers or websites for advertising), and
- **Mechanisms to verify advertising reach to target audience.**

RECOMMENDATION 6: REVIEW OF EXISTING MEDIA REGULATORY REGIME

The ACCC proposes the Government conduct a separate independent review to design a regulatory framework to regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia. The purpose is to create a level regulatory playing field across digital platforms, publishers, broadcasters and other media businesses.

One of the proposed areas of focus is on the creation of guiding principles for an over-arching platform-neutral regulatory regime that can apply effectively across media formats and platforms, with common rules applying to online and offline activities. It is unclear the extent to which this regime is intended to replace, or supplement, the existing copyright regime.

RECOMMENDATION 7: MEASURES TO ASSIST A MORE EFFECTIVE REMOVAL OF COPYRIGHT INFRINGING MATERIAL

Currently, owners of content protected by copyright in Australia have the exclusive right under the Copyright Act to reproduce, publish or communicate it to the public. However, as the reach and popularity of digital platforms has increased, so too has the proliferation of unauthorised reproductions of copyright content hosted on these platforms. The ACCC is concerned that existing mechanisms for copyright holders to remove infringing content from digital platforms are too difficult, slow and costly for rights holders, particularly if court proceedings against an overseas defendant (which is typically the case) is necessary. The ACCC also considers that there are insufficient incentives for digital platforms to protect copyrighted content. As a result, the ACCC considers that digital platforms have impacted the ability of content creators (such as those in the news and media business) to monetise their content, and the incentives to create original and news/journalistic content.

In response to these concerns, the ACCC has recommended that Australian Communications and Media Authority (ACMA) develop a mandatory standard for take down procedures for copyright infringing content to apply to digital platforms (potentially via amendments to the Telecommunications Act). The objective of this standard would be to enable effective and timely take-down of copyright-infringing content. While the detail of the standard remains to be seen, we expect rights holders will welcome this recommendation. A single, uniform process that applies across multiple platforms is likely to assist businesses to streamline the enforcement of their rights and removal of infringing content, and avoid the delays, complexity and costs often associated with the current platform-specific regimes.

RECOMMENDATIONS 8, 9 AND 10: MEASURES TO ADDRESS PRIVACY CONCERNS

Many Australians do not feel empowered to exercise their privacy rights, particularly in online contexts. The ACCC is seeking to redress this imbalance by introducing 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 8),

- developing an OAIC (Office of the Australian Information Commissioner) enforceable code of practice (Recommendation 9), and
- creating offences for serious invasions of privacy (Recommendation 10).

The ACCC's wide reaching recommendation regarding the use and collection of personal information (Recommendation 8) is likely to increase the regulatory burden and costs for businesses, particularly to the extent that a business may be required to undergo an external privacy audit and certification process. It also reflects the ACCC's ongoing focus on ensuring consumers are provided with clear and accurate information and notification of the collection and use of their personal information.

The ACCC has also sought to increase the penalties for breaches of the Privacy Act to those currently available for breaches of the Australian Consumer Law (ACL). The ACCC has recently seen the penalties it can impose on corporations for a breach of the ACL increase to the greater of \$10,000,000 or three times the value of the benefit received or 10% of annual turnover in preceding 12 months, for corporations. Penalties have increased to \$500,000 for individuals.

The amendments to the Privacy Act are focused on economy-wide concerns raised by current data practices. In contrast, the introduction of an OAIC enforceable code of practice is designed to facilitate proactive and targeted regulation of digital platforms' data collection practice, supplementing the principles based framework established by the Privacy Act.

The adoption of the Australian Law Reform Commission's recommendation to give Australian consumers a direct cause of action to enforce their privacy rights is designed to redress the current imbalance of power between consumers and digital platforms and, in conjunction with the proposed increase in penalties under the Privacy Act, increase the deterrence effect.

The ACCC has also identified two areas for further analysis in relation to privacy concerns including:

- **an obligation to delete all user data** after a user ceases to use a digital platforms' service or after a set period of time, and
- **express opt-in consent for consumers for targeted advertising.**

RECOMMENDATION 11: PROHIBITION AGAINST UNFAIR CONTRACT TERMS

The ACCC has long sought to hold businesses to account for including unfair contract terms in contracts. Currently, a provision is only voidable if declared unfair – it is not a contravention of the Australian Consumer Law (ACL) to include such terms in contracts and as a consequence no penalties for breach can be sought.

The ACCC is keen to more effectively deter digital platforms from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use and privacy policies. The ACCC has a strong track record of enforcement of the ACL.

The ACCC is further considering whether there is a case for the introduction of a general prohibition against the use of unfair practices to deter digital platforms and other businesses from engaging in conduct consumers are uncomfortable with or that falls short of societal norms, outside the existing provisions of the ACL.

The introduction of such a prohibition would be a significant extension of consumer protection legislation in Australia, and would significantly strengthen the ACCC's arsenal and ability to enforce the ACL.

ACCC FOCUS ON NEWS AND JOURNALISM

The ACCC has recognised the significant contribution made by news and journalism to the public interest. Quality journalism enables individuals to develop informed opinions and decisions, and engage in social, political and economic communities. It also plays an important role in holding others to account, campaigning for social or political change, keeping a record on public forums, and acting a mediator of ideas and opinions. Media and particularly print media has experienced a decline in readership and a significant fall in advertising revenue as consumers migrate to online news sources and in particular are content to read 'snippets'. Combined, these developments have reduced the incentives to produce news content and there has been a material reduction in the number of people in journalism-related occupations. Although the ACCC has not made any specific recommendations in this regard, the ACCC has proposed a number of areas for further assessment including:

- **the choice and quality of news journalism** including measures to provide consumers transparency and opportunity to make informed choices on how they consume news on digital platforms.
- **improved news literacy** through the development of a broad campaign to improve understanding of how news and journalism is curated on social media and digital platforms.
- **a review of funding for the production of journalism** and measures to incentivise print/online news media businesses to invest in news and journalism.

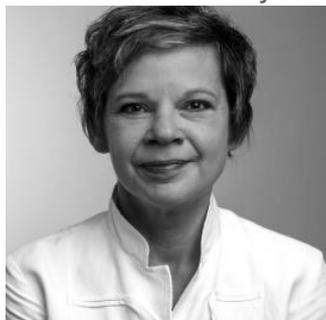
ENFORCEMENT ACTION

The ACCC has announced in its Preliminary Report that it is currently investigating five possible contraventions of the CCA by digital platforms including the potential misuse of market power, and breaches of the ACL.

Market studies are primarily a fact gathering exercise that enables the authority to identify competition problems where markets may not be delivering optimal outcomes for consumers. Although a market study is non-contentious, there is a global trend for such studies to lead to follow-on enforcement action.

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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