Brief prepared by FARE, August 2019, for participants in 30 August meeting

Brief – ACCC’s Digital Platforms Inquiry Final Report

Background to Inquiry
At the end of 2017, the Hon Scott Morrison MP, then-treasurer, wrote to the Australian Competition and Consumer Commission (ACCC) directing it to undertake an inquiry “into the impact of digital platform services on the state of competition in media and advertising services markets” (Inquiry).

The impetus for the Inquiry came from negotiations on the media reform package. Then-Senator Nick Xenophon agreed to lend his party’s support to the package if an ACCC inquiry was established into Google and Facebook and the effect these platforms were having on news and journalism. The original terms of reference focused heavily on areas where traditional media was concerned that digital platforms had an (unfair) competitive advantage such as advertising and copyright compliance.

The Digital Platforms Inquiry Final Report (Report) was released on 26 July 2019. The Report contains 23 recommendations. While the Inquiry had a specific focus on the impact of digitalisation on news and journalism, the ACCC made it clear during the inquiry that it was impossible to produce a report without increasing the original scope of the inquiry, especially to take into consideration impacts on the consumer. The final finding and recommendations span a vast range of issues, including users’ privacy, and consumer harms resulting from poor data practices.

Current consultation
Following the release of the Report, the Government announced a further consultation process on its findings and recommendations. Treasury together with the Attorney General’s Department and the Department of Communications and the Arts will undertake this consultation. It commenced on 1 August, with submissions due on 12 September. The Government is specifically seeking ‘views on practical options for implementation, timing and any impediments or challenges.’ Following the close of submissions, the departments involved will undertake targeted consultation for a further six weeks. The consultation process will inform the Government’s response to the Report, which is expected by the end of the year.

Scope of the Brief
The Report investigates the role and impact of digital platforms on the lives of Australians and the functioning of our markets and society.

This Brief focuses on the matters raised in the Report that are relevant to the public health sector, specifically those relevant to unhealthy marketing, and health and science news media.

Key findings and recommendations

Overarching environment
Finds:

- Consumer data and attention is the central pillar of the digital platforms’ business model
- Facebook and Google have substantial market power in display advertising and search advertising respectively
• The supply of advertising has an important impact on consumers as well as a critical role in the business models of digital platforms and commercial media businesses
• Some forms of public interest journalism, including health reporting, have suffered a serious decline, with a 30% decline in health articles from 2004
• Health journalism may be provided by digital natives such as Croakey Media

Recommends:
• Support for philanthropic public-interest journalism
• Continued and stable funding for public broadcasters

Regulatory Framework
Finds:
• The sector-specific approach to media regulation has not kept up with digitalisation and needs modernisation and harmonisation
• Advertising is one area where there is stark regulatory disparity
• Consumers may be exposed to inappropriate content where content rules do not consistently regulate the content being displayed to audiences across Australia

Recommends:
• A new platform-neutral regulatory framework be developed and implemented, which sets out clear rules based on sound policy objectives applicable to a converging media landscape and adaptable to future developments
• This should include a consistent system of advertising restrictions across all delivery platforms, including online and offline channels
• Harmonisation to take place in staged reforms, electoral advertising singled out as a potential priority

Consumer rights and protections
Finds:
• The current regulatory framework for data treatment is not preventing problematic data practices
• Data detriments may be especially harmful to vulnerable consumers
• The risks may be particularly acute for children

Recommends:
• Establishment of a media literacy program that will deliver for all Australians, and the proposed inclusion of digital media literacy for consideration as part of the upcoming Australian Curriculum review
• Privacy Act reforms and broader privacy law changes, including the ALRC’s recommendation for a tort for serious invasion of privacy, are proposed
• Proposed amendments to the Competition and Consumer Act 2010 relating to unfair contract terms and trading practices

Monitoring, compliance and enforcement
Finds:
• Current investigation and enforcement mechanisms are not sufficient to deal with all competition and consumer issues arising out of online markets
• There is a lack of transparency and consumers, market participants, regulators and decision makers lack data

