



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Digital Platforms Inquiry

**Preliminary report**

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Australian Competition and Consumer Commission  
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# Executive summary

## Overview

On 4 December 2017, the then Treasurer, the Hon Scott Morrison MP, directed the Australian Competition and Consumer Commission (the ACCC) to hold an inquiry into the impact of online search engines, social media and digital content aggregators (digital platforms) on competition in the media and advertising services markets. The ACCC was directed to look at the implications of these impacts for media content creators, advertisers and consumers and, in particular, to consider the impact on news and journalistic content.

Digital platforms offer innovative and popular services to consumers that have, in many cases, revolutionised the way consumers communicate with each other, access news and information and interact with business. Many of the services offered by digital platforms provide significant benefits to both consumers and business; as demonstrated by their widespread and frequent use by many Australians and many Australian businesses.

The ACCC considers, however, that we are at a critical point in considering the impact of digital platforms on society. While the ACCC recognises their significant benefits to consumers and businesses, there are important questions to be asked about the role the global digital platforms play in the supply of news and journalism in Australia, what responsibility they should hold as gateways to information and business, and the extent to which they should be accountable for their influence.

In particular, this report identifies concerns with the ability and incentive of key digital platforms to favour their own business interests, through their market power and presence across multiple markets, the digital platforms' impact on the ability of content creators to monetise their content, and the lack of transparency in digital platforms' operations for advertisers, media businesses and consumers. Consumers' awareness and understanding of the extensive amount of information about them collected by digital platforms, and their concerns regarding the privacy of their data, are also critical issues. There are also issues with the role of digital platforms in determining what news and information is accessed by Australians, how this information is provided, and its range and reliability.

Digital platforms are having a profound impact on Australian news media and advertising. The impact of digital platforms on the supply of news and journalism is particularly significant. News and journalism generate broad benefits for society through the production and dissemination of knowledge, the exposure of corruption, and holding governments and other decision makers to account.

It is important that governments and the public are aware of, and understand, the implications of the operation of these digital platforms, their business models and their market power.

The ACCC's research and analysis to date has provided a valuable understanding of the markets that are the subject of this Inquiry, including information that has not previously been available, and has identified a number of issues that could, or should, be addressed. Many of these issues are complex. The ACCC has decided that the best way to address these issues in the final report, due 3 June 2019, is to identify preliminary recommendations and areas for further analysis, and to engage with stakeholders on these potential proposals.

Such engagement may result in considerable change from the ACCC's current views, as expressed in this report.

The ACCC's preliminary recommendations are summarised on pages 9-14 and the specific matters for further analysis and assessment are summarised on pages 14-17.

The ACCC welcomes feedback, and will use the preliminary recommendations and areas for further analysis identified in this report as the basis for further engagement with businesses, consumers and other stakeholders that have an interest in these issues.

In carrying out the Inquiry, the ACCC has looked generally at the three categories of digital platforms identified in the Terms of Reference, namely, digital search engines, social media platforms and digital

content aggregators. However, the influence, significance and size of Google and Facebook, has resulted in them being the principal focus of the Inquiry. Google and Facebook are the two largest digital platforms in Australia and are the most visited websites in Australia. This focus also reflects the submissions received from interested parties and consumers, almost all of which concerned Google and Facebook.

## The growth of digital platforms

Australian consumers are frequent users of digital platforms, and in particular the platforms operated by Google and Facebook. The use of these platforms has grown substantially over the past ten years and they are now an integral part of life for most Australians. Each month, approximately 19 million Australians use Google Search, 17 million access Facebook, 17 million watch YouTube (which is owned by Google) and 11 million access Instagram (which is owned by Facebook).

The ACCC recognises the transformational innovation provided by digital platforms such as Google and Facebook. The widespread and frequent use of digital platforms by consumers is an indication of the benefits that they derive from the platforms. Google Search, for example, has transformed the way consumers access information.

This widespread and frequent use of Google and Facebook means that these platforms occupy a key position for businesses looking to reach Australian consumers, including advertisers and news media businesses. Google and Facebook are critical and, in many cases, unavoidable business partners.

While the ACCC recognises the consumer benefits provided by digital platforms such as Google and Facebook, there are potentially adverse consequences from the growth of digital platforms that need to be considered:

- the impact of digital platforms on the sustainability of the commercial news sector in Australia and the risk that particular news and journalism which is beneficial to society may be underprovided
- the impact of digital platforms on advertisers
- the impact of digital platforms on consumers in terms of digital platforms' acquisition and treatment of consumers' information as well as the reliability, quality and diversity of news provided to consumers by the platforms.

## The disruption of Australian news media

Australian news media has been significantly impacted by digitalisation and the growth of digital platforms.

Traditionally, commercial media businesses in Australia have been reliant on advertising to fund news and journalism. The advertising revenue of key providers of news and journalism, the traditional print media, has declined substantially in the past 20 years for reasons including the rise of online advertising.

Australian commercial media, and in particular traditional print media, first suffered a significant reduction in advertising revenue with the unbundling of classified advertisements from newspapers. This resulted in a decline from \$2 billion in classified advertising revenue in 2001 to \$200 million in 2016<sup>1</sup>.

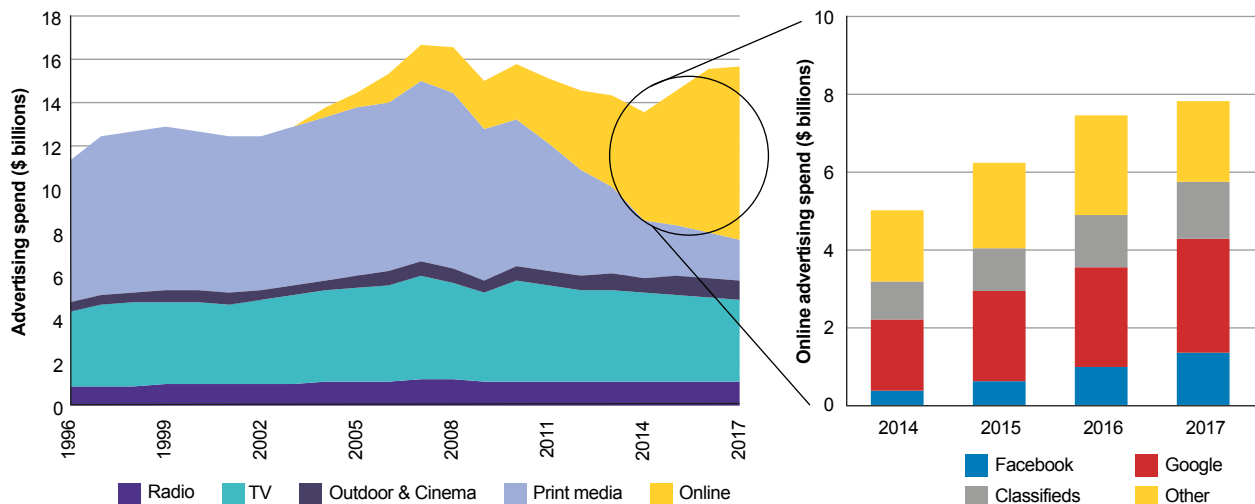
At the same time, traditional print media (now print/online media) faced increased competition from both international sources and other media, both commercial and publicly funded. Consumers are now more easily and frequently able to access free-of-charge news from local as well as international sources.

Over the past decade, a strong fall in the print advertising revenue of commercial Australian media publishers has been accompanied by a rise in spending on online advertising (figure 1, left panel). It is also clear that digital platforms have taken an increasing share of advertising expenditure with a significant portion of the increase in online advertising revenue from 2014–2017 going to Google and Facebook (figure 1, right panel).

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1 2001 figure adjusted for inflation.

**Figure 1: Australian advertising expenditure by media format and digital platform**



Source: ACCC estimates of spend relating to Australian customers based on CEASA data and information provided by market participants. Amounts are shown in 2017 Australian dollars.<sup>2</sup>

Importantly, the revenue of the traditional print publishers, including their overall advertising revenue, continued to decline even after the vast majority of classified revenue had shifted online.

Digital platforms also created opportunities and cost savings for online media, enabling news media businesses to reach a larger potential audience and by lowering the costs of journalists collecting news and information as well as significantly cutting distribution costs. However, at the same time the shift in advertising revenue online, and to digital platforms, appears to have reduced the ability of some media businesses to fund Australian news and journalism.

Census data shows that from 2006 to 2016, the number of people in journalism-related occupations fell by 9 per cent, and by 26 per cent for traditional print journalists (including those journalists working for print/online news media businesses). Data provided by media companies show the number of journalists in traditional print (now print/online) businesses fell by 20 per cent from 2014 to 2017. This is at a time when Australia's population and economy were growing strongly.

While the ACCC recognises that there are wider sources of journalism and news available than in the past (such as blogs and podcasts), the ACCC is concerned with the reduction in the number of professional journalists. In particular, the ACCC is concerned that this continuing reduction in journalist numbers has led and will lead to a reduction in certain forms of journalism which are beneficial to society including, for example, local, regional and court reporting and public interest investigative journalism.

The reduction in journalist numbers is important given the critical role news and journalism perform in society. Even those members of the public that do not read, watch or listen to the news benefit from the role journalism performs in exposing corruption, the creation of public debate and holding governments, corporations and individuals to account through their questioning and investigation.

The extent to which the reduction in journalist numbers results in an underinvestment in news and journalism is not yet fully clear. The data, however, shows that there has been a downward trend in the number of journalists working in Australia, particularly for the traditional print (now print/online) sector. The risk of under provision is not a new risk and the ACCC recognises the difficulties in determining

<sup>2</sup> Advertising market shares identified in this report are the ACCC's best estimate based on information from a number of sources including data from Commercial Economic Advisory Service of Australia (CEASA). Where the ACCC has requested information from firms it has done so on the basis of the revenue received from advertisers in Australia. This may include some portion of expenditure that is spent by Australian advertisers targeted at users located outside Australia. Conversely, it does not include expenditure by advertisers located overseas targeted at users in Australia. As with all estimates, there is a potential that this may under or overstate the actual market share of each firm or the total size of the market. The ACCC notes that the most recent data referenced in this preliminary report relates to the 2017 calendar year and market shares may have changed from this point in time

the extent to which digital platforms may contribute to the under-provision of any categories of news or journalism.

The ACCC is continuing to explore this issue, but as set out below, is considering a number of measures aimed at increasing the production and/or consumption of certain types of journalism, including public investigative journalism and also other forms of journalism that provide benefits to society.

## Digital platforms: their business model and their market power

### Google and Facebook have similar business models: both are reliant on consumer attention and consumer data in order to sell advertising opportunities

Both Google's and Facebook's business models rely on attracting a large number of users and collecting rich data sets associated with those users. This enables them to offer highly targeted or personalised advertising opportunities to advertisers. The advertising revenue in turn allows them to invest in the functionality and services provided, improving the consumer experience and attracting greater numbers of users to the platform, as well as improving data gathering techniques. As more consumers are attracted to the platform, and increasingly detailed data is gained, more advertisers are likely to regard the platform as a valuable place to advertise.

### Google has substantial market power

The ACCC's preliminary report finds that Google enjoys substantial market power in a number of markets relevant to this Inquiry and that this power is unlikely to erode in the short to medium term:

- Google has substantial market power in the supply of online search in Australia with approximately 94 per cent of online searches in Australia currently performed through Google.
- Google has substantial market power in the supply of online search advertising. This flows directly from its substantial market power in the consumer facing market for online search.
- Google has substantial market power in the supply of news media referral services. Google is a substantial source of referral traffic for news media businesses, and for many news media businesses, having links to their websites displayed on Google is a necessity.

### Facebook has substantial market power

The ACCC's preliminary report finds that Facebook also enjoys substantial market power in a number of markets relevant to this Inquiry and this market power is unlikely to erode in the short to medium term:

- Facebook has substantial market power in the market for social media services (the consumer facing market). The Facebook and Instagram platforms, operated by Facebook have, by a significant margin, the largest audience in Australia of any social media platform. While the ACCC recognises that the threat of potential new entry may in theory provide a competitive constraint on Facebook, the considerable scale of Facebook (over 20 times that of MySpace at its peak) appears to protect it from dynamic competition, through the operation of same-side and cross-side network effects, as well as economies of scale.
- Facebook has substantial market power in display advertising. Facebook and Instagram together obtain approximately 46 per cent of Australian display advertising revenue. No other website or application has a market share of more than five per cent.
- Facebook has substantial market power in the supply of news media referral services. While there is some variation between news media businesses, Facebook is a substantial source of referrals for many news media businesses and a relationship with Facebook is unavoidable.



Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from ‘out-competing’ its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. However, a firm with substantial market power could damage this competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals’ ability to compete, rather than by offering a more attractive product.

It is important to note that the Terms of Reference for this Inquiry are broad and do not focus on whether digital platforms have misused their market power but, instead, pose broader questions; including whether the digital platforms are exercising their market power in their dealings with advertisers and content creators.

## Digital platforms and advertisers

### Lack of transparency

There is a lack of transparency in the operation of Google and Facebook’s key algorithms, and the other factors influencing the display of results on Google’s search engine results page, and the surfacing of content on Facebook’s News feed. This lack of transparency makes it difficult for advertisers to understand the factors influencing the display of their advertising to consumers and, in particular, to identify whether Google or Facebook are favouring their own business interests at the expense of advertisers.

While the ACCC appreciates the significance of minimising the opportunity for businesses to ‘game’ the key algorithms, it is not clear that the appropriate balance has been struck between avoiding this risk and ensuring advertisers are appropriately informed.

The ACCC’s concerns with the lack of transparency extend to the operation of the intermediary services offered by the digital platforms. A range of intermediary services are offered by Google (and other businesses) to advertisers and websites in order to match advertising demand and supply. The processes used by these intermediary platforms and their share of the total advertising price are opaque which inhibits competition.

### Risk of favouring related businesses or business interests

Google and Facebook operate across online advertising markets, offering advertising opportunities on their own owned and operated platforms, third party websites and platforms as well as a range of intermediary services.

Google and Facebook have both the ability and incentive to favour their own related businesses. They also have the ability and incentive to favour a business with which they have an existing relationship (and through which additional revenue may be generated), such as websites which are members of their display or audience network or which use other intermediary services. This ability and incentive derives from their market power, their presence across the multiple levels of the advertising supply chain as well as the opacity of key algorithms.

Anti-competitive discrimination by digital platforms in favour of a related business has been found to exist in overseas cases. For example, in the European Commission’s 2017 decision, Google was found to have systematically given prominent placement to its own comparison shopping service (Google Shopping) and to have demoted rival comparison shopping services in its search results.

Monopoly or near monopoly businesses are often subject to specific regulation due to the risks of competitive harm. The risk of competitive harm increases when the monopoly business is vertically integrated. The ACCC considers that Google and Facebook each have substantial market power and each have activities across the digital advertising supply chain. Google in particular occupies a near monopoly position in online search and online search advertising, and has multiple related businesses offering advertising services.

These factors, combined with the roles the platforms perform as gateways to the internet and Australian consumers and the lack of transparency, justify a greater level of regulatory oversight as proposed in preliminary recommendation 4.

## Questions over advertisement verification

The lack of transparency also means that advertisers are unable to verify whether advertisements are served to their intended audience. While independent third party verification may address these concerns, this depends on the nature of the verification the third parties are able to provide. The ACCC has not yet reached a view about the extent to which the current third party verification available overcomes this issue.

The inability for advertisers to verify the delivery and performance of their advertisements on Google and Facebook has the potential to lessen competition in the supply of advertising services. This is because it has the potential to mislead advertisers into thinking their advertisements perform better than they actually do. This impedes the transmission of price and quality signals in the market and encourages some advertisers to advertise on certain platforms rather than with competing suppliers of advertising services.

The ACCC welcomes further feedback on both the measurement undertaken by digital platforms and the ability of advertisers to verify such measurement so it can form a view in its final report.

## Digital platforms and news media businesses

### News media businesses and digital platforms have a symbiotic relationship

Content creators, including news media businesses, have a symbiotic relationship with the key digital platforms, in that they are rivals in the supply of display advertising opportunities and essential business partners. Both Google and Facebook are important sources of internet traffic (and therefore audience) for news media businesses. Approximately 50 per cent of traffic to Australian news media websites comes from Google or Facebook. The significance of the referral traffic from Google and Facebook to Australian news media businesses has provided these digital platforms with a substantial degree of market power in the market for news media referral services.

The content produced by news media businesses is also important to digital platforms. For example, between 8–14 per cent of Google search results trigger a “Top Stories” result, which typically includes reports from news media websites including niche publications or blogs. While the digital platforms clearly value the news media content which they are able to display to their users, Google and Facebook each appear to be more important to the major news media businesses than any one news media business is to Google or Facebook.

At the same time digital platforms have obtained a significant and increasing share of online advertising expenditure, traditional print media (now print/online media) have suffered a significant decline in advertising revenue. The reduction in advertising revenue has made it difficult for print/online media to monetise their content. The financial difficulties of the traditional print sector have occurred at the same time their content has been used by digital platforms to attract and retain consumers to their platforms.

### Consequences of that relationship for news media

Given the reliance by news media businesses for traffic from Google and Facebook, digital platforms and their business models have a significant effect on news media businesses. Particular concerns include:

- the lack of warning provided by digital platforms to news media businesses of changes to key algorithms relating to the display of news content or news referral links
- the implementation of policies and formats that may have a significant and adverse impact on the ability of news media businesses to build or sustain a brand and therefore an audience, and

- the impact of such policies on the incentives for news and journalistic content creation, particularly where significant effort is involved in researching and producing original content.

The ACCC considers that these concerns, in the case of Google, stem from the intention, and the ability, to position the Google search engine as the source of all information, and for news stories, the intention to position Google as an intermediary between consumers and providers of news and journalism.

The ubiquity of the Google and Facebook platforms, and the lack of transparency in the operation of their algorithms, have had adverse effects on news publishers and their opportunities to monetise their content.

While a greater level of transparency to news media businesses may address some of these issues, the ACCC recognises that providing detailed information about a digital platform's algorithms to news media businesses could provide opportunities for 'gaming' the algorithms or potentially involve exposing information confidential to the digital platform. The ACCC considers that oversight by a regulatory authority, as proposed in preliminary recommendations 4 and 5, would help address some of the concerns identified above.

## Consequences of that relationship for news media regulation

Digitalisation and the increase in online sources of news and media content are also highlighting inconsistencies in the current, sector-specific approach to media regulation. Digital platforms increasingly perform similar functions to media businesses, such as selecting and curating content, evaluating content, and ranking and arranging content online. This means digital platforms actively participate in the online news ecosystem and are acting as considerably more than mere distributors or pure intermediaries in the supply of news and journalistic content in Australia.

However, virtually no media regulation applies to digital platforms. This creates regulatory disparity between some digital platforms and some more heavily-regulated media businesses that perform comparable functions, which could provide some digital platforms with an unfair advantage in attracting advertising expenditure because they operate under fewer regulatory restraints and have lower regulatory compliance costs.

The ACCC also considers that digital platforms could do more to assist in the timely take-down of copyright infringing content, including content belonging to Australian news media businesses.

## Digital platforms and consumers

The services provided by Google, Facebook and other digital platforms are clearly valued by Australian consumers as demonstrated by their frequent and widespread use.

However, the ubiquity of digital platforms mean many consumers feel they have to join or use these platforms, and agree to their non-negotiable terms of use, in order to receive communications and remain involved in community life.

### A lack of informed and genuine choice

Many digital platforms increasingly collect a large amount and variety of user data. The data collected often extends beyond data that users actively provide when using the digital platform's services. Digital platforms may passively collect data from users, including from online browsing behaviour across the internet, IP addresses, device specifications and location and movement data. The user data collected can enable digital platforms to create more detailed segmented user profiles, for use by advertisers wishing to target advertisements. Consumers have informed the ACCC that they have concerns over the extent and range of information collected by digital platforms.

The ACCC considers that consumers are better off if they can make informed and genuine choices in how digital platforms collect and use their data. The ACCC's preliminary view is that consumers' ability to make informed choices is impacted by:

- *The information asymmetry between digital platforms and consumers.* The ACCC's preliminary finding is that consumers are generally not aware of the extent of data that is collected nor how it is collected, used and shared by digital platforms. This is influenced by the length, complexity and ambiguity of online terms of service and privacy policies. Digital platforms also tend to understate to consumers the extent of their data collection practices while overstating the level of consumer control over their personal user data.
- *The bargaining power held by digital platforms vis-à-vis consumers.* The ACCC also found considerable imbalance in bargaining power between digital platforms and consumers. Many digital platforms use click-wrap agreements with take-it-or-leave-it terms and bundled consents, which limits the ability of consumers to provide well-informed and freely given consent to digital platforms' collection, use and disclosure of their valuable data.

Without adequate information on how digital platforms collect and use their users' data, or the ability to choose between digital platforms on the basis of their data practices, consumers are unable to make informed decisions. This is likely to impede potential competition between digital platforms on the privacy and data protection offered. This may also impede the new entry of rival services that use alternative business models.

## **Lack of consumer protection and effective deterrence under existing laws**

The lack of both consumer protection and effective deterrence under laws governing data collection have enabled digital platforms' data practices to undermine consumers' ability to select a product that best meets their privacy preferences.

As a result, competition may have been distorted in multiple sectors where consumer data is used, including those markets beyond the digital platform, media and advertising services markets the subject of this Inquiry.

## **Risk of filter bubbles and less reliable news**

As noted above, digital platforms have a significant influence on access to the news and journalism consumed. Over 50 per cent of the traffic on Australian news media websites comes from Google and Facebook.<sup>3</sup>

While issues relating to authenticity and quality of news are not new or confined to journalism curated via algorithms, the ACCC's preliminary view is that these risks are potentially magnified online. In particular, the ACCC considers that there is a risk that consumers accessing news via digital platforms may be at risk of greater exposure to less reliable news and potential filter bubbles. That said, while there is a real risk of these effects occurring, there is not currently strong evidence of filter bubbles, arising from digital platform use, in Australia.

## **What can be done to address these issues?**

### **Governments should respond to current problems and anticipate future issues**

We are at a critical time in the development of digital platforms and their impact on society. Digital platforms have fundamentally changed the way we interact with news, with each other and with government and business. It is also clear that the markets in which digital platforms and news media businesses operate will continue to evolve.

It is very important that governments recognise the role digital platforms perform in our individual and collective lives and to be responsive, and indeed proactive, in reacting to and anticipating challenges and problems.

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<sup>3</sup> ACCC analysis based on stakeholder data.

The ACCC's preliminary report aims to contribute to the wider debate about the role digital platforms play and the appropriate level of government oversight.

The ACCC is proposing specific preliminary recommendations aimed at addressing the actual and potential negative impacts of digital platforms identified in this report. The ACCC has also identified a number of other proposals for further analysis and assessment.

## International engagement

The ACCC recognises that the issues Australia is facing with digital platforms are not unique. Many other countries face similar concerns and are also taking steps to explore these issues.

The ACCC intends to share and discuss its findings and recommendations with fellow regulators overseas, both directly and via its existing networks such as the Organisation for Economic Cooperation and Development (the OECD), the International Competition Network (the ICN) and the International Consumer Protection Enforcement Network (ICPEN).

## Potential funding of regulatory functions

The ACCC notes that the regulatory functions discussed in the preliminary recommendations and areas for future analysis and assessment, identified below, could be funded in a variety of ways, including from direct government funding or via cost recovery, having regard to relevant government policy.

# Preliminary recommendations

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

The value of digital platforms to users and the lack of close alternatives has afforded both Google and Facebook substantial market power.

The ACCC considers that Google has substantial market power in supplying general search services (with a current market share of approximately 95 per cent) and appears likely to retain its dominant share at least in the short to medium term. This substantial market power has been extended to the supply of online search advertising and the supply of news referral services to news media businesses.

The ACCC also considers that Facebook has substantial market power in supplying social media services in Australia via its Facebook and Instagram platforms. In addition, the ACCC considers that Facebook also has substantial market power in display advertising and the supply of news referral services to news media businesses.

While dynamic competition may place some degree of competitive constraint on Google and Facebook, the ACCC considers that this constraint is likely to be weak due to the size of the barriers to entry and expansion (including the value of accumulating data on users, which includes, but is not limited to, data on their use of the platform). The ACCC is also of the preliminary view that Google's position as the current default search engine on the major browsers underpins its market power.

The ACCC has reached the preliminary view that strategic acquisitions by both Google and Facebook have contributed to the market power they currently hold.

The aim of the preliminary recommendations below is to remove some of the potential impediments to the growth and independence of potential competitors that may challenge that market power by:

- strengthening merger laws and processes
- promoting consumer choice by addressing the barriers caused by the pre-installation or establishment of default search engines or internet browsers.

## **Preliminary Recommendation 1—merger law**

The ACCC considers that section 50(3) of the *Competition and Consumer Act 2010*, which identifies the factors to be taken into account in assessing the likely competitive effects of a merger or acquisition, could be amended to make it clearer that the following are relevant factors:

- (a) the likelihood that an acquisition would result in the removal of a *potential* competitor, and
- (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

## **Preliminary Recommendation 2—prior notice of acquisitions**

The ACCC is also intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.

If such a commitment were not forthcoming from the major digital platforms other options could be considered to address this issue.

## **Preliminary Recommendation 3—choice of browser and search engine**

The ACCC is considering recommending that:

- (a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and
- (b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).

The ACCC considers that where options for internet browsers and search engines are presented, no option should be pre-selected.

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

A recurring theme in this Inquiry is the market power of Google and Facebook and the critical role these platforms play in enabling businesses to reach consumers, including the ability of news media businesses to reach their audience. The algorithms operated by each of Google and Facebook, as well as other policies, determine which content is surfaced and displayed to consumers in news feed and search results. However, the operation of these algorithms and other policies determining the surfacing of content remain opaque.

In the case of the advertising markets, this lack of transparency compounds concerns that Google or Facebook may be favouring either their own related businesses or those businesses with which they have a particular commercial relationship. The ACCC considers that given Google's and Facebook's market power, as well as their presence across multiple levels of the advertising supply chain, each has the ability and incentive to favour its own business interests above those of advertisers or potential competitors.

In the case of the media markets, the lack of transparency causes concerns that the algorithms and policies may be operating in a way that affect competition in media markets, and/or the production of news and journalistic content.

Given the significance of these issues, the preliminary recommendation below calls for a regulatory authority to be tasked with monitoring, investigating and reporting on the criteria, commercial arrangements or other factors used by relevant digital platforms (identified according to objective criteria reflective of influence and size) to impact:

- (a) the ranking and display of advertisements (or other content when displayed alongside advertisements) with the aim of identifying whether the platforms may be discriminating in favour of their own related businesses or a business with which they have a specific commercial relationship as well as the potential competitive effect

- (b) the ranking and display of news and journalistic content with the aim of identifying the effects of algorithms or other policies on the production of news and journalistic content or competition in media markets.

The regulatory authority could also refer matters to other government agencies for investigation where relevant.

The ACCC considers that such a regulatory approach would provide assurances to both businesses and consumers that algorithms are not being used to favour certain businesses or, in the case of news stories, are operating in such a way as to cause significant detriment to the production of news and journalistic content or media markets. The ACCC also considers that this regulatory proposal would ensure Governments stay ahead of the game and are able to identify potentially significant consumer detriment.

The ACCC recognises the importance of preventing ‘gaming’ of algorithms by advertisers and news media businesses. Accordingly, while the ACCC is proposing to recommend that the regulatory authority report publicly on the performance and impact of key algorithms and policies, the ACCC is not proposing that the underlying information provided by the relevant digital platforms to the regulatory authority be made publicly available.

#### **Preliminary Recommendation 4—advertising and related business oversight**

A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum from digital advertising in Australia.

The regulatory authority could consider the digital platform’s criteria, commercial arrangements and other circumstances which impact competition between advertisers, suppliers of advertising services and digital platforms. This may include:

- the ranking and display of advertisements and also organic content (when advertisements are displayed alongside the organic content)
- whether the acquisition of any other product or service from the same digital platform (or a related business) affects the display or ranking of advertisements or content
- the impact of any related business of a digital platform (e.g. how referral links appear in the search engine results page or social media news feed).

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

#### **Preliminary Recommendation 5—news and digital platform regulatory oversight**

The ACCC considers that the regulatory authority could also monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum in revenue in Australia and which also disseminate news and journalistic content, including by providing hyperlinks to news and journalistic content, or snippets of such content.



In performing its functions, the regulatory authority could consider the digital platform's criteria, commercial arrangements and other factors that affect competition in media markets or the production of news and journalistic content in Australia. This may include:

- (a) the rankings of news and journalistic content presented to consumers
- (b) the referrals of consumers to media businesses.

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers.

The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

## Measures to address regulatory imbalance

Publishers, broadcasters and other media businesses, and digital platforms operate under different regulatory frameworks. The purpose of the preliminary recommendation below is to conduct a review of these frameworks to identify unnecessary regulation and to ensure, where practicable, regulations are applied effectively and consistently across business types, both online and offline.

### Preliminary Recommendation 6—review of media regulatory frameworks

The ACCC proposes to recommend the Government conduct a separate, independent review to design a regulatory framework that is able to effectively and consistently regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia, including news and journalistic content, whether they are publishers, broadcasters, other media businesses, or digital platforms.

Such a review should focus on content production and delivery and consider the following matters:

- **Underlying principles:** creating clear guiding principles for an overarching platform-neutral regulatory regime that can apply effectively across media formats and platforms, with common rules applying to online and offline activities, and which is adaptable to new services, platforms and technologies.
- **Extent of regulation:** setting objective factors to determine whether regulations should be imposed on certain enterprises and determining appropriate roles for self-regulation and co-regulation.
- **Content rules:** creating a nationally-uniform classification scheme to classify or restrict access to content regardless of the format of delivery.
- **Enforcement:** implementing appropriate enforcement mechanisms and meaningful sanctions, including whether it is appropriate to establish or appoint a single agency responsible for monitoring, enforcing, complaints-handling, and administering the unified regulatory framework.

The implementation of a unified, platform-neutral framework will affect and simplify existing regulations across the different media, communications and telecommunications industries.

The ACCC would intend to contribute its knowledge and expertise to such a review.

## Measure to assist a more effective removal of copyright infringing material

Rights holders in Australia, including media businesses, face particular difficulties requesting take-down of copyright-infringing content on digital platforms in a timely way. This is, in part, due to the uncertainties in establishing authorisation liability (that is, liability for 'authorising' a copyright-infringing act) in relation to digital platforms. The purpose of the proposed recommendation below is to encourage the development of timely and effective procedures for the take-down of copyright-infringing content of Australian rights holders on digital platforms and increase the enforceability of copyright protections online.



## Preliminary Recommendation 7—take-down standard

The ACCC proposes to recommend that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright infringing content to enable effective and timely take-down of copyright-infringing content. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital platforms under Part 6 of the Telecommunications Act.

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

A key preliminary finding of the 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. This reflects the bargaining power held by the digital platforms vis-à-vis consumers, and the information asymmetries that exist between digital platforms and consumers.

In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws, though the increasing volume and importance of data in the digital economy means that the collection, use and disclosure of user data increasingly impacts on competition, innovation, and consumer protection issues in Australian markets. The ACCC considers that the current regulatory framework, including 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 preliminary recommendations below aim to better inform consumers when dealing with digital platforms and to improve their bargaining power.

## Preliminary Recommendation 8—use and collection of personal information

The ACCC proposes to recommend the following amendments to the Privacy Act to better enable consumers to make informed decisions in relation to, and have greater control over, privacy and the collection of personal information. In particular, recommendations (a) and (b) are aimed at reducing information asymmetries to improve the transparency of digital platforms' data practices. Recommendations (c) and (d) seek to provide consumers with stronger mandated controls over the collection, use, disclosure and erasure of their personal information to lessen the bargaining power imbalance between consumers and digital platforms. Recommendations (e) to (g) are measures to increase the deterrence effect of the Privacy Act.

- (a) **Strengthen notification requirements:** Introduce an express requirement that the collection of consumers' personal information directly or by a third party is accompanied by a notification of this collection that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge.
- (b) **Introduce an independent third-party certification scheme:** Require certain businesses, which meet identified objective thresholds regarding the collection of Australian consumers' personal information, to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations, through the use of a privacy seal or mark. The parties carrying out such audits would first be certified by the OAIC.
- (c) **Strengthen consent requirements:** Amend the definition of consent to require express, opt-in consent and incorporate requirements into the Australian Privacy Principles that consent must be adequately informed (including about the consequences of providing consent), voluntarily given, current and specific. This means that settings that enable data collection must be pre-selected to 'off'. The consent must also be given by an individual or an individual's guardian who has the capacity to understand and communicate their consent.
- (d) **Enable the erasure of personal information:** Enable consumers to require erasure of their personal information where they have withdrawn their consent and the personal information is no longer necessary to provide the consumer with a service.
- (e) **Increase the penalties for breach:** Increase penalties for breaches of the Privacy Act to at least mirror the increased penalties for breaches of the Australian Consumer Law.

- (f) **Introduce direct rights of action for individuals:** Give individual consumers a direct right to bring actions for breach of their privacy under the Privacy Act.
- (g) **Expand resourcing for the OAIC to support further enforcement activities:** Provide increased resources to equip the OAIC to deal with increasing volume, significance, and complexity of privacy-related complaints.

### **Preliminary Recommendation 9—OAIC Code of Practice for digital platforms**

The ACCC proposes to recommend that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part III B of the Privacy Act to provide Australians with greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. A code would allow for proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act.

The code of practice would likely contain specific obligations on how digital platforms must inform consumers and how to obtain consumers' informed consent, as well as appropriate consumer controls over digital platforms' data practices. The ACCC should also be involved in the process for developing this code in its role as the competition and consumer regulator.

### **Preliminary Recommendation 10—serious invasions of privacy**

The ACCC proposes to recommend that the Government adopt the Australian Law Reform Commission's recommendation to introduce a statutory cause of action for serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

### **Preliminary Recommendation 11—unfair contract terms**

The ACCC proposes to recommend that unfair contract terms should be illegal (not just voidable) under the Australian Consumer Law, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms, as well as other businesses, from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies.

## **Proposed areas for further analysis and assessment**

The ACCC has identified 9 areas where further analysis and assessment is required. The ACCC is particularly interested in views and analysis on the following issues.

### **1. Supporting choice and quality of news and journalism**

The Terms of Reference direct the ACCC to consider the impact of digital platforms on the level of choice and quality of news and journalistic content to consumers.

In considering the impact of the digital platforms on the quality of news and journalistic content, the ACCC has not attempted to undertake an empirical assessment of news and journalistic content. However, consistent with existing codes and frameworks that aim to hold Australian journalists and news media businesses to account, the ACCC considers that there are certain aspects of the process of producing news which are important indicators of quality, such as objectivity, accuracy (fact-checking) and the performance of functions such as analysis and investigation.

The rapid digitisation of news and the growth of the digital platforms have led to the atomisation of news and, for some consumers, a disconnect between news content and its source. These consumers may not know where their news comes from and whether the creator of that news content has committed to journalistic processes, such as fact checking and accuracy. Combined with the algorithmic selection of news, this potentially exposes individuals/consumers to the risk of filter bubbles or echo chambers, as well as the risk of unreliable information.

While the extent of these effects in Australia is not yet clear, the ACCC is concerned that there is a real risk of these consequences either now or in the immediate future. The ACCC is therefore considering proposals to provide greater transparency to consumers about the news they consume on digital platforms. The ACCC notes that some digital platforms, including Facebook and Google, are taking steps to signal and/or curate content served to consumers. In so doing, the platforms are making their own decisions regarding the quality or “trustworthiness” of the content to be served to consumers. While these steps may be well intentioned, individual decisions by platforms on these key factors may reflect their own interests and may not necessarily serve consumers well. The ACCC considers that a more transparent approach may be preferable.

The ACCC is considering whether digital platforms and media businesses should be required to take steps to increase the ability of consumers to make informed choices about news and journalism accessed via digital platforms. This proposal would not interfere with how the algorithms select and display news and journalism, the news stories which consumers may choose to access (consumer choice) or press freedom. The ACCC is particularly interested in feedback from news media businesses and journalists as to the potential operation of the proposal below and the relationship with existing codes of journalistic practice.

- (a) Digital platforms would be required to signal, in their display of content to consumers, content from news media businesses that have signed up to certain standards for the creation of news and journalistic content by complying with registered codes of journalistic practice. This signalling could be by way of a ‘badge’ on the news content as it appears in search results or a user’s news feed.
- (b) The ACMA would recognise codes of journalistic practice from news media representative groups that contain principles and processes, including but not limited to accuracy (fact-checking), clarity, and avoidance of harm.
- (c) Digital platforms would be required to inform consumers about the processes put in place to ensure accountability and to better inform consumers about how their news and journalistic content is curated and displayed to them (for example, via a badge or signal).
- (d) The obligations on digital platforms to take these steps could be contained in separate ACMA approved code(s) submitted by the digital platforms, or mandated by the ACMA.

As discussed further in chapters 4 and 6, the ACCC recognises that many Australian news media businesses are already subject to sectoral specific regulation aimed at journalistic standards of accountability (or in the case of traditional print media, a degree of self-regulation via the Australian Press Council). The ACCC is interested in exploring whether the existing sector specific codes of conduct (including the codes administered by Free TV or the Australian Press Council) could be the type of codes to be recognised by the ACMA.

## **2. Improve news literacy online**

The ACCC is considering measures aimed at increasing news literacy and is considering recommending that the ACMA work with the leading digital platforms to develop a broad campaign targeted at all Australians, to improve their understanding of how news and journalism is curated and displayed on social media and other digital platforms.

## **3. Improving the ability of news media businesses to fund the production of news and journalism**

As set out above, news and journalism have broad public benefits to society and the ACCC is concerned at the risk of under-provision. Australia’s existing policy and regulatory arrangements support the production of news and journalism in a number of ways. The most obvious is the public funding of the ABC and SBS, which deliver quality, independent news and journalism and add plurality. Commercial broadcasters, both TV and radio, also receive a level of public support via access to spectrum at below-market rates.

The ACCC considers that traditional print media (now print/online media) also play an important role in providing diversity and quality news and journalism. The ACCC is therefore continuing to consider mechanisms to maintain the incentives on print/online news media businesses to invest in

news and journalism, particularly those types of news and journalism which may be at risk of being under-produced. At this stage, the ACCC has identified three potential options on which it would like feedback:

- (a) A review of the impacts of the measures comprising the Regional and Small Publishers' Jobs and Innovation Package in 2018–19 to determine whether the Package should be continued beyond its current three year funding profile (and potentially modified or expanded)
- (b) Tax offsets for the costs incurred by news media organisations to produce particular types of journalism that have high public benefits and are at risk of under-production. The ACCC recognises the difficulties in determining the scope of such a subsidy and the risk of misappropriation or fraud
- (c) Making personal subscriptions for publications by media businesses that are signatories to a registered ACMA code of practice, as set out in the potential proposal described above, tax deductible to encourage production and consumption of news and journalism.

The ACCC recognises that there can be concerns with implementing and proposing tax incentives and subsidies. Nevertheless, such arrangements can on occasion be a suitable option to achieve a particular objective. The ACCC welcomes feedback and suggestions regarding these or other approaches, including potential Government grants, which may maintain the incentives on news media businesses to invest in news and journalism, particularly those types of news and journalism which may be at risk of being under-produced.

#### **4. A digital platforms ombudsman**

The ACCC considers that one effect of Google's and Facebook's substantial market power in the markets for search and display advertising respectively, is that some advertisers, particularly small businesses, are unable to negotiate the terms on which they do business with Google and Facebook. This can be evident in the difficulties businesses may encounter when attempting to seek effective dispute resolution.

The ACCC is considering whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms. For example, an ombudsman may have the power to resolve some or all of the following:

- (a) disputes from businesses that consider digital platforms' representations as to the performance or likely performance of purchased advertising to be inaccurate or unsubstantiated
- (b) disputes from consumers relating to scams and the removal of such content
- (c) disputes from media companies relating to the surfacing and ranking of news content
- (d) disputes from businesses relating to false or misleading advertising.

An ombudsman could investigate complaints that are unable to be resolved by the internal dispute resolution mechanisms of digital platforms and make decisions that are binding on digital platforms. Terms of reference could set out the types of disputes the ombudsman can consider, how the ombudsman will resolve disputes and remedies the ombudsman can recommend or implement.

The ACCC does not intend for any of the functions to duplicate those proposed elsewhere for a regulatory authority.

#### **5. Monitoring of intermediary pricing**

The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising. To achieve this, businesses offering these services earning revenue exceeding a certain threshold (e.g. revenue in Australia greater than AUD 5million) could be required to provide a regulatory authority with details on:

- (a) the median price charged for each product offered
- (b) an explanation of how that price is determined
- (c) the revenue received for supplying each product or service
- (d) any discounts, rebates or other incentives offered to customers

This information should be provided at least once a year, or as required by the regulatory authority. The regulatory authority could be required to report publicly on this information.

## 6. Third party measurement of advertisements served on digital platforms

The ACCC is considering whether there is an ability for advertisers to verify whether advertisements on digital platforms, including Google and Facebook, are delivered to their intended audience and whether there may be instances where the performance of digital advertising is overstated; or advertisers are misled into thinking more consumers viewed their advertisements than actually did. The ACCC is examining the extent to which the current level of third party measurement overcomes these problems. The ACCC is seeking further feedback on the effectiveness of current mechanisms for verifying whether advertisements are served to their intended audience. If current mechanisms are not sufficient, the ACCC would be assisted by feedback and suggestions for mechanisms that are needed to address this issue.

## 7. Deletion of user data

The ACCC is considering whether there should be an explicit obligation to delete all user data associated with an Australian consumer once that user ceases to use the digital platform's services or whether user data should automatically be required to be deleted after a set period of time. This obligation would seek to go further than preliminary recommendation 8(d) as it would not require a user to actively request the deletion of the data and would prevent open-ended retention of data.

ACCC invites views on the feasibility of such an obligation, and the appropriate timeframe for such deletion.

## 8. Opt-in targeted advertising

The ACCC is considering whether, in addition to proposed preliminary recommendation 8(c), consumer consents in relation to targeted advertising should be further strengthened by prohibiting entities from collecting, using, or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in consent.

Under such a proposal, consumers receiving advertising-funded services (including via a social media platform or search engine) can still be required by the platform to consent to view advertisements but the user must not be required to consent to view *targeted* advertisements based on their user data or personal information in order to use the platform. Such a requirement would be proposed to apply beyond entities covered by the Privacy Act to ensure coverage of all entities which may collect data for this purpose.

## 9. Prohibition against unfair practices

In its 2017 review of the Australian Consumer Law, Consumer Affairs Australia and New Zealand recommended to governments that exploration be undertaken as to how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.

The ACCC is considering whether its exposure to issues through this Inquiry considerably strengthens the need for a general prohibition against the use of unfair practices in the Australian Consumer Law. Such a prohibition could deter digital platforms and other businesses from engaging in conduct that falls short of societal norms, but which is not currently captured under the Australian Consumer Law.

As in overseas jurisdictions, such a prohibition could involve boundaries to ensure it is appropriately targeted, for example by applying to practices that:

- cause, or are likely to cause, substantial detriment to consumers,
- the substantial detriment is not reasonably avoidable by consumers themselves, and
- the detriments are not outweighed by countervailing benefits to consumers or to competition.

## The next steps

The ACCC welcomes submissions in response to this preliminary report. Submissions should focus on the issues raised in this report and other issues relevant to the terms of reference, but need not repeat materials already submitted to the ACCC.

The ACCC is particularly interested in obtaining feedback on:

- the preliminary recommendations (pages 9-14)
- the proposed matters for further analysis and assessment (pages 14-17).

Submissions in response to this report are due by 15 February 2019.

The ACCC has collected a large amount of information as part of this Inquiry and will continue to analyse the data it has received in the lead up to the final report. The ACCC may also be seeking additional information from a range of parties. This will include the use of the ACCC's powers to compel information under s95ZK of the Competition and Consumer Act 2010. The ACCC may also hold further stakeholders forums early in 2019.

## Ongoing investigations under the Competition and Consumer Act

The ACCC is investigating the conduct of certain digital platforms under the *Competition and Consumer Act 2010* (the CCA).

The ACCC's investigations include:

- investigating whether access restrictions imposed by a digital platform on a third-party app developer may raise issues under section 46 of the CCA
- investigating whether a particular digital platform's representations to users regarding the collection of particular types of data may have breached the Australian Consumer Law (the ACL)
- investigating potential breaches of the ACL relating to changes to a digital platform's privacy policy that may enable the digital platform to combine different sets of user data
- investigating whether a particular digital platform may have breached the ACL by failing to adequately disclose changes to its terms and conditions which allowed it to share consumers' user data with third parties
- investigating whether digital platforms' terms of use and privacy policies may contain unfair contract terms under the ACL.

These investigations are continuing and the ACCC has not yet reached a view as to what enforcement outcomes, if any, may be appropriate.

The ACCC will also investigate any other conduct of digital platforms that raises concerns under the CCA and consider whether it is appropriate for the ACCC to take enforcement action.

# Introduction

## Terms of Reference

On 4 December 2017, the then Treasurer, the Hon. Scott Morrison MP, directed the ACCC to conduct a public inquiry into the impact of digital search engines, social media platforms and other digital content aggregation platforms ('digital platforms') on the state of competition in the media and advertising services markets, in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers, and consumers.

The Terms of Reference specifically identify the following non-exhaustive list of matters which are to be taken into account:

- the extent to which digital platform providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers
- the impact of digital platform providers on the level of choice and quality of news and journalistic content to consumers
- the impact of platform service providers on media advertising markets
- the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets, and
- the impact of information asymmetry between digital platform providers, advertisers and consumers and the effect on competition in media and advertising markets.

## The ACCC's Inquiry to date

Over the past 12 months, the Inquiry has received a large amount of information from digital platforms, media businesses, advertisers, representative groups, government agencies and consumers. The ACCC has received over 60 public submissions to our issues paper and commissioners and staff have spoken directly to participants in public forums for consumers, advertisers and journalists. The ACCC conducted a forum specifically for major stakeholders, which covered many of the issues raised in submissions. The ACCC also issued approximately 40 statutory notices under section 95ZK of the Act requiring the provision of information and documents to the ACCC.

## Structure of this report

The ACCC has looked at the impact of the digital platforms on the three stakeholder groups identified in the Terms of Reference: media content creators, advertisers and consumers. Digital platforms facilitate interaction between these three groups of market participants.

The ACCC has focussed in particular on the impact of the digital platforms on the supply of news and journalism in Australia.

The broad structure of the preliminary report is as follows:

- Chapter 1 sets out the characteristics of digital platforms, details their rapid growth and their influence on the consumption of news and journalism, as well as the disruption experienced by the media and advertising markets.
- Chapter 2 examines the extent to which the two largest digital platforms, Google and Facebook, hold substantial market power, identifying the markets in which the platforms operate and where market power is held.
- Chapter 3 explores the relationships between the two largest digital platforms and advertisers. It considers the consequences of Google and Facebook's market power in relevant advertising markets and issues related to their presence at multiple levels of the advertising supply chain.



- Chapter 4 considers the relationships between the largest digital platforms and media businesses, including the consequences of Google and Facebook’s market power in the market for news media referral services and the extent of the regulatory imbalance.
- Chapter 5 focuses on the key questions relevant to consumer protection: are consumers well informed and can consumers make an informed and free choice in how digital platforms collect and use their data? This chapter considers the implications of the information asymmetry for potential competition between digital platforms on privacy and data protection.
- Chapter 6 considers the impact of digital platforms on the level of choice and quality of news and journalistic content supplied to consumers.
- Chapter 7 outlines some emerging technological and market-driven trends that may shape the relationships between digital platforms, advertising, and news media in the longer term.

Preliminary recommendations and proposed areas for further assessment are identified in relation to the preliminary findings expressed in each of chapters 2-6.

The ACCC’s consultation process revealed a number of other issues that have not been included in this preliminary report as they were not directly relevant to the scope of the Inquiry. A number of these issues are set out in the submissions to the Inquiry published on the ACCC website.

The ACCC is cognisant of the international application of the issues that have arisen in the course of the Inquiry. The ACCC has followed the work currently being undertaken by a number of overseas agencies and governments but welcomes feedback on international developments and proposals that are relevant to the issues considered in this preliminary report and for the final report.



# Chapter 1: The rise of digital platforms

## Key points

- There has been a rapid growth of digital platforms in Australia. Platforms operated by Google and Facebook, in particular, are an integral part of life for many Australians.
- Digital platforms and, in particular, Google and Facebook have succeeded in attracting significant advertising expenditure due to their ability to offer highly targeted advertising based on data they collect from users, and because of the large amount of time spent and number of interactions consumers have on these platforms.
- Google and Facebook receive over half of all online advertising revenue in Australia<sup>4</sup> and this share is growing.
- Digital platforms influence both the production and consumption of news and journalism in Australia through their roles as:
  - platforms for the distribution of news stories to Australian consumers
  - rival suppliers of online advertising opportunities.
- Digital platforms have significant influence on the consumption of news and journalism in Australia with over half of online news sourced via a digital platform.

This chapter describes the characteristics of digital platforms (section 1.1) and examines their rapid increase in size and profitability (section 1.2).

This chapter then briefly explores the growing influence of digital platforms on the consumption of news and journalistic content in Australia (section 1.3) and outlines the significant disruptions that Australian media and advertising markets have experienced from digital platforms (section 1.4).

As the purpose of this chapter is to serve as an introduction to the more substantive analysis undertaken in the rest of the report, it does not include any preliminary recommendations.

## 1.1 What are digital platforms?

### Key findings

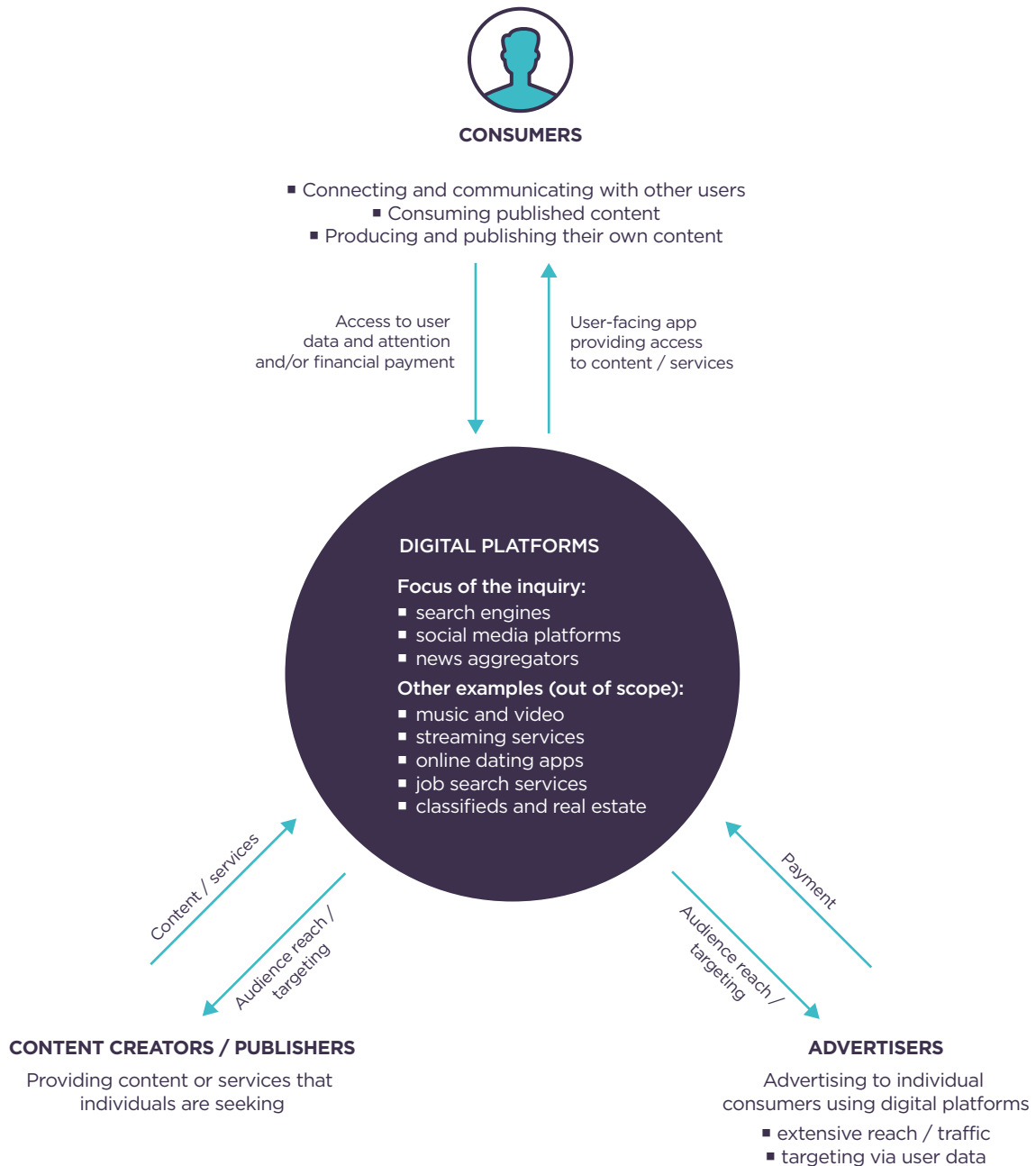
- The digital platforms covered by this Inquiry are search engines, social media platforms and digital content aggregation platforms.
- Google and Facebook are the two largest digital platforms in Australia and are the most visited websites. These two platforms are the major focus of this Inquiry.

Digital platforms are applications that serve multiple groups of users at once, providing value to each group based on the presence of other users. As explored in chapter 2, the economic concept of ‘multi-sided platforms’ is used to describe and explain how digital platforms function. The multiple sides of these platforms consist of groups of individuals who use the platform for different reasons. For example, one side of a platform may consist of individuals who use its search services to find content or products while another side consists of businesses wanting to advertise to targeted groups of those individuals.

<sup>4</sup> Google and Facebook sell advertising on their owned and operated properties as well as on other websites and applications. Revenue received by Google and Facebook from the sale of advertising on other websites and applications is shared with owners of the properties where those advertisements appear. This analysis is based on the revenue that Google and Facebook keep after these revenue splits as well as the revenue Google and Facebook receive for the sale of advertising on their own properties. Additional detail about how the ACCC has estimated market shares in advertising markets is set out in chapter 2 under ‘Scope of the ACCC’s market power assessment’.

Using different types of digital platforms, users can communicate with other users, find and consume content or services, transact with merchant businesses, or produce and publish their own user-generated content (figure 1.1). At the same time, content publishers and advertisers can use digital platforms to easily reach online audiences.

**Figure 1.1: Interactions of digital platforms with their users**



### 1.1.1 Types of platforms that are the focus of this Inquiry

Under the Terms of Reference, this Inquiry examines ‘digital platforms’ that may impact on competition in media and advertising services markets, particularly in relation to the supply of news and journalistic content. The Terms of Reference explicitly mention three types of platforms: ‘digital search engines’, ‘social media platforms’ and ‘other digital content aggregation platforms’. Given this, this preliminary report does not focus on online shopping and e-commerce platforms such as Amazon and eBay.

The types of platforms mentioned in the Terms of Reference can be broadly defined in the following ways:

- **Search engines:** software systems designed to search for information on the World Wide Web, generally returning a curated, ranked set of links to content websites. They operate in an automated fashion using sophisticated algorithms for collecting information (commonly known as ‘crawling’) and for providing search results. Examples include Google Search, Bing, Yahoo! and DuckDuckGo.
- **Social media platforms:** online services that primarily allow users to participate in social networking, communicate with other users, and share and consume content generated by other users (including professional publishers). Social media platforms generally display content for consumption as linear ‘feeds’, curated by chronology or by algorithms. Examples include Facebook, Instagram, and Snapchat. Platforms may also offer additional functions including instant messenger services.
- **Digital content aggregation platforms:** online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product. Those specialising in news and journalistic content—‘news aggregators’—are the most relevant example for the purposes of this Inquiry. Users may be able to customise or filter their aggregation, or to use a search function. Examples include Google News, Apple News, and Flipboard.

In practice, some of the major digital platforms offer combinations of services from various broad categories of user services. For example:

- while Facebook’s primary consumer-facing social media service allows communication between networked users, it now includes online marketplaces for goods and jobs
- while Google’s search engine is its primary service, it is linked to other services including mapping, email and cloud storage
- while Snapchat began as primarily a medium for creating and privately sharing photo-based content with other networked users, it later expanded to include public content services.

The services provided by digital platforms are constantly changing, due to technological advancement and shifts in consumer preferences. This constant change and expansion encourages the digital platforms’ future growth, which drives their market value.

### 1.1.2 Today’s major digital platforms

As businesses, the leading digital platforms are some of the world’s most valuable listed companies. As at 21 November 2018, Facebook had a market capitalisation of US\$380.6 billion and Google’s parent company Alphabet had a market capitalisation of US\$716.6 billion.<sup>5,6</sup> These businesses have built this market value through their extremely rapid growth (as described in section 1.2) and presumably the expectation that this growth will continue.

The most widely used digital platforms in Australia are also those with globally dominant positions. Among search engines, in 2017 Google Search accounted for 90 per cent of search traffic originating from Australian desktop computer users<sup>7</sup> and over 98 per cent of search traffic from Australian mobile users.<sup>8</sup>

Among social media platforms, Facebook has by far the largest user base in Australia. Its Australian usage in 2018 is approximately 17 million accessing on a monthly basis.<sup>9</sup> This equates to approximately 68 per cent of the Australian population accessing the Facebook platform on a monthly basis.<sup>10</sup> Instagram (owned by Facebook) is the next most popular social media platform with approximately 11 million monthly users (see table 1.1 for reported monthly users of major digital platforms).

5 Nasdaq, [Facebook, Inc. Class A Common Stock \(FB\) Quote & Summary Data](#), accessed 21 November 2018.

6 Nasdaq, [Alphabet Inc. Class A Common Stock \(GOOGL\) Quote & Summary Data](#), accessed 21 November 2018.

7 Stat Counter, [Desktop Search Engine Market Share Australia](#), accessed 22 October 2018.

8 Stat Counter, [Mobile Search Engine Market Share Australia](#), accessed 22 October 2018.

9 Nielsen, [Digital Panel Data](#), August 2018.

10 Based on the Australian Bureau of Statistics, [Population clock](#), accessed 21 November 2018. Population figure of 25 142 187.

News aggregators are less widely used in Australia than search or social media platforms, but are still used by a significant proportion of the population. Survey data indicates that Apple News had an approximate unique Australian audience of five million in August 2018 while Google News had an approximate unique Australian audience of 0.6 million in the same month.<sup>11</sup>

## 1.2 The rise of the digital platforms

### Key findings

- Digital platforms generate their revenue primarily from advertising, generally through collecting and harnessing user data and capturing user attention. User attention is at least as important as user data in monetising services.
- Digital platforms such as Google and Facebook have a significant presence in various aspects of the online advertising supply chain.
- The growth of today's leading digital platforms can be explained by a number of distinct contributing factors, including:
  - the transition of communications to the online world, and the rapid increase in the number of internet users in the past two decades
  - the innovative, user-friendly services the platforms provide
  - the role of network effects in building scale in platform user bases
  - the ability of digital platforms to collect and harness user data for advertising purposes
  - the vertical and horizontal integration of platform businesses.

The way Australians communicate and consume content has changed dramatically in recent years. For example, 15 years ago:

- there were 65 000 payphones in operation (closer to 23 000 today)<sup>12</sup>
- 2G networks were still in operation and 3G mobile networks covered 53 per cent of the population (whereas 4G services from multiple providers now cover over 95 per cent)<sup>13</sup>
- Australians spent \$1.6 billion renting videos and DVDs in 2004–05 (all but disappearing to \$160 million in 2018)<sup>14</sup>
- Australians bought around 48 million albums on CD in 2004 (around eight million in 2017).<sup>15</sup>

Moreover, 15 years ago, the most popular digital platforms at the focus of this Inquiry were at relatively early stages of development, or did not yet exist (table 1.1).

- Facebook launched its services in 2004 and started showing advertisements in 2007 (it had 2.2 billion monthly active users worldwide in June 2018, and earned US\$13 billion in advertising revenue in the second quarter of 2018).<sup>16, 17</sup>
- Google became a public company in 2004, when it was already the most widely used search engine in the world handling around 200 million queries per day (the number of queries it receives in a given year is now estimated to be in the trillions).<sup>18, 19, 20</sup>

11 Nielsen, [Digital Panel Data](#), August 2018.

12 ACMA, [Communications Report 2005-06](#), 30 October 2006, p. 27; ACMA, [Communications Report 2016-17](#), 8 December 2018, p. 8.

13 ACMA, [Communications Report 2005-06](#), 30 October 2006, p. 11; ACMA, [Communications Report 2016-17](#), 8 December 2018, p. 15.

14 IbisWorld, [Video and DVD Hire Outlets in Australia](#), May 2018, p. 29.

15 ARIA, [2004 Yearly Statistics](#), accessed 22 October 2018; ARIA, [2017 Yearly Statistics](#), accessed 22 October 2018.

16 Facebook, [Facebook Unveils Facebook Ads](#), accessed 22 October 2018.

17 Facebook, [Facebook Reports Second Quarter 2018 Results](#), accessed 22 October 2018.

18 Google, [Prospectus](#), 18 August 2004, accessed 22 October 2018.

19 S Olsen, 'Google files for unusual \$2.7 billion IPO', *CNET*, 30 April 2004, accessed 15 November 2018.

20 D Sullivan, 'Google now handles at least 2 trillion searches per year', *Search Engine Land*, 24 May 2016, accessed 15 November 2018.

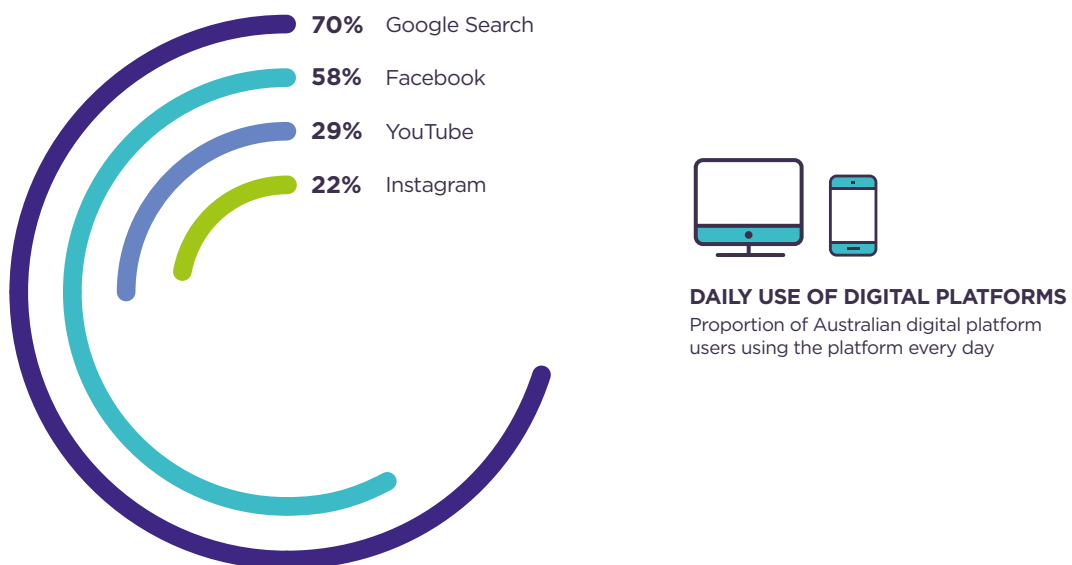
**Table 1.1: Australian usage of selected major digital platforms**

Digital platform	Year of launch	Unique monthly audience in Australia (August 2018)
Google Search	1997	19.0 million
Google News	2002	0.6 million
Facebook	2004	17.0 million
YouTube	2005	17.0 million
Instagram	2010	10.7 million
Snapchat	2011	5.1 million
Twitter	2006	7.6 million
Bing	2009	2.0 million
LinkedIn	2003	9.3 million
Apple News	2015	5.0 million

Source: Nielsen, [Digital Panel Data](#), August 2018.

These digital platforms have now become a part of daily life for many Australians. A 2018 Roy Morgan Research survey commissioned by the ACCC (the ACCC consumer survey) shows that high proportions of the 4000 Australian digital platform users surveyed use these services daily, as set out in figure 1.2.

**Figure 1.2: Digital Platform Users: Daily use of digital platforms in 2018**



Source: Roy Morgan Research, *Consumer Views and Behaviours on Digital Platforms*, November 2018, p. 11.

This Inquiry has identified a number of distinct factors that have contributed to the extremely rapid and widespread growth of the digital platforms. These include:

- the rapid growth of internet use in Australia and overseas
- the innovative, quality and popular products digital platforms supply to users
- the complementary benefits that digital platforms provide to various groups of internet users
- the way that successful digital platforms can increase their value to users through the presence of other users ('network effects', discussed in chapter 2)

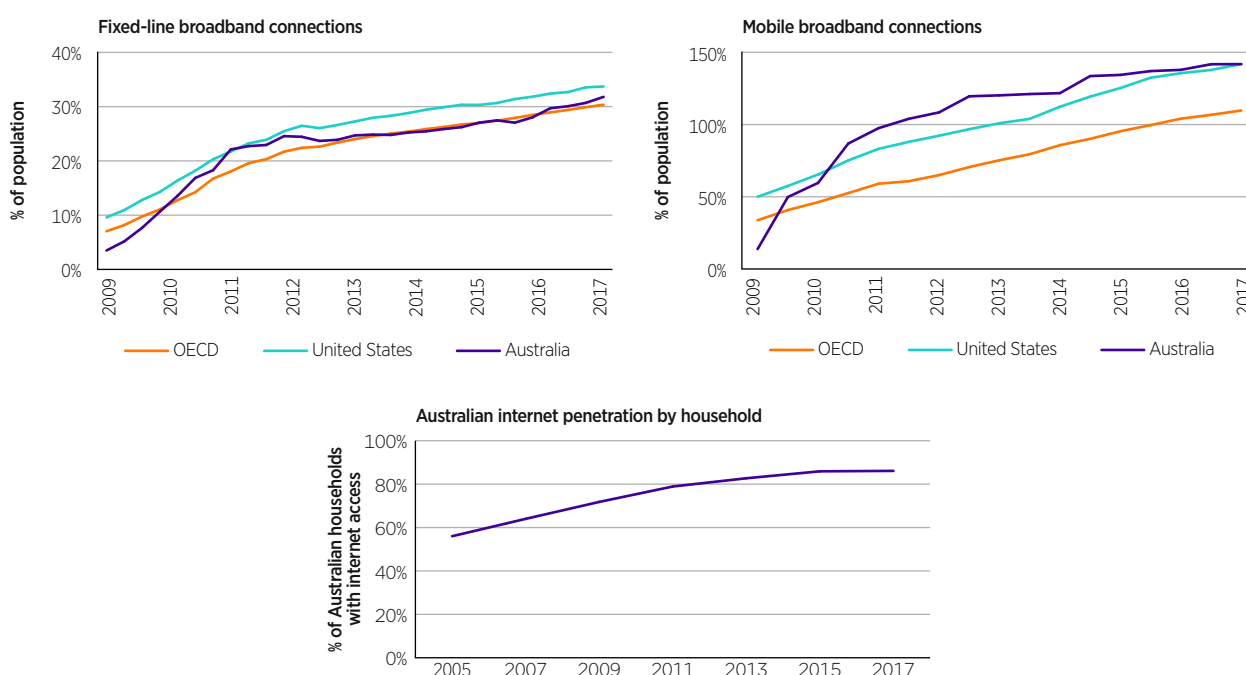
- the way that successful digital platforms have been able to harness their large user bases to generate revenue through participation in the advertising market
- the acquisition and ownership of multiple digital platforms and related services by the same companies which may provide business efficiencies (i.e. ‘vertical and horizontal integration’).

The following sections provide some more detail about each of these contributing factors.

## 1.2.1 Moving online

The number of internet users has grown rapidly over the past two decades in Australia, in the United States (where most of today’s major digital platforms started) and across the world (figure 1.3). In particular, the huge increase in smartphone usage during the past decade means that the internet is constantly accessible, further changing consumers’ internet usage habits. Today, there are around three and a half times more mobile handset subscribers than fixed internet subscribers in Australia,<sup>21</sup> and more searches on Google Search are undertaken on mobile devices than on desktop computers.<sup>22</sup>

**Figure 1.3: Broadband penetration rates in Australia and worldwide**



Sources: OECD, [Broadband Subscriptions](#), 28 June 2018, accessed 12 October 2018; Australian Bureau of Statistics, [Household Use of Information Technology](#), 8 February 2010 and 28 March 2018, accessed 12 October 2018.

These trends have meant that the number of potential digital platform users, and the potential frequency of their activity, has grown exponentially. The interaction between higher broadband penetration and the growth of digital platforms has not been one-way, as the benefits that digital platforms provide to users have encouraged more common and more frequent internet use:

- The internet made it technically feasible for individuals wanting to connect and communicate with each other to communicate instantaneously in one-to-one and one-to-many formats using text, audio, and visual media. Digital platforms help individuals do this.
- The internet made it possible for consumers of content to access an unprecedented breadth and depth of information, without the inherent geographic limitations of other mass media and information sources. Digital platforms help consumers navigate the vast and expanding amounts of information available online in a coherent and digestible format.
- The internet allowed content creators, publishers and advertisers instantaneous access to larger and more dispersed audiences through online publication of ‘non-rivalrous’ digital content (i.e. content

<sup>21</sup> ACMA, [Communications Report 2016-17](#), 8 December 2018, p. 7.

<sup>22</sup> Information provided to the ACCC.

that can be consumed at once by multiple parties). Digital platforms provide avenues to reach large groups of consumers in an increasingly diverse and fragmented online environment by collecting these consumers together in one ‘virtual space’.

In each case, the movement of consumer and business activity to the online environment created an opportunity for new software systems and applications to help users fully realise the potential of the internet. Digital platforms made use of this opportunity by devising and implementing online services that provide significant benefits to different groups of users.

While providing valuable services to consumers have allowed digital platforms to build scale and attract large user bases, that scale does not, of itself, explain their growth as profitable businesses.

Online businesses have pursued a variety of business approaches, but those businesses with the greatest commercial success are the digital platforms that generate revenue through advertising (or which have the potential to do so). Advertising allows digital platforms to make use of their scale because advertisers value access to larger user bases (see ‘cross-side network effects’ discussed in chapter 2). Platforms are able to provide compelling content without imposing a monetary charge on users and generate revenue by selling opportunities to advertise to these users. Importantly, the major digital platforms can offer highly targeted advertising by collecting and harnessing personal data from their users. The role of digital platforms in the advertising market, including their integration in the advertising supply chain, is discussed in more detail in chapter 3.

### 1.2.2 Network effects and scale

An important factor in explaining the growth of digital platforms is, nevertheless, that the larger the platforms are, the more valuable they tend to be for their users. Economists refer to such businesses as being characterised by ‘network effects’.

Digital platforms address the needs of multiple groups of users simultaneously, which is the characteristic of specific types of network effects. This relationship between the value of a platform to its user groups, and the size and scale of those groups, is likely to have been a significant factor in the ability of such platforms to build scale. It is also a significant consideration in competition between platforms. Network effects and the scale of digital platforms are discussed further in chapter 2.

### 1.2.3 Horizontal and vertical integration

Several of the digital platforms relevant to this Inquiry, including the largest ones, have benefited from an increasing degree of horizontal and vertical integration, acquiring multiple businesses at different points on the advertising supply chain. For example, in the period 2004 to 2014, Google is reported to have spent at least US\$23 billion buying 145 companies.<sup>23</sup> Since 2004, Facebook is reported to have spent at least US\$23 billion buying 66 companies.<sup>24</sup> The increasing horizontal and vertical integration of digital platforms is discussed in more detail in chapter 2.

## 1.3 The role of digital platforms in news and journalism

### Key findings

- Digital platforms are in a position to have significant influence on the consumption of news and journalistic content in Australia. These platforms are extremely popular avenues for accessing news, and have the ability to select and rank the news stories and sources they provide to consumers.

At the time of this report, digital platforms do not produce news or journalistic content within Australia. However, they do perform a number of key roles in the supply and consumption of this content in Australia, including:

<sup>23</sup> J. Lipton, ‘[Google’s best and worst acquisitions](#)’, *CNBC*, 19 August 2014, accessed 8 November 2018.

<sup>24</sup> S. Toth, ‘[66 Facebook Acquisitions—The Complete List \(2018\)!](#)’, *TechWyse*, 4 January 2018, accessed 15 November 2018.

- as platforms for publication and marketing for media businesses, providing new ways for media companies to reach audiences, and thereby monetise their online content
- as a source of collated and curated news for a significant proportion of society
- as a rival supplier of advertising opportunity, placing increasing financial pressure on the production of news and journalistic content.

The Inquiry is considering the implications of the roles of digital platforms for news and journalism in Australia.

Digital platforms such as search engines and social media services have become extremely effective tools for journalists, aiding the effectiveness and efficiency of news gathering and reporting.<sup>25</sup> Publishing content online and through digital platforms has also provided a method of distributing journalistic material at lower costs than traditional physical production.<sup>26</sup> The cost of traditional production and distribution methods limited the practice of journalism to certain large media organisations. The cheaper cost of online content production has removed this limitation, allowing for the entry of smaller-scale ‘digital native’ news producers.

Most significantly, however, digital platforms have changed the way Australians consume news and journalism. The section below includes a short discussion of these issues as an introduction to chapter 6.

### 1.3.1 Australians increasingly get their news online

As Australians increasingly made the internet part of their daily lives, the consumption of news and journalistic content became one of the key activities to move online. As shown in figure 1.4, survey results suggest that the online consumption of news is undertaken more frequently than the online consumption of entertainment content or financial transactions.

While the growth of online news has provided an additional source of news for many Australians, it has become the primary source of news for a growing proportion of the population. A 2018 survey conducted by the University of Canberra’s News and Media Research Centre found that around 47 per cent of Australians use online sources as their primary source of news—similar to trends in the United Kingdom (45 per cent), Canada (45 per cent), and the United States (51 per cent).<sup>27</sup>

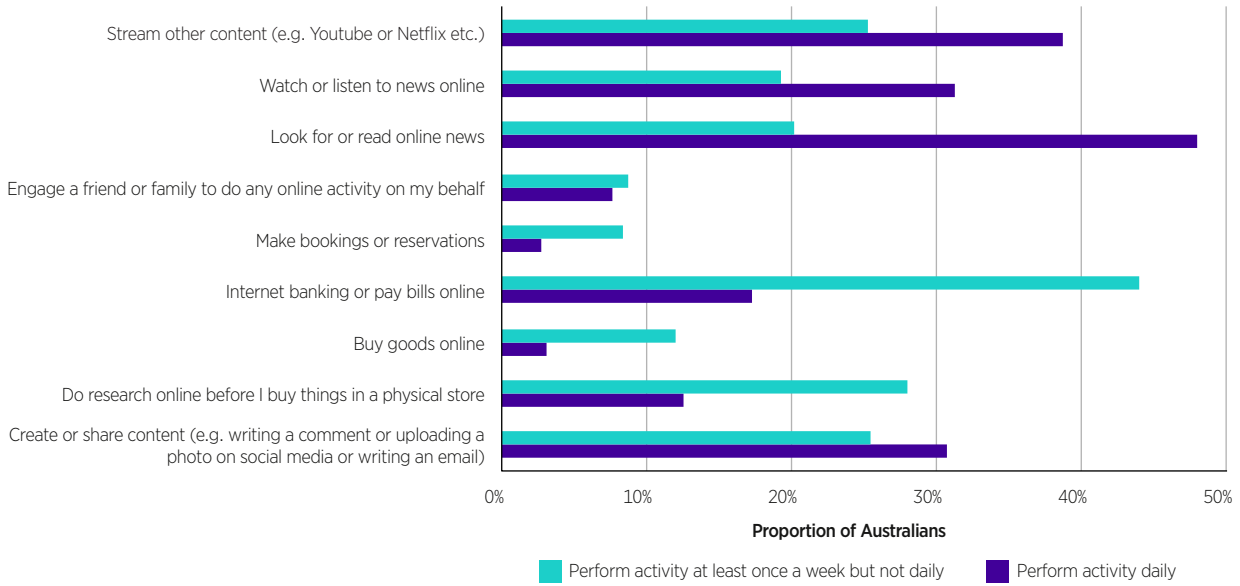
25 Facebook, [Submission by Facebook Australia Pty Limited](#), 18 April 2018, p. 23; Twitter, [Submission to the Digital Platforms Inquiry](#), 17 April 2018, p. 3, 4; EC Tandoc Jr, TP Vos, [The Journalist is Marketing the News: Social media in the gatekeeping process](#), *Journalism Practice*, 10 (8) (2016), p. 952; QUT Creative Industries Research Office, [Digital Platforms and Australian News Media](#), April 2018, p. 11 12.

26 Queensland University of Technology, Creative Industries Faculty, [Digital Platforms and Australian News Media: Report](#), April 2018, p. 5.

27 S Park, C Fisher, G Fuller and Lee, [‘Digital News Report: Australia 2018’](#), News and Media Research Centre, University of Canberra, June 2018, p. 29.



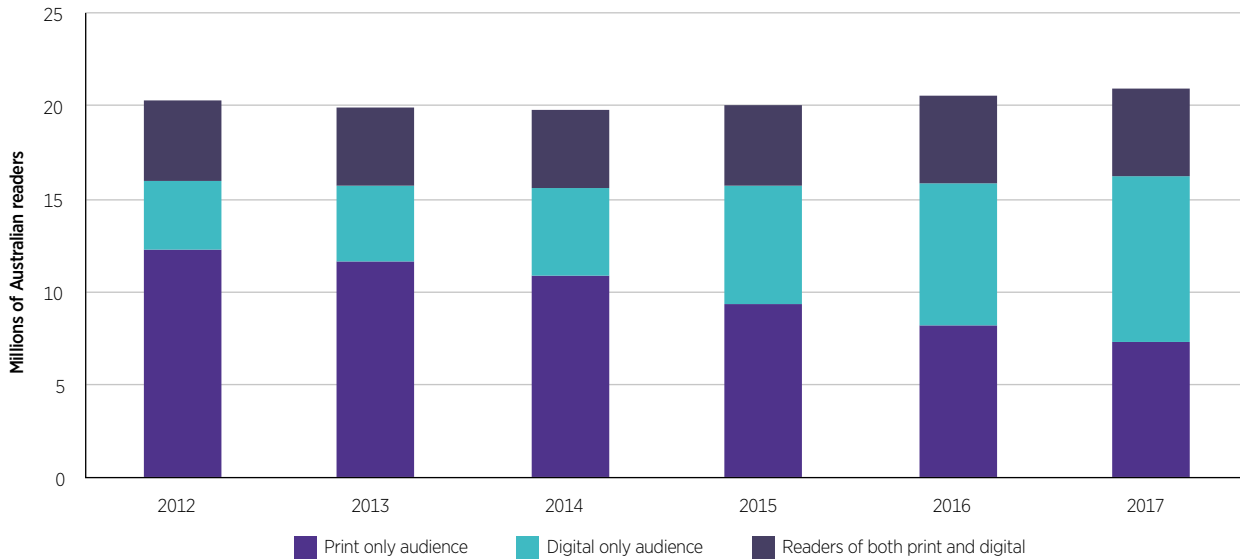
**Figure 1.4: Frequency of online activities**



Source: Roy Morgan Research, Consumer Views and Behaviours on Digital Platforms, November 2018, p. 14.

While print, radio, and television remain significant sources of news, the vast majority of media businesses using these formats also operate websites providing news and journalistic content. Some of the most frequently accessed and trusted brands of online news are those associated with established broadcasters and newspapers.<sup>28</sup> In the case of the traditional print media, decreases in print newspaper readership appear to have been supplemented by increases in audiences accessing the website and app editions of those publications (figure 1.5).

**Figure 1.5: Newspaper readership shifting from print to digital**



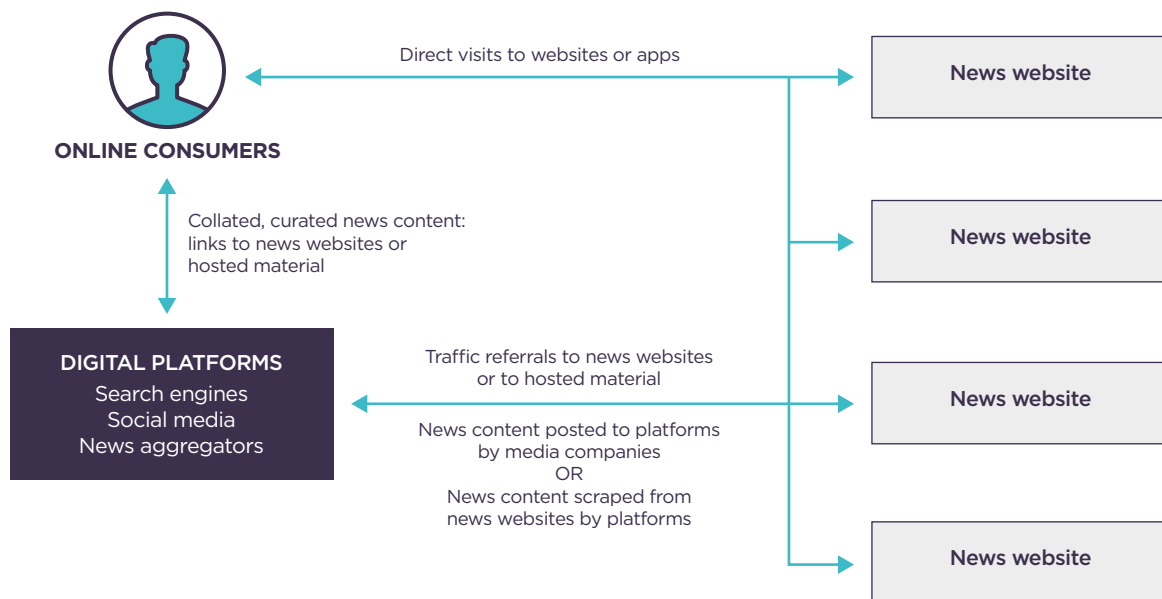
Source: ACCC analysis based on data provided to the Inquiry.

<sup>28</sup> S Park, C Fisher, G Fuller and Lee, 'Digital News Report: Australia 2018', News and Media Research Centre, University of Canberra, June 2018, p. 29.

### 1.3.2 Digital platforms and news consumption

Search engines play an important role in news consumption by determining the listing of news articles (and news media websites) from which a user might choose. On social media services, news is often presented as part of a feed or chat, determined by a user's interests or friends. However, interactions do not preclude users from accessing news content directly from the websites or apps of media companies. Given that accessing news on digital platforms generally imposes the same monetary cost on consumers as accessing news directly, the use of digital platforms to access news appears to be borne largely out of consumer preference.

Figure 1.6: How consumers access news online



By acting as an intermediary between consumers and news outlets, platforms are inherently influential in shaping consumers' choices of digital journalism:

- Search engines provide links to news results that are ranked according to a user's search terms, and the top ranked links are generally significantly more likely to be clicked.<sup>29</sup>
- On social media platforms such as Facebook, media companies post news content directly onto the platform, to be shown to other users according to user preferences and curation decisions made by algorithms. The platform may provide links directly to news websites, or the content may be hosted on the platform itself, if the news outlet partners with a social media platform to allow this hosting arrangement.
- News aggregators may present a 'front page' of collated news links, or may allow users to search for specific keywords among news stories.

Increasingly, consumers are accessing news websites via links, either from digital platforms or from other websites. The 2018 University of Canberra study suggests that over half of online news consumption in Australia is channelled through algorithm-driven platforms such as search engines, social media and news aggregators.<sup>30</sup> This study also suggests that this influence is more prevalent among younger cohorts, with social media providing the main source of news for 36 per cent of 18-24-year-olds.<sup>31</sup>

29 D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology, Sydney, NSW, 2018, p. 68.

30 S Park, C Fisher, G Fuller and Lee, '[Digital News Report: Australia 2018](#)', News and Media Research Centre, University of Canberra, June 2018, p. 57.

31 S Park, C Fisher, G Fuller and Lee, '[Digital News Report: Australia 2018](#)', News and Media Research Centre, University of Canberra, June 2018, p. 52.

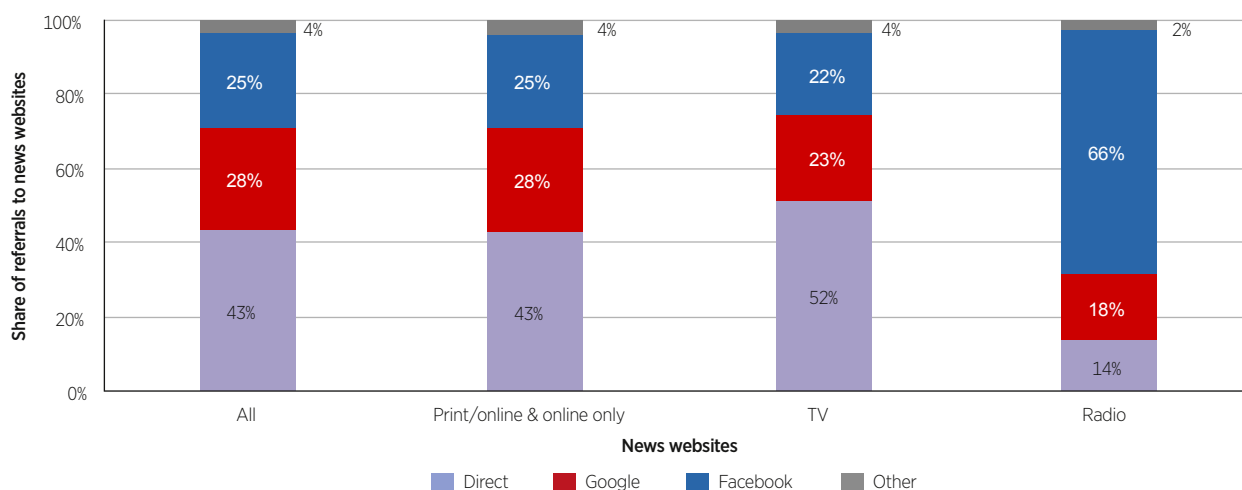
People who access news via digital platforms are also likely to access news in other ways. The ACCC consumer survey showed that 91 per cent of Australians who use digital platforms accessed some form of online news in the past month; and a large share of these respondents did so via social media (48 per cent), through search engines (47 per cent), or by searching online for the name of a news website (35 per cent). About 56 per cent of people who used digital platforms also accessed news websites or apps directly. About 34 per cent had an online news article forwarded to them by a friend or family member, and 30 per cent received email alerts or newsletters.<sup>32</sup>

From the perspective of online media businesses, referrals to news websites provide a significant share of their traffic (figure 1.7). Google and Facebook account for over half of referrals to Australian news websites, often providing more traffic than direct visits to the website. Data provided to the ACCC in the course of this Inquiry shows referrals from Google and Facebook account for:

- more than 80 per cent of traffic to news websites operated by Australian radio broadcasters
- more than 50 per cent of traffic to news websites operated by Australian print and digital native publishers
- more than 40 per cent of traffic to news websites operated by Australian television broadcasters.

While Google and Facebook are, by a wide margin, the digital platforms with the largest role in Australian consumption of news and journalism, a significant number of Australians also get their news from other platforms, such as Twitter, Instagram and Apple News.

**Figure 1.7: Referrals and direct visits to news websites in 2017**



Source: ACCC analysis based on data provided to the Inquiry.

## 1.4 A disrupted media sector

### Key findings

- Australian media (including both print and broadcast) have traditionally relied heavily on advertising revenue to fund the production of news and journalistic content.
- Online advertising now accounts for around half of all advertising spend in Australia. Advertising in traditional media, particularly traditional print media, has fallen over the past decade.
- Digital platforms have captured a significant share of the advertising revenue that has moved online.

The Terms of Reference seek an examination of digital platforms' impact on the media and advertising services markets. Given this context, it is necessary to consider the history and nature of the disruptions to the media sector caused by digitalisation and the online ecosystem before this Inquiry can assess the role that the digital platforms have played in that disruption.

<sup>32</sup> Roy Morgan Research, Consumer Views and Behaviours on Digital Platforms, November 2018, p. 33.

Australian commercial media businesses have traditionally relied heavily on advertising. Free-to-air commercial television and radio services provide programming without charging their audiences, and rely almost exclusively on the broadcast of advertising to generate revenue. Australian newspaper and magazine publishers traditionally generated the vast majority of their revenue by printing advertisements and classifieds (once referred to in the print industry as its ‘rivers of gold’), with subscription fees and cover prices only contributing a small proportion of income. For example, in 1999, about 80 per cent of Fairfax’s revenue derived from advertising, while subscriptions and cover prices only contributed 20 per cent.<sup>33</sup> Even Australian subscription television generates meaningful advertising revenue, despite limiting services to paying subscribers.<sup>34</sup>

Traditional media companies thrived throughout the 20th century. However, this changed because of competition for audiences and advertising from online services. First, online classifieds such as eBay, SEEK and Carsales.com.au removed a major revenue stream from print newspapers, though some publishers followed this trend and moved their classifieds online (Fairfax’s flagship Domain real estate site is one key example). More recently, the success of the leading digital platforms has led to pressure on advertising revenue for news media. The main platforms are immensely popular and profitable, services such as Google and Facebook are ubiquitous in jurisdictions where access to the internet is unrestricted, such as Australia.

Newspapers, regional television and radio have historically played an important role in producing, publishing and distributing news and journalism, which provides broad benefits to the functioning of Australia’s democratic society. The capture of an increasing proportion of Australian advertising revenue by digital platforms is a potential threat to the commercial viability of media companies and, in particular, to the traditional print media sector and therefore their capacity to produce quality news and journalism. Decreased advertising revenue earned by traditional media companies appears to have contributed to declining employment of journalists in Australia, the closure of numerous local and regional print publications and the consolidation of broadcast newsrooms into fewer regional centres. Chapter 6 explores in more detail the potential challenge that digital platforms place on Australian news media.

