ACCC'S DIGITAL PLATFORMS REPORT: MARKET POWER IN ADVERTISING, SEARCH SERVICES & MEDIA & PRIVACY IMPLICATIONS

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By: Ayman Guirguis

IN BRIEF

The ACCC and the Australian Government released the Final Report of the ACCC's Inquiry into Digital Platforms (Report) on 26 July 2019.

The Report makes 23 recommendations. Key findings and proposals include:

- findings that Google and Facebook possess substantial market power in several markets, including in online search, online advertising and news media referral as "gateways" to online publishing
- a new regime to ensure the collection and use of consumer data by large digital platforms does not undermine competition or consumer interests and substantial changes to privacy laws more generally
- amendments to merger rules to address acquisitions of potential nascent competitors, consideration of data acquired in transactions and arrangements for large digital platforms to notify the ACCC of planned acquisitions
- the creation of a new digital platforms branch within the ACCC that would "proactively" monitor and enforce competition laws, potentially including new information-gathering powers to review platform algorithms
- technology-neutral media laws in areas such as content regulation, complaints and classification and recommendations to improve funding of news media to ensure public interest journalism and regional news are preserved
- a new focus on and inquiries into "ad tech" platforms
- reforms to make unfair contract terms illegal, not merely void, and to introduce a new prohibition on unfair trading practices.

The ACCC also announced that it has five current investigations into digital platforms.

The Government will consult on the Report, with submissions due by 12 September 2019 and consultations to close by 24 October 2019. It intends to provide a response to the Report by the end of 2019.

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Some key takeaways for business are:

- Digital platform operators are subject to increasing scrutiny and enforcement action, both in Australia and around the world. The recommendations in the Report suggest that the ACCC will continue to take a leading role in this area.
- While there is a focus on digital platforms and in particular Facebook and Google, all businesses are likely to be affected by reforms coming out of the Report, including users of platform services (such as online advertising), and as a result of proposed economy-wide changes to consumer protection and privacy legislation.
- It is more important than ever to understand the ACCC's holistic view of regulation in the digital sector and to develop strategies for business structure, compliance and engagement with the regulator.

"HOLISTIC AND DYNAMIC"… AND VERY LONG

In releasing the Report, the Chair of the ACCC, Rod Sims, said:

> *This inquiry has looked at the digital platforms in relation to competition matters, consumer matters, advertising… there's vital linkages between those four topics and this whole areas of digital platforms requires a holistic approach ... [I]t's the breadth of coverage that differentiates the work we've done from others that have occurred around the world.*

There have been several reports into different aspects of digital platform regulation over the last few years, particularly in Europe, where the European Commission has also taken enforcement action under its competition laws, fining Google a total of €8.2 billion to date. The US House of Representatives Judiciary Committee has recently held hearings on platform issues and the US Department of Justice has announced a comprehensive review of digital platforms.

The ACCC's Report runs to 619 pages and contains 23 recommendations relating to digital platform regulation. It builds on, rather than substantially changes, the approach outlined in its Preliminary Report, issued in December 2018.

The Report does not directly address online commerce platforms such as eBay, Amazon or Uber, nor "sharing economy" platforms. However, many of the ACCC's findings and recommendations, particularly those relating to the use of data and consumer protection, may ultimately have broader applications.

MARKET POWER

The Report finds that Google and Facebook have gained overwhelming market shares in their primary markets in a very short time. Google, founded in 1998, has an estimated 95% share of the general search market in Australia; Facebook, started in 2004, has approximately 80% share of the social media market.

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The Report stresses the dramatic changes in advertising over the last 10 years, with online advertising growing from approximately AUD2 billion in 2008 to over AUD8 billion in 2018. It also notes that for every AUD100 spent, AUD47 goes to Google, AUD21 goes to Facebook and AUD32 goes to all other websites.