Recommends:
• Introduction of monitoring, enforcement and sanction capabilities to the proposed platform-neutral media regulatory framework
• A specialist digital platforms branch at the ACCC that will monitor and investigate, among other things, practices causing consumer harm
• In addition to privacy reforms, a privacy code for digital platforms is recommended to be developed and enforced by the Officer for the Australian Information Commissioner (OAIC), and provide opt-controls and additional protections for children’s personal information
• The establishment of a digital platforms ombudsman, either through the expansion of the Telecommunications Industry Ombudsman’s role or the creation of a standalone ombudsman

Detailed summary and analysis of relevant findings
Business model of the digital platforms
The digital platforms, particularly the two major platforms: Google and Facebook, are now ubiquitous with modern life, for individuals and businesses. They offer their services to consumers free of charge in exchange for user data and attention, which is monetised through advertising on the platforms.

The digital platforms have grown their share of advertising revenue, while the share going to traditional print media has shrunk significantly. Digital Platforms are not held to the same standards as traditional media, with a regulatory imbalance existing in the frameworks for media, communications and advertising. This has an impact on competition across the sectors, particularly where digital platforms and other businesses are performing similar functions.

Data collection
The more data collected from users the better targeted the advertising on the platform, and the better tailored the platform’s offerings for consumers. The more users on the platform, and the greater the capacity for targeting, the more valuable the platform is to advertisers.

To increase the level of first party data collected, a platform can increase the number of services it provides. Google, for example, has over 60 online services that it can source user data from. This data can be combined and linked to a specific user.

The digital platforms can also gather data from third party websites and apps. They are then able to combine this data with data generated on their platforms, even in circumstances where the user has blocked web tracking. Those without accounts are also not free of their influence – Facebook is still able to build profiles of these individuals.

The level of data Google and Facebook collect from users and their advertising activities is unlikely to be matched elsewhere.

While the targeting of advertising to an intended audience is not a new phenomenon, the level of detail available from the vast amount and range of data provided to the platforms has notably increased the ability of advertisers to reach their target.
Users may not anticipate the level of data being collected by Google and Facebook, the various sources of this data external to the platforms themselves and the usage of that data to generate advertising revenue.

**Analysis**
While the Report takes issue with data treatment that has the potential to cause consumer harm, and the regulatory imbalance existing between digital platforms and other media businesses, it does not question whether the collection and usage of consumer data and the analytics of it is a legitimate market. The recommendations concerning data treatment therefore tackle the identified issues – they do not attempt structural reform of how the digital platforms operate and make money.

Without structural reform, the nature of these businesses will not change; they will continue to harvest and analyse data and monetise this. This will likely limit any future success the public health sector has on regulating unhealthy marketing to protecting those with recognised vulnerabilities, such as dependant drinkers or gamblers.

**Market power and arising issues**
The Report finds that Facebook has market power in display advertising, including social media advertising, and Google has market power in search advertising. Facebook and Google each have a monopoly over the eyeballs of those who ‘single home’.

There is discussion of the potential effect of the market power of the platforms when they extend into related markets, particularly self-preferencing behaviour, and bundling and tying of services.

**Monitoring, investigations and compliance**
Current investigation and enforcement mechanisms are not sufficient to deal with all competition and consumer issues arising out of online markets. The lack of transparency makes it difficult to identify issues, and given the potential for market failure, ensuring consumers and the economy are buffeted from the associated risks requires additional investigation, monitoring and enforcement powers.

The ACCC recommends it be given these new powers to keep well-informed of the platforms activities and the associated impacts on Australians, and recommends a specific Digital Platforms branch be created within the ACCC. The ACCC would continue to work with other regulators, including the Office of the Information Commissioner and the ACMA. This group will also provide decision makers with useful evidence on which to base future policy decisions.

The Report envisages that this recommendation will extend to all digital platforms, but that the focus would be on the larger platforms due to their power and their ability to impact on consumers and the economy. The ACCC intends to compel the platforms to provide data to them.

**Online advertising services**
Online advertising services and more specifically ad tech services and advertising and media agencies lack transparency. Ad tech services exist within the ad tech supply chain and enable the programmed serving of online display advertising. They lack pricing transparency for both advertisers and hosts.

Advertising and media agencies add further complication to the advertising supply chain.