### 1.4.1 Digital platforms’ growing share of advertising revenue

The significance of online advertising has grown in the past decade, but particularly between 2012 and 2017 (figure 1.8). Among other things, this is likely to reflect increasing internet usage, as discussed in section 1.4. Since 2012, the proportion of total Australian advertising spend allocated to:

- digital media has increased from 25 per cent to 51 per cent
- print has fallen significantly from 33 per cent to 12 per cent
- television has fallen slightly from 29 per cent to 24 per cent
- radio has remained relatively steady, moving from 8 per cent to 7 per cent
- outdoor and cinema has increased from 5 per cent to 6 per cent.<sup>35</sup>

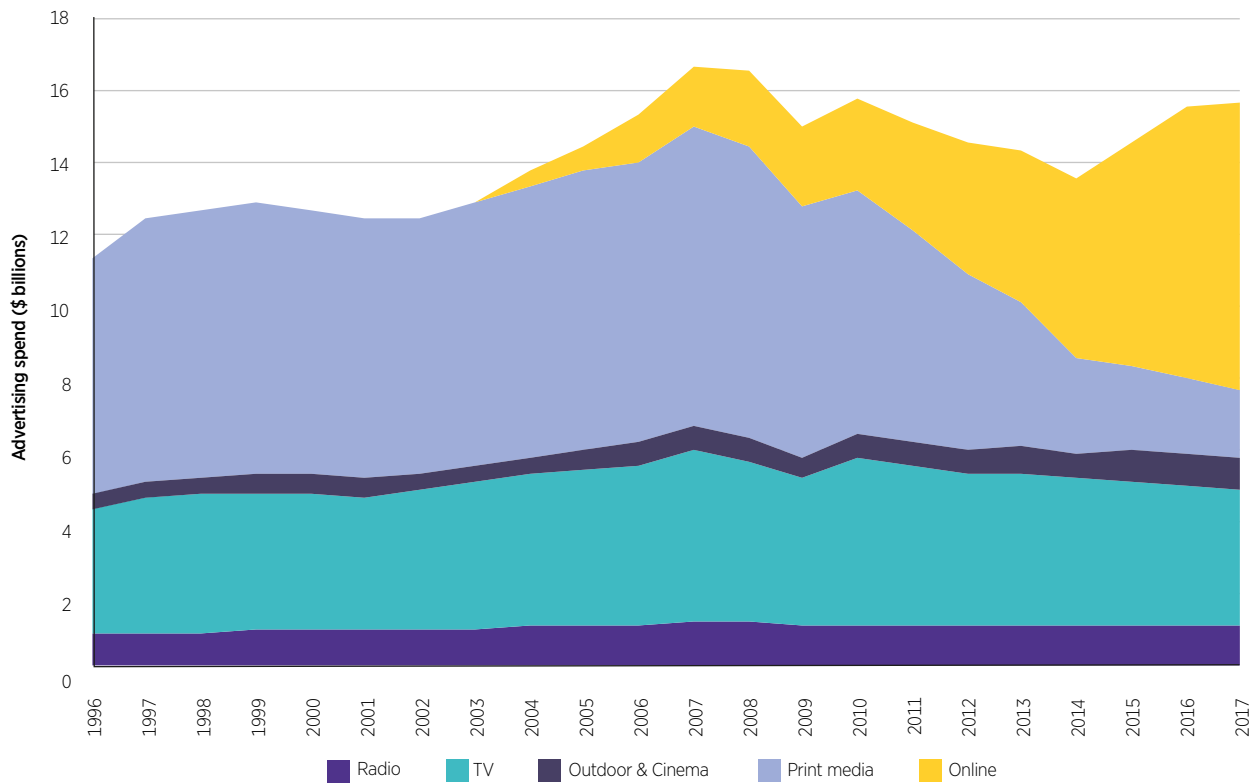
As shown in figure 1.8, the overall amount of advertising expenditure has increased slightly since the emergence of online advertising. However, most of the growth in online advertising has occurred at the expense of print media advertising.

<sup>33</sup> Fairfax, [Fairfax Media response to issues paper](#), 20 April 2018, p. 2.

<sup>34</sup> News Corp, [News Corporation Reports Fourth Quarter and Full Year Results for Fiscal 2018](#), 9 August 2018, accessed 18 October 2018, p. 29.

<sup>35</sup> Commercial Economic Advisory Service of Australia, [Advertising Expenditure in Main Media](#), 1996–2017, accessed 5 June 2018.

**Figure 1.8: Advertising expenditure by major advertising agencies in Australia, adjusted for inflation**



Note: Amounts adjusted to 2017 dollars.

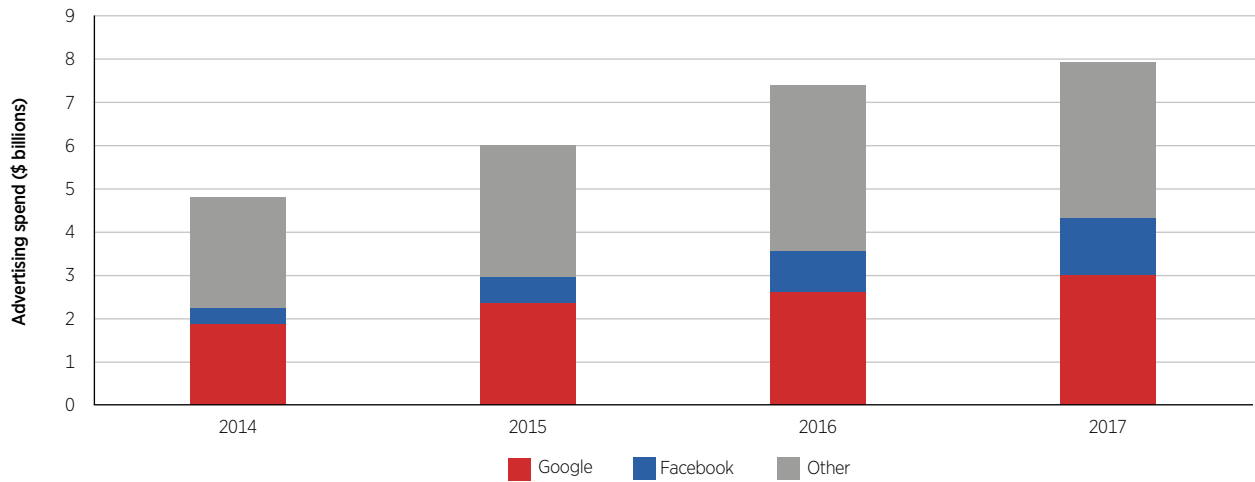
Source: Commercial Economic Advisory Service of Australia, [Advertising Expenditure in Main Media](#), 1996–2017<sup>36</sup>, accessed 5 June 2018. ACCC Analysis.

While not all online advertising revenue goes to digital platforms, a large proportion has flowed to Google and Facebook in particular (figure 1.9). The total online advertising market in Australia has grown by \$3.1 billion between 2014 and 2017, and Google and Facebook account for 70 per cent of that growth. If classified advertisements are excluded from this analysis, Google and Facebook account for 86 per cent of the total market increase from 2014 to 2017.

Google is estimated to have accounted for 38 per cent of online advertising spend in 2017, with Facebook accounting for 17 per cent. If online classifieds are excluded, this increases to 47 per cent for Google and 21 per cent for Facebook.

<sup>36</sup> The print media category of the Commercial Economic Advisory Service of Australia (CEASA) data includes newspapers, magazines and print classified directories such as the Yellow and White Pages. The majority of print media spend goes to newspapers. Advertising spend on print classified directories is not included after 2013. In 2013 the advertising spend on print classified directories was \$0.7 billion (nominal). Amounts for 1998–2000 and 2003–05 have been interpolated from CEASA data in 1997, 2001–02 and 2006.

Figure 1.9: Total Australian online advertising expenditure



Source: ACCC analysis based on data provided to the Inquiry.

Digital platforms have successfully captured advertising revenue because of the specific benefits they can offer to consumers, advertisers and content creators, which are described in sections 1.2 and 1.3.

# Chapter 2: Do digital platforms have market power?

## Key findings

- Google and Facebook operate multi-sided platforms. On one side, they offer services to consumers for a zero monetary price in order to obtain consumers' attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers. Advertising is the source of most of the revenue earned by the two major digital platforms in Australia.
- Google has substantial market power in supplying general search services in Australia, with a market share of around 94 per cent. Google is likely to retain its dominant share of the market at least in the short- to medium-term.
- Facebook has substantial market power in supplying social media services in Australia, which are provided by its platforms, Facebook and Instagram. Facebook's substantial market power can be expected to persist in at least the short- to medium-term.
- Google has substantial market power in the supply of search advertising in Australia, with a share of more than 96 per cent of general search advertising revenue.
- Facebook has substantial market power in the supply of display advertising in Australia, with a market share of 46 per cent. The rest of the market is highly fragmented; the ACCC estimates that no other firm has a market share of more than 5 per cent.
- Google and Facebook are 'must have' sources of traffic for news media businesses in Australia. Combined, they account for more than 50 per cent of traffic to news media websites. Google and Facebook each have substantial market power in the supply of news referral services to media businesses.
- There are considerable barriers to entry and expansion for search platforms and social media platforms that reinforce and entrench Google and Facebook's market power. These include barriers arising from same-side and cross-side network effects, branding, consumer inertia and switching costs, economies of scale and sunk costs.
- Dynamic competition may place some degree of competitive constraint on Google. However, it is insulated to a substantial extent from dynamic competition by barriers to entry and expansion for search platforms, Google's advantages of scope, and its acquisition strategy.
- Dynamic competition may place some degree of competitive constraint on Facebook. However, this constraint is tempered by barriers to entry and expansion for social media platforms, Facebook's advantages of scope and its acquisition strategy.

## 2.1 Scope of the ACCC's market power assessment

The Terms of Reference directed the ACCC to examine the extent to which platform service providers (that is, providers of search engine, social media or digital content aggregation services) are exercising market power in commercial dealings with the creators of journalistic content and advertisers; and the impact of platform service providers on media and advertising markets. In this respect, the ACCC notes that:

- The ACCC's analysis primarily relates to Google and Facebook. This is for three reasons. First, almost all the submissions received from interested parties and consumers concern Google and Facebook. Second, Google and Facebook are by far the largest digital platforms in Australia by revenue.<sup>37</sup> Finally, Google and Facebook are the most visited websites in Australia.<sup>38</sup> For these reasons, Google and Facebook are the platforms most likely to be having an impact on creators of journalistic content and advertisers.

<sup>37</sup> Data provided to the ACCC.

<sup>38</sup> Similar Web, [Top Website Ranking](#), accessed 8 November 2018; Alexa, [Top Sites in Australia](#), accessed 8 November 2018.

- Advertisers in Australia acquire digital advertising space from various firms, including digital platforms and media publishers. In examining the extent to which digital platform service providers have market power in commercial dealings with advertisers, the ACCC has focused on online search and display advertising.
- In examining the extent to which digital platform service providers have market power in commercial dealings with the creators of journalistic content, the ACCC considers it useful to identify a market for the supply of news media referral services to news media businesses.
- Digital platforms (including Google and Facebook) are multi-sided platforms. That is, the platforms bring together multiple sets of users that interact via the platform. The number of users on one side (e.g. consumers) increases the value of the platform to other sets of users (e.g. advertisers). Recognising the multi-sided nature of these platforms, the ACCC has been careful to take into account the competitive constraint provided by the different sides of the relevant platforms in determining whether market power is held in the relevant market(s).

This is a preliminary report and the ACCC's views on the relevant markets and the extent to which digital platforms hold market power are preliminary and will be considered further following public consultation. The markets identified in this report are limited to markets the ACCC considers are relevant to this Inquiry. Digital platforms such as Google and Facebook may have substantial market power in markets other than those identified in this report.

Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from 'out-competing' its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skilful or less efficient. This conduct is part of the competitive process, which drives firms to develop and offer products that are more attractive to customers, and should not be deterred.

However, a firm with substantial market power could damage this competitive process by preventing or deterring rivals, or potential rivals, from competing on their merits. That is, a firm with substantial market power could maintain or advance its position by restricting or undermining its rivals' ability to compete, rather than by offering a more attractive product.

The Terms of Reference for this Inquiry are broad and do not limit the ACCC to only examine whether digital platforms have misused their market power (or otherwise breached the *Competition and Consumer Act*), but poses a wider question; asking whether the digital platforms are exercising their market power in their dealings with advertisers and content creators and examining any price or non-price effect of this.

Finally, market shares listed in this report are the ACCC's best estimates, based on information from a number of sources including, in the case of advertising markets, data from the Commercial Economic Advisory Service of Australia (CEASA). Where the ACCC has requested information from firms on advertising revenue it has done so on the basis of the revenue received from advertisers in Australia. This may include some portion of expenditure that is spent by Australian advertisers targeted at users located outside Australia. Conversely, it does not include expenditure by advertisers located overseas targeted at users in Australia. As with all estimates, there is a potential that this may under or overstate the actual market share of each firm or the total size of the market. The ACCC notes that the most recent data referenced in this preliminary report relates to the 2017 calendar year and market shares may have changed from this point in time.



## 2.2 How Google and Facebook monetise their services

### Key findings

- Google and Facebook operate multi-sided platforms. On one side, they offer services to consumers for a zero monetary price, in order to obtain consumers' attention and data, which they monetise. On the other side, they sell advertising opportunities to advertisers. Advertising is the source of most of the revenues earned by the two major digital platforms in Australia.

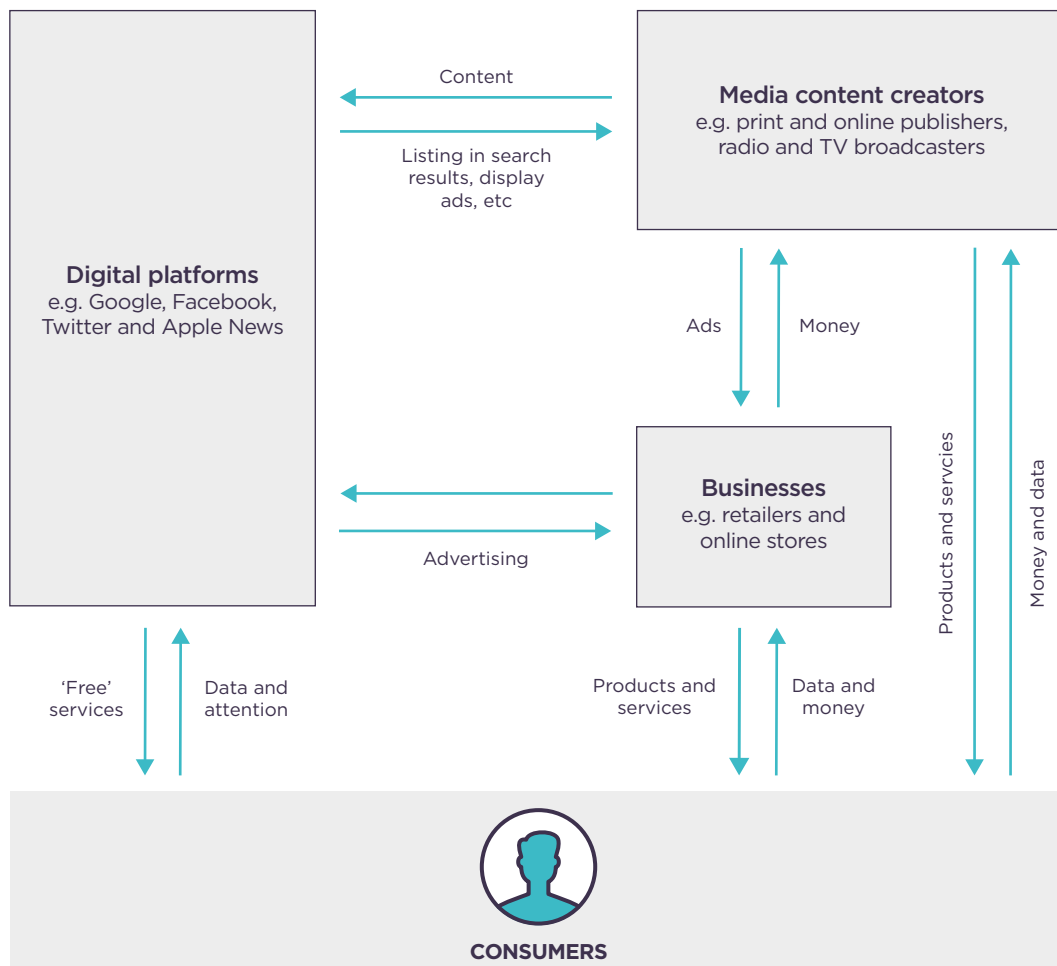
### Digital platform business model

Google and Facebook, along with other digital platforms, are multi-sided platforms that interact with a number of groups:

- consumers who utilise services provided by the digital platform
- advertisers who are purchasing the opportunity to display ads to consumers, and
- content creators, including creators of news and journalistic content.

Figure 2.1 illustrates these relationships.

**Figure 2.1: Relationships between digital platforms, consumers, advertisers and media content creators**



Source: Extracted from figure 3, 'Big Data Ecosystem' from OECD, Bringing Competition Policy to the Digital Era: [Background note by the Secretariat](#), 29–30 November 2016, p. 12. Figure has been updated and adjusted as relevant to the Australian context and matters of key relevance to the Inquiry.

Google's and Facebook's business model for consumer facing services, such as Google Search, YouTube, the Facebook platform and Instagram, is to charge a zero monetary price to consumers in return for the collection of customers' data, and the subsequent ability to sell targeted advertising opportunities. Users effectively pay for these services by allowing Google and Facebook to collect and use their data and by viewing advertisements. Because Google and Facebook collect a great depth of information about their users (both on and off their own platforms as discussed in chapter 5), they are able to offer advertisers very specific targeting opportunities. This business model is outlined further below:

1. By not charging a monetary price to consumers, Google and Facebook are able to attract a high number of consumers to the platform.
2. This increases the revenue that they are able to obtain from advertisers because:
  - by gaining the attention of more consumers, Google and Facebook increase the supply of advertising opportunities available to be sold
  - a higher number of consumers increases the quantity of consumer data accessible to Google and Facebook, allowing them to provide higher quality ad targeting services
  - a higher number of consumers increases the quantity of traffic for an advertising campaign, which reduces the average fixed costs of advertising, making the platform more attractive to advertisers.
3. As Google collects more data on users, it is able to improve the relevance algorithm of its search service, which allows it to attract more users. Similarly, if Facebook obtains more data on users, it may be able to improve the quality of its news feed algorithm, which, in turn, may allow it to attract more users. These effects give rise to positive feedback loops.

## Google

Google was founded in 1998. It operates Google Search, which is by far the leading general search engine internationally, with an estimated 92 per cent global market share as at October 2018.<sup>39</sup> In Australia, Google Search is estimated to have a 94 per cent market share as at October 2018.<sup>40</sup> Google earns revenue predominantly by selling advertising on Google Search.

Google's business model is very successful—in 2017, it earned US\$110 billion of revenue globally.<sup>41</sup> Around AU\$3 billion of this revenue is attributable to customers in Australia<sup>42</sup>:

- approximately 80 per cent of the total advertising revenue generated in Australia is from selling ads that appear within Google Search results<sup>43</sup>
- less than 10 per cent of the total advertising revenue generated in Australia is from the provision of its advertising intermediary services.<sup>44</sup>

## Facebook

Facebook, founded in 2004, operates the Facebook social media platform which is the leading social media platform globally and also within Australia based on traffic.<sup>45</sup> Globally, Facebook reports that in the second quarter of 2018, it had approximately 2.2 billion monthly active users.<sup>46</sup> Australian usage in 2018 is approximately 13 million users accessing the platform on a daily basis, and approximately 17 million accessing the platform on a monthly basis.<sup>47</sup> A recent survey by the Productivity Commission

<sup>39</sup> Statcounter, [Search engine market share](#), accessed 11 September 2018.

<sup>40</sup> Statcounter, [Search engine market share](#), accessed 11 September 2018.

<sup>41</sup> Alphabet Inc., [Form 10-K form lodged with United States Securities and Exchange Commission](#), for the fiscal year ended 31 December 2017, p. 28.

<sup>42</sup> Google Australia Pty Ltd, Financial statements and reports for the year ending 31 December 2017 lodged with ASIC.

<sup>43</sup> Data provided to the ACCC.

<sup>44</sup> Data provided to the ACCC. Google says that 'Google Marketing Platform (previously DoubleClick and Analytics) represent less than 10% of Google's Australian total accounted advertising revenues. They experienced higher growth rates in Australia from 2014 to 2017 than more established advertising offerings, such as for example Google Ads'.

<sup>45</sup> SimilarWeb, [Top Websites Ranking](#), accessed 8 November 2018; We Are Social, [2018 Digital Report—Australia](#), accessed 8 November 2018.

<sup>46</sup> Facebook, [Facebook Reports Second Quarter 2018 Results](#), p. 2, accessed 16 November 2018.

<sup>47</sup> Nielsen Digital Panel data, 2018.

suggests that 95 per cent of Australian consumers who use social networking use the Facebook platform.<sup>48</sup>

Facebook also owns Instagram, WhatsApp and Messenger.

The Facebook platform gradually introduced advertising, including Facebook Ads, which was introduced in 2007. Facebook predominantly earns revenue from selling advertising opportunities on its social media platform.

Facebook generated global revenue of USD\$40.7 billion in 2017.<sup>49</sup> In Australia, it generated AU\$1.3 billion in advertising revenue.<sup>50</sup>

## Cross-subsidisation on Google and Facebook's multi-sided platforms

As discussed above, both Google and Facebook operate multi-sided digital platforms. Typically, multi-sided platforms have an incentive to cross-subsidise. That is, the platforms have an incentive to set a relatively low price to users on one side of the platform, in order to increase the revenue earned on another side of the platform. The prices charged by Google and Facebook involve a cross-subsidy, with individual users being charged a zero monetary price so as to enable them to increase the revenue earned from advertisers. Box 2.1 defines a multi-sided platform, as well as cross-sided network effects, and explains that the incentive to cross-subsidise arises from the operation of cross-side network effects on the platform.

### **Box 2.1: Multi-sided platforms and cross-subsidisation<sup>51</sup>**

A multi-sided platform can be characterised by the following pair of properties:

- distinct types of users or parties ('economic agents') interact on the platform, and
- an increase in usage by one type of user or party increases the value of the platform to users of the other type.

The first property can be illustrated with the examples of Google and Facebook. On Google's search platform, advertisers interact with users of the search service. On the Facebook social media platform, advertisers interact with users of the social media platform.

Other examples of multi-sided platforms are newspapers and credit cards. The two types of users that interact on a newspaper platform are readers and advertisers, and the two types of users on a credit card platform are merchants and consumers.

The second property is sometimes referred to as a 'cross-side network effect'.<sup>52</sup> It operates for example on a newspaper platform, where an increase in usage by readers increases the value of the platform to an advertiser.

48 Productivity Commission, [Data Availability and Use](#), 31 March 2017, p. 573, accessed 8 November 2018.

49 Facebook, Inc., [Form 10-K lodged with United States Securities and Exchange Commission](#), for the fiscal year ended December 31, 2017, p. 32.

50 Data provided to the ACCC. The ACCC notes that advertising revenue figures for Facebook relate to the amount of advertising revenue from customers in Australia based on the location of the invoiced party (which may differ from the country in which the advertisements are shown). The ACCC understands that these figures are not recorded in the ordinary course of business by Facebook and are not audited, verified or otherwise reported on. As such, the ACCC considers that these are approximate estimates of relevant advertising revenue attributable to Australia for Facebook.

51 For discussions of multi-sided platforms, see Belleflamme, P & Peitz, M, *Industrial Organization*, (2015); Jean-Charles Rochet and Jean Tirole, 'Two-sided markets: A progress report', *The RAND Journal of Economics*, vol. 37, no. 3 (Autumn, 2006), pp. 645–667; Rysman, M, 'The Economics of Two-Sided Markets', *Journal of Economic Perspectives*, vol. 23, no. 3, Summer 2009.

52 Alternative terminology includes 'indirect network effect' and 'indirect network externality'.

Economists developed the theory of multi-sided platforms, in part, to explain some unusual pricing structures involving cross-subsidisation. This refers to the tendency of a platform to set a price structure such that revenue earned from one type of user, in effect, subsidises another type of user, who is charged a relatively low price, potentially less than the marginal cost. For example, a newspaper may use revenue earned from advertisers to subsidise readers, who are charged a cover price or subscription which is less than the marginal cost. The cross-side network effect provides the newspaper with an incentive to cross-subsidise in this way. By charging readers a relatively low price, the newspaper ensures that a high number of readers uses its service, increasing the value of the newspaper to advertisers. Accordingly, the newspaper is able to obtain a relatively high quantity of revenue from advertisers.

Search platforms and social media platforms are examples of multi-sided platforms characterised by cross-side network effects. There are at least three kinds of cross-side network effects which ensure that an increase in the number of individual users increases the value of the platform for advertisers:

- An increase in the number of users increases the number of users exposed to an advertising campaign, which may increase an advertiser's return from that campaign.
- An advertiser may incur fixed set-up costs from using a particular platform.<sup>53</sup> There may also be fixed set-up costs of running a particular campaign. If there are more users on a platform, an advertiser and a campaign obtain more traffic, which in turn reduces the average fixed costs. All else equal, an advertiser is likely to prefer a large platform over a small one, on the grounds that running campaigns on the former has lower average fixed costs.<sup>54</sup>
- A platform with more users has access to more data which can improve the relevance of ads presented to users. All else equal, an advertiser may prefer a larger platform, because its ads will tend to be more targeted.

As will be discussed in section 2.4, the second and third cross-side effects ensure that a larger platform has a competitive advantage in attracting advertisers.

There is also a cross-side network effect that potentially operates in the opposite direction. That is, an increase in the number of advertisers may increase the value of the platform to a user. If a platform has more advertisers, for any given user, the platform is able to serve ads that are more relevant to that user. For at least some users, being shown more relevant ads (as opposed to generic ads) improves the user experience.<sup>55</sup> However, for other users, the serving of targeted ads could decrease their user experience due to privacy concerns.

Revenue earned from advertisers is used to subsidise the users of the platform. Indeed, the magnitude of the cross-subsidy is such that users of the platforms are charged a zero monetary price. The cross-side network effects explain why the platforms have an incentive to subsidise users in this fashion. As users are charged a zero monetary price, the number of users of the platform is relatively high. As a consequence of the cross-side network effects, the value of the platform to an advertiser is relatively high which, in turn, ensures the revenue that the platform earns from advertisers is high.

53 David Evans, Economics of the Online Advertising Industry, in Platform Economics: Essays on Multi-sided Businesses, December, 2011.

54 David Evans, Economics of the Online Advertising Industry, in Platform Economics: Essays on Multi-sided Businesses, December, 2011.

55 David Evans, Economics of the Online Advertising Industry, in Platform Economics: Essays on Multi-sided Businesses, December, 2011.

## 2.3 Market power in search

### Key findings

- Google has substantial market power in supplying general search services in Australia, with a market share of around 94 per cent. Google is likely to retain its dominant share of the market at least in the short- to medium-term.

### 2.3.1 Types of search

It is helpful to distinguish between two types of online search services. The first is the ‘general search service’ that is supplied in Australia, by for example Google, Bing, Yahoo and DuckDuckGo. The second are the specialised search services that are supplied, for example, by Amazon, Expedia and eBay, which are also known as ‘vertical searches’.

There is limited substitutability between generalised search services and specialised search services. Specialised search is restricted to providing information regarding its area of specialisation. They typically provide certain features that are unavailable on generalised search services. For example, a hotel booking service may provide its own star rating service, the verification of reviews and an ability to book and pay directly from its search results. A user may also often access a specialised search service via a more general online search such as Google.

### 2.3.2 Google’s market share and dynamic competition

To assess the market power of a business, it is necessary to evaluate the competitive constraints on the price and quality of the product. As Google charges users a zero monetary price for its search service, and obtains value through consumer attention and collection of their data, an assessment of Google’s market power in relation to users focuses on the competitive constraint on the quality of its search service.

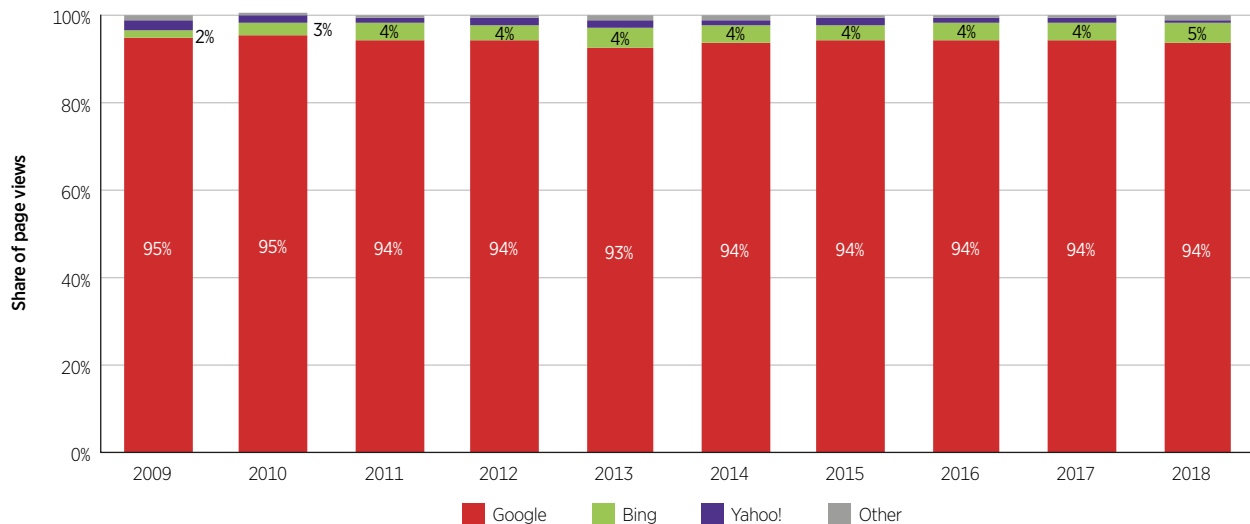
Also, as is the case with all multi-sided platforms, an assessment of market power on one side also involves a consideration of any competitive constraints provided by the operation of the other side of the platform.

In Australia, there are a number of general search engines, including Google, Bing, Yahoo and DuckDuckGo. Google and Bing are the only suppliers with a market share of more than 1 per cent.<sup>56</sup> Moreover, as shown in figure 2.2, Google has been the dominant provider for the past decade, enjoying a market share of between 93 and 95 per cent since 2009.<sup>57</sup>

<sup>56</sup> Statcounter, [Search engine market share](#), accessed 11 September 2018.

<sup>57</sup> Statcounter, [Search engine market share](#), accessed 11 September 2018.

Figure 2.2: Market share of general search services in Australia



Source: Statcounter, [Search engine market share](#), accessed 11 September 2018.

Google's high market shares could be seen as evidence that there is little competitive constraint on the quality of their services. However, it has been argued that digital platforms such as Google are constrained by 'dynamic competition'.<sup>58</sup> That is, digital platforms are subject to competitive pressures on account of the possibility that a rival develops an innovation that allows it to enter and/or expand.

The argument is that dynamic competition is especially relevant to markets involving digital platforms—including the market for general search services and the market for social media services—because of the importance of innovatory technology in these markets. Potentially, a technological innovation could be developed at a relatively low cost, which allows a rival to enter and/or expand, displacing large incumbents. For example, when Google entered the market, it rapidly overtook the incumbent search services, including those of Yahoo! and AltaVista, principally because it provided a superior relevance algorithm. As discussed in section 2.4, such innovation has also been prominent in the market for social media services. The argument is that such disruptive innovation characterises markets involving digital platforms.

Accordingly, even large incumbents must vigorously innovate, ensuring that they invent their own new features, as well as copying, and improving on, the new features introduced by rivals, in order to maintain their market share.<sup>59</sup> Thus, dynamic competition and the threat of new entry can place a substantial constraint on the quality of the services provided by large incumbents in these markets.

This said, the ACCC considers that, at least to a substantial extent, Google is insulated from dynamic competition by barriers to entry and expansion for search platforms, Google's advantages of scope, and its acquisition strategy. The role of these three factors in insulating Google from dynamic competition is discussed below.

### 2.3.3 Barriers to entry and expansion

A potential new entrant to the market for search services, or a small-scale competitor of Google, is likely to face several barriers to entry and/or expansion.

#### Same-side network effects arising from data accumulation

Google's search platform has accumulated, and continues to accumulate, a considerable quantity of data on its users and their use of the search platform. All else being equal, a large amount of data improves the relevance algorithm in the search engine, increasing the quality of the search service. A greater quantity of user data, including data on user searches and user interactions with search results,

<sup>58</sup> See, for example, David Evans, Multi-sided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms, Coase-Sandor Institute for Law and Economics Working Paper No. 753, March 2016.

<sup>59</sup> This is referred to as 'feature competition'. See David Evans, Multi-sided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms, Coase-Sandor Institute for Law and Economics Working Paper No. 753, March 2016.

allows the Google relevance algorithm to update in a timely fashion, improving its relevance ranking. In particular, large quantities of these types of data improves the ability for the algorithm to generate reliable relevance rankings for queries that are uncommon.<sup>60</sup>

The relationship between the quantity of data and the quality of the search service is an example of a same-side network effect. Box 2.2 defines a same-side network effect, contrasts it to a cross-side network effect, and describes how network effects may give rise to barriers to entry and expansion.

### ***Box 2.2: Network effects and barriers to entry and expansion***

Both same-side and cross-side effects can operate on a platform. In general, a same-side network effect is said to operate if an increase in the number of users on one side of a platform affects the value of the service to a given user on that side of the platform. A simple example of a same-side network effect is a traditional telephone network. If there are only a few users of a telephone network, that network will be of relatively low value to any given user, and may, therefore, have difficulty attracting new users. Conversely, a network with many users will be of relatively high value to a user and thus, be attractive to new users. As a consequence, a small-scale new entrant may have difficulty attracting new users relative to a large incumbent, creating barriers to entry and expansion.

As noted in box 2.1, a cross-side network effect operates if an increase in the number of users on one side of the platform affects the value of the service to a given user on another side of the platform. On a credit-card platform, cross-side effects operate in both directions—an increase in the number of consumers with the card increases the value of the card to a merchant and if more merchants accept the card, the card is more valuable to a consumer. This creates a positive feedback loop. Both merchants and consumers, therefore, will tend to find large-scale credit card platforms more attractive than small-scale credit card platforms, which may create a barrier to entry and expansion.

### **Cross-side network effects**

As noted in box 2.2, cross-side network effects may give rise to barriers to entry or expansion. Section 2.2 identified two cross-side network effects which ensure that Google has a competitive advantage in the supply of search advertising over a small-scale search platform.

If a potential entrant expects that, for a substantial period of time, it will operate at a relatively small-scale, then on account of these cross-side network effects, it will expect that for this period of time, Google will enjoy a competitive advantage over it. This will provide a disincentive for a potential entrant to enter the market.

Moreover, as noted in section 2.2, there is a cross-side network effect that operates in the opposite direction. When cross-side network effects operate in both directions, a positive feedback loop may result. That is, an increase in the number of users of the search service (and an increase in the frequency of its use) increases the value of the platform to advertisers; the number of advertisers then increases; this increases the value of the platform to users; the number of users (and the frequency of its use) then increases, and so forth. The operation of such a feedback loop may serve to entrench the market power of a single dominant platform.<sup>61</sup>

60 See European Commission's [Google Search \(Shopping\) case prohibition decision](#), 18 December 2017, p. 62.

61 David Evans, Economics of the Online Advertising Industry, in Platform Economics: Essays on Multi-sided Businesses, December, 2011.

## Customer inertia and the effect of default settings

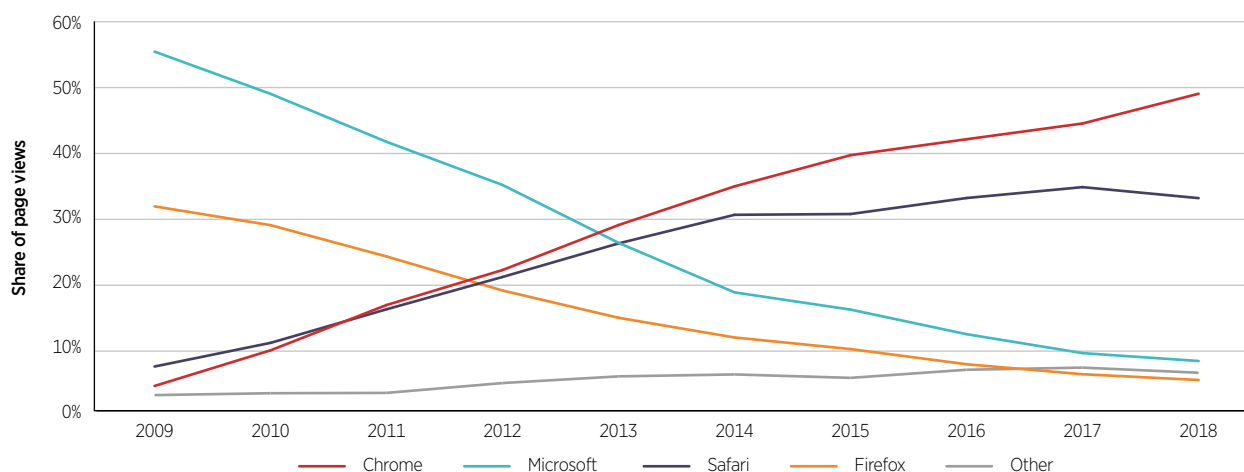
### Chrome and Safari

The Chrome browser is owned by Google and the Safari browser is owned by Apple. Google Search is currently the default search engine on both internet browsers, which together account for more than 80 per cent of the Australian market for browsers.<sup>62</sup> As Google is installed as the default search engine on both browsers, it substantially increases the propensity of Australians to use Google, for the following three reasons:

- (i) there is a strong tendency for consumers to accept the default option<sup>63</sup>
- (ii) consumers may stick with a default option on account of imperfect information. For example, consumers may stick with Google Search rather than switch to Bing if they do not know whether Google provides a higher quality search service than Bing, and substantial information costs would have to be incurred to compare the quality of the two search services<sup>64</sup>, and
- (iii) for consumers with relatively low information-technology skills, there may be costs to switching from the default-option search service (e.g. the time needed to learn how to do so).

Accordingly, a barrier to expansion arises from the prevalence of Google Search as the default option on Australian browsers. In 2018, Chrome comprised 49 per cent of the browser market and Safari 33 per cent. As figure 2.3 illustrates, Chrome and Safari's share of the market has grown steadily since 2009.<sup>65</sup>

Figure 2.3: Shares of Australian browser market



Source: Statcounter, [Browser market share](#), accessed 24 September 2018.

Google clearly recognises the value of installing Google Search as the default option; it pays a substantial fee to Apple for using Google Search as the default search service on Safari. The exact amount paid by Google to Apple to secure Google Search as the default option on Safari is not known to the ACCC, but estimates reported by the media suggest that, globally, Google paid US\$3 billion in 2017 and US\$9 billion in 2018 and will pay US\$12 billion in 2019 to remain as the default option on Safari.<sup>66</sup>

62 Statcounter, [Browser market share](#), accessed 24 September 2018.

63 This is a central finding of behavioural economics. See, for example, Thaler, RH, & Sunstein, Nudge: Improving decisions about health, wealth, and happiness. New Haven, CT: Yale University Press (2008).

64 Mark Patterson, 'Google and Search-Engine Market Power', Harvard Journal of Law and Technology Occasional Paper Series, July, 2013.

65 Statcounter, [Browser market share](#), accessed 24 September 2018.

66 K Leswing, [Google may have paid Apple \\$3 billion to remain the iPhone's default search engine](#), AOL, 14 August 2017, accessed 8 November 2018; S Ovide, [Apple Looks Down on Ads But Takes billions From Google](#), Bloomberg, 29 September 2018, accessed 8 November 2018; K Leswing, [Apple makes billions from Google's dominance in search—and it's a bigger business than iCloud or Apple Music](#), Business Insider, 29 September 2018, accessed 9 November 2018.



Safari is the default browser on mobile phones with Apple's iOS operating system. If, for example, Bing were the default search engine on the Apple iOS operating system, then the growing tendency for users to access search services via mobile devices would pose a potential threat to Google's dominant hold on the search market. Conversely, by paying Apple to ensure that Google is the default search engine on mobile phones with the Apple iOS operating system, Google is able to suppress this threat to its dominance of the search market.

Google has also purchased the right to serve as the default search engine on a number of other browser services, including Mozilla Firefox in the United States and Canada.<sup>67</sup> While this protects Google's market share in search, it also imposes on Google a substantial cost of acquiring traffic, reducing its margin on advertising. But Google is better placed to incur this cost than its smaller rivals, because, as discussed in section 2.5, it has a competitive advantage in providing advertising, allowing it to enjoy higher advertising margins. This may allow Google to outbid its smaller rivals in future negotiations for purchasing the default status on a browser, further entrenching its market power.

## **Android**

As discussed above, the ACCC considers that customer inertia in switching between search engines is likely to be reinforced where Google services are pre-installed on mobile devices. Where Google's services are frequently set as the default, this is likely to make it more difficult for alternative mobile browsers and search engines to challenge Google's market position.

Google is the global owner of Android, a licensable mobile operating system used as the base software by many mobile manufacturers, such as Samsung, LG, HTC and Sony. As a licensable operating system, Android is different from an operating system like Apple iOS that is exclusively used by Apple and not available to third parties. In Australia, it is estimated that Android and iOS are present on over 40 and 55 per cent of devices respectively in Australia, meaning combined, they are on over 95 per cent of devices.<sup>68</sup> As Google Search and Chrome are currently pre-installed on Android devices and Apple's Safari mobile browser (which by default uses the Google search engine), Google's search engine is effectively the current default search engine on over 95 percent of mobile devices in Australia.

As discussed in box 2.3, the European Commission found that Google breached EU antitrust laws by imposing illegal restrictions on Android device manufacturers and mobile network operators between 2011 and 2014, to cement its dominant position in Europe in general internet search.

The ACCC is not aware that Google imposes any restrictions on Android mobile device operators in Australia, including any conditions similar to those investigated by the European Commission. The ACCC is however considering further the impact of Google's ownership of Android on competition in general search.

### **Box 2.3: EC fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine<sup>69</sup>**

In July 2018, the European Commission found that Google imposed illegal restrictions on Android device manufacturers and mobile network operators between 2011 and 2014 to cement its dominant position in general internet search. The European Commission fined Google €4.34 billion for breaching EU antitrust rules in respect of abuse of a dominant position.

The EC explained the role of Google in licensing Android as follows:

*When Google develops a new version of Android it publishes the source code online. This in principle allows third parties to download and modify this code to create Android forks. The openly accessible Android source code covers basic features of a smart mobile operating system but not Google's proprietary Android apps and services. Device manufacturers who wish to*

67 D Dixon, [Firefox Features Google as Default Search Provider in the U.S., Canada, Hong Kong and Taiwan](#), Mozilla, 14 November 2017, accessed 8 November 2018.

68 Statcounter, [Mobile Operating System Market Share in Australia](#), accessed 24 September 2018.

69 European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

*obtain Google's proprietary Android apps and services need to enter into contracts with Google, as part of which Google imposes a number of restrictions. Google also entered into contracts and applied some of these restrictions to certain large mobile network operators, who can also determine which apps and services are installed on devices sold to end users.<sup>70</sup>*

The EC did not question the open source model or the Android operating system as such. Instead its decision concerned three specific types of contractual restrictions that it found Google had imposed between 2011 and 2014 on device manufacturers and mobile network operators, being:

- requiring Android device manufacturers to pre-install the Google Search app and Google Chrome mobile browser, as a condition for licensing the Google Play Store
- making payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed Google Search on their devices, and
- preventing manufacturers wishing to pre-install Google apps from selling smart mobile devices running on alternative versions of Android that were not approved by Google (known as Android forks).

The EC found that Google offered its mobile apps and services to device manufacturers as a bundle, which included the Google Play Store, Google Search and Google Chrome, and that Google's licensing conditions made it impossible for manufacturers to pre-install some apps but not others. In particular, the EC found that Google Play Store (Google's official app store which enables users to download apps) was a 'must-have' as mobile phone users expected it to be pre-installed on their devices and they could not lawfully download it themselves.

The EC found that about 80 per cent of smart mobile devices in Europe, and worldwide, run on Android and discussed the impact of pre-installed services on mobile devices in its findings:

*Pre-installation can create a status quo bias. Users who find search and browser apps pre-installed on their devices are likely to stick to these apps. For example, the Commission has found evidence that the Google Search app is consistently used more on Android devices, where it is pre-installed, than on Windows Mobile devices, where users must download it. This also shows that users do not download competing apps in numbers that can offset the significant commercial advantage derived through pre-installation. For example, in 2016:*

- *on Android devices (with Google Search and Chrome pre-installed) more than 95 per cent of all search queries were made via Google Search, and*
- *on Windows Mobile devices (Google Search and Chrome are not pre-installed) less than 25 per cent of all search queries were made via Google Search. More than 75 per cent of search queries happened on Microsoft's Bing search engine, which is pre-installed on Windows Mobile devices.*

*Google's practice has therefore reduced the incentives of manufacturers to pre-install competing search and browser apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google.<sup>71</sup>*

The EC also found that Google had illegally obstructed the development and distribution of competing Android operating systems by preventing device manufacturers from using Android forks:

*This practice reduced the opportunity for devices running on Android forks to be developed and sold. For example, the Commission has found evidence that Google's conduct prevented a number of large manufacturers from developing and selling devices based on Amazon's Android fork called "Fire OS". In doing so, Google has also closed off an important channel for competitors to introduce apps and services, in particular general search services, which could be pre-installed on Android forks. Therefore, Google's conduct has had a direct impact on*

70 European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

71 European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

*users, denying them access to further innovation and smart mobile devices based on alternative versions of the Android operating system. In other words, as a result of this practice, it was Google—and not users, app developers and the market—that effectively determined which operating systems could prosper.<sup>72</sup>*

The EC concluded that Google's practices had denied rival search engines the possibility to compete on the merits. The tying practices ensured the pre-installation of Google's search engine and browser on practically all Google Android devices and the exclusivity payments strongly reduced the incentive to pre-install competing search engines. Google also obstructed the development of Android forks, which could have provided a platform for rival search engines and other app developers to gain traffic and thrive. Google's strategy also prevented rival search engines from collecting more data from smart mobile devices, including search and mobile location data, which helped Google to cement its dominance as a search engine. Furthermore, Google's practices also harmed competition and further innovation in the wider mobile space, beyond just internet search because they prevented other mobile browsers from competing effectively with the pre-installed Google Chrome browser.

We understand that Google's appeal against the decision of the European Commission was filed to the General Court of the European Union on 9 October 2018.<sup>73</sup>

## Branding

For a new or smaller search platform, another barrier to expansion arises from the strength of Google's brand. One simple indication of Google's brand strength is the fact that the verb 'to Google' has appeared in the Oxford English Dictionary for the past decade. Google is generally assessed to be one of the most valuable brands in the world. For example, according to studies by Kantar and Millward Brown, Google was the most highly valued brand globally in 2016, 2017 and 2018.<sup>74</sup>

The ACCC recognises the strength of Google's brand partly reflects the high quality of its search service. When first developed, the Google algorithm provided an innovative method for ranking the relevance of search results. Google invests a considerable sum each year on improving the quality of its service. The brand recognition that Google enjoys is partly a consequence of such investments. While some consumers may make the active choice to use Google's products, as they are of the view that it offers a search service of higher quality compared to other search engines, brand recognition can have other additional influences on consumer choice. If a consumer does not know the quality of a product and does not have the time to assess the quality of the product, the consumer may treat the prominence of a brand as an indicator of the quality of the product.

## Economies of scale and sunk costs

Google's search platform maintains its large share of the search market, in part, through considerable capital expenditure and research and development (R&D). Google's global R&D expenditure in 2017 was over US\$16 billion, equal to approximately 15 per cent of its revenue.<sup>75</sup>

More generally, a search platform faces substantial fixed costs. In contrast, the marginal cost of an additional user of the platform is relatively low. Accordingly, a search platform enjoys considerable economies of scale. To the extent that the fixed costs are 'sunk', they give rise to substantial barriers to entry for a potential new entrant.<sup>76</sup> For such an entrant, sunk costs create a risk in the event that the costs cannot be recovered by advertising revenue. Even if fixed costs are not sunk, they may give rise to a barrier to entry if capital markets are imperfect.

72 European Commission, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), 18 July 2018, accessed 23 November 2018.

73 Foo Yun Chee, [Google challenges record \\$5 billion EU antitrust fine](#), Reuters, 10 October 2018, accessed 23 November 2018.

74 Millward Brown, [2018 BrandZ Top 100 Global Brands](#), accessed 8 November 2018.

75 Alphabet Inc., [Form 10-K form lodged with United States Securities and Exchange Commission](#), for the fiscal year ended December 31 2017, p. 36.

76 Capital expenditure gives rise to a cost that is not only fixed but is also 'sunk' if it cannot be recovered by selling or redeploying the asset in the event that an entrant to the market subsequently exits.

### 2.3.4 Advantages of scope and conglomeration effects

The previous subsection pointed to features of Google's search platform that help to ensure its market power will persist and reduce the constraint arising from dynamic competition. But Google provides a variety of related services in addition to its search platform. Its presence in a collection of related markets gives Google certain advantages of scope, giving rise to 'conglomeration effects'.<sup>77</sup> These advantages of scope further serve to entrench Google's market power, weakening the constraint from dynamic competition.

#### Advantages of scope through data accumulation

One important advantage of scope stems from Google's accumulation of user data. Google obtains this data from two principal sources.

- First, data is obtained from Google's owned and operated sites. Such sites include Google's search engine, YouTube, Google Shopping, Gmail, Google+ and Google Maps.<sup>78</sup>
- Second, data is obtained from third-party sites. For example, Google is able to collect such data when a consumer uses a device with an Android operating system or a Chrome browser to access a third-party website, or when a user visits a third-party website that uses Google's advertising services (of which Google claims there are more than two million sites, reaching 90 per cent of users worldwide<sup>79</sup>) independent of the browser or operating system they use.

Google's access to this data then allows it to provide a high quality ad targeting service. This ensures that Google has a comparative advantage in the supply of a number of services, including:

- the supply of search advertising inventory on Google Search and Google Maps
- the supply of display advertising inventory on YouTube and Gmail
- sales of advertising inventory on third-party sites through Google Ads, including advertising on sites that are members of the Google Search Network and Google Display Network (through AdSense and AdMob), and
- the supply of services in the ad tech stack that rely on data to provide ad targeting.<sup>80</sup>

#### Advantages of scope arising from the Google Ads entry point

Google provides a number of its services through Google Ads, including:

- sales of search advertising inventory on its own websites
- sales of display advertising inventory on its own websites
- sales of search advertising inventory on third-party websites, and
- sales of display advertising inventory on third-party websites.

Further, advertising inventory on Google's search engine can only be purchased through Google Ads, and advertising inventory on YouTube can only be purchased through Google Ads or through Display & Video 360. If an advertiser purchases a Google service through Google Ads, it may also have an incentive to purchase other services through Google Ads. There are considerable fixed costs of setting up a new online advertising campaign, including 'costs of setting up the platform, installing software and learning how to use it'.<sup>81</sup> Therefore, once an advertiser has incurred the fixed costs of purchasing one service through Google Ads, it may choose to purchase another service through Google Ads, in order to avoid incurring additional set-up costs.

77 Firms that interact or potentially interact across several separate markets and supply goods or services that are in some way related to each other, for example, products that are complementary in either demand or supply.

78 Google recently announced that it plans to close down Google+ for customers. Google, [Project Strobe: Protecting your data, improving our third-party APIs, and sunseting consumer Google+](#), 8 October 2018, accessed 8 November 2018.

79 Google, [Google Display Network](#), accessed 8 November 2018.

80 Ad tech refers to intermediary services involved in the automatic buying, selling and serving of some types of display advertisements. Ad tech stack refers collectively to the combination of ad tech involved in the whole digital advertising supply chain between the advertisers and websites/apps. For example, this may include DSPs, SSPs, ad servers and ad exchanges.

81 See David Evans, 'Economics of the Online Advertising Industry', p. 209.

## Advantages of scope arising from control of default settings

As noted above, the prominence of Chrome in the browser market and Android in the mobile operating system market gives Google an advantage in the supply of search services, through Google Search serving as the default search engine.

## Advantages of scope arising in the ad tech stack

Google provides intermediary services throughout the ad tech stack. As will be discussed in chapter 3, the provision of a number of related services provides it with certain advantages of scope.

### 2.3.5 Google's strategic acquisitions

Google has spent substantial sums acquiring other businesses. Some of these acquisitions may have enabled Google to entrench its position in search and search advertising, including through expanding into related markets which may have been a source of possible rivals to Google's core products in the medium term. This potentially weakens the constraint from dynamic competition.

In the period 2004 to 2014, Google is reported to have spent at least USD\$23 billion buying 145 companies.<sup>82</sup> Some of the key acquisitions of Google during this time include<sup>83</sup>:

- Nest Labs US\$2.6 billion (2014), home automation software
- Waze US\$969 million (2013), GPS navigation software
- Motorola US\$12.4 billion (2011), mobile device manufacturer
- ITA Software US\$676 million (2011), travel technology software
- Admeld US\$400 million (2011), online advertising
- AdMob US\$681 million (2009), mobile advertising software
- DoubleClick US\$3.2 billion (2008), demand side platform software
- YouTube US\$1.19 billion (2006).

This series of acquisitions has served to entrench Google's position in search and search advertising, particularly by providing it with advantages of scope and by reducing competition.

For example, YouTube had a strong position in video that could not easily be replicated. Google's purchase of YouTube yields a number of competitive advantages. First, it provides Google with an advantage of scope through the accumulation of data. YouTube provides Google with access to data that can be used to improve the quality of its ad targeting services provided by Google Ads and also by Google's demand side platform. Second, as advertising inventory on YouTube, since 2015, can only be purchased through Google Ads and Google's demand side platform, Google is able to encourage advertisers to use these services.

To take another example, Google's purchase of DoubleClick also helped to entrench its market power in search and search advertising for two reasons. First, DoubleClick represented a source of competition to Google's intermediary service that sold advertising inventory on websites part of Google Display Network through AdWords. At the time, DoubleClick had developed an ad exchange, as well as advertising-facing and publisher-facing ad servers<sup>84</sup>, which could have provided a rival service for selling programmatic advertising. Second, the purchase of DoubleClick gave Google a number of advantages of scope. For instance, following the acquisition, Google used the DoubleClick cookie to improve the quality of the ad targeting on Google's AdSense network.<sup>85</sup>

82 J Lipton, [Google's best and worst acquisitions](#), CNBC, 19 August 2014, accessed 8 November 2018.

83 Information provided to the ACCC.

84 SEC, [Google to Acquire DoubleClick](#), 13 April 2007, accessed 8 November 2018.

85 SEC, [Google to Acquire DoubleClick](#), 13 April 2007, accessed 8 November 2018.

### 2.3.6 Conclusion: Google's market power in online search

The ACCC's preliminary view is that Google has substantial market power in the market for general search services. It is arguable that dynamic competition and the threat of new entry places some constraint on the quality of the general search service supplied by Google. However, the ACCC considers Google is insulated from dynamic competition, to a considerable degree, by barriers to entry and expansion, advantages of scope as well as its acquisition strategies. Accordingly, while dynamic competition provides a degree of competitive constraint, large-scale entry is unlikely to occur at least in the short- to medium-term, ensuring that this constraint arising from dynamic competition remains somewhat weak.

Further, suppose that a rival search platform were able successfully to enter and expand. It is plausible that the new search platform would then become the dominant platform in the market because of same-side network effects, cross-side network effects, and economies of scale. In the absence of changes to the regulatory environment, any problems associated with the market power of Google would, potentially, re-emerge as the new platform attained its dominant position.

## 2.4 Market power in social media services

### Key findings

- Facebook has substantial market power in supplying social media services in Australia, which are provided by its platforms, Facebook and Instagram. Facebook's substantial market power can be expected to persist in at least the short- to medium-term.

The ACCC considers that the suppliers of social media services include the Facebook platform, Instagram (owned by Facebook), Snapchat and Twitter.

### 2.4.1 Facebook's market share and dynamic competition

Facebook charges a zero monetary price for the social media services that it provides, and obtains value from consumer attention and the collection of consumer data, so an assessment of its market power in relation to users focusses on the competitive constraint on the quality of their services.

The closest competitor to the social media services provided by the Facebook platform and Instagram is Snapchat. The unique audience of Facebook is more than three times that of Snapchat, and the unique audience of Instagram is more than double that of Snapchat.<sup>86</sup> Accordingly, the Facebook platform, together with its subsidiary Instagram, accounts for a large share of the market for social media services.

Facebook's large market share could be seen as evidence that there is little competitive constraint on the quality of its social media services. This said, as in the case of Google, it is argued that dynamic competition places a competitive constraint on the quality of services provided to users by Facebook. In particular, in the market for social media services, Friendster was initially leapfrogged by MySpace, which, in turn, was rapidly replaced by Facebook. It is argued that, more broadly, the market for social media services is characterised by innovation, which places a competitive constraint on the market.<sup>87</sup>

However, the barriers to entry and expansion may be substantially higher now than in the early phase of the social media market. In particular, the global size of Facebook now dwarfs the size of MySpace at its peak. Whereas MySpace peaked at approximately 100 million monthly active users<sup>88</sup>, Facebook, which was founded in 2004, currently has more than 2.2 billion monthly active users globally.<sup>89</sup> As discussed in the next section, the considerable scale of Facebook may serve to protect it from dynamic competition, through the operation of same-side and cross-side network effects, as well as economies of scale.

86 Nielsen Unique Audience in Australia in August 2018 (Nielsen Digital Panel data, 2018) estimates the unique audience of Facebook as 16.9 million; Snapchat 5.1 million and Instagram 10.8 million.

87 See, for example, David Evans, Multi-sided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms, Coase-Sandor Institute for Law and Economics Working Paper No. 753, March 2016.

88 MySpace unique user numbers can be found in News Corporation's 10-K reports. See for example, [News Corporation's 2010 report](#) which states there were 101 million unique users in June 2010. Additionally, there were 68.4 million, 73 million, and 70 million unique users in June 2010, 2009 and 2008 respectively.

89 Facebook, [Facebook Reports Second Quarter 2018 Results](#), 25 July 2018, accessed 21 November 2018.



The ACCC considers that, like Google, to a large extent, Facebook is insulated from dynamic competition by barriers to entry and expansion, advantages of scope, and its acquisition strategies.

## 2.4.2 Barriers to entry and expansion

A new entrant to the social media market, or a low-scale competitor, faces the following barriers to entry and expansion.

### Same-side network effects

Social media platforms exhibit same-side network effects on the user side of the platform. In particular, an increase in the number of users tends to raise the value of the platform to a given user. That is, if a large number of a user's social group and family are on the platform, then the platform will be relatively valuable for the user. As a consequence, large scale social media platforms, such as Facebook and Instagram, may have a greater ability to attract users than a smaller scale social media platform, such as Snapchat. The German Federal Cartel Office (the Bundeskartellamt) observes that 'from the users' perspective, decisive criteria for the choice of a social network are its size and the possibility to find that persons they want to be in contact with on it (so-called "identity-based network effects")'.<sup>90</sup>

A further explanation on same-side network effects is provided above in box 2.2.

Nevertheless, such same-side network effects may not preclude the entry of a niche or differentiated social media platform. For example, LinkedIn provides a professional network, providing the opportunity to establish contacts with other people for professional purposes. Snapchat provides a network that is especially popular for people in younger age demographics.

### Branding

Another barrier to expansion is the branding of Facebook's social media services. According to Kantar and Millward Brown, Facebook was the sixth most valuable brand globally in 2018, and the fifth most valuable in 2016 and 2017. Moreover, in 2018, Instagram joined the top 100 most valuable brands, being ranked at 91.<sup>91</sup>

The barriers to entry and expansion arising from branding for a social media platform are similar to those discussed above in section 2.3 in relation to Google.

### Economies of scale and cross-side network effects

The barriers to entry and expansion arising from economies of scale and cross-side network effects for a social media platform are similar to those discussed above in section 2.3 in relation to Google. Like Google, Facebook incurs large fixed costs on R&D.

## 2.4.3 Advantages of scope

Facebook provides a number of related services, allowing it to enjoy various advantages of scope.

First, while the social media services provided by the Facebook platform and Instagram are differentiated products, nevertheless, they are closely related, allowing Facebook potentially to enjoy economies of scope.

Second, Facebook is able to access data from its various owned and operated sites—including the Facebook platform, Instagram, Messenger, WhatsApp—as well as from Facebook Audience Network. It can then use this large pool of data to improve the quality of the ad targeting service it provides for advertisements sold on the Facebook platform, Instagram, Messenger and Facebook Audience Network.

<sup>90</sup> Bundeskartellamt, [Background Information on the Facebook Proceeding](#), December 2017, p. 3.

<sup>91</sup> Millward Brown, [2018 BrandZ Top 100 Global Brands](#), accessed 8 November 2018.

Third, Facebook Ads serves as a single entry point for sales of advertising inventory on the Facebook platform, Instagram, Messenger and Facebook Audience Network. Given the set-up costs of using an advertising service, an advertiser that wishes to purchase any one type of advertising inventory sold through Facebook Ads may have an incentive to purchase other types of advertising inventory through Facebook Ads.

#### 2.4.4 Facebook's strategic acquisitions

Facebook has undertaken a considerable number of strategic acquisitions that may have served to entrench its market power. This strategy increases the probability that Facebook's market power will persist.

In the past 12 years, Facebook is reported to have spent at least USD\$23 billion buying 66 companies.<sup>92</sup> These acquisitions include:

- WhatsApp US\$19 billion (2015)<sup>93</sup>
- Instagram US\$715 million (2012).<sup>94</sup>

Facebook's acquisitions have had the effect of entrenching its power in the supply of social media services, particularly through providing it with various advantages of scope and reducing competition.

For example, in acquiring Instagram, Facebook eliminated a potential competitor. At the time of the acquisition, Instagram was primarily a photo-sharing app, and did not sell advertising inventory. Following the purchase, however, Facebook developed Instagram into a broader social media platform, with the ability for users to share information and photos, to message other users, and to now sell advertising inventory. While, at the time of the acquisition, Instagram was more differentiated from Facebook than it is now and it is difficult to determine how Instagram would have been developed in the absence of its acquisition by Facebook, it at least had the potential to develop into a competitor. Even at the time of the acquisition, like Facebook, Instagram was a platform facilitating the development of social networks of users, and it attracted attention that was ripe for monetising with advertising.

This highlights an inherent challenge for regulators reviewing potential acquisitions by digital platforms: the need to speculate about changing digital habits by consumers, and the likelihood of firms to grow and develop to match those changing habits in the absence of a potential acquisition.

Further, Facebook obtained advantages of scope from the purchase of WhatsApp. For instance, through the ownership of WhatsApp, Facebook is able to access data, which can be used to improve the quality of ad targeting on the Facebook platform, Instagram, Messenger and Facebook Audience Network.

##### **Box 2.4: Onavo**

Onavo Protect (Onavo) is an app owned by Facebook that offers users a number of security features, including security alerts and access to a virtual private network (VPN) service. VPNs create a virtual encrypted tunnel between users and a remote server operated by a VPN service. All external internet traffic is routed through this tunnel, and a user's computer appears to have the IP address of the VPN service (see illustration in figure 2.4).<sup>95</sup> This allows users to secure their personal information by establishing secure connections when using public wi-fi hotspots or while working remotely. It also allows users to hide their location and internet activities from their internet service provider and to bypass geographic restrictions on websites.

92 TechWyse, [66 Facebook Acquisitions—The Complete List \(2018\)! \[infographic\]](#), accessed 15 November 2018.

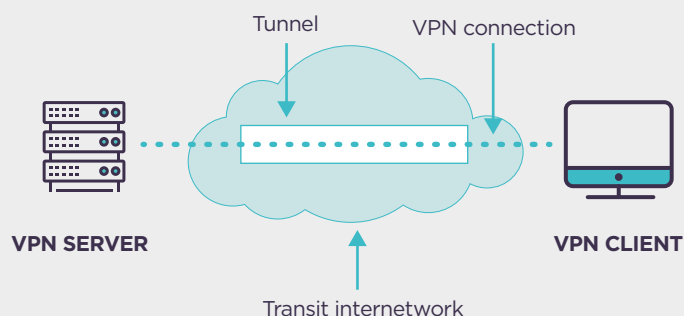
93 SEC, [Facebook to Acquire WhatsApp](#), accessed 9 November 2018.

94 SEC, [Facebook, Inc. Quarterly report for the period ended September 30, 2012](#), accessed 9 November 2018. Facebook paid a total purchase price of US\$521 million (consisting of the issuance of approximately 12 million vested shares of Facebook's Class B common stock to non-employee stockholders of Instagram and \$300 million in cash) and issued approximately 11 million unvested shares of its Class B common stock to employee stockholders of Instagram on the closing date, with an aggregate fair value of US\$194 million. Together, this amounted in a total acquisition price of US\$715 million as at the date of the transaction.

95 M Eddy, [What Is a VPN, and Why You Need One](#), PC Mag, 7 August 2018, accessed 30 October 2018.



**Figure 2.4: How a VPN works**



The Onavo website states the following:

*Onavo Protect for Android helps you take charge of how you use mobile data and protect your personal info. Get smart notifications when your apps use lots of data and secure your personal details.<sup>96</sup>*

*Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information.<sup>97</sup>*

The Onavo privacy policy provides that Facebook can:<sup>98</sup>

- receive all of a user's mobile data traffic, including location data, after a user downloads and agrees to use the Onavo app, which directs a user's mobile data traffic through or to Facebook's server, and
- receive personally identifying information such as the user's name, email address, or other contact information and use the information that Facebook receives to operate and improve the services, develop new products and services, analyse usage of Facebook's apps and other applications on the user's device, to support advertising and related activities, and for other purposes.

As of February 2018, Onavo has been downloaded more than 33 million times across both iOS and Android globally.<sup>99</sup> Users can download Onavo as a standalone app, or it can be downloaded through the Facebook app. However, as of August 2018, Onavo cannot be downloaded on the Apple app store. This was reported in the media to be because Apple deemed Onavo to have violated its App Store user privacy and data security policies.<sup>100</sup> As at 21 November 2018, Onavo is still available on the Google Play Store.

Claims have been made in the media that Facebook has the ability through Onavo to obtain detailed insights into consumers' online activity and track the popularity of rival websites and apps. The Washington Post reports that Onavo 'sends anonymised data to Facebook on what apps consumers have installed, how frequently they open those apps, how long they linger inside them, and the sequence throughout the day of consumers' app usage'.<sup>101</sup> The Wall Street Journal reports that data from Onavo helped inform Facebook's acquisition of WhatsApp and its live video strategy in response to Twitter.<sup>102</sup>

96 Onavo, [Home page](#), accessed 30 October 2018.

97 Onavo, [Home page](#), accessed 30 October 2018.

98 Onavo, [Privacy Policy](#), accessed 4 October 2018.

99 T Hatmaker, [Apple removed Facebook's Onavo from the App Store for gathering app data](#), TechCrunch, August 2018, accessed 9 November 2018.

100 T Hatmaker, [Apple removed Facebook's Onavo from the App Store for gathering app data](#), TechCrunch, August 2018, accessed 9 November 2018.

101 E Dvoskin, [Facebook's willingness to copy rivals' apps seen as hurting innovation](#), Washington Post, 10 August 2017, accessed 9 November 2018.

102 D Seetharaman & B Morris, [Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users](#), *Wall Street Journal*, 13 August 2017, accessed 9 November 2018.

The ACCC at this stage is considering further the extent to which Facebook may be able to use user data from Onavo, and its other products, to determine the popularity of apps and implement similar features into its own existing apps, create new apps that mirror the popular apps and purchase promising new start-ups or competing businesses.

The ACCC considers that if Facebook has the ability to track consumer use of rival apps, this could provide Facebook with a significant competitive advantage and facilitate a strategy of acquiring potential rivals, or competing suppliers with a large user base. This would further enhance Facebook's market power in the relevant markets.

More information about the effect of Onavo on consumer privacy can be found at chapter 5.

## 2.4.5 Conclusions: Facebook's market power in social media services

The ACCC's preliminary view is that Facebook has substantial market power in the market for social media services. While dynamic competition may provide a degree of competitive constraint on Facebook's supply of social media services, the barriers to entry and expansion for social media platforms, Facebook's advantages of scope and its acquisition strategy mean that large-scale entry is not likely in the short- to medium-term. The implication is that any constraint arising from dynamic competition is somewhat weak and that Facebook's substantial market power is likely to persist in the short- to medium- term.

Nevertheless, the persistence of Google's market power is, perhaps, more probable than that of Facebook. As discussed above, same-side network effects do not preclude the entry of smaller rivals, such as Snapchat, which appeal to specific groups. If such rivals are able to expand the breadth of their appeal, they may provide a challenge to Facebook's dominance in the provision of social media services.

## 2.5 Market power in search advertising

### Key findings

- Google has substantial market power in the supply of search advertising in Australia, with a share of more than 96 per cent of general search advertising revenue.

### 2.5.1 Background: Online advertising in Australia

In chapter 1, figure 1.8 presents a breakdown of advertising revenue in Australia, showing the shift from offline to online advertising. It is useful to distinguish between three broad types of online advertising: search, classified, and display.

Search advertising can be divided into two types—general and specialised. General search advertising is the advertising that appears on the search results of general search engines, such as those of Google and Bing. Specialised search advertising is the advertising that appears alongside the search results of search engines that perform more specialised functions, such as the search engines on the platforms of Amazon or Expedia (which are also examples of vertical search).

Classified advertising can also be divided into general and specific services. A classified advertising service is said to be specific if it focuses on a specific type of product. For example, in Australia, specific classified advertising is supplied by carsales.com.au for motor vehicles, by Seek for employment, and by Domain and realestate.com.au for real estate. In contrast, general classified advertising services provide advertising for a broader range of products. In Australia, sites that provide general classified advertising include Gumtree and Trading Post.

In this report, the term 'display advertising' will be used to refer to a residual category of online advertising—in particular, online advertising other than classifieds and search. Display advertising includes banner advertisements, video advertisements, as well as advertisements that appear on social media platforms.<sup>103</sup> In Australia, major suppliers of display advertising inventory include the social media

<sup>103</sup> The term 'display advertising' is sometimes used in narrower senses—for example, in a sense that does not include video advertising.

platforms Facebook and Instagram, the video platform YouTube, as well as news media platforms. These various types of advertising are depicted in figure 2.5.

**Figure 2.5: The varieties of advertising**

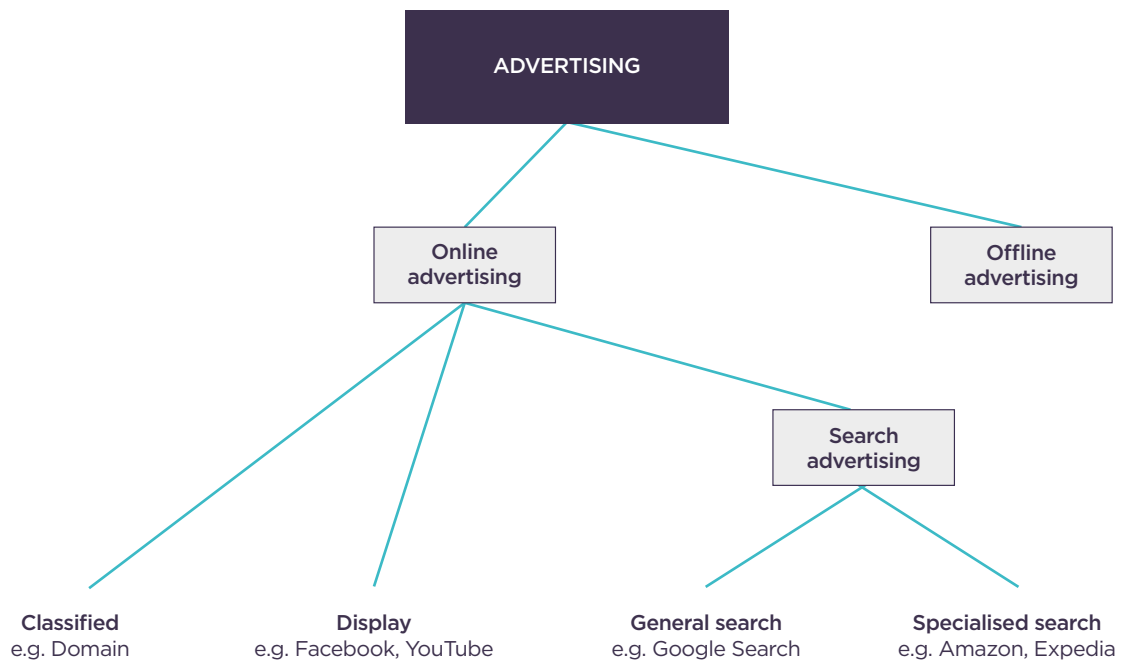
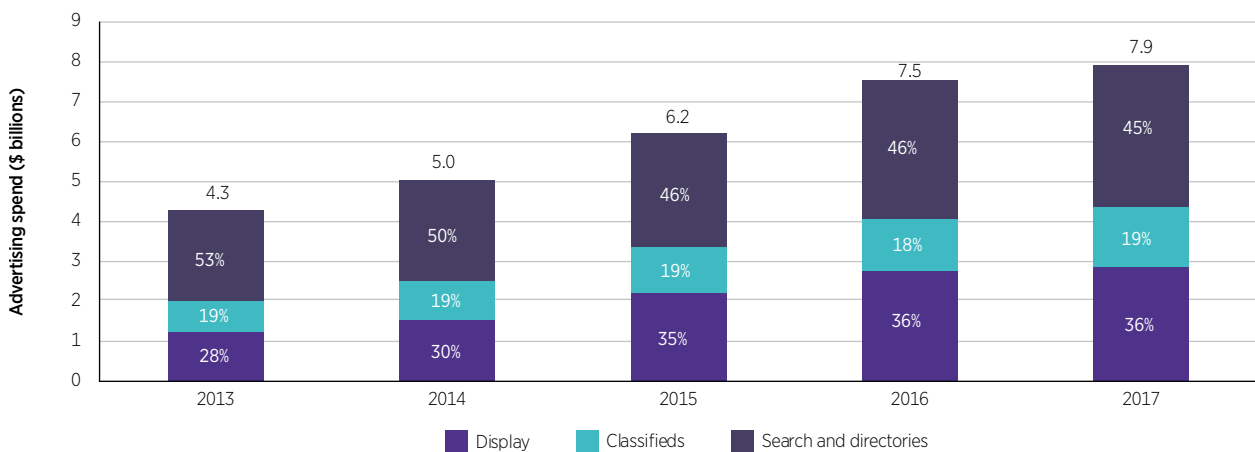


Figure 2.6 shows the levels of expenditure on the various types of online advertising in Australia.<sup>104</sup> While search and directories advertising continues to increase in value, it has fallen somewhat in prominence over the past few years. In 2013, it accounted for more than half of advertising expenditure, whereas in 2017, it comprised 45 per cent of total advertising expenditure. Conversely, in 2017, display advertising comprised 36 per cent of advertising revenue, higher than its contribution of 28 per cent in 2013.

**Figure 2.6: A breakdown of online advertising expenditure in Australia**



Note: Amounts are shown in 2017 dollars.

Source: CEASA, ACCC analysis.

<sup>104</sup> CEASA, ACCC analysis.

Google supplies general search advertising inventory on its search engine site, as well as on Google Maps and other platforms it owns and operates. Additionally, Google sells search advertising inventory on behalf of third party content websites that are part of the Google Search Network. In relation to the supply of search advertising, Google is subject to little competitive constraint from offline advertising, display advertising, and classified advertising, for the reasons outlined below.

## Offline advertising

As discussed in chapter 1, the main kinds of suppliers of offline advertising are radio and TV advertising, outdoor and cinema advertising and advertising on print media. The ACCC considers that these forms of advertising are not a close substitute for search advertising.

First, the type of targeting employed in online advertising, which tracks consumers' online behaviour to form predictions about their purchasing intentions, is not currently widely available for offline advertisers.<sup>105</sup>

Second, online advertising and in particular search advertising facilitates direct response campaigns, which encourage a consumer to click and purchase the advertised product. Offline advertising is less suited to direct response campaigns.

## Display advertising

The ACCC considers that display advertising is not a close substitute for search advertising. The process of online search provides specific information to the search service about the purchasing intentions of a user. If a user types into the Google search engine the keyword 'Canberra vacuum cleaner', this keyword provides good evidence that the user is considering buying a vacuum cleaner in Canberra. Google can then serve an ad to that user that is relevant to that user's purchasing intention. This is not to say, however, that advertisers cannot obtain evidence about a user's purchasing intentions when serving display advertising. After all, ad targeting is used for both display and search advertising. But the keywords used in online search provide a particular form of strong evidence about the user's purchasing intentions.

Accordingly, search advertising is often favoured over display advertising for campaigns focused on 'conversion'. A conversion occurs when:

- a consumer clicks on an advertisement, which takes them to the landing page, and
- the consumer takes some action desired by the advertiser from the landing page—for example, purchasing the advertised product, or contacting the supplier of the product.

Given the evidence of a user's purchasing intention provided by their choice of keyword, search advertising is especially suitable for 'direct response campaigns' that focus on conversion. Conversely, display advertising is often used for promoting general brand awareness rather than inducing a direct response.

## Classified advertising

General classified advertising, such as that provided by Gumtree and Trading Post, is not a close substitute for Google's search advertising. Many of the advertisements on these platforms are for 'one off' sales of a single product or a few products, often by private individuals. As noted above, there are considerable set-up costs for running an advertising campaign on Google Search, so it is unsuitable for such 'one off' sales.

The ACCC considers that specific classified advertising, such as that provided by Domain, carsales.com and Seek, is not a close substitute for Google's search advertising. In Australia, specific classified advertising is provided at scale for only a few products, such as real estate, motor vehicles and employment. While the supply of such advertising may, potentially, place some competitive constraint on Google's search advertising service that relates to each of these specific ranges of products, it places no competitive constraint on the search advertising services that relate to the broad range of other products advertised on Google's search engine.

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<sup>105</sup> Note, however, that, with the recent introduction of 'addressable TV', which is connected to the internet, targeted advertising will become available for TV advertising. This is discussed further at chapter 7.

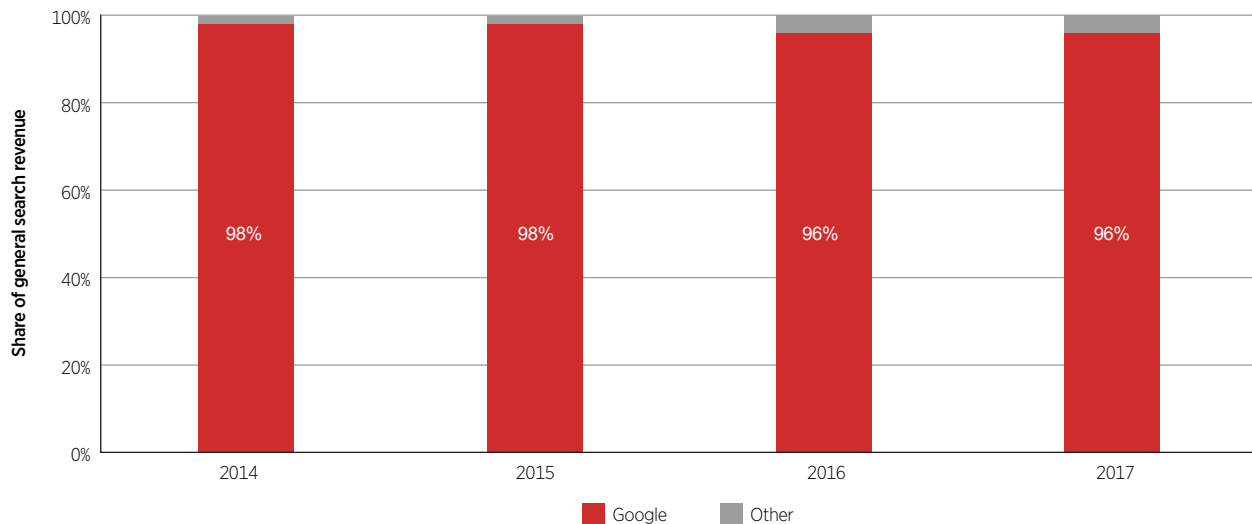
## 2.5.2 Google's market power in search advertising

Google has two kinds of competitors in the supply of search advertising—competitors in general search advertising and suppliers of specialised (vertical) search advertising. Neither classes of competitors place significant competitive constraint on Google's supply of search advertising.

### Competitive constraint from suppliers of general search advertising

As noted above in section 2.3, while there are a number of suppliers of general search services in Australia, Google and Bing are the only suppliers with a market share of more than 1 per cent. Moreover, as depicted in figure 2.2, Google has been the dominant search engine provider for the past decade, enjoying a market share of 93 per cent or more since 2009.<sup>106</sup> Figure 2.7 shows Google's share of general search advertising in Australia. For the past few years, Google's market share has ranged from 96 to 98 per cent.<sup>107</sup>

Figure 2.7: Share of general search advertising revenue in Australia



Source: ACCC analysis based on stakeholder data.

Given Google's large share of both general search services and general search advertising, as well as the two reasons given below, other search engines place little competitive constraint on Google.

First, a large fraction of Australian users of general search services effectively 'single home' on Google. A user is said to 'single home' on a platform if it uses that platform and no others. Given Google's large share of general search services, it follows that most Australian users of general search almost always use Google, and thus effectively single home. If an advertiser wishes to reach these single homing customers of general search services, it cannot do so through another search engine and must use Google. For such advertisers, Google is a 'must have' product—Google has a monopoly over access to the attention of these single homing customers.<sup>108</sup>

Second, Google's large share of the general search service market gives it a competitive advantage over other search engines in the supply of search advertising. This competitive advantage is a consequence of two of the cross-side network effects discussed in section 2.2.

- Many advertisers incur fixed set-up costs from using a particular search platform and/or from running a particular campaign. As advertisers tend to obtain more traffic on Google's platform compared to other search engines, their average fixed costs may be lower on Google than on other search engines. All else equal, such advertisers may thus prefer to advertise with Google than with other search engines.

<sup>106</sup> Statcounter, [Search engine market share](#), accessed 11 September 2018.

<sup>107</sup> Data provided to the ACCC.

<sup>108</sup> The economic literature has explored the implications of single-homing by users of a multi-sided platform, pointing, in particular, for the potential for such single-homing to ensure the platform obtains market power. See, for example, M Armstrong, *Competition in Two-sided Markets*, *Rand Journal of Economics* 37 (2006); P Belleflamme and M Peitz, *Platform Competition: Who Benefits from Multihoming*, *International Journal of Industrial Organization* (2018).

- As there is more search traffic on Google, it has access to more search data than other search engines which it can use to show more relevant ads to users.

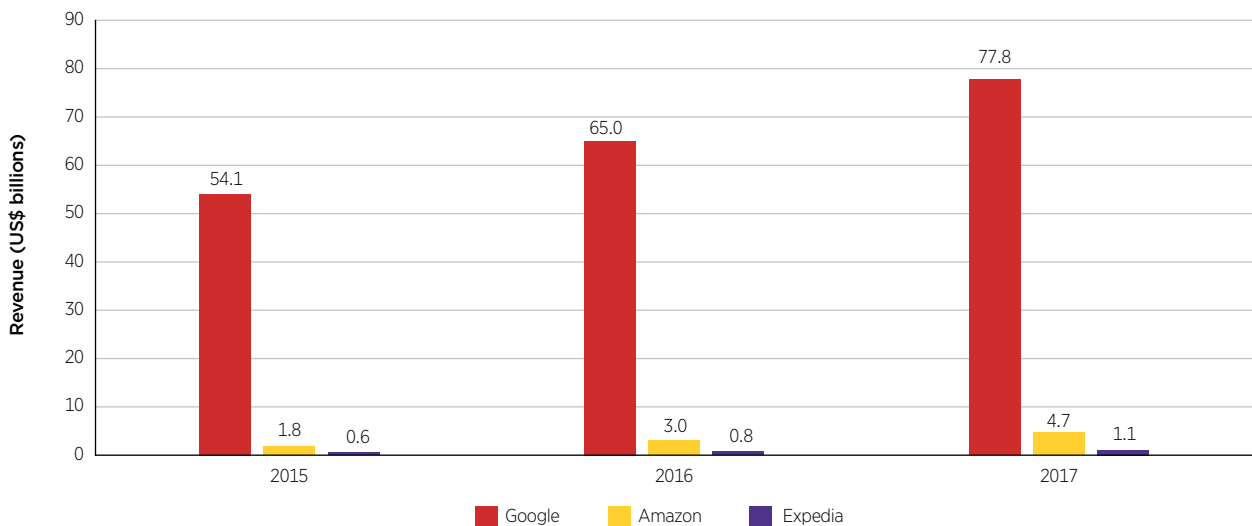
### Competitive constraints from suppliers of specialised search advertising

Advertising appears alongside search results not only on general search services but also more specialised (vertical) search services, such as those provided by the Amazon and Expedia platforms. The ACCC considers that such suppliers of specialised search advertising place little competitive constraint on Google.

First, such suppliers of specialised search advertising only provide advertising inventory for a specific range of products or services, ensuring that, for a broad range of products and services, Google’s supply of advertising is not constrained by specific search advertising. Second, suppliers of specific search advertising still have a relatively small presence in the advertising market compared to Google. For example, Amazon and Expedia are two of the larger digital platforms that supply specific search advertising. Figure 2.8 compares the *global* advertising revenue from Google’s sites to estimates of the advertising revenue earned by Amazon and Expedia.<sup>109</sup> While Amazon’s presence in online advertising is growing, it still has a small presence relative to Google, globally.<sup>110</sup>

Amazon’s presence in Australia is currently relatively small, and the discrepancy between Google and Amazon’s Australian advertising revenue is likely to be significantly larger than that represented in figure 2.8.

**Figure 2.8: Global revenue from the supply of advertising opportunities (US\$)**



Source: Google, Amazon and Expedia 2017 10-K forms. The figures for Amazon and Expedia are proxies for advertising revenue: the figure for Amazon is the ‘Other’ component of the ‘Net Sales’ item; the figure for Expedia is the ‘Advertising and media’ item.

<sup>109</sup> The data in figure 2.8 is taken from the companies’ 10-K financial statements. For Amazon and Expedia, the estimates represent upper bounds on their annual advertising revenue. The figure for Amazon is its ‘other sales’ item, which is primarily advertising revenue. The figure for Expedia is its ‘advertising and media’ component of its revenue, which includes third-party revenue from Trivago.

<sup>110</sup> Note that the online marketplace provided by Amazon may place some competitive constraint on the Google’s supply of search advertising. If prices for advertising on Google were to increase, a business that had previously advertised on Google’s search service might instead shift to selling on the Amazon marketplace. This marketplace service provided by Amazon is not, however, an advertising service, and thus the degree of substitutability can be expected to be limited.

In summary, the ACCC's preliminary view is that Google has substantial market power in the supply of search advertising. In supplying search advertising inventory, Google faces little competitive constraint, either from suppliers of general search advertising or from suppliers of specific search advertising. Moreover, section 2.3 concluded that large-scale entry by a search platform is unlikely in at least the short- to medium-term, because of barriers to entry and expansion for search platforms, Google's advantages of scope, and its strategic acquisitions. Thus, Google's market power in search advertising is not merely transitory.

Further, even the largest advertisers have budgets that are small relative to Google's advertising revenue. While some larger advertisers have been able to negotiate pricing discounts from Google for search advertising, advertisers generally have little bargaining power in negotiations with Google because of their small size relative to Google. Moreover, advertisers have little opportunity to bypass Google's search advertising service, either by vertical integration with a search service or by sponsoring a new entry.<sup>111</sup>

## 2.6 Market power in display advertising

### Key findings

- Facebook has substantial market power in the supply of display advertising in Australia, with a market share of 46 per cent. The rest of the market is highly fragmented; the ACCC estimates no other firm has a market share of more than 5 per cent.

Companies supplying display advertising are subject to little competitive constraint from offline advertising, search advertising, or classified advertising. The justification for this conclusion is analogous to the justification provided above that Google is subject to little competitive constraint from offline advertising, display advertising and classified advertising. Note, in particular, that display advertising is particularly suitable for promoting brand awareness, in contrast to search and classified advertising.

The advertising on Facebook's social media platforms, Facebook and Instagram, is display advertising, as is advertising on multiple other websites, including the websites of online news sites. Display advertising may take the form of a banner, image or video advertisement.

### 2.6.1 Facebook's market power in display advertising

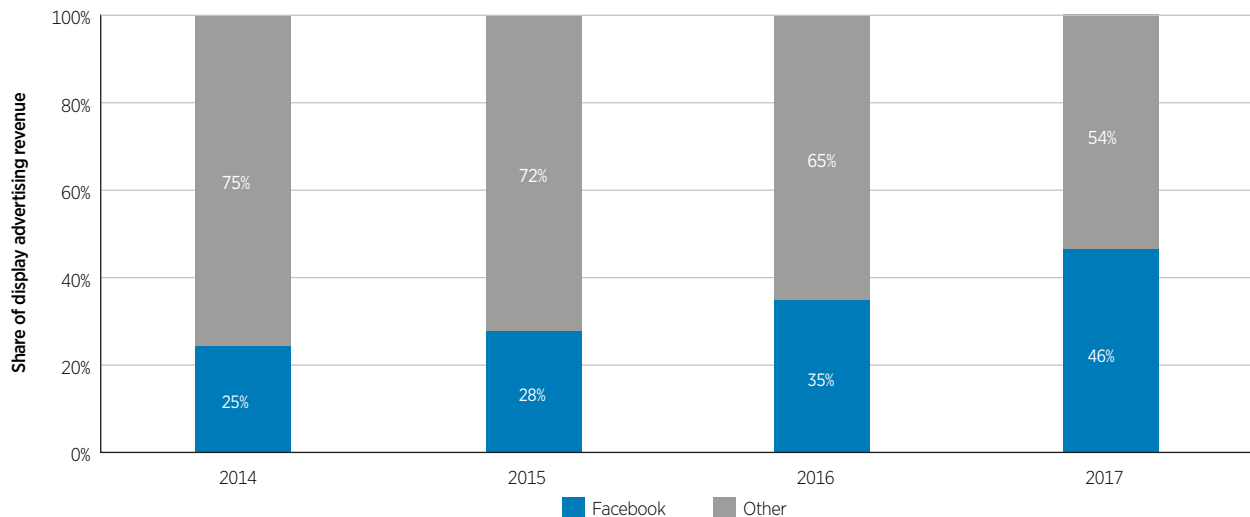
Figure 2.9 depicts the shares of Australian display advertising revenue.<sup>112</sup> In 2017, Facebook and Instagram accounted for 46 per cent of the market. The rest of the market is highly fragmented, with the ACCC estimating no other firm having a market share of more than 5 per cent (including for example YouTube and Snapchat). Facebook and Instagram's share of the market has grown substantially over the past few years.<sup>113</sup> Now Facebook and Instagram, taken together, account for almost half of the display advertising market.