Large market shares do not, in themselves, equate to market power and simply possessing market power is not an offence in Australia. However, the particular advantages Google and Facebook enjoy in being able to attract new users (due largely to the network effects of their vast existing consumer bases), and the advantages that both platforms have from data collected from users across a range of services, mean that the ACCC concluded the existence of their market power is very clear.

The advantages that Facebook and Google enjoy in supplying services to consumers also makes them unavoidable trading partners for businesses wishing to supply advertising and news. Consequently, the ACCC finds that Google has market power in online search markets and Facebook has market power in social media. It also considers both platforms to have market power in online advertising markets and in news referral services.

The Report finds that the existing prohibitions on the misuse of market power are sufficient to prevent anticompetitive conduct by the platforms. Nevertheless, it makes recommendations to prevent such platforms from gaining further market power through acquisitions.

Recommendation 1 proposes that the test for mergers include express consideration of the removal of potential and/or nascent competitors, not only in relation to current market participants, and that the significance of any data acquired be considered.

Recommendation 2 is that large platforms give undertakings to the ACCC that they will provide advanced notification of acquisitions to allow the ACCC sufficient time to review the acquisition fully.

In practice, the recommendations would not change the merger laws dramatically, as the ACCC or the Court can examine these factors already and the platforms would likely seek clearance of any significant merger already.

However, the recommendations signal an intention on the ACCC's part to examine data issues more closely and to intervene more often in digital mergers.

Recommendation 3 is that Google's operating systems and devices be required to give consumers a choice of browser, rather than setting a default, and for browsers to include a choice of search engines.

This proposal would result in Australian consumers having the same options that currently exist in Europe due to remedies against Google from earlier cases.

ONLINE ADVERTISING MARKETS AND "AD TECH"

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The rapid rise in online advertising has also brought dramatic changes in the way advertising is bought and sold.

Businesses placing advertisements and publishers supplying advertising services (both online and in traditional media) now interact through specialist "ad tech" platforms that operate as advertising clearing houses not only for ads placed on the platforms themselves but also for advertising on third party sites.

The ACCC noted that Google and Facebook are important publishers of online advertising but also have substantial influence along the ad tech supply chain. It found that these markets are opaque: advertisers may not know the effective price they end up paying for advertising, and the tools for verifying the results from the ad are not independent as they are also provided by Google and Facebook.

The ACCC acknowledges that the particular complexities of the digital platforms market will take some time to explore.

Recommendation 4 is for the ACCC to establish a new digital platforms branch to proactively monitor and investigate ad tech markets for anticompetitive conduct and conduct that harms consumers. The branch would also proactively monitor and report on concerns (potentially even where conduct may not contravene competition laws).

Recommendation 5 is for a Ministerial direction that the ACCC's digital platforms branch conduct a further inquiry into ad tech markets.

The changes would ensure a central role for the ACCC, not only to investigate potential competitors, but to have a strong influence on regulatory policy. Detail on the information-gathering powers proposed is limited. In old-media terms, "watch this space".

MEDIA AND JOURNALISM – PUBLISHING ON A LEVEL PLAYING FIELD

The ACCC has responded to concerns that publishers, broadcasters and other media businesses are disadvantaged compared to digital platforms that enjoy the benefits of hosting content without having to comply with media and content regulation. Platforms argue that it would be impractical to apply the same regulatory structure, given their role as aggregators, not creators, of content.

The Report also finds that restoring a level playing field in this market will not be possible through competition law alone.

- Recommendation 6 is that media regulation frameworks be revised to ensure the laws that apply to online and traditional media be harmonised.
- Recommendation 7 addresses the disparity in bargaining power in dealings between media sources and platforms by proposing a new code of conduct be established.
- Recommendation 8 proposes enhanced rights for copyright owners to require the removal ("take down") of unauthorised material.

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Throughout the course of the Inquiry, the ACCC indicated that some direct intervention to support "public interest journalism" is required. The Report made recommendations in two main areas:

- Recommendations 9-11 propose increases to funding for national broadcasters and regional journalism, and tax measures to support philanthropy for investigative journalism; and
- Recommendations 12 and 13 are measures to support media literacy in the community and schools.