Accordingly, the ACCC recommends a further inquiry into ad tech services and advertising agencies.
Regulatory imbalance
Digital platforms have almost no media regulation to comply with. This is in stark contrast to traditional media. The current sector-specific approach to media regulation has not kept up with digitalisation and the way consumers’ access news and media content. Where digital platforms are competing with other media businesses, regulatory imbalance provides them with a competitive advantage. Specifically, less compliance obligations and costs. This relates to both the ability to generate advertising revenue and obtain content rights.

Of specific interest to the public health sector, there is also a regulatory imbalance with regards to advertising restrictions between digital platforms and some media businesses.

This can lead to consumers seeing unsuitable advertisements that are potentially restricted elsewhere. Vulnerable consumers and children are the ones most likely to be impacted.

As Rod Sims recently said in his speech at the Melbourne Press Club, “… where digital platforms do perform comparable functions to media businesses, they should be regulated similarly, and yet they are not, by a long way.”

The Report also states that “[s]takeholders have made submissions raising concerns that there is little effective regulation to protect children from targeted online advertising.”

Process toward a harmonised framework
The ACCC recommends a harmonised media regulatory framework be developed and implemented. This will level the playing field in Australian media and advertising markets through the establishment of a platform-neutral legal framework for those involved in content production or delivery. The ACCC considers that the framework should include advertising restrictions that are consistent across online and offline delivery methods, and should contain “appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions.”

The ACCC has recommended the harmonisation take place in stages so the most pressing concerns can be addressed as a matter of priority, identifying election advertising restrictions and local content obligations as potential priorities.

ACMA raised and highlighted the need to ensure enduring policy objectives of the current regulatory frameworks continue to underpin the harmonised media framework. Community safeguards was one such enduring concept. However, the Report did leave it open for discussion that there should be less regulation for broadcasters, rather than more regulation for digital platforms.

The ACCC considered that the need to ascertain the right level of regulation would be a key part for the review.

Analysis
The need for regulatory harmonisation is clear. However, there is a real risk of a race to the bottom, where the outcome is less regulation on the broadcasters, which will be a significant setback to our joint efforts for further regulation.

Approaching the harmonisation in a staged way could be positive, in that action may be taken sooner rather than later and it allows stakeholders to narrow the scope and bring pressure to bear effectively. However, a split may be problematic if different forms of advertising are reviewed and reformed at different times, with unhealthy marketing given a low priority. Noting the nomination of electoral advertising as a priority – whatever approach is taken for restrictions, monitoring and
compliance are likely to be the default settings for any other types of advertising regulation, and may not be appropriate for unhealthy marketing.

The new regulatory function over digital platforms for the ACCC may be positive, but it is concerning that competition issues seem to be given higher importance than consumer issues. The scope of powers, especially in relation to data collection, and the role in proactive monitoring are areas where more input could be given.

**Privacy**

The ACCC posits that targeted advertising is valuable for some users, but comes at a cost of decreased privacy, which means that it is a net negative for some users.

Privacy preferences vary among consumers, as do levels of privacy awareness. However, overall the ACCC finds that consumers care about their data and how it is leveraged. Roy Morgan undertook a survey of consumers about their views towards, and actions on, digital platforms for the ACCC during the course of the Inquiry. Privacy concerns are growing among digital platforms users. 54 per cent of those surveyed are more concerned about the use of their personal information on these platforms than they were just one year ago. Given the option, more than half of digital platforms users would elect to opt-out of sharing information.

The ACCC centres their analysis around the central question of whether consumers truly understand how much of their data is being collected and how that data can be used, concluding “[t]he ACCC’s view is that few consumers are fully informed of, fully understand, or effectively control, the scope of data collected and the bargain they are entering into with digital platforms when they sign up for, or use, their services.”

Consumers are often hindered from making informed choices about how digital platforms use and disclose the data collected from them. This is due to the nature of the relationship between consumers and digital platforms, characterised by bargaining power imbalances, information asymmetries and the struggle consumers’ face determining the ongoing costs of supplying their data. The form of the digital platform’s privacy policies, such as a lack of clarity, and the use of clickwrap agreements that require consumers to either accept or reject the terms, which often contain multiple consents relating to the treatment of their data, contribute to the bargaining power imbalance and the information asymmetries.