<sup>111</sup> See ACCC, Merger Guidelines, 2008, p. 44, for the relevance of such bypass opportunities for the assessment of market power.

<sup>112</sup> Data provided to the ACCC.

<sup>113</sup> Data provided to the ACCC.

**Figure 2.9: Shares of digital display advertising revenue in Australia**



Source: ACCC analysis based on data provided to the ACCC.

In supplying advertising inventory on Facebook and Instagram, Facebook faces little competitive constraint from other suppliers of display advertising.

First, Facebook is a relatively large supplier of display advertising. Facebook and Instagram dwarf the revenue of all other competitors.<sup>114</sup> For example, News Corp Australia and Fairfax, two other suppliers of display advertising inventory in Australia, each earn significantly less display advertising revenue than Facebook.

Second, the advertising inventory on social media platforms is a specific kind of display advertising—social media advertising—which is somewhat differentiated from other kinds of display advertising. For instance, users of social media platforms can interact with advertising—for example, by ‘liking’ advertisements (or other types of response). So if an advertiser believes that its product is such that advertisements for that product are prone to be ‘liked’ (or otherwise responded to) on a social media platform, then that advertiser may prefer to advertise on a social media platform than, say, using a banner ad on an online newspaper. In attracting those advertisers with a preference for advertising on social media, Facebook faces little competitive constraint from other suppliers of social media advertising.

In Australia, Facebook’s largest and closest competitor in the supply of social media advertising is Snapchat. Nevertheless, Facebook has a much larger presence in social media advertising. The combined revenue from advertising inventory sold on Facebook and Instagram is many times more than Snapchat.<sup>115</sup> Moreover, the unique audience of Facebook is more than three times that of Snapchat, and the unique audience of Instagram is more than double than that of Snapchat.<sup>116</sup> These numbers indicate that a substantial fraction of users ‘single home’ on Facebook’s social media platforms. That is, a substantial proportion of those who use Facebook and/or Instagram do not use Snapchat. For advertisers with a preference for advertising on social media, Facebook has a near monopoly over access to the attention of its single-homing users.

Further, given that Facebook enjoys greater usage than Snapchat, the operation of cross-side network effects confer on Facebook a competitive advantage. This is for the same reasons that cross-side network effects serve to provide Google with a competitive advantage over Bing. In particular, Facebook has a competitive advantage over social media platforms with fewer users for at least two reasons: it has access to more data and so can provide a higher quality ad targeting service; and advertisers on Facebook can expect to receive more traffic, and so enjoy lower average fixed costs.

Accordingly, the ACCC considers that Facebook has substantial market power in the supply of display advertising. Facebook is subject to little competitive constraint, either from suppliers of social media

<sup>114</sup> Data provided to the ACCC.

<sup>115</sup> Data provided to the ACCC.

<sup>116</sup> Nielsen Unique Audience in Australia in August 2018 (Nielsen Digital Panel data, 2018) estimates the unique audience of Facebook as 16.9 million; Snapchat 5.1 million and Instagram 10.8 million.



advertising or, more generally, from suppliers of display advertising. Moreover, given the discussion in section 2.4 of the barriers to entry and expansion in social media services, advantages of scope and Facebook’s strategic acquisitions, large-scale entry by a new provider of social media services is unlikely in the short- to medium- term.

Given the significance of the Facebook’s platforms for advertisers looking to reach an online Australian audience, advertisers have little bargaining power. Further, advertisers have little opportunity to bypass Facebook’s display advertising services, by vertical integration or by sponsoring new entry.<sup>117</sup>

## 2.7 Market power in news media referral services

### Key findings

- Google and Facebook are ‘must have’ sources of traffic for news media businesses in Australia. Combined, they account for more than 50 per cent of traffic to news media websites. Google and Facebook each have substantial market power in the supply of news referral services to media businesses.

The Terms of Reference require the ACCC to examine the extent to which digital platforms are exercising market power in dealings with the creators of journalistic content. Media businesses interact with digital platforms in a variety of ways. Social media platforms, search engines and media aggregation platforms are increasingly common ways for Australian consumers to access news and journalism.

If a search is made on Google’s search engine, the search results page may include a hyperlink to the website of a news publisher, accompanied by a small snippet of news content (see chapter 4 for a detailed discussion on snippets). These links refer consumers to a news publisher’s website. Posts on Facebook and Instagram can also contain hyperlinks that refer users to a news publisher’s website.

The principal benefit to a platform of providing these links is that they attract consumers to the platform. For example, consumers searching for news on particular topics expect to find links to large media businesses. If digital platforms did not provide this content, at least some consumers may shift to other platforms.

News media businesses benefit from links from Google and Facebook because it directs consumers to their websites. News media businesses can then monetise this additional traffic through the sale of advertising inventory and subscriptions.

The ACCC refers to this concept as the supply of news media referral services (see chapter 4 for a detailed discussion on news media referral services).

### 2.7.1 Do Google and Facebook have market power in the supply of news media referral services?

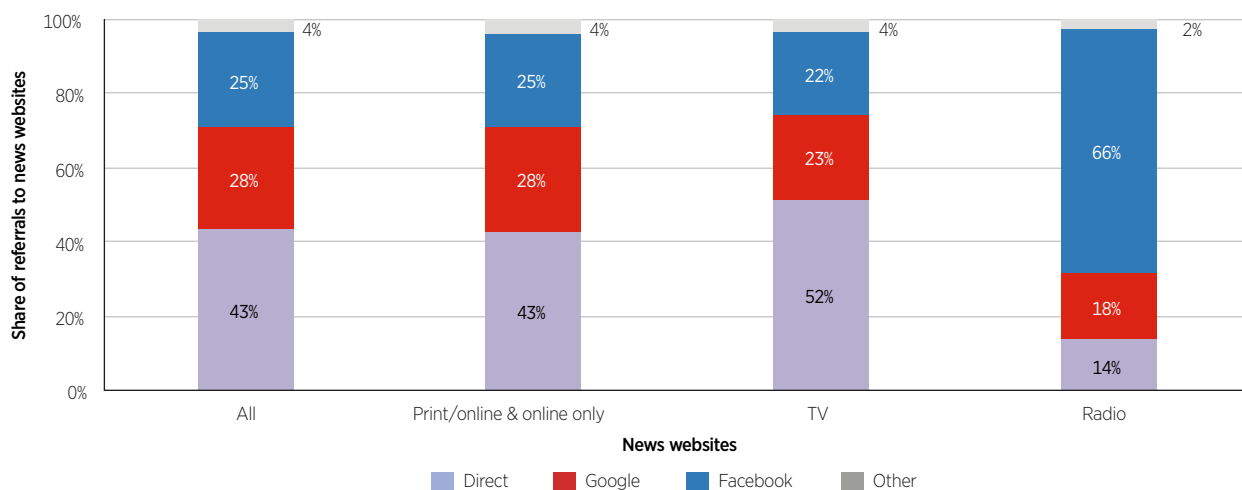
In order to assess whether a firm has market power in the supply of news media referral services, it is necessary to consider the quantity of referrals that news media businesses obtain from Google and Facebook, as well as the other means by which consumers access the websites of news media businesses.

Visitors can access a news media website either by directly typing its address into their browser, or by being referred from another website or app, such as Google or Facebook.

Figure 2.10 portrays how visitors accessed news media websites, specifying the proportions that accessed the websites directly by typing the address into the browser, via a referral from Google, via a referral from Facebook, or via a referral from another website.

<sup>117</sup> See ACCC, Merger Guidelines, 2008, p. 44, for the relevance of such bypass opportunities for the assessment of market power.

**Figure 2.10: Means of accessing news media websites in Australia in 2017**



Source: ACCC analysis based on stakeholder data.

Google is the largest source of referrals for websites of print/online and online only news businesses and websites of TV businesses.<sup>118</sup>

In general, for news media businesses, Google’s referral service is a ‘must have’ product. Given the magnitude of the referral rates from Google, such businesses would suffer a substantial loss of traffic—and consequently, a considerable fall in revenue—if they did not allow referrals from Google to their websites.

If a media business elected not to obtain referrals from Google, there may be substitution possibilities—that is, users may employ other means of accessing the relevant websites. In particular, users may increase their propensity to access the websites directly or to access the website via Facebook.

- Regarding the possibility of substituting to direct access, the ACCC considers that, while users probably would increase their propensity to access websites directly, such an increase would not fully offset the fall in referrals from Google. A survey by the News and Media Research Centre at the University of Canberra found that 29 per cent of subjects accessed online media by searching for the brand of the media business, whereas 26 per cent accessed it by searching for a news story.<sup>119</sup> While users who search for a media brand might plausibly substitute to accessing websites directly, users who search for a news story would not be expected to substitute in this fashion.
- Regarding the possibility of substituting to Facebook, the ACCC considers that such substitution would be relatively limited. Users who access online news via a search engine or directly are typically browsing with the specific intention of obtaining news content, whereas users who access online news through Facebook often encounter such links in the course of a more general social media experience, rather than going specifically to Facebook to obtain access to a particular media website.

Accordingly, a fall in referrals resulting from a media business’s decision not to obtain referrals from Google would not be likely to be fully offset by gains in referrals from substitution by users. Other suppliers of referral services, therefore, place little competitive constraint on Google. The ACCC’s preliminary view is that Google has substantial market power in the supply of news media referral services.

Facebook is the largest source of referrals for radio; approximately two-thirds of the page views for radio websites are accessed through Facebook. More generally, it is a substantial source of referrals for the four types of media companies.

<sup>118</sup> Data provided to the ACCC.

<sup>119</sup> S Park, C Fisher, G Fuller & JY Lee, (2018). Digital news report: Australia 2018. Canberra: News and Media Research Centre (Digital News Report), p. 57. The Digital News Report surveyed 2026 internet users (excluding non-news users), by way of an online survey. The Digital News Report is part of a study commissioned by the Reuters Institute for the Study of Journalism at the University of Oxford to understand how news is being consumed in 37 countries. Research was conducted by YouGov using an online questionnaire at the end of January/beginning of February 2018.

If a media company chose not to receive referrals from Facebook, there are again substitution possibilities. Users may increase their tendency to access the websites directly or to access the website through Google. The ACCC considers that such substitution, to the extent that it occurred, would not fully offset the fall in referrals from Facebook. For example, users of Facebook may encounter links to media websites that they generally would not access—either directly or through Google—because a friend ‘liked’ that media business, or a friend posted a link to its website.

Accordingly, for a broad range of news media businesses, a failure to allow hyperlinks to the websites of news publishers to appear on the Facebook news feed would ensure a substantial loss of traffic and the attendant revenue. Therefore, there is little competitive constraint on Facebook in the supply of referral services. The ACCC’s preliminary view is that Facebook, like Google, has substantial market power in the supply of news media referral services.

## 2.8 Preliminary recommendations

### 2.8.1 Update to mergers legislation

#### Preliminary Recommendation 1

The ACCC considers that section 50(3) of the *Competition and Consumer Act 2010*, which identifies the factors to be taken into account in assessing the likely competitive effects of a merger or acquisition, could be amended to make it clearer that the following are relevant factors:

- (a) the likelihood that an acquisition would result in the removal of a *potential* competitor, and
- (b) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.

The ACCC notes that it is currently not prevented from taking these factors into account in reaching a view as to whether a merger or acquisition is likely to substantially lessen competition and the ACCC will likely consider such factors in relevant cases even without the legislative amendment. This recommendation is intended to signal the significance of these factors in relevant cases and remove any ambiguity as to their relevance. In particular, articulating these factors in legislation is also intended to have the effect of signalling the importance of these factors to the courts or the Competition Tribunal, in assessing whether a merger or acquisition has the effect or likely effect of substantially lessening competition.

#### Removal of potential competition

A key concern relevant to acquisitions in fast moving markets and/or acquisitions in markets involving emerging technologies is the removal of potential competition.

A frequently cited example of such a scenario is Facebook’s acquisition of Instagram in 2012. This transaction was not looked at by many competition authorities (and was not examined by the ACCC) but was reviewed and cleared by the UK Office of Fair Trading (the predecessor to the Competition and Markets Authority) and the US Federal Trade Commission.<sup>120</sup>

As set out above, Instagram is now the social media platform that is the closest substitute to Facebook in terms of both functionality and the size of its network.

With the benefit of hindsight, a view could be taken that this acquisition should not have been cleared or should have been subject to closer scrutiny.<sup>121</sup> However, the ACCC recognises the difficulty in reviewing acquisitions of nascent competitors and predicting the likely future in the absence of the proposed acquisition.

<sup>120</sup> FTC, [FTC Closes Its Investigation Into Facebook’s Proposed Acquisition of Instagram Photo Sharing Program](#), 22 August 2012, accessed 9 November 2018.

<sup>121</sup> The Chief Executive of the UK Competition Authority, the successor to the UK Office of Fair Trading, which cleared Facebook’s acquisition of Instagram, recently expressed the view that the Office of Fair Trading’s clearance of Instagram was ‘a bit naive’ and that the decision may have been different if looked at today. Andrea Coscelli, Chief Executive Officer of the CMA, the Fordham Conference on International Anti-trust Law and Policy, New York, 7 September 2018. Reported in V Ibitoye and J Ebersole, Facebook, Instagram clearance may have been ‘naive’, CMA boss says, MLex, 7 September 2018, accessed 20 November 2018.

While it is easier with hindsight to identify technologies, products and start-ups that had the potential to thrive and compete vigorously, and to identify issues with them being acquired by the largest incumbent in the market, more emphasis is needed on the potential for competition. Merger parties can be quick to dismiss the need for ACCC engagement when buying a relatively small business, particularly where there is no immediate overlap.

The ACCC recommends amending section 50(3)(h), such that it becomes ‘the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor or *potential competitor*’.

The ACCC recognises that there may be other factors in section 50(3) that implicitly require any analysis of a merger or acquisition to take into account the removal of a potential competitor, such as section 50(3)(a) and section 50(3)(c) and that the ACCC will already consider this factor in its analysis of relevant mergers or acquisitions. However, amending the legislation to make it explicit will highlight the importance of these issues and alert parties to the rigour with which the ACCC will test the removal of potential competition when considering mergers by a large existing player.

### **Access to a greater scale and scope of data**

Another concern arising from Google and Facebook’s acquisitions is their increased access to data, noting that the two digital platforms already own and have access to a large amount of data. For instance, Google’s acquisition of Waze and Facebook’s acquisition of WhatsApp have increased the sources and volume of data available to Google and Facebook, and may well have provided them with:

- a competitive advantage in the quality of their services (such as a higher quality mapping service for Google Maps, through its acquisition of Waze and consequently, a database of routes and maps that it may not otherwise have had access to), and
- more targeted data on users, which effectively enhances the advertising services supplied to advertisers by increasing the level and/or range of targeting possible.

It is proposed that an additional factor would be added as section 50(3)(j) as follows:

*(j) the amount and nature of data which the acquirer would likely have access to as a result of the acquisition.*

## **2.8.2 Large digital platforms to provide advance notice of acquisitions**

### **Preliminary Recommendation 2**

The ACCC is also intending to ask large digital platforms (such as Facebook and Google) to provide advance notice of the acquisition of any business with activities in Australia and to provide sufficient time to enable a thorough review of the likely competitive effects of the proposed acquisition.

If such a commitment were not forthcoming from the major digital platforms, other options could be considered to address this issue.

In addition to formal legislative change, the ACCC will request undertakings from key digital platforms (principally Google and Facebook) to:

- inform the ACCC in advance of the proposed acquisition of any business with activities in Australia, and
- provide the ACCC with a sufficient time period to review such proposed acquisitions.

Such a step is sometimes considered necessary given the absence of a compulsory merger filing obligation in Australia. The ACCC has sought similar undertakings from other businesses in the past, particularly when there had been a history of transactions which required scrutiny.

### 2.8.3 Default bias

#### **Preliminary Recommendation 3**

The ACCC is considering recommending that:

- (a) suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and
- (b) suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine)

The ACCC considers that where options for internet browsers and search engines are presented, no option should be pre-selected.

As set out above, the ACCC considers customer inertia to be a barrier to expansion in the search services market. This customer inertia is reinforced and facilitated by the default bias that results from Google Search being the default search engine on a number of internet browsers and mobile operating systems. In particular, the pre-installation of Google Search on Safari and Google Chrome (and the pre-installation of Safari on Apple iOS devices and Chrome on Android devices) is likely a contributing factor to the continued use of both Google Search and Google Chrome by Australian consumers.

Retaining Google Search as the default search engine is highly valued, as demonstrated by the significant licensing fees Google pays providers of operating systems and internet browsers for this position. The same applies for Google Chrome.

As discussed above, Google has substantial market power in the supply of search services. Google also has substantial market power in the supply of search advertising, derived from its market power in the supply of search services. The ACCC considers that the bias resulting from Google Search and Google Chrome as the default search engine and internet browser across a number of internet browsers and operating systems is likely to contribute to this market power.

In light of these conclusions, the ACCC recommends that:

- suppliers of operating systems for mobile devices, computers and tablets be required to provide consumers with options for internet browsers (rather than providing a default browser), and
- suppliers of internet browsers be required to provide consumers with options for search engines (rather than providing a default search engine).

That is, when a consumer purchases a new mobile device, computer or tablet and goes through the initial process of setting up the relevant device, the consumer would be presented with a number of options for their preferred internet browser and preferred search engine, with no options having been pre-selected for the consumer. The consumer would also be presented with additional information about each of the possible internet browser and search engine options. For example, next to each possible option, there may be an icon that a consumer could click on to obtain a short summary of the key features of the relevant internet browser or search engine and/or their distinguishing features.

This would remove the default bias that currently exists, by providing consumers with an informed choice of internet browser and search engine, rather than simply offering a pre-installed internet browser or search engine for consumers to use.

The ACCC recognises that the above recommendation would principally affect Google's products, namely Google Search and Google Chrome. The ACCC also recognises that these products are well regarded by Australian consumers and that consumers may elect to continue using Google Search and Google Chrome. However, the ACCC considers that this recommendation would provide consumers with greater transparency and information about the options available to them. The ACCC considers that this recommendation would enhance consumer welfare and would encourage other jurisdictions to adopt a similar requirement for suppliers of operating systems for mobile devices, computers and tablets, and suppliers of internet browsers.

# Chapter 3: Digital platforms and advertisers

## Key findings

- Digital advertising makes up an increasing portion of the total advertising spend in Australia.
- Google and Facebook are the channels by which most digital advertising is purchased and sold in Australia.
- Google and Facebook receive the majority of digital advertising revenue in Australia; and have captured more than 80 per cent of growth in digital advertising in the past three years.
- Google and Facebook provide advertisers with numerous and significant benefits through an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers.
- Advertisers are unable to verify for themselves whether advertisements on Google and Facebook are delivered to their intended audience. The ACCC has not yet reached a view about the extent to which third party auditing overcomes this issue but expects to in its final report.
- Facebook and Google are vertically integrated businesses and each is likely to have the ability and incentive to favour their own related businesses or businesses with which they have an existing relationship. This could occur without third parties, such as advertisers or online media sites, being aware that it is happening. The ACCC is considering recommending a regulatory authority to monitor and report on these issues.
- There is the potential for bundles of advertising inventory, intermediary services and other products offered by each of Google and Facebook to lessen competition in certain advertising markets.
- The complexity and the large number of intermediaries involved in serving some forms of display advertising means that the resulting revenue flowing from advertisers to websites can be opaque and it is unclear what proportion of revenue is being retained by intermediaries. The ACCC is giving consideration to whether a regulatory authority should have the power to monitor and report on pricing to increase transparency.
- Advertisers have a limited ability to negotiate with Google and Facebook. Google and Facebook are likely to have the ability to charge advertisers more to provide search and display advertising services than they could if competition were effective.
- Advertisers appear to have a limited ability to seek review or dispute resolution of decisions by Facebook or Google. The ACCC is giving consideration as to whether an ombudsman should be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms.
- Advertisements containing false representations, such as fake claims concerning celebrities, are a problem for consumers. Google and Facebook could do more to address this issue. The ACCC is giving consideration to whether an ombudsman could have some role in resolving these issues.

As set out in the Terms of Reference, the ACCC must consider the impact of digital platforms on the state of competition in advertising services markets. In particular, the ACCC is to take into consideration:

- the extent to which digital platforms are exercising market power in commercial dealings with advertisers
- the impact of digital platforms on advertising markets, and
- the impact of information asymmetry between digital platforms, advertisers and consumers and the effect on competition in advertising markets.

## 3.1 Digital advertising in Australia

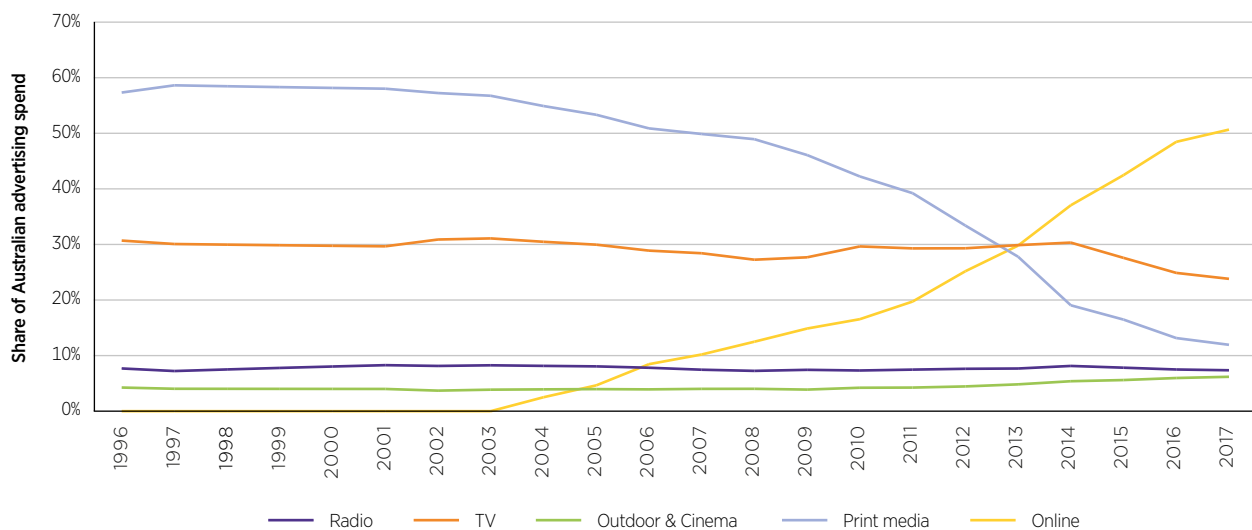
### Key findings

- Digital advertising makes up an increasing portion of the total advertising spend in Australia.
- Google and Facebook are the channels by which most digital advertising is purchased and sold in Australia.
- Google and Facebook receive the majority of digital advertising revenue in Australia; and have captured more than 80 per cent of growth in digital advertising in the past three years.

### 3.1.1 Growth of digital advertising

As explained in chapter 1, advertising in Australia has undergone significant change in the past 20 years. Twenty years ago, most advertising expenditure was on print, television and radio, and was critical to the supply of news and journalism over these mediums in Australia. Consumers accessed news, journalism and entertainment content on these mediums at zero monetary cost or at subsidised rates, which were then funded by advertiser dollars. As shown in figure 3.1, advertising spend largely mirrored this with print accounting for just under 60 per cent of Australian advertising expenditure, television with 30 per cent, and radio with just under 10 per cent in 1998.<sup>122</sup>

Figure 3.1: Share of Australian advertising expenditure



Source: CEASA, ACCC analysis based on stakeholder data.

Consumer habits have changed dramatically over the past 20 years. Large numbers of consumers are now accessing news and entertainment through the internet (websites and apps), and in general, consumers are spending significantly more time online.

As consumers have increased the amount of time spent online, advertisers have similarly increased the amount spent on digital advertising as they seek to go where consumers spend their time (where ‘the eyeballs’ are). The expenditure on digital advertising has increased substantially in Australia, as shown in figure 1.8 in chapter 1, rising from less than \$1 billion in 2005 to almost \$8 billion in 2017.<sup>123</sup> Over the same time, spending on print advertising has fallen from \$5.7 billion to \$1.9 billion. Additionally, as a share of all advertising, digital advertising rose from less than 1 per cent in 2003 to 50 per cent in 2017. Over the same period, print advertising fell from more than 50 per cent in 2003 to 12 per cent in 2017.

Digital advertising has also dramatically changed the way advertising works, as the use of data has opened up the opportunity for advertisers to engage in a higher level of targeting of advertisements and also new ways of targeting that were previously not possible. Instead of targeting broad audience

<sup>122</sup> CEASA, ACCC analysis.

<sup>123</sup> CEASA, ACCC analysis.



segments with print or TV, advertisers are now able to serve advertisements in real time, taking into account factors such as individual user interests, browsing history, time, location, and website content, and can also target users at specific points in the purchasing journey (e.g. search advertising can reach users when they show purchasing intent). CEASA estimates that in 2017, \$3.6 billion was spent on search advertising in Australia and \$2.8 billion was spent on display advertising in Australia.<sup>124</sup>

### 3.1.2 Digital advertising expenditure in Australia

The rise in digital advertising has also been accompanied by the rise of Google and Facebook as the two largest suppliers of online advertising opportunities. Outside of Google and Facebook, digital advertising is highly fragmented with a large number of websites offering advertising opportunities, each with a small market share. Examples of other websites that provide digital advertising opportunities include:

- traditional media publishers; for example, Fairfax through its online mastheads such as *The Sydney Morning Herald* and *The Age*, News Corp Australia through its online mastheads such as *The Australian* and News.com.au, and Nine through Ninenews.com.au
- other types of digital platforms; for example eBay, Bing, Reddit.

The owners of media websites can be considered competitors to digital platforms for the supply of advertising opportunities but media businesses are also reliant on Facebook and Google, which act as gateways for consumers to access their content.<sup>125</sup>

The ACCC notes that any website can offer advertising opportunities; however, not all websites choose to. Some estimates of the top 50 websites by traffic in Australia include a number of websites that do not sell advertising opportunities to third parties.<sup>126</sup> For example, this includes the websites of the four major banks, Wikipedia, Netflix and a variety of government websites.

The ACCC estimates that for a typical \$100 spent by advertisers on digital advertising (excluding classifieds)<sup>127</sup>:

- \$47 goes to Google (some of which is for the provision of intermediary services)
- \$21 goes to Facebook<sup>128</sup>, and
- \$32 goes to all other websites.

The ACCC estimates that over the past three years, Google and Facebook have captured more than 80 per cent of all growth in digital advertising.

**Figure 3.2: Breakdown of \$100 spent by an advertiser in digital advertising (exc. classifieds)**



Source: ACCC estimates, based on information provided to the ACCC.

<sup>124</sup> CEASA.

<sup>125</sup> Nine, [Submission to the ACCC Issues Paper](#), April 2018, pp. 10–11.

<sup>126</sup> Alexa, [Top Sites in Australia](#), accessed 9 November 2011.

<sup>127</sup> ACCC estimates, based on information provided to the ACCC.

<sup>128</sup> The ACCC notes that advertising revenue figures for Facebook relate to the amount of advertising revenue from customers in Australia based on the location of the invoiced party (which may differ from the country in which the advertisements are shown). The ACCC understands that these figures are not recorded in the ordinary course of business by Facebook and are not audited, verified or otherwise reported on. As such, the ACCC considers that these are approximate estimates of relevant advertising revenue attributable to Australia for Facebook.



### 3.1.3 Types of digital advertising

As set out in chapter 2, digital advertising can be divided into three broad categories:

- Search ads are ads that appear on search engines as a result of a user performing a search query. These search ads are typically found at the top of a search engine's search results page and are denoted with an 'Ad' or 'Sponsored' tag. They can appear on dedicated search engine websites such as Google and Bing, or on other websites that have a search function and will partner with search engines to allow it to sell search ads on their behalf.
- Classified ads are ads that appear on classifieds websites such as carsales.com.au, Domain, Gumtree and Trading Post.
- Display ads, in this report, refer to a residual category of digital advertising—in particular, digital advertising other than search and classifieds ads. They can be made up of different visual elements such as text, images, animations, and video that appear alongside website content. For example, a display ad may appear as an image at the top or next to content on a website (this is often referred to as a banner ad). As discussed in chapter 2, ads that appear on social media are a category of display ads. These generally contain a combination of different visual elements and can be purchased in a number of different formats as offered by each respective social media platform.

As discussed in chapter 2, Google and Facebook have substantial market power in the supply of search advertising and in the supply of display advertising in Australia, respectively. As such, this chapter will focus on search and display advertising.

### 3.1.4 How digital advertising is purchased and sold

#### Search advertising

The most common channel for purchasing *search* advertising is through Google. The ACCC estimates over 96 per cent of search ads are currently purchased this way in Australia.<sup>129</sup> Most of these ads are displayed on Google's own search site. A small proportion are displayed on third party sites.

#### Display advertising

Display advertising is purchased through four primary channels:

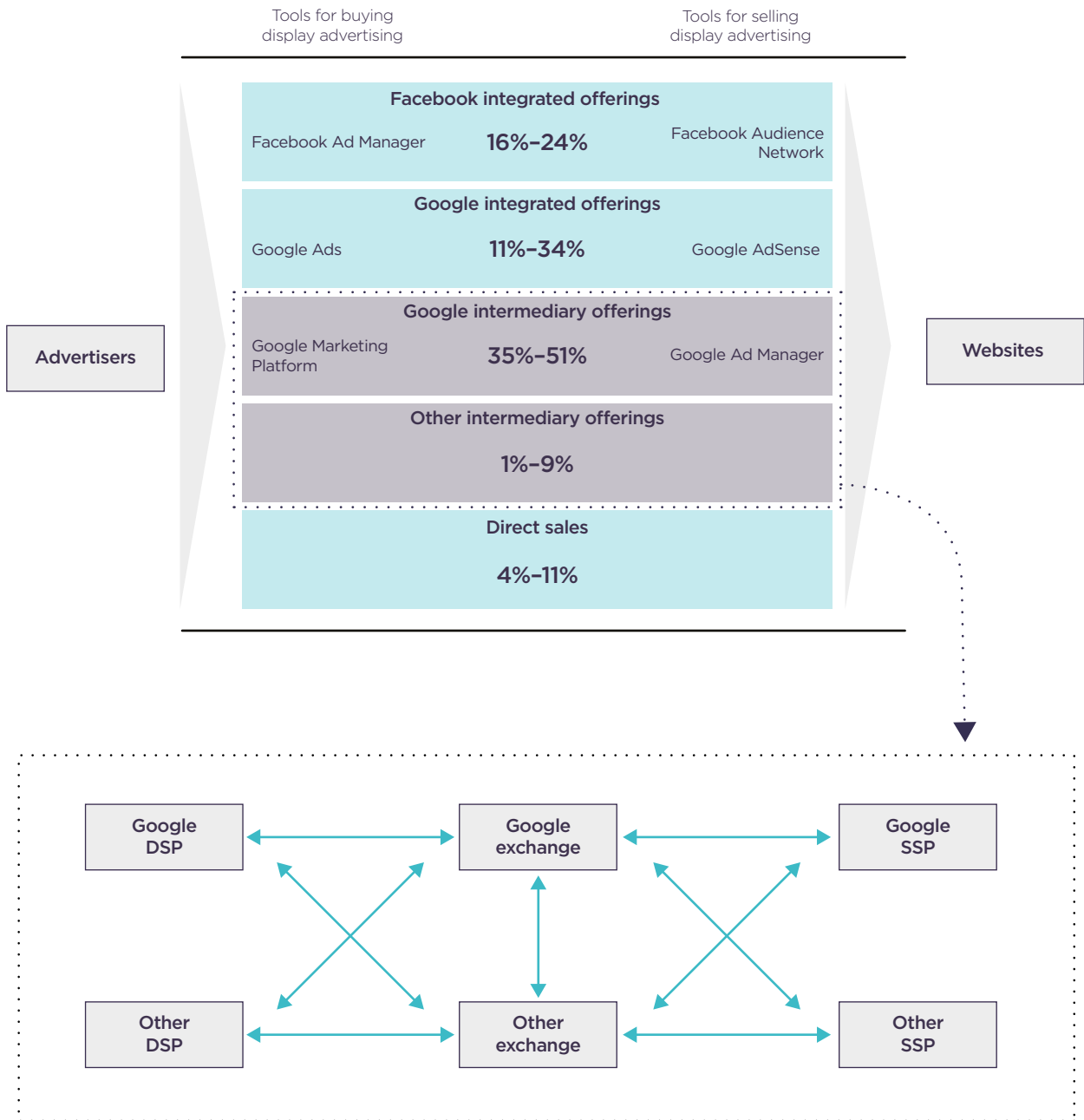
- **Facebook:** These ads may be displayed on the Facebook platform, Instagram, Messenger, or third party websites that are part of Facebook Audience Network.
- **Google:**
  - through Google's integrated products
  - through Google's intermediary products.Ads purchased through Google may be displayed on Google websites such as YouTube and on third party websites (including news media websites).
- A **range of intermediaries:** these ads are displayed on third party websites (including those of news publishers).
- Via **direct sales:** these ads are displayed on third party websites (including those of news publishers).

The main services involved in each of these channels are explained below.

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<sup>129</sup> Data provided to the ACCC.

**Figure 3.3: Channels by which display advertising is purchased in Australia**



**Box 3.1: Difference between direct and programmatic**

In direct sales, advertising proposals are negotiated between advertisers and websites. For example, an advertiser may negotiate with an online news website to purchase banner advertising. Direct sales occur in advance of ads being served to users. Typically, only display ads are purchased through direct sales.

Programmatic advertising is the automated buying, selling and serving of advertising, which occurs in real time and allows advertisers, publishers and intermediaries to utilise various data sources for targeting users. It involves the use of different interfaces, advertising technology (ad tech) and software to facilitate the advertising process. Both display ads and search ads can be purchased programmatically.

### 3.1.5 Main digital advertising services

#### Facebook

Facebook sells advertising on the Facebook platform, Messenger and Instagram as well as on third party websites that have agreements with Facebook. Advertisers looking to purchase advertisements from Facebook can do so in several ways but this is predominantly done via Ads Manager—Facebook’s self-service interface for ad creation.

#### *Ads Manager*

When creating an ad in Ads Manager, advertisers can choose to have ads shown on the Facebook platform, Messenger, Instagram and also on third party websites which are part of Facebook Audience Network (discussed further below). Advertisers are also able to select from and specify a number of different target audiences, marketing objectives, budgets, and ad formats. Facebook then determines what ads a user sees on Facebook properties (or on Facebook Audience Network properties) and where they might see them.

#### *Boosted Posts*

Publishers can pay Facebook to increase the number of users that see a post, and such posts are called boosted posts. For example, a publisher may have a post that is already published on its Facebook page and would like to increase its visibility. The publisher can then pay money to boost the post which will increase its reach to a specified target audience. Boosted posts are considered ads but they are not created via the Ads Manager and as such, don’t have the same level of customisable features.

#### *Facebook Audience Network*

As mentioned above, advertisers can choose to have their ads shown on third party websites or apps that are part of Facebook Audience Network, effectively extending their Facebook ad campaign off the Facebook platform but using the same targeting information. Facebook Audience Network works in a similar way to Google AdSense, in that websites and apps apply to be part of Facebook Audience Network and allow Facebook to sell ads on their behalf.<sup>130</sup> Once a website becomes part of Facebook Audience Network, Facebook serves ads on the website and the revenue is split between Facebook and the website. Publishers that sell their advertising space via Facebook Audience Network receive the majority of the revenue collected from the advertiser and the remainder is kept by Facebook.<sup>131</sup> Facebook claims on its website that ‘1 billion+ people see a Facebook Audience Network ad each month’.<sup>132</sup>

#### Google’s integrated product offerings

##### *Google Ads*

Google’s most significant service, by revenue, is Google Ads (previously known as Google AdWords). Google Ads allows advertisers to create ads in a number of formats including<sup>133</sup>:

- Search Ads: Ads that appear on search results pages such as Google Search.
- Display Ads: Ads that can be made up of text, images, animations, interactive elements, audio, and video.
- App Ads: Ads that encourage users to click and install the app being advertised. These ads can appear in a number of locations including Google Search, Google Play, YouTube, and Gmail.

<sup>130</sup> Facebook, [About Audience Network](#), accessed 9 November 2018.

<sup>131</sup> Information provided to the ACCC.

<sup>132</sup> Facebook, [About Audience Network](#), accessed 22 November 2018.

<sup>133</sup> Google, [Google Ads—How it Works](#), accessed 9 November 2018.

When an advertiser chooses to advertise with Google Ads, their ads can appear on:

- Google owned and operated sites (e.g. Google Search, YouTube, Gmail, Google Play), and
- Third party websites and apps that sell inventory through Google AdSense or AdMob (these are sometimes referred to as sites on Google Display Network and Google Search Network).<sup>134</sup> Google claims on its website that Google Display Network has ‘over 2 million websites worldwide and reaches over 90 per cent of people on the internet’.<sup>135</sup>

### **Google AdSense**

AdSense is the service by which websites supply inventory (advertising opportunities) to Google Display Network or Google Search Network. This service enables website owners to monetise their advertising inventory as being part of either network and allows Google to sell ads on those websites through Google Ads to advertisers on their behalf.

Any revenue generated from the sale of these advertising opportunities is then shared between Google and the website. Websites signing up for AdSense for display advertising, and websites signing up for AdSense for search advertising receive 68 and 51 per cent of the advertising revenue, respectively, when using the online terms.<sup>136</sup>

### **AdMob**

AdMob is a service offered to application developers to help monetise their applications by allowing Google to sell advertising opportunities on their applications through AdMob to advertisers on their behalf.

### **Intermediaries**

Ad tech intermediaries are tools that assist in the automatic purchasing, selling and serving of some types of display advertisements. These ad tech tools can be configured to interact with each other in different ways and are generally interoperable (i.e. the services connect and are able to be used with each other).

Ad tech intermediary tools include:

- Publisher ad servers—servers used by websites to organise and manage advertising space and opportunities on their website. Publisher ad servers typically determine what ads will be shown, serve ads, and also collect information on their performance.
- Supply side platforms (SSP)—platforms used by websites to help maximise the price at which ad impressions are sold, and which utilise various data to provide ad targeting services.
- Demand side platforms (DSP)—platforms used by advertisers to help them purchase advertising impressions from suppliers of advertising inventory as effectively and cheaply as possible, and which utilise various data to provide ad targeting services.
- Ad exchanges—platforms on which supply and demand side sources meet to take part in an auction for ad impressions.
- Ad networks—networks which purchase advertising impressions from different publishers and, similar to brokers, repackage and sell these to advertisers directly, or through ad exchanges.
- Advertiser ad servers—servers used by advertisers to manage and track all advertising and campaign information in one location.
- Data management platforms (DMP)—platforms used by websites and advertisers to store, manage and analyse data collected, which can then be used in the selling and buying of advertising.

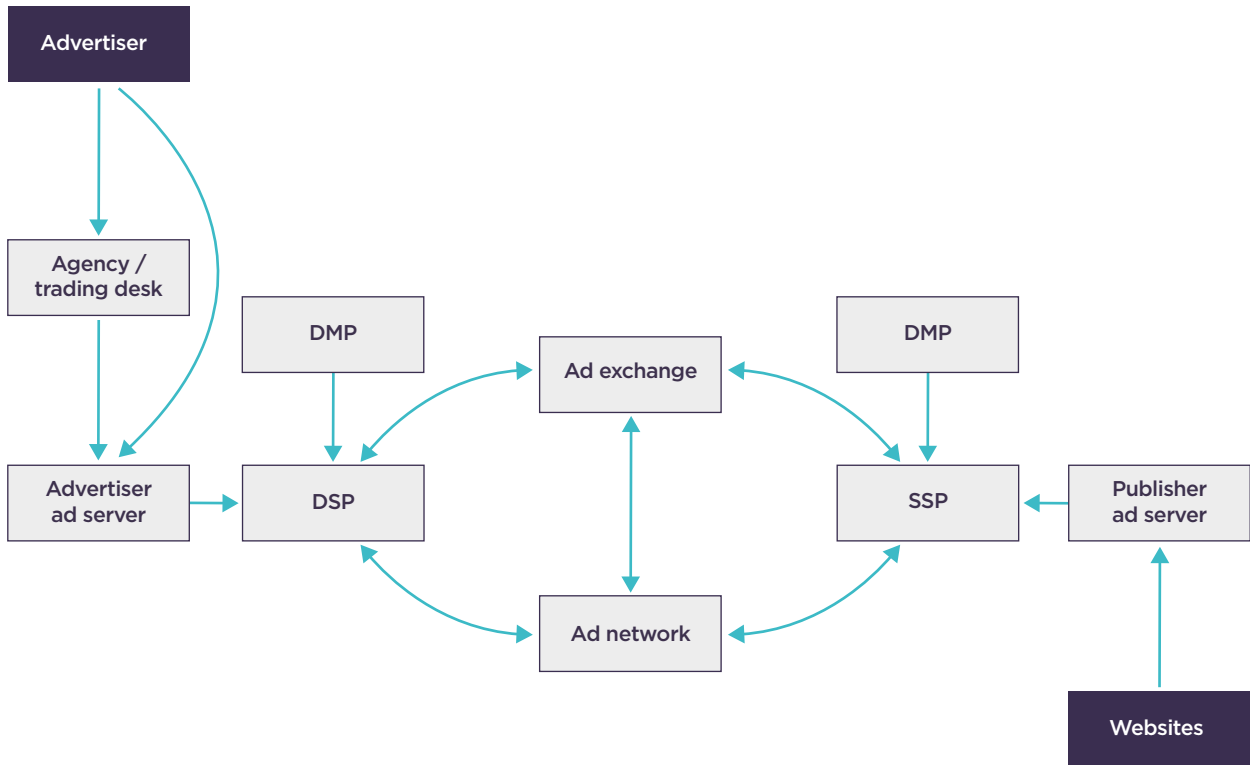
<sup>134</sup> Google, [Where your ads can appear](#), accessed 9 November 2018.

<sup>135</sup> Google, [About targeting for Display Network campaigns](#), accessed 9 November 2018.

<sup>136</sup> Google, [AdSense revenue share](#), accessed 9 November 2018.

- Third party data—data purchased by websites and advertisers to supplement the data they collect first hand. Third party data includes information such as user purchasing history, geographic data and sociodemographic data, which can be used to increase the ability of websites and advertisers to target advertisements.
- Data analytics—tools used by websites and advertisers to measure and track the performance of advertising as well as the behaviours of users more broadly online.
- Trading desks—centralised management platforms specialising in programmatic ad purchasing and the optimisation of these ads. Trading desks are often in-house departments found in the major advertising agencies.

**Figure 3.4: Interactions between ad tech intermediaries**



**Table 3.1: Ad tech intermediaries<sup>137</sup>**

Ad tech functionality	Google's integrated products	Google's intermediary products	Other participants <sup>138</sup>	Facebook's integrated products
Publisher ad server	Google AdSense and AdMob are Google's integrated publisher product	Google Ad Manager	AppNexus, OpenX, Freewheel, Sizmek, Flashtalking, AdZerk	Facebook Audience Network is Facebook's integrated publisher product
Supply side platform		Google Ad Manager	AppNexus, Rubicon, PubMatic, OpenX	
Ad exchange		Google Ad Manager	AppNexus, Rubicon, OpenX, PubMatic	
Ad network		N/A	Various	
Demand side platform	Google Ads is Google's integrated advertiser product	Google Marketing Platform	AppNexus, One (AOL), MediaMath, TubeMogul, DataXu	Facebook Ads is Facebook's integrated advertiser product
Advertiser ad server		Google Marketing Platform	Sizmek, AdZerk	
Data management platform		Google Marketing Platform	Adobe Audience Manager, BlueKai (Oracle), MediaMath	
Data analytics		Google Marketing Platform	Integral Ad Science, Moat, comScore	
Third party data providers		Allows the use of additional data provided by the advertiser/publisher	Quantium, Experian, Equifax, Data Republic, Acxiom, Red Planet	Allows the use of additional data provided by the advertiser <sup>139</sup>
Ad verification		Allows third party ad verification	Integral Ad Science, Moat, comScore, DoubleVerify	Allows third party ad verification

## Google's intermediary services

### Google Ad Manager

Google Ad Manager is the new brand name for the platform which houses a number (but not all) of the website-facing Google products used for the selling of advertising inventory via the ad tech supply chain, though each product can be used separately. It houses the following products:

- Supply side platform (previously called DoubleClick Ad Exchange)
- Ad exchange (previously called DoubleClick Ad Exchange)
- Publisher ad server (previously called DoubleClick for Publishers)

<sup>137</sup> Google and Facebook's integrated products are also listed in this table as they are integrated products that perform a number of different ad tech functionalities. However, they do not interconnect with third party intermediaries and as such, have been excluded from additional discussion in this section.

<sup>138</sup> This list is not exclusive and there may be other firms supplying each of these services.

<sup>139</sup> In addition to allowing advertisers to utilise their own data or third party data, Facebook previously had a partnership program called Partner Categories which allowed advertisers using Facebook's Ad Manager to target users based on purchasing and other offline information provided by Quantium, Acxiom and Experian. However this was discontinued in March 2018 due to privacy concerns. Announcement of this decision can be found on Facebook newsroom, [Shutting Down Partner Categories](#), accessed 15 November 2018.

Google Ad Manager enables website owners to sell advertising opportunities available on their website via programmatic ad exchanges (both Google's exchange and other third party ad exchanges). Websites that use Google Ad Manager can make available individual advertising opportunities to buyers and optimise ad placement and revenue. This system allows websites to target different ads to different consumers, and to maximise revenue by accepting bids from multiple advertisers across multiple exchanges in real time. As a service for websites, it differs from Google AdSense in that it allows for more automation, greater use of data and customisation (e.g. websites can select or favour the advertisers that can purchase inventory, and set the number of advertisements being sold), and also makes the website's advertising inventory available not just to Google's intermediary services, but also to other third party intermediaries.

### ***Google Marketing Platform***

Google Marketing Platform is the new brand name for the platform which houses a number (but not all) of Google's advertiser-facing products used for the purchasing and measurement of advertising inventory via the ad tech supply chain, though each product can be used separately. It houses the following products:

- Demand side platform (previously called DoubleClick Bid Manager; DoubleClick Search)
- Advertiser ad server (previously called DoubleClick Campaign Manager)
- Analytics tools (previously called Google Analytics 360 Suite).

The Google Marketing Platform allows advertisers or their agents to purchase inventory by connecting the advertiser to sellers or website owners through exchanges which may be operated by Google and/or third party providers. The Google Marketing Platform is aimed at, typically, larger, more sophisticated advertisers and firms, whereas Google Ads is aimed at smaller advertisers and businesses.

It differs from Google Ads in that it has a higher level of automation, better ad targeting and a greater ability for advertisers to use data. It also allows advertisers to purchase advertising inventory available not just on Google's intermediary services, but also on third party intermediaries. For example, advertisers can purchase advertising opportunities from Google's own ad exchange as well as from other third party ad exchanges.

### ***Other intermediary services***

At this stage, the ACCC has received consistent feedback that the other firms listed in the table above are of a far smaller scale of operation, and are more likely to operate in niche areas. For example, other intermediaries are more likely to focus on particularly detailed campaigns where more control is required, or charge higher prices for what they consider to be a premium product. There are a number of reasons that these non-integrated offerings may be less attractive than the larger integrated players such as Google. Smaller providers have less access to data, are less able to follow users across multiple touchpoints and therefore may be less attractive to advertisers.

## **3.2 The effect of digital platforms on advertisers**

The rest of this chapter focuses on the following effects of digital platforms on advertisers:

- the benefits to advertisers
- a reported inability to verify whether ads on digital platforms are effectively served to the intended audience
- the risk of digital platforms favouring their own business interests in the operation of advertising and ad tech services
- an incentive for digital platforms to bundle services to leverage market power
- a limited ability for advertisers to negotiate
- the ability of digital platforms to leverage market power through industry standards, and
- advertisements containing false representations.

## 3.2.1 Benefits to advertisers

### Key findings

- Google and Facebook provide advertisers with numerous and significant benefits through an ability to specifically target relevant audiences and by providing advertisers with an additional channel to reach consumers.

The online advertising tools supplied by digital platforms provide advertisers with numerous and significant benefits above those of traditional advertising. The Australian Association of National Advertisers submits that:

*...digital platforms have provided a number of positive impacts for advertisers, offering strong and innovative advertising services to the market. These services empower advertisers with robust targeting and format options. In conjunction with cost efficient buying methodologies, digital platforms are appealing for advertisers.<sup>140</sup>*

The NSW Business Chamber submits that in response to a survey of its members, 71 per cent had utilised digital platforms to advertise and indicated digital advertising had positively affected their business; 62 per cent of respondents indicated digital advertising had increased customers; 43 per cent indicated it had increased sales; and 34 per cent indicated it helped reduce costs.<sup>141</sup>

As discussed in the introduction of this chapter, one of the most significant advantages of advertising using the services of digital platforms is the ability to more specifically target consumers, resulting in a potentially higher return on advertising spend. The Australian Association of National Advertisers submits that:

*...the ability for advertisers to reach their desired audience, confident in the accuracy of the targeting and armed with insights that will drive relevant messaging enables a much more effective marketing approach compared to broad brush techniques that some more traditional channels offer. The greater potential to target specific audiences assists in the ability to measure the short term effects of a campaign with respect to consumers and sales.<sup>142</sup>*

Digital platforms have also provided a new advertising avenue for small to medium sized enterprises that may not have been able to afford the advertising available on the high-reach traditional newspapers or commercial television and radio network. For some small to medium businesses, online advertising has become a significant part of their business models, and many have become successful through an online only focused strategy, building a brand and following entirely through social media. As one submission notes:

*Small business owners must utilise digital platforms if they want to survive in today's current economic climate. It's not a choice anymore, it's a necessity.<sup>143</sup>*

For small to medium businesses the self-serve platforms of Google and Facebook enable them to very efficiently acquire their advertising needs. For example, the Australian Association of National Advertisers submits that:

*...advertising budgets can be deployed in a nimble, responsive manner and can be optimised in real time.<sup>144</sup>*

For these reasons, the ACCC considers that digital platforms, and in particular Google and Facebook, provide significant benefits to businesses.

140 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

141 NSW Business Chamber, [Submission to the ACCC Issues Paper](#), April 2018, p. 3.

142 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

143 Confidential Party #2, [Submission to the ACCC Issues Paper](#), May 2018, p. 3.

144 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.



## 3.2.2 Inability to verify whether ads are effectively served to the intended audience

### Key findings

- Advertisers are unable to verify for themselves whether advertisements on Google and Facebook are delivered to their intended audience. The ACCC has not yet reached a view about the extent to which third party auditing overcomes this issue but expects to in its final report.

A number of stakeholders have raised concerns about ad verification and ad fraud regarding the use of Google and Facebook's advertising products. The crux of these complaints is that Google and Facebook are measuring the performance of their own advertising services while restricting the ability of advertisers to engage independent parties to do so.

For example, the Australian Association of National Advertisers says that:

*...a key risk for advertisers is a lack of transparency in measurement and viewability. While digital platforms offer more to advertisers in terms of immediate measurement of campaign results, these measures and results are not independently audited. Nor is there the opportunity to compare across platforms due to the difference in metrics used.<sup>145</sup>*

Similarly, media businesses that compete with Google and Facebook for the supply of advertising opportunities allege that the unilateral verification and measurement carried out by Google and Facebook compares unfavourably with what they consider to be objective sector-wide measures applicable to traditional print and now online publications and commercial TV broadcasters.<sup>146</sup>

The potential ways this may occur are:

- There may be instances when the performance of Google and Facebook's advertising services is overstated; this may be as a result of over reporting the number of visitors to a platform.<sup>147</sup>
- The standards adopted by Facebook and Google may mislead advertisers into thinking more consumers have viewed their ads than actually did.<sup>148</sup>
- Advertising purchased through Google and Facebook may be subject to ad fraud. Google and Facebook may not have strong incentives to address this because they generate revenue whenever an ad is served, regardless of whether it is a human or a bot that views the ad.<sup>149</sup>

If third parties are not able to effectively monitor the delivery of ads for advertisers, the risks to advertisers would appear greater.

### Box 3.2: Ad fraud

Ad fraud involves the practice of creating fraudulent advertising clicks, impressions and conversions to generate digital advertising revenue. The result is that advertisers are charged for advertising that does not actually reach their intended audience. Ad fraud has been represented to be a USD\$7.2 billion global crime.<sup>150</sup> The World Federation of Advertisers has predicted ad fraud to grow to be in excess of USD\$50 billion globally by 2025, which is considered a conservative estimate.<sup>151</sup> While fraudulent websites are unlikely to be Australian websites, the advertisers impacted by ad fraud would include Australian advertisers. However, it is difficult to determine the scale of such ad fraud on Australian advertisers.

145 Australian Association of National Advertisers, [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

146 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 23.

147 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 20.

148 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 20.

149 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 24.

150 G Slefo, [Ad Fraud Will Cost \\$7.2 billion in 2016, ANA Says, Up Nearly \\$1 billion](#), Ad Age, 19 January 2016, accessed 9 November 2018.

151 World Federation of Advertisers, [Compendium of ad fraud knowledge for media investors](#), p. 3, accessed 9 November 2018.

Ad fraud generally operates in the following way:

1. Fraudsters create fraudulent websites that look like legitimate websites. Fraudsters then sign up to advertising intermediary services, such as Google AdSense, to allow Google to sell advertising opportunities on their website on their behalf.
2. Viruses and malware are then used by the fraudster to create and send bot traffic to the fraudulent website.
3. Advertisers' ads are then delivered on the website via Google AdSense and are viewed by the bots.
4. Payment is made to Google by the advertiser for the delivery of their ads. A share of that revenue is passed onto the fraudster as part of the Google AdSense revenue share agreement.

The ACCC notes that verifying whether advertising has reached its intended audience is not a problem unique to digital advertising. For example, the often cited quote 'I know that half the money I spend on advertising is wasted. My only problem is that I don't know which half' has persisted for more than one hundred years.<sup>152</sup> TV ratings are sometimes criticised for being blunt estimates of audience size because the number of viewers may fluctuate across a program (and may be lower in ad breaks).<sup>153</sup> Similarly, the veracity of print circulation and readership estimates is sometimes questioned.<sup>154</sup>

Google and Facebook reject claims that their advertisements are not verifiable. Facebook says<sup>155</sup>:

- There are currently 40 different companies globally offering independent verification services for ads served on the Facebook platform and are able to measure outcomes such as reach, viewability, attribution, brand lift and outcome lift.
- In Australia, seven companies (Nielsen, Moat, Integral Ad Science, AppsFlyer, Datalicious, Quantum, Acxiom) currently offer these services.
- Third-party viewability companies like Integral Ad Science and Moat run daily discrepancy checks to test for fraud across Facebook's owned and operated platforms.
- Facebook has received accreditation from the Media Ratings Council (MRC) for its first party measurement of ad impressions in News Feed. Facebook is in the process of obtaining MRC verification of its process for providing data to companies that provide independent verification of viewability measurements.
- Facebook works closely with companies that are currently able to offer verification services on its platform to implement each company's measurement code within the Facebook infrastructure.
- Where Facebook determines that an advertiser was materially overbilled as a result of incorrect measurement of an ad, it will issue a refund to the affected advertiser.

Specifically in relation to ad measurement, Google says:

- It has over 20 independent third party measurement partners that can be engaged by advertisers to measure and verify their metrics.
- The primary body it deals with in relation to ad measurement and verification is the MRC. Google currently has over 30 accredited metrics with the MRC and is in the process of applying for accreditation for further metrics.<sup>156</sup>

Specifically in relation to ad fraud and the existence of bad ads delivered through Google Ads, Google says:

152 This quote has been attributed to a number of different people including William Hesketh Lever and John Wanamaker; See J Bullmore, [Why it's Time to Say Goodbye to IKTHTMISOAIW\\*](#), WPP, accessed 9 November 2018.

153 B Higgs, [The Gloss Free Glossary](#), Marketing and Media Survival Guide, 2006, (A practitioner's planning guide), Niche Media, St Kilda, Melbourne.

154 B Higgs, [The Gloss Free Glossary](#), Marketing and Media Survival Guide, 2006, (A practitioner's planning guide), Niche Media, St Kilda, Melbourne.

155 Information provided to the ACCC.

156 Information provided to the ACCC.

- It has put into place automated systems as well as human reviewers that review ads to prevent fraud.
- It has increased investment in staff and has more than 10 000 people reviewing and enforcing policies.
- Publishers that place their websites on Google Display Network have access to opt in and opt out controls which determine what ads can show on their websites.
- Where ad fraud or invalid clicks is identified as having occurred, Google says that it can refund advertisers.<sup>157</sup>

Free TV submits that it is incorrect that Google and Facebook are subject to third party verification or that their measurement systems are independently verified.<sup>158</sup> It says<sup>159</sup>:

- The process of calculating audience reach and video viewership on Google and Facebook products relies on data solely captured and collated by the digital platforms themselves.
- Independent measurement and verification needs to occur directly by a third party, rather than through the ex-post interpretation of usage data collated by the platforms themselves.
- The right of third parties to audit the proprietary data (which is how Free TV characterises Nielsen's measurement of Google and Facebook) should not be confused with third party verification.

The ACCC considers the inability for advertisers to verify the delivery and performance of their ads on Google and Facebook has the potential to lessen competition in the supply of advertising services. This is because it has the potential to mislead advertisers into thinking their ads perform better than they actually do. This impedes the transmission of price and quality signals in the market and encourages some advertisers to advertise on certain platforms rather than with competing suppliers of advertising services.

Google and Facebook do not have strong incentives to address these issues because they may profit from them. The opaque nature of the advertising systems offered by the digital platforms makes it difficult to assess the extent of this problem.

While independent third party ad verification may address these concerns, this depends on the nature of the verification the third parties are able to provide. The ACCC considers it is not yet clear the extent to which third party measurement overcomes these issues. In particular, it is not clear whether the current terms on which third party verification providers have access to the Facebook and Google platforms enable them to carry out a reliable and fulsome audit of relevant ad metrics and measurements. This may be problematic for advertisers as third party verification providers are not able to actually audit and verify the relevant metrics and measurements necessary to assess the performance of advertisements placed on Google and Facebook. The ACCC will consider this issue further in its final report.

### ***Area for further analysis and assessment—Third party measurement of advertisements served on digital platforms***

The ACCC is considering whether there is an ability for advertisers to verify whether advertisements on Google and Facebook are delivered to their intended audience and whether there may be instances where the performance of digital advertising is overstated; or advertisers are misled into thinking more consumers viewed their ads than actually did. The ACCC is examining the extent to which the current level of third party measurement overcomes these problems. The ACCC is seeking further feedback on the effectiveness of current mechanisms for verifying whether advertisements are served to their intended audience. If current mechanisms are not sufficient, the ACCC would be assisted by feedback and suggestions for mechanisms that are needed to address this issue.

<sup>157</sup> Information provided to the ACCC.

<sup>158</sup> Free TV Australia, [Submission 3 to the Digital Platforms Inquiry](#), November 2018, pp. 3–4.

<sup>159</sup> Free TV Australia, [Submission 3 to the Digital Platforms Inquiry](#), November 2018, p. 4.

### 3.2.3 Risk of digital platforms favouring their own business interests in the operation of advertising and ad tech services

#### Key findings

- Facebook and Google are vertically integrated businesses and each is likely to have the ability and incentive to favour their own related businesses or businesses with which they have an existing relationship. This could occur without third parties, such as advertisers or online media sites, being aware that it is happening. The ACCC is considering recommending a regulatory authority to monitor and report on these issues.

As Google and Facebook supply advertising services on their own platforms and act as intermediaries to facilitate the display of advertising on third party websites, there is a risk they may preference their own interests above those of advertisers or websites. As the process for buying, selling and delivering ads is not transparent, advertisers will be unable to determine whether this occurs.

In terms of advertising services, digital platforms could seek to maximise their own profits, rather than optimise outcomes for advertisers and websites. For example, this could occur as a result of:

- favouring or preferencing their own advertising inventory. For example, Google's DSP (which offers advertisers the ability to place ads across a range of platforms, including its own) could preference the purchasing of ads on locations which generate the most revenue to its own business (e.g. ads on YouTube or other Google sites), as opposed to acting in the best interests of the advertiser
- favouring their own advertising services by ranking their own advertising services higher on search or social media results, or by excluding rivals from their platform. For example, preferencing its own specialised search results (such as Google Shopping or Facebook Marketplace) instead of websites that offer competing services. This is discussed further in chapter 7
- favouring their own advertising services by excluding rival suppliers of advertising from other products. For example, by refusing rival advertising apps access to the Google Play Store
- favouring websites that are a part of Google Display Network or Facebook Audience Network. For example, for Google Search, publishers that are a part of Google Display Network could be ranked more highly in organic search results, or in sponsored or ad results, than publishers that are not a part of Google Display Network
- favouring advertisers that use Google's or Facebook's advertising services, in the display of organic results or ordering of the news feed. For example, organic posts from advertisers with high expenditure being displayed more prominently
- favouring or preferencing their own ad tech products. For example, Google's DSP or SSP could preference advertising inventory made available through its own ad exchange, rather than a third party ad exchange. If this occurred it may have flow on effects. For example, if a digital platform is able to drive additional volume to its exchange, it may decrease the viability of competing ad exchanges as they would receive less advertiser demand.

The ACCC considers there is a risk competition may be hindered due to the vertically integrated nature of Google and Facebook, and the fact that they have the ability and incentive to favour their own business interests.

There is also a risk that digital platforms may favour their own interests above those of advertisers where, as an intermediary, they make decisions about where material is placed or ranked.

At the core of advertising products offered by search platforms and social media are algorithms that determine what advertisements are selected to be displayed, their subsequent rankings, and the costs charged to advertisers. There is a lack of transparency on the part of digital platforms about these algorithms, which exacerbates the potential for these outcomes to be undetected. For advertisers, the risk of such outcomes is likely to create uncertainty and the inefficient allocation of resources. This may result in poorer outcomes for consumers as resources are diverted.

Google submits that it is:

*...constantly engaged in finding the right balance between providing transparency about how Search works while playing a cat and mouse game against sites that try to “game” Google’s algorithms without providing any benefit to users. For this reason, while Google does not reveal the specific details of its algorithm changes, it provides extensive tools and tips to empower webmasters to manage their Search presence...<sup>160</sup>*

Similarly, Facebook has an explanation of how its news feed works and explains to users how they can control what they see in their news feeds.<sup>161</sup>

The ACCC accepts that it is important to ensure that third parties are not able to manipulate search results or news feeds on social media platforms and that Google and Facebook do endeavour to provide some information about their algorithms. However, the ACCC also considers that this may not be sufficient and that there needs to be a greater level of transparency. For example, while Google’s ‘How Search Works’ page provides a broad overview of its search service, it does not provide any detail about how the quality of content of pages are used to rank search results.

Accordingly, the ACCC puts forward the below preliminary recommendation which aims to provide greater transparency by tasking a regulatory authority with monitoring, investigating and reporting on whether vertically integrated digital platforms are favouring their own business interests above those of advertisers and other websites.

The ACCC recognises the importance of preventing ‘gaming’ of algorithms by advertisers and websites and is therefore not proposing that the information provided by relevant digital platforms to the regulatory authority be made publicly available.

#### ***Preliminary Recommendation 4—advertising and related business oversight***

A regulatory authority should be tasked to monitor, investigate and report on whether digital platforms, which are vertically integrated and meet the relevant threshold, are engaging in discriminatory conduct (including, but not limited to, conduct which may be anti-competitive) by favouring their own business interests above those of advertisers or potentially competing businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum from digital advertising in Australia.

The regulatory authority could consider the digital platform’s criteria, commercial arrangements and other circumstances which impact competition between advertisers, suppliers of advertising services and digital platforms. This may include:

- (a) the ranking and display of advertisements and also organic content (when advertisements are displayed alongside the organic content)
- (b) whether the acquisition of any other product or service from the same digital platform (or a related business) affects the display or ranking of advertisements or content
- (c) the impact of any related business of a digital platform (e.g. how referral links appear in the search engine results page or social media news feed).

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers. The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

These regulatory functions could be funded in a variety of ways including from direct government funding or via cost recovery, having regard to relevant government policy.

<sup>160</sup> Google, [Submission 2 to the Digital Platforms Inquiry](#), October 2018, pp. 4–5.

<sup>161</sup> See Facebook, [How News Feed Works](#), accessed 1 November 2018; Facebook, [Control What You See in News Feed](#), accessed 1 November 2018.

## 3.2.4 Bundling and tying

### Key findings

- There is the potential for bundles of advertising inventory, intermediary services and other products offered by each of Google and Facebook to lessen competition in certain advertising markets.

Bundling and tying are common commercial arrangements which usually do not harm competition and in many scenarios promote competition by offering consumers more compelling offers. However, in some circumstances, tying or bundling by a firm with a substantial degree of market power could result in anti-competitive effects. This can occur when a firm with substantial market power in one market uses a tie or bundle to extend or ‘leverage’ this market power into another market.

As previously discussed, the ACCC considers that Google has substantial market power in the supply of search advertising services and Facebook has substantial market power in the supply of display advertising services. Because of the substantial degree of market power Google and Facebook each have over their respective types of inventory, they may be able to leverage this into other related markets such as the delivery of advertising.

Submissions suggest there are a number of ways in which this could occur, which are discussed below.

### Bundling of ad tech services with inventory

One example raised by media companies is that access to advertising opportunities on YouTube is only available through Google’s intermediary services.<sup>162</sup> Media companies submit that access to video advertising on YouTube inventory is critical for them. Accordingly, if they want access to video advertising, they are effectively required to use Google’s intermediary services.

### Bundling of multiple intermediary services

Submissions suggest that websites may be encouraged to use a single digital platform for all intermediary services when other services are set as defaults.<sup>163</sup> For example, if an SSP defaults to a particular ad server, customers may be more likely to use them as a bundle.

Alternatively, if the intermediary services offered by digital platforms are unable to interoperate with rival services, these may be rendered ineffective. For example, if a DSP is unable to connect to any ad exchanges, the advertiser will not be able to purchase any advertising in this way as it cannot link up with any supply sources. Similarly, if a SSP cannot connect to any ad exchanges, the publisher will be unable to sell its advertising in this way as it cannot link up with any demand sources. A similar effect may be observed if the speed of the connection between rival intermediaries is too slow. This is because a website needs to ensure its ads are served when a page loads, and any bids that occur too slowly will ‘time-out’ and not be taken into consideration.

### Bundling of ad tech services with data

Submissions suggest that digital platforms are able to use data they collect from their owned and operated websites and third party websites in the supply of intermediary services.<sup>164</sup> This data is not otherwise accessible by advertisers outside of this platform.

162 See e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 94; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 36.

163 See e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 94; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 36.

164 See e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 94–95; Nine, [Submission to the ACCC Issues Paper](#), April 2018, p. 40.

### **Box 3.3: Data used in advertising**

Data used in advertising can be collected by numerous parties including advertisers, websites and platforms that supply advertising inventory or advertising intermediary services, firms that offer ad tech services, and mobile operating system owners.

The extensive data collected by Facebook and Google on their own users (off-platform as well as on-platform) and the data collected via their activities in online advertising is likely to be unparalleled.

These parties can collect data in various ways including the following<sup>165</sup>:

- **Sign-in/subscription**—Data can be collected when users sign-up or subscribe to websites and apps online. For example, users will often identify themselves when signing up for different services and websites, such as Gmail, Facebook, or any other website that allows for a user log-in. Information provided could include name, age, address, phone number, date of birth and different preferences.
- **Cookies**—Cookies are small files that are placed on users' computers and store data on their activity and browsing specific to different websites. When a user visits a website, that website might automatically and invisibly send a cookie to the user's computer. This cookie then helps the website keep track of the user's visits and activity on the website and allows the website to deliver webpages tailored specifically to that user. For example, an online retailer website may use cookies to keep track of what a user is adding to their shopping cart as they navigate the website as well as across different sessions.
- **Web tags**—Web tags are similar to cookies except that they are elements found within webpages as opposed to files sent to users' computers. These tags can be used to recognise and track users as they browse the internet.
- **Ad tags**—Ad tags help advertisers and publishers measure the performance of ads and to track any users' engagements with the ads (viewing the ad, clicking the ad).
- **Pixels**—There are a number of different pixels that websites and advertisers use to track users in different ways. For example, there are pixels that gather technical information on users (IP address, device used), track users as they purchase products or complete equivalent actions, and track how long users are on specific pages. One example of a pixel that advertisers can use is the Facebook Pixel, which helps them track when someone visits their website and takes an action such as making a purchase. This data then allows advertisers to target that user through Facebook ads in the future.
- **Mobile apps**—Mobile apps offer a number of tools which enable developers of mobile apps to analyse users and track their behaviours. For example, Google Maps and other navigational apps can allow the tracking and collection of geolocation data. Additionally, mobile phone operating systems more generally, such as Android and iOS, can be a source of data.

### **Bundling of ad tech services with other services**

Media companies submit that Google bundles its analytics software with its advertising intermediary services.<sup>166</sup> As a result, they consider that this increases the incentive for advertisers that use Google Analytics to use other Google products.

### **ACCC's preliminary view on bundling and tying**

The ACCC considers that:

- Google and Facebook enjoy strong advantages in the supply of intermediary services products because of their substantial market power in search and display advertising respectively. Most of Google's inventory, and all of Facebook's inventory, is only accessible through their proprietary platforms.

<sup>165</sup> Autorité de la concurrence, [Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector](#), pp. 30–31.

<sup>166</sup> Nine, [Submission to the ACCC Issues Paper](#), 3 May 2018, pp. 40–41.



- As a result, advertisers that use Google’s or Facebook’s intermediary services to access this exclusive inventory are likely to have a lower incentive to use third party intermediaries to purchase other forms of advertising. This is because an advertiser using an additional intermediary incurs further costs of setting up and operating an ad campaign on that platform. These costs may potentially include costs of administration, software, labour and staff training. Google or Facebook are more likely to become a convenient one-stop shop. This bundling is therefore likely to hinder the ability of third party intermediaries to compete. This may mean that Google and Facebook face less competition because of bundling.
- Google likely has a competitive advantage in the supply of intermediary services because it is able to set its services as ‘defaults’ for other Google intermediary services.
- Google likely also has a competitive advantage because it offers intermediary services across all functional levels of the programmatic supply chain.
- Google and Facebook likely have a significant competitive advantage because of the data they collect from their owned and operated websites and third party websites. Google and Facebook can use this data to enhance their offerings (e.g. by providing higher levels of targeting).
- Interoperability issues are unlikely to raise competition concerns if they are the result of technical limitations, or are undertaken on the basis that it is a more efficient way for a firm to provide its products.

Because of this, there is likely to be less competition in the supply of intermediary services than otherwise might exist in a competitive market. This may result in higher prices and/or lower quality services.

The ACCC has not yet reached a concluded view of these effects because it requires:

- more information about the extent to which advertisers ‘multi-home’ or use multiples of the same type of intermediaries, and
- more evidence about the extent to which advertisers could switch to rival intermediaries if Google or Facebook raised prices or reduced the quality of their services.

The ACCC notes no third party intermediary has made submissions about the competitive effect of bundling.

The ACCC will continue to investigate these issues for the purposes of its final report. The ACCC welcomes further engagement and written submissions on these issues, particularly from competitors to digital platforms in the ad tech stack who believe that bundling conduct by digital platforms may be hindering their ability to compete.

### 3.2.5 Complexity and opacity associated with intermediary pricing

#### Key findings

- The complexity and the large number of intermediaries involved in serving some forms of display advertising means that the resulting revenue flowing from advertisers to websites is opaque and it is unclear what proportion of revenue is being retained by intermediaries. The ACCC is giving consideration to whether a regulatory authority should have the power to monitor and report on pricing to increase transparency.

The issues discussed in this section are specific to intermediary products (i.e. those supplied by Google and third parties). The same issues do not apply to Google’s integrated products or Facebook’s products.<sup>167</sup>

<sup>167</sup> While Facebook Audience Network can be classified as an intermediary service, it is part of Facebook’s integrated advertising product offering and does not interconnect with third party intermediary products. As such, it will not be discussed in this section. Similarly, Google AdSense and AdMob does not interconnect with third party intermediary products.



While the process of serving a digital ad to users occurs seamlessly, it is facilitated by a number of different ad tech tools or platforms and completed in milliseconds. Ad tech tools and platforms are software that assist in the automatic purchasing, selling and serving of digital advertisements. These ad tech tools can be configured to interact with each other in different ways.

As discussed above in section 3.1.5, there are a large number of intermediary services.

The large number of intermediary services and the lack of transparency as to their operations give rise to concerns that the revenue flowing from advertisers to websites is opaque and it is unclear what proportion of revenue is being retained by intermediaries.

### **Box 3.4: How do ad tech intermediaries earn revenue?**

The majority of the ad tech platforms and tools described above charge a fee based on the number of ad impressions going through the platform. For example, a SSP generates revenue by keeping a percentage of the revenue received from ad impressions sold through the SSP, and an ad exchange generates revenue by keeping a cut of the transactions that occur on the platform. The SSP and ad exchange will therefore typically be agnostic about the quality of the impression delivered and the website on which it was served (including websites which give rise to brand safety and ad fraud issues).

Third party data providers and ad verification partners charge a fee whenever advertisers use their services. For example, if an advertiser uses a data provider to increase the level of targeting of an advertisement, the data provider will be paid a percentage of the cost of the advertisement. Similarly, an advertiser will be charged a fee if they choose to use an ad verification partner to verify the delivery of an ad campaign.

As figure 3.4 in section 3.1.5 depicts, the programmatic advertising chain contains many different functional levels of ad tech products or services that facilitate the buying, selling and delivery of online advertising. Each of these products or services charges a separate fee, and the aggregate fees for a user can be significant.

This makes it difficult for advertisers to know the proportion of money that is spent on purchasing inventory compared to the proportion spent on fees charged by various ad tech products. This issue also occurs in other advertising markets (for example, television). However, it is magnified in digital advertising because of the many intermediaries involved.

There are various estimates of the proportion of revenue that is retained by intermediaries. For example:

- Some submissions state that the total budget spent by the advertiser is reduced by approximately 25 per cent before it even reaches an ad exchange and that advertising spend is 75 per cent less efficient than the advertiser had intended or believes—that is, out of \$100 from an advertiser, only \$25 becomes working ad spend and \$75 is taken up by various ad tech platforms and intermediaries along the advertising supply chain.<sup>168</sup>
- The World Federation of Advertisers estimates that publishers receive 40 per cent of advertisers spend, with ad tech platforms sharing 60 per cent of spend.<sup>169</sup> Agencies and trading desks take 5 and 15 per cent respectively, while DSPs; data, targeting and verification services; and ad exchanges take 10, 25 and 5 per cent respectively.
- Other public estimates suggest between 52 and 63 per cent of revenue flows to publishers.<sup>170</sup>

168 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 28.

169 World Federation of Advertisers, [Compendium of ad fraud knowledge for media investors](#), p. 13..

170 48 cents in every dollar goes to adtech: A Hickman, [Programmatic 'tech tax' costs 48 cents of every dollar—ANA study](#), AdNews, 20 June 2017, accessed 9 November 2018; 45 cents in every dollar goes to adtech: IAB, [The Programmatic Supply Chain](#), accessed 9 November 2018; 37 cents in dollar goes to adtech: G Kaye, [Where does your programmatic spend go?](#), Marketing Land, 12 April 2017, accessed 9 November 2018.

- Google’s US financial reporting indicates that it passes approximately 70 per cent of revenue to publishers.<sup>171</sup> This figure does not appear to take into account any fees paid by advertisers.
- In 2016, The Guardian UK conducted an experiment and purchased programmatic advertising on its own website.<sup>172</sup> In some cases, it found that The Guardian, as the relevant website and supplier of the advertising inventory, received less than 30 pence in the pound.
- In 2018, Jon Ones, head of digital for Duracell’s international markets, stated that ‘at worst’, 20 per cent of its initial ad spend in 2017 may have reached consumers as effective media.<sup>173</sup>

The ACCC is continuing to investigate this issue, but it is clear that from the perspective of advertisers and website owners, the pricing of the intermediary services is opaque. The lack of transparency means that advertisers and websites lack visibility and are not empowered to seek out better or more competitive deals. This, combined with the bundling issues discussed immediately above, is likely to affect the competitive process. The ACCC is giving further consideration as to whether a regulatory authority should be able to monitor prices and investigate complaints with public reporting obligations to increase transparency in this market.

### ***Area for further analysis and assessment—Monitoring of intermediary pricing***

The ACCC considers that a regulatory authority could have the power to monitor the pricing of intermediary services supplied to advertisers or websites for the purpose of digital display advertising. To achieve this, businesses offering these services earning revenue exceeding a certain threshold (e.g. revenue in Australia greater than AUD 5 million) could be required to provide a regulatory authority with details on:

- the median price charged for each product offered
- an explanation of how that price is determined
- the revenue received for supplying each product or service
- any discounts, rebates or other incentives offered to customers.

This information should be provided at least once a year, or as required by the regulatory authority. The regulatory authority could be required to report publicly on this information.

## **3.2.6 Limited ability for advertisers to negotiate with digital platforms**

### **Key findings**

- Advertisers have a limited ability to negotiate with Google and Facebook. Google and Facebook are likely to have the ability to charge advertisers more to provide search and display advertising services than they could if competition were effective.
- Advertisers appear to have a limited ability to seek review or dispute resolution of decisions by Facebook or Google. The ACCC is giving consideration as to whether an ombudsman should be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms.

As discussed in chapter 2, the ACCC considers that Google and Facebook each have substantial market power in the markets for search advertising and display advertising respectively. A key contributing factor to this market power is the fact that Google and Facebook both offer targeted advertising services that are highly valued by advertisers and face limited competitive constraints by other suppliers

171 According to Alphabet’s Annual Report (10-K) for the fiscal year ending 31 December 2017, traffic acquisition costs to Google Network Members as a percentage of Google Network Members’ properties revenues’ was 68.1 per cent in 2015, 69.9 per cent in 2016 and 71.9 per cent in 2017. The ACCC understands the traffic acquisition cost to be the amount paid to Google Network Members primarily for ads placed on their properties through AdMob, AdSense and DoubleClick Ad Exchange (now part of Google Ad Manager). That is, using the figures above, Google paid 71.9 per cent of the revenue Google received from advertisers, for the display of ads on Google Network Member properties (Google Network Members’ properties revenue), to those Google Network Members. Expressed in a different way, Google kept 28.1 per cent of the revenue that it received from advertisers displaying their ads on Google Network Member properties in 2017.

172 B Ice, [Guardian buys own ad inventory, only gets 30p to the pound](#), Marketing, 12 October 2016, accessed 9 November 2018.

173 S Joesph, [How Duracell is addressing its programmatic problems](#), Digiday, 3 April 2018, accessed 9 November 2018.

of search advertising and display advertising. As a result of this substantial market power, advertisers have a limited ability to negotiate with Google and Facebook, resulting in:

- the potential for the relevant platforms to charge more
- a lack of bargaining power to negotiate terms on which advertisers acquire services and seek effective dispute resolution.

## Price

As Google and Facebook face limited competitive constraints in the supply of search and display advertising respectively, they are each likely to have the ability to charge advertisers significantly more in providing search and display advertising services than would be the case if competition were effective. As advertisers have few other attractive alternatives for search advertising, Google is likely to be able to charge prices that are higher than it would if there was a risk it would lose a material level of advertising expenditure to rival platforms. The same is likely to be true of Facebook in respect of display advertising.

The auction based mechanisms used by Google and Facebook do not mean that they have no control over price. For example, Google is able to influence prices by its specification of (i) how many advertisements can appear alongside search results, which affects its supply of advertising, and (ii) how the various inputs to the auction algorithm—such as the bids, Google’s assessment of ad relevance and Google’s assessment of landing page quality—determine the outcome of the auction. Similarly, Facebook is able to influence price by its specification of how many advertisements appear on Facebook or Instagram.

It is difficult to estimate with precision whether the pricing for search or display advertising may be considered excessive. In some other industries, the ACCC is able to estimate what prices it considers would prevail if a market were more competitive. The ACCC does this as part of its regulatory function and in other contexts. In regard to digital advertising, there are a number of issues that make a similar analysis particularly challenging. The ACCC is not disclosing publicly its estimates for the prices charged by various digital platforms or the relativity of these prices.

Excessive prices charged to advertisers would be of concern to the ACCC, because a proportion of such prices are likely to be ultimately passed on to Australian consumers in the form of higher priced goods and services.

## Bargaining power

Bargaining power relates to the relative ability of parties in a negotiation to exert pressure and influence over each other. The ACCC considers that one effect of Google and Facebook’s substantial market power in the markets for search and display advertising respectively, is that some advertisers, particularly small businesses, appear unable to negotiate the terms on which they do business with Google and Facebook. This can be evident in the difficulties businesses may encounter when attempting to seek effective dispute resolution.

While Google and Facebook can provide many different benefits to small businesses in advertising and reaching current and prospective customers, there are also a number of challenges that small businesses face in dealings with Google and Facebook.

For these businesses:

- it can take considerable time and effort to receive an explanation or the rationale behind decisions which adversely affect their businesses
- decisions may appear to be arbitrary, inconsistent or lack detail
- it can be difficult to dispute decisions or seek remedies, and
- if they are blocked from using services, it may result in negative financial consequences.

Over the past two years, almost half of all complaints received by the ACCC about Google and Facebook from small businesses have been in relation to a lack of transparency in advertising services, including difficulties in disputes. This is likely because of two factors—the terms of service provided by

Google and Facebook, which may limit or restrict the remedies available to its customers, and the lack of an effective external dispute resolution mechanism available.

This is likely inconsistent with what might reasonably be expected of a competitive market where firms would consider the loss of sales to each other if they treated customers in such ways. As previously discussed in this report, Google and Facebook have substantial market power in the supply of search advertising services and display advertising services respectively. This is partly due to the reach of the two digital platforms and the data that they have, which enable both platforms to provide a more highly targeted advertising service than other suppliers.

Because of this market power, Google and Facebook arguably each have a reduced incentive to maintain their quality of service. For example, they may have less incentive to be transparent about pricing or putting in place effective dispute resolutions mechanisms as advertisers would likely continue to use their services despite these issues.

### ***Area for further analysis and assessment—A digital platforms ombudsman***

The ACCC is giving consideration to whether an ombudsman could be established to deal with complaints about digital platforms from consumers, advertisers, media companies, and other business users of digital platforms.

For example, an ombudsman may have the power to resolve some or all of the following:

- (a) disputes from businesses that consider digital platforms' representations about the performance or likely performance of purchased advertising to be inaccurate or unsubstantiated
- (b) disputes from consumers relating to scams and the removal of such content
- (c) disputes from media companies relating to the surfacing and ranking of news content
- (d) disputes from businesses relating to false or misleading advertising.

An ombudsman could investigate complaints that are unable to be resolved by the internal dispute resolution mechanisms of digital platforms and make decisions that are binding on digital platforms. Terms of reference could set out the types of disputes the ombudsman can consider, how the ombudsman will resolve disputes, and remedies the ombudsman can recommend or implement.

As noted below, the ACCC considers that an ombudsman could have a role in resolving issues about the removal of content associated with scams. The ACCC does not intend for any of the functions to duplicate those proposed elsewhere for a regulatory authority.

## **3.2.7 Leveraging market power through industry standards**

An issue that has been raised by stakeholders is that Google and Facebook may each be able to leverage their presence in search advertising, display advertising and the supply of intermediary services to obtain an advantage for themselves, by creating 'industry standards' that advertisers must adhere to. If these standards were to hinder or exclude competitors to Google and Facebook, then these 'industry standards' have the potential to lead to a lessening of competition.

Submissions have noted that technical specifications introduced by Google have the potential to benefit its own products and services to the detriment of competitors—the most prominent example raised has been the Coalition for Better Ads and the Better Ads Standards.<sup>174</sup>

The Coalition for Better Ads (the Coalition) is a group of associations and companies involved in online media that aims to improve consumers' experience with online advertising.<sup>175</sup> The Coalition is made up of 51 members, including Google and Facebook which are board members. There are 15 board members in addition to Google and Facebook representatives.

174 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 37; Nine, [Submission to the ACCC Issues Paper](#), April 2018, pp. 33–34; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 75–76.

175 Coalition for Better Ads, [About](#), accessed 9 November 2018.

In March 2017, the Coalition released its initial Better Ads Standards, which identifies ad experiences that fall beneath a threshold of consumer acceptability, developed from research which ranked various user experience factors in relation to digital ads.<sup>176</sup> Google then subsequently announced in December 2017 that it would be enforcing these standards on its Chrome browser, to commence in February 2018.<sup>177</sup> As a result, Google blocks all ads that do not comply with the Better Ads Standards from appearing on Chrome.

Submissions note that all of Google's advertising products already fall within the Better Ads Standards and, therefore, will not be affected by these changes. Stakeholders submit that these standards benefit Google's own advertising products, to the detriment of advertisers, by increasing the reach and apparent effectiveness of Google's ads relative to that of other advertisers. Stakeholders also submit that any ad standards should be set independently from the major suppliers of ad tech services.<sup>178</sup>

As a result of these Better Ads Standards, Google's ads are shown, while advertising inventory by other suppliers that do not comply with these standards are not.

As a result, standards set by the Coalition for Better Ads and Google's subsequent conduct would have a significant impact on competing advertisers and their advertising revenues. One stakeholder, for example, has noted that it was informed that certain advertising agencies will not purchase video advertising that auto-plays with sound off (auto-play videos with sound on are one of the ad types deemed to be bad for user experience and is therefore blocked).<sup>179</sup>

Whether this has had an impact on competition in the digital advertising markets is unclear.

The ACCC is continuing to consider this issue. However, the ACCC has not received evidence that these standards have had a material adverse impact on advertisers or media website/app owners. The ACCC also notes the potential consumer benefits which may be associated with the introduction of the Better Ads Standards.

The ACCC remains open to further submissions.

### 3.2.8 Advertisements containing false representations

#### Key findings

- Advertisements containing false representations, such as fake claims concerning celebrities, are a problem for consumers. Google and Facebook could do more to address this issue. The ACCC is giving consideration to whether an ombudsman could have some role in resolving these issues.

The ACCC is aware of issues about advertisements containing false representations being displayed on Google and Facebook. For example, Channel Nine complains that ads including fake endorsements from celebrities have become widespread in 2018.

These often appear on social media or on seemingly legitimate, trustworthy websites. These fake ads can contain sensationalised quotes and doctored or out-of-context images of celebrities, and often include the promotion of products such as skin care creams, weight loss pills, or investment schemes. Users that click on these ads are then sent to websites where they are encouraged to sign up to a service or purchase a product resulting in potential financial loss for the user. As at 31 October 2018, reports relating to fake celebrity ads to ACCC's Scamwatch total 233 and financial losses total more than \$148 000.<sup>180</sup>

Nine provided the ACCC with examples of fake celebrity ads that appeared on Google Display Network. Nine says that at the time, Google advised it was unable to stop the offending ads appearing. However, it says Google has since taken steps to attempt to remedy the appearance of the advertisements

<sup>176</sup> Coalition for Better Ads, [The Initial Better Ads Standards](#), accessed 15 November 2018.

<sup>177</sup> Google, [An update on Better Ads](#), accessed 9 November 2018.

<sup>178</sup> Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 37.

<sup>179</sup> Information provided to the ACCC.

<sup>180</sup> Internal ACCC Scam Watch data.

on its display network. Nine says that while the steps taken have curtailed the appearance of false advertisements, Google was unable to give it certainty that the ads will not reappear in the future.<sup>181</sup>

Nine has publicly raised similar issues about fake celebrity ads appearing on Facebook, claiming that there had been little response from Facebook.<sup>182</sup>

Often these ads are created by entities designed to drive traffic. Sometimes this traffic is not sent to an original product site but instead resold for a commission which becomes a source of revenue for the entities creating bad ads. As mentioned above, often these landing websites will encourage users to sign up for some product or service.

The ACCC considers this conduct to be a problem for consumer welfare and is also a concern for news media businesses as their websites may serve these fake ads if the website is part of Google Display Network or Facebook Audience Network. The ACCC considers that Google and Facebook could do more to address this issue.

The ACCC considers that an ombudsman could have a role in resolving these types of issues, by having the ability to make binding decisions requiring Google and Facebook to remove content associated with scams.

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<sup>181</sup> Information provided to the ACCC.

<sup>182</sup> J Duke, [Nine slams Facebook over ads impersonating TV stars](#), Sydney Morning Herald, 15 August 2018, accessed 9 November 2018.

# Chapter 4: Digital platforms and news media businesses

## Key findings

- Both media businesses and digital platforms are evolving in the digital economy, with shifting functions, revenue streams, and business models.
- Digital platforms are the gateways to online news media for many consumers and provide news referral services for media companies in the form of: media aggregation services; online search services; and social media services.
- Media companies have raised concerns regarding Google and Facebook's market power in the supply of news referral services to news publishers including: a lack of algorithmic transparency; the appropriation of the value of news publishers' content by digital platforms; restrictive proprietary formats; a lack of access to user data; a lack of recognition for original content; and a significant bargaining power imbalance between digital platforms and media companies.
- Google and Facebook do not provide sufficient notice about changes to algorithms that affect referral traffic.
- There is a bargaining power imbalance between large digital platforms and news publishers and the ACCC is further exploring the extent of this imbalance.
- The ACCC is further exploring the issues of how restrictive proprietary formats affect news publishers and how news publishers should be recognised for original content on digital platforms.
- The ACCC does not consider that there is sufficient evidence to show that digital platforms' use of snippets alone has reduced referral traffic or inhibited media companies' ability to compete more broadly in the supply of news media content, or that digital platforms unreasonably withhold user data from media companies (though the volume and quality of user data obtained by digital platforms has likely contributed to their market power in advertising markets).
- Digital platforms actively participate in the online news ecosystem by performing a wide range of functions other than news referral services, some of which overlap with the functions of media businesses. This means that digital platforms are considerably more than mere distributors or pure intermediaries in the supply of news and journalistic content in Australia.
- Despite digital platforms increasingly performing similar functions to media businesses, virtually no media regulation applies to digital platforms in comparison with some other media businesses. The regulation of media sectors supplying news and journalistic content varies by sector and different regulatory models and obligations apply for TV, radio, print and online publishers.
- Digitalisation and the increase in online sources of news and media content have highlighted the inconsistencies in the sector-specific approach to media regulation. This results in regulatory disparity that provides digital platforms with an unfair advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions.
- Digital platforms' take-down processes do not always provide for the timely take-down of copyright infringing content, including content belonging to Australian news media businesses. Rights holders face considerable challenges in enforcing copyright against digital platforms because of the cost and delay involved in bringing court proceedings against overseas-based defendants hosting content outside Australia. These enforcement difficulties create detriments for rights holders because they lower the incentives for digital platforms to respond promptly to take-down requests and erode the value of their copyrighted content.