The ACCC also recommends that online platforms be required to exercise greater control over the information that is published, to ensure that false or inaccurate information (so-called "fake news") cannot be perpetuated online:

- Recommendation 14 is that the online platforms' existing systems of "credibility signalling" (such as "badging"), be monitored and publicly reported by the Australian Communications and Media Authority (ACMA).
- Recommendation 15 is that platforms with more than one million active monthly users must comply with an industry code of conduct to ensure that complaints about disinformation that causes public detriment will be addressed. The ACMA would be given new powers to investigate "systemic breaches" of the code and, if necessary, to impose sanctions.

CONSUMER DATA PRIVACY

In launching the Report, Rod Sims emphasised that consumer data and attention are the two basic inputs to the large platforms' business models. Although the services provided by the platforms are very valuable, he argued that consumers are not getting a fair deal.

The Report noted many points where there is a mismatch between the platforms' terms and conditions and consumers' expectation on matters such as how much of their data is collected by platforms, how that data is used and the extent to which it is accessible to third parties.

There was also extensive discussion of the flaws in current practices: privacy notices provided to consumers are long and often too complex to be understood by most consumers. The Report found that:

- terms are offered on a "take-it-or-leave-it" basis
- consents to the use of data are bundled across different uses and different services
- privacy settings are often pre-selected against consumers' interests.

Recommendations 16 and 17 suggest wide-ranging (including some economy-wide) reforms to privacy legislation, including:

- updating the objectives and core concepts such as "personal information" to include data about a consumer's use of services (metadata), including data inferred from that use of services or devices (such as location and online tracking data)
- clearer and more accessible notification of platforms' privacy terms and conditions

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- enhanced consumer rights over data, including stronger notice and consent requirements, rights to erasure of personal information, direct rights to seek compensation for privacy interference and higher penalties for breaches of the Privacy Act
- a new tort of "serious invasions of privacy" (recommendation 19)
- new rules and standards to cover de-identification of data and the transfer of data overseas.

Recommendation 18 calls for a new Digital Platforms Privacy Code to be developed and enforced by the Office of the Australian Information Commissioner (OAIC). The code would apply to all search, social media and content aggregation platforms with over a certain number of visits a month.

The code would address issues such as requirements for privacy notices, consent to data collection, rights for consumers to opt-out of data collection not directly related to providing a platform service and retention of data. The code would have special provisions to protect collection and retention of children's data.

UNFAIR CONTRACT TERMS AND UNFAIR PRACTICES

The ACCC considers many privacy terms may be unfair contract terms, throughout the economy, not just in the digital platforms' data practices.

Currently, the law makes unfair contract terms void and therefore unenforceable. Recommendation 20 proposes that unfair terms be prohibited, so that fines could be imposed on businesses that include them in standard form contracts.

Recommendation 21 calls for the introduction of a general "unfair trading practices" prohibition that would address forms of conduct that are unfair but may not be addressed by unfair contract terms provisions or the current prohibitions on misleading or deceptive conduct.

This would be a new provision in Australia, although similar laws exist in many other countries, notably the US and Europe. The Report only provided a short analysis of how such provisions would operate in practice but did note that it would be important to establish clear guidelines and avoid "an overly broad interpretation of fairness" to reduce uncertainty.

DISPUTE RESOLUTION MECHANISM

Recommendation 22 is for introduction of new dispute resolution procedures and the establishment of an ombudsman to address complaints about digital platforms' conduct in dealing with personal information and dealings with consumers. The proposal is that the ombudsman (or the existing Telecommunications Industry Ombudsman) would have the power to impose compensation orders on platforms and to compel the removal of "scam" content.

KEY TAKEAWAYS AND THE ROAD AHEAD

Impacts extend beyond digital platforms

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All businesses are likely to be affected by some of the Report's recommendations.

The proposed reforms to rules on advertising, privacy and unfair contract terms and practices would be the most significant.