Consumers have been given the false impression by some digital platforms that they have the ability to exert control over their data. The privacy policies of the digital platforms often refer to the online tracking of users in a way that disguises the extent to which the practice occurs, to whom it occurs and for what purposes. The Report states that, “A lack of clarity in information provided to consumers regarding how their personal information is used (and whether it is used for targeted advertising purposes) is particularly problematic when information ostensibly collected for a consumer-facing service or feature is also used for purposes beyond a consumer’s reasonable expectations.”

The ACCC finds this concerning, concluding “[a]ll consumers will be better off when they are sufficiently informed and have sufficient control over their user data, so that they can make informed choices that align with their privacy and data collection preferences.”

The Report states that, “The existing Australian regulatory framework for the collection, use and disclosure of user data and personal information does not effectively deter certain data practices
that exploit the information asymmetries and bargaining power imbalances between digital platforms and consumers."

The concerns the ACCC have in relation to the regulation of data treatment extend beyond the digital platforms to other businesses utilising and profiting off consumer data, which is expected to grow into the future.

**Consumer harm**

The digital platforms leverage the characteristics of the relationship they have with consumers to gain power over the data of consumers and how they use it. The ACCC characterises this as market inefficiencies and determines that substantial consumer harm can eventuate.

The types of consumer harm identified in the Report include decreased consumer welfare from decreased privacy, risks to consumers from increased profiling and particular risks to vulnerable consumers, including children.

Of concern is the collection of data that contains information regarding an individual’s vulnerability and this data then being used to target them with products, services etc. that exacerbate that vulnerability.

The Report states that, “Submissions to the Inquiry have highlighted that the risks associated with data collection and use could be particularly acute for children.”

The ACCC considers that the consumer harms identified are not limited to the data practices of the digital platforms.

Accordingly, the ACCC believes that regulatory reform should not focus solely on the digital platforms and should extend across the economy, with particular, additional responsibilities for digital platforms where required.

The ACCC recommends strengthening provisions in the Privacy Act, including the need for consent that is “freely given, specific, unambiguous and informed” to collect, use or disclose personal information, except in limited circumstances. If this recommendation is adopted, guardians will need to provide consent for the collection of a child’s personal information. This recommendation also envisages a re-defining of the term ‘personal information’ and an individual’s personal information being erased on their request, without unnecessary delay, except in certain circumstances.

Broader privacy reforms are also contemplated, including a potential widening of the scope of the Privacy Act to include currently exempt entities, provision in the Privacy Act for inferred information, and the need for data treatment to be fair and lawful.

An additional, enforceable privacy code for the digital platforms is recommended. Opt-out controls and additional protections for children’s personal information in respect of profiling and targeting are suggested for inclusion, as is an approach that would minimise the use of children’s data more broadly.

**Analysis**

Overall the ACCC posits questions around privacy and data use as a matter of consumer choice and legitimate market functionality, with no real engagement with wider thoughts of placing limits on the data-driven, advertising funded model of digital platforms and with restricted discussion about imposition of basic standards outside of the choice framework. Some further scope may exist to push this framing in light of the work on unfair contract terms and Australian Consumer Law.
It is of key importance that the ACCC recognises that consumer welfare must be taken into account, and that vulnerable consumers, including children may require particular protections. The acceptance that society may expect children to be protected is important, and encompasses restrictions on both the collection of data (so a non-negotiable right to privacy) and use of the data, including passive uses such as profiling.

There is little recognition that people from a non-vulnerable class may still have vulnerabilities (for example to addictions to alcohol and gambling) which should engage protective measures including over data collection and use.

**Conclusion**

The Report contemplates what responsibilities the platforms should have in the markets they exist in, acknowledging that those with substantial market power have a special responsibility not required of those without such power. Consideration is given to users’ privacy, regulatory imbalance, lack of competition, and business and consumer harms.

Recommended responses to the problems identified are multifaceted and involve consumer and privacy laws as well as competition law.

The message woven throughout the Report is that the current settings are outdated and are not effectively dealing with the digital challenges we face. Reform is necessary to address the current, identified issues and to future-proof against potential further challenges.

As Mr Sims has said, “Thoughtful regulatory frameworks can help us harness the benefits of innovation while protecting society from its potential harms.”