The Terms of Reference direct the ACCC to examine:

- the extent to which platform service providers are exercising market power in commercial dealings with creators of journalistic content
- the impact of platform service providers on media and advertising markets, and
- the impact of information asymmetry between digital platforms, advertisers and consumers and the effect of competition in media markets.

This chapter covers:

- the functions of media and digital platforms in a shifting digital landscape
- the importance of news referral services
- the impact of regulatory imbalance, and
- practical difficulties in copyright protection.

## 4.1 News publication and broadcasting in an online world

### Key findings

- Both media businesses and digital platforms are evolving in the digital economy, with shifting functions, revenue streams, and business models.

### 4.1.1 The evolving activities and functions of media businesses

#### Traditional publishing and broadcasting functions

Media businesses create, curate, edit and promote a wide range of media content both online and offline, including news and journalistic content. Traditionally, print news publishers performed a range of functions that can be broadly divided into content creation, manufacturing, and distribution<sup>183</sup>:

- content creation refers to the creation of news and journalistic content based on research, investigation and analysis of current events by journalists, photographers and news agencies, plus a range of copy-editing, editing, rearranging and graphics work
- manufacturing refers broadly to the physical printing process, and
- distribution refers to the circulation of newspapers by wholesalers and retailers, with newspapers either being sold at individual sales points or via subscription.

The functions in a traditional newspaper value chain are depicted in figure 4.1.

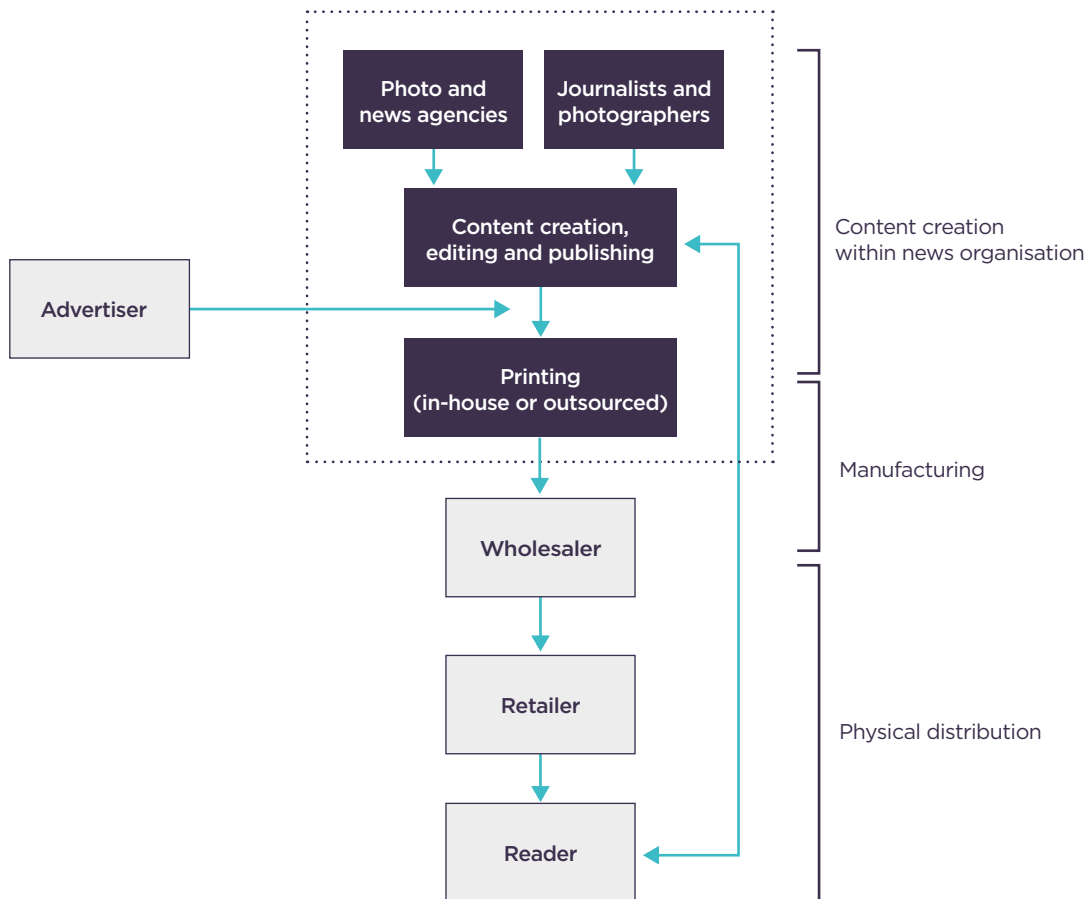
Other forms of media, such as television and radio broadcasting, also involve content creation. However, the manufacturing and distribution process is largely combined with broadcast and transmission. The greater regulation of broadcasting over other media sectors was historically justified on the basis of the airwaves being a public resource, the scarcity of spectrum, and the distinctive power of broadcast media to influence public attitudes. However, the continuing force of these rationales in the current media environment have been called into question.<sup>184</sup>

183 OECD, 'News in the Internet Age' (2010), pp. 56–57.

184 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 46.



**Figure 4.1: Traditional newspaper value chain**



Source: Extracted from figure 2.1 'Traditional newspaper value chain' in OECD, 'News in the Internet Age' (2010), p. 56.

### Adaptation to the online news ecosystem

Importantly, rapid technological advancements and digitalisation are reshaping the functions of news media businesses in both incremental and transformative ways. The incremental changes include the development of new software, standards and graphic tools for content creation and new digital print processes<sup>185</sup>, as well as advancements in television production and the conversion from analogue to digital television.<sup>186</sup>

The more transformative changes involve the emergence of new online news ecosystems characterised by shifting functions, revenue streams, and business models.<sup>187</sup> Technological innovations have enabled these online news ecosystems to remove or streamline key steps in the traditional value chain above, such as printing and distributing hard-copy newspapers or the transmission of news content on expensive and scarce broadcasting frequencies.<sup>188</sup>

A stylised illustration of the online news value network is shown at figure 4.2.

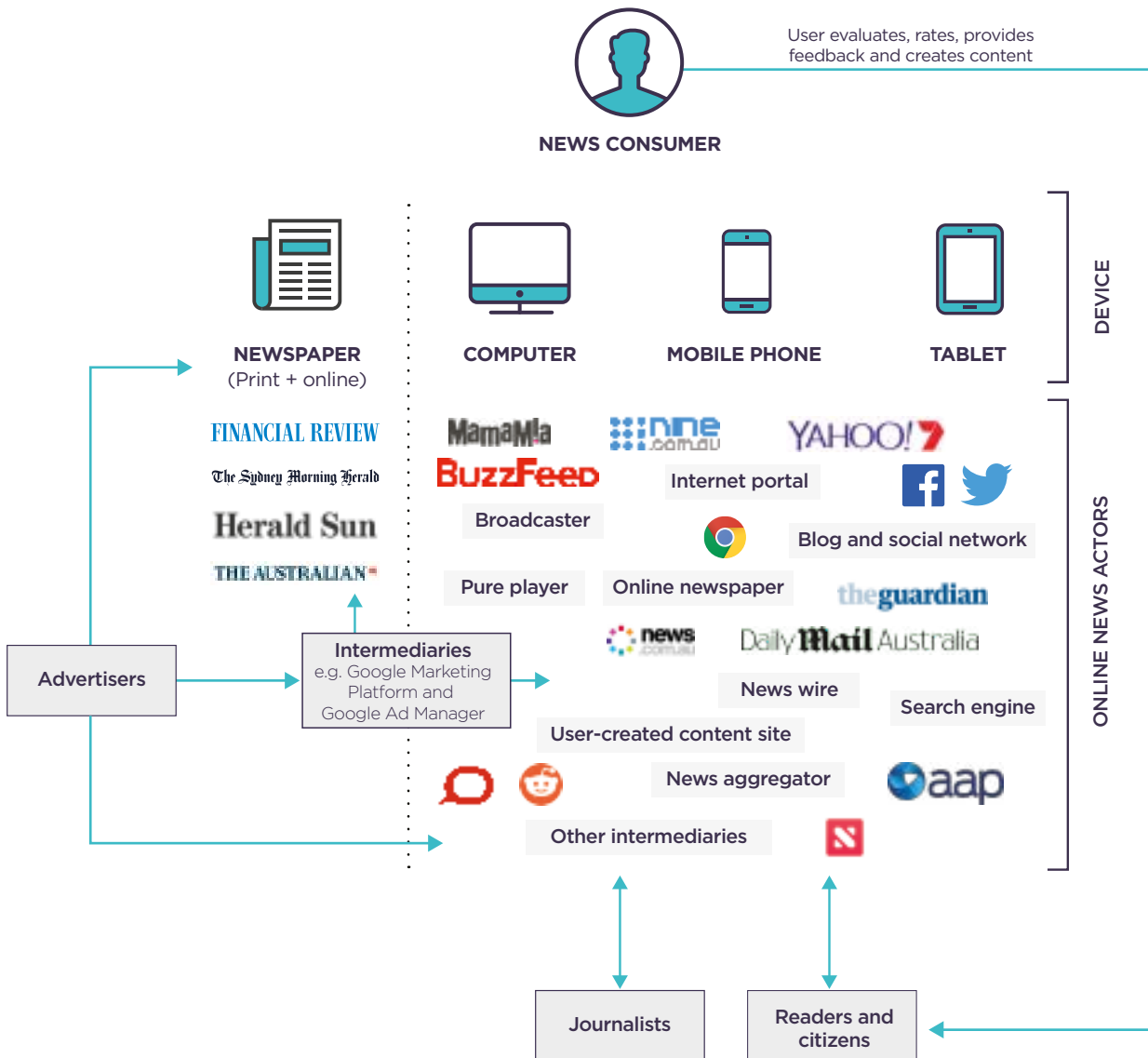
185 OECD, 'News in the Internet Age' (2010), p. 57.

186 OECD, 'Communications Outlook' (2013), p. 178.

187 OECD, 'News in the Internet Age' (2010), p. 86.

188 For further discussion on the impact of technological changes on established media business models, see, e.g., OECD, 'The Development and Diffusion of Digital Content' (2011), pp. 21-26.

Figure 4.2: Online news value network



Source: Extracted from figure 3.7 'A stylised online news value network' from OECD, 'News in the Internet Age' (2010), p. 87. Figure has been updated and adjusted as relevant to the Australian context and matters of relevance to the Inquiry.

The traditional functions of media businesses in supplying news and journalistic content—namely creating, manufacturing, and distributing news—are evolving to fit within these new online ecosystems. Some of the traditional functions are obsolete in the online ecosystem (e.g. physical printing or distribution), whilst new functions are also created (e.g. digital rights management, content aggregation, content hosting, etc.).<sup>189</sup>

The creation of news content online has also become a more immediate, interactive and multi-directional process, where ever-increasing sources of information are continually monitored, distilled, and updated by a network of participants and presented to widespread audiences in a rich variety of formats.<sup>190</sup>

#### 4.1.2 The varied functions of digital platforms

As set out in chapter 2, consumers are increasingly growing reliant on digital platforms as a channel for accessing news, with a large proportion of traffic to news media websites attributable to digital platforms (and in particular, Google and Facebook). That is, digital platforms effectively provide a news

<sup>189</sup> OECD, 'News in the Internet Age' (2010), p. 86.

<sup>190</sup> OECD, 'News in the Internet Age' (2010), chapter 3.

referral service for media businesses. This section discusses digital platforms' supply of news referral services, consumer access to news via digital platforms, and commercial arrangements between specified digital platforms and news publishers in Australia.

## Digital platforms' supply of news referral services

The supply of news referral services by digital platforms to news publishers primarily takes the form of digital platforms:

- providing hyperlinks to news and journalistic content to consumers, and
- referring consumers to the source content of media businesses, which are generally websites or apps owned and operated by the media business.

By providing news referral services to media businesses, digital platforms effectively act as a source of referral traffic for media businesses. News publishers then monetise this referral traffic by selling advertising opportunities on their websites and apps, and (for some news publishers) converting a proportion of referral traffic into subscribers. Some news publishers are purely reliant on advertising services to monetise their news content and offering that content at zero cost, while others use a mix of both. The different news publication business models are discussed further at chapter 6.

Digital platforms do not impose a monetary charge on news publishers for supplying these news referral services, but derive benefits from their supply of news referral services. The more relevant the search results of news items digital platforms provide, the higher the value to consumers. Including summaries of relevant content in search results, for example, is a higher quality service. This then attracts a greater number of consumers to the platform, in turn enhancing the attractiveness of the platform to advertisers and enabling digital platforms to monetise their supply of news referral services. Additionally, digital platforms may monetise this service by taking a portion of subscription revenue, where they act as an intermediary between the platform service provider and a news publisher that offers subscription content.

Further information about digital platforms' supply of news referral services, including the different types of news referral services provided by digital platforms, is at section 4.2.

## Digital platforms as a gateway to news

Recent research conducted by the News and Media Research Centre of the University of Canberra<sup>191</sup> shows that, of the people surveyed who access news online, 38 per cent expressed preferences for accessing news through social media, 37 per cent through going directly to news websites, 29 per cent search for the news publishers' brand<sup>192</sup>, and 26 per cent search for the news story.<sup>193</sup> These figures are not mutually exclusive, with users often having more than one preference for how they access news. Google and Facebook are the two primary gateways through which consumers in Australia access news media on the internet.

This is consistent with the results of the ACCC's commissioned consumer research with Roy Morgan Research (ACCC consumer survey).<sup>194</sup> The ACCC consumer survey surveyed 4308 users of digital platforms in Australia (being people who said they had used a digital platform in the last three months). The relevant question asked how users accessed news online, noting that users were able to select more than one option. The results of the ACCC consumer survey showed that direct visits to news websites or apps is the most popular way of accessing news at 55 per cent of respondents, followed by social media at 48 per cent, searching for a search term on a search engine at 47 per cent and searching

191 S Park, C Fisher, G Fuller and J Y Lee, 'Digital news report: Australia 2018', News and Media Research Centre, University of Canberra (2018) (Digital News Report). The Digital News Report surveyed 2,026 internet users (excluding non-news users), by way of an online survey. The Digital News Report is part of a study commissioned by the Reuters Institute for the Study of Journalism at the University of Oxford to understand how news is being consumed in 37 countries. Research was conducted by YouGov using an online questionnaire at the end of January/beginning of February 2018.

192 For example, a consumer might search for 'The Guardian Australia' if they cannot remember the direct web link to the Guardian website.

193 Digital News Report, p. 57.

194 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018.

for the name of a news publication at 35 per cent.<sup>195</sup> Further information about the ACCC consumer survey is set out in chapter 5.

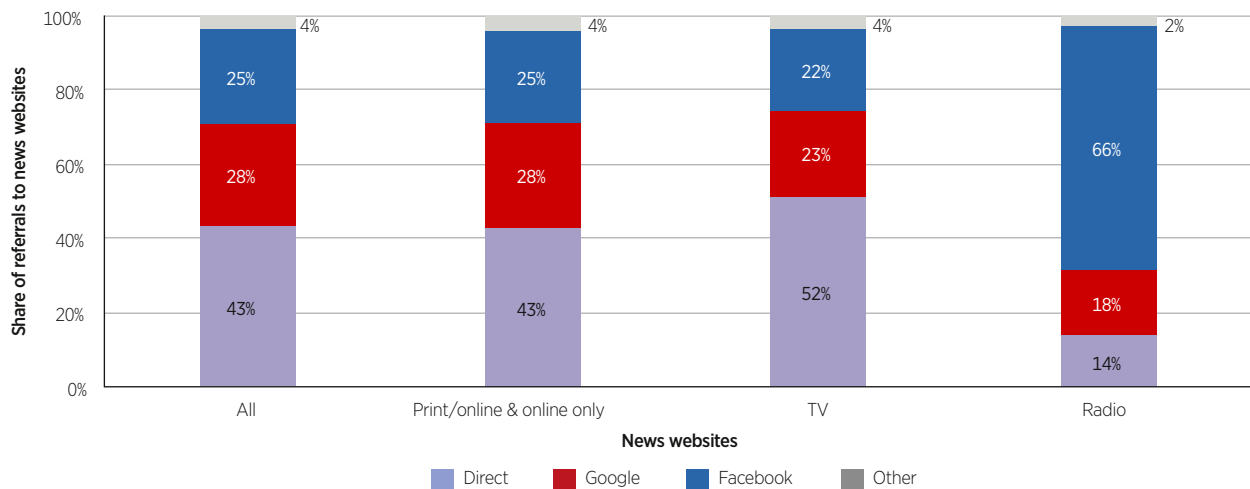
Media businesses have also made submissions to this Inquiry regarding the importance of Facebook and Google in directing traffic to their websites. For example:

- Seven West Media indicates that on average in the last 12 months, around a third of traffic to its various digital properties came from Facebook, a third from Google (via paid and organic search) and the remainder from other sources.<sup>196</sup>
- The Media, Entertainment and Arts Alliance (MEAA) cites the following statistics: in the US, Google and Facebook collectively contribute about 70 per cent of publishers' referral traffic; and Facebook news feed is said to represent 43 per cent of referrals for news and media sites.<sup>197</sup>
- Nine submits that 9news.com.au obtains approximately 30 per cent of its referral traffic from Facebook's news feed and 10 per cent from Google.<sup>198</sup>

The ACCC notes that the extent of referral traffic from digital platforms to a news publisher varies significantly, depending on the relevant news publisher. Some media businesses are significantly reliant on referral traffic, while some smaller media businesses are establishing other means for reaching consumers. The extent of referral traffic also appears to vary, depending on the channel through which a news publisher supplies news.

For example, figure 4.3 sets out the proportion of referral traffic and direct visits print or online news publishers, radio news broadcasters, and television news broadcasters receive to their digital publications. As shown in the figure, radio news publishers derive a significantly larger proportion of referrals from Facebook, compared to other types of news publishers (although, as a proportion of the overall level of online news consumed, online radio sites receive a relatively small volume of traffic).

**Figure 4.3: Breakdown of referral traffic and direct visits to media websites by type of media in 2017**



Source: ACCC analysis based on stakeholder data.

Note: These numbers relate to referrals and direct visits to news companies' websites only. They do not include referrals and direct visits to mobile phone based news applications.

Figure 4.3 suggests that news media businesses are heavily reliant on digital platforms for referrals to their websites. This has been supported by submissions to the ACCC, as well as information obtained by the ACCC through the use of its compulsory information gathering powers.

Notwithstanding the importance of these referrals, and the resulting reliance of news media businesses on digital platforms for the volume of traffic they receive, it is important to keep a number of things in mind when interpreting figure 4.3.

<sup>195</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 33.

<sup>196</sup> Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 24.

<sup>197</sup> MEAA, [Submission to the ACCC Issues Paper](#), April 2018 p. 3.

<sup>198</sup> Information provided to the ACCC.

First, the figure does not present the proportion of *individual* users who access news through each channel. Where users access news through multiple channels, this may act to mitigate the effective control that digital platforms have over the type of news content users view.

Second, digital platforms are likely to have more effective control over some of these referrals than others. Referrals for news brand searches (e.g. 'The Australian') rather than news content searches (e.g. 'Prime Minister') provide the digital platform with less opportunity to control what users click. This is similar when referrals result from news brands that users have 'liked' or 'followed', as a result of their own preferences.

Third, referral traffic from digital platforms may be different in its nature to visits directly to websites. Users who visit a site directly may spend more time on a news website, or be more likely to be a subscriber, or to subscribe. Some referral traffic may also represent traffic that is additional to, rather than a substitute for, direct visits to news websites.

Regardless of the extent of these effects, it remains clear that referrals from digital platforms form an important part of news publishers' businesses. This likely results from a combination of the role of digital platforms as online intermediaries for news content (discussed further below) with their media-like functions in selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display to their users. That is, the significance of their media-like functions is compounded by their importance as a source of referral traffic for media businesses

The ACCC welcomes further submissions from interested parties on any of the issues discussed above.

## Commercial arrangements between digital platforms and news publishers

In addition to providing consumers with access to news via another channel, digital platforms also present new partnership opportunities for traditional news publishers. In particular, Google has launched a number of initiatives and projects to 'help journalism thrive in the digital age'.<sup>199</sup> These include:

- Google News Lab—Google recently launched in Australia its News Lab, which includes a collaboration between Google, the Walkley Foundation and the ABC, and offers two fellowships to work at ABC News.<sup>200</sup>
- Subscribe with Google—Subscribe with Google is a new service that allows users to buy subscriptions, using their Google account, on participating news websites. This allows users to 'Sign in with Google' to access the publisher's products, with the payments processed through Google. Fairfax is a launch partner.<sup>201</sup>

Fairfax also has an advertising partnership with Google. It has been reported that this arrangement in effect gives Google control of booking digital advertisements on Fairfax's news websites (such as theage.com.au and afr.com) through its automated system.<sup>202</sup> Fairfax submits that this partnership:

*...aims to create opportunities for advertisers that neither party could deliver alone...the arrangements free up Fairfax staff to focus on our most valuable commercial relationships and bespoke creative solutions across digital display, commercial content and print.*<sup>203</sup>

Accordingly, it is clear that digital platforms are also providing services to, and working with, news publishers outside of news referral services. The ACCC would be interested in any other commercial arrangements between digital platforms and news publishers, existing or in development.

199 P Schindler, Chief Business Officer, [The Google News Initiative: Building a stronger future for news](#), 20 March 2018, accessed 9 November 2018.

200 P Wallbank, [Google, ABC News and Walkley Foundation expand journalism fellowship](#), Mumbrella, 25 October 2017, accessed 9 November 2018.

201 J Albrecht, Project Management Director, Subscribe with Google, [Introducing Subscribe with Google](#), 20 March 2018, accessed 9 November 2018.

202 J Duke, [Google, Fairfax joins forces in advertising partnership](#), Sydney Morning Herald, 12 December 2017, accessed 9 November 2018.

203 Fairfax, [Submission to the ACCC Issues paper](#), April 2018, p. 8.

## 4.2 The supply of news referral services by digital platforms

### Key finding

- Digital platforms are the gateways to online news media for many consumers and provide news referral services for media businesses in the form of: media aggregation services; online search services; and social media services.

#### 4.2.1 What are news referral services?

News referral services can take the form of media aggregation services, online search services or social media services. These are explained below.

#### 4.2.2 Media aggregation services

A digital platform that supplies a media aggregation service collects and presents available news content across the internet. Most providers of media aggregation services have desktop and mobile options available to assist with accessibility and improve readability for users.

Media aggregation services in Australia include Google News, Apple News, YouTube News, News360 and Flipboard. News publishers may also be considered media aggregation services, although the news content is limited to news content produced by the relevant media business. For consumers that prefer a variety of news sources, news publishers' websites and apps may not represent a strong competitive constraint.

According to recent survey data by Nielsen, Apple News is the most used news aggregator in Australia.<sup>204</sup> Apple News aggregates and personalises news content for users, using both editorial and algorithmic elements to determine what and how news content is presented to consumers. Apple has paid agreements with approximately 50 Australian publishers who supply content for Apple News.<sup>205</sup>

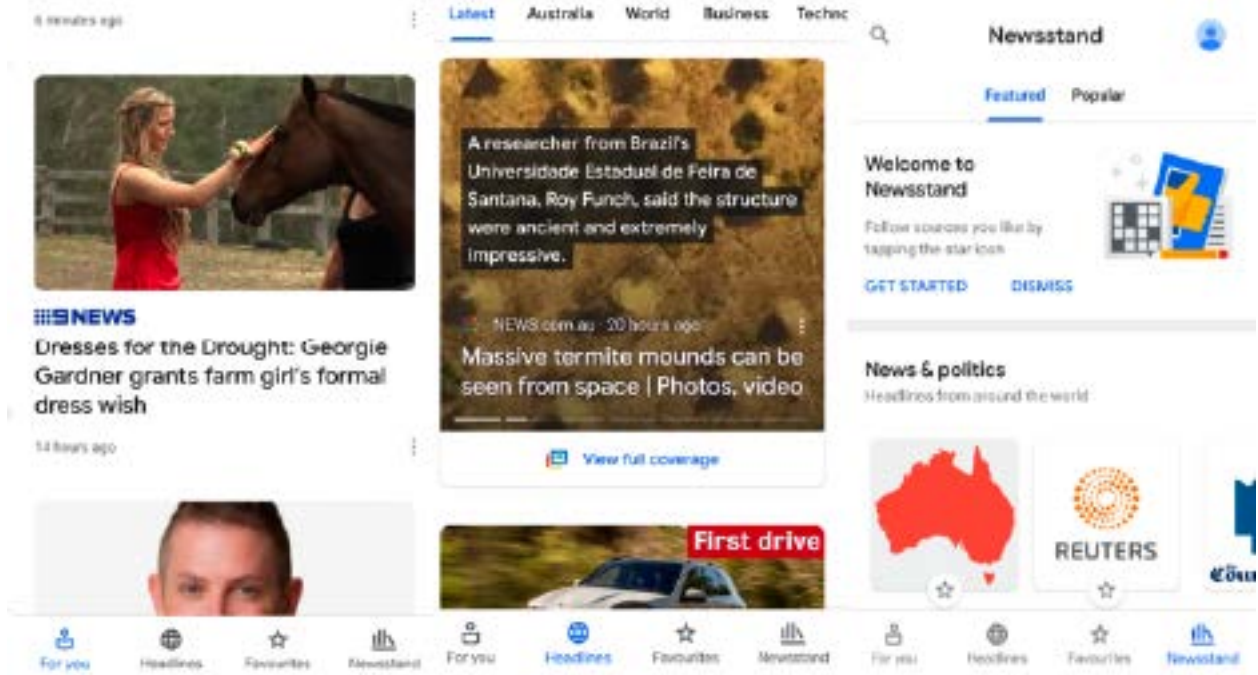
Examples of Google News and Apple News available on mobile devices are set out below.

<sup>204</sup> Nielsen Audience Data, August 2018.

<sup>205</sup> Information provided to the ACCC.

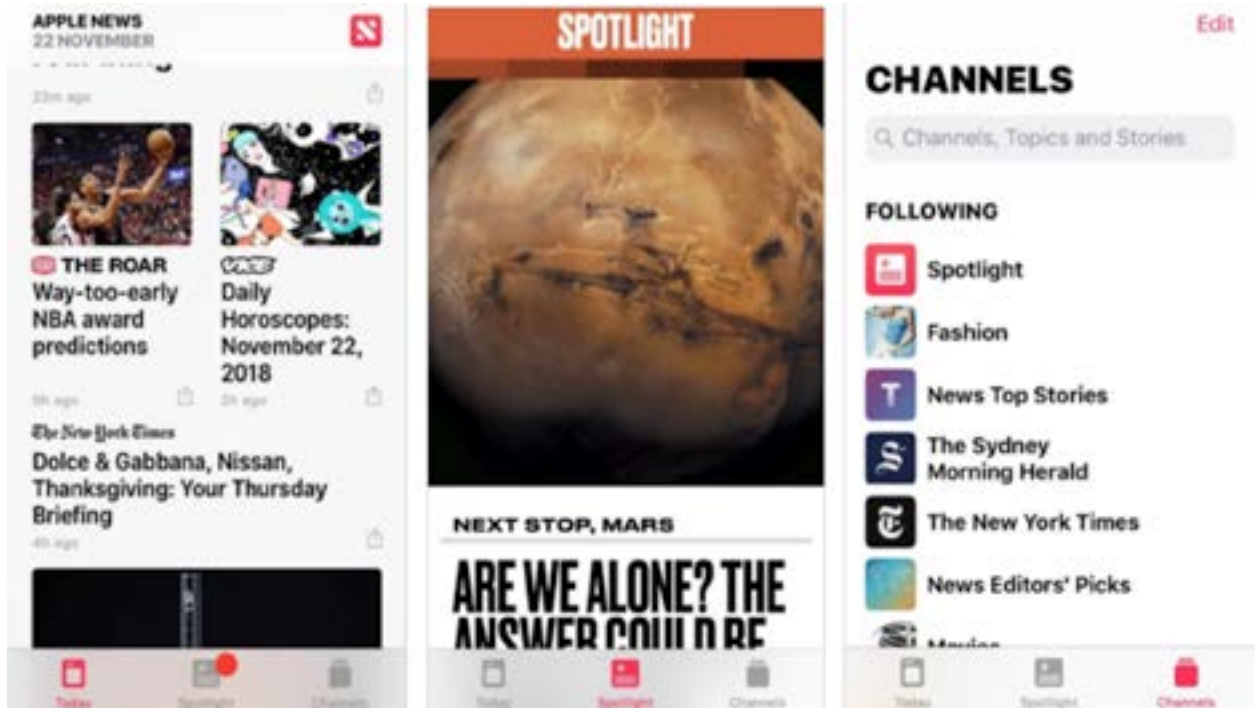


Figure 4.4: Example of Google News' media aggregation service



Source: Google News app, accessed 22 November 2018.

Figure 4.5: Example of Apple News' media aggregation service



Source: Apple News app, accessed 22 November 2018.

A number of submissions to the Inquiry discuss Google News. Only a small number of users in Australia use this service compared to Apple News. Recent Nielsen survey data estimates the unique monthly audience of Apple News as five million users, compared to 618 000 users for Google News.<sup>206</sup> Based on the same data, the annual growth in unique audience numbers from September 2017 to September 2018 for Apple News was more than 40 per cent.<sup>207</sup>

The News and Media Research Centre of the University of Canberra reports that, along with the increase in mobile device use, media aggregation services have become a major method of accessing news, with about 79 per cent of news consumers having used a news aggregation app, 34 per cent having used a news aggregation app in the last day and 18 per cent having used a news aggregation app in the last week at the time the survey was conducted.<sup>208</sup>

The growth in users of Apple News is likely due to the fact that users of Apple iPhones receive and use Apple News as part of the iPhone offering, with Apple News pre-installed on all iOS devices.

Google also offers a 'news' tab in Google Search, which aggregates news content relevant to the search term entered by a user. Only a very small percentage of Google Search users in Australia access the news tab.<sup>209</sup>

### 4.2.3 Online search services

Another method for consumers to access news online is through online search services. Consumers use online search services to access news content either by entering keywords relevant to the news story, or the brand or name of their chosen news supplier, into a search engine. The search engine then provides hyperlinks and at times, snippets of the relevant news content and/or relevant images, using its algorithm to rank the results. As noted above, search services have become an increasingly popular method for consumers to access news content. As set out in chapter 2, Google Search has a dominant position in the provision of search services in Australia, with a 94 per cent market share.<sup>210</sup> The products and services search engines supply that are specific to news referral services are set out below.

#### Google's products

When a user types a search term in Google Search, Google produces a set of hyperlinks that its algorithm considers to be relevant to the given search term. These are known as organic search results.

When a user types a search term in Google Search that Google considers to have a 'news intent' (i.e. relevant to a current news item), Google Search may also present the user with a 'Top Stories' carousel on its search engine results page, in addition to the organic search results. Top Stories is a type of specialised result (known as Universal Search results) designed to respond to user queries with news intent and consists of a grouping of news results that Google crawls and indexes in a separate index. Google employs specialised algorithms to rank news results within Top Stories, determine whether to display Top Stories within Google's results page, and where to place it when it is displayed. The stronger the user intent for news and the higher the quality of the results, the higher on the page Top Stories will be displayed. Conversely, if the user intent is not clear or the quality of the results is not as high, then Top Stories will appear lower on the page or not at all.<sup>211</sup>

Google's Top Stories carousel is a container that includes articles, live blogs and videos on breaking news stories and displays sets of related results horizontally with images. Top Stories can contain news articles from different publishers, or from one news publisher. News publishers have the option of using structured data to mark-up content on their web pages, which makes the web page eligible for inclusion in Google's Top Stories carousel. An example of a Top Stories carousel on a desktop is set out below:

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206 Nielsen Audience Data, August 2018.

207 Nielsen Audience Data, September 2017 and September 2018.

208 Digital News Report, p. 56.

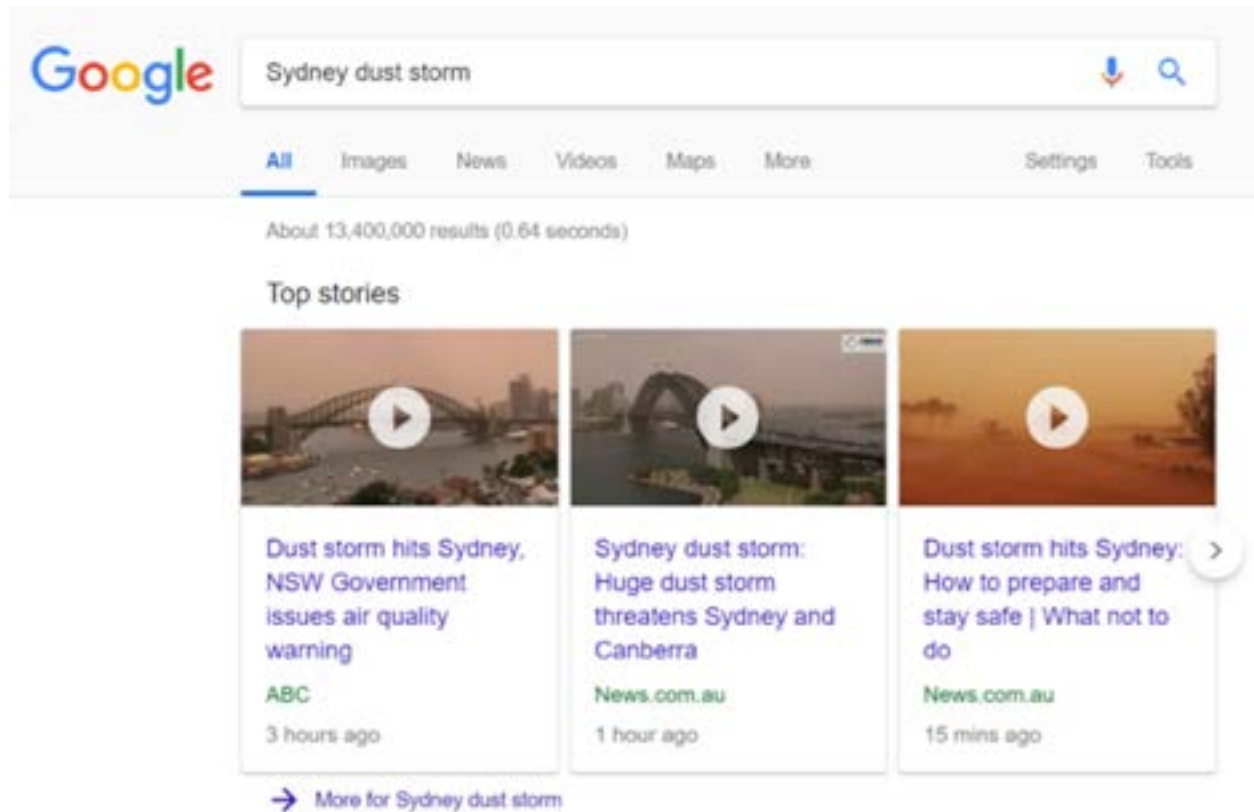
209 Information provided to the ACCC.

210 ACCC analysis, based on information provided by Statcounter, [Search Engine Market Share Worldwide](#), accessed 12 November 2018.

211 Information provided to the ACCC.



Figure 4.6: Example of Google's Top Stories carousel on a desktop device

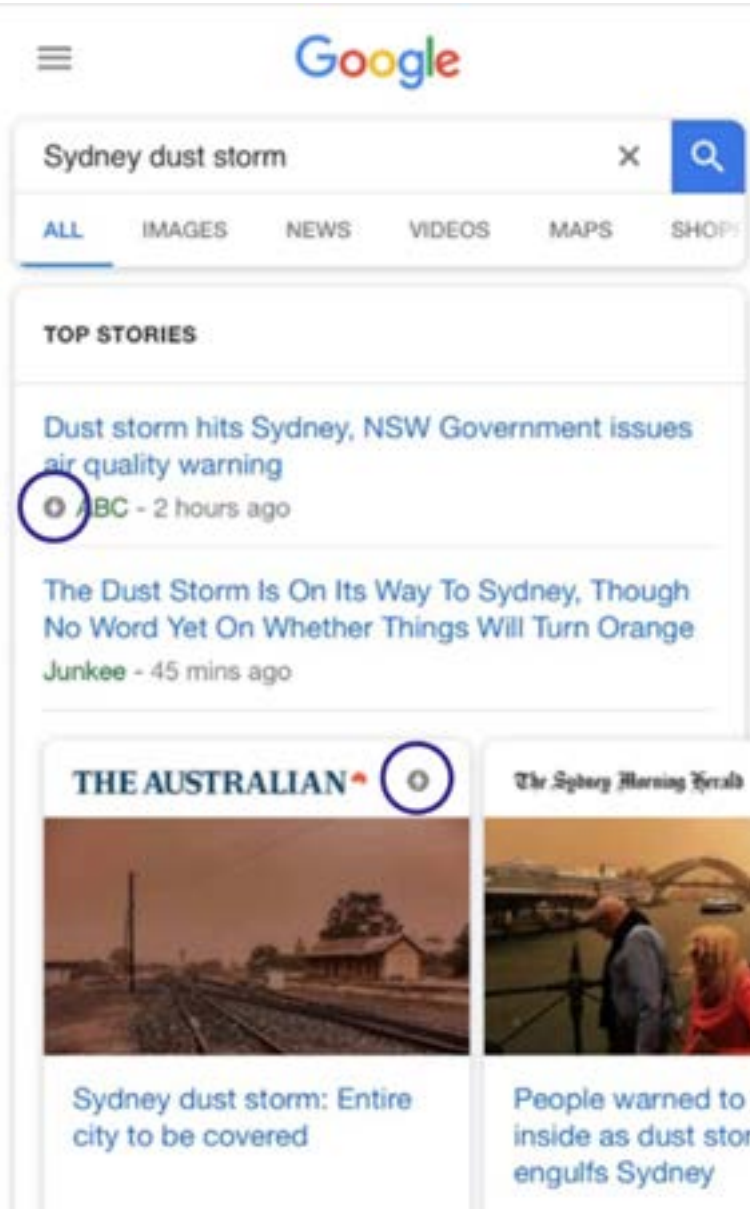


Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

On mobile devices, Google's Top Stories carousel displays only stories published as Accelerated Mobile Pages (AMP), which provides consumers with the ability to instantly swipe between full pages of content. AMP is an open-source publishing technology that allows mobile pages to be loaded more quickly by uploading them onto the Google cache. It has been reported that AMP pages 'typically load four times faster and use ten times less data than non-AMP pages'.<sup>212</sup> An example of a Top Stories carousel on a mobile device is set out below. The lightning bolt symbol (next to the news publisher's name) indicates stories that are in AMP format; these are highlighted by the purple circles in the example below.

<sup>212</sup> C Crivallaro, [Accelerated Mobile Pages \(AMP\): Why They Are Important to Your Website](#), Rawfish, 20 July 2017, accessed 12 November 2018.

Figure 4.7: Example of Google's Top Stories carousel on a mobile device



Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

In the results for Google Search, which is one of the primary ways in which consumers access news, traditional Australian news publishers' stories appear prominently in the organic search results.

#### **Box 4.1: Sources of news presented in news searches on Google Search**

From 15–26 October 2018, the ACCC ran searches on three separate phrases on Google Search: 'Banking Royal Commission', 'AFL' and 'Scott Morrison' and recorded the news publishers that appeared on Google's Top Stories carousel and the first page of the organic search results.<sup>213</sup> While this is not representative of all news searches, it provides an insight into the types of news sources that are surfaced to Australian users using Google Search.

Appendix A shows the results of this experiment. There were a broad range of news publishers represented in the Top Stories carousel and organic search results for the three search terms examined, although some news publishers were featured much more frequently than others. Overall, the ABC, *The Sydney Morning Herald*, *The Guardian* and *The Australian Financial Review* were consistently featured in the Top Stories carousel and the first page of organic search results, for search terms unrelated to sport. For the sport-related search term, Fox Sports featured heavily on the Top Stories carousel and organic search results.

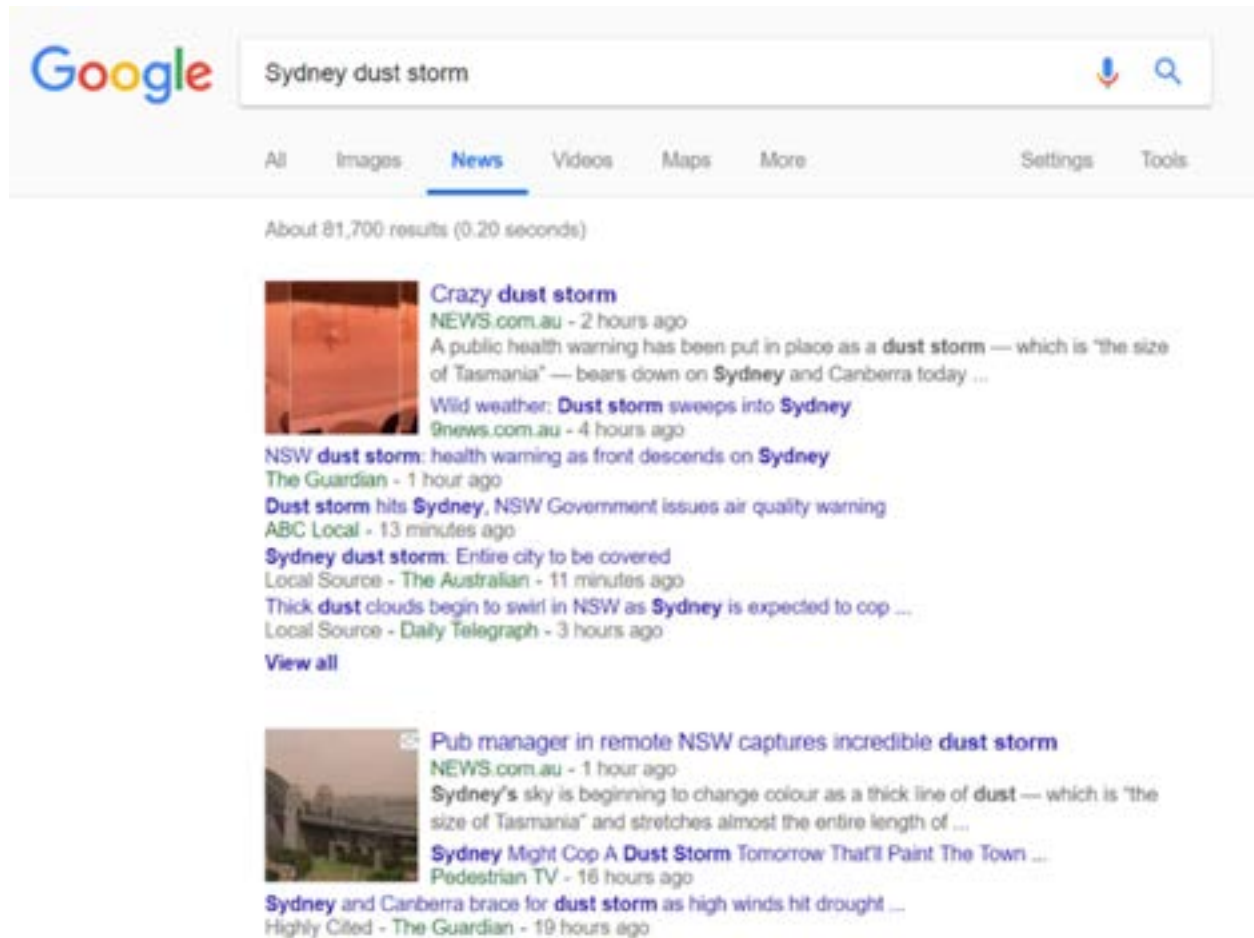
In this respect, it is clear that the search term influences the frequency with which news publishers are featured on the Top Stories carousel or organic search results. For instance, *The Australian Financial Review* was featured more frequently in organic search results for the 'Banking Royal Commission' search term, compared to 'Scott Morrison'. The spread with which *The Guardian*, News.com.au, *The Australian* and *The Sydney Morning Herald* (a mix of News Corp, Fairfax and other independent publications) were featured in the Top Stories carousel in response to the 'Scott Morrison' search term was relatively even, compared to the 'Banking Royal Commission' search term, where the ABC appeared more than half the time.

Google also provides a news tab, which groups news articles relevant to the search query. An example of Google's news tab is set out below.

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<sup>213</sup> The searches were conducted in Sydney, using the 'Guest' window function of Google Chrome.

Figure 4.8: Example of Google Search's news tab



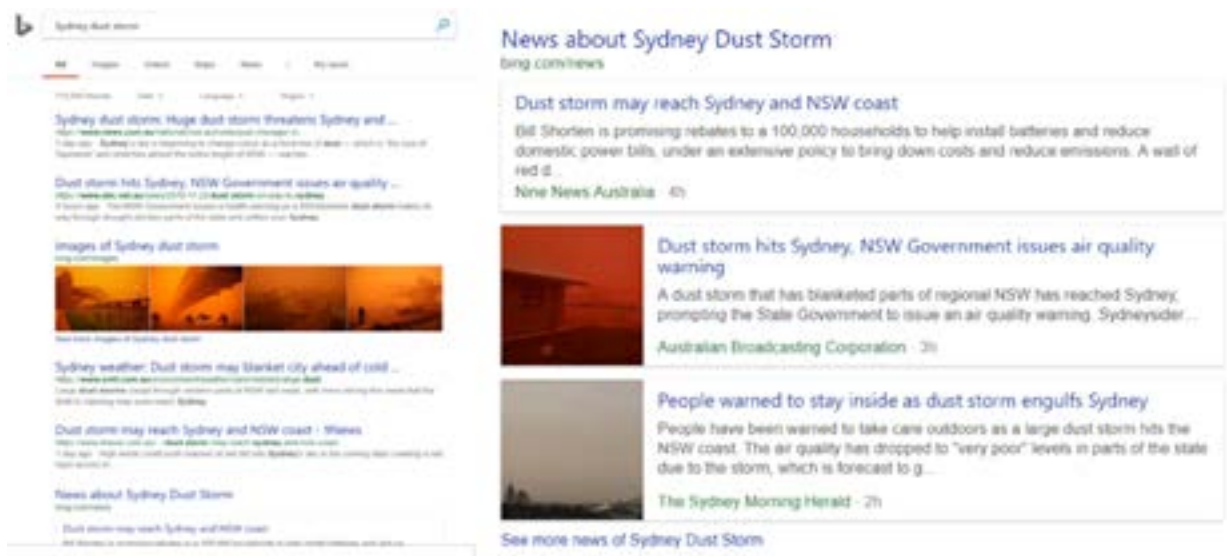
Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

## Bing's and DuckDuckGo's products

Similar to Google, Bing and DuckDuckGo both offer news tabs in their search engines, which provides news content relevant to a search query.

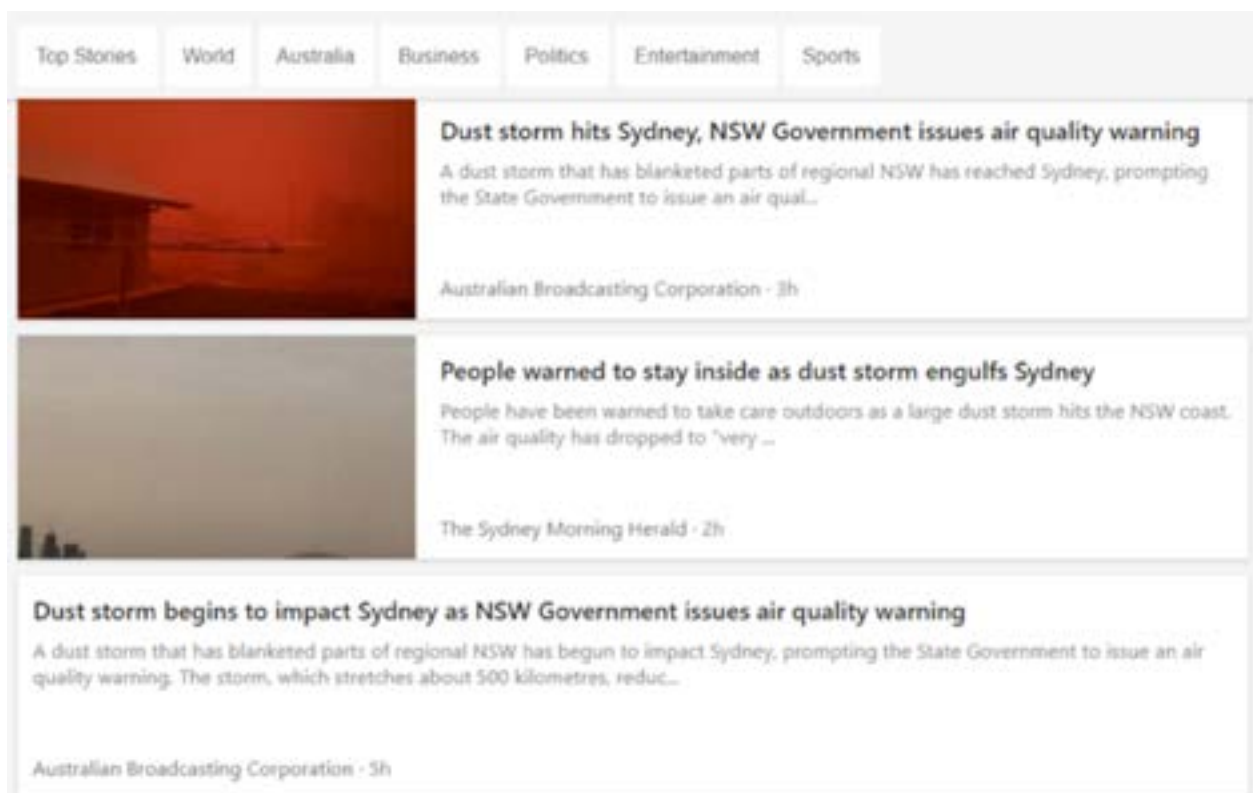
On its news tab, Bing provides users with the ability to select news categories, sort news items in terms of 'best match' (in relation to the search query) or 'most recent', and filter news based on sources. In the organic search results, Bing provides a product similar to Google's Top Stories carousel, highlighting news content relevant to the search query in boxes separate to the organic search results. Examples of Bing's organic search results and news tab are set out below.

Figure 4.9(a): Examples of Bing's organic search results and highlighted news items featured in Bing's organic search results



Source: Bing, Results for 'Sydney dust storm', accessed 22 November 2018.

Figure 4.9(b): Example of Bing's news tab



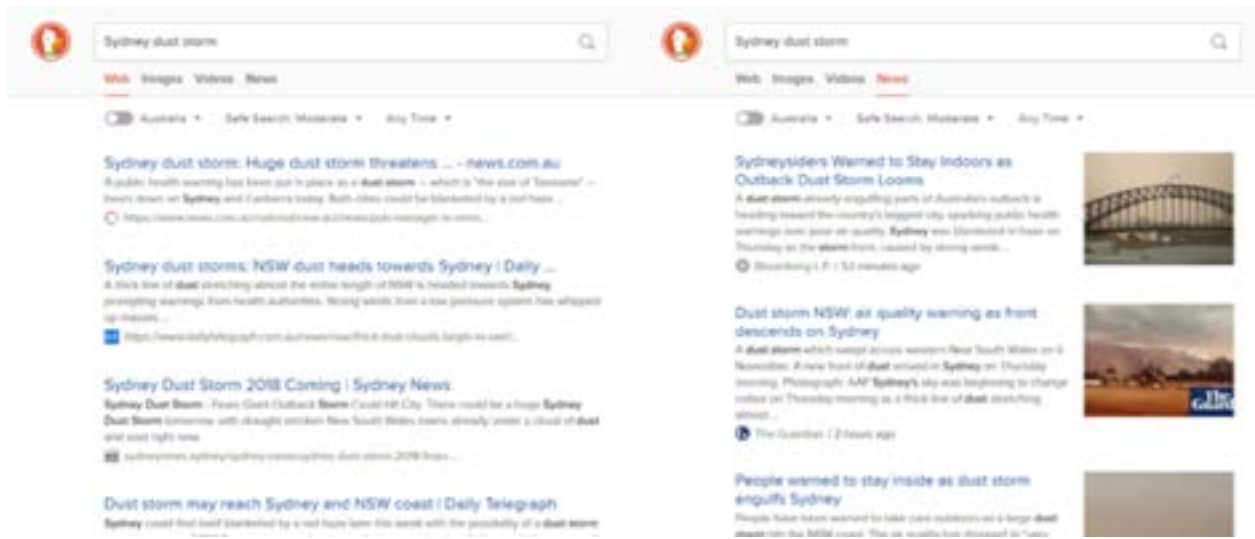
Source: Bing, Results for 'Sydney dust storm', accessed 22 November 2018.

DuckDuckGo similarly offers a news tab in its search service which, like Google and Bing, provides hyperlinks to news content relevant to a search query. DuckDuckGo also provides users with the option to select 'Australia' as the user's location for both organic search results and its news tab. Finally, similar to Bing and Google, DuckDuckGo also highlights particular news stories in its organic search results. Interestingly, DuckDuckGo only provided news highlights for the search query 'Sydney dust storm news' and did not provide any highlighted news stories for the search query 'Sydney dust storm'. Examples of both DuckDuckGo's organic search results page and news tab, using the same search term as above for



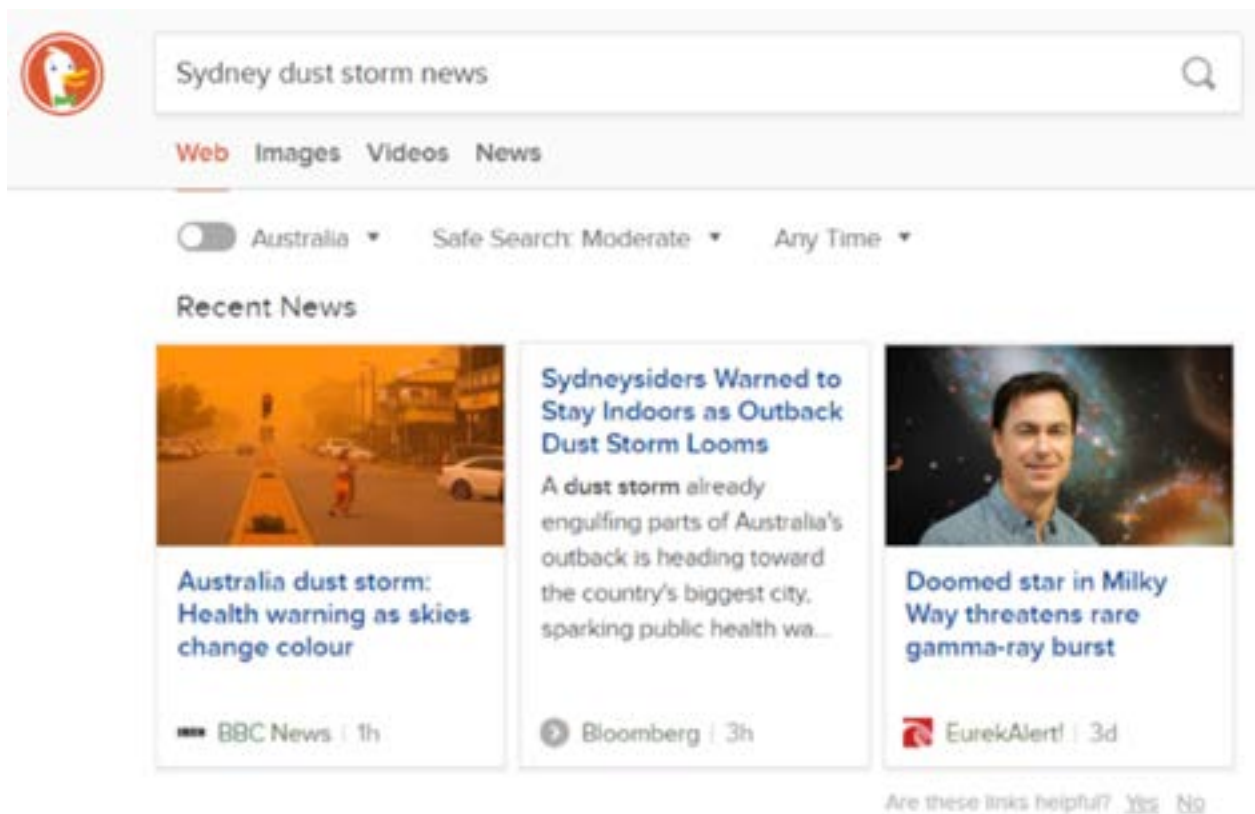
Bing, and DuckDuckGo's highlighted news stories for the search term 'Sydney dust storm news', are set out below.

Figure 4.10(a): Examples of DuckDuckGo's organic search results and news tab



Source: DuckDuckGo, Results for 'Sydney dust storm', accessed 22 November 2018.

Figure 4.10(b): Example of DuckDuckGo's highlighted news stories in organic search results



Source: DuckDuckGo, Results for 'Sydney dust storm', accessed 22 November 2018.

#### 4.2.4 Social media services

Consumers also use social media platforms to stay up to date with news content. As noted above, a survey by the News and Media Research Centre of the University of Canberra reported that 38 per cent of respondents indicated that one of the ways in which they access news via digital devices is through

social media.<sup>214</sup> In addition, of the respondents surveyed, 41 per cent indicated that they had used Facebook for news at least once in the past week and 20 per cent had used YouTube at least once for news in the last week.<sup>215</sup> For respondents who identified themselves as mainly mobile phone users, these figures rise to 53 per cent for Facebook and 24 per cent for YouTube.<sup>216</sup> These figures are not mutually exclusive and consumers often use more than one platform or website to access news.

Social media platforms supply hyperlinks to and/or snippets of news content, or an abbreviated or shortened form of news content made for the platform. For instance:

- News publishers are able to post news articles or links to news articles on Facebook, which then show up on the news feeds of users who have liked or subscribed to receive posts from the media business.
- Snapchat offers a product known as Snapchat Discover, through which news publishers can upload short clips of video news content to their followers on Snapchat.
- Any user, including news publishers and journalists, can post text, links, images, video, and news content using their Twitter accounts. Users can also create Twitter Moments, or curated stories comprised of Tweets, using the Twitter.com website.<sup>217</sup>

Social media services use algorithms to rank and present content, including hyperlinks to news content:

- On Facebook, the make-up of a user's news feed will depend, among other things, on a mixture of 'signals', being data points that Facebook uses to determine the relevance of a particular post to a particular user at that particular time.<sup>218</sup> We understand that Facebook's news feed algorithms are focused on promoting 'meaningful social interactions' between users, with the result that users will see less public content, such as posts from media.<sup>219</sup>
- On Twitter, a user will see posts from users they follow on their home timeline.<sup>220</sup> The default setting for this timeline is 'Show the best Tweets first'. Users will see Tweets from users they follow and Recommended Tweets (Tweets that Twitter believes the user will enjoy, based on their platform activity). If the 'Show the best Tweets first' setting is turned off, then users will see Tweets from users they follow in their home timeline view in reverse chronological order.<sup>221</sup>
- On Snapchat, a user is able to 'subscribe' to Snapchat Discover channels; the stories on these channels are then published at the top of the user's Discover feed. Snapchat also recommends Snapchat Discover channels for its users to follow, which includes stories with news media content. We understand that Snapchat uses a number of internal systems to process recommendations; one of these systems includes a system to rank specific content according to the likelihood that a certain user will like that content.<sup>222</sup>

An example of each of these news feeds is provided below.

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214 Digital News Report, p. 57.

215 Digital News Report, p. 55.

216 Digital News Report, p. 56.

217 Information provided to the ACCC.

218 Information provided to the ACCC.

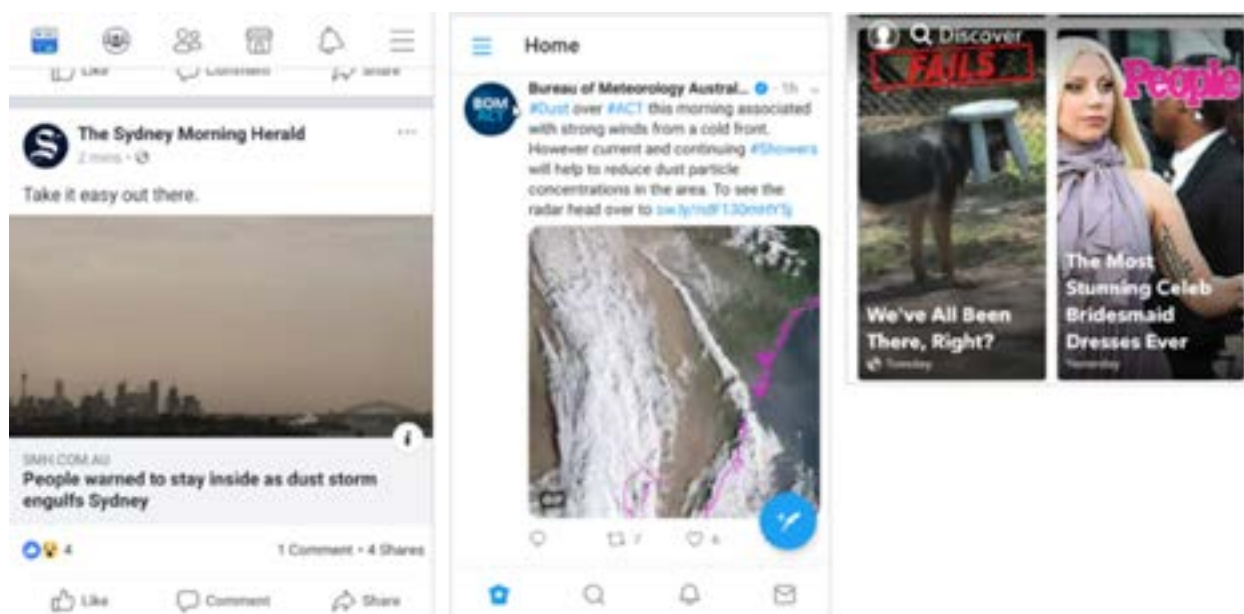
219 Mark Zuckerberg, [Post](#), Facebook, 11 January 2018, accessed 12 November 2018.

220 A home timeline is a stream of Tweets from accounts a user has chosen to follow on Twitter.

221 Information provided to the ACCC.

222 Information provided to the ACCC.

Figure 4.11: Examples of news articles in Facebook's news feed, Twitter's news timeline and Snapchat Discovery



Source: Facebook app, Twitter app, Snapchat app, accessed 22 November 2018.

### 4.3 How the market power of Google and Facebook affects the supply of news referral services

#### Key findings

- Media businesses have raised concerns regarding Google and Facebook's market power in the supply of news referral services to news publishers including: a lack of algorithmic transparency; the appropriation of the value of news publishers' content by digital platforms; restrictive proprietary formats; a lack of access to user data; a lack of recognition for original content; and a significant bargaining power imbalance between digital platforms and media businesses
- Google and Facebook do not provide sufficient notice about changes to algorithms that affect referral traffic.
- There is a bargaining power imbalance between large digital platforms and news publishers and the ACCC is further exploring the extent of this imbalance.
- The ACCC is further exploring the issues of how restrictive proprietary formats affect news publishers and how news publishers should be recognised for original content on digital platforms.
- The ACCC does not consider that there is sufficient evidence to show that digital platforms' use of snippets alone has reduced referral traffic or inhibited media businesses' ability to compete more broadly in the supply of news media content, or that digital platforms unreasonably withhold user data from media businesses (though the volume and quality of user data obtained by digital platforms has likely contributed to their market power in advertising markets).

A number of news media businesses and journalists raised concerns about the supply of news referral services by digital platforms and its consequent impact on the ability of news publishers to monetise and produce news content. These concerns include:

- **Transparency:** a lack of transparency in relation to how digital platforms' algorithms rank and distribute news content to consumers, reducing the level of control a news publisher can exercise in relation to how their news content is distributed to consumers.
- **Appropriation of value:** allegations that digital platforms appropriate news content produced by news publishers, which they then use to improve the quality of their own services (and thereby profiting from this content).



- **Proprietary formats:** the restrictive nature of publishing formats offered by digital platforms, such as Google’s AMP and Facebook’s Instant Articles, limits the amount of advertising that can be displayed, reducing opportunities for monetisation by news publishers. It also reduces the value of news publishers’ brand names and consumer brand recognition.
- **Access to user data:** digital platforms collect and use individual data from consumers when consumers access and consume news on digital platforms. However, digital platforms do not share all data they gather with news publishers. News publishers claim that this limits news publishers’ ability to understand their audience and improve the quality of their advertising services and news content.
- **Recognition:** digital platforms that offer search services do not reward news publishers that invest in and produce original content or break news stories with higher rankings, compared to news publishers that copy such content.
- **Lack of bargaining power:** digital platforms have significantly greater bargaining or negotiating power than news publishers, which allows digital platforms to implement and enforce policies and practices that may be detrimental to the interests of news publishers (such as Google’s previous First Click Free policy).

Each of these concerns is examined in turn below.

### 4.3.1 Algorithmic transparency

A key complaint from stakeholders is that Google and Facebook are not sufficiently transparent about their algorithms, how results are displayed on their platforms, or when changes to their algorithms will take place.<sup>223</sup> This is an issue for news publishers because a significant proportion of their referral traffic is derived from Google and Facebook. Accordingly, news publishers submit that in order to maximise their ability to monetise news content, they need to be aware of how their content is being presented to consumers and any changes that may affect referral traffic.<sup>224</sup> Broadly, stakeholder concerns about the digital platforms’ algorithms can be grouped into two issues:

- a lack of transparency about how news content is ranked and displayed on digital platforms, and
- insufficient notice provided by digital platforms about changes to their algorithms that are likely to affect referral traffic to news publisher websites.

There appear to be three reasons why news publishers desire greater algorithmic transparency and advanced notice of changes to algorithms:

- it provides greater certainty for news publishers to make business decisions
- news publishers invest time and resources into understanding algorithms, which represents an inefficient allocation of resources, and
- it allows news publishers to better understand consumer preferences.

#### Effect on referral traffic

As noted above, Google and Facebook are incentivised to maintain or increase the quality of their supply of search services or social media services to attract and retain users. Their algorithms are a key part of their services and where digital platforms are changing algorithms to optimise the consumer experience, they are doing no more than acting in accordance with these incentives. However, the digital platforms’ changes to their algorithms, or their decisions to not disclose the factors that go into their algorithms or the algorithms themselves, may have unintended consequences for news publishers.

An issue arises when algorithm changes are implemented with little notice, impacting on a news publisher’s referral traffic and providing the news publisher with little time to consider and implement strategies to face those changes. For example, a number of news publishers submit that Facebook’s change to their news feed algorithm in early 2018 (increasing the proportion of content from friends

<sup>223</sup> See, e.g., Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 82, 90.

<sup>224</sup> See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 90; Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25.

and family and consequently reducing the proportion of news-related content available on the news feed) adversely affected their business.<sup>225</sup>

These publishers also submit that Facebook did not provide sufficient time for them to consider the impact of the changes to their business and create strategies to deal with the algorithm change.<sup>226</sup> In particular, the ACCC has received the following information about the effect of Facebook's change to its algorithms on news referral traffic:

- Seven West Media indicated that traffic to some of its websites fell around 40 per cent from June 2017 to April 2018, likely due to Facebook's algorithm change. To reach the same audience they had prior to the algorithm change, news publishers would need to invest significantly more money than previously.<sup>227</sup>
- SBS made a similar submission, noting that 'SBS has seen a marked drop in reach for its news content on the platform' since the algorithm change. It further stated that 'SBS's youth-focused nightly current affairs program, The Feed, has seen a 50 per cent drop in Facebook reach since the January 2018 algorithm changes'.<sup>228</sup>

Stakeholders have also raised concerns about the lack of transparency about Google's and Facebook's algorithms.

For example, News Corp submits that original content is not rewarded with a higher ranking on Google Search results. Instead, ad-funded publishers of reproduced content that invest heavily in search engine optimisation and accommodate the algorithms used by digital platforms, can feature higher in search results than publishers of original content hosted behind a paywall. News Corp submits that this reduces the incentives for news publishers to invest in original and diverse content.<sup>229</sup> This is further explored in chapter 6.

While there is some publicly available information on Google's algorithm, this information appears to be quite broad in nature and does not provide the specific factors Google considers in its algorithm or the weighting accorded to each factor.<sup>230</sup> For example, the information does not identify how Google selects and displays news content for its Top Stories carousel. It also does not identify how a user's search history or use of Google's other services contributes to organic search results.

Similarly, while Facebook provides some information on the factors it takes into account in ranking and displaying content on the Facebook news feed<sup>231</sup>, the ACCC considers that it could provide more detailed information about how news content is displayed and ranked on the Facebook news feed. For example, while Facebook provides information on the signals it takes into account in providing items on a user's news feed, it does not provide any information about how its algorithm weighs those signals or whether there are particular signals that may be more important than others.

## Effect on news publishers' resources

News publishers invest time, money and resources into understanding the algorithms of digital platforms and how they affect referral traffic. This may represent an inefficient allocation of resources that could otherwise be used to fund the production of news content.

For instance, Nine submits that it is investing in search engine optimisation expertise to ensure that its news content is discoverable on Google. This represents a transaction cost of dealing with Google and Facebook and participating on their platforms.<sup>232</sup>

225 See, e.g., Free TV Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 34; Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25; SBS, [Submission to the ACCC Issues Paper](#), April 2018, p. 5.

226 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 90; Free TV Australia, [Submission to ACCC Issues Paper](#), April 2018, p. 34.

227 Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 25.

228 SBS, [Submission to the ACCC Issues Paper](#), April 2018, p. 5.

229 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 87.

230 See, e.g., Google, [How Search Works](#), accessed 9 November 2018.

231 Facebook, [News Feed](#), accessed 9 November 2018.

232 Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 24.

## Preliminary findings on transparency

Based on information available to the ACCC, news publishers appear to have little choice but to accept the degree of transparency offered by Google and Facebook in their algorithms (which ultimately determines a large part of their referral traffic) and notice provided by both platforms in relation to changes to their algorithms. News publishers are then required to adapt their business models to achieve the same or similar levels of referral traffic and, where relevant, subscription numbers as before. This may involve news publishers altering their business models or the types of news content produced to reach their desired audience.

The ACCC considers that the lack of transparency on the part of Google and Facebook has some effect on news publishers' ability to monetise their news content and consequently, their ability to compete more broadly in the supply of news media. As discussed above, Facebook's changes to its algorithms has significantly affected the referral traffic of certain news publishers. This appears to have had the effect of reducing audience numbers for these news publishers and/or requiring news publishers to invest more money into understanding the algorithm changes to reach the same level of referral traffic as prior to the algorithm change. In this respect, news publishers could benefit from greater transparency from Google and Facebook on algorithm changes, or more advanced notification of such changes.

The ACCC recognises that this lack of transparency likely stems from different incentives digital platforms face in the markets for online search services and social media services, in comparison to the market for news referral services. The ACCC also recognises that there may be issues in a digital platform providing detailed information on its algorithm, given that algorithms are a core part of a digital platform's business model. Providing such information may also allow businesses to effectively 'game' the algorithm by knowingly drafting or changing content to increase their ranking on the platform. Accordingly, the ACCC is further considering the benefits arising from a greater level of transparency with the risk created by the potential manipulation of digital platforms' algorithms.

Separate from issues arising from monetisation, this lack of transparency also raises broader public policy issues. These issues include:

- consumer access to news: because of the lack of transparency in the algorithms of Google and Facebook, it is not clear how news content is ranked and displayed to consumers
- investment in the production of news content and investigative journalism: the level of investment and resources news publishers put into understanding and meeting changes to algorithms is likely taking away resources that may be better utilised in the production of quality news content, and
- type of news content produced: in order to monetise their content and maximise referral traffic to their websites, news publishers may be purposefully manipulating existing content or producing content to satisfy the demands of an algorithm, rather than producing content that is in the public interest.

These issues are discussed further at chapter 6.

### 4.3.2 Appropriation of value

#### Length of news snippets

For the purposes of this discussion, the ACCC is focusing on the use of snippets by search engines. This discussion does not focus on the use of snippets by news aggregators or social media.

Submissions assert that Google's practice of extracting content from news articles produced by a news publisher and republishing that content on its search results in the form of a snippet has the effect of reducing referral traffic to the news publisher's website.<sup>233</sup> Stakeholders submit that the longer the

<sup>233</sup> See, e.g., Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19; News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 69.

snippet, the more content is revealed to the consumer, reducing the consumer's incentive to click through to the news publisher's website or app.<sup>234</sup>

### **What is a snippet?**

A snippet refers to the small amount of text, an image, or a short video that forms part of a link. When producing a list of hyperlinks in response to a search item (including news content), search engines often scrape websites that are the subject of the hyperlink for content and provide a snippet of content relevant to the website. The purpose of the snippet is to provide context to the hyperlink and an indication of the contents of the relevant website to the user, so that the user can evaluate the relevance of the website to their search query. Accordingly, while a snippet may be the first line or two of a news article, a snippet may also be extracted from the body of a news article, if the search engine finds that information to be more relevant to answering the user's query.

If the owner of a website does not want a search engine to produce snippets, it can incorporate a piece of code onto the website to prevent a search engine from scraping content and producing snippets. Similarly, links to news content generated as a result of a news-related search term entered into a search engine are generally accompanied by a snippet of the news content. Snippets are generated automatically and search engines use a number of different points of information to produce snippets, including description information in the title of the website, content on the website itself and meta tags for each page.<sup>235</sup>

An example of news snippets that appear on Google Search, when searching for 'Sydney dust storm', is set out below. The blue text is the name of the news article and links to the news article itself, the green text sets out the website's address and the black text is the snippet.

**Figure 4.12: Example of a news snippet on Google Search**



Source: Google Search, Results for 'Sydney dust storm', accessed 22 November 2018.

### **How does Google use snippets and who controls them?**

Google only displays snippets on Google Search. It does not display snippets on Google News. Accordingly, the rest of this section is focused on Google's use of snippets in Google Search.

Google submits that the purpose of snippets is to describe each result and explain how it relates to a user's query, in order to help users quickly find pages that are likely to be relevant to their query.<sup>236</sup> Google says that its generation of snippets is automated and takes into account both the content of a page as well as references to it that appear on the web. Google also uses a number of different sources to generate the snippet, including descriptive information in the title and meta tags for each page.<sup>237</sup>

As snippets are generated automatically, it is ultimately Google that controls the length and content of snippets. The only control publishers have over snippets is the ability to opt out. Accordingly, publishers can only choose whether they want snippets to appear in conjunction with a hyperlink to their news content and cannot control the length of the snippet or the substance of the snippet.

<sup>234</sup> See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68; Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 34.

<sup>235</sup> Information provided to the ACCC.

<sup>236</sup> Information provided to the ACCC.

<sup>237</sup> Information provided to the ACCC.

Publishers that do not want Google to extract and post snippets of their content can use a ‘nosnippet’ tag. Hyperlinks to these publishers’ news items may still surface in response to a Google search query (provided the publisher did not opt out of crawling)<sup>238</sup>, but such a publisher’s content may be demoted in search rankings.

This is because while it appears that a publisher’s use of the ‘nosnippet’ tag does not directly factor into a site’s ranking, consumer behaviour when encountering such results impacts the ranking of the site in Google’s general search results. For instance, if consumers do not click on the link to a news article with no snippet provided, Google’s algorithm may consider that the content is less relevant to the search query.

### ***How does Google’s use of snippets affect news publishers?***

There are two ways that Google’s practice of using snippets can potentially affect news publishers:

- If a publisher opts out of snippets (such that Google only provides a hyperlink to the relevant news content and no accompanying text), the publisher may be ranked lower in organic search results, reducing the publisher’s visibility to consumers and accordingly, click through rates. As such, there is little value for a publisher to prevent Google producing snippets.
- If a publisher does not opt out of Google producing snippets of their content, the relevant snippet may reveal the substance of the news publisher’s content. For example, a snippet may be long enough for a consumer to understand the context of the media article, which may remove the need for the consumer to click on the link and navigate to the full content article.<sup>239</sup> This would then have a direct impact on referral traffic by reducing click-through rates of organic search results.<sup>240</sup>

As a consequence of fewer consumers clicking on hyperlinks, news publishers are less likely to have consumers viewing the advertisements on their websites or apps, or considering subscribing to their news service.

The reduction in referral traffic can also affect the news publisher’s future supply of advertising services as the level of traffic a website receives will likely be an important part of an advertiser’s decision regarding where to invest their advertising budget.

### ***ACCC’s conclusion on the effect of snippets***

The ACCC considers that there are two issues in relation to snippets and their effect on news publishers’ ability to monetise content. First, whether the existence of snippets themselves affects click through rates and consequently, the extent to which news publishers are able to monetise news content; and second, whether the length of snippets affects click through rates.

In relation to the first issue, the ACCC considers that the existence of snippets provides some benefit to Google, news publishers and consumers. News publishers have an incentive to offer snippets of their content because it provides context and an indication to the user of the value of that content; consumers value snippets for the same reason. This issue is further discussed in chapter 6. The headlines to news articles and associated snippets provided in search results may be sufficient for some consumers, who may choose not to click through to the relevant news website. However, the ACCC has not received any evidence that Australian consumers are choosing not to click through to news websites on Google Search due to snippets.

238 Crawling is a process undertaken by providers of search services. Google, How search works, [How search organizes information](#), accessed 12 November 2018. As Google explains, ‘The web is like an ever-growing library with billions of books and no central filing system. We use software known as web crawlers to discover publicly available webpages. Crawlers look at webpages and follow links on those pages, much like you would if you were browsing content on the web. They go from link to link and bring data about those webpages back to Google’s servers.’

239 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 68.

240 See, e.g., Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 19.

In relation to the second issue, it is not clear to the ACCC that the length of snippets on Google Search significantly adversely affects click-through rates. This is because:

- while longer snippets may have some effect on click-through rates, there are likely to be a variety of other factors which would affect click-through rates of news content and the level of referral traffic a news publisher receives; accordingly, it is unlikely that the length of snippets would solely contribute to the level of referral traffic a news publisher receives, and
- although some concerns have been raised about the effect of snippets on referral traffic for news publishers, the ACCC has not received evidence that demonstrates a direct correlation or causation between the length of news snippets on Google Search and changes in referral traffic for a news publisher or their click through rates.

Even if the length of snippets does have an effect on click-through rates, it is not clear to the ACCC what the optimal length of news snippets may be. In any event, the ACCC accepts in theory that because Google is a key source of traffic for news publishers and has a large share of the search services market, news publishers are unlikely to elect to prevent Google from extracting and publishing snippets of their news content. As such, Google may be able to benefit from news publishers' content by way of snippets, while news publishers face declining referral traffic.<sup>241</sup>

As previously discussed, by providing a high quality search service that includes the production of hyperlinks to news content that is accurate, current and relevant to users' search queries (and with those hyperlinks, snippets of relevant news content), Google is able to maintain its standing as a reputable platform for news and other search queries. Although Google does not offer advertising services or inventory when consumers search for news-related queries, Google is able to monetise its service by consumers' continued use of its search services for all uses, and not just for news queries.

Based on information before the ACCC, we understand that approximately 8 per cent to 14 per cent of Google Search queries from devices in Australia led to the appearance of Top Stories on the Google Search results page.<sup>242</sup> This is a relatively significant proportion of search queries and may indicate the value to Google of being able to refer to news content.

### **Google's former First Click Free policy**

A number of stakeholders have complained about Google's former First Click Free (FCF) policy, which required news publishers to provide a certain amount of free content to Google users on a daily basis.

Google's FCF policy required news publishers to provide a number of subscription articles free of charge to consumers. The reasoning behind this policy was to ensure that 'sites provide some amount of free sampling of their content so that users can learn how valuable their content is.'<sup>243</sup> The policy had been in place since 2008.<sup>244</sup> In December 2009, Google updated the FCF policy so that news publishers could limit users to accessing no more than five pages per day without registering or subscribing.<sup>245</sup> In September 2015, Google updated the policy again, reducing the limit of pages of premium content accessible by the public to three articles per day.<sup>246</sup>

In October 2017, Google discontinued its FCF policy and replaced it with its Flexible Sampling policy, which allows publishers to choose the number of free news articles to provide to Google users. There are two types of sampling available:

- metering, which provides users with a quota of free articles to consume, after which paywalls will start appearing, and
- lead-in, which offers a portion of an article's content without it being shown in full.<sup>247</sup>

241 Google does not typically place advertisements next to search results for news-related queries on Google Search (or Google News results). Rather, offering news stories in response to search queries increases the overall user experience of Google and therefore, any monetisation by Google is indirect.

242 Information provided to the ACCC.

243 Google Webmaster Central Blog, [Enabling more high quality content for users](#), 1 October 2017, accessed 21 November 2018.

244 Google Webmaster Central Blog, [First Click Free for Web Search](#), 17 October 2008, accessed 21 November 2018.

245 Google News Blog, [Google and paid content](#), 1 December 2009, accessed 21 November 2018.

246 Google Webmaster Central Blog, [First Click Free Update](#), 29 September 2015, accessed 21 November 2018.

247 Google Search Console Help, [Flexible Sampling general guidance](#), accessed 21 November 2018.



Despite the discontinuation of the FCF policy, a number of news publishers have provided Google's FCF policy as an example of Google exercising its market power and the consequent anti-competitive effects of the policy in news media markets. For example:

- News Corp submits that if news publishers did not adhere to FCF, they would suffer a decline in visibility on Google Search, which would result in a loss of traffic and revenue from subscription conversions. The 'effect of the FCF policy was to make Google the central gateway to news content and to undermine publishers' efforts to create a direct relationship with customers via subscriptions'.<sup>248</sup>
- Seven West Media submits that FCF is a 'critical example of the way control over discoverability has been used to hinder traditional media businesses from being able to transition to a digital subscription model'.<sup>249</sup>
- Free TV submits that FCF 'circumvented paywalls and undermined the subscription-based news model'.<sup>250</sup>

In relation to the replacement of FCF with Flexible Sampling, Free TV submitted that:

*...rather than the fact that the first-click free policy was abandoned pointing to the responsiveness of Google, it highlights their complete indifference until the point that their reputation is drawn into question. This is not bilateral negotiation at work. This is a damaging, slow and inefficient process that at very best will take years to remove even the most egregious of terms and conditions.*<sup>251</sup>

In contrast, Fairfax highlighted Google's replacement of its FCF policy with Flexible Sampling as an example of Google working 'proactively with the industry to help address challenges or create conditions for publishers to capitalise on market opportunities'.<sup>252</sup>

### ***The effect of providing content at no cost***

Subscription revenue is one of the key ways news publishers monetise their news content, with a number of news publications offering subscriptions to their digital news offerings.

For news publications that offer news subscription content, some news publications allow consumers to access a number of news articles for free, so that consumers can get a sense of the value of the content provided. For example, *The Sydney Morning Herald* currently offers consumers access to 30 articles per month free of charge.<sup>253</sup> Some news publications, such as *The Australian*, do not provide consumers with access to any articles without a subscription. The ACCC notes news websites themselves offer free access to the headline, and often short descriptions, of stories so that consumers may get an idea of the news content without clicking on a story.

For most of the duration of Google's FCF policy, news publications offering subscription content were required to provide five articles per day for free. In a 30-day period, that equated to 150 articles provided to consumers for free. As noted above, news publishers may offer news content for free, whether because this is part of their business model or because they want to show consumers the value of their subscription content. However, the amount of articles that Google required news publishers to make available on their search engine was significantly more than the number of news articles that news publishers of premium content provide to users for free, of their own volition. For consumers who wished to access this premium content without paying for that content, Google Search effectively allowed the consumers to bypass the news publisher and access that content for free.

Refusing to adhere to the FCF policy or removing itself from Google Search would likely have affected the level of referral traffic, and consequently, subscription rates, for news publishers. For instance, News Corp Australia commissioned a study on Google's FCF policy. The study found that *The Wall Street*

248 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 69-70.

249 Seven West Media, [Submission to the ACCC Issues Paper](#), April 2018, p. 24.

250 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 33.

251 Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 33.

252 Fairfax, [Submission to the ACCC Issues Paper](#), April 2018, p. 8.

253 S Aylmer, [Sydney Morning Herald introduces digital subscriptions](#), Sydney Morning Herald, 2 July 2013, accessed 12 November 2018.



*Journal* would have obtained significantly more subscribers each year if it had been able to opt out of FCF and Google had not imposed its refusal to crawl policy. It also found that it was more costly for *The Times*, *The Sun*, *The Sunday Times* and *The Wall Street Journal* to 'opt-in' to the FCF policy in terms of foregone revenue from users that might otherwise have taken out a subscription.<sup>254</sup>

News Corp Australia also provided the ACCC with evidence of the effect of FCF on their referral traffic and subscription numbers. News Corp Australia says *The Daily Telegraph* received almost three times the amount of subscriptions in January and February 2018 combined compared with the same period for 2017.<sup>255</sup>

Because of the importance of search engines as a source of referral traffic, and the fact that Google Search has a significant market share in the supply of search services, news publishers are unable to switch to another search engine provider that offers the same reach as Google Search.

### **Google's incentives to offer free content to consumers**

Google has an incentive to maintain or increase the quality of its search service to attract users (and advertisers) to its platform. This includes providing high quality search results to users, with information relevant to the search term. As previously noted, Google states that the FCF policy provided users with the opportunity to learn the value of the content offered by news publishers.

It is clear that the incentives Google faces on one side of the market (attracting users) influences its conduct in its supply of news referral services. These incentives have flow-on effects to news publishers in Google's supply of referral services. In this sense, Google is able to appropriate the value of content produced by news publishers, which it then uses to enhance its offering to advertisers.

### **ACCC's views on requiring free content**

News publishers offering premium content have traditionally provided some articles to consumers free of charge, before requiring consumers to sign up to an account, or to pay for content. However, the FCF policy effectively removed the ability for news publishers to choose how many articles they made available to consumers via Google Search. This is important, given that Google Search makes up a substantial proportion of traffic to a news publisher's website. It is likely because news publishers are so reliant on Google Search for referral traffic that it was able to enforce a policy that was detrimental to the interests of news publishers.

Based on information provided by stakeholders to the ACCC, it appears Google's FCF policy had an effect on the subscription numbers of news publications that offer subscription content. It appears that Google had the ability to affect the subscription numbers and referral traffic that news publishers received, by requiring news publishers to provide news content at no cost.

The ACCC notes that FCF's replacement, Google's Flexible Sampling policy, has appeared to have made a meaningful difference to news publishers, as news publishers are able to choose how many news articles they make available to consumers on Google Search on a zero cost basis.<sup>256</sup> The ACCC will continue to consider the effect of Flexible Sampling on news publishers and would welcome any submissions in this respect.

## **4.3.3 Proprietary formats**

### **The effect of AMP**

AMP is an open-source publishing format for mobile devices that enables the near-instant loading of content. AMP pages are HTML web pages, hosted and controlled by publishers and other content creators, engineered to optimise instant-loading mobile content.<sup>257</sup> The AMP Project is not owned or controlled by Google. Originally, the AMP Project Tech Lead was a Google employee. But on 18 September 2018, AMP Project announced its new governance model. In particular, the

<sup>254</sup> Information provided to the ACCC.

<sup>255</sup> Information provided to the ACCC.

<sup>256</sup> See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 70.

<sup>257</sup> See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 70.

announcement noted that the power to make a significant decisions in the AMP Project will move from a single Tech Lead to a Technical Steering Committee.<sup>258</sup>

To enable the fast loading of AMP, AMP pages are cached. This means that AMP are preloaded so that when users click on a hyperlink to the AMP, the AMP loads quickly on the user's device. There are currently two AMP cache providers—Google and Cloudflare.<sup>259</sup> Publishers do not choose the AMP cache on which their pages are uploaded; instead, it is the platform that chooses the AMP cache to use.<sup>260</sup> AMP pages on Google Search are cached by Google and sit on Google's servers. This provides Google with some level of control over content created by news publishers that it would otherwise not have, if the pages remained on the servers of news publishers.

Because the purpose of AMP pages is to enable faster loading of content, AMP pages contain less space for advertising than traditional web pages.

Stakeholders have raised the following concerns about Google's use of AMP:

- Attribution<sup>261</sup>
- Monetisation<sup>262</sup>
- Branding<sup>263</sup>
- Data<sup>264</sup>
- Ranking<sup>265</sup>

Each of these are discussed below.

### ***Attribution***

One concern raised by stakeholders is that because news publishers' AMP pages are served from Google's cache, the traffic to those pages is attributable to Google, rather than news publishers.

The extent to which this remains an issue in Australia is not clear. The attribution of audience numbers in the AMP format has been a problem for news publishers, until recently. Since April 2018, Nielsen's Digital Content Ratings, one of the ways in which publishers can measure audiences, now attributes readership on Google AMP to the news publisher rather than Google.<sup>266</sup> This should provide a more accurate picture of referral traffic and attribution, which would help advertisers make more informed choices about their advertising decisions.

### ***Monetisation***

As noted above, content published in the AMP format is loaded more quickly than standard web pages. To allow for faster load times, the AMP format necessarily reduces the amount of space or inventory for advertising opportunities.

News publishers submit that because of this reduced space for advertising inventory, the AMP format has the effect of reducing news publishers' opportunities to monetise their content.

The ACCC accepts this submission. Compared to news publishers' websites, AMP pages do contain less space for advertising, which likely has an impact on news publishers' advertising revenue. However, the ACCC is further considering the financial impact of this reduction in advertising space on revenue news publishers receive and would welcome any submissions in this respect.

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258 Information provided to the ACCC.

259 AMP project, [How AMP pages are cached](#), accessed on 21 November 2018.

260 AMP project, [How AMP pages are cached](#), accessed on 21 November 2018.

261 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

262 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

263 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

264 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 89.

265 See, e.g., Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 34.

266 Nielsen, Digital measurement upgrade: Nielsen expands mobile coverage, adds off-platform measurement, 29 June 2018, accessed 12 November 2018.

Despite the fact that the AMP format limits the volume of advertising opportunities available, we understand that a large number of Australian news publishers publish their content in the AMP format. One of the likely reasons for this is that Google represents a significant proportion of referral traffic for news publishers, such that news publishers are willing to publish their content in the AMP format to maintain a certain level of referral traffic. However, there may be other reasons for this. For instance, consumers may prefer a fast-loading publication and by providing news content in AMP, a news publisher could attract more clicks and increase consumer satisfaction with their brand.

While AMP may result in a better user experience for consumers accessing news content, Google's use and promotion of the AMP format may have led to sub-optimal outcomes for news publishers in the form of reduced traffic and subsequently, advertising revenue.