Changes to the regulation of online advertising and the ACCC's ongoing work on ad tech systems may have direct impacts on all businesses as consumers of advertising.

Many of the Report's recommendations are expressed to apply across the economy. Extensive changes to the Privacy Act are likely to apply to businesses that collect personal information.

The proposed penalties for unfair contract terms (rather than only voiding terms) and new rules on unfair practices generally are significant changes to current rules and are proposed to cover the whole economy.

More broadly, as markets become increasingly digital, regulation of search, acquisitions and the treatment of new technologies (such as the Internet of Things) will affect the plans and operations of all businesses that operate online.

Algorithms as the keys to digital commerce

Algorithms are used by platforms to address different groups of consumers and to rank content and advertising displayed in response to search requests. More and more of these functions determine how commerce takes place and how value is allocated online, meaning that algorithms are central to how businesses implement strategy and interact with consumers online.

The extent to which regulators should be able to examine the content and workings of algorithms was highly contentious during consultation in the course of the Inquiry – and will continue to be a battleground in future consultations. The ACCC expressed three main concerns about the use of algorithms:

- lack of transparency and information about changes to algorithms makes it difficult for media content providers and advertisers that rely on platforms to access consumers and may lead to excessive pricing of advertising services
- the potential for discrimination by a platform in favour of its own businesses in related markets, such as in shopping comparison, travel or apps
- advertisers may not be able to verify whether their advertisements are seen by their intended audience and may be subject to "ad fraud", where fraudulent operators set up websites, sell advertising space and use bots to click on sponsored ads, generating revenue for themselves (as the website owner) and the search platform that refers the traffic.

The Report recommends a greater role for the ACCC itself in monitoring algorithms. It has not suggested a power to compel disclosure of algorithm content but does seek powers to allow the testing of algorithmic results. The topic will be the subject of further debate as the Government consults in coming months.

The ACCC as a dominant regulatory platform

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More than any individual recommendation, a key message from the Report is the increasing role of the ACCC as an economic "super-regulator". Unlike many of its international equivalents, the scope of the ACCC's enforcement role covers both competition and consumer protection and it has extensive regulatory functions in areas such as energy and communications.

The ACCC has also gained increasing regulatory "soft power" through sector inquiries, such as digital platforms, financial services, energy and agriculture. These inquiries often result in additional, ongoing enforcement and regulatory responsibilities for the ACCC itself.

The trend raises some policy questions for the regulator that have analogies to those raised about digital platforms: the ACCC must balance the economic interests on different "sides" of the regulatory platform, it has extensive (and may gain further) powers to collect data and information that may only be compelled in relation to possible contraventions of the law but will be highly relevant across different regulatory functions. It will remain important that the ACCC's statutory functions and powers are subject to effective oversight and review.

However, similarly to the Report's reminders about the benefits of digital platforms, there are many advantages that a well-resourced, integrated economic regulator can deliver by allowing the full range of policy issues to be examined and implemented and seeking to avoid unintended effects on competition through proposed reforms. There is no "market for regulatory services" which the ACCC competes in but the Australian Government does allocate responsibilities between existing or new agencies and will only entrust new functions to the ACCC if it is confident that it can successfully address the complex challenges of modern markets. The strength of analysis in the Report and the ACCC's leading role internationally suggest it will continue to gain political traction to examine and regulate emerging markets and industry sectors.

Ongoing consultation

The Government has announced that submissions on the Report are due on 12 September 2019 and further consultations will be held until 24 October 2019. The Government has indicated it will respond to the Report by the end of the year.

MORE DETAIL

K&L Gates will publish additional Insights in coming months about particular aspects of the Report. In the meantime, if you require more detail, please contact a member of our Australian Competition & Consumer Law Team or our IT/Privacy Law Team.

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KEY CONTACTS



AYMAN GUIRGUIS
PARTNER

SYDNEY
+61.2.9513.2308
AYMAN.GUIRGUIS@KLGATES.COM

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