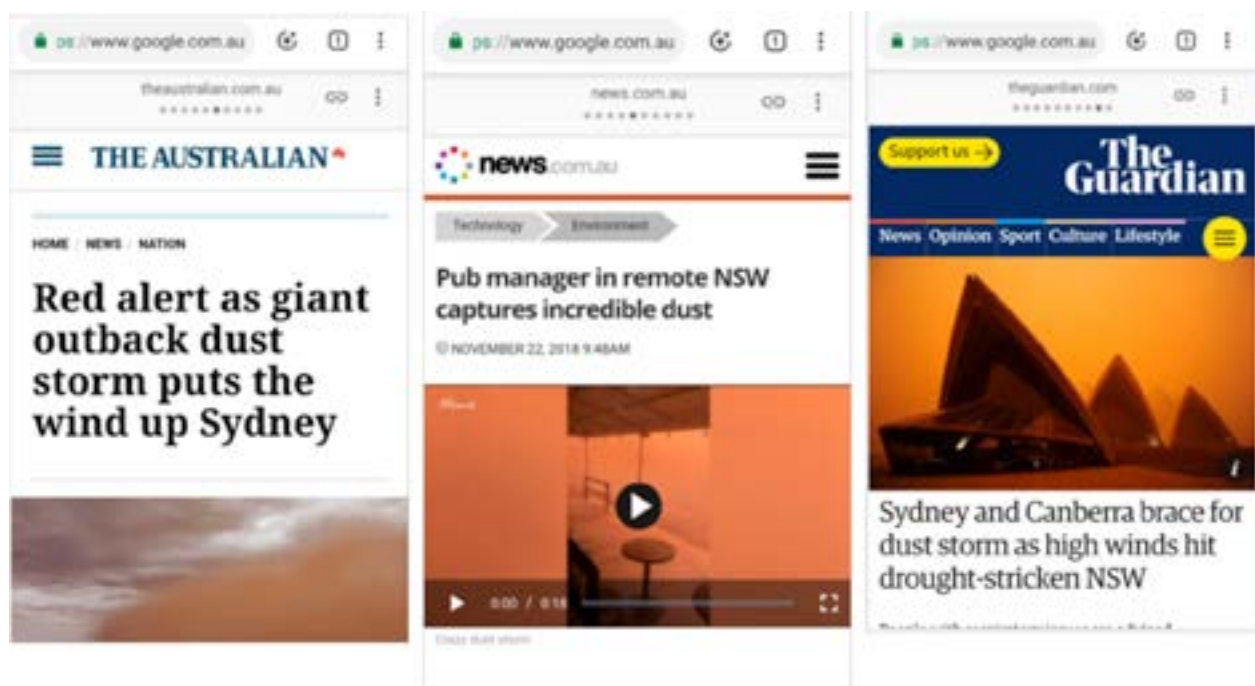
### Branding

Some stakeholders submit that publishing news content in the AMP format has the effect of diluting a news publisher's brand.<sup>267</sup> This then reduces consumer engagement with, and awareness of, the brand, which has an adverse effect on a news publisher's position in the market for the supply of news media content more broadly.

For instance, News Corp submits that the AMP result presents 'little scope for publishers to differentiate the "look and feel" of their content from other publishers. This undermines the brand value of publishers.'<sup>268</sup>

The extent of AMP's influence on consumer perceptions of a news publisher's brand is unclear. It is also difficult to quantify. While AMP does facilitate swiping between news articles, we understand that news publishers still retain their branding in the actual news article and in the Top Stories carousel that links to the publisher's content, even though their content is hosted on Google's servers. This is shown in the examples below:

Figure 4.13: Examples of AMP pages featured on Google's Top Stories carousel



Source: E Visontay, [Red alert as giant outback dust storm puts the wind up Sydney](#), Sydney Morning Herald, 21 November 2018, accessed 22 November 2018; B Graham, [Pub manager in remote NSW captures incredible dust storm](#), news.com.au, 22 November 2018, accessed 22 November 2019; N Zhou, [Sydney and Canberra brace for dust storms as high winds hit drought-stricken NSW](#), The Guardian, 20 November 2018, accessed 22 November 2018

267 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 71.

268 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 71.

## Data

Some stakeholders submit that, in order to better understand their audience and provide higher quality news content and advertising services (via more targeted or defined audience segments), news publishers require access to data that digital platforms gather about their readers.<sup>269</sup> One of the issues raised is that news publishers may be required to use Google Analytics to obtain such data on consumers who access their content via AMP.<sup>270</sup> However, it is unclear if this claim is valid as the ACCC understands that publishers using AMP can track and collect data on their users, without using Google Analytics.

Publishers publishing in AMP can utilise two components to track and collect data on users that access their AMP pages, known as amp-pixel (which provides basic page view tracking) and amp-analytics (which provides more advanced page view tracking, as well as a range of other metrics).

Publishers can use either or both components on a given AMP page. The chosen components then report data to the publisher-specified recipient each time an AMP is loaded, delivering data to either the publisher's in-house or third party software analysis, without participation from any other third party (including Google).<sup>271</sup> There are a number of third party analytics firms that a news publisher can use to track AMP data, outside of Google Analytics.<sup>272</sup>

Accordingly, the ACCC does not consider that publishing content on AMP restricts news publishers' access to metrics. It appears that Google provides news publishers with this information. The separate claims about digital platforms' refusal to supply data are discussed in the next section.

## Ranking based on format

The key stakeholder complaint about search rankings is that Google prioritises news content published in the AMP format, in its organic search results. As such, news publishers are effectively required to publish content in AMP, to reach their users through Google Search. Because AMP pages feature less advertising, news publishers are required to accept less advertising revenue to improve their reach to consumers. This ultimately affects the competitive standing of news publishers in the supply of news content and their ability to fund the production of content.

The speed with which a page loads is a signal that Google Search considers in ranking and displaying content. Therefore, publishing content in the AMP format may have some influence on search rankings as it potentially reduces page load times.

The ACCC understands the following:<sup>273</sup>

- The speed signal only affects pages that deliver the slowest experience to users and affects a small percentage of queries.
- The intent of the search query is still a very strong signal, so a slow page may still rank highly if it has relevant content.
- Content does not receive any ranking advantages in general Google Search results merely because it is AMP, as distinct from being accelerated or instant loading content (whether AMP or otherwise). Content is not penalised in organic Google Search results for being non-AMP.

In producing search rankings, Google utilises generalist search algorithms and specialised content-specific algorithms, which are designed to provide relevant results for a particular content category, such as images, videos, maps and news.<sup>274</sup>

In terms of its generalist search algorithm, Google states that its ranking is based solely on the objective of providing users with the most relevant and useful results for their query, with its algorithms analysing

<sup>269</sup> See, e.g., Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 32.

<sup>270</sup> See, e.g. News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 73.

<sup>271</sup> Information provided to the ACCC.

<sup>272</sup> AMP Project, [Analytics vendors](#), accessed 12 November 2018.

<sup>273</sup> Information provided to the ACCC.

<sup>274</sup> Information provided to the ACCC.

and weighing a series of different signals in producing search results.<sup>275</sup> Google asserts that its algorithms take account of more than 200 signals.<sup>276</sup>

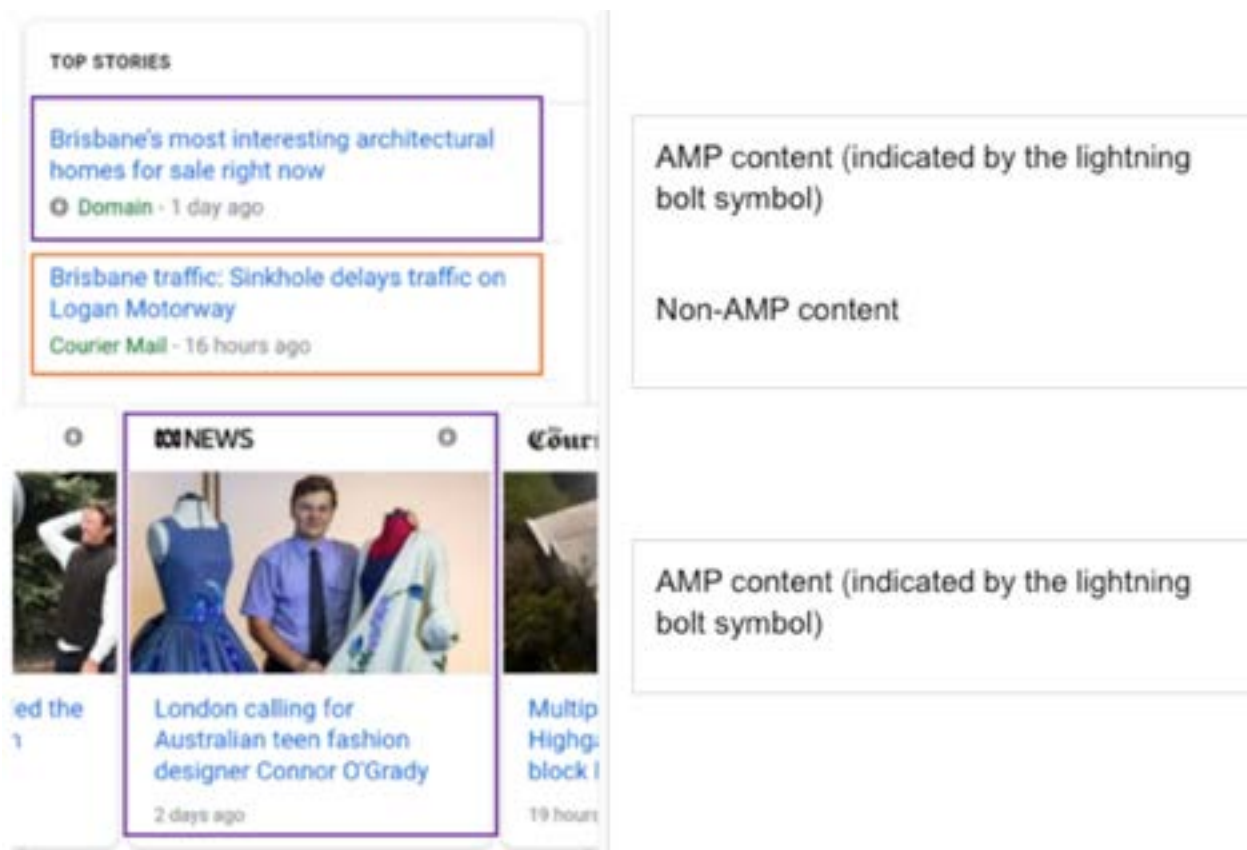
In terms of Google's specialised algorithm, this algorithm produces a grouped display of results known as Universal Search. This algorithm considers two main criteria in displaying and ranking specialised search results—user intent and the quality and relevance of potential results. Google's Top Stories is a type of Universal Search result, designed to respond to user queries with news content. In this respect, signals such as when the article was published will be relevant to this algorithm.

However, there are a number of other signals Google Search takes into account in ranking search results.<sup>277</sup>

News publishers can add a mark-up to their websites to promote content. One type of mark-up allows publishers to identify a page as an article, which helps Google to recognise that the article is eligible for inclusion in the 'Top Stories' block on Google Search. This applies to AMP and non-AMP content.<sup>278</sup>

In addition, while the Top Stories carousel on mobile devices only shows news content published in AMP, Google submits that non-AMP content can appear as one of the links in the Top Stories block above the carousel itself (such that non-AMP content may still be shown before AMP content).<sup>279</sup> The screenshot below provides an example of the Top Stories carousel (which contains AMP content) and non-AMP news content, which is placed above the Top Stories carousel.

**Figure 4.14: Example of AMP content and non-AMP content featured in Google's Top Stories carousel on a mobile device**



Source: Google Search, Results for 'Brisbane news' search term, accessed 22 November 2018

<sup>275</sup> Google, How Search Works, [How Search algorithms work](#), accessed 12 November 2018.

<sup>276</sup> Information provided to the ACCC.

<sup>277</sup> Information provided to the ACCC.

<sup>278</sup> Information provided to the ACCC.

<sup>279</sup> Information provided to the ACCC.

## The effect of Instant Articles

The ACCC has received similar concerns about Facebook Instant Articles as for AMP. For example:

- News Corp submits that Facebook Instant Articles

*...impose a number of restrictions on publishers. Although paywalls are supported, they face limitations: for publishers with metered models, that meter is set at 10 articles,<sup>280</sup> while for publishers with a freemium model, the publisher determines what content is locked. It is important to highlight that publishers cannot offer direct subscriptions to consumers in Instant Articles. Additionally, similar to AMP, Instant Articles limit the type of ad formats available to content creators in order to facilitate quick loading.<sup>281</sup>*

- Fairfax submits that Instant Articles represents ‘an unclear path to commercialisation’<sup>282</sup> and that, following the release of Instant Articles [Facebook’s] news feed began to prioritise articles in that format over links to publishers’ owned and operated channels’.<sup>283</sup>

Facebook’s Instant Articles are designed to allow pages to load faster on the Facebook app and are only available on mobile devices. Facebook states that Instant Articles load ten times faster than standard mobile web articles and that users read 20 per cent more Instant Articles on average and are 70 per cent less likely to abandon an Instant Article than a standard mobile web article.<sup>284</sup> An example of an Instant Article is set out below:

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280 The ACCC understands that this is set at 10 articles per month (see, e.g., F Tepper, ‘[Facebook is now testing paywalls and subscriptions for Instant Articles](#)’, TechCrunch, accessed 15 November 2018; News Corp Australia, [Submission to the ACCC Issues Paper](#), May 2018, p. 81.).

281 News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, p. 81.

282 Fairfax, [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

283 Fairfax, [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

284 Facebook, [Instant Articles](#), accessed 12 November 2012.



Figure 4.15: Example of a Facebook Instant Article



Source: S Delibasic, [New 'son of Concorde' supersonic jet could hit Australia within five years](#), *The New Daily*, 20 November 2018, accessed 22 November 2018.

Very few news publishers in Australia use Instant Articles. The effect of Instant Articles on news publishers is likely more limited, given the minimal uptake. Fairfax submits that Facebook's news feed prioritises articles in the Instant Articles format over links to publishers' owned and operated channels.<sup>285</sup> Based on information provided by Facebook, there does not appear to be any correlation between use of Instant Articles and ranking of news content. Instant Articles are ranked by the same criteria used to rank standard articles on the mobile web. The news feed on Facebook is personalised according to each user, with Facebook ranking in order of content based on what it predicts will matter most to users. In particular, Facebook takes into account signals, which are used to train models that make predictions about the relevance of a particular post to a particular person. These predictions are then weighted using a set of models to determine a post's relevancy scores. The posts on a user's news feed are then ordered by relevancy scores. Users can further customise their feeds by, for example, choosing to see posts from a particular person or Page at the top of their news feed, or by choosing to see posts in chronological order.<sup>286</sup>

In terms of information provided to news publishers that utilise Instant Articles, Facebook provides the same advertising measurement tools and metrics as it does for other advertisers. Facebook also provides Instant Articles Insights, which provides publishers with information in relation to consumer

<sup>285</sup> Fairfax, [Submission to the ACCC Issues Paper](#), April 2018, p. 9.

<sup>286</sup> Information provided to the ACCC.



readership of Instant Articles. This includes the total number of times an Instant Article is opened, the time spent reading the article and how far into the article readers scroll.<sup>287</sup> Facebook offers an application program interface, which allows publishers to import data from Instant Article Insights into their own data management platform.<sup>288</sup>

#### 4.3.4 Access to user data

As discussed in chapter 3, user or audience data is a key input into the supply of digital advertising services. This is because user data enables advertisers to target their advertisements with greater precision, so that those suppliers of advertising services able to provide this service are seen as providing a higher quality of service.

A number of news publishers submit that Google and Facebook provide limited data about users who have clicked on news media links on Google Search or the Facebook platform, or users who access their news content published on AMP pages, or Instant Articles,<sup>289</sup> affecting their ability to target their advertising services to readers.

News publishers can access a range of data on their own users/audience. For instance, most news publishers allow users to register for an account on their website or app or for email updates. The news publisher can then track readership metrics, such as time spent by the user on the news publisher's website and the number and types of articles they clicked on.

In addition, as discussed above, publishers can use specific components on AMP to track and collect data on users that accessed AMP pages. Facebook also provides news publishers with information on user engagement with the news publisher's Facebook Page.

Accordingly, it appears that Google and Facebook provide news publishers with some data that news publishers are likely to consider valuable. However, news publishers' submissions about access to data relates to the richer datasets that Google and Facebook have access to, beyond the types of data (such as readership metrics) that they supply to news publishers.

News publishers are unlikely to have, or have access to, the same kind of individual information on the relevant user (such as demographic information or information based on the user's use of their other products, as well as more sophisticated or targeted customer segments) as large digital platforms. While in theory some of this data could be captured if a reader signs up to an account, consumers relatively infrequently sign up or register with news publishers when accessing news content.

Other likely reasons why Google or Facebook do not provide richer datasets to news publishers, include:

- an imbalance of bargaining power between Google and Facebook and news publishers (such that Google and Facebook are not compelled to provide such data to news publishers), which is discussed further below
- privacy issues, including whether consumers have consented to Google and Facebook sharing their data with news publishers; this is further discussed in chapter 5, and
- the fact that digital platforms' business models are based on gathering and using data to provide higher quality advertising services, which may contribute to digital platforms' reticence to provide this data.

#### 4.3.5 Recognition

Another issue raised by stakeholders is that digital platforms that offer search services do not reward news publishers that produce original content or break news stories with higher rankings, compared to news publishers that copy such content. This may affect the profitability of news publishers and reduce

287 Facebook, [Analytics for Instant Articles](#), accessed 21 November 2018.

288 Facebook, [Analytics for Instant Articles](#), accessed 21 November 2018.

289 See, e.g., News Corp Australia, [Submission to the ACCC Issues Paper](#), April 2018, pp. 73 and 90; Nine, [Submission to ACCC Issues Paper](#), April 2018, p. 32.

the return on their investment in quality news content, lessening the incentives for news publishers to invest in investigative journalism and the production of such news content.

The fact that such news publishers may be ranked lower in search engine results contributes to the difficulty in the news publishers' ability to monetise their content, making it more difficult for news publishers to compete in the supply of news media. The ACCC considers this to be a public policy issue, which is explored further in chapter 6.

### 4.3.6 Bargaining power

A consistent theme arising from these issues relates to the degree of bargaining power news publishers have relative to digital platforms.

The ACCC has received submissions from stakeholders highlighting a lack of bargaining power on the part of news publishers, relative to Google and Facebook.<sup>290</sup> In particular, news publishers have noted Google's use of snippets and previous enforcement of its FCF policy, and Facebook changing its news feed algorithm and providing limited notice to news publishers, as being indicative of the imbalance of bargaining power between news publishers and the digital platforms.

Google and Facebook are likely to have some degree of bargaining power relative to news publishers due to the reach both platforms have. As set out in chapter 2, a significant proportion of traffic to the websites of news publishers is derived from referrals from Google and Facebook. In addition, the ACCC considers that Google and Facebook both have market power in the supply of search services and the supply of social media services, respectively.

If Google and Facebook wanted to maintain or improve the quality of their services by providing consumers with up-to-date, relevant and current news content, they are ultimately reliant on news publishers for this content. Theoretically, news publishers could bypass Google and Facebook by directly supplying that content to users or using some other form of news referral service.

However, this has not been the case. For example, during Google's enforcement of its FCF policy, there were attempts by news publishers to change the policy, but despite those attempts, Google was able to enforce its FCF policy for nine years, with little change to the policy itself or the number of articles made free. The Wall Street Journal reported significant declines in referral traffic and subscription numbers after it withdrew from FCF,<sup>291</sup> demonstrating the significant consequences of not complying with Google's policies.

While Google and Facebook likely have a stronger bargaining position than news publishers, the extent of that bargaining power is unclear. For example, Google eventually removed the FCF policy and replaced it with Flexible Sampling, which has been beneficial for news publishers. However, whether this can be attributed to commercial pressure, public pressure, a combination of the two or other factors, is unclear.

The ACCC considers that it is apparent there is an imbalance of bargaining power between Google and Facebook, and news media businesses. The ACCC notes that the CCA provides an ability for businesses to apply for authorisation to come together to negotiate with a supplier over terms, conditions and prices to collectively bargain. Each application is considered on its merits.

290 See, e.g. Free TV Australia, [Submission to the ACCC Issues Paper](#), April 2018, p.33; Nine, [Submission to ACCC Issues Paper](#), April 2018, pp. 18-19.

291 L O'Reilly, [CMO Today: Google drops 'First Click Free,' Facebook Mid-Roll Ad Performance; French Ad Retouching Law](#), The Wall Street Journal, 2 October 2017, accessed 12 November 2018.

In addition, some of Google's practices have actually led to consumer benefit for a number of users, at least in the short term. For instance, while Google's FCF policy created issues for news publishers, consumer access to premium content at zero cost was arguably beneficial for consumers. Similarly, Google's practice of crawling news content and producing snippets in organic search results enhances consumer welfare by providing context of the results to the user's query, and assisting the user in assessing the relevance of the results.

### 4.3.7 Preliminary recommendation to address effects of digital platforms on news media businesses

#### ***Preliminary Recommendation 5—news and digital platform regulatory oversight***

The ACCC considers that the regulatory authority proposed in Preliminary Recommendation 4 could also monitor, investigate and report on the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses.

These functions could apply to digital platforms which generate more than AU\$100 million per annum in revenue in Australia and which also disseminate news and journalistic content, including by providing hyperlinks to news and journalistic content or snippets of such content.

In performing its functions, the regulatory authority could consider the digital platform's criteria, commercial arrangements and other factors that affect competition in media markets or the production of news and journalistic content in Australia. This may include:

- (a) the rankings of news and journalistic content presented to consumers
- (b) the referrals of consumers to media businesses.

The relevant digital platforms would need to be obliged to provide information and documents to the regulatory authority on a regular basis, and the regulatory authority would need appropriate investigative powers.

The regulatory authority could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.

As discussed in Preliminary Recommendation 4, these regulatory functions could be funded in a variety of ways including from direct government funding or cost recovery, having regard to relevant government policy.

Digital platforms and their business models have had a significant effect on news publishers. These effects have often created undesirable outcomes for news publishers, in terms of their ability to produce and monetise news and journalistic content. In particular, news publishers have highlighted the following as key areas of concern:

- the lack of warning provided by digital platforms to news media businesses of changes to key algorithms relating to the display of news content or news referral links, and
- the implementation of policies and formats that may have a significant and adverse impact on the ability of news media businesses to build or sustain a brand and therefore an audience, as well as issues around the ranking of original content in light of subsequent news stories.

The ACCC considers that these two issues stem from a lack of transparency as to the operation of the digital platforms' algorithms. This lack of transparency may have adverse effects on news publishers and their opportunities to monetise their content.

A greater level of transparency would address some of these issues. However, the ACCC recognises that providing detailed information about a digital platform's algorithm to news media businesses could provide opportunities for 'gaming' the algorithm or risk exposing information confidential to the digital platform. The ACCC considers that regulatory oversight (for example, a review of the implications of major changes to algorithms or the implementation of new policies and formats) by

way of the regulatory authority proposed in preliminary recommendation 4 could address the issue of transparency and ensure that the issues discussed above do not eventuate. To ensure the proper performance of the regulatory authority's functions and that the objective of increasing transparency is achieved, there would also be accompanying obligations on those digital platforms meeting certain thresholds to provide information to the regulatory authority as required by the regulatory authority.

## 4.4 The roles of digital platforms in Australian media markets

### Key finding

- Digital platforms actively participate in the online news ecosystem by performing a wide range of functions other than news referral services, some of which overlap with the functions of media companies. This means that digital platforms are considerably more than mere distributors or pure intermediaries in the supply of news and journalistic content in Australia.

### 4.4.1 Do digital platforms publish or broadcast news content?

#### Digital platforms' involvement in the supply of news and journalistic content

Digital platforms in Australia are actively involved in the publication, distribution and/or broadcast of news online including through performing some functions that overlap with those of news publishers or broadcasters such as: selecting and curating content, evaluating content, and ranking and arranging content. However, digital platforms have more limited overlap with media businesses in other functions, such as the creation of original news and journalistic content. The ACCC's preliminary view is that the role of digital platforms in Australian media markets is somewhere between that of media businesses creating news media content and that of a mere distributor or pure intermediary.

This varied role, between publisher and original content producer, is further discussed.

#### *Selecting and curating news content*

News media businesses make deliberate editorial choices in their curation of content to be published or broadcast to maintain a certain breadth, depth, or quality of coverage, to meet the preferences or expectations of their audiences, and to meet broader public service objectives. Digital platforms undergo a comparable process of selecting and curating the best content to display to their users based on specific and often personalised criteria set by the platforms, such as relevance and usefulness to the user, timeliness, likelihood of user engagement, etc.<sup>292</sup>

One of the central functions of digital platforms that supply media aggregation services is to select and curate the news and journalistic content to be displayed to users. Many digital platforms build complex algorithms to cache or index available online content, select relevant content, extract titles and links, and group or rank them in order of relevance. Whilst many of these processes are automated, different aggregators provide for differing degrees of human editorial control, either in setting the parameters for the algorithms or in selecting the content displayed. For instance:

- Apple News employs editors in Australia to select and curate the articles displayed in the 'Top Stories' and 'Spotlight' sections, whilst it uses a combination of algorithmic personalisation and editorial curation to select and curate the articles displayed in the 'For You' section.<sup>293</sup>
- Google News automatically indexes and links to relevant news articles online from over 80 000 news publications worldwide and has 70 country-specific editions, including an Australian edition.<sup>294</sup>

292 Google, [How Search algorithms work](#), accessed 2 November 2018, and Facebook, Newsroom, [News Feed Ranking in Three Minutes Flat](#), 22 May 2018, accessed 2 November 2018.

293 Information provided to the ACCC. See also, e.g., s. Dredge, [Apple News app to rely on editors rather than algorithms for curation](#), The Guardian, 16 June 2015, accessed 2 November 2018.

294 Information provided to the ACCC.

Digital platforms that supply online search services can also have an important role in selecting and curating news content, as search results often include news content. See further discussion in section 4.3.2 regarding the proportion of Google Search queries from devices in Australia that lead to the appearance of Top Stories on the Google Search results page.

Digital platforms that supply social media services also perform many of the functions of a publisher by selecting and curating the content displayed to users, which can include news and journalistic content. For example, Facebook uses algorithms that consider thousands of data points regarding the available inventory of stories to surface and rank the most relevant content on the Facebook News Feed for its users, including consideration of factors such as Facebook's predictions on how likely a user is to comment on a story or share it with a friend.<sup>295</sup>

### ***Evaluating content based on specific criteria***

Media businesses employ staff such as editors, copy-editors and fact checkers who are responsible for evaluating the quality and accuracy of content to be published or broadcast.<sup>296</sup> Although different in method, digital platforms also perform an evaluative function to filter out information that is not relevant to the user, often by using automated algorithms with limited human oversight.<sup>297</sup> Arguably, a central function of platforms is to moderate content. As noted by Tarleton Gillespie in his book 'Custodians of the Internet':

*...moderation is, in many ways, the commodity that platforms offer. Though part of the web, social media platforms offer to rise above it, by offering a better experience of all this information and sociality: curated, organised, archived and moderated.*<sup>298</sup>

Further, whilst digital platforms' evaluation and moderation of content for relevancy to individual users do not typically include assessing the accuracy of the content, there are some limited exceptions. For instance, in the US, Facebook has begun working with third-party fact-checkers such as Associated Press, Factcheck.org, PolitiFact, Snopes, and Weekly Standard Fact Check to evaluate information to establish the truth or falsity of a story.<sup>299</sup> No such initiative exists in relation to content displayed to Facebook users in Australia at present,<sup>300</sup> though there are media reports that Facebook has plans to expand this service to Australia before the next Federal election.<sup>301</sup>

Digital platforms also evaluate content in accordance with their internal policies that outline types of content that are not permitted on their platforms. For instance, Facebook's Community Standards prohibit objectionable content such as hate speech, graphic violence, adult nudity and sexual activity, and cruel or insensitive content.<sup>302</sup>

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295 Facebook, Newsroom, [News Feed Ranking in Three Minutes Flat](#), 22 May 2018, accessed 2 November 2018.

296 See, e.g., P. Meyer, *The Vanishing Newspaper: Saving Journalism in the Information Age* (2006), 1st edition, University of Missouri (cited in OECD, 'News in the Internet Age' (2010)) for a discussion on connecting the accuracy of content and language in a publication and the number of copy editors at work.

297 In addition, the Australian has reported that an internal document produced by Google's Insights Lab called 'The Good Censor' states that Google has become a 'moderator in chief' of online content. *The Australian*, [Google revises 'neutrality' stand](#), 15 October 2018, p. 19, originally published in *The Sunday Times*, accessed 2 November 2018.

298 T Gillespie, 'Custodians of the Internet—Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media' (Yale, 2018), p. 13.

299 Facebook response to questions on notice before [US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, p.68, accessed 9 September 2018.

300 Facebook Business, [Third -party fact-checking on Facebook](#). Australia is not on the list of countries where third-party fact-checking occurs. Accessed 11 October 2018. See also Facebook Help Centre, [How is Facebook addressing false news through third party fact-checkers?](#) States "We're not working with third-party fact-checking partners in your country right now." Accessed 11 October 2018.

301 J Duke, [Facebook to launch fact checking in Australia ahead of election](#), *Sydney Morning Herald*, 19 November 2018, accessed 20 November 2018.

302 Facebook, Community Standards, [Objectionable content](#), accessed 12 November 2018.

## ***Ranking and arranging content for display***

Similar to the ways in which print news publishers arrange articles, pictures and design elements of a newspaper before printing, digital platforms rank and arrange how content is displayed to their users. Examples of digital platforms ranking and arranging content for display to users include Facebook's News Feed, Apple News, Twitter Moments, and Snapchat Discover.

Whereas publishers and broadcasters arrange content in a particular way for a mass audience, digital platforms tend to arrange content in a specific order that is personalised for each user. Nevertheless, these ranking functions of digital platforms and media businesses have important implications for consumers' exposure to the content—just as audiences of broadsheet newspapers are most likely to read articles arranged 'above the fold', Facebook users are most likely to view content ranked near the top of their News Feed.

## ***Creation of original news content?***

A core function of media businesses is to create news and journalistic content by employing journalists to undertake research, investigation and analysis of current events. However, in relation to news and journalism, digital platforms have tended to focus on facilitating users' access to online content rather than the creation of original content themselves. For example, Google's submission to the Inquiry argues that 'search engines are not news publishers', noting that Google does not author news articles.<sup>303</sup>

This represents a key difference in the functions of digital platforms and media businesses, although there are some indications that this distinction may be beginning to blur. For instance, Facebook has recently launched Facebook Watch in Australia, which is a visual content platform distributing original content produced and funded by Facebook.<sup>304</sup> Further, Google's video-sharing platform YouTube has been producing its own original content, named YouTube Originals. YouTube Originals has already released more than 65 projects to-date, with 50 scheduled for release in 2019.<sup>305</sup> Thus far, these projects have tended to involve entertainment content rather than news and journalistic content, although some include a number of documentaries exploring matters of public interest.<sup>306</sup> There are also some instances where digital platforms and media companies may be rivals for content rights.<sup>307</sup>

At the time of producing this report, the ACCC is not aware of any relevant digital platforms being involved in the commissioning of content that could be considered a substitute for Australian news and journalistic content.

## **Digital platforms' many other roles and functions**

In addition to the above functions that overlap with the functions of media businesses, digital platforms also perform a variety of other roles and functions. Each digital platform provides users with a distinctive and dynamic array of product offerings that are not always comparable with the services provided by other digital platforms or by media businesses.

303 Google, [Second submission to the Digital Platforms Inquiry](#), October 2018, p. 8.

304 M Collett, [Facebook Watch joins the television disruption party with Sorry For Your Loss](#), ABC News, 19 September 2018, accessed 2 November 2018.

305 A. Ritman, [YouTube to Release 50 Original Shows in 2019](#), The Hollywood Reporter, 22 August 2018, accessed 20 November 2018. Quoting YouTube Originals EMEA, Luke Hymas. "We've had more than 65 shows and movies since it launched at the end of 2016, and we've got 50 shows releasing in 2019," he said. See also YouTube Blog, [YouTube Music and YouTube Premium launch in 17 countries; It's all here](#), 18 June 2018; Accessed 9 September 2018. While much of this is not news and journalistic content, the ACCC has received submissions arguing that the documentaries are intended to inform as well as entertain and should therefore fall within the Inquiry's terms of reference: see for example Australian Film and TV Bodies [Joint submission to the Digital Platforms Inquiry Issues Paper](#), May 2018, p. 1.

306 See Australian Film and TV Bodies [Joint submission to the Digital Platforms Inquiry Issues Paper](#) May 2018, p1. For an example of recent documentary produced by YouTube Original, see '[Demi Lavato: Simply Complicated](#)', a documentary that chronicles the singer's bipolar diagnosis, substance abuse and rehabilitation. The film has been viewed more than 23.5 million times globally as at November 2018. YouTube, [Demi Lavato: Simply Complicated](#) views information, Accessed 20 November 2018.

307 See further section 4.6.2.



Digital platforms offer many other functions not related to the supply of news content.<sup>308</sup> For example, Google alone provides over 60 different services to users, some of which are relevant to the supply of news content (e.g. Google Search, Google News, YouTube) and others which are not (e.g. Google Docs, Google Photos).<sup>309</sup> Apple also supplies a variety of products and services, including mobile and personal computer devices (such as the iPhone, iPad, and iMac) and a range of consumer and professional software products (such as the iOS operating system, iCloud, Apple Pay, etc.).<sup>310</sup>

#### 4.4.2 ACCC assessment

On balance, although digital platforms may not currently produce original news and journalistic content in the same way as Australian news media businesses, it is clear that digital platforms perform increasingly important functions that are part of the supply of news and journalistic content to Australians. That is, digital platforms have an active role in the supply of news media content in Australia and should not be regarded as pure distributors or mere intermediaries in Australian media markets.

Digital platforms also have considerable influence in shaping Australian consumers' online news choices. This results from the combination of digital platforms' role as online intermediaries for news content (discussed at section 4.2.2) and their media-like functions in selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display to their users (discussed at section 4.4.1). That is, the role of digital platforms as gateways to news media on the internet for a large number of Australians increases the impact and importance of their media-like functions on Australian media markets.

## 4.5 Regulatory imbalance in Australian media markets

### Key finding

- Despite digital platforms increasingly performing similar functions to media businesses, virtually no media regulation applies to digital platforms in comparison with some other media businesses. The regulation of media sectors supplying news and journalistic content varies by sector and different regulatory models and obligations apply for TV, radio, print and online publishers.

### 4.5.1 Overview of the Australian Media Regulatory Landscape

The Australian media regulatory landscape is a complex patchwork of separate regulatory frameworks applicable to each of the different media sectors, advertising, and telecommunications industries, overlaid with national copyright laws and nationally-uniform State defamation laws. Accordingly, the level of regulation can vary significantly for suppliers of news and journalistic content dependent on how the news media content is delivered.

Broadly speaking:

- In the print publishing industry, digital platforms are not governed by the self-regulatory regime supervised by the Australian Press Council (APC), which only governs publishers who have opted-in to become APC members and accordingly does not apply to all news publishers.
- In the TV and radio broadcasting industry, digital platforms are not governed by the complex co-regulatory system of legislative restrictions, licensing conditions, standards and codes of practice that regulates news broadcasters, as supervised by the Australian Communications and Media Authority (ACMA). Broadcasters are also required to meet minimum content quotas for Australian or local content and have obligations in relation to children's programming that are not imposed on digital platforms.

<sup>308</sup> For example, Google Maps, which provides location-based services such as a directory and navigation assistance; Google's email account Gmail, Facebook's photo-sharing and instant-messaging features; online browsers such as Safari, Chrome, and Internet Explorer.

<sup>309</sup> Google, Our products, [Product News](#), accessed 2 November 2018.

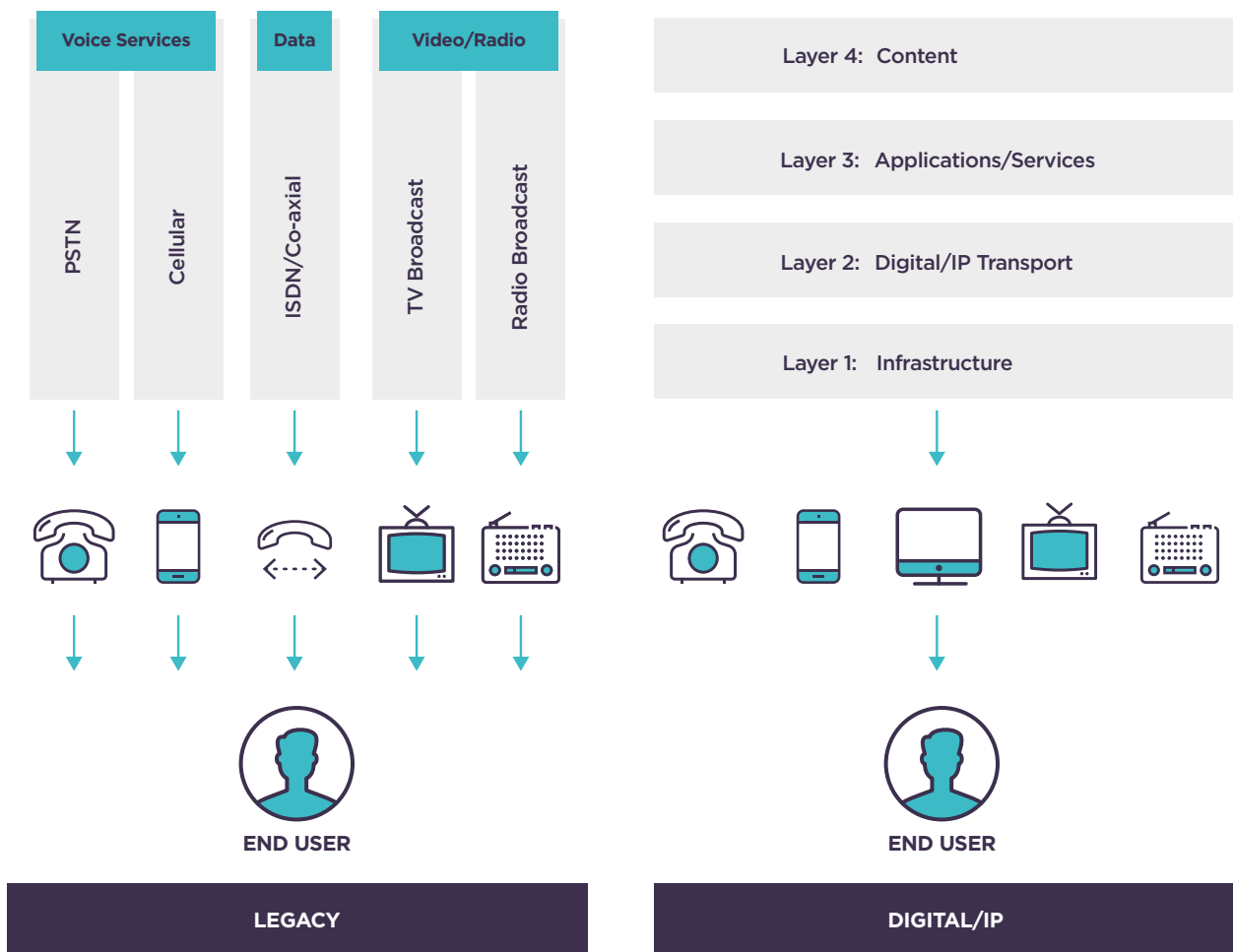
<sup>310</sup> Reuters, [Profile: Apple Inc.](#), accessed 2 November 2018.



- In the online publishing industry, digital platforms are not covered by the co-regulatory regime comprised of industry codes of practice set out in the Telecommunications Act and supervised by ACMA.
- The telecommunications industry is also subject to the obligations set out in the Telecommunications Consumer Protections Code, which do not apply to digital platforms.
- In the supply of advertising, more restrictions are imposed on TV and radio broadcasters in legislation, licence conditions, and industry codes than on other media formats. In particular, political advertising is regulated by licence conditions.
- Finally, copyright and defamation laws in Australia do regulate digital platforms, although the challenges of enforcing copyright against digital platforms and the comparative ease of doing so against Australian media businesses adds another layer to the regulatory imbalance between digital platforms and media businesses (see further sections 4.5 to 4.6).

As set out in figure 4.16, media regulation follows service-specific networks and devices. Technological change means that service delivery is now largely independent of network technologies. This can be represented as a shift from the vertical, sector-specific approach to the horizontal, layered approach.

**Figure 4.16: Convergence in the legislative landscape**



Source: ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p.6. Accessed 24 October 2018.

The key features of these different systems of regulation are summarised in table 4.1, which highlights the differences in the systems of regulation between different content providers who increasingly supply similar services in a converging media environment.

**Table 4.1: The regulatory frameworks for media and advertising services in Australia**

Industry/sector	Laws/regulations/codes	Main system of regulation	Regulator	Applies to DPs?
<b>Print news publishing</b>	APC statements of principles, standards of practice, and advisory guidelines MEAA Journalist Code of Ethics	Self-regulated	APC	X
<b>Online news publishing</b>	APC statements of principles, standards of practice, and advisory guidelines	Self-regulated	APC	X
	<i>Broadcasting Services Act 1992</i> (Cth) Schedules 5 and 7 Internet Industry Codes of Practice 2005 Content Services Code 2008	Co-regulated	ACMA	X
	<i>Radiocommunications Act 1992</i> (Cth) (RA) <i>Broadcasting Services Act 1992</i> (Cth) (BSA) Broadcasting licence conditions under the RA and BSA Apparatus licence conditions Relevant regulatory standards set by ACMA Relevant Industry Codes of Practice	Co-regulated	ACMA	X
<b>Advertising</b>	(Supplied generally) Codes of conduct adopted by AANA and other relevant industry bodies	Self-regulated	Ad Standards and AANA	✓
	Other federal and state legislation regulating advertising of gambling products, medicine, etc. <sup>311</sup>	Co-regulated	ACMA at federal level State and territory regulators	Sometimes
	(Supplied on TV and radio) Broadcasting licence conditions Relevant regulatory standards set by ACMA Relevant Industry Codes of Practice	Co-regulated	ACMA	X
<b>Telecommunications</b>	<i>Telecommunications Act 1997</i> (Cth) and regulations <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> (Cth) and regulations Telecommunications Consumer Protections Code and other relevant industry standards made by ACMA Carrier licence conditions	Co-regulated	ACMA	X
<b>Copyright</b>	<i>Copyright Act 1968</i> (Cth)	Privately-enforced	NA	✓
<b>Defamation</b>	Nationally-uniform State defamation laws	Privately-enforced	NA	✓

<sup>311</sup> *Interactive Gambling Act 2001* (Cth); *Therapeutic Goods Act 1989* (Cth).

In the above table 4.1, self-regulation refers to when an industry sets its own standards of conduct and is supervised by an industry body representing the interests of its members.<sup>312</sup> Co-regulation refers to a legislative framework supervised by a statutory authority and, within the parameters set by the legislation and the statutory authority, the industry self-regulates.<sup>313</sup>

## 4.5.2 Print publishing regulation

### Overview of regulations

There are no specific laws regulating print media in Australia. Whilst the supply of print news is subject to the general laws of the land, including copyright and defamation laws, print news media is otherwise self-regulated.

#### *The Australian Press Council*

News publishers are mostly regulated by the APC. The APC's Standards and Guidelines that apply to material published by its constituent bodies, which are publishers of newspapers, magazines and associated digital outlets of roughly 900 mastheads covering about 95 per cent of print circulation in Australia.<sup>314</sup>

As noted in the 'Report of the Independent Inquiry into Media and Media Regulation' conducted by the Honourable Ray Finkelstein QC (the Finkelstein Review), while APC membership covers established media, membership is optional and does not fully cover new media (nor does it cover many online news publishers, as discussed at section 4.5.4).<sup>315</sup> Notably, publishers can withdraw from membership if they provide sufficient notice and alter their funding contributions as they see fit.<sup>316</sup>

#### *The Media Entertainment and Arts Alliance*

Journalist Media Entertainment and Arts Alliance (MEAA) members are bound by ethics rules enforced by the (MEAA).<sup>317</sup> The MEAA is a union for journalists and others working in the media, entertainment, sports and the arts. The MEAA is also a constituent body of the APC. Journalist members of the MEAA are governed by its 'Journalists' Code of Ethics' that sets out obligations in relation to 'honesty, fairness, independence, and respect for the rights of others'. This code of ethics only applies to journalists who are members of MEAA's Journalists Section.<sup>318</sup>

In addition to these external self-regulation regimes, some news publishers may also impose internal self-regulation by adopting standards or codes of ethics which are enforced by the editor or by appointment of an ombudsman.<sup>319</sup>

312 See discussion in Senate Select Committee, 'Monitoring Australia's Media' on 'Regulation, co-regulation and self-regulation', April 2000, p. 7.

313 See discussion in Senate Select Committee, 'Monitoring Australia's Media' on 'Regulation, co-regulation and self-regulation', April 2000, p. 7.

314 See Australian Press Council, [Who are our members?](#) Accessed 2 November 2018.

315 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 8.

316 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 8.

317 MEAA, [Registered rules of the Media Entertainment & Arts Alliance](#), 21 June 2017, p. 46-47, accessed 20 November 2018. For further information, see D. Rolph et al. *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, Chapter 3 'Print Media and Journalists'.

318 See R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p.194.

319 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p. 189.

Table 4.2 summarises the key media regulations applicable to print publishing.

**Table 4.2: Key media regulations applicable to print publishing in Australia**

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all print publishers?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
APC Standards and Guidelines	Newspaper and magazine publishers who are members of the APC (inc Fairfax and News Corp)	✗ Does not apply to print publishers who are not APC members.	✗ Does not apply to TV or radio broadcasters. ✗ Does not apply to all publishers.	✗
MEAA Journalist Code of Ethics	Journalists who are members of the MEAA.	✗ Does not apply to all journalists (only applies to MEAA journalist members). <sup>320</sup>	✗ Does not apply to anyone who is not a journalist member of the MEAA.	✗

Importantly, there is no statutory requirement for publishers to be governed by the APC. As noted in table 4.2, this self-regulatory regime does not apply consistently to all print publishers and there are also prominent online publishers which are not members of the APC and therefore not governed by its self-regulatory regime, including *The Guardian Australia*, *BuzzFeed* and *MamaMia*.<sup>321</sup>

### Applicable to digital platforms?

None of the digital platforms relevant to this Inquiry have opted to become constituent bodies of the APC. This means that, even in a wholly self-regulated industry such as print publishing, media businesses in fact bear costs of regulatory compliance which are not borne by digital platforms. For example, publishers allocate funds for compliance with the APC's standards and codes as well as contribute funding for the APC's operations.<sup>322</sup> Publishers who wish to withdraw from the APC must also give four years' notice.<sup>323</sup> Digital platforms have no requirement to contribute to such industry associations, nor do they face the costs of ensuring compliance with the APC's standards, such as the cost of employing fact-checkers to ensure that factual material is accurate and not misleading to meet the standard for 'accuracy and clarity'.<sup>324</sup>

The APC's submission to the Inquiry raises concerns regarding the impact of this inequity on its publisher members, noting that:

*'Publishers that are members of the Press Council, which are the majority of publishers in Australia, agree to abide by the General Principles and Specific Standards as determined by the Council.'*<sup>325</sup>

*'The more the Australian media's viability is threatened, the more the Press Council and the high standards it asks members to adhere to are placed under strain.'*<sup>326</sup>

*'Facebook is now a leading global publisher in all but name.'*<sup>327</sup>

<sup>320</sup> ABS data 6333.0 Characteristics of Employment Australia 2016, found union membership in 'information, media and telecommunications industry' was approximately 8.8 per cent.

<sup>321</sup> Australian Press Council, [Who are our members?](#) Accessed 20 November 2018.

<sup>322</sup> For instance, in the 2016–17 financial year, the APC's constituent bodies contributed just over \$2 million to fund its operations. See APC, [Annual Report 2016–17](#), at p. 39.

<sup>323</sup> Australian Press Council, Update, [New package to strengthen the Press Council](#), 11 April 2012, accessed 2 November 2018.

<sup>324</sup> Australian Press Council, [Statement of General Principles](#), Accuracy and clarity, July 2014, p.2, accessed 2 November 2018.

<sup>325</sup> Australian Press Council, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018 p. 3, accessed 30 September 2018.

<sup>326</sup> Australian Press Council, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018 p. 3, accessed 30 September 2018.

<sup>327</sup> Australian Press Council, [Submission to the Digital Platforms Inquiry Issues Paper](#), April 2018 p. 6 quoting Former Chair of the Press Council Professor David Wesibrot AM on 13 September 2016, Accessed 30 September 2018.

### 4.5.3 TV and radio broadcasting regulation

#### Overview of regulations

TV and radio broadcasting bears a significantly heavier regulatory burden than the publishing sectors. Broadcasters must obtain a broadcasting licence before commencing service and are subject to a complex, sector-specific rules under a co-regulatory regime, which include restrictions and obligations set out in the conditions of their broadcasting licence, along with the provisions of the *Broadcasting Services Act 1992* (Cth) (the BSA), *Radiocommunications Act 1992* (Cth) (the RA), and any applicable industry codes of practice and mandatory standards.

The greater regulation of broadcasting over other media sectors was historically justified on the basis of the airwaves being a public resource, the scarcity of spectrum, and the distinctive power of broadcast media to influence public attitudes, although the continuing force of these rationales in the current media environment has been called into question.<sup>328</sup>

Table 4.3 sets out the key sources of regulations in the broadcasting industry and their application across the broadcasting sector and the media industry more broadly.

**Table 4.3: Application of TV and radio broadcasting regulations in Australia**

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all broadcasters?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
<i>Radiocommunications Act 1992</i> (Cth) <i>Broadcasting Services Act 1992</i> (Cth)	Providers of 'broadcasting services', (anything transmitted over the broadcasting services bands).	✗ Applies differently to different types of broadcasters.	✗ Does not apply to publishers. <sup>329</sup>	✗
Broadcasting licence conditions	Public, commercial, and community radio and TV broadcasters.	✗ Different broadcasting licences impose different conditions.	✗ Does not apply to publishers.	✗
Relevant regulatory standards set by ACMA Relevant industry codes of practice	Public, commercial, and community radio and TV broadcasters.	✗ Different broadcasters bound by different industry codes and standards.	✗ Does not apply to publishers.	✗

In addition, broadcast TV and radio are subject to numerous content requirements in relation to the broadcast of Australian or local content and children's content. For instance, the BSA requires that Australian programming must comprise at least 55 per cent of the content broadcast by commercial free-to-air television licensees on their primary channels between 6 am and midnight.<sup>330</sup> The Australian Content Standard 2016 also sets out minimum annual sub-quotas for Australian drama, documentary and children's programs that all commercial free-to-air television broadcasters must meet.<sup>331</sup> The broadcasting of children's program content is also regulated by the Children's Television Standards 2009.<sup>332</sup>

328 R Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p.167-168.

329 Most of the regulations in the RA and the BSA are specific to TV and radio broadcasting, though the media ownership rules also apply to publishers of newspapers deemed to be 'associated' with particular broadcasting licence area.

330 ACMA, [Australian TV Content](#), accessed 7 November 2018.

331 ACMA, [Broadcasting Services \(Australian Content\) Standard 2016](#), made under subsection 122(1) of the *Broadcasting Services Act 1992*.

332 ACMA, [Children's Television Standards 2009](#), made under subsection 122(1) of the *Broadcasting Services Act 1992*.

Further, regional commercial broadcasters in the licence areas of Northern NSW, Southern NSW, Regional Victoria, Regional Queensland, and Tasmania must also meet broadcasting licence conditions that require them to broadcast minimum amounts of ‘material of local significance’.<sup>333</sup> Broadcasters are responsible for ensuring their own compliance with the applicable rules and standards and ACMA also has a role in resolving complaints or setting standards, where appropriate.<sup>334</sup>

## Applicable to digital platforms?

The broadcasting regulations outlined above do not apply to online content under a Ministerial Determination made in 2000 that specifies that ‘broadcasting services’ does not include ‘a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands’.<sup>335</sup>

Despite increasing amounts of audio and visual content being broadcast online, this means that the rules under the BSA and related standards and codes do not regulate the online activities of TV and radio broadcasters. For instance, each of Channels 7, 9 and 10, as well as the ABC and SBS, operate websites that provide news and journalistic content, among other material. Although these do not fall within the definition of ‘broadcasting services’ under the BSA, there is evidence to suggest that most broadcasters voluntarily apply the same editorial principles in the codes to their online news services.<sup>336</sup>

As indicated in table 4.3, none of the broadcasting regulations apply to digital platforms, creating significant regulatory imbalance between broadcasters and digital platforms in the provision of audio and/or visual content to the Australian public. For example:

- Digital platforms are not required to ensure a minimum amount of Australian or regional local content is distributed on their platforms
- Digital platforms are not under any obligations to classify content or to restrict access to prohibited content.<sup>337</sup>

The exact extent of the imbalance between digital platforms and each broadcaster will depend on how that broadcaster is categorised under the BSA (i.e. as a commercial broadcaster, national broadcaster, community broadcaster, etc.), as different types of broadcasters are subject to different regulatory obligations.<sup>338</sup>

333 See ACMA, [TV content regulation](#), accessed 7 November 2018 and ACMA, [Local content conditions on regional commercial television broadcasters](#), accessed 7 November 2018.

334 *Broadcasting Services Act 1992* (Cth) s. 123 (2) (h) and 148 D. Rolph et al. *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, p. 90.

335 See Federal Register of legislation, [Determination under paragraph \(c\) of the definition of “broadcasting service” \(No. 1 of 2000\)](#) accessed 12 November 2018.

336 R.Finkelstein, [Report of the Independent Inquiry into the Media and Media Regulation](#) (Report to the Minister for Broadband, Communications and the Digital Economy, 28 February 2012), p.165-6.

337 For example, Schedule 7 of the BSA currently imposes obligations to classify online content only on ‘commercial content service providers’ who provide content services to the public on payment. This does not include the bulk of services and content provided through digital platforms, which users can access without a charge, and is typically funded through the sale of associated advertising space; see ALRC, [‘Classification- Content Regulation and Convergent Media’](#), 1 March 2012 pp. 109-110. See also ALRC, [‘Classification- Content Regulation and Convergent Media’](#), The Current Classification Scheme, 1 March 2012, pp. 47-62.

338 *Broadcasting Services Act 1992* (Cth), ss13-18.

## 4.5.4 Online publishing regulation

### Overview of regulations

Online content providers are also co-regulated under industry codes registered with ACMA in accordance with the framework set out in Schedules 5 and 7 to the BSA,<sup>339</sup> which is also administered by ACMA in cooperation with industry bodies.<sup>340</sup>

Schedule 5 of the BSA regulates internet content hosted outside Australia by imposing regulation on internet service providers (ISPs), and Schedule 7 regulates online and mobile content hosted inside or provided from within Australia by imposing regulation on commercial content services providers.

- Under Schedule 5, industry codes must be developed for internet services providers dealing with matters including: enabling parents to better monitor the online activities of their children; provision of filtering technologies; content labelling; legal assessments of content; and complaints handling procedures.<sup>341</sup> The Internet Industry Codes of Practice 2005 (the Internet Code) was developed in accordance with Schedule 5, which regulates the conduct of internet content hosts in Australia, which includes mobile carriers and ISPs.<sup>342</sup>
- Under Schedule 7, industry codes must be developed for commercial content service providers; trained content assessors must be engaged; and content must be assessed by these content assessors.<sup>343</sup> The Content Services Code 2008 (the Content Code) was developed in accordance with Schedule 7.<sup>344</sup>

Online news publishers may also opt in to the self-regulatory regime overseen by the APC, although, as noted at section 4.5.2, some prominent publishers have not elected to do so.

Table 4.4 summarises the application of key online publishing regulations across the online publishing sector and to the media industry more broadly.

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339 The provisions allowing for industry bodies to develop industry codes as well as the provisions governing complaints-handling mechanisms are set out in Schedules 5 and 7 to the BSA.

340 As discussed in Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), Appendix G.

341 See *Broadcasting Services Act 1992* (Cth) Sch 5, cl 60 Matters that must be dealt with by industry codes and standards,

342 Australian Broadcasting Authority, Internet Industry Code of Practice, [Codes for Industry Co-regulation in areas of internet and mobile content](#), May 2005, version 10.4, accessed 1 November 2018.

343 See *Broadcasting Services Act 1992* (Cth) Sch 7, cls 81 (c) and cl 81 (e) (ii)-82; 81 Matters that must be dealt with by industry codes and industry standards--commercial content providers and 82 Examples of matters that may be dealt with by industry codes and industry standards.

344 Australian Communication and Media Authority, Internet Industry Code of Practice, [Codes for Industry Co-regulation in areas of internet and mobile content](#), May 2005, version 10.4, accessed 1 November 2018.



**Table 4.4: Application of key online publishing regulations to online publishing in Australia**

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all broadcasters?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
<i>Broadcasting Services Act 1992</i> (Cth) Schedules 5 and 7	Content services providers in Australia, mobile carriers and ISPs	✗ Does not apply to providers outside Australia.	✗ Does not apply to print publishers, TV or radio broadcasters.	✗
Internet Industry Codes of Practice 2005	Hosts of internet content in Australia, mobile carriers and ISPs	✗ Does not apply to internet content hosts outside Australia.	✗ Does not apply to print news publishers, TV broadcasters or radio broadcasters.	✗
Content Services Code 2008	Content service providers who provide a service with 'an Australian connection'.	✗ Does not apply to providers of content services without 'an Australian connection'.	✗ Does not apply to print news publishers, TV broadcasters or radio broadcasters.	✗
APC Standards and Guidelines	Online publishers who are members of the APC	✗ Does not apply to online publishers who are not APC members.	✗ Does not apply to TV or radio broadcasters. ✗ Does not apply to all publishers.	✗

### Applicable to digital platforms?

Neither Schedule 5 nor Schedule 7 to the BSA applies to digital platforms who do not charge a monetary fee for displaying content.<sup>345</sup> Nor do the industry codes apply to digital platforms:

- The Internet Code applies to internet content hosts in Australia, which includes mobile carriers and internet service providers (ISPs)<sup>346</sup> but not digital platforms.
- The Content Code imposes obligations on content service providers with '... an Australian connection'. A 'content service' means any combination of text, data, speech, music, sounds or visual images delivered through a carriage service such as a communications network.<sup>347</sup> An 'Australian connection' will be established where content is hosted on servers physically located in Australia or where it refers to live content that originates in Australia.<sup>348</sup> Multi-national digital platforms host content in servers around the world, which makes it difficult to ascertain whether they supply content that will provide an 'Australian connection'.<sup>349</sup>

The Australian Government's 2012 Convergence Review noted that the restriction to content services with an Australian connection 'is becoming increasingly irrelevant with the emergence of international cloud-based services for the hosting of content'.<sup>350</sup> Similarly, an ACMA research paper noted that the distinction between content hosted in Australia and overseas is 'challenged by the recent industry practice of hosting content in the cloud so that its location inside or outside of Australia is not able to be determined'.<sup>351</sup>

345 To note, Schedule 7 of the *Broadcasting Services Act 1992* (Cth) does regulate services which charge a fee as it applies to 'commercial content services' which are services that are 'operated for profit or as part of a profit making enterprise' and is 'provided to the public but only on payment of a fee (whether periodical or otherwise).'

346 Australian Broadcasting Authority, Internet Industry Codes of Practice, [Codes for Industry co-regulation in areas of Internet and Mobile content](#), May 2005, version 10.4, accessed 1 November 2018.

347 *Broadcasting Services Act 1992* (Cth) Sch 7 cl 2 definitions of content and content service. The definition of carriage service is set out in s. 7 of the *Telecommunications Act 1997* (Cth) and means 'a service for carrying communications by means of guided and/or unguided electromagnetic energy'.

348 *Broadcasting Services Act 1992* (Cth) Sch 7 Australian Communications and media Authority, Internet Industry Code of Practice, [Content Services Code for Industry co-regulation in the area of content services](#), 10 July 2008, Version 1.0, accessed 1 November 2018.

349 Google, Privacy Policy, [Introduction](#), accessed 1 November 2018. 'We maintain servers around the world and your information may be processed on servers located outside of the country where you live.'

350 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 146.

351 ACMA, [Broken Concepts: The Australian communications legislative landscape](#) (2011), p. 81.

Nevertheless, digital platforms hosting content overseas or in the cloud are unlikely to be bound by similar requirements or incur similar costs to other content hosts in Australia, such as the requirement to be bound by industry codes or the costs of engaging and using trained content assessors.

## 4.5.5 Advertising standards

### Overview of regulations

#### *Advertising regulations generally*

Different media formats are bound by different advertising restrictions—most advertisements in Australia are self-regulated under industry codes and supervised by Ad Standards,<sup>352</sup> but advertising broadcast on TV and radio is also bound by additional legislative restrictions and is co-regulated by ACMA.

Ad Standards handles complaints made under various advertising industry codes, including the Australian Association of National Advertisers (AANA) Code of Ethics, AANA Code for Advertising and Marketing Communications to Children, AANA Food and Beverages Advertising and Marketing Communication Code, AANA Wagering Advertising Code, AANA Environmental Claims Code, as well as a number of other advertising industry codes adopted by the Australian Food and Grocery Council and Federal Chamber of Automotive Industries.

Ad Standards must take into account the relevant industry codes when evaluating complaints from the public regarding advertisements.<sup>353</sup> If the Ad Standards Community Panel upholds a complaint, it will ask an advertiser to remove or amend the offending advertisement as soon as possible.<sup>354</sup> The decisions of Ad Standards are not underpinned by any legislative powers.<sup>355</sup>

#### *Additional regulations for advertisements on TV or radio*

In addition to the above system of self-regulation (under which TV advertisements attracted the majority of advertising complaints), TV and radio broadcasting are also subject to restrictions under the BSA and set out in their broadcasting licence conditions, including prohibitions on tobacco advertising, prohibitions on therapeutic goods advertising (unless approved by the Therapeutic Goods Administration), and restrictions on political advertising.<sup>356</sup>

Advertisements provided on commercial TV broadcasting services are also regulated by:

- the Commercial Television Industry Code of Practice<sup>357</sup>, which places limits of no more than 13–16 minutes of advertising content per hour<sup>358</sup> and restrictions on the broadcast of advertisements for alcoholic drinks, betting and gambling, intimate products and services, etc.<sup>359</sup>
- the Children’s Television Standards 2009<sup>360</sup>, which restricts the amount and content of advertisements broadcast during designated children’s viewing periods
- the Television Program Standard for Australian Content in Advertising (TPS 23)<sup>361</sup>, which restricts the amount of foreign-produced advertising permitted.

352 Formerly referred to as the Ad Standards Bureau, see Ad Standards, About, [Our purpose](#), accessed 1 November 2018.

353 Ad Standards, [Review of Operations 2017](#), p. 11, accessed 1 November 2018.

354 Ad Standards, FAQs, [What happens when complaints about an advertisement are upheld by the Ad Standards Community Panel?](#) Accessed 1 November 2018.

355 Ad Standards, [Self-Regulation](#), accessed 1 November 2018.

356 ACMA, [Advertising on radio and TV](#), accessed 1 November 2018.

357 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, accessed 1 November 2018.

358 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, section 5, accessed 1 November 2018.

359 ACMA, [Commercial Television Industry Code of Practice](#), 1 December 2015, section 6, accessed 1 November 2018.

360 ACMA, [Children’s Television Standards 2009](#), accessed 1 November 2018.

361 ACMA, [The Television Program Standard](#), accessed 1 November 2018.

Regulations for commercial radio broadcasting advertisements are found in:

- The Commercial Radio Australia Code of Practice<sup>362</sup>, which restricts betting and gambling advertisements in live sports coverage, requires that advertising is clearly distinguishable from other programs, and regulates the content of advertisements (including in relation to the depiction of violence, racial vilification, decency and language).
- The Commercial Radio Disclosure Standard,<sup>363</sup> which regulates the disclosure of sponsorship arrangements.

ACMA can act on complaints about the content of radio broadcasts, including ABC and SBS services, provided those complaints have first been made directly to the broadcaster.<sup>364</sup>

Table 4.5 summarises the application of advertising regulations across the media industry.

**Table 4.5: Application of advertising regulation in Australia**

Laws/regulations/codes	Who does this apply to?	Applies the same rules to all advertisers?	Applies the same rules to all media businesses?	Applies the same rules to digital platforms?
<i>Industry codes adopted by industry associations</i>	Advertising services directed at consumers in Australia.	✓ Applies to advertising directed to consumers in Australia.	✗ Applies to advertising supplied over any medium.	✓
Broadcasting codes and licence conditions overseen by ACMA	Advertising services supplied by radio and TV broadcasters	✗ Different restrictions apply to different broadcasters.	✗ Does not apply to online or print publishers.	✗

### ***Applicable to digital platforms?***

As indicated in table 4.5, the self-regulatory regime is likely to apply to digital platforms, whilst the more onerous requirements applicable to advertisements broadcast on TV and on radio do not.

Under the self-regulatory regime, the AANA states that its codes above apply to ‘advertising and marketing communications’ directed to customers in Australia in ‘any medium whatsoever including without limitation cinema, internet, outdoor media, print, radio, television, telecommunications, or other direct-to-consumer media including new and emerging technologies. The codes therefore apply to material on the internet or in social media in the same way as they apply to any other form of advertising or marketing communications.’<sup>365</sup> Google and Facebook are also both members of AANA.<sup>366</sup>

However, neither AANA nor Ad Standards have any powers underpinned by law to compel advertisers to remove advertisements found to be in breach of codes of practice or to impose any other sanctions apart from public reporting of the breach.<sup>367</sup> Additionally, despite the regulation of TV advertisements under broadcasting legislation and codes, the majority (79 per cent) of recent complaints received by Ad Standards have been about TV advertisements. Online ads, Posters and Pay TV were the subject of about 5 per cent, 4 per cent and 3 per cent of complaints respectively.<sup>368</sup>

The difference in advertising rules applied to TV and to online advertisements is highlighted in a recent advertisement about Facebook that was distributed online and via free-to-air TV. In the TV version of the advertisement, the words ‘fake news’ and ‘privacy’ were required to be removed from the narration,

362 ACMA, [Register of broadcasting codes and schemes index](#), accessed 1 November 2018.

363 ACMA, [Commercial radio disclosure standard](#), accessed 1 November 2018.

364 ACMA, [Regulating radio broadcasters](#), accessed 1 November 2018.

365 AANA, Codes, Practice Notes and Guidelines, [Advertising regulatory guide](#), accessed 1 November 2018.

366 AANA, [Our members](#), accessed 1 November 2018.

367 AANA, [What happens if the ad is in breach of a code?](#), March 2017, p. 4, accessed 1 November 2018 and [Ad Standards, Self-Regulation](#), accessed 1 November 2018.

368 Ad Standards, [Review of Operations 2017](#), p. 18, accessed 1 November 2018.

after industry association Free TV raised concerns that the advertisement could be construed as being political in nature, whilst the online version was not required to make any changes.<sup>369</sup>

## 4.5.6 Telecommunications services providers

### Overview of regulations

The *Telecommunications Act 1997* (Cth) (the Telecommunications Act) provides a regulatory framework for electronic communications, regulating network and infrastructure providers and carriage service providers. It also has the capacity to regulate content service providers, though its 'potential to serve as a vehicle for regulating content has been exploited to only a limited extent'.<sup>370</sup> The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) sets out further provisions on consumer protection and the complaints-handling scheme administered by the Telecommunications Industry Ombudsman.

As noted above, ISPs are subject to some regulations under Schedules 5 and 7 to the BSA. In addition, the Telecommunications Consumer Protections Code (the TCP Code) sets out a range of consumer safeguards for mobile, landline and internet consumers.<sup>371</sup> It includes rules about how to communicate and deal with customers, advertising and point of sale, billing and payment methods, and complaints-handling.<sup>372</sup>

Section 118 of the Telecommunications Act enables ACMA to request the development of an industry code by defined sections of the telecommunications industry.<sup>373</sup> ACMA may also issue directions to comply with the relevant industry code<sup>374</sup> and formal warnings if a person has contravened an industry code. Compliance with a direction from ACMA is compulsory and any subsequent failure to comply will trigger the civil penalty provisions under Part 31B.<sup>375</sup> ACMA also has the power to determine mandatory industry standards under the Telecommunications Act, subject to a direction from the Minister for Communications.<sup>376</sup>

### *Applicable to digital platforms?*

The obligations under the Telecommunications Act or the TCP Code apply only to carriage service providers and do not apply to digital platforms or other online content service providers.<sup>377</sup> This is despite digital platforms becoming increasingly important as communications platforms such that it is not clear that there are sufficient differences between online messaging apps and mobile carriers to warrant the differential regulation.<sup>378</sup> For instance, in 2016, Mark Zuckerberg stated that Facebook Messenger and WhatsApp together accounted for around 60 billion messages a day, which is around three times more than the peak of global SMS traffic.<sup>379</sup>

369 J Duke and J.McDuling, [Facebook forced to take 'fake news' out of TV ad](#), *Sydney Morning Herald* 4 July 2018, accessed 1 November 2018.

370 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 162.

371 ACMA, Communications Alliance, Industry Code, [Telecommunications Consumer Protections Code](#), Variation 1/2018, accessed 1 November 2018.

372 ACMA, [The TCP Code](#), accessed 1 November 2018.

373 *Telecommunications Act 1997* (Cth), s. 118 (1) (a).

374 *Telecommunications Act 1997* (Cth), s. 121.

375 *Telecommunications Act 1997* (Cth), s. 21(4) and Part 31B Section 572G

376 *Telecommunications Act 1997* (Cth), s. 125AA of the Telecommunications Act. "ACMA must determine an industry standard if directed by the Minister."

377 ACMA, Communications Alliance, Industry Code, [Telecommunications Consumer Protections Code](#), Variation 1/2018, section 1.3 Scope, accessed 1 November 2018.

378 D Evans, 'Mobile Advertising: Economics, Evolution and Policy', June 2016, p. 48.

379 Facebook Earnings Call Q2 2016 at [Facebook, Inc., Second Quarter 2016 Results Conference Call, July 27th 2016](#), p. 14. The ACCC notes that Sheryl Sandberg in a Q1 Earnings Call has stated that Facebook Messenger and WhatsApp accounted for around 60 billion messages a day, as cited in Evans, 'Mobile Advertising and Policy' at p48, although the transcript of the Q1 2016 call is no longer available online.

## 4.5.7 Copyright laws

### Overview of copyright law

Australian copyright law is regulated under the *Copyright Act 1968* (Cth) (the Copyright Act). It has an important impact on Australian media markets as it seeks to balance the competing interests of authors and creators of copyright material in determining how their artistic and intellectual works are used and the rights of the public to engage with those works.<sup>380</sup> Copyright also has an important role in establishing incentives to create works by giving rights holders a limited monopoly over the use of their material and also outlining exceptions to enable appropriate use of those works to encourage competition and stimulate innovation.<sup>381</sup>

Copyright is a complex and technical area of law. This section sets out a high-level overview of some key provisions relating to media content, but does not provide a comprehensive overview.

### *Subsistence of copyright*

In Australia, copyright law protects the expression of an idea rather than the idea itself and therefore requires an element of originality.<sup>382</sup> Copyright can be denied on the basis that works are insufficiently original or that there is an insufficient amount of input contributed by a human.<sup>383</sup> For example, Australian courts have expressly found that specific headlines of newspaper articles were not original literary works in which copyright subsists.<sup>384</sup> On the other hand, it is likely that a photograph will meet the originality requirement by the mere fact that it was taken.<sup>385</sup>

Copyright protection does not require registration of any intellectual property right but is triggered when an original work is published in a material form.<sup>386</sup> 'Publication' in Australian copyright law is broadly defined to occur when reproductions of literary, dramatic, musical or artistic works are supplied, whether by sale or otherwise, to the public.<sup>387</sup> Accordingly, content on social media platforms is published such that it is potentially protected by copyright laws in Australia if it meets the other criteria for subsistence of copyright.<sup>388</sup>

### *Copyright infringement*

If copyright exists in material, the Copyright Act grants the copyright holder exclusive rights to copy, reproduce, publish and communicate the copyrighted work to the public.<sup>389</sup> Copyrighted content may be used by third parties on the grant of a licence by the rights holder, often in exchange for royalty payments, or if the use fits within an established exception (e.g. fair dealing for research or study<sup>390</sup>, parody or satire<sup>391</sup>, reporting the news<sup>392</sup>, etc.).

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380 See further discussion on guiding principles of copyright law in ALRC, *Copyright and the Digital Economy*, final report, Chapter 3.

381 See ALRC report, p. 59.

382 *Copyright Act 1968* (Cth), s. 32, Productivity Commission Report of the Review into Intellectual Property arrangements (2016), p. 104.

383 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547, 561.

384 *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547.

385 *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49, 55.

386 *Copyright Act 1968* (Cth), s31 (b) (i). Productivity Commission Report of the Review into Intellectual Property arrangements (2016), p. 104.

387 *Copyright Act 1968* (Cth), s29. See also Corinne Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press, 2018), p35.

388 C Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press, 2018), p. 40.

389 *Copyright Act 1968* (Cth), s. 31.

390 *Copyright Act 1968* (Cth), s. 40.

391 *Copyright Act 1968* (Cth), s. 41A.

392 *Copyright Act 1968* (Cth), s. 42.

Unauthorised use of copyright material that infringes on the copyright holder's exclusive rights constitutes a civil infringement. The Copyright Act provides that copyright can be directly infringed by unauthorised use or by someone 'authorising' the infringing act.<sup>393</sup> However, a mere 'provision of facilities' does not of itself constitute an authorisation—see further discussion in section 4.7.3.

Rights holders must apply to the courts to enforce their rights. The potential remedies available for infringement include damages or an account of profits, together with an injunction and the ability to seek an order requiring an ISP to block access to an overseas website that facilitates online copyright infringement.<sup>394</sup>

## **Application of copyright laws to digital platforms**

As noted above, content on social media platforms constitutes published works that may be eligible for copyright protection if they meet other criteria for subsistence of copyright. Digital platforms such as search engines, social media platforms and content aggregation platforms all distribute vast amounts of third-party content online, including copyright-protected news articles created by journalists and media businesses. Australian copyright laws apply to both digital platforms and news media businesses.

Setting aside difficulties in enforcing copyright against digital platforms (discussed in section 4.7), Australian copyright law does not regulate digital platforms differently to media businesses performing the same functions—that is, selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display.

### ***Digital platforms' use of news headlines and snippets***

Digital platforms' common use of article headlines and snippets of the content in the news articles may not infringe copyright protections in Australia. This is because many headlines are concise statements of facts and therefore headlines alone are unlikely to be copyright-protected.<sup>395</sup>

Digital platforms reproducing a snippet of a copyright-protected news article does not infringe copyright protections if the snippet does not reproduce a substantial part of the article.<sup>396</sup> Only courts may determine whether a snippet reproduces enough of a copyrighted work to constitute copyright infringement, which means copyright holders must engage in expensive litigation to determine whether infringement has occurred.

In either case, even if copyright was found to subsist in a headline or a substantial part of an article was copied in a snippet, the digital platform copying the headline or snippet may be able to claim a fair dealing exception, such as fair dealing for the purposes of reporting of news.<sup>397</sup> To make out a defence of fair dealing for the purposes of reporting the news, there must be 'sufficient acknowledgment' of the author and the title,<sup>398</sup> the main purpose of the work must be for the purpose of reporting the news (or associated with reporting the news), and the use of the material must be 'fair', which will depend on the factual circumstances of each individual case.

### ***Digital platforms' unauthorised use of photographs***

Unlike headlines, copyright is likely to subsist in original photographs. Therefore, digital platforms reproducing any of the photographs published with a news article without a licence or other consent are likely to be infringing the copyright in that photograph, unless the 'fair dealing' exception (for example, for the reporting of news) applies to the specific photograph in question. As such, it is possible that digital platforms could be held liable for unauthorised uses of photographs under copyright law.

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<sup>393</sup> *Copyright Act 1968* (Cth) s. 31, ss. 36, 101.

<sup>394</sup> Productivity Commission Report of the Review into Intellectual Property arrangements (2016), p105, (Cth) s. 115A. *Copyright Act 1968*

<sup>395</sup> *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* (2010) 272 ALR 547.

<sup>396</sup> See *SW Hart & Co Pty Ltd v Edwards Hot Water Systems* (1985) 61 ALR 251 and *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 254 ALR 386 at [37].

<sup>397</sup> *Copyright Act 1968* (Cth), s. 42(1)(b).

<sup>398</sup> *Copyright Act 1968* (Cth), s10.



## Liability of digital platforms for authorising copyright infringement

Whilst breaches of the Copyright Act may arise from someone ‘authorising’ the infringement, the mere provision of facilities that enable infringement to occur does not constitute ‘authorisation’ of such infringement in itself. Accordingly, a digital platform that merely ‘provides facilities’ for copyright-infringing communications would not be liable for the copyright-infringing acts of its users, unless there is ‘something more’ to show that the digital platform authorised the infringement.<sup>399</sup>

To assess whether ‘something more’ can be established to trigger authorisation liability, courts are required to consider the following three factors, which are non-exhaustive:<sup>400</sup>

- a. the extent (if any) of the person’s power to prevent the doing of the act concerned
- b. the nature of any relationship existing between the person and the person who did the act concerned, and
- c. whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Case law has also established that an entity may only be said to authorise an infringement of copyright if it has some power to prevent it, although express or formal permission or encouragement is not essential to constitute an authorisation.<sup>401</sup>

In *Roadshow Films v iiNet Limited*,<sup>402</sup> a group of 34 film companies commenced proceedings against the ISP iiNet Limited (iiNet) for authorising the acts of its users, who were infringing the copyright in films by using a peer-to-peer file-sharing network BitTorrent.<sup>403</sup> Ultimately, the High Court held that iiNet had no direct ability to prevent its customers from using BitTorrent to infringe copyright; iiNet’s only power was to terminate user accounts, which is not likely to have the effect of preventing the infringements as its customers could switch to another ISP.<sup>404</sup>

The impact of this decision on the likely authorisation liability of digital platforms is not clear, as digital platforms are likely to have more power than ISPs to identify and prevent the infringing behaviour of their users. For instance, YouTube has a tool called Content ID that allows it to identify copyright-infringing material by matching user-uploaded content to content provided by copyright owners such as film studios and record labels and the YouTube terms of service also expressly states that ‘YouTube will terminate a user’s access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer’, which gives it the power to prevent the infringements of its users if they were identified to infringe copyright. Facebook has also been developing artificial intelligence technology to filter out certain types of content—in the first quarter of 2018, almost 90 per cent of graphic violence content on Facebook that was removed or had a warning label added was identified using artificial intelligence.<sup>405</sup> Chapter 7 contains further discussion of the development of artificial intelligence technology to filter content on digital platforms.

## Remedies for authorising copyright infringement

Civil damages for copyright infringement are calculated on the basis of loss suffered along with other factors set out under s. 115(4) of the Copyright Act.

This can have the impact of resulting in low or nominal damages. For instance, in *Pokémon Company International v Redbubble*,<sup>406</sup> the Federal Court held that Redbubble had infringed the copyright of Pokémon Company International (Pokémon) under s. 31(b)(iii) of the Copyright Act by authorising the infringement of copyright protected works.<sup>407</sup> The Court found that although the images were

<sup>399</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1 at [401].

<sup>400</sup> *Copyright Act 1968* (Cth), ss. 36(1A) and 101(1A).

<sup>401</sup> *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) ALR 127.

<sup>402</sup> *Roadshow Films v iiNet Limited* [2012] HCA 16.

<sup>403</sup> *Roadshow Films v iiNet Limited* [2012] HCA 16 at 2 and 71.

<sup>404</sup> *Roadshow Films v iiNet Limited* [2012], HCA 16 at 73.

<sup>405</sup> Facebook Inc, [Second Quarter 2018 Results Conference Call](#), 25 July 2018, accessed 9 November 2018.

<sup>406</sup> *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541.

<sup>407</sup> *Copyright Act 1968* (Cth), s. 10.



communicated by the artists presenting works on the site, Redbubble was ‘responsible for determining the content of the communication through its processes, protocols and arrangements with the artists’.<sup>408</sup> However, as Pokémon could not provide evidence of revenue lost through the infringement, only nominal damages were awarded. The Court therefore awarded Pokémon \$1 of nominal damages and ordered Redbubble to pay 70 per cent of Pokémon’s legal costs. This case demonstrates that a successful copyright litigation can potentially lead to substantial net loss for the plaintiff.

## 4.5.8 Defamation laws

### Overview of defamation law

Australian defamation law is set out in the national uniform defamation legislation enacted by each of the states and territories (the National Defamation Law) in 2005 to 2006,<sup>409</sup> supplemented by the common law.<sup>410</sup>

Defamation requires a judge to be satisfied that the material is capable of bearing a defamatory meaning and a jury to be satisfied that the defamatory meaning would be conveyed to an ordinary, reasonable reader.<sup>411</sup> There is a limitation period of one year for defamation claims, with the possibility of a court-ordered extension of up to three years.<sup>412</sup>

### Application to digital platforms?

A necessary element of defamation is that the defendant must have published the defamatory material.<sup>413</sup> ‘Publication’ under defamation law is broadly defined and includes any person who has voluntarily disseminated the defamatory material.<sup>414</sup> Content creators such as newspapers are liable under defamation law as ‘primary publishers’, whilst distributors of defamatory materials who did not create the material but voluntarily disseminated it to others such as libraries or newsagents are also liable under defamation law as ‘secondary publishers’.<sup>415</sup>

Liability under defamation law applies to digital platforms in a similar way as to other media businesses—that is, digital platforms that distribute defamatory materials on their platforms may be liable as ‘secondary publishers’ under defamation law, much like any other media business which distributes defamatory material on its website or via another channel. Further, if a digital platform were to create the defamatory materials, it would be liable under defamation law as a primary publisher.

The key difference between primary and secondary publishers is that secondary publishers may try to make out the defence of innocent dissemination.

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408 *Pokemon Company International, Inc v Redbubble Ltd* (2017) 351 ALR 676 at [48]. The Court also held that the communication occurred in Australia despite Redbubble’s servers being located outside Australia.

409 These laws enacted in substantially the same form by the state and territory legislatures: see *Civil Law (Wrongs) Act 2002* (ACT) Ch 9; *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

410 The National Defamation Law does not affect the operation of the common law tort of defamation, except to the extent that the National Defamation Law provides otherwise (whether expressly or by necessary implication). *Civil Law (Wrongs) Act 2002* (ACT) s. 118; *Defamation Act 2006* (NT) s. 5; *Defamation Act 2005* (NSW) s. 6; *Defamation Act 2005* (Qld) s. 6; *Defamation Act 2006* (SA) s. 6; *Defamation Act 2005* (Tas) s. 6; *Defamation Act 2005* (Vic) s. 6; *Defamation Act 2005* (WA) s. 6.

411 D Rolph et al, *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, p. 74.

412 See ss. 14B, 56A; *Limitation of Actions Act 1974* (Qld) ss. 10AA, 32A; *Limitation of Actions Act 1936* (SA) s. 37(1), (2); *Defamation Act 2005* (Tas) s. 20A(1), (2); *Limitation of Actions Act 1958* (Vic) ss. 5(1AAA), 23B; *Limitation Act 2005* (WA) ss. 15, 40.

413 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

414 See *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 505 per Bridge LJ; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 647 per Callinan J.

415 D Rolph et al, *Media Law: Cases, Materials and Commentary*, Oxford University Press, 2015, p. 214.

## ***Defence of innocent dissemination***

Whilst both primary and secondary publishers of defamatory materials are liable under defamation law for being involved in the publication of materials, secondary publishers may rely on the innocent dissemination defence,<sup>416</sup> which requires the following elements:

- not made aware of the defamatory materials<sup>417</sup>, or
- if made aware of the defamatory materials, took steps to remove it within a reasonable timeframe.<sup>418</sup>

In *Google Inc. v Duffy*<sup>419</sup>, Google sought to rely on the defence of innocent dissemination by arguing that its search engine algorithms automatically indexed relevant links and images without any knowledge that the material was defamatory. This argument was rejected by the court because Dr Duffy had notified Google of the defamatory materials and gave Google a reasonable timeframe to remedy the situation.

## **Liability of digital platforms under defamation law**

Digital platforms may be liable as secondary publishers of defamatory material if they do not remove defamatory material after:

- being notified of the defamatory material, and
- a reasonable period of time for the removal of the offending search terms having passed.<sup>420</sup>

There are several cases where digital platforms have been found liable under defamation law as secondary publishers.<sup>421</sup>

- For instance, in *Google Inc v Duffy*<sup>422</sup>, Dr Duffy discovered that Google searches for her name were accompanied by an autocomplete suggestion 'Janice Duffy Psychic Stalker' and that the search results included a link to a website called the Ripoff Report (which had published defamatory materials about her). Dr Duffy wrote to Google requesting removal of the content, but Google did not respond to her request. Dr Duffy then sued Google for defamation. Google argued that there was no 'publication' of its search results, but the Court nonetheless found Google to be liable as a secondary publisher of the defamatory material for reasons including that Google had intentionally designed its search engine to produce results in the way it did and had facilitated the reading of the defamatory material in an indispensable, substantial and proximate way.
- In *Trkulja v Yahoo! Inc LLC*<sup>423</sup>, Mr Trkulja successfully sued Yahoo! for displaying photos of him alongside articles associated with violent crimes and photographs of Tony Mokbel. Mr Trkulja argued that the way the search results were arranged gave rise to the imputation that he had been involved in violent crimes and his rivals had hired a hitman to murder him.
- In *Trkulja v Google Inc LLC*<sup>424</sup>, Google initially made an application to strike out the proceeding on the basis that it had no prospects of success, which was dismissed at the Victorian Supreme Court, successfully appealed by Google in the Court of Appeal, and then successfully appealed by Mr Trkulja in the High Court. The outcome of this trial is still pending.

416 See s. 32 *Defamation Act 2005* (Vic) (NSW) (Qld) (WA); s. 29 *Defamation Act 2006* (NT); s. 30 *Defamation Act 2005* (SA); s 139C; *Civil Law (Wrongs) Act 2002* (ACT), etc.

417 See *Von Marburg v Aldred & Anor* [2015] VSC 467, where Dixon J said that 'An awareness of the existence of the impugned material is a precondition before an internet intermediary such as an administrator or sponsor of a Facebook page will be held to be a publisher ... the internet intermediary is not the publisher of it if not aware of its existence'.

418 See *Trkulja v Google Inc. LLC* [2012] VSC 533.

419 [2017] SASFC 130.

420 The most recent Australian authority for this is *Google Inc v Duffy* [2017] SASFC 130.

421 *Google Inc. v Duffy* [2017] SASFC 130.

422 *Google Inc. v Duffy* [2017] SASFC 130.

423 [2012] VSC 88.

424 [2012] VSC 533.

Despite the theoretical liability of digital platforms, it should be noted that the majority of defamation cases have involved the author or publisher of the defamatory material being sued rather than the digital platform involved. For example, in *Hockey v Fairfax Media Publications Pty Ltd*,<sup>425</sup> Fairfax Media was sued under defamation law, not Twitter.<sup>426</sup>

## Remedies for publishing defamatory content

The main remedy in defamation cases is the award of damages set by the trial judge,<sup>427</sup> who is required to ensure there is a rational relationship between the amount of damages awarded and the harm suffered.<sup>428</sup> Damages may be awarded for both economic and non-economic losses. Non-economic losses are capped at a maximum of \$250 000 (subject to annual indexation).<sup>429</sup>

In *Google v Duffy*, Google was ordered to pay Dr Duffy \$115 000.<sup>430</sup> In *Trkulja v Yahoo! Inc LLC*, Yahoo was ordered to pay Mr Trkulja \$241 000 in damages.<sup>431</sup>

## 4.6 The impact of regulatory imbalance

### Key finding

- Digitalisation and the increase in online sources of news and media content have highlighted the inconsistencies in the sector-specific approach to media regulation. This results in regulatory disparity that provides digital platforms with an unfair advantage because they operate under fewer regulatory restraints and have lower regulatory compliance costs than other media businesses when performing comparable functions.

The sector-specific approach to media regulation discussed at 4.5.2 to 4.5.5 results in an imbalance between the regulation imposed on digital platforms and other media businesses both in relation to the greater compliance costs incurred by media businesses and the greater regulatory restrictions imposed on media businesses' ability to generate certain types of revenue.

### 4.6.1 Rivalry in the supply of advertising opportunities

As digital platforms are subject to a lesser regulatory burden, this may distort the rivalry between digital platforms and media businesses in the supply of advertising opportunities by providing digital platforms with an unfair advantage because they have a lower cost base. For example, commercial free-to-air broadcasters must meet minimum quotas for Australian or local content,<sup>432</sup> which is an additional cost not borne by digital platforms. Similarly, publishers may bear additional costs related to compliance with industry standards and codes that do not apply to digital platforms.<sup>433</sup> The ACCC is not able to quantify the overall impact of the regulatory imbalance, as media businesses have not provided the ACCC with detailed costs of regulatory compliance in Australia.

425 [2015] FCA 652.

426 In this instance the court found defamatory imputations in two tweets written by Fairfax Media and broadcast on Twitter. Fairfax Media was ordered to pay Mr Hockey \$80 000 for the two tweets "published on Twitter by *The Age*." *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652 at 515, 517.

427 See *Defamation Act 2005* (NSW) s. 22(3); *Defamation Act 2005* (Qld) s. 22(3); *Defamation Act 2005* (Tas) s. 22(3); *Defamation Act 2005* (Vic) s. 22(3); *Defamation Act 2005* (WA) s. 22(3).

428 See *Civil Law (Wrongs) Act 2002* (ACT) s. 139E; *Defamation Act 2006* (NT) s. 31; *Defamation Act 2005* (NSW) s. 34; *Defamation Act 2005* (Qld) s. 34; *Defamation Act 2005* (SA) s. 32; *Defamation Act 2005* (Tas) s. 34; *Defamation Act 2005* (Vic) s. 34; *Defamation Act 2005* (WA) s. 34.

429 *Civil Law (Wrongs) Act 2002* (ACT) s. 139F(1); *Defamation Act 2006* (NT) s. 32(1); *Defamation Act 2005* (NSW) s. 35(1); *Defamation Act 2005* (Qld) s. 35(1); *Defamation Act 2005* (SA) s. 33(1); *Defamation Act 2005* (Tas) s. 35(1); *Defamation Act 2005* (Vic) s. 35(1); *Defamation Act 2005* (WA) s. 35(1).

430 *Duffy v Google Inc* (No 3) [2016] SASC 1 at 3.

431 *Trkulja v Yahoo! Inc & Anor* (No 2) [2012] VSC 217 at 1.

432 See discussion in s. 4.5.3 above.

433 See discussion in s. 4.5.2 above.

Digital platforms may also have an unfair advantage because they operate under fewer regulatory restrictions. Some stakeholders noted that regulation specific to radio and broadcast had a direct impact on revenue. For example the prohibition on broadcasters (but not online or print) from displaying election advertising during a 'black-out' period before an election.<sup>434</sup>

## 4.6.2 Rivalry for access to content rights

Many digital platforms access a range of different sources of content, including significant amounts of user-uploaded content and most do not compete directly with media businesses for content. However, there is some evidence to suggest that some digital platforms and media businesses may be rivals in overseas markets for content rights, such as sports streaming rights. For instance:

- In June 2018, Facebook won exclusive broadcast rights to show live Premier League matches in Thailand, Vietnam, Cambodia and Laos. The deal is reportedly worth about £200 million and Facebook won the auction for these coveted rights over television networks BeIn Sports and Fox Sports Asia.<sup>435</sup>
- In May 2018, Amazon purchased the rights to broadcast 20 live Premier League matches a season for three years from 2019 to Amazon Prime's UK members.<sup>436</sup>

Radio broadcasters also submit that they consider digital platforms to be rivals in the supply of audio content, following the increasing popularity of voice-activated devices, including Amazon's "Echo" smart speakers, Google's "Home" smart speakers, Apple's "Homepod" smart speakers and virtual assistant "Siri".<sup>437</sup> See also further discussion of these devices in chapter 7. Smart devices which are asked news related queries may play snippets of audio taken directly from commercial radio stations original bulletins. For example, Google Home will respond to commands to play "the latest news", or play news from a specific media provider or by topics including general news, technology, sports, world, politics, local, business, science and health.<sup>438</sup>

Additional stakeholder concerns regarding these technologies include:

- the impact of audio snippets being used by voice-activated devices and audio aggregators such as TuneIn and Spotify, which are accessible from voice activated devices. These services are able to access and monetise audio news content produced by or exclusively licensed to radio producers of news and journalistic content in Australia.<sup>439</sup>
- license negotiations over the use of audio snippets by digital platforms are challenging due to digital platforms' greater bargaining power.<sup>440</sup>
- digital platforms and audio content aggregators are not required to comply with minimum local content requirements and this is likely to reduce the extent to which Australian consumers are exposed to local news.<sup>441</sup>

Where digital platforms and media businesses are rivals for content rights, digital platforms will again have an advantage over media businesses by having fewer regulatory restraints and having lower regulatory compliance costs.

434 See for example, Australian Radio Network, [Submission to the ACCC Issues Paper](#), p. 4, April 2018. Clause 3A of Schedule 2 to the BSA requires that a broadcaster must not broadcast an election advertisement from the end of the Wednesday before polling day until the close of the poll on polling day, where an election is to be held in an area which relates to a licence area, or an area where a broadcast can normally be received.

435 M Hughes, [Facebook agreed first Premier League broadcast deal](#), The Times, July 6 2018, accessed 9 September 2018.

436 BBC Sport, [Premier League TV Rights: Amazon to show 20 matches a season from 2019-2022](#), 7 June 2018, accessed 9 September 2018.

437 See for example, [Southern Cross Austereo Submission to the ACCC Issues Paper](#), April 2018, p. 4, accessed 4 October 2018.

438 Google Home help, Explore features, [Listen to news](#), Accessed 19 October 2018

439 See for example, [Southern Cross Austereo Submission to the ACCC Issues Paper](#), April 2018, p. 5, accessed 4 October 2018.

440 See [Summary of Digital Platforms Inquiry Industry Stakeholder Forum](#), 16 August 2018, p. 3.

441 See for example, [Southern Cross Austereo Submission to the ACCC Issues Paper](#), April 2018, p. 5, accesses 4 October 2018.

### 4.6.3 Impact on consumers

Regulatory disparities between digital platforms and media businesses may also have other impacts on consumers by exposing consumers to content that is subject to fewer controls, which is particularly likely to impact vulnerable consumers and children.

For instance, consumers may be harmed by being exposed to content that has been through less rigorous quality control, fewer content filters, and less general oversight in comparison with content supplied by media businesses. As a consequence of digital platforms' personalisation of content to users, it can also be difficult to get a clear indication of the quality and quantity of information present on digital platforms.<sup>442</sup>

Stakeholders raise concerns that there is little effective regulation to protect children from targeted online advertising.<sup>443</sup> Stakeholders also noted that the immersive and embedded nature of some advertisements that are blended with unpaid content may particularly affect children who have reduced capacity to understand the commercial and persuasive intent behind advertising messages.<sup>444</sup>

### 4.6.4 The case for fundamental regulatory reform of media services industries

This Inquiry has required an examination of the impact of digital platforms on the state of competition in media services markets and the impact of longer term trends, such as innovation and technological change, on competition in this market. The ACCC's preliminary findings above indicate that the existing Australian media services regulatory framework has not adapted consistently to digitalisation and the shift to online provision of media services, including not consistently capturing new media providers such as digital platforms.

#### Impact of media convergence on current regulatory silos

As described above, the different regulatory frameworks that currently govern the media, communications, and telecommunications industries reflect historic industry silos that imposed different rules on the providers of different services.<sup>445</sup> However, the increasing convergence of these industries means that their once separate functions increasingly overlap—for example, where video content previously available only via television broadcast is now widely accessible over the internet.<sup>446</sup>

ACMA has previously noted that the blurring of boundaries between devices, services and industry sectors within a regulatory landscape that has nevertheless retained its historical distinctions is leading to inconsistent regulatory treatment of similar content, devices and services.<sup>447</sup>

#### Are sector-specific rules still necessary?

The convergence of industries calls into question the continuing necessity of many elements of the current regimes. As noted in ACMA's Broken Concepts report: 'the process of convergence has broken, or significantly strained, the legislative concepts that form the building blocks of current communications and media regulatory arrangements'.<sup>448</sup>

442 UK Commons Select Committee, Digital, Culture, media and Sports, 5th Report, [Disinformation and 'fake news': Interim Report](#), 29 July 2018, at 61 Accessed 30 September 2018. See also Nick Evershed and Christopher Knaus, [Help us monitor political advertising in Australia](#), The Guardian 24 July 2018, Accessed 30 September 2018, Christopher Knaus and Nick Evershed, [Electoral watchdog powerless to crack down on offshore political ads targeting Australians](#) *The Guardian*, 24 July 2018, Accessed 30 September 2018; Facebook response to questions on notice before [US Senate Committee on Commerce, Science and Transportation](#), 8 June 2018, question 3, p. 204 accessed 20 September 2018.

443 See for example, [Obesity Policy Coalition Submission to the ACCC Issues Paper](#), April 2018, p. 3.

444 See for example, [Obesity Policy Coalition Submission to the ACCC Issues Paper](#), April 2018, p. 6.

445 As discussed in Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 162, ALRC review on Classification - Content Regulation and Convergent Media, p. 61 at 2.71.

446 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), see definition of 'convergence' at p. 174.

447 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

448 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 5.

In particular, the Broken Concepts report notes that convergence has resulted in a ‘misplaced emphasis in the legislative framework or underlying policy that skews regulatory activity towards traditional media or communications activity’ and away from other newer forms of content delivery.<sup>449</sup> For instance, ACMA has noted that many of the consumer safeguards under the Telecommunications Act focus on voice services, with much less emphasis in regulation on other communications services such as video communications that are of increasing commercial and social significance.<sup>450</sup>

As such, many of the existing broadcasting legislative concepts have been highlighted in past reviews as outdated and potentially no longer necessary in the new media landscape.<sup>451</sup> For example, ACMA has also noted that the current broadcasting and datacasting licensing arrangements may be outdated, as new online content services reduce the rationale for special regulation of broadcasting services through licence arrangements.<sup>452</sup>

### **Are sector-specific rules still effective?**

Media and communications convergence also calls into question the continuing effectiveness of existing laws at achieving their intended objectives. Both ACMA and DOCA have noted that, whilst many of the objectives of existing regulation remain appropriate, the regulatory mechanisms used to achieve those objectives are not working.<sup>453</sup>

In particular, the Broken Concepts report noted that developments associated with convergence have resulted in:<sup>454</sup>

- misalignment of policy and legislative constructs with market, behavioural and technological realities
- gaps in the existing framework’s coverage of new forms of content and applications
- piecemeal responses to new issues, as core communications legislation is incrementally amended and supplemented to address the rapid change occurring in the communications sector over the past two decades (see Figure 4.16), fragmenting the communications legislative landscape and reducing the overall coherence of the regulatory scheme, and
- institutional ambiguity as a consequence of sectoral convergence such that several regulators—or no regulators—have a clear mandate to address pressing market or consumer concerns.

For example, excluding services providing programs using the internet from the definition of a ‘broadcasting service’ under the Ministerial Determination discussed at section 4.5.3 above has created a widening gap over time as online content grows in availability and popularity.<sup>455</sup>

### **The benefits of a unified and modernised legal framework**

In contrast to the fragmentary frameworks currently in place, a unified and platform-neutral legal framework that covers both online and offline delivery of media content to Australian consumers could create significant benefits for consumers and for participants in the Australian media and communications industries.<sup>456</sup> Some potential benefits for consumers and for industry participants include the following:

- A unified legal framework would significantly improve regulatory parity to enable different businesses that perform comparable functions to be regulated in the same way. This would decrease digital platforms’ unfair advantage from operating under fewer regulatory restraints and incurring lower compliance costs than media businesses, thereby levelling the playing field and increasing competition in the relevant media, advertising, and communications markets affected. Removing

449 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

450 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

451 See Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), Appendix K, ALRC Content regulation report; and ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011.

452 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011., p. 23.

453 Department of Broadband, Communications and the Digital Economy, [Convergence Review](#) (2012), p. 3.

454 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

455 ACMA, [Broken Concepts: The Australian communications legislative landscape](#), August 2011, p. 7.

456 Such an approach to regulation would also be consistent with that outlined in the Department of Prime Minister and Cabinet, [The Australian Government Guide to Regulation](#), March 2014, p. 5, accessed 24 October 2018.



redundant legislation would reduce the overall regulatory burden on media and communications industries and for Government agencies.

- Implementing a wholesale reform rather than continuing to enact regulatory fixes to specific technological advancements is also likely to simplify the complex system of regulations currently in place.
- A unified legal framework would enable the determination of issues most important to Australian audiences and ensure that such issues are more consistently and reliably protected under the new regime. The coverage of the law would evenly extend to all the different types of content delivered to Australian consumers across different media formats, including online content. This would improve the ability of the law to safeguard community expectations and standards.
- An overhaul of existing regulatory arrangements would allow the establishment of more flexible, technology-neutral principles that could better respond to technological change and adapt to new innovations in the dynamic and rapidly-changing media and communications industries.
- More broadly, establishing a unified and more flexible regulatory framework crafted for the new media environment is likely to improve the competitiveness of Australian digital content industries in a dynamic and increasingly-global media environment.

### **Scope of proposed reform extends beyond the scope of the Inquiry**

Clearly, there are significant benefits to be derived from a fundamental reform of the Australian media and communications regulatory frameworks to adequately address the challenges of digitalisation and convergence. The realisation of these benefits, however, requires an analysis of issues and markets beyond the remit of this Inquiry.

The primary reason is that the regulatory disparities identified above affect a large number of interrelated markets and any proposals for reform will similarly have far-reaching and potentially economy-wide impacts. The Inquiry's targeted analysis of the impact of digital platforms on media and advertising services markets, in particular in relation to the supply of news and journalistic content, is not conducive to a broader consideration of the impact of convergence on other media and communications markets more broadly. Digital platforms also perform many other functions that do not overlap with those of media companies (as discussed at section 4.4.1). As such, broad reform such as that proposed above should also be considered in the context of all the different types of digital platforms involved in the wider media and communications markets.

To craft broader reform of these intricate and technical areas of law and policy requires a fine balancing of competing interests that warrants in-depth consideration and guidance by the Government. Although the ACCC considers that the goals of regulatory parity and a level playing field are a good starting point, it will be necessary for the Government to take into account many other competing interests, including broader policy issues as well as Australia's international obligations. In this regard, the ACCC notes that the Government has commissioned numerous other reviews and reports that investigate the issues raised in this section, though none has been conducted with respect to the same breadth as this proposed recommendation. A list of past Government reviews and reports in relation to media and intellectual property regulation in recent years is provided at appendix B.



## 4.6.5 Preliminary recommendation to address regulatory imbalance

### ***Preliminary Recommendation 6—review of media regulatory frameworks***

The ACCC proposes to recommend the Government conduct a separate, independent review to design a regulatory framework that is able to effectively and consistently regulate the conduct of all entities which perform comparable functions in the production and delivery of content in Australia, including news and journalistic content, whether they are publishers, broadcasters, other media businesses or digital platforms.

Such a review should focus on content production and delivery and consider the following matters:

- **Underlying principles:** creating clear guiding principles for an overarching platform-neutral regulatory regime that can apply effectively across media formats and platforms with common rules applying to online and offline activities, and which is adaptable to new services, platforms and technologies.
- **Extent of regulation:** setting objective factors to determine whether regulations should be imposed on certain enterprises and determining appropriate roles for self-regulation and co-regulation.
- **Content rules:** creating a nationally-uniform classification scheme to classify or restrict access to content regardless of the format of delivery.
- **Enforcement:** implementing appropriate enforcement mechanisms and meaningful sanctions, including whether it is appropriate to establish or appoint a single agency responsible for monitoring, enforcing, complaints handling, and administering the unified regulatory framework.

The implementation of a unified, platform-neutral framework will affect and simplify existing regulations across different media, communications, and telecommunications industries.

The ACCC would intend to contribute its knowledge and expertise to such a review.

The ACCC recognises that sector-specific regulations are often underpinned by sound rationales based on differences in the functions or impact of the regulated entities. However, where entities perform comparable functions with comparable impact, the ACCC's view is that increasing regulatory parity between such entities would improve competition in affected markets as well as ensure even and consistent coverage of the regulations to achieve their objectives.

As discussed above, digitalisation and media convergence have transformed Australian media markets and raised questions about the continuing existence of differing layers of regulation applied to publishers, broadcasters, and digital platforms. As such, the ACCC proposes to recommend the Government to commission a separate, holistic review of the media industry with a view to reforming the existing fragmentary systems of regulations applicable to the converging media and communications industries in Australia, such that common rules apply to the production and delivery of content occurring online and offline.

Removing obsolete regulations and reinforcing the remaining regulations in media and communications will benefit consumers and market participants in the Australian media and communications industries by reducing the regulatory imbalance between market participants and increasing competition in those markets.

## 4.7 Practical challenges in requesting removal of content from digital platforms

### Key finding

- Digital platforms' take-down processes do not always provide for the timely take-down of copyright infringing content, including content belonging to Australian news media businesses. Rights holders face considerable challenges in enforcing copyright against digital platforms because of the cost and delay involved in bringing court proceedings against overseas-based defendants hosting content outside Australia. These enforcement difficulties create detriments for rights holders because they lower the incentives for digital platforms to respond promptly to take-down requests and erode the value of their copyrighted content.

The emergence of digital platforms and new business models have reinforced the role of the internet as a key marketplace for the distribution and access to copyright-protected materials. Within this online marketplace, however, there is also a perceived proliferation in unauthorised uses of copyright protected materials. Media businesses face considerable challenges in enforcing copyright against digital platforms, who are often hosts of copyright-infringing materials.

It is difficult to estimate the size of the market for copyrighted content in Australia. The Productivity Commission found that the capital expenditure on 'artistic originals' (the category of goods covered by copyright) was estimated at \$2.7 billion in the year ending June 2015—this equates to about 0.16 per cent of Australia's gross domestic product.<sup>457</sup> Another report from PwC (commissioned by the Australian Copyright Council) valued the contribution of copyright industries at more than 7 per cent of gross domestic product per year.<sup>458</sup>

However, the Productivity Commission has indicated that useful data on the precise revenue impact of copyright infringement, or the potential revenue lost through infringement, is 'lacking'.<sup>459</sup> Nevertheless, the Government has expressed its view that online copyright infringement can result in detriment to Australian content creators and creative industries, particularly in industries where copyright material can be copied and shared through digital means.<sup>460</sup>

When advocating for changes to Australian copyright infringement laws in October 2018 (including the website-blocking regime), the Australian Government has noted that '[t]he UK has a long established website blocking regime that enables responsive Court orders and the ability to consider a broader range of websites for blocking'.<sup>461</sup> This may be a contributing factor to the lower instances of copyright infringement amongst digital consumers in the UK (25 per cent) than in Australia (33 per cent), as found in an annual survey conducted by DOCA.<sup>462</sup>

457 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 105.

458 PwC, [The Economic Contribution of Australia's Copyright Industries- 2002-2016](#), prepared for the Australian Copyright Council, September 2017. Also citing WIPO 2015a. The estimate was derived by taking into account the costs of labour, advertising, distribution and collecting royalties as well as the contributions of industries related to copyright, such as manufacturing, wholesaling, retailing, renting, etc.

459 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 552.

460 Regulation Impact Statement, [Copyright Amendment \(Online Infringement\) Amendment Bill](#), October 2018 at para 6

461 Regulation Impact Statement, [Copyright Amendment \(Online Infringement\) Amendment Bill](#), The Problem October 2018 at para 24.

462 DOCA, [New online copyright research released](#), 7 August 2018, accessed 20 November 2018 and Regulation Impact Statement, [Copyright Amendment \(Online Infringement\) Amendment Bill](#), October 2018 at para 24.

## 4.7.1 Digital platforms' current takedown processes

### Variety of takedown practices

Digital platforms make a variety of 'notice and takedown' mechanisms available for their users to request that content infringing copyright or is defamatory in nature is removed. The efficacy of these measures varies between digital platforms.

Many digital platforms also do not have clear policies on the removal of content that may infringe copyright or be defamatory in nature. For example, although Facebook users can report abuse or conduct that goes against its 'community standards', these standards do not expressly prohibit defamatory content. Accordingly, aside from obtaining a court order, a user's ability to compel Facebook to remove defamatory material appears to be limited. In addition, whilst Facebook's terms of service enable it to remove content and disable accounts, there are no obligations on Facebook to do so. Facebook 'can' and 'may' take action to remove infringing content, but a failure to remove content is not likely to be a breach of its terms, because the terms do not impose any such duty on Facebook.

Google also offers rights management tools to some copyright owners.<sup>463</sup> For instance, YouTube's Content ID system automatically scans YouTube videos for content that matches uploaded intellectual property. Content ID is only offered to some copyright owners who meet specific criteria,<sup>464</sup> including a 'substantial body of material that is frequently uploaded'.<sup>465</sup> Once copyrighted material is uploaded, Content ID continuously scans and compares new uploads to the copyrighted material provided.<sup>466</sup> Content ID gives copyright owners the option to block, monetise, or track the video. These tools are available in Australia.<sup>467</sup>

Stakeholders have noted that Content ID has not been effective for live content broadcasts such as sporting events.<sup>468</sup> For instance, stakeholders submit that there is no retrospective remuneration for unauthorised content,<sup>469</sup> and small edits to authorised content may defeat the matching program.<sup>470</sup>

There also appear to be significant delays and costs associated with requesting take-down of infringing content from digital platforms. For instance, stakeholders have submitted that the process of engaging with Google and Facebook staff to access their rights management tools can take up to four weeks and that rights holders must issue individual notices for each infringing act.<sup>471</sup>

### Volume of infringement notices

The Inquiry received submissions from rights holders regarding the volume of takedown notices that must be sent to digital platforms on a regular basis. Take down notices are typically issued by copyright owners to digital platforms where unauthorised content is hosted or displayed by that platform.

Stakeholders note Facebook web form takedown processes are managed overseas, leading to significant delays during live sporting events and unauthorised broadcasts on Facebook Live.<sup>472</sup> Slight alterations to copyright content, such as borders or flipping prevents matching of infringing content and manual processes to takedown unauthorised content are ineffective for live sport and cost-prohibitive.<sup>473</sup>

463 Google Privacy Policy YouTube Terms of Service, [Qualifying for Content ID](#), accessed 3 October 2018.

464 Google Privacy Policy YouTube Terms of Service, [Qualifying for Content ID](#), accessed 3 October 2018.

465 Google Privacy Policy YouTube Terms of Service, [Using Content ID](#), accessed 3 October 2018.

466 Google Privacy Policy YouTube Terms of Service, [Using Content ID](#), accessed 3 October 2018.

467 See Google, [How Content ID works](#), accessed 1 November 2018.

468 See for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, pp. 11-12.

469 See for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, p. 6-10 and Google, You Tube How Content ID Works, [Common questions about content ID](#), accessed 20 November 2018.

470 See for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, p. 10-14 and Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 10.

471 See, for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 10.

472 See, for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, p. 9.

473 See, for example, Foxtel and Fox Sports, [Submission to ACCC Issues Paper](#), April 2018, pp. 11-12.

While only a portion of unauthorised content on digital platforms relates to news or journalistic content, it provides an example of the bargaining relationship between news and media businesses and digital platforms.

Table 4.6 below sets out Google's estimate of the number of copyright infringement notices it received regarding YouTube and regarding its other products and services in 2016, 2017, and part of 2018, that may be relevant to Australia.<sup>474</sup>

**Table 4.6: Number of copyright infringement notices received by Google<sup>475</sup>**

Period	No. notices issued regarding YouTube in Australia	No. notices regarding other product/services in Australia
1 Jan 2016–31 Dec 2016	13 392	23 377
1 Jan 2017–31 Dec 2017	16 946	16 901
1 Jan 2018–25 July 2018	7 969	7 538

Source: Information provided to the ACCC.

## Discretion of digital platforms

Australian copyright law does not impose obligations on digital platforms to search for and remove copyright-infringing content. Likewise, Australian defamation law does not impose positive obligations on digital platforms to proactively remove defamatory content.

If a digital platform does not take down infringing content after receiving a valid take-down request from a rights holder, the rights holder may commence proceedings against the user or, if the digital platform is likely to be liable for authorising the infringement, the rights holder may also commence proceedings against the digital platform. Neither option is likely to result in the quick or straightforward removal of the infringing content.

Submissions from media businesses note the difficulties in enforcing copyright protections against digital platforms as well as the lack of alternatives to major players, stating that refusing to deal would be tantamount to opting out of the internet.<sup>476</sup>

## Inefficiencies in existing processes

Stakeholder submissions to the Inquiry suggest that many consider that digital platforms' current takedown processes do not provide for the efficient and effective takedown of copyright-infringing content:

- as digital platforms benefit from copyright-infringing content hosted on their platforms, they have little incentive to remove infringing content in a timely way<sup>477</sup>
- most rights holders are required to issue individual-take down notices, which imposes significant monitoring and enforcement burden<sup>478</sup>
- content creators incur significant losses from infringing content being hosted on digital platforms.<sup>479</sup>

<sup>474</sup> Information provided to the ACCC.

<sup>475</sup> Statement provided by Google regarding Table 4.6. "The figures in the table are estimates only, as it is not possible in all cases to ascertain whether a copyright infringement notice is in fact relevant to Australia. The figures in the table represent: (a) For YouTube: the number of 'takedown requests' received through Google's public webform or email address [copyright@youtube.com](mailto:copyright@youtube.com), for which the complainant submitting the request listed their Country/Region as Australia, or which came from a 'au' domain; and (b) For products/services other than YouTube: the number of copyright infringement notices received through Google's public webform, for which the complainant submitting the form listed their Country/Region as Australia. Furthermore: an infringement notice may be made in respect of multiple copyrighted works or in respect of multiple URLs for the same copyrighted work; may be submitted by an overseas representative or representative organisation on behalf of a copyright owner; may relate to more than one allegation of copyright infringement; and may relate to allegations of copyright infringement with respect to content outside of Australia."

<sup>476</sup> See, for example, [Free TV, Submission to ACCC Issues Paper](#), April 2018, p. 8 and Free TV, [Supplementary Submission to ACCC Issues Paper](#), September 2018, p. 3.

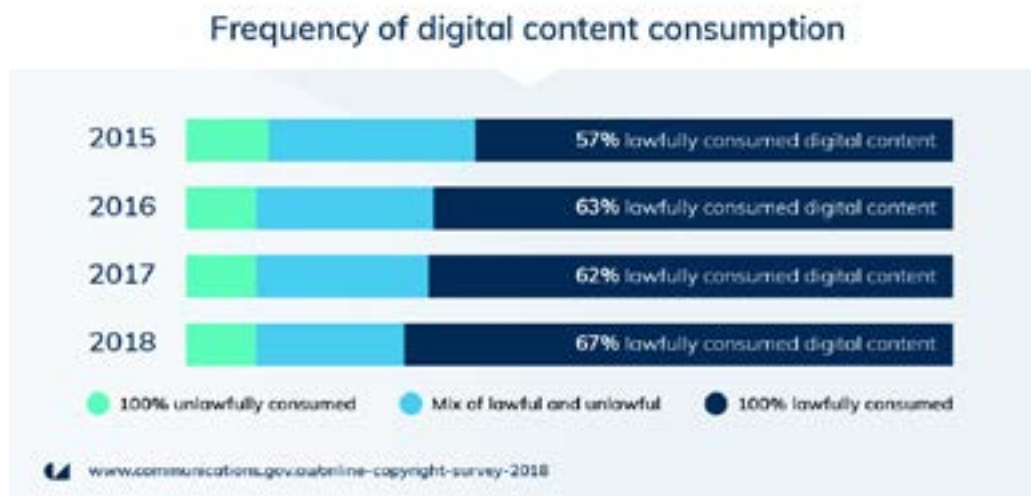
<sup>477</sup> See, for example. Getty Images, [Submission to ACCC Issues Paper](#), April 2018, p. 7.

<sup>478</sup> See, for example. [Foxtel and Fox Sports, Submission to ACCC Issues Paper](#), April 2018, pp. 6-8.

<sup>479</sup> See, for example, [Free TV, Submission to ACCC Issues Paper](#), April 2018 and [Foxtel and Fox Sports, Submission to ACCC Issues Paper](#), April 2018.

The results of an annual consumer survey on online copyright infringement (DOCA survey) in 2018 found, however, that copyright infringement among consumers has been decreasing over the past four years, as shown in figure 4.17 below.<sup>480</sup>

**Figure 4.17: Frequency of digital content consumption**



Source: Department of Communications and the Arts '[New online copyright research released](#)', 7 August 2018. Accessed 20 November 2018.

## 4.7.2 Digital platforms' current take-down obligations

### Current takedown requirements under copyright law

Many digital platforms are headquartered in the United States and are bound by s. 512 of the *Digital Millennium Copyright Act* (the DMCA), which provides safe harbour from liability for copyright infringement if, upon receiving a proper notification, a service provider promptly removes or blocks access to the material identified in the notification.<sup>481</sup> The DMCA sets out procedures for proper notification of an infringement, which requires copyright owners to submit a notification to the service provider's designated agent for identified infringements.<sup>482</sup>

Although digital platforms do not have the same safe harbour protections under the DMCA in Australia, there is evidence to suggest that digital platforms apply the same take-down procedures in the Australian jurisdiction, which may result in difficulties for rights holders. For instance, digital platforms are required to designate an agent for receiving infringement notices, but the designation of an agent in the USA may result in significant delays to processing infringement notices filed from Australia. Rights holders have also submitted that digital platforms require separate notices to be submitted for each infringement, which results in significant burden on rights holders.<sup>483</sup>

<sup>480</sup> See DOCA, [New online copyright research released](#), 7 August 2018, accessed 20 November 2018.

<sup>481</sup> The Digital Millennium Copyright Act of 1998, s. 512(g)(1).

<sup>482</sup> The Digital Millennium Copyright Act of 1998, s. 512(c)(3).

<sup>483</sup> See, for example, [Foxtel and Fox Sports, Submission to ACCC Issues Paper](#), April 2018 pp. 6–8 and Free TV, [Supplementary Submission to ACCC Issues Paper](#), September 2018, p. 10.

## Other requirements under copyright law

Currently, rights holders can apply to the Federal Court for a court order directing an ISP to block access to websites that have the 'primary purpose' of infringing copyright.<sup>484</sup> The Copyright Amendment (Online Infringement) Bill 2018 (Cth) (the Online Infringement Bill) was introduced into Parliament in October 2018 and amends the current site-blocking provisions of the Copyright Act to allow rights holders to apply for a court order directing an ISP or a search engine to block access to websites that have the 'primary purpose or *primary effect* [emphasis added]' of infringing copyright.<sup>485</sup> The Online Infringement Bill also clarifies that the Federal Court has the power to issue 'responsive and adaptive injunctions' that 'block other pathways that start to provide access to an infringing site. The Online Infringement Bill was passed by the Parliament on 28 November 2018.<sup>486</sup>

### 4.7.3 Challenges in prosecuting digital platforms

#### High costs of prosecution

Cost and time are significant deterrents in commencing proceedings in court.<sup>487</sup> Some estimates suggest that the average cost for Federal Court action to enforce copyright is between \$80 000 and \$100 000, though the expense of copyright litigation varies significantly depending on the nature of the infringement and the evidence brought before the court. That is, whilst an uncontested claim may cost around \$80 000, contested claims requiring expert evidence at trial may cost significantly more, in between \$500 000 to \$1 million.

#### Particular difficulties in pursuing overseas-based defendants

In addition to the cost and delay associated with copyright litigation, there are three additional challenges in enforcing copyright against overseas-based defendants such as the key digital platforms operating in Australia:

- serving a foreign defendant outside the Australian jurisdiction
- establishing that there is infringing conduct occurring within Australia, and
- enforcing judgments against a foreign defendant.

First, to launch legal proceedings, copyright holders must first serve the digital platform with an originating motion or other document instituting proceedings. In order to serve an entity outside Australia and without a physical presence in Australia, the rules for 'service out of jurisdiction' must be followed.

Second, in order to prove copyright infringement, it is necessary for the copyright owner to prove:

- that there is a work in which copyright subsists
- that the alleged infringer has copied a substantial part of the copyright work, and
- that the alleged infringing conduct occurred in Australia.

484 *Copyright Act 1968* (Cth), s115A.

485 Copyright Amendment (Online Infringement) Bill 2018.

486 Copyright Amendment (Online Infringement) Bill 2018, [Second reading speech](#), accessed 9 November 2018.

487 Attorney General [A strategic Framework for Access to Justice in the Federal Civil Justice System](#), September 2009, p. 27, accessed 21 February 2018.

Whilst many digital platforms are located overseas, it is necessary to prove that the infringing conduct occurred in Australia to establish copyright infringement. The mere fact that the digital platform is available in or accessible from Australia is unlikely to be sufficient.<sup>488</sup> It will be a question of fact in each case, but the court's assessment will turn on factors such as whether the infringing conduct (e.g. publishing or downloading) is directed or targeted at persons or subscribers in Australia,<sup>489</sup> where the infringing content was uploaded and where the infringing content is stored.

Third, even if a rights holder succeeds in their action against a digital platform based overseas, they must still apply for the Australian court's judgment to be enforced in the digital platform's home jurisdiction. Each country may have its own individual rules for recognising an Australian judgment and overseas enforcement can be a costly and time consuming process—the cost of enforcing a judgment overseas may exceed the value of the judgment.

Each of these challenges is likely to add significant cost and delay to the already expensive and time-consuming process of establishing copyright infringement. These are likely to present particular challenges for enforcing copyright against time-sensitive media such as live-streamed content.<sup>490</sup>

### **Difficulty establishing authorisation liability in relation to digital platforms**

Authorisation liability requires the consideration of three factual matters in s101(1A) of the Copyright Act involving:

- the extent of the digital platform's power to prevent the infringements
- the nature of the relationship between the digital platform and the primary infringer, and
- whether the person took any other reasonable steps to prevent or avoid the infringing act.

Ultimately, authorisation is a question of fact and degree to be determined on the facts of each case and it is uncertain whether any digital platform providing a service involving user-uploaded content will be found to have authorised any infringing acts of its users.

Stakeholder submissions to the Inquiry have also noted the difficulty and lack of clarity in the operation of authorisation liability as a critical problem that impedes enforcement of copyright and undermines the incentives of digital platforms to ensure that copyright-infringing content is removed.<sup>491</sup>

### **Low value of likely remedies**

The basis for calculating civil damages for copyright infringement under the Copyright Act can result in low or nominal damages. For example, in *Pokémon Company International v Redbubble*,<sup>492</sup> the Federal Court awarded Pokémon \$1 in nominal damages for successfully establishing authorisation liability and ordered Redbubble to pay 70 per cent of their legal costs, leading to a substantial net loss.

As such, rights holders must also balance the high costs of copyright proceedings and the uncertainties surrounding authorisation liability against the possibility of only nominal damages being awarded for a successful action, further decreasing the incentives on rights holders to commence court action to enforce copyright against digital platforms.

## **4.7.4 Impact of enforcement difficulties on media markets**

### **Lower incentives for digital platforms to respond promptly to take-down requests**

As a result of the difficulties in enforcement, digital platforms have lower incentives to respond promptly to requests to takedown infringing material and to refrain from engaging in conduct that may infringe copyright than media businesses which may also host content online.

488 *Ward Group Pty Ltd v Brodie & Stone Plc* (2005) 215 ALR 716, 717.

489 *Ward Group Pty Ltd v Brodie & Stone Plc* (2005) 215 ALR 716, 717.

490 See for example, [Foxtel and Fox Sports, Submission to ACCC Issues Paper](#), April 2018 pp. 6–8.

491 See for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, pp. 10–14; Foxtel and Fox Sports [Submission to ACCC Issues Paper](#), April 2018 p. 6–8.

492 [Pokémon Company International, Inc. v Redbubble Ltd \[2017\] FCA 1541](#).



For instance, the following issues relating to potential infringement of copyright protections and other intellectual property rights have been reported by digital platform users.

- Use of copyrighted images: Digital platforms often link to or display photographs, which may be copyright protected works.<sup>493</sup> Reproduction of photographs used in news articles, in particular, is likely to infringe the copyright in those photographs held by media businesses (unless the limited ‘fair dealing’ exception applies, or unless consent or a license has been granted for use).
- Text and data mining: Digital platforms produce indices, snippets and listings via the background caching of internet content. Where the data or text mining processes involve the copying of copyrighted content, this may give rise to a copyright infringement in Australia.<sup>494</sup>

## Detriments for content creators

The difficulties in enforcing copyright against digital platforms and the resulting lower incentives on digital platforms to protect copyrighted content cause detriments for rights holders by eroding the value of their copyright and other intellectual property rights. These difficulties may also harm content creators, who are likely to receive less attribution and less revenue for their copyrighted content. These detriments may become increasingly significant as digital sources of revenue become a greater proportion of the revenue received for copyrighted content by rights holders and content creators.<sup>495</sup>

These detriments may disproportionately impact smaller content creators, who are less able to bear the costs of monitoring and enforcing infringing conduct on digital platforms and who are likely to have less direct access to digital platforms for the purposes of requesting take-downs.<sup>496</sup>

Research has found that users are more likely to choose a link to pirated content when those links are promoted in search results.<sup>497</sup> As such, submissions have been made to the Inquiry that the availability of free, unauthorised content on digital platforms is likely to lead to fewer users paying to legally access copyrighted content, leading to potential detriments in lost revenue and less access to valuable user data.<sup>498</sup>

## Detriments for media businesses hosting content online

The difficulties with enforcing copyright against digital platforms and the relative ease of enforcing copyright against media businesses also adds another layer to the regulatory imbalance between the media businesses and digital platforms. This is because media businesses which host content online will face greater constraints from copyright and defamation laws because they are more readily enforced against the media businesses.

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493 In 2017, Getty Images made a complaint to the European Commission accusing Google of anti-competitive practices relating Google’s reproduction of copyrighted images. Google and Getty Images reached a confidential licencing deal in February 2018 and, as part of the deal, Google removed some features from image search, including the “view image” button that opened an individual picture in the web browser and made it easy to download: see BBC, [Anger at Google image search ‘peace deal’](#), 16 February 2018, Accessed 23 September 2018.

494 ALRC report ‘Copyright and the Digital Economy’ at p. 262 and DOCA commissioned report ‘Cost benefit analysis of changes to the *Copyright Act 1968* (Cth) at p. 39-40.

495 In the 2017-18 financial year, APRA AMCOS collected revenue of \$134.5 million from digital sources, up 21.9 per cent from the previous financial year and higher than the revenue collected from from television (\$85.7 million) and radio (\$46.9 million) combined: see Michael Bailey, [APRA AMCOS pay songwriters record \\$362m as digital revenue eclipses broadcast](#), Australian Financial Review 17 October 2018, accessed 9 November 2018.

496 Survey by CEG TEK, [Top 100 pirated Movies of the Festival Report](#), accessed 24 October 2018. Independent Australian film 100 Blood Acres was the 95th most illegally downloaded film in 2013. “About 50 per cent more people illegally downloaded 100 Bloody Acres every single day, than saw it in the cinema. And compared to gross Australian and US revenues of A\$24 744, the illegal downloads were worth perhaps A\$434 000 in box office sales.” V. O’Donnell, [A real victim of online piracy is Australian indie cinema](#), The Conversation, November 2016, accessed 24 October 2018.

497 L. Sivan, M. D Smith, R. Telang, [Do Search Engines Influence Media Piracy? Evidence from a Randomized Field Study](#), Carnegie Mellon University, September 2014, pp. 25-27, accessed 24 October 2018.

498 See for example. [Getty Images, Submission to ACCC Issues Paper](#), April 2018 p. 7 and [Foxtel and Fox Sports, Submission to ACCC Issues Paper](#), April 2018 pp. 6-8.

On this issue, media submissions to the NSW Statutory Review on the *Defamation Act 2005* (NSW) raised concerns regarding the realistic level of editorial control over content hosted by their websites, which include not only content prepared by the media businesses themselves, but also content from third party affiliates and comments from their readers.<sup>499</sup> The Review summarised concerns raised in submissions from The Communications Alliance and ninemsn that:

*..lack of clarity around the scope of liability for digital content hosts and online intermediaries in relation to content posted by third parties has led to Australian media and online hosts taking a conservative approach to third party content.*<sup>500</sup>

#### 4.7.5 New approaches to enforcement of rights holders

The enforcement of the rights of copyright holders in the shift to digitalisation is a challenge facing rights holders in a range of jurisdictions.

The Productivity Commission's 2016 report on 'Intellectual Property Arrangements'<sup>501</sup> proposed the introduction of a specialist IP list in the Federal Circuit Court with features similar to those of the UK Intellectual Property Enterprise Court (IPEC). The Department of Industry, Innovation and Science (DIIS) currently has carriage of implementing this recommendation from the Productivity Commission and has established an enforcement working group that includes representatives from DIIS, DOCA, Department of Home Affairs, IP Australia, Treasury and the Attorney General's Department.

##### **Case study: New enforcement approaches in media markets—IPEC in the UK**

In 2010, the IPEC was established in the UK to lower the costs of enforcing IP rights for rights holders. The key features of the IPEC are:

1. a cap on recoverable costs of £50 000 and a cap on damages of £500 000, which addresses key concerns of small and medium-sized enterprises (SMEs) regarding the risks of paying a defendant's costs and the amount of potential damages payable
2. an active case management system that limits the amount of discovery and expert evidence, endeavouring to hear trials in under two days (with many cases heard in a single day), and
3. a small claims procedure with a cap on damages of £10 000, with case management done on the papers and trials completed in hours.

This new court has been a successful way of improving access to justice for rights holders in the UK, particularly for lower-value IP matters. In particular, active case management, particularly regarding the use of discovery and expert witnesses, has been an effective way of making cases much quicker and cheaper.<sup>502</sup> The small claims procedure has also become a popular forum for professional photographers to enforce their rights.

Whilst there appears to have been an increase in the number of cases filed in the IPEC from 110 cases in 2010 to 272 cases in 2013<sup>503</sup>, initial concerns that the UK IPEC would encourage inappropriate cases do not appear to have eventuated.<sup>504</sup>

499 NSW Statutory Review of the *Defamation Act 2005*, June 2018, p. 32. *ACCC v Allergy Pathway* (No. 2) [2011] FCA 74

500 NSW Statutory Review of the *Defamation Act 2005*, June 2018, reproduced at page, p. 32 at 5.54 and 5.60 Submission of ninemsn, p. 3–4. Submissions from Communications Alliance, at p. 8.

501 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 579.

502 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 576.

503 Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 560.

504 C. Helmers, Y. Lefouli and L. McDonagh, [Evaluation of the Reforms of the Intellectual Property Enterprise Court 2010–2013](#), City Research online, University of London, June 2015, p 34; Productivity Commission, [Intellectual Property Arrangements](#), September 2016, p. 577.

## 4.7.6 Improving the enforcement of IP rights

While the ACCC has formed the preliminary view that a broader technology-neutral review of the media and communications regulatory framework is necessary to address regulatory imbalances, the ACCC also proposes to recommend action in the shorter-term to address the detriments experienced by rights holders from the availability of copyright-infringing content being made available on digital platforms.

### Setting a mandatory standard for take-down procedures

A uniform industry standard for the removal of copyright-infringing content from digital platforms would address the significant detriments to content creators and media businesses by the difficulty, cost, and delay in enforcing intellectual property rights against overseas-based digital platforms.

Faster and more efficient take-downs strengthen copyright protections and has the potential to increase the attribution and the revenue flowing to rights holders from use of copyright-protected content in Australia.

### Improving clarity of authorisation liability

Clear industry standards regarding reasonable take-down procedures would also increase the clarity of how authorisation liability operates under the Copyright Act and increase its utility to rights holders.

Broadly speaking, a digital platform displaying copyright-infringing content may be liable if it has ‘authorised’ the infringement.<sup>505</sup> However, authorisation liability is a complex area of copyright law and is difficult to establish for both digital and non-digital conduct. Accordingly, there is significant uncertainty both for rights holders seeking to hold digital platforms accountable for hosting infringing content, and also for digital platforms, which do not have safe harbour from authorisation liability under Australian copyright law.

Notably, one of the relevant considerations in determining authorisation liability is ‘whether the person took any other reasonable steps to prevent or avoid the doing of the act, *including whether the person complied with any relevant industry codes of practice*’ (emphasis added),<sup>506</sup> though no relevant industry code of practice is currently in place. Stakeholder submissions to the Inquiry have noted the importance of clear rules on authorisation liability to ensure that online content hosts, such as digital platforms, have appropriate incentives to remove copyright-infringing content.<sup>507</sup> As such, the ACCC considers that the development of a mandatory industry code or standard may improve the clarity and utility of the authorisation liability provisions in the Copyright Act.

A supplementary submission from Free TV has raised concerns about developing any industry codes because ‘compliance with any such codes would significantly reduce any risks associated with pirated material online to the benefit of service providers and would make a finding of authorisation infringement unlikely.’<sup>508</sup> However, if compliance with an industry standard could establish a reasonable and effective method of removing copyright-infringing content from digital platforms, that addresses the current challenges in enforcing copyright on digital platforms outlined above, this would be valuable for both rights holders and for digital platforms.

A mandatory code or standard could also outline reasonable and effective steps for a digital platform to prevent distribution of copyright-infringing content or otherwise seek to fairly divide the burden of enforcement between the content hosts and the rights holders. Under such an approach, rights holders would benefit from a more efficient and equitable way of enforcing copyright, and digital platforms would benefit from a reduction in the likelihood of being found liable of authorising an infringement.

<sup>505</sup> *Copyright Act 1968* (Cth), ss. 36 and 101.

<sup>506</sup> *Copyright Act 1968* (Cth), ss. 36(1A) and 101(1A).

<sup>507</sup> See, for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 14 -15; NewsCorp, [Submission to the ACCC Issues Paper](#), April 2018, p. 129-130.

<sup>508</sup> Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p.15.

## 4.7.7 Preliminary recommendation to assist more effective removal of copyright infringing material

### ***Preliminary Recommendation 7—take-down standard***

The ACCC proposes to recommend that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright infringing content to enable effective and timely take-down of copyright-infringing content. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital platforms under Part 6 of the Telecommunications Act.

The ACCC views that a mandatory code, unlike a voluntary regime, is more likely to incentivise the compliance of digital platforms as it would be supported by meaningful sanctions and subject to enforcement by a statutory authority. As outlined in section 4.7.6, the ACCC considers that the development of clear and effective procedures for take-down of infringing content is likely to strengthen copyright protections by making copyright protections easier to enforce. Incorporating the take-down procedures in an industry code of practice or industry standard is likely to benefit both rights holders and digital platforms by increasing the clarity of the operation of authorisation liability. The ACCC also recognises that rights holders and digital platforms each have strong and often conflicting views on effective and reasonable procedures and thus may have difficulty achieving consensus.

As such, the ACCC proposes to recommend that the development of take-down procedures for copyright infringing content should be set out in a mandatory industry standard determined by ACMA, following consultation with industry. One way to enable this is to amend Part 6 of the Telecommunications Act to expand ACMA's power to set industry standards in the telecommunications industry to include digital platforms. The proposed amendments and mechanisms for ACMA to develop a mandatory industry standard over take-down procedures of digital platforms are outlined in more detail below.

### **Proposed legislative amendments**

ACMA has the power to set industry standards applicable to a section of the telecommunications industry, telemarketing industry, or the fax marketing industry, if there are no industry codes in existence or if an industry code is deficient.<sup>509</sup>

However, Part 6 of the Telecommunications Act currently only applies to the telecommunications industry, telemarketing industry, or fax marketing industry; none of which includes the supply of goods or services by digital platforms. As such, the ACCC proposes to recommend that the Telecommunications Act be updated to allow the ACMA to make industry codes in relation to digital platforms, consistent with the existing arrangements which allow codes and standards to be made for the telecommunications, telemarketing, and fax marketing industries.

One way of effecting the requisite amendments is to update the definition of 'telecommunications industry' in Part 6 to include digital platforms. That is, s108B of the Telecommunication Act could be amended to specify that 'for the purposes of this Part, the 'telecommunications industry' includes an industry that involves carrying on business as a digital platform.<sup>510</sup> Consequential amendments would be required for the definitions of associated terms. For example, s109C should also be amended such that 'telecommunications activity' includes an activity that consists of 'supplying goods or services as a digital platform'; s110 should be amended to include 'digital platforms' as one of the groups that constitute a 'section of the telecommunications industry'. A new definition for 'digital platform' would also be required.

<sup>509</sup> *Telecommunications Act 1997* (Cth), ss. 123, 124 and 125.

<sup>510</sup> *Telecommunications Act 1997* (Cth), s. 108B.

The proposed amendments operate for the purposes of Part 6 only. That is, digital platforms would not be included in the definition of ‘telecommunications industry’ for the purposes of any other Part 6. Accordingly, this would not impose on digital platforms any other requirements applicable to the telecommunications industry under the other Parts of the Telecommunications Act.

### **Ministerial direction to determine a mandatory standard**

Following the proposed amendments of Part 6, the ACCC proposes to recommend that the Minister for Communications direct ACMA to determine a mandatory standard applying to digital platforms that outlines effective take-down procedures, in order to improve the effectiveness of copyright enforcement in relation to digital platforms in Australia.<sup>511</sup> ACMA is empowered to determine an industry standard under section 125AA of the Telecommunications Act if directed to do so by the Minister.

Although the amendments proposed above would enable digital platforms to develop self-regulatory industry codes on any matter related to their supply of goods and services as a digital platform,<sup>512</sup> it would be preferable for take-down procedures to be set out in a mandatory standard determined by ACMA. This is due to the strong concerns voiced by industry stakeholders in submissions<sup>513</sup> and during the media industry forum<sup>514</sup> that there are serious deficiencies in the existing take-down procedures, which cast doubt on the ability of a self-regulatory code to enable rights holders to effectively enforce their valuable content rights against overseas-based digital platforms in Australia.

### **Consultation on the mandatory standard**

ACMA would be required to consult publicly with interested parties more broadly by publishing details of its proposed standard in a newspaper circulating in each state and territory. ACMA would also be required to consult specifically with:

- any industry body or association representing digital platforms<sup>515</sup>
- the ACCC<sup>516</sup>
- the Telecommunications Industry Ombudsman<sup>517</sup>
- the Office of the Australian Information Commissioner (if the mandatory standard raises any privacy issues),<sup>518</sup> and
- at least one body or association representing consumer interests.<sup>519</sup>

It would be appropriate for ACMA to consult broadly with industry stakeholders, including digital platforms, content creators and media businesses regarding the proposed mandatory standard. Each of the different groups of stakeholders are likely to have valuable (and potentially conflicting) insights regarding key features of an effective and practicable take-down process to enable the efficient removal of copyright-infringing content in a way that does not impose undue financial or administrative burdens on digital platforms.

511 *Telecommunications Act 1997* (Cth), s. 125AA. ‘ACMA must determine an industry standard if directed by the Minister.’

512 *ibid.*, s. 112(1).

513 See, for example, Free TV, [Second submission to ACCC Issues Paper](#), September 2018, p. 11 -14; Foxtel and Fox Sports [Submission to ACCC Issues Paper](#), April 2018, p. 6-8; MEAA, [Submission to the ACCC issues paper](#), April 2018, p. 2.

514 ACCC, Summary of Digital Platforms Inquiry Industry Stakeholder Forum, 16 August 2018 p. 7.

515 *Telecommunications Act 1997* (Cth), s. 125(4).

516 *Telecommunications Act 1997* (Cth), s. 133(1).

517 *Telecommunications Act 1997* (Cth), s. 133(2).

518 *Telecommunications Act 1997* (Cth), s. 134.

519 *Telecommunications Act 1997* (Cth), s. 135(1).

## Enforcement of a mandatory standard

Compliance with an industry standard is mandatory.<sup>520</sup> If a digital platform were to contravene an industry standard registered under Part 6 of the Telecommunications Act, ACMA may issue a formal warning<sup>521</sup> and the digital platform may be required to pay civil penalties of up to \$250 000 for each contravention, in accordance with Part 31 of the Telecommunications Act.<sup>522</sup> Making this mandatory code would ensure breaches could attract penalties under the Telecommunications Act.

## Matters determined in the mandatory standard

Whilst the specifics of the take-down notice procedure should be settled after consultation with relevant industry stakeholders, the standard should provide guidance on the following key issues of concern raised by rights holders in this Inquiry:

- improving ease of communication between rights holders and digital platforms
- mechanisms to address particularly time-sensitive content such as live streamed sporting events
- mechanisms for rights holders to make bulk notifications to address repeated infringements of the same content
- measures to develop or update content-matching or unauthorised content identification software
- procedures for removing users who commit multiple or regular infringements.

### 4.7.8 Other preliminary recommendations addressing enforcement difficulties

A recurring theme in this Inquiry has been the difficulty of enforcing breaches of copyright hosted on digital platforms and the difficulties experienced by advertisers, consumers and media companies in seeking review or disputing digital platforms' decisions. These issues are discussed in detail above in this chapter 4 at 4.7.1 to 4.7.4 and in chapter 3.

Preliminary recommendations 4 and 5 propose a regulatory authority that could have the power to monitor and enforce digital platforms' obligations in digital advertising markets and in the display of news content or news referral services. The regulatory authority could have powers to monitor and investigate biases, respond to complaints, commence investigations of its own initiative, publish reports and make recommendations to government agencies and industry to further address these ongoing concerns.

The ACCC is also considering one area for further analysis and assessment to address enforcement issues—the introduction of a digital platforms ombudsman.<sup>523</sup> This ombudsman could have powers to resolve access, scam content, surfacing and misleading advertising disputes. The ACCC seeks further industry feedback regarding this proposal.<sup>524</sup>

<sup>520</sup> *Telecommunications Act 1997* (Cth), s. 128.

<sup>521</sup> *Telecommunications Act 1997* (Cth), s. 129.

<sup>522</sup> Pecuniary penalties are ordered by the Federal Court. See further *Telecommunications Act 1997* (Cth), s. 570.

<sup>523</sup> See chapter 3, section 3.2.6.

<sup>524</sup> See chapter 3, section 3.2.6.

# Chapter 5: Digital platforms and consumers

## Key findings

- Digital platforms provide a wide range of valuable services to consumers, often for zero monetary cost, in exchange for consumers' attention and their user data. Many digital platforms can collect a large amount and variety of user data on a user's activities beyond what is actively provided by users during the use of the digital platform's services.
- Consumers have different privacy preferences and levels of privacy awareness. All consumers will be better off when they are sufficiently informed and have sufficient control over their user data such that they can make informed choices that align with their privacy and data collection preferences.
- Currently, several features of consumers' relationship with digital platforms may prevent consumers from making informed choices, including the bargaining power held by the digital platform vis-à-vis the consumer; information asymmetries that exist between digital platforms and consumers; and inherent difficulties in accurately assessing the current and future costs of providing their user data.
- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.
- Many digital platforms' privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as 'personal information', which is likely to cause significant confusion for consumers.
- Despite consumers being particularly concerned by location tracking, online tracking for targeted advertising purposes and third-party data-sharing, these data practices are generally permitted under digital platforms' privacy policies.
- Many consumers would like to be able to opt-out of certain types of data practices and some digital platforms convey to consumers an impression of providing extensive privacy controls. However, it may not be in the digital platforms' interests to allow consumers to opt-out of such data practices and in some cases, digital platforms do not provide consumers with meaningful control over the collection, use and disclosure of user data.
- Some digital platforms may also design user interfaces that lead users to make privacy-intrusive selections by appealing to certain psychological or behavioural biases, for example in the use of privacy-intrusive defaults or pre-selections.
- In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws. Strong privacy protections that inform and empower consumers can promote competition, innovation, and the welfare of individual consumers in digital markets.
- The existing Australian regulatory framework over 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 Terms of Reference require the Inquiry to consider the implications for consumers of the impact of digital platforms on competition in media and advertising services markets and the impact of information asymmetry between digital platforms and consumers.

This chapter focuses on consumers' bargain with digital platforms, including digital platforms' collection, use and disclosure of user data (referred to collectively as '**data practices**'). Digital platforms' data practices are relevant to the Inquiry because they form an important part of digital platforms' bargain



with consumers and because user data is a key input in some of the advertising services markets that are the subject of this Inquiry.

Where necessary, this chapter will discuss issues arising under Australian privacy law, as this is the main regulatory framework applicable to digital platforms' data practices. This chapter also discusses some data practices that may also raise concerns under Australian competition and consumer laws, which may be subject to current or future ACCC investigation.

This chapter sets out the ACCC's preliminary findings and is structured as follows:

- **Section 5.1** sets out key features of the bargain between digital platforms and consumers, including the services provided by some digital platforms to consumers; and the attention and user data provided by consumers to digital platforms.
- **Section 5.2** discusses consumers' different attitudes and levels of awareness regarding digital platforms' data practices and notes the importance of consumers being able to make informed choices that align with their privacy and data collection preferences.
- **Section 5.3** discusses the nature of consumers' consents to digital platforms' data practices, which are often provided in response to clickwrap agreements containing take-it-or-leave-it terms and bundle together multiple consents.
- **Section 5.4** discusses the clarity and accessibility of digital platforms' terms of use and privacy policies, including digital platforms' disclosures regarding three areas of particular concern to consumers: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties.
- **Section 5.5** discusses the extent to which consumers can meaningfully control the collection, use and disclosure of their data, including the extent to which consumers can effectively-opt out of certain data practices and digital platforms' use of defaults and pre-selections.
- **Section 5.6** discusses the impact of privacy laws on consumer protection, competition and innovation in digital markets and notes that existing regulatory frameworks may not effectively deter digital platforms from engaging in problematic data practices or provide individuals with sufficient recourse.
- **Section 5.7** sets out the ACCC's proposed recommendations targeting the information asymmetries, bargaining power imbalance, and lack of effective deterrence identified in digital platforms' interactions with consumers.

## 5.1 Consumers' bargain with digital platforms

### Key findings

- Digital platforms provide a wide range of valuable services to consumers, often for zero monetary cost, in exchange for consumers' attention and their user data. Many digital platforms can collect a large amount and variety of user data on a user's activities beyond what is actively provided by users during the use of the digital platform's services.

### 5.1.1 What do digital platforms provide to consumers?

#### Digital platforms provide a diverse range of valuable online services

As discussed in chapter 1, digital platforms have facilitated interactions between numerous different groups of users, lowered transaction and search costs, provided new ways to disseminate information, and facilitated collaboration. They enable Australians to take advantage of digitalisation and share in the benefits of the digital economy. The following digital platform services are of particular relevance to this Inquiry:

- **search engines** that search for information in an online database or on the web, making it easier for users to find useful information within the vast number of web pages on the internet<sup>525</sup>
- **social media platforms** that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users, making it easier for users to stay in contact with other users by offering a wide variety of functions including a user profile, a contacts list, and a messaging feature<sup>526</sup>
- **content or news aggregators** that collect and group information from disparate sources, making it easier for consumers to access a collated, curated product.

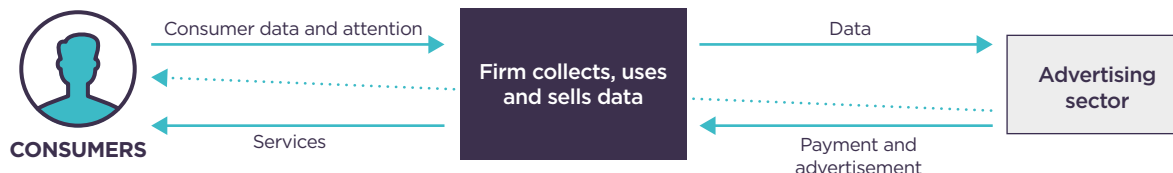
Submissions from stakeholders noted that consumers obtain numerous benefits from digital platforms' services, including a useful resource for gathering information and exchanging ideas,<sup>527</sup> access to a vast array of online media with greater convenience and personalisation<sup>528</sup>, and new distribution, marketing and revenue generating channels for Australian businesses and content creators.<sup>529</sup>

## Services often provided to consumers for zero monetary cost

Digital platforms often provide Australian consumers with a large range of services for zero upfront monetary cost. Whilst some digital platforms collect subscription or membership fees for a paid version of their services, such as YouTube Premium and LinkedIn Premium, most of digital platforms relevant to this Inquiry make their consumer-facing products available for zero monetary cost. Valuable services provided to consumers for zero monetary cost include Facebook, Snapchat, Google Search and Apple News.

Digital platforms are able to provide their range of valuable services to consumers for zero monetary cost because their consumer-facing services are subsidised by the advertising services supplied by digital platforms.<sup>530</sup> Figure 5.1 illustrates the financial and non-financial exchanges of value occurring between consumers, digital platforms and advertisers.

**Figure 5.1: Exchanges of value in the provision of services for zero monetary cost<sup>531</sup>**



### 5.1.2 What do consumers provide to digital platforms?

#### Consumers provide valuable attention and generate user data

Despite the zero upfront price usually paid by consumers when accessing many digital platform services, consumers' interactions with digital platforms nevertheless provide transactions of significant value. In exchange for the many and varied digital platforms' services provided, consumers provide (and effectively 'pay') digital platforms with their attention, user data and rights to user-uploaded content. Table 5.1 provides an overview of the typical flows of economic value between the digital platform, the consumer, and the advertiser.<sup>532</sup>

525 Monopolkommission, [Competition Policy: The Challenge of Digital Markets](#), p. 51.

526 Monopolkommission, [Competition Policy: The Challenge of Digital Markets](#), p. 70.

527 Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 2.

528 Australian Communications and Media Authority, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 6.

529 Digital Industry Group Incorporated, [Submission to ACCC Digital Platforms Inquiry](#), April 2018, p. 2.

530 See, for example: Facebook, ['Advertising', Relevant ads that protect your privacy](#), accessed 29 October 2018; Google, ['Advertising', 'Advertising keeps Google and many of the websites and services you use free of charge'](#), accessed 29 October 2018.

531 Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, p. 79. Figure updated and adjusted by the ACCC as relevant to matters of relevance in this inquiry.

532 D Evans, [Mobile advertising: Economics, Evolution and Policy](#), 1 June 2016, p.33.

**Table 5.1: Economic Deal between Advertiser, Digital Platform and Consumer**<sup>533</sup>

	<b>Advertiser</b>	<b>Digital Platform</b>	<b>Consumer</b>
<b>Content</b>		Provides [and hosts] content	Receives [and provides] content for zero price
<b>Advertising messages</b>	Delivers message and gets benefit from it	Gets paid for message	Receives message which may annoy [or be appreciated]
<b>Data and privacy</b>	Gets benefit of data in the form of more relevant ads and higher conversion	Receives data and charges marketers more to deliver more relevant ads	Provides data which may increase relevance of ads but reduce privacy

As summarised in table 5.1 above, when consumers perform a search on a search engine, post on a social media site, or view an article on a news aggregator, they are receiving valuable services from digital platforms, often at no monetary cost. In exchange, consumers provide digital platforms with their attention, which can be monetised by digital platforms by the supply of advertising services.

Digital platforms also receive the valuable user data generated by consumers, which is a key input into the supply of personalised and segmented advertising services that enable digital platforms to deliver more relevant ads (see discussion in chapter 3).

Some digital platforms have expressly acknowledged the link between the ‘free’ nature of the services and the use of advertising.<sup>534</sup>

### The value of user data

The collection and analysis of user data by digital platforms can benefit consumers, such as when user data is used to fix problems, to improve products and services, or create new products. For example, Google Maps collects and aggregates location data to provide users with directions that take into account real-time traffic information to find the best route.<sup>535</sup>

Digital platforms can also derive value from collecting the user data of consumers to target ads more precisely to individuals who are most likely to respond to these ads. As discussed earlier in chapter 3, user data can be a key input to the supply of targeted advertising services, as digital platforms can use user data to create segmented user profiles that are sold to advertisers wishing to target ads to an audience with particular characteristics. Greater collection of user data is also likely to lead to more efficient targeting of ads. The insights generated from the data collected from consumers may also be provided to advertisers to measure the reach and distribution of ads and services that are served to the consumer.

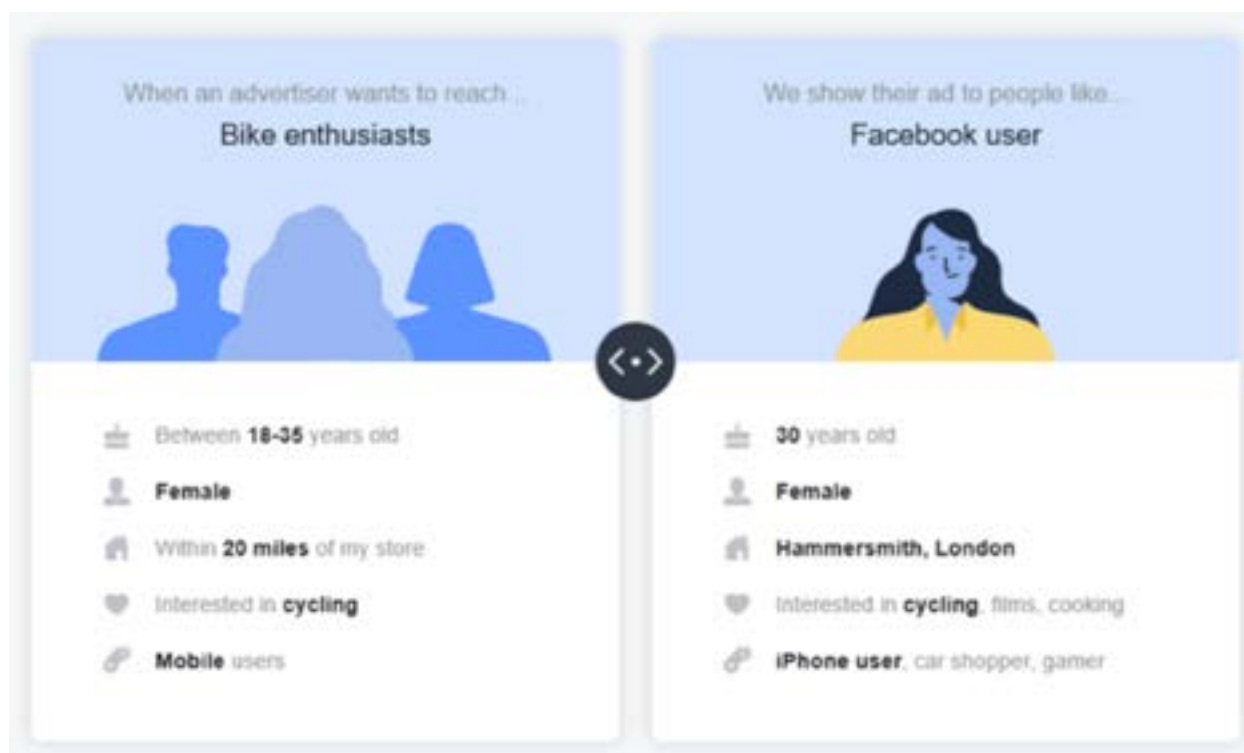
Figure 5.2 provides an example of how different points of user data can be matched to an advertiser’s desired audience to enable targeted advertisements.

533 D Evans, [Mobile advertising: Economics, Evolution and Policy](#), 1 June 2016, p.33. Amended by the ACCC by adding in the wording in the square brackets.

534 See, for example: Facebook, [Hard Questions: What Information Do Facebook Advertisers Know About Me?](#), accessed 29 October 2018; Google, [Advertising](#), “Advertising [keeps Google and many of the websites and services you use free of charge](#)”, accessed 29 October 2018.

535 Google [‘Use navigation in the Google Maps App’](#), accessed 30 October 2018.

Figure 5.2: Facebook on 'why you see a particular ad'<sup>536</sup>



User data can also be viewed as an asset for digital platforms that can be sold, licensed, disclosed or exchanged with third parties. In an ACCC review of the privacy policies and terms of use for several large digital platforms (the ACCC review of terms and policies)<sup>537</sup>, each set of privacy policies and terms of use provided that user data, including personal information, may be sold or transferred to another entity in the event of bankruptcy, merger, acquisition, or sale of assets. The ACCC notes that many digital platforms have publicly stated that they do not sell user data—see further discussion in box 5.16 on 'Do digital platforms 'sell' user information to third parties?'.

Measuring the value of user data is difficult, given the large and exponentially increasing amount of user data generated in the digital economy and its countless (current and future) applications and purposes for use.<sup>538</sup> However, there are some ways to estimate its value to provide an indication of its worth to digital platforms. These estimates include average revenue per user, revenue per data record, cost of a data breach, users' reported willingness to pay for privacy, etc.<sup>539</sup> Regardless of the measure used to estimate the value of user data, it is clear to the ACCC that user data is a valuable commodity for digital platforms.

It is also important to note that the value of user data held by digital platforms does not necessarily correspond to the same monetisable value when held by a consumer. First, the value of user data derives, in part, from the ability of digital platforms (and advertisers) to aggregate large volumes of user data. That is, it is likely to generate some efficiencies for an intermediary, such as a digital platform, to 'pool' user data. Second, in most cases, the value of any individual's data to an advertiser is also likely to be small. The transaction costs incurred by an individual in selling his or her user data to individual advertisers are likely to exceed this value. It is not currently likely that consumers could individually overcome these transaction costs and monetise their own data to the same extent as digital platforms and data brokers can.

536 Facebook, [About Facebook Ads](#), accessed 3 October 2018.

537 The ACCC reviewed the privacy policies from Facebook, Google, Twitter, Microsoft, Apple, WhatsApp and Snapchat and the terms of use for Facebook, Google, Twitter, Apple, WhatsApp and Snapchat. See further box 5.5 and appendix C section 3.

538 OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220(2013), p.2.

539 OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220(2013), pp. 4-5.

A key component of the business model for advertising-funded digital platforms is to aggregate the data of individual users, for use by advertisers, effectively ‘compensating’ users by providing them with services at zero monetary cost. This is arguably an efficient way of providing both advertisers and consumers with a valuable service. However, it remains to be seen whether alternative business models (such as those generating value from interactions with users in other ways) could create similar efficiencies.

### The different methods of collecting user data

There are many different ways in which user data can be collected by or provided to digital platforms. User data can be:<sup>540</sup>

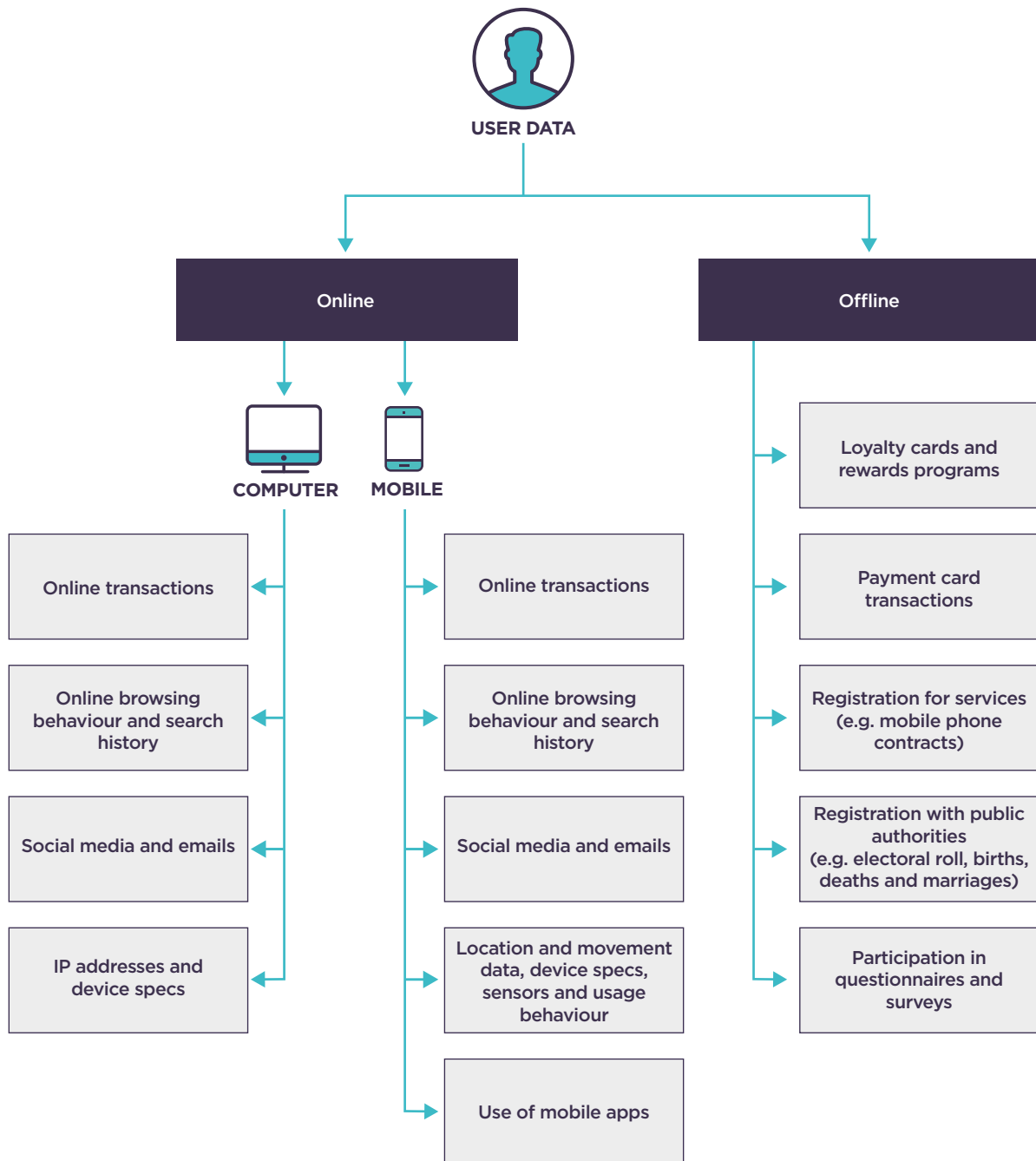
- **actively provided** by a consumer (e.g. entering name and contact details in an online form)
- **passively collected** from a consumer (e.g. background collection of location data from Wi-Fi networks, GPS, or IP addresses, collected through a consumer’s use of a platform, apps on a device, or from a consumer’s use of third party websites)
- **inferred** from other sources (e.g. by analysing data actively provided by a consumer, other user data passively collected or data from de-identified datasets; and making deductions based on this combined data).

Figure 5.3 illustrates the different types of user data that may be provided or collected from consumers both online and offline.

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540 OECD, [Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value](#), OECD Digital Economy Papers, 220(2013), p. 10.

Figure 5.3: Tracking of consumer data online and offline<sup>541</sup>



541 Collated from various sources, including ACCC review of digital platforms' privacy policies and Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, pp. 28–31.

The different types of data collected online or offline from users can vary significantly. For a discussion on the types of data collected by Facebook and Google, see further discussion in box 5.1.

### ***Box 5.1: How much data does Facebook and Google have on consumers?***

#### **Facebook**

In June 2018, an ACCC staff member downloaded their Facebook data. They found that Facebook had stored their 'active' user activity information such as photos and comments posted on Facebook. They also found that Facebook stored data that had been collected passively, such as names and phone numbers of the user's contacts from the user's mobile device even though those contacts were not the user's Facebook friends.

Despite having location tracking turned off in their Facebook account settings, the staff member's downloaded data showed Facebook had a comprehensive record of IP addresses matched to 53 different locations where the user had logged into their Facebook account.

The Facebook data showed that Facebook had also linked over 500 ad interests to the user's profile and matched the user to contact lists provided by 127 advertisers, including frequent flyer programs and private health insurance companies.

#### **Google**

In November 2018, an ACCC staff member downloaded the Google data attached to their Google family account. The data downloaded covered 51 products and services, accessed through Google, that the Google family account had interacted with between 2011 and 2018.

The ACCC staff member found a wide variety of data had been stored to the account, including some data collected from 2011, covering a period which included multiple additions and changes to devices used by the family. This data included a non-chronological list of every Android mobile app installed from 2014–18 (comprising 2482 Excel rows of data); orders made in the Google Play Store, including time of purchase, phone number, card type and expiry date, as well as the IP address it was purchased from; and the names and email addresses from a Google group set up and used in April 2011.

It also included a recording of every question asked to the family's Google Assistant (by various family members including children) between January 2018 and June 2018 (when the staff member's Google Home was active).

The staff member also found that Google had stored copies of photos from 2011–18, including photos which came from previous devices, and that had not been transferred to new devices or stored on the cloud.

Location data was collected by a number of different products and services. For example, every photo stored had attached geodata, latitude and longitude and timestamp of when photo taken. For location history, as well as latitude and longitude information, an accuracy and vertical accuracy rating was stored.

For further discussion on the different ways in which consumers' user data can be tracked, see figure 5.3 on '*Tracking of consumer data online and offline*'.



## 5.2 Consumer attitudes regarding their user data

### Key findings

- Consumers have different privacy preferences and levels of privacy awareness. All consumers will be better off when they are sufficiently informed and have sufficient control over their user data such that they can make informed choices that align with their privacy and data collection preferences.
- Currently, several features of consumers' relationship with digital platforms may prevent consumers from making informed choices, including the bargaining power held by the digital platform vis-à-vis the consumer; information asymmetries that exist between digital platforms and consumers; and inherent difficulties in accurately assessing the current and future costs of providing their user data.

### 5.2.1 Overview of consumer attitudes in Australia

The ACCC consumer survey found that most Australians using digital platforms consider that there should be transparency and choice in how digital platforms should collect, use and disclose certain types of user data. For instance, the majority of digital platform users surveyed agreed or strongly agreed that digital platforms should:<sup>542</sup>

- tell users who they are providing personal information to (91 per cent)
- allow users to opt out of collection of certain types of information (90 per cent)
- be open about how they use data about users and assess eligibility for products and services (89 per cent), and
- only collect information needed to provide their products or services (85 per cent).

The ACCC consumer survey and other research also indicates consumers are becoming increasingly concerned in relation to their privacy and use of information on digital platforms and online. The ACCC consumer survey found that more than half of the digital platform users surveyed (54 per cent) reported being more concerned about the privacy of their personal information on digital platforms than they were one year ago.<sup>543</sup>

The 'Australian Community Attitudes to Privacy Survey 2017' (OAIC survey) by the OAIC found that the proportion of Australians who have chosen not to deal with a private company because of privacy concerns has risen from 36 per cent in 2007 to 58 per cent in 2017.<sup>544</sup>

Responses to the ACCC's Consumer Questionnaire on the Digital Platforms Inquiry website (the ACCC Questionnaire) express similar concerns regarding transparency and choice in relation to data practices—see some consumer views in box 5.2.<sup>545</sup>

#### **Box 5.2: Some consumer views from ACCC Questionnaire**

“My main concern is that I don't know what personal data is collected by digital platforms or how it is used, which means I can't make an informed decision about whether or not to use a particular DP. If I knew that a particular DP was violating my privacy, I probably wouldn't use it”

“I try to keep on top of what personal information each digital platform takes/uses/shares, but sometimes it's hard to know the extent. Some platforms aren't exactly forthright about it”

“The use of data collected is part of the platform owners business model, but transparency with regards to use and users is lacking”

542 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 17.

543 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 5.

544 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 19.

545 Excerpts from [ACCC's Consumer Questionnaire Responses](#).

## 5.2.2 Different consumers have different privacy preferences

The ACCC recognises that consumers have differing preferences regarding how their user data may be used or disclosed and what types of data practices they are comfortable with.<sup>546</sup> Without due regard to individual consumers' privacy preferences, decreased data collection, increased privacy protections, or more data disclosures are unlikely to maximise consumer welfare. For instance, some consumers may prefer to receive advertisements about products and services based on their interests, whilst others may derive little or no benefit from unsolicited marketing personalised using their user data.<sup>547</sup>

Whilst there is no definitive classification of consumers' privacy preferences, academic studies on information privacy have identified broad categories of consumer preferences, such as:

- *privacy guardians* who attach a relatively high value to information privacy and therefore prefer relatively higher privacy protections against error, improper access, and unauthorized secondary use of their personal information<sup>548</sup>
- *information sellers* who attach a relatively high value to monetary reward and therefore may 'sell' personal information but cannot be attracted to provide personal information by offers from websites to provide more convenient, personalised services<sup>549</sup>, and
- *convenience seekers* who prefer convenience and time savings over privacy protections or monetary reward and will readily register with a website or accept cookies if it simplifies navigation or enables personalised content.<sup>550</sup>

Consumers can also have different preferences about disclosure of digital platforms' data practices. A US study from 2013 found that one in five users wanted to see privacy disclosures each time data was collected, more than half wanted to see them before making a purchase, and one in 10 never wanted to see any privacy disclosures.<sup>551</sup>

Different consumer preferences are also reflected in the ACCC consumer survey, which found significant differences in the attitudes of digital platform users to their user data as well as differing attitudes to privacy across users in different demographics. For example, younger digital platform users (those aged 18–34) were significantly less likely to agree that digital platforms should advise users who their information is being shared with, allow users to 'opt out' of data collection and sharing, or only collect information needed for the specific product or service.<sup>552</sup> They were also less likely to mind digital platforms collecting information if it meant more interesting advertising.<sup>553</sup>

These differing consumer attitudes and preferences highlight the importance of providing consumers with sufficient transparency and control in how their user data is collected, used and disclosed by digital platforms. This would enable consumers to make an informed choice in selecting digital platform services that process user data in a way that meets their individual privacy preferences. As such, this chapter will focus on the extent to which consumers are able to make informed choices over how their user data and personal information is collected, used, and disclosed in their transactions with digital platforms.

546 See, for example A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 5.

547 A. Acquisti, L Wagman and C. Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 5.

548 I. Hann, K. Hui, S. Lee, and I. Png, [Overcoming Online Information Privacy Concerns: An Information-Processing Theory Approach](#), Journal of Management Information Systems 24 (2007), p. 30..

549 I. Hann, K. Hui, S. Lee, and I. Png, [Overcoming Online Information Privacy Concerns: An Information-Processing Theory Approach](#), Journal of Management Information Systems 24 (2007), p. 33..

550 I. Hann, K. Hui, S. Lee, and I. Png, [Overcoming Online Information Privacy Concerns: An Information-Processing Theory Approach](#), Journal of Management Information Systems 24 (2007), p. 32.

551 Cited in OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 43.

552 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 18.

553 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 18.

### 5.2.3 Different consumers have varying levels of privacy awareness

In addition to different privacy preferences, consumers also have varying levels of awareness regarding digital platforms' data practices. For example, the ACCC consumer survey found that almost one in three digital platform users surveyed considered that a user owned the user data they shared online (29 per cent); and more than one in three considered that the company to which they had given the user data owned the data, but that the company 'must provide me with access to it at my request, and cannot share it with anyone else if I request they do not'.<sup>554</sup> This suggests that a majority of consumers are not aware that the extent of control they retain over their user data is limited to the extent outlined in digital platforms' privacy policies and terms of use.

There is also a possible disconnect between users' general awareness of digital platforms' data practices and users' awareness of specific data practices by digital platforms. For example, 85 per cent of digital platform users surveyed indicated they thought digital platforms (as an aggregated whole) have the ability to follow user activities across the web; and 82 per cent believed digital platforms had the ability to collect and combine information about users from third parties.<sup>555</sup> However, other responses from those digital platform users—such as what they regarded as a misuse of personal data<sup>556</sup>, and what they considered personal information—indicate that users are not aware of the extent of online tracking occurring or how digital platforms may use user data such as location information.

Some consumers may also be unaware that agreeing to a digital platform's terms of use and privacy policy means they have relinquished their control over their personal information and user data to the extent outlined in that privacy policy. For instance, the ACCC consumer survey found that 36 per cent of Australian digital platform users agreed with the statement 'when a digital platform has a privacy policy, it means it will not share my personal information with anyone else (including other digital platforms)'.<sup>557</sup> Similarly, the results of the 'Consumer data and the digital economy' survey (CPRC Survey), conducted by the Consumer Policy Research Centre (CPRC) in 2018 found that 19 per cent of respondents believed that a company with a privacy policy would not share information with other websites or companies, and 22 per cent of respondents did not know enough to answer the question.<sup>558</sup> A factor contributing to these misperceptions may be that the title of 'privacy policy' is a misnomer, given these policies tend not to outline privacy protections for users but rather sets out the extent of permissions granted to digital platforms, which could result in this fundamental misunderstanding as to the purpose and function of a privacy policy.

### 5.2.4 Is there a privacy paradox?

The apparent disconnect between the privacy attitudes and intentions expressed by consumers and their actual behaviour has been called a 'privacy paradox' and is the subject of significant academic debate.<sup>559</sup> In essence, the privacy paradox refers to a perceived discrepancy between the strong privacy concerns voiced by consumers who, paradoxically, do not appear to make choices that prioritise privacy.<sup>560</sup>

One possible explanation for the privacy paradox is that consumers claim to care about their privacy in theory but, in practice, the value they derive from using a digital platform's services outweighs the 'price' they pay in allowing the collection of their user data. A further explanation is that, whilst consumer attitudes are often expressed generically in surveys, actual behaviours are specific and contextual, and therefore consumers' generic views regarding privacy do not necessarily predict their context-specific online behaviours.<sup>561</sup>

554 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 18, p. 31.

555 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 15.

556 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, pp. 21–23.

557 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 6.

558 The Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 5. The CPRC Survey report was provided as an attachment to the submission (CPRC Survey Report).

559 See, for example, B Berendt, O Gunther and S Spiekermann, [Privacy in E-Commerce: stated preferences vs. actual behavior](#), Communications of the ACM 48(2005), p. 101; P Norberg, DR Horne and DA Horne, [The Privacy paradox: Personal Information Disclosure Intentions versus Behaviours](#), The Journal of Consumer Affairs, 41(2007), p.100; S Kokolakis, [Privacy attitudes and privacy behavior: A review of Current research on the privacy paradox phenomenon](#), Computers & Security (2015); B Brown, [Studying the internet experience](#), Hewlett Packard (2001).

560 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 476.

561 A Acquisti, L Wagman and C Taylor, [The Economics of Privacy](#), Journal of Economic Literature, 52 (2016), p. 477.

These explanations for the privacy paradox rest on a premise that consumers are making informed choices in their transactions with digital platforms. As discussed above, providing digital platforms with user data is part of consumers' bargain with digital platforms. It is through the use of user data that digital platforms, in part, recover the cost of providing their services to consumers and generate revenue. To the extent that consumers are fully aware of the actual 'price' they pay for use of a digital platform (by providing their data), their choice to use the platform indicates that they value the use of the platform more than the privacy that they give up. However, if consumers are not adequately informed about how their user data is collected, used and disclosed, and if consumers do not have sufficient control in deciding whether to give up their user data, their behaviours in using digital platforms may not accurately reflect their innate privacy preferences.

Additional complexity is introduced in the difficulty of assessing and quantifying the impact of likely detriments caused by data practices, as the risks of harm will vary in severity and likelihood for each consumer, and the associated harms may not occur until an unknown point in the future. Behavioural economics suggests that consumers are unlikely to be able to accurately assess the risks associated with a unilateral variation clause, which is a common clause in digital platforms' privacy policies, because consumers tend to discount the likelihood of adverse changes and may be overly optimistic about their capacity to deal with the variation.<sup>562</sup> This means it is very difficult for consumers to predict the long-term costs of data collection and factor these costs into their decision on whether to use a digital platform or whether to amend their privacy settings.

The ACCC's preliminary view is that there are several factors of a consumer's bargain with digital platforms that may prevent a consumer from making informed choices that align with their privacy and data collection preferences. These factors include the bargaining power held by the digital platform vis-à-vis the consumer, significant information asymmetries that exist between digital platforms and consumers, and inherent difficulties in accurately assessing the current and future costs of providing their user data. Each of these factors is likely to impede consumers' ability to make an informed choice about the agreements they enter into with digital platforms.

## 5.3 The nature of consumer consents

### Key findings

- Many digital platforms seek consumer consents to their data practices using clickwrap agreements with take-it-or-leave-it terms that bundle a wide range of consents.
- These features of digital platforms' consent processes leverage digital platforms' bargaining power and deepen information asymmetries, preventing consumers from providing meaningful consents to digital platforms' collection, use and disclosure of their user data.

This section discusses the nature of consumers' consents to digital platforms' data practices. The ACCC's preliminary view is that these consumer consents are generally not well-informed or freely-given, as they are provided by consumers in response to 'clickwrap agreements', which are online agreements using digital prompts that request users to provide their consent to online terms and policies without requiring them to fully engage with the terms and policies of use.<sup>563</sup> The clickwrap agreements used by digital platforms also contain take-it-or-leave-it terms and involve the bundling of a wide range of consents.

The ACCC considers that these features of the consumers' bargain with digital platforms result in significant information asymmetry between consumers and digital platforms in relation to the terms on which digital platforms collect, use and disclose user data and reflects a bargaining power imbalance between consumers and digital platforms.

<sup>562</sup> JM Paterson and RL Smith, 'Why unilateral variation clauses in consumer contracts are unfair', *Competition & Consumer Law Journal*, 23(2016), p. 205. See also, MA Eisenberg, '[The Limits of Cognition and the Limits of Contract](#)' *Stanford Law Review*, 47(1995), p. 241; R Korobkin, 'Bounded rationality, standard form contracts, and unconscionability', *UCLR*, 70 (2003); C R Sunstein, 'Behavioural Analysis of Law', *UCLR*, 64(1997).

<sup>563</sup> J Obar and A Oeldorf-Hirsch, 'The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media', *Social Media + Society*, July–September 2018.

### 5.3.1 Clickwrap agreements

#### Impact on information asymmetries

Figure 5.4: Facebook sign-up screen

Figure 5.5: Twitter sign-up screen

In the ACCC’s review of the sign-up processes for four digital platforms (Google’s Gmail, Facebook, Twitter and Apple)<sup>564</sup>, it found that each of Facebook, Google, and Twitter’s sign-up processes used a clickwrap agreement where a consumer is deemed to have accepted the digital platform’s terms of use and privacy policies by proceeding with the sign-up process (see screenshots at figure 5.4 and figure 5.5). Apple did not require users to accept its terms of service as part of the sign-up process for creating a new Apple ID.

The use of clickwrap agreements means that users signing up to a digital platform would be required to agree to terms and conditions, which may include extensive rights to collect, use and disclose user data, without being asked to review any of the relevant terms of service or privacy policies.

In addition, clickwrap agreements can also deem a user’s consent to multiple separate agreements, some of which may change over time. The ACCC’s review of digital platforms’ terms of use and privacy policies found that each digital platform used terms of use that incorporated their privacy policies, which sometimes also incorporated additional policies regarding the use of cookies.<sup>565</sup> This means that a consumer’s act of signing-up to a digital platform is deemed to signal their acceptance of both the terms of use as well as the associated privacy policies of the digital platform, despite most privacy policies also being capable of being unilaterally varied by the digital platform from time to time after the sign-up has occurred.

#### The role of behavioural biases

As mentioned above, many digital platforms do not charge a monetary fee for their consumer-facing services, representing them as ‘free’—see figure 5.4 screenshot of Facebook’s sign-up screen that states ‘*Create an account—It’s free and always will be*’. However, although consumers often do not pay a monetary price to access digital platform services, consumers may still incur costs when their user data is collected, used, and disclosed by digital platforms.

<sup>564</sup> See further ACCC’s review of sign-up processes, see appendix C section 1.

<sup>565</sup> As found in the ACCC review of terms and policies, see appendix C section 3.

These costs can include increased risk of data breach and cybercrime from increased online transmission, storage and disclosure<sup>566</sup>, which may result in both financial detriments such as those associated with identity fraud as well as non-financial detriments such as harm to health and safety and reputational injury.<sup>567</sup> Other costs include decreased privacy and potential increase in unsolicited targeted advertising and third parties leveraging information against the consumers' interests, for example by engaging in price discrimination (allowing businesses to take more of the consumer surplus) or targeting of scams. Each of these costs is discussed in greater detail at section 5.6.2.

Presenting consumers with services marketed as 'free' in the form of a clickwrap agreement is likely to create behavioural biases that lead consumers to provide their consent to a transaction without informing themselves of the content of the terms and conditions and without due regard to these other potential costs of providing their user data—see further box 5.3 on '*Behavioural biases resulting from offers of 'free' online services*'.

### **Box 5.3: Behavioural biases resulting from offers of 'free' online services**

Whilst it is the case that customers are often receiving valuable digital platform services for no monetary cost, the framing of these services as 'free' fails to take into account that consumers are required to provide the digital platforms with access to their user data, which is often a key input in the business models of digital platforms.

Presenting offers to consumers as 'free' is likely to result in behavioural biases from the impact of the emotional appeal of free offers.<sup>568</sup> This is because marketing a service as 'free' presents consumers with 'a narrow way of thinking that focuses on only one or a few aspects of a more complex decision problem.'<sup>569</sup> As a result, consumers are likely to focus more on the zero monetary cost of signing-up to a digital platform and less on the other potential costs of providing digital platforms with their user data.

Consumers receiving free services are also less likely to perceive digital platforms as commercial entities supplying advertising services, which may have the effect of lowering their guard in transactions with digital platforms.<sup>570</sup>

## **Consumer outcomes**

The use of clickwrap agreements is likely to contribute to consumers' tendency not to read online terms of service or privacy policies, creating significant information asymmetry between consumers and digital platforms regarding the terms of their agreement.

It is generally well-established that most consumers do not read the terms of online standard form contracts, particularly if they are acting under pressure from time or financial constraints.<sup>571</sup> This is also reflected in the ACCC consumer survey results in relation to digital platforms' terms and policies, which found that less than one in five digital platforms users surveyed (18 per cent) reported they read the privacy policies or terms of use for online sites or apps most or every time; three in five users

566 CJ Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet's Most Popular Price](#), UCLA Law Review (via SSRN), 606 (2014), p. 611.

567 MK Ohlhausen (former Commissioner, Federal Trade Commission), [Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases](#), 19 September 2017, pp. 4–8.

568 DA Friedman, *Free Offers: A New Look*, 38 New Mexico Law Review (2008), pp. 49, 68–69; C. J. Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet's Most Popular Price](#), UCLA Law Review (via SSRN), 606 (2014), p. 609.

569 D Boush et al., *Deception in the marketplace: the psychology of deceptive persuasion and consumer self-protection*, (2009); cited in CJ Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet's Most Popular Price](#), UCLA Law Review (via SSRN), 606 (2014).

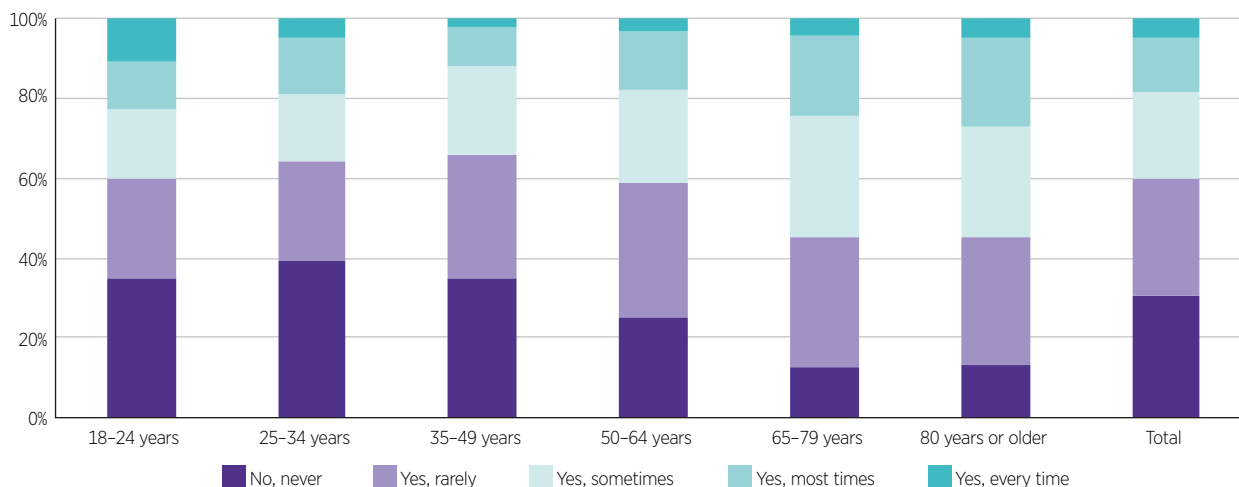
570 CJ Hoofnagle and J Whittington, [Free: Accounting for the Costs of the Internet's Most Popular Price](#), UCLA Law Review (via SSRN), 606 (2014), p. 611.

571 As discussed in JM Paterson and RL Smith, 'Why unilateral variation clauses in consumer contracts are unfair', *Competition & Consumer Law Journal* 23 (2016), p. 205. See also, MA Eisenberg, '[The Limits of Cognition and the Limits of Contract](#)', *Stanford Law Review*, 47 (1995), p. 241; R Korobkin, 'Bounded rationality, standard form contracts, and unconscionability', *University of Chicago Law Review* Vol. 70 Iss. 4, Article 2 (2003); CR Sunstein, 'Behavioural Analysis of Law' (Coase-Sandor Institute for Law & Economics Working Paper No. 46, 1997), p. 64.



(60 per cent) indicated that they rarely or never did so.<sup>572</sup> In addition, as illustrated in figure 5.6, people younger than 50 years old are also less likely to read terms and conditions before agreeing.<sup>573</sup>

**Figure 5.6: How often users read privacy policies<sup>574</sup>**



Source: ACCC consumer survey. Q12. Do you normally read all the privacy policy or terms and conditions for an internet site or app?

Base: Australian digital platform users aged 18 or more (n = 4308)

The CPRC survey similarly found that only 6 per cent of consumers surveyed reported they had read all the privacy policies or terms of use for all the products they signed up to.<sup>575</sup> The OAIC survey has also found a declining trend in the proportion of Australians reporting that they normally read online privacy policies from 44 per cent in 2013 to 29 per cent in 2017.<sup>576</sup>

### 5.3.2 Take-it-or-leave-it terms

Clickwrap agreements are usually offered to consumers on a take-it-or-leave-it basis.<sup>577</sup> This means that consumers are provided with a standard set of terms that are offered to all prospective users with no opportunity to negotiate with digital platforms on any specific term, including in relation to how much user data can be collected from them and how that user data may be used and shared with third parties.

Take-it-or-leave-it terms may be offered for a range of reasons. For example, the cost of customising terms for each user may be prohibitive relative to the amount of value generated from each user.

#### Impact on information asymmetries and bargaining power imbalance

Offering terms on a take-it-or-leave-it basis may contribute to information asymmetries between digital platforms and their users, as their terms of use and privacy policies are impersonal documents that do not clearly set out to each user what is occurring with their user data specifically. As a result, the terms of a consumer's agreement with the digital platform cannot clearly outline to a consumer the extent of user data collected from them individually, in a way that takes into account that user's particular data settings and privacy controls.

The use of take-it-or-leave-it terms may also reflect the significant bargaining power held by digital platforms vis-à-vis consumers such that they can unilaterally set the terms of use and privacy policies applicable to their transaction with consumers, which often include the right to unilaterally change their terms of service and privacy policies from time to time. In contrast, consumers may only decide

<sup>572</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 25.

<sup>573</sup> The ACCC notes that the figures in figure 5.6 will not sum to 100% due to rounding results to the nearest percentage.

<sup>574</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 26.

<sup>575</sup> Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 31.

<sup>576</sup> OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 31.

<sup>577</sup> A Gatt, [Electronic Commerce—Click Wrap Agreements](#), Computer Law & Security Report, University of Melbourne (2002), p. 405.



whether they will access a digital platform's services, and therefore accept all of its terms and policies, or not.

## Consumer outcomes

As a result of this bargaining power imbalance, Australian consumers may provide nominal consents to terms and conditions even when they are uncomfortable with them. For instance, the CPRC survey found that, of the consumers surveyed who did read the privacy policies, 67 per cent had signed up even though they were not comfortable with the terms of use.<sup>578</sup> When asked why they signed up in spite of this discomfort, 73 per cent of respondents stated that it was the only way to access the product or service.<sup>579</sup>

Consumer responses to the ACCC Questionnaire also describe a level of discomfort and lack of choice in the terms of their transactions with digital platforms—see some consumer views in box 5.4.<sup>580</sup>

### **Box 5.4: Some consumer views from ACCC Questionnaire**

“We are forced to sign agreements to ‘terms & conditions’ to use software that in most cases we have little choice in using if we are to be able to function at work and in society.”

“I’m aware some data is collected via cookies and possibly shared across platforms. It seems difficult to control this without stopping to access the sites.”

“I know my data is collected and used but I’m not sure by whom. It is impossible to use the internet effectively if you object to this so you have to agree or be locked out of content, social and political forums.”

“On most sites I use as much privacy software as I can and still be able to access the content I wish too. However it’s never 100% effective and I don’t get a choice really.”

The ACCC notes that Facebook is currently being investigated in an abuse of dominance proceeding under European Union law by the German competition authority in relation to its terms of use, in particular its requirements for Facebook users to accept all of Facebook’s terms, ‘including an extensive disclosure of personal data’, or not use Facebook at all.<sup>581</sup>

### 5.3.3 The use of bundled consents

Bundled consent is the practice of seeking one consent from an individual for numerous different types of collections, uses and disclosures of their personal information.<sup>582</sup> Bundled consents are often used where there may be such a large number of consents sought that it would be impractical or unreasonable for a business to request each consent individually.<sup>583</sup>

#### Impact on information asymmetries and bargaining power imbalance

In conjunction with clickwrap agreements that contain take-it-or-leave-it terms, the bundling of consents is likely to exacerbate the information asymmetries and bargaining power imbalances in consumers’ transactions with digital platforms.

Digital platforms bundle consents which facilitates the collection of large amounts of personal information and user data. The ACCC review of privacy policies found that collection by digital platforms often went beyond what was necessary to provide the service. For example, WhatsApp’s terms of use requires users to agree to its privacy policy, which states that WhatsApp collects

578 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 31.

579 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 4.

580 Excerpts from responses to [ACCC Consumer Questionnaire](#).

581 Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017.

582 OAIC, [APP guidelines – complete set as at 2 March 2018](#), p. 10.

583 The OAIC suggests that businesses who are considering the use of bundled consent could consider whether ‘it is practicable and reasonable to give the individual the opportunity to refuse consent to one or more proposed collections, uses and/or disclosures’: OAIC, [APP guidelines – complete set as at 2 March 2018](#), pp. 10–11.

information from users that it shares with Facebook.<sup>584</sup> However, arguably, the sharing of this data would not be necessary to provide WhatsApp’s instant messaging service and may not be what many users expect.

Digital platforms can also bundle consents across different services. For example, Google’s privacy policy states that it collects user information across its services and that ‘We may combine the information we collect among our services and across your devices for the purposes described above’.<sup>585</sup> This privacy policy is incorporated into Google’s Terms of Service,<sup>586</sup> and applies to users of over 60 different online services provided by Google.

The ACCC’s review of terms and policies also found that digital platforms’ terms of use include the grant of potentially valuable rights to user-created content, including grants of licences from the user to the digital platform with broad permissions to use, distribute or modify content uploaded by the user<sup>587</sup> and from the user to the digital platforms to use the user’s name and picture in connection with advertising or sponsored content.<sup>588</sup>

Table 5.2 summarises some of the rights consumers are required to grant to Google, Facebook, Twitter and Snapchat in order to use the platform under their respective terms of use.

**Table 5.2: Rights granted to digital platforms under their terms of use on sign-up**

	<b>Can the digital platform use the user-uploaded content and images without further negotiation with the user?</b>	<b>Can the digital platform sell user-uploaded content and images to third parties without further agreement of the user?</b>
<b>Google</b>	Yes, if the use is within the scope of the limited purpose and the user’s privacy settings.	Yes, if the use is within the scope of the limited purpose and the user’s privacy settings.
<b>Facebook</b>	Yes.	Yes, but only content that is shared publicly.
<b>Twitter</b>	Yes.	Yes.
<b>Snapchat</b>	Yes.	Unlikely as this does not fall within the scope of the licence.

## Consumer outcomes

Bundled consents can leverage a digital platform’s bargaining power vis-à-vis consumers to enable digital platforms to obtain consents to a broader range of conduct. Consumers are also less likely to be adequately informed about all the different types of user data collected by digital platforms and about how that user data is used and disclosed, where they only provide one overarching bundled consent.

As mentioned above, the ACCC consumer survey found that 85 per cent of digital platforms users considered that digital platforms should only collect the information they need to provide their product or service.<sup>589</sup> Despite this view, digital platforms routinely collect information of Australians that is not necessary to provide the service by obtaining their bundled consent for a large variety of user data collection and use for a range of different purposes. The OAIC has raised concerns with the practice of

584 WhatsApp, Privacy policy, accessed 31 October 2018.

585 Google, Privacy policy, accessed 13 November 2018.

586 See [Google Terms of Service](#): ‘By using our Services, you agree that Google can use such data in accordance with our privacy policies’, accessed 31 October 2018.

587 See further ACCC review of terms and policies at appendix C section 3.

588 For example: Facebook, [Terms of Service](#): ‘You give us permission to use your name and profile picture and information about actions that you have taken on Facebook next to or in connection with ads, offers and other sponsored content that we display across our Products, without any compensation to you’, accessed 24 November 2018.

Snap Inc., [Terms of Use](#): ‘To the extent it’s necessary, when you appear in, create, upload, post, or send Public Content, you also grant Snap Inc., our affiliates, and our business partners the unrestricted, worldwide, perpetual right and license to use your name, likeness, and voice, including in connection with commercial or sponsored content’, accessed 24 November 2018.

Google, [Terms of Service](#): ‘If you have a Google Account, we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1’s, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts. We will respect the choices you make to limit sharing or visibility settings in your Google Account. For example, you can choose your settings so your name and photo do not appear in an ad’, accessed 24 November 2018.

589 Roy Morgan Research, ‘Consumer Views and Behaviours on Digital Platforms’, November 2018, p. 17.

bundled consent as early as 2002 and considers that this practice has the potential to undermine the voluntary nature of any consumer consent.<sup>590</sup>

By bundling consents in these different ways, digital platforms ask consumers to enter into contracts ‘without giving the individual the opportunity to choose which collections, uses and disclosures they agree to and which they do not’.<sup>591</sup>

### 5.3.4 ACCC assessment of digital platforms’ consent processes

The ACCC’s review of digital platforms’ sign-up processes found various clickwrap agreements with unobtrusive links to online documents that detail the collection, use and disclosure of extensive amounts of user data, offered on a take-it-or-leave-it basis that involves the bundling of numerous different consents. Each of these elements in a consent process leverage bargaining power imbalances between digital platforms and consumers, or deepen information asymmetries between them, with the effect of preventing consumers from providing their meaningful consent to the collection and use of their personal information and user data. As a result, consumers may find themselves providing nominal consent to data practices that they feel uncomfortable about so that they can access a digital platform’s services.

The ACCC’s preliminary view is that these bargaining power imbalances and information asymmetries reflect market failures that may be addressed by amending the Privacy Act to require digital platforms to obtain informed consents from consumers that are voluntary, current, and specific to particular categories of data collection that extends beyond what is necessary for the digital platform to provide its services to the user (see further recommendation 8(c)). It may also be appropriate to amend the Privacy Act to enable consumers who have previously given consent to data practices to withdraw their consent and request erasure of their personal information in certain circumstances, which would also improve the bargaining power imbalance between digital platforms and consumers (see further recommendation 8(d)). These stricter consent requirements and an obligation to erase personal information on request may also be implemented in a Privacy Code applicable only to digital platforms (see recommendation 9).

## 5.4 Disclosures in privacy and data policies

### Key findings

- Many digital platforms’ privacy policies are long, complex, vague, and difficult to navigate. They also use different descriptions for fundamental concepts such as ‘personal information’, which is likely to cause significant confusion for consumers.
- Despite consumers being particularly concerned by location tracking, online tracking for targeted advertising purposes, and third-party data-sharing, these data practices are generally permitted under digital platforms’ privacy policies.

Although most consumers tend not to read online terms of use and privacy policies, these terms and policies are nevertheless an important way for digital platforms to communicate to consumers about their data practices.<sup>592</sup> Privacy policies describe to consumers how their user data and personal information will be collected, used, and disclosed and are usually also incorporated as part of the terms of use that must be accepted before using a digital platform. Accordingly, clear and effective privacy policies are fundamental to ensuring that consumers can engage in the digital economy, in an informed way, to make decisions that are in their own best interests and ensure effective competition between businesses online.<sup>593</sup>

590 OAIC, [Announcement: bundled consents and the Privacy Act](#), 23 May 2002; OAIC, [APP guidelines — complete set as at 2 March 2018](#), p. 10.

591 OAIC, [APP guidelines — complete set as at 2 March 2018](#), p. 11.

592 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 10.

593 OECD, [Policy Note, Improving online disclosures with behavioural insights](#), April 2018, p. 4.

This section considers the way that digital platforms' terms and policies are presented to consumers, as well as their clarity and accessibility, are important factors informing the ACCC's analysis of consumers' awareness of how digital platforms collect, use and disclose data and the extent of information asymmetry between digital platforms and consumers. In particular, this section considers digital platforms' disclosures regarding three areas in which consumers may have particular concerns: location tracking, online tracking for targeted advertising purposes, and the disclosure of user data to third parties.

**Box 5.5: ACCC review of digital platforms' terms of use and privacy policies ('ACCC review of terms and policies')**

The ACCC reviewed the privacy policies and terms of use of several large digital platforms relevant to the Inquiry, including Google, Facebook, Apple, WhatsApp, Instagram, Twitter, and Snapchat. The ACCC's review found some key characteristics that are likely to impede consumers' ability to accurately and comprehensively understand the digital platforms' data practices, including the length of privacy policies, the complexity of many interlinked web pages, the vague language used, and the tendency to understate data collection, use and disclosure.

The findings of the ACCC's review of these digital platforms' privacy policies and its research into sign-up and opt-out processes is set out in more detail in appendix C.

### 5.4.1 Privacy policies are long, complex, vague, and difficult to navigate

The ACCC's review of terms and policies found that digital platforms' privacy policies are often long, complex, vague and difficult to navigate. This view is also reflected in consumer responses to the ACCC's Questionnaire that have raised concerns about digital platforms' terms and conditions being difficult to understand—see some consumer views in box 5.6.

**Box 5.6: Some consumer views from ACCC Questionnaire**

“Usually the privacy policies of most sites are buried somewhere and hard to find and are very lengthy and confusing”

“Terms and conditions are seemingly intentionally vague and full of legalese. They are obviously designed so that people do not read them and realise what they are signing away. A notification should be sent to any person who has their personal data held by a 3<sup>rd</sup> party who want to send that data onto another party asking for permission.”

“I'm sure the terms explaining how your data is being used exists, but are difficult to navigate and find.”

“Terms and conditions of sites are far too tedious and not actually understood”

#### Length

Most digital platforms' privacy policies are long. The ACCC review of terms and policies found that each digital platform's privacy policies, excluding the additional links to separate web pages, were between 2500 and 4500 words, and would take an average reader between 10 and 20 minutes to read.<sup>594</sup> These average reading times are likely to significantly exceed the time actually spent by consumers trying to read digital platforms' privacy policies. For example: Information provided by Google to the Inquiry shows that in 2018, the average time spent by Australian users viewing the Google Privacy Policy web page<sup>595</sup> was less than two minutes.<sup>596</sup> Overall, only 0.03 per cent of devices with an Australian IP address spent more than ten minutes on the Google Privacy Policy web page.<sup>597</sup> Whilst there may be a range of reasons for the brevity of a consumer's visits to a privacy policy web page, these figures suggest that very few consumers are engaging meaningfully with the text of a digital platform's privacy policy even when they are on a privacy policy web page.

594 See further ACCC's review of terms and policies at appendix C section 3.

595 Google, [Privacy Policy](#), accessed on 30 October 2018.

596 Information provided to the ACCC.

597 Information provided to the ACCC.

In addition to the length of individual policies, the number of separate privacy policies for online services that a consumer encounters is also likely to be impracticably large. US researchers estimated in 2008 that consumers are likely to encounter an average of 1462 privacy policies a year for all the different online services they use and different websites that they visit. Combining the estimated average time to read each policy means that it would take an average of 244 hours, or 76 working days of eight hours a day,<sup>598</sup> to read all of the privacy policies.<sup>599</sup> Though this research is from 2008, it provides an indication of the volume of terms and conditions that consumers are likely to be presented with online.

## Complexity

Privacy policies of digital platforms are often complex. In the ACCC review of terms and policies, six out of the seven privacy policies of Google, Facebook, Apple, WhatsApp, Instagram, Twitter, and Snapchat required a university education to understand (all except Snapchat).<sup>600</sup>

The complexity of language makes it harder for average consumers to process the information contained within these policies. It also creates particular difficulties for children and users from a non-English speaking background.

## Ambiguity

Privacy policies of digital platforms are often vague. The ACCC review of terms and policies found a range of broad, vague statements in a number of the digital platforms' policies relating to the collection, use and disclosure of user data. A key example of vague language is the frequent use of the word 'may' in digital platforms' privacy policies. For example:

- **Twitter's privacy policy** states: 'We may also disclose personal data about you to our corporate affiliates in order to help operate our services and our affiliate's services, including the delivery of ads' (emphasis added).<sup>601</sup>
- **Instagram's cookies policy** states: 'Third-party cookies may be placed on your device by someone providing a service for Instagram' (emphasis added).<sup>602</sup>
- **WhatsApp's privacy policy** states: 'As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We may use the information we receive from them, and they may use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our services and their offerings' (emphasis added).<sup>603</sup>

The word 'may' can denote various meanings, including the expression of uncertainty, permission, possibility, intention or hope.<sup>604</sup> When used in contract terms, including in a digital platform's terms of use or privacy policy, the use of the word 'may' gives digital platforms significant discretion to do, or not do, the actions prefaced by the word. A consumer reading this policy therefore cannot accurately determine the exact scope of the user data the platform is collecting from them and how the user data will be used and disclosed.

598 A McDonald and L Cranor, [The Cost of Reading Privacy Policies](#), I/S: A Journal of Law and Policy for the Information Society (2008) Privacy Year in Review issue, p. 17. See also AC Madrigal, [Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days](#), The Atlantic, 1 March 2012.

599 A McDonald and L Cranor, [The Cost of Reading Privacy Policies](#), I/S: A Journal of Law and Policy for the Information Society (2008), p. 17.

600 ACCC review of the privacy policies showed that most of the policies rated 30–50 on the Flesch-Kincaid readability scale. The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 60.0–50.0 are classified as 'fairly difficult to read', which translates to around a US 10th to 12th grade school level; documents scoring between 50.0–30.00 are 'difficult to read', at a US college reading level. The only exception was Snapchat's privacy policy, which scored above 51, meaning it requires US10–12 grade education level to read. Snapchat's privacy policy scored above 51, meaning it requires US 10–12 grade education level to read. See ACCC review of terms and policies at appendix C section 3.

601 Twitter, [Privacy policy](#), accessed 31 October 2018.

602 Instagram, [About Cookies](#), accessed 31 October 2018.

603 WhatsApp, [Privacy policy](#), accessed 31 October 2018.

604 See [Macquarie Dictionary](#) definition.

## Difficulty of navigation

Many digital platforms' terms and conditions are also hard to navigate, with numerous separate, interlinked policies that all contain information regarding the digital platform's data practices. For example: Google's privacy policy states that 'This Privacy Policy doesn't apply to services that have separate privacy policies that do not incorporate this Privacy Policy',<sup>605</sup> but it is only by reading each of the eight separate privacy policies for other Google services (being Chrome and Chrome OS, Play, Books, Payments, Fiber, Project Fi, G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link) that a user would discover that each of those separate privacy policies do incorporate Google's main policy and therefore Google's privacy policy does apply to all of its services (although the privacy policies for G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link state that their terms prevail in the event of any inconsistency with Google's main privacy policy).<sup>606</sup>

Some digital platforms also have policies where key terms can only be accessed by following a link that takes users away from the privacy policy web page. The interlinking of separate pages substantially increases the amount of navigation and reading time for a user, as there is often no differentiation between links that contain key terms and links that contain explanatory content. For example, Facebook's Data Policy contains over 70 links to other pages.<sup>607</sup> One of the links is 'Learn more' under 'Information from partners' on Facebook's Data Policy, which takes the reader to a page setting out more information about the third-party data providers with whom Facebook shares user data (see figure 5.7 screenshot).<sup>608</sup> This additional page states that Facebook's data providers in Australia include Acxiom, Experian, Greater Data, and Quantum, though there is no additional information on how and with whom those data providers can further share user data.<sup>609</sup>

**Figure 5.7: Screenshot of links from Facebook's Data Policy regarding third-party data sharing**

### Information from partners.

Advertisers, app developers and publishers can send us information through [Facebook Business Tools](#) that they use, including our social plugins (such as the Like button), Facebook Login, our [APIs and SDKs](#), or the Facebook [pixel](#). These partners provide information about your activities off Facebook – including information about your device, websites you visit, purchases you make, the ads you see and how you use their services – whether or not you have a Facebook account or are logged in to Facebook. For example, a game developer could use our API to tell us what games you play, or a business could tell us about a purchase you made in its shop. We also receive information about your online and offline actions and purchases from third-party data providers who have the rights to provide us with your information.

Partners receive your data when you visit or use their services, or through third parties that they work with. We require each of these partners to have lawful rights to collect, use and share your data before providing us with any data. [Learn more](#) about the types of partners we receive data from.

605 Google, [Privacy policy](#), accessed 13 November 2018.

606 See [Chrome and Chrome OS](#), [Play Books](#), [Payments](#), [Fiber](#), [Project Fi](#), [G Suite for Education](#), [YouTube Kids](#), [Google Accounts Managed with Family Link](#).

607 See Facebook, [Data Policy](#), accessed 30 October 2018.

608 See Facebook, [Data Policy](#), accessed 30 October 2018.

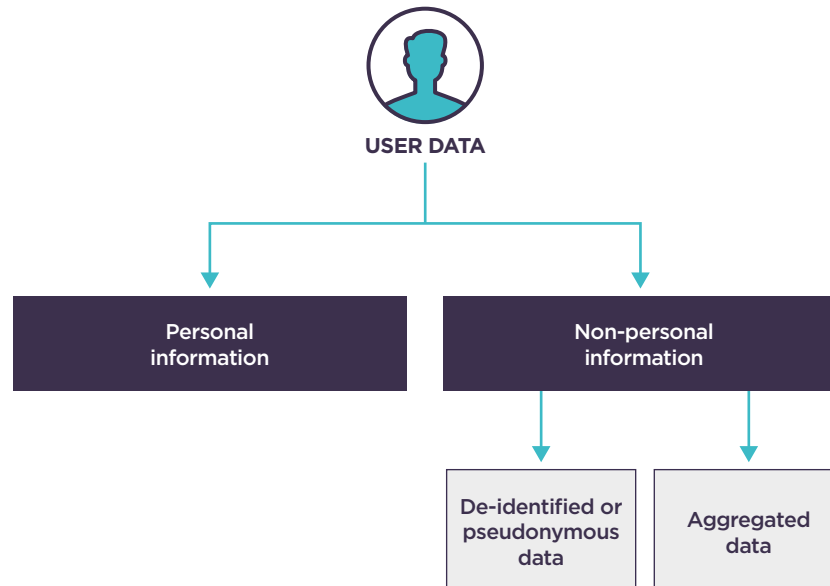
609 Facebook, [How does Facebook work with data providers?](#), accessed 30 October 2018.



## 5.4.2 Different definitions and interpretations of ‘personal information’

Digital platforms collect large amounts of user data from consumers, including both ‘personal information’ and ‘non-personal information’ (see **Figure 5.8** below).

**Figure 5.8:** Different types of user data



Generally, **personal information** refers to data that can be used alone or in combination with other data to identify specific individuals.<sup>610</sup> In contrast, **non-personal information** cannot be used alone to identify individuals. It includes<sup>611</sup>:

- *Anonymous or de-identified data*: any data that has been collected from individuals stripped of any personally-identifying information
- *Pseudonymous data*: any data that has been collected where the personally-identifying information has been replaced with artificial identifiers, and
- *Aggregated data*: any data that is created by combining personal or non-personal data of multiple individuals.

An important reason for distinguishing between ‘personal information’ and ‘non-personal information’ is because privacy protections generally apply only to user data that constitutes ‘personal information’. That is, the *Privacy Act 1988* (Cth) (Privacy Act) only protects data within its definition of ‘personal information’, which is ‘information or an opinion about an identified individual, or an individual who is reasonably identifiable’.<sup>612</sup> Many digital platforms’ privacy policies also outline protections for user data considered to be ‘personal information’, whilst also occasionally describing wide discretions in their handling of ‘non-personal information’ (see further section 5.4.2).

### The definitions of ‘personal information’

Despite the significance of the distinction between ‘personal’ and ‘non-personal’ information, digital platforms tend to use inconsistent definitions of ‘personal information’ or do not define the term at all. These definitions of ‘personal information’ also do not match the definition of ‘personal information’ under the Privacy Act. Whereas the Privacy Act definition includes ‘information *or an opinion*’ about

610 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA’s call for information](#), June 2015, pp. 25–26.

611 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA’s call for information](#), June 2015, pp. 25–26.

612 Privacy Act, s. 6(1).



an identified individual ‘or *an individual who is reasonably identifiable*’, digital platforms tend to refer to personal information as information that can be used to directly identify or contact a person.

Table 5.3 compares the definition of ‘personal information’ under the Privacy Act with the definitions under some digital platforms’ privacy policies.

**Table 5.3: Definitions of ‘personal information’**

Source	Definition of ‘personal information’?
<b>Privacy Act</b>	‘information or an opinion about an identified individual, or an individual who is reasonably identifiable.’ <sup>613</sup>
<b>Google’s privacy policy</b>	Defines ‘personal information’ as ‘information that you provide to us which personally identifies you, such as your name, email address, or billing information, or other data that can be reasonably linked to such information by Google, such as information we associate with your Google Account’. <sup>614</sup>
<b>Facebook’s data policy</b>	Does not expressly define ‘personal information’ but describes ‘information that personally identifies you’ as ‘information such as your name or email address that by itself can be used to contact you or identifies who you are’. <sup>615</sup>
<b>Twitter’s privacy policy</b>	Does not expressly define ‘personal information’ but describes ‘personal data’ as including ‘a display name (for example, “Twitter Moments”), a username (for example, @TwitterMoments), a password, and an email address or phone number’. <sup>616</sup>
<b>Apple’s privacy policy</b>	‘Personal information is data that can be used to identify or contact a single person.’ <sup>617</sup>

How digital platforms define ‘personal information’ is important, as most digital platforms’ policies state that how they handle user data will depend on whether it falls within this definition. Some examples of the protections set out in digital platforms privacy policies for ‘personal information’ include:

- **Google’s Privacy Policy** states that: ‘We do not share your personal information with companies, organizations, or individuals outside of Google except in [specific] cases’.<sup>618</sup>
- **Facebook’s Data Policy** states that: ‘We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing, but we don’t share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are)’.<sup>619</sup>
- **Apple’s Privacy Policy** states that: ‘personal information will only be shared by Apple to provide or improve our products, services and advertising; it will not be shared with third parties for their marketing purposes’.<sup>620</sup>

The different meaning that ‘personal information’ can take between digital platforms’ privacy policies, and under the Privacy Act, is likely to create significant confusion for users.

### Consumers’ interpretation of ‘personal information’

There is also evidence to suggest that Australian consumers interpret ‘personal information’ more broadly than either the Privacy Act definition or the definitions employed by some digital platforms. For instance, the ACCC consumer survey found that the majority of digital platform users surveyed found each of the following types of information to be ‘personal information’:

- Date of birth—86 per cent
- Name—84 per cent
- Photos—79 per cent
- Telephone and device information—79 per cent

613 Privacy Act, s. 6(1).

614 Google, [Privacy Policy](#), accessed 30 October 2018.

615 Facebook, [Data Policy](#), accessed 30 October 2018.

616 Twitter, [Privacy Policy](#), accessed 13 November 2018.

617 Apple, [Privacy Policy](#), accessed 30 October 2018.

618 Google, [Privacy Policy](#), accessed 30 October 2018.

619 Facebook [Data Policy](#), accessed 30 October 2018.

620 Apple, [Privacy Policy](#), accessed 30 October 2018.

- Location information—78 per cent.<sup>621</sup>

Of the above types of information, only an individual's name is definitively 'personal information' within the Privacy Act. The nature of the Privacy Act definition means that some types are personal information depending on their context (date of birth, photos, telephone number). Device information and location information are also context-dependent, but it is not clear whether they constitute 'personal information' under the Privacy Act.<sup>622</sup>

## Broad discretions regarding non-personal information

As noted earlier, any user data that constitutes 'non-personal information' is not regulated by the Privacy Act. Where personal information collected by digital platforms has been de-identified and aggregated, the collection and distribution of this data is not then subject to protections under the Privacy Act.

Information that is deemed 'non personal' by digital platforms is also often subject to fewer protections under digital platforms' privacy policies. Some digital platforms share de-identified information gathered from their users with third parties, including data brokers<sup>623</sup> or advertisers, often for purposes related to their supply of advertising services.<sup>624</sup> The following statements from digital platforms' privacy policies further illustrate their stated discretions in relation to non-personal information:

- **Google's privacy policy** states that: 'We may share non-personally identifiable information publicly and with our partners—like publishers, advertisers or connected sites.'<sup>625</sup>
- **Apple's privacy policy** states that: 'We may collect, use, transfer, and disclose non-personal information for any purpose.'<sup>626</sup>
- **Twitter's privacy policy** states that: 'We share or disclose non-personal data...'<sup>627</sup>

## De-identification of 'personal information'

De-identification can transform 'personal information', protected under privacy regulations and privacy policies, into 'non-personal information'. Definitions of de-identification can vary, but the OAIC considers it refers to a process whereby personal identifiers are removed or altered and, in addition, where techniques or controls are applied to 'remove, obscure, aggregate, alter and/or protect' data so that it is no longer 'reasonably identifiable' to an individual. The OAIC has published guidance in relation to de-identification, though specific procedures are not currently prescribed under the Privacy Act.<sup>628</sup>

Two common techniques for de-identification (or 'pseudonymisation') of personal information include:

- **Hashing:** This generally refers to a process whereby identifying details of a personally identifying data item are removed, but, to ensure two parties can link information together (without disclosing the personal information to each other), a unique identifier (using a hashing encryption process<sup>629</sup>) is allocated instead of the personal details. If these hashes 'match', the parties know that they are communicating to the same person and can, for example, target that user with a relevant

621 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, pp. 19–20.

622 Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4. Whilst the Full Federal Court did not expressly state that metadata could never be personal information, it did not overturn the decision of the Administrative Appeal Tribunal which had found that network metadata was not sufficiently connected to an individual because the allocation of an IP address to a device is normally only temporary and can change frequently.

623 For a discussion on how data brokers interact with range of businesses to share and provide data, including digital platforms, see FTC, [Data Brokers: A Call for Transparency and Accountability: A Report of the Federal Trade Commission](#), May 2014. See also Quantum, [Media Release: Quantum announces data partnership with Facebook](#), 23 July 2015, Note: accessed via wayback machine (26 March 2016 snapshot).

624 See, e.g., J Tyson, Facebook, [Relevant Ads that Protect Your Privacy](#), 30 September 2012, accessed 30 October 2018. The ACCC notes that Facebook indicated in 2018 that it intends to roll back its 'partner' categories program.

625 Google, [Privacy Policy](#), accessed 30 October 2018. Google's policy defines non-personal identifiable information as '...information that is recorded about users so that it no longer reflects or references an individually-identifiable user'.

626 Apple, [Privacy Policy](#), accessed 20 September 2018.

627 Twitter, [Privacy Policy](#), accessed 13 November 2018.

628 OAIC, [De-identification and the Privacy Act](#), March 2018; OAIC and Data61, [The De-Identification Decision-Making Framework](#), 18 September 2017.

629 For an explanation of the hashing encryption process, see The Economist, [Pseudonymisation is helping firms comply with a new EU privacy law](#), 5 April 2018, accessed 30 October 2018.

advertisement.<sup>630</sup> This process allows advertising associated with a particular hash or device ID to follow a particular user across different devices or browsing sessions.

- **Unique identifiers:** Digital platforms may assign a ‘unique identifier’ to a user such as to the browser, mobile device or IP address of a user when using their service. Advertisers seeking to market through a platform generally need to use the unique identifier to match their data with those of a digital platform to market through a platform. Some digital platforms indicate that such a system ensures that marketers don’t need to send personal information they hold about a user to a digital platform.<sup>631</sup>

Though these techniques ostensibly remove personal identifiers from user data, de-identification does not remove all risk of re-identification<sup>632</sup>—see further discussion in box 5.7 on ‘*Risks associated with de-identified data*’.

### **Box 5.7: Risks associated with de-identified data**

The Productivity Commission has noted that the ‘[r]isks of re-identification change as more datasets become available and analytical techniques advance’.<sup>633</sup> The UN Special Rapporteur on Privacy notes that de-identified information can be re-identified through identifying a person’s “digital fingerprint”, which is a set of features that uniquely identifies a person. This may create risks in the ‘linking of a person’s data across...two different datasets—if the additional dataset has names then the “de-identified” dataset can be re-identified.’<sup>634</sup> Research has also demonstrated that data can be re-identified through analysing particular data sets (such as telephone metadata, social network connections and credit card transactions).<sup>635</sup>

In 2016, the Department of Health released a de-identified dataset that was later found to be re-identifiable by a University of Melbourne research team.<sup>636</sup> The OAIC investigated this incident to determine whether there had been a breach of the Privacy Act and ultimately found that the de-identified data, despite being re-identifiable, did not constitute ‘personal information’ of patients and accordingly is not protected under the Privacy Act.<sup>637</sup>

## **5.4.3 Disclosures regarding location tracking**

### **Consumer concerns**

One of the most concerning types of data collection for Australian consumers is the collection of location data. In the ACCC consumer survey, 86 per cent of digital platforms users surveyed considered the monitoring of offline location and movement without the user’s consent to be a misuse of their data.<sup>638</sup> Similarly, the CPRC Survey found that 71 per cent of consumers surveyed were uncomfortable with their location data being shared with third parties.<sup>639</sup>

These views are echoed in responses to the ACCC’s consumer questionnaire—see some consumer views in box 5.8.

630 J Tyson, [Facebook Relevant Ads that Protect Your Privacy](#), Facebook, 30 September 2012, accessed 30 October 2018.

631 J Tyson, [Facebook Relevant Ads that Protect Your Privacy](#), Facebook, 30 September 2012, accessed 30 October 2018.

632 OAIC and Data61, [The De-Identification Decision-Making Framework](#), 18 September 2017, p. 10.

633 Productivity Commission, [Data Availability and Use](#), March 2017, p. 156.

634 Supporting document to UN Special Rapporteur on Privacy, [Report of the Special Rapporteur on the right to privacy \(advanced unedited version\)](#), 19 October 2017, p. 5.

635 See: YA De Montjoye, C Hidalgo, M Verleysen, and V Blondel, [Unique in the crowd: The privacy bounds of human mobility](#), *Nature Scientific Reports*, 3 (2013); M Srivatsa & M Hicks, *Deanonymizing mobility traces: Using social network as a side-channel*, Proceedings of the 2012 ACM Conference on Computer and Communications Security, ACM (2012); YA De Montjoye, L Radaelli, VK Singh & A Pentland, *Unique in the shopping mall: On the reidentifiability of credit card metadata*. *Science*347 (2015).

636 OAIC, [Annual Report 2017- 2018](#), p. 63.

637 OAIC, [Annual Report 2017- 2018](#), p. 63. The OAIC investigation also found that though personal information was not disclosed the Department had ‘improperly disclosed the information of service providers’ and that the Department of Health’s processes to remove personal information were inadequate. The OAIC accepted an offered undertaking from the Department to oversee its data governance arrangements.

638 Roy Morgan Research, ‘Consumer Views and Behaviours on Digital Platforms’, November 2018, p. 21.

639 [CPRC Survey Report](#), 10 March 2018, p. 5.

### **Box 5.8: Some consumer views from ACCC Questionnaire**

“Though ‘Location Services’, Google pretty much knows my whole routine for the week. Time I leave home for work, route I take, where I park my car, time I leave work etc. ... So, I am really concerned. I do not remember giving these platforms authority to collect and use my personal information to the extent that they now are tracking, storing and sharing information about my daily life (unless they did put a something in that service agreement that I just clicked OK to in exchange for a free email/social media account).”

“When I first started using Facebook, I did not use any of my personal data, my name consisted of my dogs names and [date of birth] was made up as I didn’t think they needed to know me but slowly it became more convenient to start using my real personal data (eg to be able to find friends I lost touch with) then came location services without which some apps weren’t as useful and today, I give my details to anyone just for the convenience and points/rewards. I still shred any paperwork with personal details out of habit and hope no one will do anything nasty with my personal details :(”

### **Location tracking disclosures**

Despite the prevalence of consumer concerns, the ACCC’s review of terms and policies found that each digital platform collected detailed location information on its users. For instance:

- **Google’s privacy policy** discloses the collection of user location data via GPS, IP addresses, sensor data from the user’s mobile device, and information from Wi-Fi access points, cell towers, and Bluetooth-enabled devices.<sup>640</sup> Further information, available via clicking on the link in ‘sensor data’, further discloses that sensor data from a mobile device can provide granular data on the user’s movement: ‘an accelerometer can be used to determine your speed and a gyroscope to figure out your direction of travel’.<sup>641</sup>
- **Facebook’s data policy** (which covers Facebook, Instagram and Messenger) discloses that information it obtains from users’ devices includes ‘Bluetooth signals, information about nearby Wi-Fi access points, beacons and mobile phone masts’, ‘the name of your mobile operator or ISP, language, time zone, mobile phone number, IP address, connection speed and, in some cases, information about other devices that are nearby or on your network’<sup>642</sup>, and GPS location information.
- **Twitter’s privacy policy** discloses that ‘Subject to your settings, we may collect, use, and store additional information about your location - such as your current precise position or places where you’ve previously used Twitter - to operate or personalize our services including with more relevant content like local trends, stories, ads, and suggestions for people to follow’.<sup>643</sup>

There may be several explanations for the between the extent of location data collection amongst digital platforms and consumer concerns. One possible explanation is that consumers may not be aware or fully understand all of the different technologies that can be used to track a user’s location, such as via geo-location tracking via satellites (GPS), Wi-Fi network sensors, radio signals to mobile antennas, or the IP addresses collected when individuals use online services. Another possible explanation is that consumers have insufficient bargaining power to negotiate with digital platforms to stop tracking their location. Another contributing factor is that the opt-out controls for location tracking that digital platforms provide may also be confusing to consumers—see further box 5.9 on ‘Google’s location tracking’.

640 Google, [Privacy Policy](#), accessed 30 October 2018.

641 Google, [Privacy Policy](#), accessed 30 October 2018.

642 Facebook, [Data Policy](#), accessed 30 October 2018.

643 Twitter, [Privacy Policy](#), accessed 30 October 2018.

### Box 5.9: Google's location tracking

According to an Associated Press report from August 2018, Google made potentially misleading statements to its users regarding its collection of location information by stating on a support page for 'Location History' that: 'You can turn off Location History at any time. With Location History off, the places you go are no longer stored' (see figure 5.9 screenshot).<sup>644</sup>

Figure 5.9: Screenshot of Google 'Location History' page before August 2018<sup>645</sup>

#### Turn Location History on or off

You can turn off Location History at any time. With Location History off, the places you go are no longer stored. When you turn off Location History for your Google Account, it's off for all devices associated with that Google Account.

You can also turn off Location services for a device. [Learn how.](#)

However, the investigation by the Associated Press (confirmed by Princeton University researchers) indicated that, despite this statement, location data could still be collected even when Location History was paused.<sup>646</sup> The Associated Press reported that, even when Location History was paused, some Google apps (like Google Maps) automatically store time-stamped location data without asking, and that this occurred for consumers on a phone running the Android operating system or consumers on an iPhone using Google Maps or Google Search.<sup>647</sup>

These data collection practices were controlled via a separate setting titled 'Web & App activity', which is set to 'save Web & App activity' by default for Google user accounts.<sup>648</sup> Since then, Google has revised its explanation of 'Location History' to provide more details on the location data it may collect (see figure 5.10 screenshot):

Figure 5.10: Screenshot of Google 'Location History' page after August 2018<sup>649</sup>

If you have other settings like [Web & App Activity](#) turned on and you pause Location History or delete location data from Location History, you may still have location data saved in your Google Account as part of your use of other Google sites, apps, and services. For example, location data may be saved as part of activity on Search and Maps when your [Web & App Activity](#) setting is on, and included in your photos depending on your camera app settings.

Google's location tracking practices and representations are currently facing class-action lawsuits for potential violation of the US State of California's privacy laws,<sup>650</sup> are reportedly under investigation by the US State of Arizona Attorney-General<sup>651</sup> and are subject to complaints by the Norwegian Consumer Council (NCC) and six other European consumer agencies relating to their compliance with the GDPR.<sup>652</sup> The latter follows the release of the NCC's report 'Every step you take' in November 2018 relating to Google's tracking practices.<sup>653</sup>

644 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 30 October 2018.

645 Google Support Page, [Location History](#), accessed via wayback machine (29 July 2018 snapshot).

646 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 30 October 2018.

647 R Nakashima, [AP Exclusive: Google tracks your movements, like it or not](#), AP News, 14 August 2018, accessed 30 October 2018.

648 ACCC analysis of sign-up processes, see further appendix C section 1. This was also the analysis of the Norwegian Consumer Council in [Deceived by Design](#), June 2018, p. 14.

649 Google Support Page, [Location History](#), accessed 25 October 2018.

650 See, for example: [Patacsil v Google](#) (ND Cal) Case No. 18-5062, filed 17 August 2018.

651 See T Romm, ['Google's location privacy practices are under investigation in Arizona'](#), *The Washington Post*, 11 September 2018, accessed 30 October 2018.

652 F. Yun Chee, [European consumer groups want regulators to act against Google tracking](#), Reuters, accessed 28 November 2018.

653 Norwegian Consumer Council, [Every Step you take: How deceptive design lets Google track users 24/7](#), November 2018.

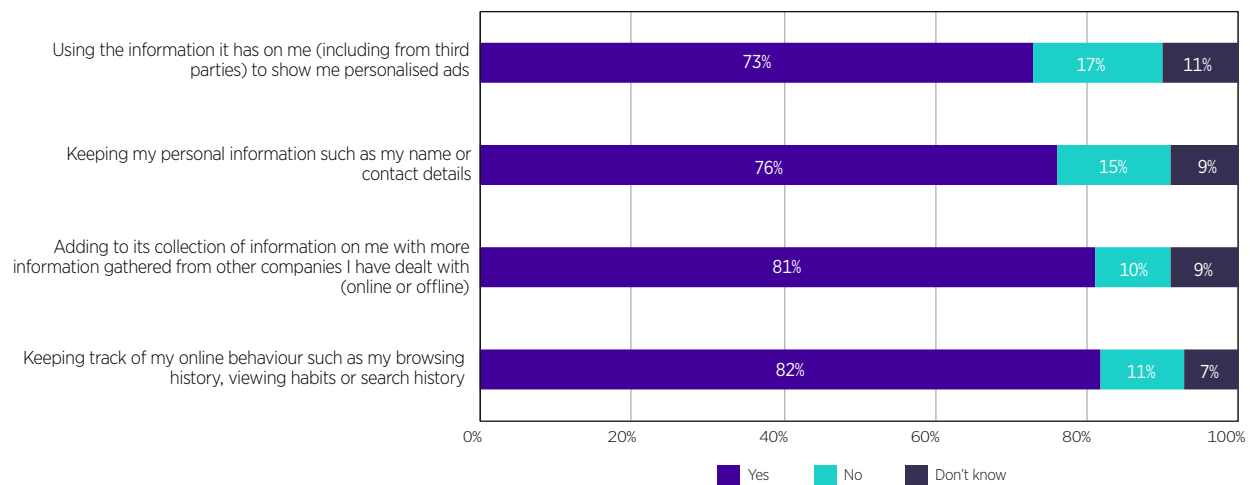
## 5.4.4 Disclosures regarding online tracking for targeted advertising purposes

### Consumer concerns

Another area of concern for consumers is the tracking of their online behaviour for targeted advertising purposes. In the ACCC consumer survey, more than three in four digital platform users surveyed (77 per cent) considered it to be a misuse of their personal information for it to be used to create profiles or to monitor online activities to enable targeted advertising.<sup>654</sup>

In addition, more than four in five digital platforms users surveyed (82 per cent) considered that tracking of online behaviour such as browsing history, viewing habits, or search history when they are not logged into an account to be a misuse of personal information.<sup>655</sup> Figure 5.11 shows the ACCC consumer survey results on what consumers perceive to be a misuse of personal information when they are *not* signed in to a digital platform.<sup>656</sup>

**Figure 5.11: Perceived misuse of personal information when not signed-in<sup>657</sup>**



Source: ACCC consumer survey. Q15. If you are not signed into an account with a digital platform, would you consider any of the following actions by them a misuse of your personal information?

Base: Australian digital platform users aged 18 or more (n = 4308).

This is supported by the finding in the OAIC survey, which found that only one in five Australians (21 per cent) were comfortable with targeted advertising based on their online activities and that only one in six Australians (17 per cent) were comfortable with social networking companies keeping databases of information on their online activity.<sup>658</sup> Similarly, the results of the CPRC survey also found that around half of Australians did not find it acceptable for companies to monitor their online behaviour to show them relevant advertising and offers.<sup>659</sup>

Consumer responses to the ACCC consumer questionnaire also expressed strong concerns about the monitoring of online activities to create profiles or target advertising—see some consumer views in box 5.10.

<sup>654</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 21.

<sup>655</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 22.

<sup>656</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 23.

<sup>657</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 23.

<sup>658</sup> OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. ii.

<sup>659</sup> [CPRC Survey Report](#), 10 March 2018, p. 6.



### **Box 5.10: Some consumer views from ACCC Questionnaire**

“Online tracking is the bane of the Internet, and there is no visibility to the end user as to WHAT is being tracked, and WHO that is being shared with. Let alone consent to it”

“What is concerning is the cross platform sharing of data that allows deductions to be made of individuals. For example, if your shopping data is linked to your web browsing, then deductions about your health, financial status or party plans can be extrapolated. This can impact your privacy, particularly regarding your health, insurance or financial outcomes”

“I work in Communications so know how personal data is collected and used, but not sure who it is shared with. I’m concerned that profiling using digital technologies is both intrusive and detrimental to dimensions of social, cultural, political diversity.”

“From basics like cookies and tracking of clicks or likes through to even reading the content of emails, and unsent Facebook searches, your digital fingerprint is recorded everywhere. No amount of firefox/chrome extensions can totally protect you.”

## **Types of online tracking technologies**

### **(i) Cookies**

Despite the consumer discomfort, consumer tracking is a common practice and aided by a variety of online tracking technologies. The most well-known online tracking technology is online cookies, which are small text files that store information about a user’s interaction with a web page. First-party cookies can be used by the web page to recall information about the user (e.g. contents of their online shopping basket) and to personalise their experience (e.g. displaying the time and weather in the user’s location). Third-party cookies may also be set by companies other than the one operating the website and often used for advertising and to track users across different sites.<sup>660</sup>

In 2014, several Data Protection Authorities in the European Union conducted a sweep of cookies to assess the extent of use of cookies and the level of information provided. The ‘Cookie Sweep Combined Analysis Report’ found that a total of 16 555 cookies were set on all 478 sites reviewed, of which 70 per cent were third party cookies, mainly involved in advertising.<sup>661</sup> The report also noted that most cookies had an average duration of one to two years, though a few cookies had duration periods of nearly 8000 years.<sup>662</sup>

### **(ii) Other tracking technologies**

Growing consumer awareness of the use of web cookies and the ability to require web browsers to block cookies has also led to the development and widespread use of other online tracking technologies, which include:

- **web beacons or pixel tags:** small objects that can be embedded into a web page or email that are not visible to the user. When a user loads a web page or email with a beacon or pixel, it will make a call to the server to load the object, which enables a company to know that someone has loaded the web page or opened the email.<sup>663</sup> These are used to collect information such as what users click on.<sup>664</sup>
- **device or browser fingerprinting:** the collection of patterns of information about the device or browser to enable identification of a specific device or user. Information collected can include: browser type, font preference, operating system, battery status, plugins, time-zone, etc.<sup>665</sup> This technology can be used to recognise the same user across multiple online sessions even if cookies are deleted, user login changes, or IP addresses are hidden or changed.<sup>666</sup> For example, a privacy

660 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, pp. 11-12.

661 European Commission, [Cookie Sweep Combined Analysis Report](#), 3 February 2015, pp. 2 and 19.

662 European Commission, [Cookie Sweep Combined Analysis Report](#), 3 February 2015, p. 2.

663 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 24.

664 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p11-12.

665 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 23.

666 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, pp. 11-12; Citi GPS, [ePrivacy and data protection](#), March 2017, p. 23.



analysis of the HTML5 Battery Status API<sup>667</sup> that enables websites to access the battery state of a mobile device or a laptop to determine whether to show an energy-saving or high-performance display to users has been shown to provide identifiers that facilitate online tracking.<sup>668</sup>

- **facial recognition:** biometric software can be used to identify individuals in a digital image. For example, the software used by the Facebook Moments app applies facial recognition technology to identify individuals in photos.<sup>669</sup>
- **mobile device tracking:** there are numerous additional ways that consumers may be tracked on their mobile devices, including via mobile apps that display advertising, Wi-Fi network sensors that can track the movement of a mobile device, information collected by mobile carriers, GPS tracking, and iBeacons or Antennas that use radio signals to communicate with mobile devices passing nearby.<sup>670</sup>
- **cross-device tracking:** the use of various methods to identify a single user across different devices. This includes deterministic methods like tracking the user's log-ins on multiple devices and probabilistic methods that apply machine learning algorithms to de-identified data generated via fingerprinting, mobile IDs, and online cookies to create connections between separate devices.<sup>671</sup>
- **audio beaconing:** a recent innovation in cross-device tracking, audio beaconing can be used to drop a cookie onto a device and play an inaudible ultrasonic code through the device's speakers, which can be picked up by other smart devices with appropriate software installed and used to link the devices being used by the same person.<sup>672</sup>

See box 5.11 on 'Facebook's web tracking' for a further discussion on the scale of Facebook's online tracking network.

### **Box 5.11: Facebook's web tracking**



If a third-party website has embedded 'Facebook Technologies' such as the Facebook 'like' button, a 'Facebook login' option, or analytical services such as 'Facebook Analytics'—data will be transmitted to Facebook via Application programming interfaces (APIs)<sup>673</sup> whenever a consumer visits the third party website.<sup>674</sup> Facebook has stated that, as of April 2018, the Like button appeared on 8.4 million websites, the Share button on 931 000 websites covering 275 million web pages, and that there were 2.2 million Facebook pixels installed on websites globally.<sup>675</sup>

The browsing data collected via Facebook Technologies can be merged with data from the user's Facebook account, even if the user has blocked web tracking in their browser or device settings,<sup>676</sup> and regardless of whether the consumer is logged in to their Facebook account or registered as a Facebook user at all.<sup>677</sup> This data collection practice is discussed further at section 5.4.4.

667 For further discussion on APIs, see box 5.15 on 'Data-sharing with third-party app developers'.

668 See Olejnik et al, [The leaking battery—A privacy analysis of the HTML5 Battery Status API](#), IACR Cryptology ePrint Archive, 2015, p. 1.

669 Citi GPS, [ePrivacy and data protection](#), March 2017, pp. 24-5.

670 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 24.

671 Citi GPS, [ePrivacy and data protection](#), March 2017, p. 25. See further chapter 7 section 7.3 for a definition of 'machine learning'.

672 Citi GPS, [ePrivacy and data protection](#), March 2017, March 2017, p. 25.

673 APIs are tools for building software that interacts with other software, for example, how apps interact with operating systems. APIs are discussed in more detail below at Box 5.15 on 'Data-sharing with third-party app developers'.

674 See Facebook Help Centre, [What information does Facebook get when I visit a site with the Like button?](#); see also Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017, accessed 13 November 2018, p. 2.

675 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 114.

676 As described in Bundeskartellamt, [Background information on the Facebook proceeding](#), 19 December 2017, accessed 13 November 2018.

677 See Facebook, [Cookies Policy, accessed 30 October 2018](#): 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in'.

## Online tracking disclosures

As with location tracking, online tracking of users for targeted advertising purposes is a common practice despite widespread consumer discomfort. The ACCC's review of terms and policies found that each digital platforms' privacy policies reviewed alluded to the practice of online tracking of users, though the language in the privacy policies reviewed tended to understate to consumers the extent to which users and non-users can be tracked online for targeted advertising purposes.

In general, the privacy policies reviewed tended not to clearly outline to readers the extent to which users are tracked online for advertising purposes. Instead, the privacy policies tend to describe online tracking technologies as being used for product improvement or user convenience purposes, placing emphasis on the value of online tracking to customers rather than on the value of the user data for the digital platforms. For example:

- A **'How Google uses cookies'** web page states that: 'We use cookies for many purposes. We use them, for example, to remember your safe search preferences, to make the ads you see more relevant to you, to count how many visitors we receive to a page, to help you sign up for our services, to protect your data, or to remember your ad settings'.<sup>678</sup>
- **Facebook's cookies policy** states that: 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in.'<sup>679</sup>
- **Twitter's privacy policy** states that: 'When your browser or device allows it, we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences.'

Digital platforms also frame online tracking as standard practice. For example:

- **Google's privacy policy** links to a 'Key Terms' page that states: 'Like most websites, our servers automatically record the page requests made when you visit our sites. These "server logs" typically include your web request, Internet Protocol address, browser type, browser language, the date and time of your request, and one or more cookies that may uniquely identify your browser.'<sup>680</sup>
- **Twitter's privacy policy** also states that 'Like many websites, we use cookies and similar technologies to collect additional website usage data and to operate our services'.<sup>681</sup>

Digital platforms' privacy policies can often also warn users not to delete or disable cookies. For example:

- **Facebook's cookies policy** states that 'certain parts of the Facebook Products may not work properly if you have disabled browser cookie use', but fails to specify whether it is the consumer-facing or advertiser-facing Facebook Products that may not work properly.<sup>682</sup>
- **Twitter's privacy policy** similarly warns readers that 'some of our services may not function properly if you disable cookies'.<sup>683</sup>

678 Google, [How Google uses cookies](#), accessed 22 November 2018.

679 Facebook, [Cookies Policy](#), accessed 30 October 2018.

680 Google, Privacy and Terms, [Key Terms](#), accessed 30 October 2018.

681 Twitter, [Privacy Policy](#), accessed 30 October 2018.

682 Facebook, [Cookies and other storage technologies](#), accessed 30 October 2018.

683 Twitter, [Privacy Policy](#), accessed 30 October 2018.

Finally, digital platforms' privacy policies often include broad discretions to collect, use, and disclose user data for targeted advertising purposes but also tend to minimise references to targeted advertising. For example, privacy policies may camouflage the targeted advertising purpose within a long list of other purposes beneficial to users:

- **Google's privacy policy** states that it collects data from its users to: provide its services; maintain and improve its services; develop new services; provide personalised services, including content and ads; measure performance; communicate with users; and protect Google, its users, and the public (emphasis added).<sup>684</sup>
- **Facebook's data policy** states that it collects user data to: 'provide, personalise and improve its products (including to select and personalise ads, offers and other sponsored content); provide measurement, analytics and other business services, promote safety; integrity and security; communicate with its users; and research and innovate for social good' (emphasis added).<sup>685</sup>
- **Twitter's privacy policy** states that 'we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences' (emphasis added).<sup>686</sup>

Facebook can also collect detailed user data from its users who have downloaded the Onavo Protect VPN—see further discussion in box 5.12 on '*Facebook tracking users via the Onavo Protect VPN*'.

### **Box 5.12: Facebook tracking users via the Onavo Protect VPN**

As discussed above in chapter 2<sup>687</sup>, in 2013 Facebook Inc. acquired Onavo which, amongst other things, provided users with VPN services.

A common reason for individuals and businesses to use a VPN is to mask their identity and their online activities. Privacy policies of leading VPN providers, such as Private Internet Access, NordVPN and TorGuard are consistent with this objective and explicitly state that they do not log online traffic when consumers use their VPN services.<sup>688</sup>

Facebook provides Onavo Protect as a typical VPN to consumers stating that 'Onavo Protect for iPhone and iPad helps keep you and your data safe when you go online, by blocking potentially harmful websites and securing your personal information'.<sup>689</sup> By February 2018, Onavo had been installed more than 33 million times across the Apple App Store and the Google Play App Store.<sup>690</sup> As discussed in chapter 2 above<sup>691</sup>, Onavo's privacy policy enabled Facebook to receive personally identifying information of a user as well as all of a user's mobile data traffic, including location data.

Onavo is still available in Google Playstore; however, it was removed from the Apple app store in August 2018, with Apple being reported to state that it considered the app to be in violation of its app store policies 'that apps should not collect information about which other apps are installed on a user's device for the purposes of analytics or advertising/marketing and must make it clear what user data will be collected and how it will be used'.<sup>692</sup>

684 Google, [Privacy Policy](#), 25 May 2018, accessed 31 October 2018.

685 Facebook, [Data Policy](#), accessed 31 October 2018.

686 Twitter, [Privacy Policy](#), accessed 31 October 2018.

687 See chapter 2, box 4.4.

688 See, for example, Private Internet Access, [Privacy Policy](#), accessed 30 October 2018 and Nord VPN, [Privacy Policy](#), accessed 30 October 2018.

689 Onavo from Facebook, [Onavo Protect for Android](#), accessed 31 October 2018

690 S. Perez, TechCrunch, '[Facebook is pushing its data-tracking Onavo VPN within its main mobile app](#)', February 2018, accessed 31 October 2018.

691 See chapter 2, box 4.4.

692 T. Hatmaker, TechCrunch, '[Apple removed Facebook's Onavo from the App Store for gathering app data](#)', TechCrunch August 2018, accessed 31 October 2018.

Onavo's privacy policy does not make it immediately clear that it shares detailed user traffic data and personally identifying information with Facebook:

- Onavo's privacy policy states that it does not share personal information except in limited circumstances, which include sharing 'personally identifying information with third parties and "Affiliates" (businesses that are or become legally part of the same group of companies that Onavo is part of, including but not limited to Facebook, Inc.) to operate, maintain and enhance the Services, or for other purposes as described below'.
- In the section on 'Sharing Personally Identifying Information', the first sentence is 'We do not share or sell your personally identifying information to third parties except if we have received your consent or given you notice, or in limited circumstances described in this Policy'.
- Later in the privacy policy, Onavo states 'We do not share or sell users' personally identifying information to third parties unless you give us permission to do so (including by your use of the services as described by this Privacy Policy)'.<sup>693</sup>

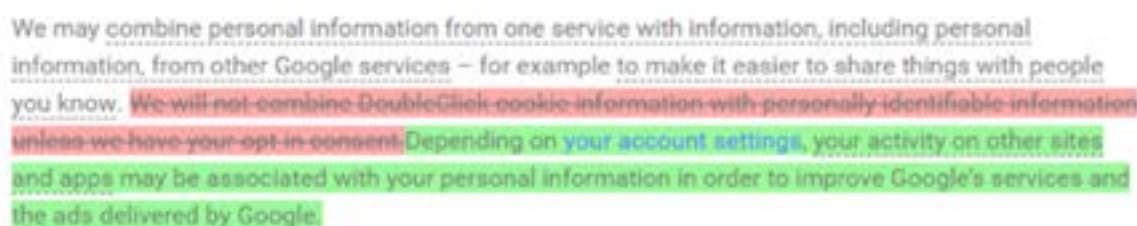
### Disclosures regarding data-combining practices

An important aspect of online tracking is the potential for consumers' user data to be combined from multiple different sources, as the value and sensitivity of user data will change depending on the other pieces of data that it is combined with.<sup>694</sup> The combining of data from multiple sources may also change non-personal information into personal information, if it becomes associated with personally identifying information.<sup>695</sup>

#### **Box 5.13: Google disclosures regarding combining of data sets**

In 2012, Google consolidated the privacy policies for over 60 of its products and services into a single policy, and explicitly noted that, under the policy, Google may combine user data provided from one service with information from other services.<sup>696</sup>

Separate to this, in July 2016, Google updated its privacy policy to remove a term that outlined how Google would treat data from its subsidiary DoubleClick. DoubleClick is an ad-serving technology company which was acquired by Google in 2007; Google's privacy policy previously explicitly stated that Google would not combine DoubleClick cookie information with personally identifiable information without the user's opt-in consent.<sup>697</sup>



The screenshot shows a portion of Google's privacy policy with several lines highlighted. The first line is underlined: 'We may combine personal information from one service with information, including personal information, from other Google services – for example to make it easier to share things with people you know.' The second line is highlighted in red: 'We will not combine DoubleClick cookie information with personally identifiable information unless we have your opt-in consent.' The third and fourth lines are highlighted in green: 'Depending on your account settings, your activity on other sites and apps may be associated with your personal information in order to improve Google's services and the ads delivered by Google.'

The ACCC's review of terms and policies found that the privacy policies of digital platforms often provide broad discretions for digital platform to combine user data collected from a broad range of sources with a user's information. For example:

- **Google's privacy policy** states that: 'We may combine the information we collect among our services and across your devices for the purposes described above'.<sup>698</sup> A different web page to its privacy policy provides some additional information: 'Many websites and apps use Google services

693 Onavo, [Privacy Policy - Sharing Personally Identifying Information](#), accessed 31 October 2018.

694 A. Acquisti, L Wagman and C. Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), p. 447.

695 A. Acquisti, L Wagman and C. Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), p. 447, citing A. Acquisti and R. Gross, 'Predicting social security numbers from public data', *proceedings of the National Academy of Sciences* 106 (27) (2009), pp. 10975–80.

696 Google, [Updating our privacy policy and terms](#), 24 January 2012, accessed 7 November 2018.

697 Google, [Privacy policy - 28 June 2016](#), accessed 24 November 2018. Google provides archived versions of its privacy policy, tracking the changes made in each version.

698 Google, [Privacy Policy](#), 25 May 2018, accessed 31 October 2018

to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google'.<sup>699</sup>

- **Twitter's privacy policy** states that: 'we may also associate your account with browsers or devices other than those you use to log into Twitter (or associate your logged-out device or browser with other browsers or devices)'.<sup>700</sup>
- **Facebook's data policy** states that: 'We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their Terms and Policies.'<sup>701</sup> Facebook Companies is defined to include Facebook Payments, Onavo (see Box 5.12 above on 'Facebook tracking users on the Onavo Protect VPN'), Oculus and WhatsApp.<sup>702</sup> See further box 5.18 on 'WhatsApp data-sharing'.

Consumers are able to login to a large number of websites and digital apps using their logins for a digital platform, which enables the linking together of different sources of data from across the web.<sup>703</sup> Google has provided the following estimates to the Inquiry:

It is estimated that there are over 23 million third party websites and mobile apps globally that allow Google Account holders to sign in using their Google Account credentials. Not all of these websites and apps are available in Australia, and only a very small percentage (less than 1% of these websites and apps) are being accessed by Australian Google Account holders using their Google Account credentials.

It is estimated that around 10 million Google Accounts that were created in Australia have been used to sign-in to a third party website or app that offers Google Sign-In (noting that an Australian Google Account holder can have more than one Google Account).<sup>704</sup>

Digital platforms may also encourage users to sign-in to their services as much as possible to facilitate the combination of user data across devices (see section 5.4.4 on 'cross-device tracking').<sup>705</sup> In September 2018, Google released a new version of Chrome that signed users into Chrome automatically whenever a user signs into any other Google service such as Gmail.<sup>706</sup> Google has explained via its blog that 'this change to sign-in does not mean Chrome sync gets turned on. Users who want data like their browsing history, passwords, and bookmarks available on other devices must take additional action, such as turning on sync'.<sup>707</sup> However, Google's privacy policy does not mention that changes to Chrome sync settings affect its ability to 'combine the information we collect among our services and across your devices'. Google has provided the following information regarding a growth in the number of signed-in users on Google Search, Chrome and YouTube:

In recent years, for those Google's Search, Chrome and YouTube products which experienced growth in user numbers on desktop, mobile and tablet devices, there has been higher growth in the number of signed-in users compared with the number of users overall. The percentage of Google search queries made by signed-in Australian users in 2018 is higher than the percentage of Google search queries made by signed-in Australian users in 2014.<sup>708</sup>

## Disclosures regarding online tracking of non-users

Despite consumer concerns, some digital platforms' privacy policies also note the collection of information on users who are not signed-in to that digital platform. Google notes that it collects data from consumers' interactions with Google services provided to the consumer as well as through websites that use Google's advertising services.<sup>709</sup> Facebook also tracks the web browsing activity of logged-in users, logged-out users, and non-users (as discussed in box 5.11 on 'Facebook's Web

699 Google, Privacy and Terms, [How Google uses information from sites or apps that use our services](#), accessed 31 October 2018.

700 Twitter, [Privacy Policy](#), accessed 31 October 2018.

701 Facebook, [Data Policy, accessed 31 October 2018](#).

702 Facebook, Help Centre, [The Facebook Companies](#), accessed 31 October 2018.

703 Competition and Markets Authority, [The commercial use of consumer data](#), June 2015, p. 30.

704 Information provided to the ACCC.

705 Although, as discussed in section 5.4.4 below, digital platforms may still collect user data from some users even when they are not signed in.

706 Google, [Chrome, Product updates based on your feedback](#), 26 September 2018, accessed 31 October 2018.

707 Google, [Chrome, Product updates based on your feedback](#), 26 September 2018, accessed 31 October 2018.

708 Information provided to the ACCC.

709 Google, [How Ads Work](#), accessed 30 October 2018.

Tracking' above). Facebook has explained that 'when a website uses one of our services, our users' browsers send the same kinds of information to Facebook as the website receives'.<sup>710</sup> 'One of our services' refers to any of the Facebook services such as Facebook's 'Like' and 'Share' buttons, the Facebook Login, Facebook Analytics, and Facebook ads and measurement tools.<sup>711</sup> Facebook has stated that it is the responsibility of the third party site or app to tell users that data is being shared with Facebook via the Facebook business tools.<sup>712</sup> It has also stated that '*We do not use web browsing data to show ads to non-users or otherwise store profiles about non-users*'.<sup>713</sup>

Consumers who are not registered as users of a particular digital platform may not be aware that their online activity is being tracked by that digital platform, as they are less likely to read that digital platform's privacy policy (and also less likely to receive prompts from the digital platform regarding changes to its privacy policy). These consumers are likely to experience greater information asymmetry in relation to that digital platform's data practices than its registered users.

## 5.4.5 Disclosures regarding third-party data-sharing

### Consumer concerns

Consumers are also concerned about their personal information being shared with third parties. The ACCC consumer survey found that 86 per cent of digital platform users considered it a misuse of their personal information if it was shared with an unknown third party and 83 per cent also considered it a misuse of their personal information if it was shared with a third party to enable targeted advertising.

Responses to the ACCC's consumer questionnaire expressed similar views—see some consumer views in box 5.14.

#### **Box 5.14: Some consumer views from ACCC Questionnaire**

"I am concerned about how and why digital platforms collect personal data, and the extent to which this impacts my privacy. It also concerns me that this personal information may be available to others who may misuse it"

"What I'd like to know more about is what/if any personal data is shared with digital platform partners/service suppliers and what security these third-party groups have when managing data"

"The terms and conditions are so loosely defined that, without extensive research into all commercial relationships of each digital platforms, users will never know where their data is shared/sent to."

These views are also supported by the results from the CPRC Survey, which found that at least two thirds of Australians indicated they were uncomfortable with most types of information being shared with third parties.<sup>714</sup> Similarly, the OAIC Survey found that 79 per cent of consumers do not want their data shared with other organisations,<sup>715</sup> and an online survey by MediaScope found that 94 per cent of respondents were concerned with third party use of data tools such as those used in the Cambridge Analytica data breach.<sup>716</sup>

Once again, despite these consumer views, digital platforms can often disclose user data to third parties, particularly if that user data does not constitute 'personal information' under their privacy policy. As mentioned in section 5.4.2, there is likely broad discretion for digital platforms to disclose user

710 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 74.

711 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 74.

712 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 148.

713 Facebook, [Response to questions asked during 'Facebook: Transparency and Use of Consumer Data' hearing](#), House of Representatives, 29 June 2018, p. 75.

714 Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 32.

715 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 11.

716 Mediascope, [submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 15.

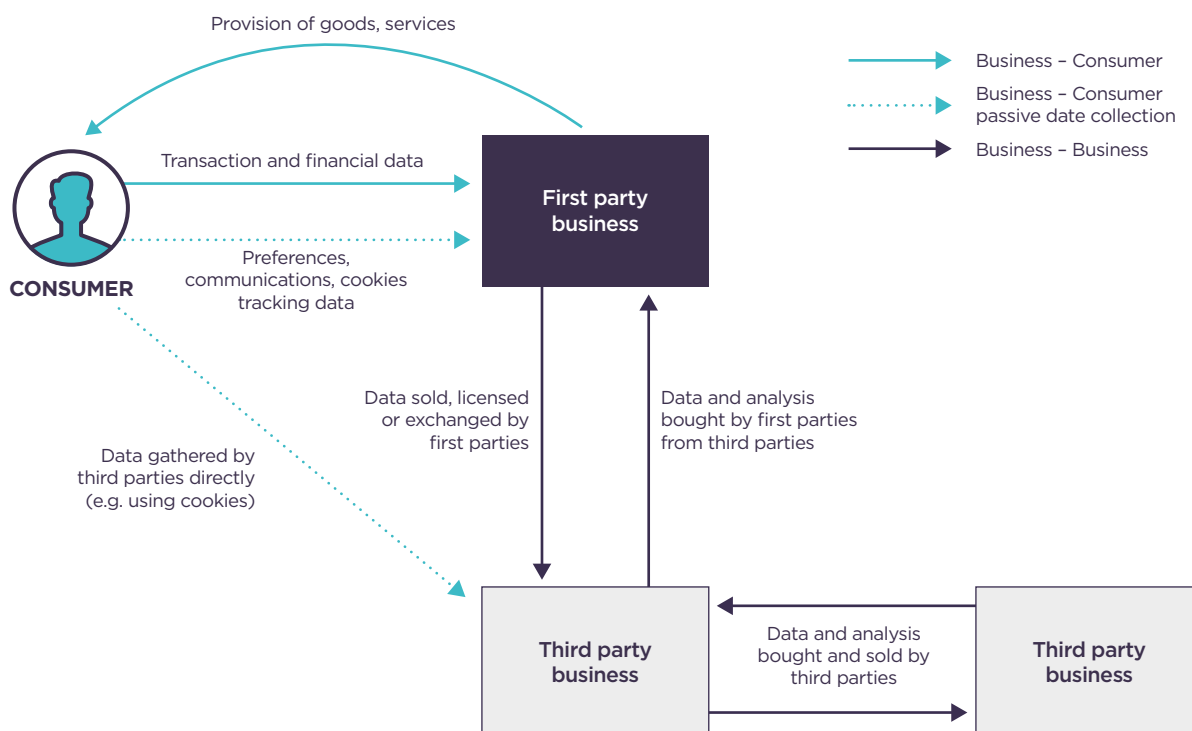


data not defined as ‘personal information’ to third party businesses, for example to advertisers or to app developers—see further discussion in box 5.15 on ‘Data-sharing with third-party app developers’ .

Moreover, as mentioned in section 5.4.2, consumers tend to interpret ‘personal information’ more broadly than the terms and policies of digital platforms, which may result in consumers mistakenly believing that more of their user data is protected from disclosure to third parties under a digital platform’s privacy policy than is actually the case.

Digital platforms may also acquire additional data sets from third parties to combine with their user data to create richer profiles of their users. The flow of data between consumers, businesses and third parties is illustrated in figure 5.12.<sup>717</sup>

**Figure 5.12—Illustration of data flows between consumers and businesses**



Application programming interfaces (APIs) are tools for building software that interacts with other software including, for example, how apps interact with operating systems.<sup>718</sup> APIs are generally provided by digital platforms that own software programs to app developers to allow apps to interact with the platform. In some cases, APIs can allow app developers to access the large amounts of user data collected by a digital platform.

Large digital platforms such as Google,<sup>719</sup> Apple<sup>720</sup> and Facebook<sup>721</sup> all provide APIs to their software. The digital platforms’ collection of data via APIs is often included in their Terms and Conditions: for example, Google’s privacy policy states that the information it collects on a user may include ‘Activity on third-party sites and apps that use our services’. Data collected by the apps is governed by consents requested by the app—see box 5.15 on ‘Data-sharing with third-party app developers’.

717 Competition & Markets Authority, [The commercial use of consumer data](#), June 2015, p. 35.

718 For further explanation on APIs, see MuleSoft Videos, [What is an API](#), YouTube, accessed 30 October 2018.

719 Google, APIs Explorer, accessed 30 October 2018.

720 Apple, [Apple Developer Documentation](#), accessed 30 October 2018.

721 Facebook, [Facebook for developers](#), accessed 30 October 2018.



## Box 5.15: Data-sharing with third-party app developers

### Facebook

The Cambridge Analytica data breach involved the misuse of Facebook user data which had initially been accessed through an API.<sup>722</sup> An academic researcher and app developer built a ‘this is your digital life’ app, which requested Facebook users’ permission to collect Facebook profile information on users and on users’ friends.<sup>723</sup> Once the user granted permission, the app was able to collect that user’s information such as name, gender, birthdate, location, photos and Page likes, as well as similar information from that user’s friends (depending on each friend’s own privacy settings).<sup>724</sup> All of this user data was then improperly shared by the researcher and app developer with Cambridge Analytica which used some of this information to build models that were able to profile users’ political views and target them with political ads.<sup>725</sup>

In October 2018, the UK Information Commissioner’s Office fined Facebook £500 000 for serious breaches of data protection law, finding that Facebook processed the personal information of users unfairly by allowing application developers access to their information without sufficiently clear and informed consent.<sup>726</sup> In November 2018, it was reported that Facebook had issued a statement that it was appealing this fine and the ICO’s findings.<sup>727</sup>

In 2014, Facebook announced that it would more tightly restrict its platform APIs to prevent abuse.<sup>728</sup> Facebook has also stated that the majority of app developers were required to transition to more limited data access in the next 12 months, though 61 companies were provided a six month extension to this 12 month period.<sup>729</sup> After the Cambridge Analytica data breach was reported in March 2018, Facebook further restricted app developers’ data access to this kind of information.<sup>730</sup>

Facebook has estimated that, between October and December 2015, there were approximately two million apps that were active on Facebook<sup>731</sup>; these apps potentially had access to user data under Facebook’s earlier and less restrictive policies. Between February and April 2018, Facebook estimates that there were approximately 1.8 million apps and 1.5 million app developers active on Facebook.<sup>732</sup>

### Google

In July 2018, following media reports, Google confirmed that its Gmail APIs allowed for third party developers to gain access to Gmail users’ messages if they had sought and been granted permission.<sup>733</sup> One of the permissions that app developers are allowed to seek via Google Gmail APIs is to ‘read, create, or modify message bodies (including attachments), metadata, or headers’.<sup>734</sup>

In October 2018, Google announced that it will be changing the policies relating to Gmail APIs from January 2019 with policies that direct that developers can no longer ‘...transfer or sell the data for other purposes such as targeting ads, market research, email campaign tracking, and other unrelated purposes’.<sup>735</sup>

722 J Albright, ‘[The Graph API: Key Points in the Facebook and Cambridge Analytica Debacle](#)’, Medium, 21 March 2018, accessed 30 October 2018.

723 M Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 30 October 2018.

724 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, p. 3.

725 M Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 30 October 2018. See also C. Cadwalladr and E Graham-Harrison ‘[Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach](#)’, The Guardian (Australia Edition), 18 March 2018, accessed 30 October 2018.

726 UK Information Commissioner’s Office, [ICO issues maximum £500,000 fine to Facebook for failing to protect users’ personal information](#), 25 October 2018, accessed 1 November 2018.

727 See, e.g., A Hearn, [Facebook to lodge appeal against ICO’s £500,000 fine](#), *The Guardian*, 22 November 2018, accessed 22 November 2018.

728 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, p. 4.

729 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, pp. 95–96.

730 M Zuckerberg, [Facebook Blog Post Re Cambridge Analytica](#), Facebook, 21 March 2018, accessed 30 October 2018.

731 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, p. 644.

732 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, p. 645.

733 Google, [Ensuring your security and privacy within Gmail](#), accessed 6 November 2018.

734 Google, [Google API Services: User Data Policy](#), accessed 6 November 2018.

735 A Wen, Google, [Elevating user trust in our API ecosystem](#), 8 October 2018, accessed 31 October 2018.

Though apps will still be able to seek permission to access/read user's email under the new policy,<sup>736</sup> the policy restricts use of such data to use of data to 'providing or improving user-facing features that are prominent in the requesting application's user interface',<sup>737</sup> and the types of apps that will be allowed to seek permissions relating to reading of emails have also been restricted. Restrictions on when a human is able to read emails (as opposed to the content being scanned by an automated system) have also been included in the new policy, including after gaining user consent or for security reasons; these reasons are in line with when humans employed by Google are able to read user messages.<sup>738</sup>

### Third-party data-sharing disclosures

The ACCC's review also found that there is also a lack of clarity in digital platforms' terms of use and privacy policies regarding the sharing of data with third parties, which may include a range of entities including advertisers and app developers. (See discussion in box 5.15 on '*Data-sharing with third-party app developers*' above). Digital platforms' privacy policies and terms of use often refer to app developers as 'affiliates' or 'trusted partners' without providing more information on their identity. Table 5.4 provides a sample of the terms used by digital platforms in online statements referring to the third parties who may provide the digital platform with user data or receive user data from the digital platforms.

For instance, when agreeing to Twitter's User Agreement (which incorporates its Privacy Policy), a user accepts that 'We may also disclose personal data about you to our **corporate affiliates** in order to help operate our services and our affiliate's services, including the delivery of ads'<sup>739</sup> Similarly, Snapchat's terms of use requires a user to 'agree that we, Snap Inc., **our affiliates, and our third-party partners** may place advertising on the Services, including personalised advertising based upon the information you provide us or we collect or obtain about you'.<sup>740</sup>

736 The ACCC notes that Google considers there to be a clear distinction between an automated system scanning messages and a human reading them: see Google, [Ensuring your security and privacy within Gmail](#), accessed 6 November 2018.

737 Google, [Google API Services: User Data Policy](#), accessed 6 November 2018.

738 Google, [Ensuring your security and privacy within Gmail](#), accessed 6 November 2018.

739 Twitter, [Privacy Policy](#), accessed 31 October 2018.

740 Snap, [Terms of Service](#) (outside the United States), accessed 31 October 2018.

**Table 5.4: Sample of terms used to describe third parties providing or receiving user data**

Company	Third parties who may receive user data	Third parties who may provide user data
<b>Google</b>	‘our advertising partners’ ‘trusted businesses or persons’	‘our advertising partners’ ‘trusted partners, including marketing partners ... and security partners’ ‘our partners’
<b>Facebook</b>	‘partners’ ‘measurement partners’ ‘partners who use our analytics services’ ‘advertisers’ ‘partners offering goods and services in our Products’ ‘vendors and service providers’ ‘research partners and academics’	‘partners’ ‘select group of third-party data providers’ ‘third-party partners’ ‘website owners and publishers, app developers, business partners (including advertisers)’
<b>Twitter</b>	‘advertisers’ ‘partners’	‘ad partners and affiliates’ ‘partners (including ad partners), or our corporate affiliates’ third parties who are not our ad partners’, ‘partners who help us evaluate the safety and quality of content on our platform’
<b>Apple</b>	‘strategic partners that work with Apple to provide products and services, or that help Apple market to customers’ ‘our partners’	‘other persons’ ‘datasets such as those that contain images, voices or other data that could be associated with an identifiable person’
<b>Snapchat</b>	‘Snapchatters’ ‘third parties’ ‘business partners’ ‘the general public’	‘third-party services’
<b>WhatsApp</b>	‘third-party providers’ ‘Facebook family of companies’	‘third-party providers’ ‘Facebook family of companies’

None of the terms of use or privacy policies reviewed by the ACCC provided a definitive list of third parties who may receive or provide user data to the digital platform. This means that there is no way for a consumer reading a digital platform’s terms of use or privacy policy to know what types of entities, on what terms and for what purposes, may access their user data if they use a digital platform’s services. In addition, these terms may understate to readers the number of entities to whom their user data may be disclosed. For instance, Facebook has estimated that there were 1.5 million app developers active on Facebook between February and April 2018 and that it has over five million advertisers.<sup>741</sup>

Where terms and conditions, data or privacy policies do not clearly outline important information that consumers are concerned about, such as the sharing of information with third parties, consumers are placed at a significant disadvantage and denied the ability to make an informed decision about the collection and use of their data.

However, the ACCC notes that this opacity is not confined to the terms and conditions for using digital platforms. For example, the privacy policy for News Corp Australia’s online site states that ‘We may also share information we hold about you with those trusted businesses’ but does not specify who the trusted businesses are;<sup>742</sup> Nine Entertainment Co.’s privacy policy states that a user agrees that ‘information including your personal information may be shared within the Nine Entertainment Co. group of companies and provided to third parties, and used by those organisations for any of the purposes disclosed in this Privacy Policy’.<sup>743</sup>

741 Facebook, [Response to questions asked during ‘Facebook: Transparency and Use of Consumer Data’ hearing](#), House of Representatives, 29 June 2018, pp. 645 and 687.

742 News Corp Australia, [Privacy Policy](#), accessed 21 November 2018

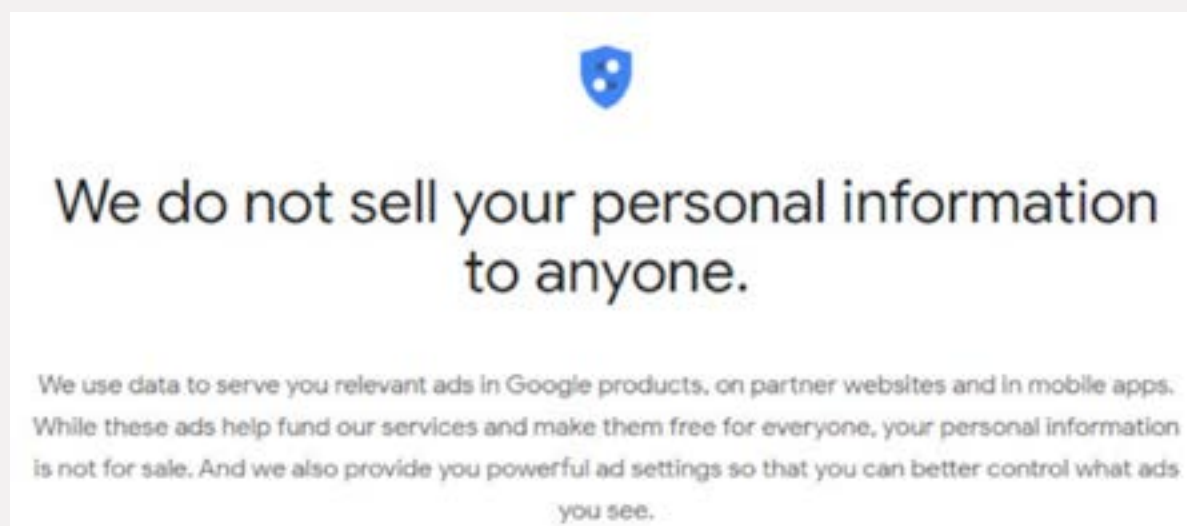
743 Nine, [How will we use or disclose your information?](#), accessed 31 October 2018.

### Box 5.16: Do digital platforms ‘sell’ user information to third parties?

Digital platforms often make statements that they do not sell user information, in particular ‘personal information’, to third parties. For example:

- A Facebook Help page states: ‘Does Facebook sell my information? No, we don’t sell any of your information to anyone and we never will. You have control over how your information is shared’<sup>744</sup>
- Google’s mobile Ad Settings (where users can choose whether to turn off Ad Personalisation) contains the statement: ‘Google doesn’t sell your personal information to anyone’<sup>745</sup> and a Google ‘safety centre’ page on ads and data states: ‘We do not sell your personal information to anyone’ (see figure 5.13).

Figure 5.13: Screenshot of Google web page on ‘How Ads Work’<sup>746</sup>



The ACCC’s information-gathering in the Inquiry to-date has not uncovered evidence of any digital platforms directly selling information to third parties.

However the ACCC has found that:

- Digital platforms do collect user data, including personal information, from Australian consumers, such as gender, age and interests, in order to create detailed profiles of consumers to enable advertisers (using that platform) to target advertising to particular segments of the population. Generally, the more specific the segments are allows digital platforms to charge more for advertising on their platforms.
- This creates an incentive to collect detailed user data, including personal information, from consumers, and digital platforms use a growing array of mechanisms to passively collect information from users (see section 5.4.4). This includes data collected across multiple digital platforms, via different devices and browsers, and through products which some users may not assume are used for this purpose<sup>747</sup>, which further increases their ability to create detailed profiles of consumers.
- Some digital platforms also collect information on consumers who are not registered as users of their services, such as through web tracking practices (see section 5.4.4 above on ‘Disclosures regarding online tracking of non-users’).
- Some digital platforms supplement their user data with data purchased from other data holders, such as data analytics firms<sup>748</sup>, to create more detailed profiles of Australian consumers.

744 Facebook, Help Centre, [Does Facebook sell my information?](#), accessed 31 October 2018.

745 Google, Ad Settings, accessed 21 November 2018.

746 Google, Safety Centre, [Ads and data](#), accessed 21 November 2018.

747 For example, until June 2017, Google indicated it used the content of Gmail to inform targeted advertising to users. D. Green, [As G Suite gains traction in the enterprise, G Suite’s Gmail and consumer Gmail to more closely align](#), Google, 23 June 2017, accessed 31 October 2017.

748 R Baker, [Facebook makes data deal with Quantium, Acxiom and Experian to fuse offline and online data](#), Ad News, 21 July 2015, accessed 31 October 2018; Quantium, [Quantium announces data partnership with Facebook](#), 23 July 2015, accessed via wayback machine (26 March 2016 snapshot). It was announced in 2018 that Facebook would seek to roll back these partnerships: Facebook, [Shutting Down Partner Categories](#), Newsroom, 28 March 2018, accessed 31 October 2018.

- There is evidence that some third parties that digital platforms have contracted with, such as application developers or ‘partners’, have used information of users obtained through digital platforms to on sell for other commercial purposes.<sup>749</sup> See, for example, discussion of Cambridge Analytica at box 5.15 on ‘Data-sharing with third-party app developers’.

These findings are relevant when considering what a reasonable consumer may expect from the headline statements provided by digital platforms such as those extracted above.

- First, as noted in section 5.4.2, the ACCC’s survey found that digital platform users may have a wide range of data they perceive to be personal information. This includes not just name, age and financial information but also browsing history, location and personal preferences. Such information is increasingly collected and used to create in-depth profiles of users by digital platforms.
- Second, the headline statements provided by digital platforms about the ‘sale’ of personal information may provide a false sense of certainty that information collected by digital platforms is not being monetised. This may therefore facilitate users not to take steps to protect or reduce the amount of information they would otherwise provide to platforms.
- Finally, the passive collection of information and the joining of third party data sets may not be matters a reasonable consumer would assume when they pass data on to one party. It is noted, however, that the Inquiry has found that these data sharing practices are not limited to digital platforms.

#### 5.4.6 ACCC assessment of digital platforms’ privacy policies

Whilst it is inherently difficult to measure concepts such as ‘consumer awareness’, the accessibility, clarity and accuracy of digital platforms’ privacy policies are important factors in determining whether consumers can accurately ascertain the data practices of digital platforms and decide whether these data practices meet their own set of privacy preferences.

The ACCC’s review of terms and policies found online agreements that are long, complex, vague, and difficult to navigate. Fundamental concepts such as ‘personal information’ varies across the privacy policies of different digital platforms and is likely to cause significant confusion to Australian consumers. In addition, data practices of particular concern to consumers including location tracking, online tracking for targeted advertising purposes and third-party data-sharing are all permitted under digital platforms’ privacy policies, though expressed in understated language.

Having regard to the above, the ACCC’s preliminary view is that the existing privacy policies of digital platforms are likely to exacerbate rather than mitigate the information asymmetries between digital platforms and consumers by providing consumers with an opaque view of privacy and data protections while simultaneously outlining broad discretions for digital platforms to collect, use and disclose user data.

As such, it may be appropriate to impose increased requirements regarding the form and content of the notifications that digital platforms must provide to consumers to increase the clarity and accessibility of these notifications. The strengthened notification requirements may be introduced economy-wide by amending the Privacy Act (see recommendation 8(a) ) and/or as part of a Privacy Code applicable only to digital platforms (see recommendation 9). Additionally, an independent third party assessment scheme may also assist in lessening the information asymmetry by reducing the burden on consumers to understand digital platforms’ data practices by processing lengthy and complex privacy policies (see further Recommendation 8(b)).

<sup>749</sup> D MacMillan ‘Tech’s ‘Dirty Secret’: The App Develops Sifting Through Your Gmail’, The Wall Street Journal, 2 July 2018, accessed 31 October 2018.

## 5.5 The extent of consumer control

### Key findings

- Many consumers would like to be able to opt-out of certain types of data practices and some digital platforms convey to consumers an impression of providing extensive privacy controls. However, it may not be in the digital platforms' interests to allow consumers to opt-out of such data practices and, some digital platforms do not provide consumers with meaningful control over the collection, use and disclosure of user data by digital platforms.
- Some digital platforms may also design user interfaces that lead users to make privacy-intrusive selections by appealing to certain psychological or behavioural biases, for example in the use of privacy-intrusive defaults or pre-selections.

This section discusses the extent of bargaining power imbalance between digital platforms and consumers by examining the extent to which consumers have meaningful control over digital platforms' collection, use and disclosure of their data. It will consider, in turn, consumers' ability to effectively opt-out of certain data practices, the impact of digital platforms' user design features including the use of defaults and pre-selection, and the availability of viable alternatives.

### 5.5.1 Lack of effective opt-outs

#### Consumer demand for opt-outs

Given the range of different consumer privacy preferences, as discussed above, consumers who are more concerned by certain types of data collection would benefit from being able to opt-out of certain types of data collection in accordance with their own unique preferences.

The ACCC consumer survey results are consistent with this view, finding that 90 per cent of digital platform users surveyed agree with the statement 'Digital platforms should allow me to opt out of collecting certain types of information about me, how they use it, and/or what they can share'.<sup>750</sup> Similarly, the CPRC survey found that 95 per cent of Australians surveyed said they wanted companies to provide options to opt-out of certain types of information they can collect use or share.<sup>751</sup>

Australians have also indicated that they will actually opt-out of sharing information when they are offered the opportunity, with 57 per cent of digital platforms users surveyed in the ACCC consumer survey indicating they select opt outs when they are available.<sup>752</sup> The CPRC survey also found that 89 per cent of Australians surveyed indicated that they select opt-outs when they were available.<sup>753</sup>

#### Representations regarding consumer control

Given the value provided by user data to the business models of digital platforms including for product development and targeted advertising, digital platforms are not incentivised to encourage consumers to opt-out of their collection, use or disclosure of user data.<sup>754</sup>

In the face of consumer demand, however, digital platforms are incentivised to convey an impression that they offer consumers significant control over the collection, use and disclosure of their user data. Research also suggests that the impression of user control increases users' propensity to take more risks when disclosing sensitive information.<sup>755</sup> Accordingly, digital platforms' privacy terms often make reassuring representations as to consumer control:

<sup>750</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 17.

<sup>751</sup> CPRC, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 6.

<sup>752</sup> Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 26.

<sup>753</sup> [CPRC Survey Report](#), 10 March 2018, p. 6.

<sup>754</sup> Facebook stated in July 2018 that one of the impacts of the GDPR was that some European users had not opted-in to third party data use and that, in the second quarter of 2018, the GDPR had caused a faster deceleration in ad revenue growth than in other regions: Facebook, [Second Quarter 2018 Results Conference Call](#), 25 July 2018, pages 16-18.

<sup>755</sup> A Acquisti, I Adjerid and L Brandimarte, [Gone in 15 Seconds: The Limits of Privacy Transparency and Control](#), IEEE computer society, 11 (2013).

- Google’s privacy policy states: ‘You can control what information we use to show you ads by visiting your ad settings’ and ‘across our services, you can adjust your privacy settings to control what we collect and how your information is used.’<sup>756</sup>
- Facebook’s web page on ‘how does Facebook work with data providers’ (which is accessible via its privacy policy) states: ‘People using our services have control over the ads they see.’<sup>757</sup>

The NCC, in its June 2018 report ‘Deceived by Design’, argues that Facebook and Google, in some circumstances, give users an ‘illusion’ of privacy control, for example by not providing substantial choice, or by providing large amounts of granular choices which may discourage users from engaging in privacy choices.<sup>758</sup>

### Lack of meaningful control

The ACCC is concerned that some digital platforms may not provide consumers with easy or effective ways of opting out of data collection, particularly in relation to issues of concern to consumers such as the collection of user data for targeted advertising purposes (see further Box 5.17 on ‘Can users opt-out of targeted advertising?’). Similarly, the NCC’s ‘deceived by design’ report found that certain privacy controls provided by Facebook and Google give users the illusion of control without providing users with substantial or convenient controls in reality.<sup>759</sup>

There are different ways that digital platforms’ privacy settings may not provide users with meaningful control over opt-outs. For example:

- Digital platforms may provide an opt-out that does not actually opt-out users to the extent that the user might expect: for example, Google gives users the option of turning off ‘Location History’ on both Android and iPhone devices, but turning this setting off does not prevent Google from continuing to track users’ location via the ‘Web & App Activity’ setting (see further box 5.9 on ‘Google’s Location Tracking’)
- Digital platforms may also offer privacy settings that provide a user with detailed user-to-user controls to protect user data from being provided to other users, without necessarily changing the amount of personal information accessed by the digital platform itself:<sup>760</sup> for example digital platforms often emphasise to users the many privacy settings provided regarding the sharing of user-uploaded information with other users, which can give users an impression of granular control over the sharing of user data without providing options for less data collection.

Table 5.5 compares the privacy settings Facebook provides to its users to control the information accessible to other users and any corresponding counterpart setting available to the user to control the information accessible to Facebook or third parties who are Facebook’s ‘trusted partners’.

756 Google, [Privacy Policy](#), accessed 30 October 2018.

757 Facebook, [How does Facebook work with data providers](#), accessed 30 October 2018.

758 Norwegian Consumer Council, [Deceived by Design](#), June 2018, pp. 34, 39.

759 Norwegian Consumer Council, [Deceived by Design](#), June 2018, pp. 31-39.

760 J Albright, ‘[The Graph API: Key Points in the Facebook and Cambridge Analytica Debacle](#)’, Medium, 20 March 2018, accessed 30 October 2018.



**Table 5.5: Consumer-facing vs advertising-facing data protection on Facebook**

	Can users prevent other users from using this data?	Can users prevent third parties from using this data, if all advertising data sharing settings are turned off?
Can the user control who sees what they post in the News Feed and on their profile?	✓	✗ Third parties may still target advertising on Facebook to users based on things that users do on Facebook. <sup>761</sup>
Can the user control who sees their contact phone and email address?	✓	✗ Third parties may still use contact information to match their customer list to a Facebook profile and target advertising to that user. <sup>762</sup>
Can the user control who sees the apps and websites they use?	✓	✗ There is no setting that prevents Facebook from targeting advertising to users while on Facebook based on the apps and websites they use.

Consequently, despite consumer demand for being able to opt-out of certain types of data collection, this can often be difficult and sometimes impossible for them to do, depending on the type of data collection involved. For example, although many digital platforms provide controls for users to opt-out of certain types of targeted advertising, it may not be possible for users to opt-out of *all* types of targeted advertising.

**Box 5.17: Can users opt-out of targeted advertising?**

Most of the key digital platforms rely on placement of advertising to make money, so users cannot opt out of seeing advertising. Whether, and to what degree, users can opt out of receiving targeted advertising depends on the digital platform. However overall, the ACCC has found that most Digital Platforms do not facilitate a user to opt out of all targeted advertising entirely. Three platforms are discussed below by way of example.

**Google**

Google provides separate controls for ‘ads personalization across the web’ and ‘ads personalization for Google search’.<sup>763</sup>

The dialogue box that appears when a user turns off ‘ads personalization for Google search’ notes that the user will still see ads, only ones less useful; also stating that turning this off may result in the user seeing more ads (see figure 5.14):

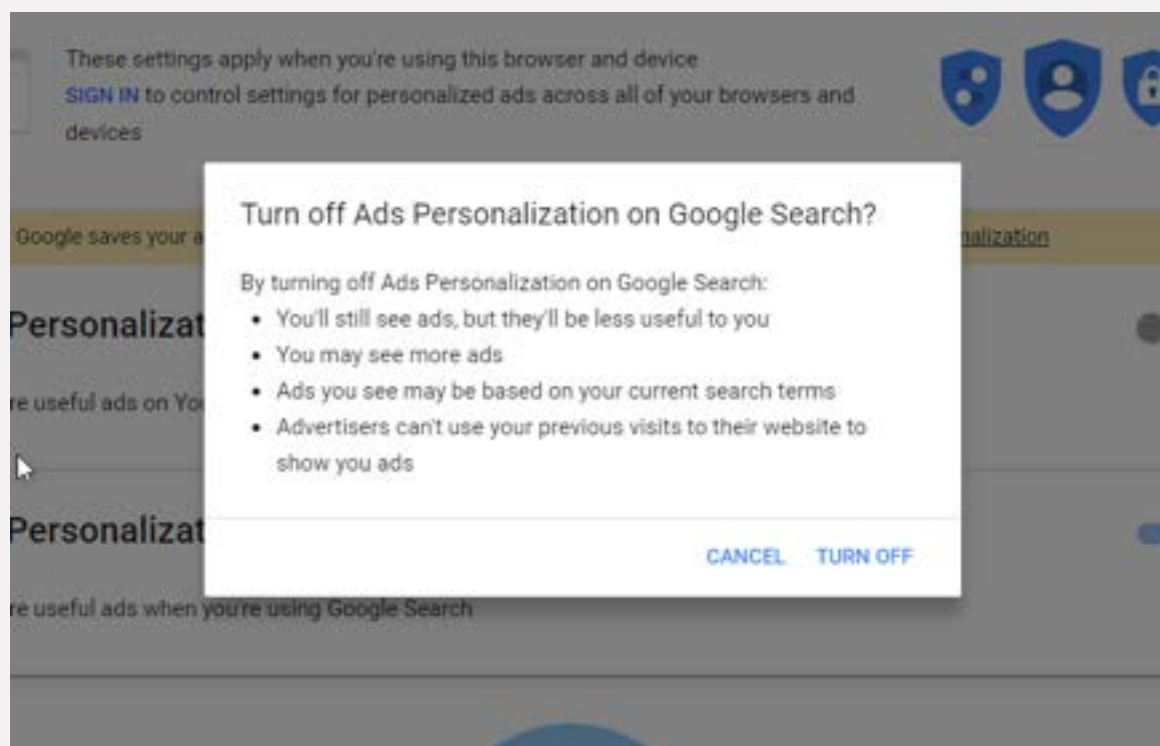
761 Facebook Ad Settings, under ‘Ads based on data from partners’: ‘You’ll still see the same number of ads, but they’ll be based on things that you do on Facebook Company Products, or they may be from a specific business that you’ve shared your contact information with, if we’ve matched your profile to their customer list’.

The ACCC notes that Facebook does allow users to turn off targeting based on four profile fields: ‘relationship status’, ‘employer’, ‘job title’, and ‘education’. See Facebook, [Your ad preferences](#) (NB: a user must log in to access web page).

762 Facebook Ad Settings, under ‘Ads based on data from partners’: ‘You’ll still see the same number of ads, but they’ll be based on things that you do on Facebook Company Products, or they may be from a specific business that you’ve shared your contact information with, if we’ve matched your profile to their customer list’.

763 Google, [Ad settings](#), accessed 21 October 2018 (NB: a user must login to access web page).

Figure 5.14: Screenshot of dialogue box when a user turns off 'ads personalization for Google Search'



Google also indicates that turning off these controls does not necessarily mean that users will not experience targeted advertising. The dialogue boxes that appear both when you turn off and turn on ads personalisation note that ads may be based on current search terms,<sup>764</sup> and on what the user is viewing and their general location.<sup>765</sup> On its privacy & terms advertising page, Google states that 'Even if you opt out of Ads Personalization, you may still see ads based on factors such as your general location derived from your IP address, your browser type, and your search terms'.<sup>766</sup>

### Facebook

Within its ad settings, Facebook provides options for users to opt out of two instances of targeted advertising: 'ads based on data from partners', for ads shown on Facebook using data collected by third parties, and 'ads based on your activity on Facebook Company Products that you see elsewhere', for ads on third party sites using Facebook preferences.<sup>767</sup> Facebook doesn't provide an option to opt out of targeted advertising on Facebook using data collected by Facebook. On a page titled 'How does Facebook work with data providers?',<sup>768</sup> it provides a list of links where users can opt out individually from each of the data companies.

Facebook indicates that users will still experience targeted advertising after opting out of the above. A Facebook help centre FAQ regarding adjusting ad preferences notes that 'Facebook always uses information about your age, gender, location and the devices you use to access Facebook when deciding which ads to show you'.<sup>769</sup>

### Twitter

Twitter's help centre provides a number of options for users to opt out of targeted ads.<sup>770</sup> Twitter provides options for opting out of ads from third parties, including from Google; it also provides options for opting out of seeing ads from Twitter on its service or across the web:

764 Google, Ad settings, [Ads personalization on Google Search](#), accessed 21 October 2018 (NB: a user must log in to access web page).

765 Google, Ad settings, [Ads personalization on Google Search](#), accessed 21 October 2018 (NB: a user must log in to access web page).

766 Google, Privacy and terms, [Advertising](#), accessed 21 October 2018.

767 Facebook, [Your ad preferences](#), accessed 21 October 2018 (NB: a user must log in to access web page).

768 Facebook, [How does Facebook work with data providers](#), accessed 21 October 2018.

769 Facebook, [What are my ad preferences and how can I adjust them?](#), accessed 21 October.

770 Twitter, [Your privacy controls for personalized ads](#), accessed 25 October 2018.

## What are my privacy options?

If you do not want Twitter to show you interest-based ads on and off of Twitter, there are several ways to turn off this feature:

- Using your Twitter settings, visit the **Personalization and data** settings and adjust the setting **Personalize ads**.
- If you are on the web, you can visit the Digital Advertising Alliance's consumer choice tool at [optout.aboutads.info](https://optout.aboutads.info) to opt out of seeing interest-based advertising from Twitter in your current browser.

If you do not want Twitter to show you interest-based ads in Twitter for iOS on your current mobile device, enable the "Limit Ad Tracking" setting in your iOS phone's settings. If you do not want Twitter to show you interest-based ads in Twitter for Android on your current mobile device, enable "Opt out of Ads Personalization" in your Android phone's settings.

Twitter notes that users who opt out may still see targeted ads, based on other information, including 'what you tweet, who you follow, what type of phone you use, where you are, and the links you click on Twitter'.<sup>771</sup>

### 5.5.2 Use of defaults and pre-selection

Digital platforms may also design user interfaces that lead users to make privacy-intrusive selections by appealing to certain psychological or behavioural biases.<sup>772</sup> These include using default settings to opt-in users to certain types of data collection or pre-selecting options in ways that may nudge users towards more privacy-intrusive choices. For the avoidance of doubt, 'default settings' as discussed in this chapter and in Appendix C refers to the preset function of a setting which applies unless changed by the user.<sup>773</sup>

#### The role of behavioural biases

Some examples of behavioural biases that are likely to affect consumers in deciding whether or not to accept a digital platform's terms of service and privacy policy include:<sup>774</sup>

- **Information overload:** When faced with complex products or bewildering amounts of information, consumers may ignore possible choices, choose not to choose, or rely on simple rules of thumb.
- **Default and status quo effect:** Presenting one choice as a default option can induce consumers to choose that option. The default effect is related to the status quo effect, where consumers have a strong tendency to retain the status quo.
- **Framing:** Consumers are influenced by how information is presented. Presenting an option in a certain way may induce consumers to evaluate the choice from a particular reference point.
- **Hyperbolic discounting and myopia:** Consumers tend to treat the present as if it were much more important than future time periods.
- **Overconfidence:** Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome.

771 Twitter, [Your privacy controls for personalized ads](#), accessed 25 October 2018.

772 Norwegian Consumer Council, [Deceived by Design](#), June 2018.

773 The [Macquarie Dictionary](#) defines 'default' as both 'a course which a program automatically follows in the absence of any specific alternative instruction' and 'a procedure which has preset parameters which operate unless changed by the user'.

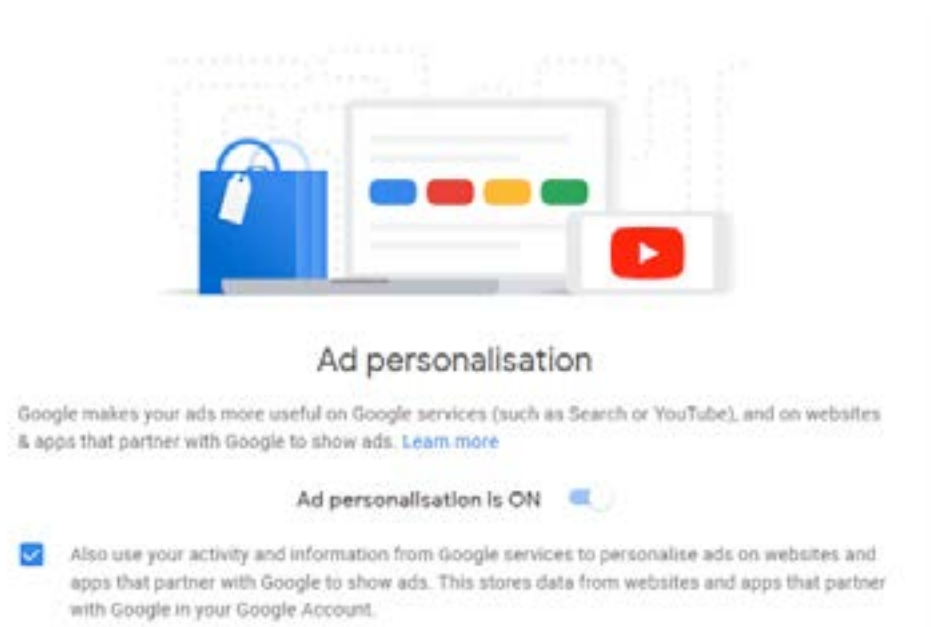
774 OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 20.

For example, the default and status quo effect may lead consumers to retain the preselected privacy settings on a digital platform that enable more data collection. Hyperbolic discounting may cause consumers to accept longer-term detriments from intrusive data practices for the shorter-term benefit of accessing a digital platform. Alternatively, overconfidence may lead consumers to think that they are less likely to experience adverse outcomes from privacy-intrusive terms and policies.

The use of defaults and pre-selections are both examples of design features that may nudge consumers towards more privacy-intrusive settings by acting on certain behavioural biases.<sup>775</sup> Default settings (both on or off) may create the perception that the choices set to default are optimal, as they nudge consumers to focus on reasons to accept the default and reject the alternative first and foremost whereas, without the default, consumers may otherwise choose differently.<sup>776</sup>

Digital platforms may also use pre-selections as another effective way of nudging users towards more privacy-intrusive options.<sup>777</sup> For example, when 'Ad personalisation' is turned on in Google's ad settings, there is a pre-selected checkbox for 'Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. This stores data from websites and apps that partner with Google in your Google Account' (see figure 5.15).<sup>778</sup> A user would have to expressly un-select that checkbox to exclude non-Google activity from their Google account.

**Figure 5.15: Screenshot of web page on 'Ad personalisation'**



The NCC's report 'Deceived by Design' found digital platforms design user interfaces that nudge users towards selecting or accepting privacy-intrusive options.<sup>779</sup> In this report, the NCC found that Google and Facebook both have privacy intrusive defaults and require users who want greater privacy to go through a significantly longer series of menus, some of which are deliberately obscure.<sup>780</sup>

Behavioural biases were also found to have a role in inducing WhatsApp users to consent to the sharing of their user data with Facebook, which was subject to a fine by the Italian Competition Authority—see box 5.18 on 'WhatsApp data-sharing with Facebook'.

775 Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 6.

776 Steffel et al, "['Default' choices have big impact, but how to make sure they're used ethically?](#)" the Conversation, 4 April 2017, accessed 15 November 2018.

777 Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 13.

778 Google, Ad settings, [Ad personalisation](#), accessed 22 October 2018. The ACCC notes that this site is only accessible to a logged-on account holder.

779 Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 4.

780 Norwegian Consumer Council, [Deceived by Design](#), June 2018, p. 15.

### Box 5.18: WhatsApp data-sharing with Facebook

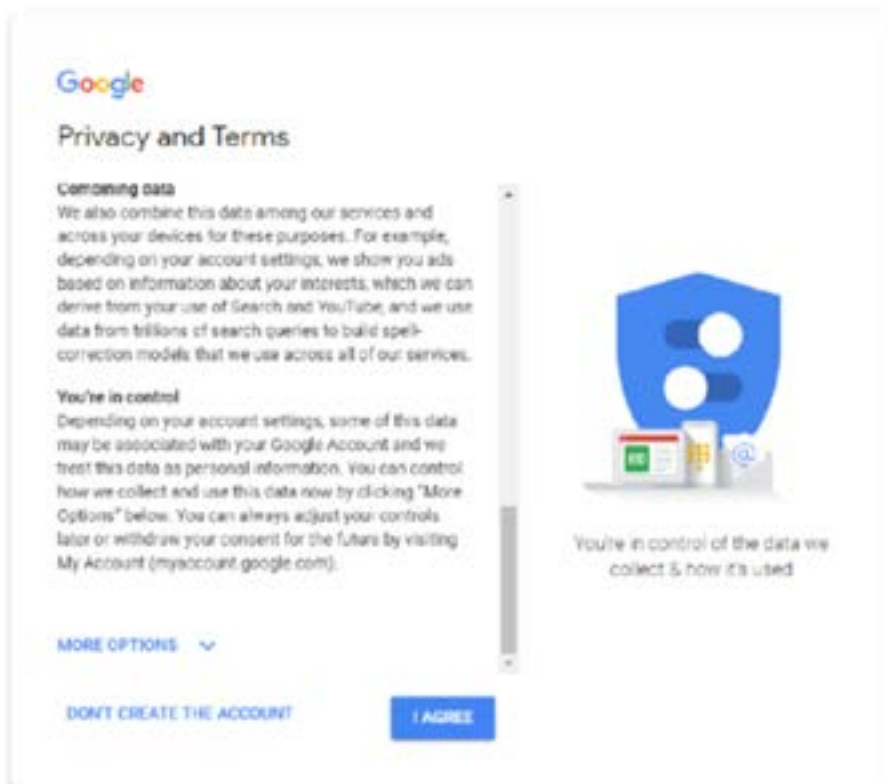
In 2017, the Italian Competition Authority fined WhatsApp for inducing users to believe they had to provide consent to a change in WhatsApp's terms of use relating to the sharing of user data with Facebook in order to continue using the service.<sup>781</sup> It found that WhatsApp achieved this by, amongst other things: the pre-selection of the option to share the data, opting-in users to data-sharing by default, and use of complex user interface design to discourage users from exercising an opt-out option once the new terms of use had been accepted.

### Impact on information asymmetries

The impact of defaults and pre-selections on information asymmetries depends on the transparency of default settings and pre-selections. The ACCC's review of sign-up processes found that none of the digital platforms reviewed (Gmail, Facebook, Twitter and Apple) required a user to review and edit their privacy settings before a new account is created, although Apple took new users directly to a 'manage account' web page once the Apple ID was created and Facebook took new users to a web page where users were prompted to take a number of actions, including to upload a profile picture, add friends, and to review their privacy settings.<sup>782</sup>

Further, whilst Gmail did offer users options to customise certain types of data collection, these options were displayed only if a new user clicked on 'more options' to open a dropdown menu (see figure 5.16). This is likely to result in greater information asymmetries for new Gmail users who do not have the time or expectation to click on 'more options' to discover the additional options for control. A more detailed discussion of the ACCC review of sign-up processes is provided at section C.3 of appendix C.

Figure 5.16: Screenshots of Google's sign-up process



781 AGCM, [WhatsApp fined for 3 million euro for having forced users to share their personal data with Facebook](#), 12 May 2017, accessed 31 August 2018.

782 See further appendix C section 1.

## Consumer outcomes

As a result of the use of defaults, pre-selections, and certain user interface designs, there are a number of behavioural biases that may work against consumers making informed choices in relation to digital platforms' data practices. For example, the process for creating a new account on Gmail, Facebook and Twitter means that new users are not required to review their default data and privacy controls and as such do not necessarily make any choices about the collection, use and disclosure of their user data.

In addition, privacy-intrusive defaults may be accompanied by additional user interface design features that nudge users away from making changes to the default settings. For example, there are several elements of the user interface design in Google Account settings that are likely to discourage or prevent some users from opting-out of Google's collection of their location data—see further discussion in box 5.19 on 'Can users easily opt-out of Google's collection of location data?'.<sup>783</sup>

### **Box 5.19: Can users easily opt-out of Google's collection of location data?**

#### **Opting out**

'Pausing' Google's Location History setting does not stop Google collecting location data. Google states that 'If you have other settings like Web & App Activity turned on and you pause Location History or delete location data from Location History, you may still have location data saved in your Google Account as part of your use of other Google sites, apps, and services. For example, location data may be saved as part of activity on Search and Maps when your Web & App Activity setting is on, and included in your photos depending on your camera app settings.'<sup>783</sup>

If both Location History and Web & App Activity are opted out of, Google may still be collecting location data on Android users through 'usage & diagnostics', an option provided to a user when they first set up an Android device.<sup>784</sup> On its support page for 'usage and diagnostics' Google states that users can have this option on to help Google 'improve Android, you can let your device send us information about how you use it and how it's working'<sup>785</sup>. In a drop down box that can be opened on the Google support page for Location History, Google state that information shared for 'usage and diagnostics could include 'Location accuracy: Google can use information from location sensors and settings to help improve location estimates for apps and services'<sup>786</sup>.

Google notes that turning off usage and diagnostics won't affect information that apps might collect. Google also notes that turning off usage and diagnostics doesn't affect a device's ability to send the information needed for essential services such as system updates and security.<sup>787</sup>

#### **Observations from opting out**

An ACCC staff member with an existing Google account took steps to opt out of the collection of location information by Google by opting-out of Location History (set to 'off' by default) and Web and App Activity (set to 'on' by default).<sup>788</sup>

The staff member navigated via the 'privacy checkup' function, described by Google as a 'quick checkup to review important privacy settings and adjust them to your preference';<sup>789</sup> this function contains links to both Location History and Web and App Activity. Allowing users to opt-out of collection of location data is theoretically a pro-consumer innovation on the part of Google. However, the officer found a number of design features that either introduced confusion or may nudge users against opting-out of location tracking; lessening the effectiveness of the innovation. These features are outlined below.

783 Google, Account Help, [Manage your Location History](#), accessed 31 October 2018.

784 Google, Google Account Help, [Share usage & diagnostics information with Google](#), accessed 21 November 2018.

785 Google, [Share usage & diagnostics information with Google](#), accessed 25 October 2018.

786 Google, Account Help, [Manage your Location History](#), accessed 25 October 2018.

787 Google, [Share usage & diagnostics information with Google](#), accessed 25 October 2018.

788 See further ACCC's review of sign-up processes, see appendix C section 1. This was also the analysis of the Norwegian Consumer Council in their [Deceived by Design](#) report, June 2018, p. 14 (regarding Location History) and in their [Every Step You Take](#) report, November 2018, p. 16 (regarding Web & App Activity).

789 Google, [My account](#), accessed 20 August 2018.



*Location History can only be 'paused' rather than 'turned off'*—the Google Account Help page for 'Manage Your Location History' has a section called titled 'Turn Location History on or off',<sup>790</sup> but the options provided are only to turn Location History on or to 'pause' it. There is no explanation of whether there is a distinction between Location History being 'paused' or 'turned off' (the latter is not offered as an option).

*Indirect route*—the ACCC staff member found that, from 'Manage Location History' link on the privacy checkup page, a user must to go through a minimum of five clicks and through a minimum of two web pages to pause Location History. The ACCC notes that this is not a large number relative to the number of clicks and page changes Australians would go through daily; these numbers are provided rather because every additional click and page change may serve as a nudge against making any change.

*Distractions*—When the user clicks on 'Manage Location History', Google shows the user a pop up box 'explore your timeline'.<sup>791</sup>

- The user must scroll through three screens. The final screen of the pop-up box is titled 'You're in control' and contains a 'Learn more' link, positioned above a more prominent button in blue labelled 'Start exploring'.
- The less prominent 'Learn more' link takes the user away from the timeline page and provides instructions for how to make changes to Location History.
- Following these instructions, a user can then click back to timeline page, and navigate, through the cog icon, to the web page with the Location History setting.

*Positive and negative wording*—after selecting 'delete' for data collected as part of 'Web and App Activity', a user must confirm that they wish to delete the collected data twice. The first time, the wording focuses on the positive aspects of retaining 'Web and App activity' and the second time warning that deleted data cannot be recovered.<sup>792</sup>

For further explanation of the opt out process, including screenshots of the above, please see appendix C, section 2.

### 5.5.3 Lack of viable alternatives

Though most consumers experience a bargaining power imbalance when dealing with other corporations, this imbalance is more acute in their transactions with digital platforms, given the market power of some digital platforms, the lack of substitutes available and, in some cases, high switching costs.

As discussed in chapter 2, the markets in which the key digital platforms (Google and Facebook) operate are concentrated where consumers are faced with a relative lack of choice. Whereas established digital platforms have millions or billions of users worldwide<sup>793</sup>, consumers have few options in the search engines and social media platforms available and which are unlikely to be fully substitutable for each other.

Consumer responses to the ACCC consumer questionnaire also note a lack of viable alternatives that impede their ability to make informed choices—see some consumer views in box 5.20:

790 Google, Account Help, [Manage your Location History](#), accessed 20 August 2018.

791 For a discussion of the possible distraction by popups, see NCC in 'Deceived by Design' report, p. 30.

792 Similar to the 'Framing and Rewards' and 'Punishment' examples of dark patterns discussed by the Norwegian Consumer Council in [Deceived by Design](#), June 2018, pp. 22-27.

793 For a discussion of the market power of digital platforms, see further discussion at chapter 2 above.



### **Box 5.20: Some consumer views from ACCC Questionnaire**

“...Being on facebook is pretty much the same, it is the biggest social network, so it has the most people that you may know and therefore it is the one that you do have to use even grudgingly if you want to keep in touch. It is actually not possible to switch to another platform if none of your friends or family are there”.

“I have never thought about what data is collected or how it’s used. Maybe I’m not concerned enough as I still continue to use these platforms, but also don’t really think I have a choice not to use them...”

## **5.5.4 ACCC assessment of the extent of consumer control**

The ACCC’s research and review of opt-out processes has found that consumers tend not to have effective opt-outs that provide them with meaningful controls over digital platforms’ collection, use and disclosure of their data. This may be partially due to information asymmetries between digital platforms and consumers regarding the purpose and effect of user controls, including user design features such as the use of defaults and pre-selections, as well as digital platforms’ incentives to ensure consumers are not provided with too many options to limit the scope of digital platforms’ data practices. The ACCC further notes that consumers are affected by significant bargaining imbalance in their dealings with digital platforms due to the large digital platforms’ market power in their respective markets, a lack of substitutes and, in some cases, high switching costs.

As discussed in section 5.4.6, the ACCC’s preliminary view is that the information asymmetries may be lessened by stricter notification requirements regarding the collection, use and disclosure of user data, which may be introduced economy-wide by amending the Privacy Act (see recommendation 8(a)) or as part of a Privacy Code applicable only to digital platforms (see recommendation 9). Independent third party assessments are also likely to lessen the information asymmetries (see further recommendation 8(b)).

Further, as discussed in section 5.3.4, the ACCC’s preliminary view is that stronger and more specific consent requirements, as well as the ability to request erasure of personal information in some circumstances, is likely to lessen some of the bargaining power imbalances and information asymmetries that lead to digital platforms collecting large amounts of personal information that make consumers feel uncomfortable. Again, stronger consent requirements may be introduced via economy-wide amendments to the Privacy Act (see further recommendations 8(c) and (d)) or via a Privacy Code applicable only to digital platforms (see recommendation 9).

## **5.6 The current privacy and data protection regulatory framework**

### **Key findings**

- In Australia, the collection, use and disclosure of personal information is primarily regulated under privacy laws. Strong privacy protections that inform and empower consumers can promote competition, innovation, and the welfare of individual consumers in digital markets.
- The existing Australian regulatory framework over 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 and may not meet community expectations.

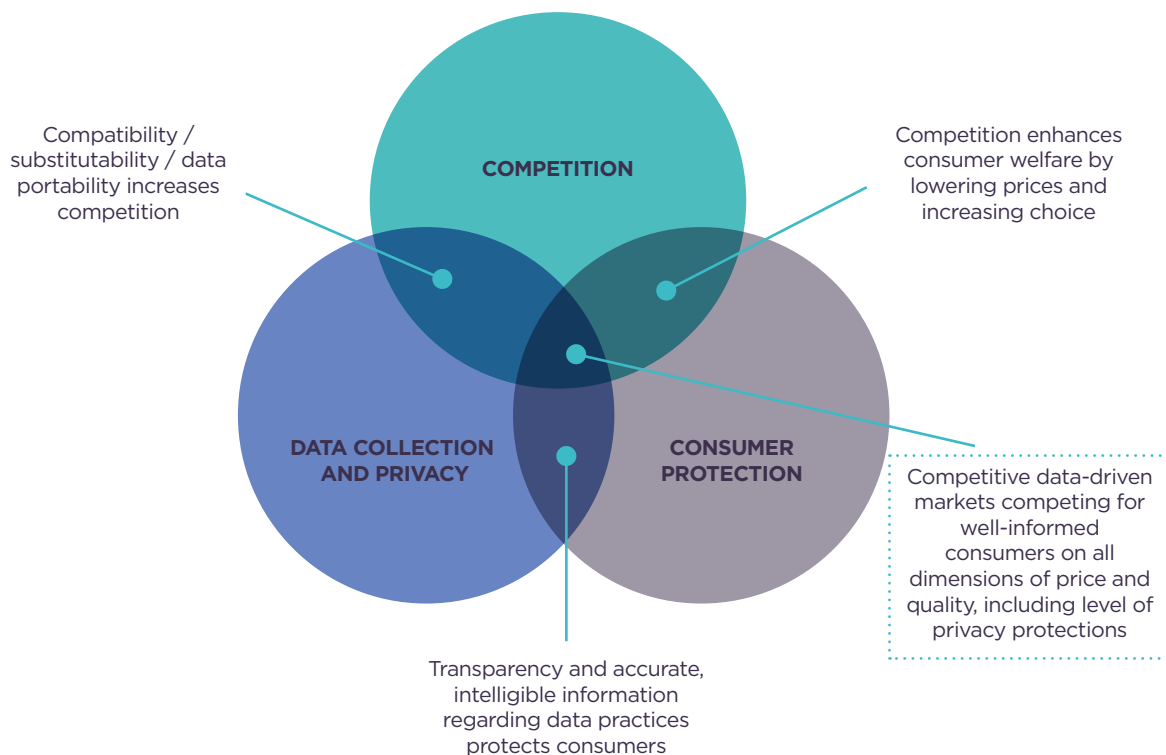
User data, including personal information, is a critical input in a myriad of markets in the digital economy. The volume of user data is also growing exponentially—according to an IBM estimate, 90 per cent of all the data that exists in the world today was created in the last two years.<sup>794</sup>

<sup>794</sup> J Dipple-Johnstone, [Beesley Lecture - 'Regulating the tech giants in the digital age'](#), UK Information Commissioner’s office, 31 October 2018.

The collection, use and disclosure of user data and personal information is therefore of increasing importance from a consumer protection, privacy, competition and innovation perspective.

As such, data-driven markets such as those in which digital platforms operate raise new issues at the intersection of privacy, competition, and consumer protection considerations. Figure 5.17 provides a stylised illustration of the interplay between data protection, competition, and consumer protection, which will be discussed further below.

**Figure 5.17: Overlapping issues in data protection, competition and consumer protection**



Source: Adapted from European Data Protection Supervisor, Privacy and competitiveness in the age of big data, March 2014.

## 5.6.1 Overview of regulatory framework

### Privacy regulatory framework

In light of these overlaps between privacy, competition, and consumer protection, digital platforms' supply of services to consumers and their data practices are accordingly governed under both privacy laws and competition and consumer protection laws. The *Privacy Act 1988* (Cth) (the Privacy Act) sets out the legislative framework for the protection of 'personal information' in Australia and applies to 'APP entities', which include any private and non-profit organisations with an annual turnover of more than \$3 million and data companies.

**Personal information** is defined as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable'. It is not clear whether the scope of 'personal information' under the Privacy Act includes metadata such as IP addresses, other location data, or other technical data.<sup>795</sup>

APP entities must handle, use and manage personal information in accordance with the 13 **Australian Privacy Principles** (APPs) set out in the Privacy Act, which include requirements to: maintain a privacy policy disclosing how personal information is collected, held and disclosed (APP 1); not collect personal

<sup>795</sup> Privacy Commissioner v Telstra Corporation Limited [2017] FCAFC 4: Whilst the Full Federal Court did not expressly state that metadata could never be personal information, it did not overturn the decision of the Administrative Appeal Tribunal which had found that network metadata was not sufficiently connected to an individual because the allocation of an IP address to a device is normally only temporary and can change frequently.

information unless it is reasonably necessary (APP 3) and not disclose personal information for direct marketing purposes, unless exceptions apply (APP 7).<sup>796</sup>

The **Notifiable Data Breaches Scheme** (the **NDB Scheme**) in Part III C of the Privacy Act also imposes obligations on APP entities who experience a data breach to conduct an assessment of all data breaches to determine whether a suspected breach is an ‘eligible data breach’ that is likely to involve serious harm to individuals affected.<sup>797</sup> All eligible data breaches must be reported to the OAIC and to affected users within 30 days.

The **Office of the Australian Information Commissioner** (the **OAIC**) is responsible for enforcing the Privacy Act and has powers to investigate an APP entity after receiving a privacy complaint from an individual or to investigate an entity on its own initiative (referred to as Commissioner-initiated investigations).<sup>798</sup> The OAIC’s powers include: making determinations on a privacy complaint, accepting enforceable undertakings from an APP entity and applying to the courts for an injunction or for civil penalties to be imposed on an APP entity for engaging in serious and repeated interference with privacy.

## Competition and consumer regulatory framework

The *Competition and Consumer Act 2010* (Cth) (the CCA) regulates the conduct of suppliers, wholesalers, retailers and consumers in Australia, including the conduct of any digital platforms carrying on business in Australia.<sup>799</sup>

Schedule 2 of the CCA sets out the Australian Consumer Law (ACL), which prohibits businesses from engaging in the following forms of conduct:

- **Misleading or deceptive conduct and false or misleading representations:** businesses (including digital platforms) must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive, or make false or misleading representations about their goods or services.<sup>800</sup> It does not matter if there is an intention to mislead or not.<sup>801</sup> It includes express and implied representations, including for example statements about how user data is collected, used, or shared, that are incorrect or likely to mislead.
- **Unconscionable conduct:** businesses (including digital platforms) must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services.<sup>802</sup> Whilst ‘unconscionable conduct’ does not have a precise legal definition, it generally refers to conduct that is against good conscience by reference to the norms of society<sup>803</sup> and that goes beyond mere unfairness.<sup>804</sup>
- **Unfair contract terms:** Terms that are deemed to be unfair in standard form contracts are considered to be void and cannot be enforced.<sup>805</sup> Digital platforms’ consumer-facing terms of use and privacy policies would likely be considered standard form contracts, which would mean that they must comply with the unfair contract term provisions in the ACL.<sup>806</sup>

796 Privacy Act, s. 18.

797 An ‘eligible data breach’ occurs when (1) there is unauthorised access to, or disclosure of, personal information (or information is lost in circumstances where unauthorised access or disclosure is likely to occur), (2) this is likely to result in serious harm to any of the individuals whose information is compromised, and (3) the entity has been unable to prevent the likely risk of serious harm with remedial action: see Privacy Act, s. 26WE.

798 OAIC, [Commissioner initiated investigation reports](#), accessed 30 October 2018.

799 ACCC, [Legislation](#), accessed 13 November 2018.

800 ACL, ss 8, 29, 33 and 34.

801 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 Gibbs J; *Yorke v Lucas* (1985) 158 CLR 661 at 666.

802 ACL, ss 20, 21 and 22.

803 *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

804 *Attorney-General (NSW) v World Best Holdings Ltd* [2005] NSWCA 261 at [121], approved in *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [356] (Allsop CJ).

805 ACL, s. 23(1).

806 ACL, Part 2-3.

## Impact of privacy and data protection regulations on consumer protection

Privacy and data protection laws can increase consumer protections by addressing some of the market failures identified in this chapter, such as significant information asymmetries and bargaining power imbalances between digital platforms and consumers.

The relationship between digital platforms and consumers is characterised by significant information asymmetries regarding digital platforms' data practices. This unequal availability of information regarding digital platforms' data practices prevents consumers from accurately assessing the quality of privacy offered by a digital platform service, which prevents them from making rational and informed choices about which digital platform service to use. Consumers' inability to make informed choices is likely to impede competition between digital platforms, particularly regarding the privacy dimension of their products.

Privacy and data protection regulations can also, to some extent, mitigate the bargaining power imbalance between digital platforms and improve consumer protections by requiring that consumers are provided with certain controls over their personal information. As discussed above, consumers currently don't have control over the scope of digital platforms' data practices and instead generally only have the choice of whether to access a digital platform or not. Providing consumers with greater control over the flow of their personal information is likely to shift the balance of economic power in favour of them: lack of privacy and control over data-sharing can give a data holder economic leverage over the data subject (e.g. by allowing a seller to use their knowledge of a consumer to price discriminate).<sup>807</sup>

The bargaining power imbalance between consumers and digital platforms, combined with the information asymmetry between them, may lead consumers to accept contractual terms setting out invasive amounts of data processing by digital platforms despite feeling uncomfortable about the amount of data being collected, used, and shared. In contrast, stricter data protection requirements would provide consumers with greater scope to make informed choices in relation to the collection, use, and disclosure of their personal information.

## Impact of privacy and data protection regulations on competition and innovation

Increasing the transparency of digital platforms' data practices, privacy and data protection laws can enable greater consumer choice, which in turn is likely to increase competition. This is particularly significant in some digital platforms markets that tend to be highly concentrated. As discussed in chapter 2, potential new entrants in the market for general search services may face barriers to entry and expansion due to Google's market power and the resulting greater switching costs on users and advertisers.<sup>808</sup> As a result, large, established digital platforms may face less competitive pressure from smaller rivals to provide better products.

In addition to increasing transparency, privacy and data protection laws can also provide incentives for digital platforms to improve the privacy dimension of their services to meet consumer demand, despite a lack of competitive constraint. Such laws could also improve the detection and punishment of certain data practices. As discussed in chapter 3, user data is a key input in the supply of online advertising services because it enables precise targeting of ads, which means that the collection of larger volumes of user data can provide a competitive advantage. Accordingly, digital platforms may exploit the existing information asymmetries to obtain more user data and personal information from its users, enabling them to create more specifically targeted advertising opportunities to sell to advertisers. In response, rivals competing for the same advertising revenue may endeavour to protect their market share by adopting similarly invasive data practices. It would be difficult for consumers themselves to detect and punish certain data practices, due to the information asymmetries and bargaining power imbalances outlined above. Therefore, it may be appropriate for privacy and data protection laws to perform these important monitoring and deterrence functions.

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807 A. Acquisti, L. Wagman and C. Taylor, [The Economics of Privacy](#), *Journal of Economic Literature*, 52 (2016), pp 21 and 445.

808 See discussion at chapter 2 above.

### **Box 5.21—How does data regulation impact data-based innovation?**

Digital platforms such as search engines, social media, and content aggregation services require efficient, data-based product design to operate business models that sell advertising opportunities to advertisers in return for providing users with zero-priced services. There are many benefits from data-based innovations for both businesses and consumers. As noted by the OECD, ‘more extensive and innovative uses of personal data are bringing increasing economic and social benefits’ for both businesses and consumers.<sup>809</sup>

Stakeholder submissions to the Inquiry have raised concerns with the potential for data protection regulations to curb innovation as an argument against strengthening privacy protections. The Digital Industry Group Incorporated, which includes representatives from Facebook, Google, and Twitter, has also submitted that it ‘*supports the development of legislative and policy frameworks that do not inadvertently discourage the development of new business models but rather encourage innovative uses of digital platforms*’.<sup>810</sup> The ACCC also notes arguments regarding the potential consequences of the increased requirements under the GDPR as having a chilling effect on innovation and potentially increasing barriers to entry.<sup>811</sup>

However, the development of robust privacy and data protection regulations may encourage the development of beneficial new data-based innovations, as well as assist in minimising the potential economic and social harms from the misuse of personal information. Such costs are significant not only for the individuals affected but also for the organisations involved, who may incur costs from implementing remedial measures, defending possible legal action, and repairing reputational damage, as well as potential loss of trust or confidence from consumers.<sup>812</sup>

More broadly, privacy protections have an integral role in maintaining the consumer trust necessary to enable the continued economic and social benefits of personal data flows.<sup>813</sup> Trust is at the core of the relationship between business and customer and remains critical in the digital economy.<sup>814</sup> If consumers perceive that they do not adequately understand or cannot adequately control an organisation’s use of their personal data, they may seek ways to undermine the accuracy of the data provided and collected and ultimately reconsider their relationship with that organisation.

Accordingly, the ACCC’s preliminary view is that there is potential for strengthened privacy safeguards to increase data accessibility and portability, thereby encouraging data-related innovations. In addition, clear and effective rules on digital platforms’ collection, use and disclosure of consumers’ user data, in particular in relation to the transparency, accountability, security and purpose limitation of their data practices, is likely to maintain the consumer trust necessary for continued growth in data-based innovations.

## **5.6.2 Impact on consumer outcomes**

As set out above, the ACCC’s preliminary view is that digital platforms’ data practices leverage significant information asymmetries and bargaining power imbalances between digital platforms and consumers to obtain broad discretions in the collection, use and disclosure of user data. These market failures result in considerable consumer harm and decrease the likelihood of effective competition on important quality dimensions of digital platforms’ products and services.

809 OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 4.

810 Digital Industry Group Incorporated, [Submission to ACCC Digital Platforms Inquiry](#), April 2018, p. 2.

811 See, for example N Wallace and D Castro, [The Impact of the EU’s New Data Protection Regulation on AI](#), Center for Data Innovation, 27 March 2018; B. Chakravorti, [‘Why the Rest of the World Can’t Free Ride on Europe’s GDPR Rules’](#), Harvard Business Review, 30 April 2018.

812 See further OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 23.

813 See further OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 4.

814 See further OECD, [The Evolving Privacy Landscape: 30 Years after the OECD Privacy Guidelines](#), OECD Digital Economy Papers, 176 (2011), p. 25.

## Decreased consumer welfare from reduced competition

As discussed previously, information asymmetries and inequalities in bargaining power undermine consumers' ability to select the product that best meets their data and privacy preferences, thereby distorting competition between digital platforms on the merits. As a result, digital platforms may be prevented from competing with each other as effectively as they would otherwise on the basis of offering better data and privacy protections to consumers, despite consumer demand for greater transparency and control over the collection, use and disclosure of their user data. This also limits the scope for potential new entrants from competing with incumbent digital platforms by providing greater data and privacy protections or transparency in data collection.

As a result, Australian consumers may suffer a decrease in welfare from being offered reduced choice and reduced quality of digital platforms services along the privacy dimension when compared with consumers in jurisdictions with stronger privacy protections in place. For instance, consumers in the European Union may access many of the same digital platforms as Australian consumers, but the application of stricter rules under the GDPR appears to translate to greater rights under digital platforms' data and privacy policies for EU-residents. For instance, Google provides users in the European Union with an additional section of the Privacy Policy, with information specific to European Union legal requirements.

## Decreased consumer welfare from decreased privacy

The detriments suffered by consumers in the form of decreased privacy and control over data can result in a multiplicity of additional harms ranging from receiving unsolicited targeted advertising to data breaches exposing their personal or financial information, which cause increased risks of online identity fraud and the potential for more effective targeting of scams. For instance, poor data security may expose consumers to greater risk that their personal information may be hacked or stolen, which may result in financial loss, reputational damage, and emotional distress.

The OAIC survey results indicate that more than one in ten Australians had previously been a victim of identity fraud or theft and more than one in four Australians knew someone who has been the victim of identity fraud or theft.<sup>815</sup> In addition, the OAIC Survey also found that Australians believed the biggest privacy risks facing their community include the use of online services (including social media sites), ID fraud and theft, data security breaches, and risks to financial data.<sup>816</sup>

Data from the OAIC suggest that there may be an increase in the number of notifiable data breaches reported to them under the Notifiable Data Breaches Scheme since it came into effect in February 2018. This increasing trend is shown in table 5.6.

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815 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. iii.

816 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. 4.

**Table 5.6: Number of data breaches reported to the OAIC under the Notifiable Data Breaches Scheme to September 2018<sup>817</sup>**

Month	Number of reported breaches to OAIC under Notifiable Data Breaches Scheme
February 2018 <sup>818</sup>	8
March 2018	55
April 2018	65
May 2018	87
June 2018	90
July 2018	81
August 2018	88
September 2018	76
<b>Total</b>	<b>550</b>

While the data above only covers a short period of time, the trend shows an increase in the number of people affected. In the first quarter of 2018, 27 per cent of breaches affected more than 100 people<sup>819</sup>; this increased to 39 per cent of breaches in the second quarter of 2018<sup>820</sup> and remained at 37 per cent of reported data breaches in the third quarter of 2018.<sup>821</sup>

### Potential risks to consumers from increased psychological profiling

The large volumes of user data controlled by digital platforms may also be used in psychological profiling of users for commercial interests. Marketers commonly segment their target audience into demographics defined by objective traits such as age, gender, marital status, income, etc. This demographic information is increasingly complemented with *psychographic* information, which measures more subjective and intangible traits such as a target audience's attitudes and interests.<sup>822</sup> The ACCC consumer survey found that over three out of four of digital platforms users surveyed considered it to be a misuse of their personal information to create profiles or monitor online activities to enable targeted advertising.<sup>823</sup>

Digital platforms can be a rich source of psychographic information. In particular, social media platforms provide analytics tools to identify trends in interests and attitudes and social media monitoring which can help with identifying emerging issues or psychographic clusters.<sup>824</sup> A high-profile example of social media user data being used in psychological profiling is the Cambridge Analytica data breach in March 2018. Access to user data profiles enabled Cambridge Analytica to build models that enabled it to profile individual US voters and target them with personalised political ads.<sup>825</sup>

The risks of detailed profiling of users extend beyond the targeting of political ads and include potential price discrimination by online retailers.<sup>826</sup> Price discrimination may allow for better pricing for one group or person relative to another; it also can allow businesses, particularly those that are monopolies<sup>827</sup>, to take more of the benefit that would otherwise go to the consumer.<sup>828</sup> The ACCC notes that, to date,

817 See OAIC, [Quarterly Statistics Report: January 2018–March 2018](#); OAIC, [Notifiable Data Breaches Quarterly Statistics Report 1 April–30 June 2018](#), 31 July 2018; OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 July–30 September 2018](#), 30 October 2018, p. 4.

818 The Notifiable data breach scheme came into effect on 22 February 2018.

819 OAIC, [Quarterly Statistics Report: January 2018–March 2018](#), p. 5.

820 OAIC, [Notifiable Data Breaches Quarterly Statistics Report 1 April–30 June 2018](#), 31 July 2018, p. 5.

821 OAIC, [Notifiable Data Breaches Quarterly Statistics Report: 1 July–30 September 2018](#), 30 October 2018, p. 5.

822 A. Samuel, '[Psychographics are just as important for marketers as demographics](#)', Harvard Business Review, 11 March 2016, accessed 13 November 2018.

823 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, p. 21.

824 A. Samuel, '[Psychographics are just as important for marketers as demographics](#)', Harvard Business Review, 11 March 2016, accessed 13 November 2018.

825 See, for example C Cadwalladr & E Graham-Harrison, '[Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach](#)', The Guardian, 18 March 2018.

826 As discussed in [CPRC Survey Report](#), 10 March 2018, p. 24.

827 Office of Fair Trading, [The economics of online personalised advertising](#), May 2013, p. 89.

828 Office of Fair Trading, [The economics of online personalised advertising](#), May 2013, p. 24.



there has been limited evidence of individually personalised, online price discrimination<sup>829</sup>; however, the increasing availability of data and use of sophisticated pricing algorithms, particularly by online retailers, increases the scope for businesses to engage in highly personalised pricing, effectively sorting customers into ever finer categories.<sup>830</sup> For example, studies have demonstrated online price differences based on the customer's geographical location, whether they were considered affluent or budget conscious customers, and if they visited a vendor site directly or if they were re-directed to a vendor site via a discount aggregator site.<sup>831</sup> See further section 7.2 in chapter 7 for a further discussion on future implications of price discrimination.

The OAIC's 2017 survey found that only 21 per cent of survey respondents were comfortable with targeted advertising based on their online activities and only 17 per cent felt comfortable with social media companies keeping databases of information on their online actions.<sup>832</sup>

### Particular risks to vulnerable consumers

The extensive amount of data collected by digital platforms may include data that identifies (or infers) an individual's vulnerabilities. The detriments identified above can be especially harmful to vulnerable consumers by placing them at risk of being targeted with inappropriate products or scams, discriminated against, or inappropriately excluded from markets. In addition to risks posed to young children, psychological profiling of consumers may facilitate discrimination against certain groups on the basis of their willingness to pay as well as for their gender, race or sexual orientation.<sup>833</sup> Tools that target consumers based on their online profiles and browsing history may also result in unfair exclusion to accessing products and services—for example, consumers with a low socio-economic background would be harmed if online profiling is used to distinguish between high-value and low-value customers, particularly in essential services markets.<sup>834</sup>

In addition, certain groups of consumers may lack the technical, critical and social skills to engage with the internet in a safe and beneficial manner in all circumstances despite increasing use of internet connected devices, especially tablets and smartphones for these groups.<sup>835</sup> A report by the eSafety Commissioner also found that respondents who were over 70 years old were more likely to experience a security breach, for example have contact details stolen, experience a virus attack, or to be a victim of a scam.<sup>836</sup>

## 5.6.3 ACCC assessment of existing regulatory frameworks

### Effectiveness of deterrence under existing regulations

The ACCC notes that, in the 30 years since the Privacy Act was passed, the ways in which businesses and consumers interact and exchange personal information has been radically altered by the Internet and digitalisation. Whilst there have been numerous amendments to the Privacy Act, these incremental changes may not be sufficient to address the volume and significance of privacy and data protection issues proliferating in the digital economy. Consequently, digital platforms (and myriad other firms) do not provide consumers with sufficient information or sufficient control to make informed choices regarding how their user data and personal information is handled and use data practices that do not meet the shifting Australian consumer expectations as expressed in the ACCC consumer survey as well as other recent surveys by the CPRC and the OAIC.

829 Competition and Markets Authority, [Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#), 8 October 2018, p. 3.

830 Competition and Markets Authority, [Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#), 8 October 2018, p. 36.

831 J Mikians, L Gyarmati, V Erramilli, N Looutaris, [Detecting price and search discrimination on the Internet](#), Universitat Politècnica De Catalunya (2012), accessed on 31 January 2018.

832 OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. ii.

833 Competition and Markets Authority, [Commercial uses of Consumer data: Report on the CMA's call for information](#), June 2015, p. 128.

834 As discussed in Consumer Policy Research Centre, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), May 2018, p. 24.

835 For example, toddler, pre-schoolers and children under nine: EU Kids Online, [Zero to eight: Young children and their internet use](#), LSE August 2013, p. 4.

836 eSafety Commissioner, [Understanding Digital Behaviours of amongst adults aged 50 years and over](#), September 2017, p. 102.

The ACCC's preliminary view is that these data practices of digital platforms arise, in part from an overly-broad interpretation of the principles-based model under the Privacy Act and insufficient focus on compliance driven, in part, by a lack of meaningful sanctions. Accordingly, the ACCC recommends that the penalties for breaches of the Privacy Act should be increased to at least mirror the recently increased penalties for breaches of the ACL (see recommendation 8(e)). The ACCC further recommends that the resources of the OAIC should be increased to support further enforcement activities and to equip the OAIC to deal with the increasing volume, significance, and complexity of privacy-related complaints within its jurisdiction (see recommendation 8(g)).

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 considers that it would be appropriate to amend the ACL to provide for civil pecuniary penalties to apply to the use of unfair contract terms (see recommendation 11). Moreover, whilst the Australian competition and consumer laws govern the conduct of digital platforms in Australia and the Australian privacy laws protect the use of 'personal information' by digital platforms, the current regulatory framework does not address certain data practices of concern outlined above. The ACCC is proposing further analysis and assessment into whether it would be appropriate to introduce a general prohibition against the use of unfair practices into the ACL (see box 5.25).

Finally, the ACCC is currently investigating a number of possible contraventions of the ACL by digital platforms—see section 7 on '*Further ACCC actions*'.

### Extent of individual recourse

Under the existing regulatory framework, individuals have limited recourse against digital platforms or other firms to seek compensation for mishandling their user data or personal information. Under the Privacy Act, consumers cannot take any direct action against digital platforms or other companies that are APP entities<sup>837</sup> to seek compensation for mishandling of their personal information or sensitive personal information—the only recourse is to first complain directly to the APP entity and then to make a complaint to the OAIC.<sup>838</sup>

It has also been the consistent finding of a number of legislative reviews that Australia's privacy regulatory framework does not provide consumers with adequate remedies for invasions of privacy. For example:

- The NSW Legislative Council's inquiry on 'Remedies for the serious invasion of privacy in New South Wales' from 2016 found that 'there remain significant gaps in the coverage afforded to privacy protection'.<sup>839</sup> The inquiry found that the existing privacy framework in NSW (which includes the federal Privacy Act) does not provide adequate remedies to many people who suffer a serious invasion of privacy.<sup>840</sup>
- Similarly, the ALRC's report on 'Serious Invasions of Privacy in the Digital Era' from 2014 found that there are significant gaps or uncertainties in the existing legal protection against invasions of privacy.<sup>841</sup> In particular, the ALRC found that the Privacy Act only provides for 'limited civil redress' by way of complaints made to the OAIC, does not provide protections for intrusions against privacy from individuals or media companies, and does not generally apply to businesses with an annual turnover of less than \$3 million.<sup>842</sup> The ALRC also notes that there is no recourse for individuals to seek compensation for invasions of privacy by media or communications entities.<sup>843</sup>

837 As discussed above, APP entities include any private and non-profit organisations with an annual turnover of more than \$3 million and data companies.

838 OAIC, [How do I make a privacy complaint](#), accessed 13 November 2018. Section 40(1A) of the Privacy Act requires that the OAIC must not investigate a complaint where the complainant has not first complained to the respondent.

839 NSW standing committee on law and justice, [Remedies for the serious invasion of privacy in New South Wales Report](#), NSW Legislative Council, 3 March 2016, p. 57.

840 NSW standing committee on law and justice, [Remedies for the serious invasion of privacy in New South Wales Report](#), NSW Legislative Council, 3 March 2016, p. 57.

841 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 51. See also the ALRC's earlier report into Privacy Framework: ALRC, [For Your Information: Australian Privacy Law and Practice Report](#), 12 August 2008.

842 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 53.

843 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 53.

- Finally, the VLRC report on ‘Privacy Law—Options for Reform’ from 2001 had found that ‘substantial gaps still exist’ in legal protections for information privacy in Australia<sup>844</sup>, many of which persist in the current legal framework. In particular, the VLRC noted the Privacy Act’s exemptions for employee records and small businesses and the need to consider the protection of personal information contained in publicly available information.<sup>845</sup>

Finally, other comparable jurisdictions do provide consumers a direct cause of action to enforce their rights under their relevant privacy and data protection regulations. Consumers in the UK, New Zealand, and certain provinces in Canada have greater control over their data and privacy by having the ability bring action against parties that have misused their personal data or breached their privacy; whereas Australian users have no direct right to seek redress for misuse of their data.

Accordingly, it is the ACCC’s preliminary view that deterrence against problematic data practices could be improved by giving individuals the ability to bring an action (or class action) against breaches of privacy and data protection regulations. This could be achieved by giving individuals a right to bring an action for breaches of the Privacy Act (see recommendation 8(f)) as well as by introducing a statutory tort of privacy to address any serious incursions of privacy that are outside the scope of the Privacy Act (see recommendation 10).

### Scope of impact

The ACCC notes that the information asymmetries and bargaining power inequalities identified in this chapter characterise not only the data practices of digital platforms, but also the data practices of many other businesses which collect, use or disclose personal user data. These include financial institutions (e.g. banks providing access to transaction data), telecommunications service providers, retailers offering rewards card schemes (e.g. Woolworths Rewards Program, Coles Fly Buys), airlines (e.g. Qantas Frequent Flyer program), news media companies and a large variety of data brokers.

Accordingly, the detriments identified above affect not only consumers of digital platform services or the related media and advertising markets, but may extend to the many and myriad industries across the Australian economy that collect, use or disclose the user data of Australians.

## 5.7 Preliminary recommendations

**Preliminary recommendation 8**—Amendments to the Privacy Act to:

- strengthen notification requirements
- introduce an independent third-party certification scheme
- strengthen consent requirements
- enable the erasure of personal information
- increase the penalties for breach
- introduce direct right of action for individuals
- expanded resources for the OAIC to support further enforcement activities

**Preliminary recommendation 9**—Establish a Privacy Code of Conduct for digital platforms

**Preliminary recommendation 10**—Introduce a statutory tort of serious invasions of privacy

**Preliminary recommendation 11**—Impose sanctions on the use of Unfair Contract Terms to increase deterrence

**Other ACCC actions:** The ACCC is also investigating whether any of the current terms of service or privacy policies used by digital platforms raise concerns under the ACL and whether enforcement action is appropriate.

<sup>844</sup> VLRC, [Privacy law options for reform: Information Paper](#), 1 July 2001, p. 28.

<sup>845</sup> VLRC, [Privacy law options for reform: Information Paper](#), 1 July 2001, p. 28–30.

The ACCC has found that a number of market and regulatory failures exist that prevent consumers from making informed choices regarding which digital platforms to use and providing meaningful consents to the collection and use of their personal information, which may also impede the entry of rival services based on alternative business models.

These market and regulatory failures include:

- information asymmetries between digital platforms and consumers that undermine a consumer's ability to ascertain which products align with their privacy preferences and that are exacerbated by the way digital platforms' data practices are disclosed to consumers
- bargaining power imbalances between consumers and digital platforms and behavioural biases that work against consumers' ability to select privacy options that better align with their privacy concerns, which prevent consumers from providing well-informed and freely-given consent to digital platforms' collection, use and disclosure of their user data
- lack of effective deterrence under current consumer protection and privacy laws against certain data practices by digital platforms.

The preliminary recommendations below seek to address these failures to improve consumers' ability to choose digital platform products that maximise their welfare and improve competition between digital platforms on the privacy dimensions of their products.

The rapid growth of online activity, including in particular the high levels of social media penetration in Australia, has increased the need for enhanced privacy and data protection. This need is particularly acute given the multi-faceted role digital platforms now perform in Australian communities including as a communication tool for schools, community groups, sports clubs and governmental bodies. Many Australian consumers therefore find themselves in a position of having to use digital platforms in order to receive communications and remain involved in community life.

The ACCC also notes that concerns raised by this Inquiry include some data practices specific to certain digital platforms but also the data practices of some other businesses across diverse industries. As such, the ACCC proposes to recommend a complement of recommendations to cover these broad and specific concerns.

- The first two recommendations relate to changes to privacy regulations: recommendation 8 contains self-contained amendments to the Privacy Act, intended to apply broadly and to mitigate concerns regarding data practices by all businesses (within the remit of the Privacy Act) collecting the personal information of Australian consumers; recommendation 9 seeks to establish a Privacy Code applying specifically to the data practices of digital platforms.
- Recommendation 10 provides a standalone right of action to consumers for serious breaches of privacy, giving them power to seek redress for poor data practices by digital platforms and also to increase the deterrence effect of Australian privacy laws against poor data practices.
- Recommendation 11 addresses changes to the ACL to increase the deterrence against businesses for using unfair contract terms in their dealings with consumers.

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

### *Preliminary recommendation 8 - Use and collection of personal data*

The ACCC proposes to recommend the following amendments to the Privacy Act to better enable consumers to make informed decisions in relation to, and have greater control over, privacy and the collection of personal information. In particular, recommendations (a) and (b) are aimed at reducing information asymmetries to improve the transparency of digital platforms' data practices. Recommendations (c) and (d) seek to provide consumers with stronger mandated controls over the collection, use, disclosure and erasure of their personal information to lessen the bargaining power imbalance between consumers and digital platforms. Recommendations (e) to (g) are measures to increase the deterrence effect of the Privacy Act.

- (a) **Strengthen notification requirements:** Introduce an express requirement that the collection of consumers' personal information directly or by a third party is accompanied by a notification of this collection that is concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge.
- (b) **Introduce an independent third-party certification scheme:** Require certain businesses, which meet identified objective thresholds regarding the collection of Australian consumers' personal information, to undergo external audits to monitor and publicly demonstrate compliance with these privacy regulations through the use of a privacy seal or mark. The parties carrying out such audits would first be certified by the OAIC.
- (c) **Strengthen consent requirements:** Amend the definition of consent to require express, opt-in consent and incorporate requirements into the APPs that consent must be adequately informed (including about the consequences of providing consent), voluntarily given, current and specific. This means that settings that enable data collection must be pre-selected to 'off'. The consent must also be given by an individual or an individual's guardian who has the capacity to understand and communicate their consent.
- (d) **Enable the erasure of personal information:** Enable consumers to require erasure of their personal information where they have withdrawn their consent and the personal information is no longer necessary to provide the consumer with a service.
- (e) **Increase the penalties for breach:** Increase the penalties for breaches of the Privacy Act to at least mirror the increased penalties for breaches of the ACL.
- (f) **Introduce direct rights of action for individuals:** Give individual consumers a direct right to bring actions for breach of their privacy under the Privacy Act.
- (g) **Expand resourcing for the OAIC to support further enforcement activities:** Provide increased resources to equip the OAIC to deal with increasing volume, significance, and complexity of privacy-related complaints.

Key digital platforms have increasingly recognised the need for stronger privacy protections in relation to user data and personal information. In September 2018, Google released its own suggested 'Framework for responsible data protection regulation';<sup>846</sup> in late October 2018, Facebook and Apple called on the United States government to adopt laws that would provide Americans with stronger privacy protections, similar to the GDPR.<sup>847</sup>

Given these views, as well as the views and concerns of Australian consumers, as recently covered in the ACCC consumer survey as well as other recent surveys in Australia, these proposed legislative amendments are likely to result in changes to the level of transparency and control that consumers have over digital platforms' data practices. Accordingly, these measures may assist in increasing Australians' trust in organisations' ability to protect their choice to privacy and enable organisations to develop 'a

<sup>846</sup> Google, [Framework for responsible data protection regulation](#), accessed 29 October 2018.

<sup>847</sup> M Khan and T Bradshaw, ['Apple and Facebook call for EU-style privacy laws in US'](#), *Financial Times*, 25 October 2018, accessed 25 October 2018.

social licence for innovative uses of data' and 'improve data mobility and analysis', which are both key ingredients to realising the potential benefits of data.<sup>848</sup>

Moreover, strengthening privacy protections under the Privacy Act is also likely to have the effect of improving the bargain between Australian consumers and digital platforms in line with the better bargain offered to consumers in other countries with stronger privacy protections. It is noted that a number of jurisdictions have undertaken to strengthen their data collection and consent requirements, including the EU, Japan,<sup>849</sup> Argentina,<sup>850</sup> and states within the US. As such, Australian consumers access the same digital platform products that are available in other countries but are not afforded the same additional protections as these other jurisdictions.

### **Box 5.22: The GDPR in the European Union**

The ACCC's preliminary recommendation is not that the Privacy Act should be amended to adopt identical terms to those found in the GDPR. The GDPR has been in effect in the EU for less than a year at the time of this report's publication and the interpretation and effect of key provisions are still being established in practice. The ACCC notes there are currently a large number of cases being brought under the GDPR, including against digital platforms, which are awaiting adjudication by data protection authorities and European courts.

However, some of the underlying principles of several provisions of the GDPR are incorporated into the proposed recommendations 8(a) to (d) to strengthen notification requirements, introduce certification schemes, strengthen consent requirements, and enable the erasure of personal information respectively. These GDPR principles are likely to provide a useful framework for further developing privacy protections in Australia for two key reasons: the first is that there are existing broad similarities between the GDPR and the requirements under the APPs, which means that APP entities may have already implemented some of the measures that are required of them under the GDPR provisions<sup>851</sup>; second, the GDPR already applies to the processing of the personal data of EU citizens by many of the same digital platforms that process the personal information of Australian consumers.

## **Strengthen notification requirements**

The Privacy Act does not expressly prescribe any notification requirements for organisations collecting the personal information of Australian consumers. Rather, the APPs require APP entities to 'take such steps (if any) as are reasonable in the circumstances' to notify the individual of such matters regarding the data collection 'as are reasonable in the circumstances or to otherwise ensure that the individual is aware of any such matters'.<sup>852</sup>

This means that APP entities have significant discretion regarding whether notification is required and how it should be provided and what information it should contain. The OAIC has issued APP Guidelines stating that 'an entity is not excused from taking particular steps by reason only that it would be inconvenient, time-consuming or impose some cost to do so',<sup>853</sup> but these Guidelines are non-binding and it is ultimately left to the APP entity to decide whether and how to provide notification under APP 5.

To improve consumers' awareness of how their personal information is collected, used and disclosed (and lessen the information asymmetry between consumers and digital platforms), the ACCC proposes to recommend that APP 5 should impose greater notification requirements when the personal information of Australians is collected or disclosed.

848 OAIC, Speeches, [Privacy in Digital Media and Digital Advertising](#), by OAIC Information and Privacy Commissioner Angelene Falk OAIC, 11 April 2018, accessed 13 November 2018.

849 Personal Information Protection Commission, [Amended act on the Protection of Personal Information](#), came into effect 30 May 2017.

850 Data Protection News, [Argentina publishes GDPR-style data protection bill](#), 25 September 2018, accessed 30 October 2018.

851 See OAIC, [Privacy business resource 21: Australian businesses and the EU General Data Protection Regulation](#), Updated June 2018, accessed 13 November 2018.

852 Privacy Act, Schedule 1, Australian Privacy Principle 5.1.

853 OAIC, [chapter 5: APP 5 – Notification of the collection of personal information](#), March 2018, p. 3.



First, APP 5 should also require that the notification to be provided must be concise, transparent, intelligible and easily accessible, written in clear and plain language (particularly if addressed to a child), and provided free of charge. The ACCC further recommends that the notifications are consumer-tested. These requirements reflect the principles in Article 12 of the GDPR regarding 'Transparent information, communication and modalities for the exercise of the rights of the data subject'.<sup>854</sup>

Second, APP 5 should also specify the information that must be set out in the notification, including:

- the identity and contact details of the entity collecting data
- the types of data collected and the purposes for which each type of data is collected, and
- whether the data will be disclosed to any third parties and, if so, which third parties and for what purposes.

These requirements are based on the list of information required to be provided to EU citizens under Article 13 of the GDPR regarding 'Information to be provided where personal data are collected from the data subject'.<sup>855</sup>

The ACCC invites stakeholder feedback on whether it would be appropriate to implement specific exemptions to the proposed notification requirements, for example where personal information is collected for non-commercial purposes and in the public interest.

The ACCC considers that strengthening the notification requirements in the manner outlined above will increase the transparency of digital platforms' data practices, particularly in relation to the disclosure of personal information to third parties. In conjunction with the other recommended amendments outlined in this recommendation, the strengthened notification requirements are a critical step to reducing information asymmetries between consumers and digital platforms and enabling consumers to make informed choices regarding how their data is collected, used and disclosed.

## **Introduce an independent third-party certification scheme**

Currently, there are no provisions under the Privacy Act for independent third-party certification or audits of an APP entity's data practices. Only the Australian Information Commissioner of the OAIC has powers to conduct privacy assessments to appraise how well an organisation has complied with all or parts of its privacy obligations.<sup>856</sup>

The ACCC proposes to recommend the introduction of an additional third-party certification scheme that would require certain APP entities to undergo external audits by certain accredited entities, to assess the compliance of an APP entity with its obligations under the Privacy Act and the APPs, including obligations proposed in recommendations 8(a), (c) and (d). APP entities that have been independently assessed as complying with all or parts of their privacy obligations will be granted use of a privacy protection seal or mark to demonstrate their compliance to the public and to the OAIC. An APP entity being assessed as non-compliant with their privacy obligations will not be permitted the use of the privacy seal or mark.

Under this proposed certification scheme, APP entities that meet an identified objective threshold (e.g. by collecting the personal information of a certain number of Australian consumers) would be required to obtain third-party certification. APP entities that do not meet this objective threshold in volume of personal information collected may also seek certification if they wish to be granted use of the privacy protection seal. The ACCC invites stakeholder feedback on an appropriate objective threshold over which APP entities should be required to obtain third-party certification.

An independent certification scheme would require:

- legislative amendments to the Privacy Act to empower a statutory authority (the OAIC) to set rules for, approve and monitor the accreditation of independent third-party certification bodies
- certification bodies with appropriate technical expertise that can be accredited by the OAIC to conduct privacy assessments and issue a data protection seal or mark to APP entities that are

<sup>854</sup> GDPR, Article 12.

<sup>855</sup> GDPR, Article 13.

<sup>856</sup> Privacy Act, s 33C; see also OAIC, [Assessments](#), accessed 13 November 2018.



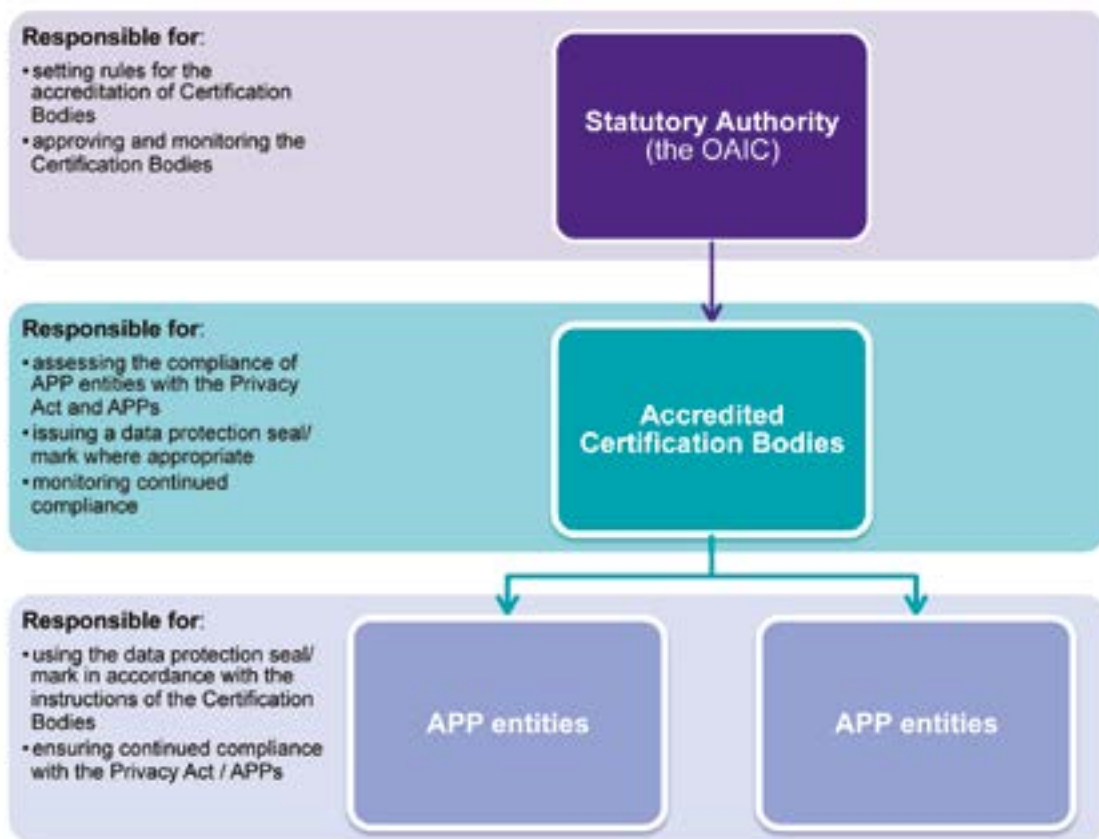
complying with the requirements under the Privacy Act and the APPs, or to work with the APP entities to address any compliance issues, and

- an approved data protection seal or mark that can indicate to the public that an APP entity is complying with the requirements for the handling of personal information under the Privacy Act.

The ACCC further invites stakeholder views on any alternative models for making rules, approving, and monitoring the accreditation of independent third-party certification bodies, whether by the OAIC or other organisation.

A diagram illustrating the proposed key participants in a certification scheme and the chain of responsibility is provided at figure 5.18.

**Figure 5.18: Key participants in an independent certification scheme**



The establishment of an independent certification mechanism and use of a data protection seal or mark could significantly increase the transparency of an organisation’s data practices by enabling Australians to quickly assess the level of data protection offered by an APP entity. This seeks to address issues arising from consumers not reading or being able to understand digital platforms’ privacy policies by outsourcing the potentially complex and time-consuming assessment to a qualified and independent third-party.

The accreditation of certification bodies would enable privacy assessments to be conducted on a larger scale than the current discretionary OAIC powers under the Privacy Act. The use of recognisable data protection seals or marks by APP entities may also provide APP entities with a point of competitive difference when seeking to attract more privacy-conscious consumers and thereby promote competition in relation to the privacy dimension of their services.

Such a scheme rests on similar principles as Article 42 of the GDPR, which encourages the establishment of data protection certification mechanisms and data protection seals and marks for the purpose of demonstrating compliance with the requirements of the GDPR.<sup>857</sup>

## Strengthen consent requirements

The APPs currently require that individuals must provide consent when their personal data is collected in limited instances, including:

- the collection of sensitive personal information: APP 3, clause 3.3(a)<sup>858</sup>
- the collection of personal information by an agency from someone other than the individual (i.e. an individual must consent for an agency to disclose their personal information to another agency): APP3, clause 3.6(a)(i)
- the use or disclosure of personal information for a secondary purpose: APP 6, clause 6.1(a)
- the use or disclosure of personal information or sensitive personal information for direct marketing purposes: APP 7, clause 7.3(b) and clause 7.4, and
- the disclosure of personal information to an overseas recipient: APP 8, clause 8.2(b).

However, the Privacy Act defines 'consent' to mean 'express consent or implied consent'<sup>859</sup> and the APPs do not outline any criteria for valid consent.

The ACCC proposes to recommend that the definition of 'consent' in the Privacy Act should be amended to include only *express* consent. This would mean, in each of the above-listed instances where consent is required to be obtained under the Privacy Act, that consent must be expressly provided. This would also mean that settings that enable data collection must be pre-selected to 'off'. The ACCC also proposes to recommend that the four key elements of the OAIC's non-binding guidance regarding consent should be incorporated as part of the binding requirements under the APPs, that is:<sup>860</sup>

- the individual is adequately informed before giving consent
- the individual gives consent voluntarily
- the consent is current and specific, and
- the individual has the capacity to understand and communicate their consent.

The first requirement that individuals are adequately informed before giving consent will ensure that individuals are aware of the implications of providing or withholding consent and the nature of the data collection occurring.<sup>861</sup> This will decrease the information asymmetries between consumers and digital platforms (and other firms).

The second requirement that consents are given voluntarily means that, in the limited instances above where individuals *must* provide consent for the collection of personal information under the Privacy Act, the consent must be separately obtained and unbundled from other consents. To avoid consumers providing an impractical number of consents for every single type of personal information collected, it would be appropriate for consumers' individual consents to be confined to each category of data collection that the APP requires consent to be obtained. For example, consumers would be asked to separately consent (or not consent) to: the use of personal information for a secondary purpose; the use of personal information for direct marketing purposes, the collection of sensitive personal information, etc.

It may also be appropriate to review the instances where consent is required under the APPs to ensure that each instance of data collection is accompanied by a specified primary or secondary purpose and that separate consents are obtained for use and for disclosure. Ensuring that consumers have the ability to provide true, genuine consent will substantially reduce the bargaining power imbalance between

857 GDPR, Article 42.

858 As defined under the Privacy Act, s 6(1).

859 Privacy Act, s 6(1).

860 OAIC, [Chapter 6: APP 6—Use or disclosure of personal information](#), February 2014, pp. 6–7. These are also similar to the requirements for consents to be given by a clear affirmative act that is freely given, specific, informed and unambiguous under the GDPR, Article 7 and Recital 32.

861 OAIC, [APP guidelines — complete set as at 2 March 2018](#), Chapter B, p. 10.

consumers and digital platforms. The ACCC invites stakeholder feedback on the scope of the instances listed above where consent is currently required under the APPs and whether any revisions to these instances are necessary if a requirement to obtain express consent was introduced.

The third requirement that consents are current and specific means that consents will relate specifically to each type of data collection and must generally not be bundled. It also means that there should be an easy and accessible way for individuals to withdraw their consent,<sup>862</sup> which would further reduce the bargaining power imbalance between consumers and digital platforms (and other firms).

The fourth and final requirement that the individual has the capacity to understand and communicate consent will provide additional privacy protection to vulnerable consumers, including those who are particularly young or elderly, those with a physical or mental disability, those who are temporarily incapacitated, or those who have a limited understanding of English.<sup>863</sup>

The requirement for express consent, in combination with the OAIC's guidelines on establishing consent, are based on similar principles as Article 7 and Recital 32 of the GDPR, which provide that 'consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement'.<sup>864</sup>

### ***Box 5.23: Area for further analysis and assessment: Opt-in targeted advertising***

An alternative way of strengthening consumer consents specifically in relation to the use of their personal information for targeted advertising purposes is to make legislative amendments that prohibit entities from collecting, using, or disclosing personal information of Australians for targeted advertising purposes unless consumers have provided express, opt-in consent.

Under such a proposal, consumers receiving advertising-funded services (including via a social media platform or search engine) could still be required by the platform to consent to view advertisements, but the user must not be required to consent to view targeted advertisements based on their user data or personal information in order to use the platform. This differs from the proposed amendment above in that it would not be limited to the Privacy Act and APP entities and would focus narrowly on the use of personal information for targeted advertising purposes.

Such an amendment could significantly decrease the bargaining power imbalance between consumers and digital platforms and other firms undertaking similar activities in relation to the use of personal information for targeted advertising purposes and the disclosure of personal information to third parties for targeted advertising purposes, both of which are areas of particular concern for consumers (as discussed in sections 4.3 and 4.4). Providing consumers with a high-privacy default that they may alter according to their preferences may also incentivise digital platforms to better inform consumers in relation to how their data is collected, used, and disclosed for targeted advertising, thereby decreasing the information asymmetry.

The ACCC recognises that such a step could have significant impacts on the businesses in the advertising services markets. The ACCC invites stakeholder feedback on this proposal.

## **Enable the erasure of personal information**

Under the APPs, APP entities must not collect personal information unless the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.<sup>865</sup> Whilst individuals could make a request to an APP entity to consider whether its collection of personal information is 'reasonably necessary for' or 'directly related to' its functions or activities, there is no obligation for APP entities to erase personal information of individuals. Effectively, therefore, individuals cannot withdraw their consent for personal information to be collected and held by an APP entity.

This can be particularly problematic given lack of meaningful consents provided by consumers who are required to accept take-it-or-leave-it terms before being able to access a digital platform's services or to provide bundled consents to the processing of their personal information for the large number of

862 OAIC, [APP guidelines – complete set as at 2 March 2018](#), Chapter B, p. 11.

863 OAIC, [APP guidelines – complete set as at 2 March 2018](#), Chapter B, p. 12.

864 GDPR, Recital 32.

865 OAIC, [Chapter 3: APP 3 – Collection of solicited personal information](#), February 2014, p. 5.

different purposes set out in a digital platform's privacy policy. The exponential increase in data sets and technological developments in data analytics may also mean that personal information provided at one point in time could in future be used in ways not envisioned when consent was given in the first place.<sup>866</sup>

To address these issues, the ACCC proposes to recommend that the Privacy Act is amended to introduce an obligation for APP entities to erase the personal information of individuals where the individual has withdrawn their consent for the collection of personal information and the personal information is no longer necessary for the purposes for which the information was collected. In order to avoid unnecessary disruptions to an APP entity's activities, the obligation to erase personal information should be limited to circumstances where there are no overriding reasons for the APP entity to retain the information, such as legal requirements to maintain a database of information.

Enabling consumers to request erasure of their personal information provides them greater control over their personal information and is likely to assist to mitigate the bargaining power imbalance between consumers and digital platforms. These proposed amendments reflect the principles outlined in Article 17 of the GDPR that provide EU citizens with a right to erasure of their personal data without undue delay where the personal data is no longer necessary or the data subject has withdrawn consent, unless the personal data processing is necessary in certain circumstances.<sup>867</sup>

### ***Box 5.24: Area for further analysis and assessment: Deletion of user data***

Due to the dynamic nature of data collection and use, what a digital platform or a third party can do with user data may change dramatically following on from a consumer consenting to the data collection in exchange for use of the services. In effect, this means the consumer does not necessarily know the cost of these services, as future use of the data has not been factored into the non-monetary price.

Consideration may therefore need to be given to whether an explicit obligation to delete all user data should be in place when a user ceases to use the services and/or whether data should automatically be deleted after a set period of time. This obligation would seek to go further than preliminary recommendation 8(d) as it would not require a user to actively request the deletion of the data and would prevent open ended retention of data.

ACCC invites views on the feasibility of such an obligation, and the appropriate timeframe for such deletion.

## **Increase the penalties for breach**

Currently, the OAIC may apply to the courts for civil penalties for a serious or repeated interference with privacy of up to \$420 000 for individuals and \$2.1 million for organisations.<sup>868</sup>

The ACCC recommends that the maximum penalty for serious or repeated interference with privacy should at least be increased to whichever is the higher of:

- \$10 000 000
- three times the value of the benefit received, or
- 10 per cent of the entity's annual turnover in the last 12 months, if a court cannot determine benefit obtained from the offence.

This would bring the penalties for serious or repeated interferences of privacy in line with the new civil pecuniary penalties available under the ACL. These penalties were recently increased because the previous penalties had been found to be insufficient to deter profitable breaches of the ACL that had been seen by some entities as 'a cost of doing business' (see table 5.7).<sup>869</sup> Given the financial benefits that firms may gain from unauthorised use of user data and the large firms that currently collect and use it, the ACCC considers that similar observations could be made in relation to the deterrence effect of the Privacy Act penalties.

866 Productivity Commission, [Data Availability and Use](#), March 2017, p.156.

867 GDPR, Article 17.

868 Privacy Act, s 13G.

869 CAANZ, [Australian Consumer Law Review Final Report](#), March 2017, p. 88.

**Table 5.7: Maximum penalties for corporations breaching the Privacy Act and the ACL**

Legislation	Maximum penalty for corporations (AUD)
Privacy Act	2 100 000
ACL (prior to amendment)	1 100 000
ACL (current penalties)	10 000 000

Increasing the maximum pecuniary penalties applicable to serious and repeated interferences with privacy is likely to increase the deterrence effect of the requirements in the Privacy Act.

The ACCC notes that this increase in penalties is intended to complement the other recommended amendments to the Privacy Act, as it does not consider that an increase in penalties alone would be sufficient to remedy the range of potentially problematic data practices identified earlier in this chapter.

### **Introduce direct rights of action for individuals**

Individual consumers currently have only limited means to seek redress under the Privacy Act. Actions they can take include the ability to:

- seek an injunction for breach of the Privacy Act<sup>870</sup>, and
- lodge a complaint with the OAIC.

The ACCC recommends that individuals should have a right of action in the Federal Court or the Federal Circuit Court to be able to seek not only injunctions but also compensatory damages and, in exceptional circumstances, potentially also aggravated damages and exemplary damages for the financial and non-financial harm suffered as a result of an infringement of the Privacy Act and the APPs.

Whilst recognising the expense and time required to litigate matters in court, the ACCC considers that the ability for individuals to bring an action (or a class action) against APP entities for mishandling of their personal information will give consumers greater control over their personal information. Consumers would have a direct avenue to seek redress in court without having to rely on the OAIC alone to take representative action. This ability will not only empower consumers but may also provide an additional incentive for APP entities to ensure compliance with their obligations under the Privacy Act and the APPs.

Notably, consumers in the United Kingdom, New Zealand, certain provinces in Canada, and the EU have direct rights to bring action against firms who have misused their personal data or breached their rights under privacy and data protection legislations. For instance, EU citizens have direct rights to action under the GDPR: Article 79 provides EU citizens with a right to an effective judicial remedy where his or her personal data has been processed in breach of the GDPR<sup>871</sup>; and Article 78 further gives EU citizens a right to an effective judicial remedy against a legally binding decision of a data protection authority concerning them.<sup>872</sup> EU citizens also have the right under Article 82 to receive compensation for any material or non-material damage as a result of an infringement of the GDPR.

### **Expand resourcing for the OAIC to support further enforcement activities**

The ACCC proposes to recommend increasing the OAIC's enforcement resources, in line with the increased volume, significance, and complexity of privacy-related complaints that arise in the digital economy, and to ensure that the OAIC is able to:

- maintain sufficient focus on enforcement whilst the OAIC's functions continue to expand
- have sufficient ability to pursue Commissioner-initiated matters arising, including any matters arising from the notifiable data breaches scheme

870 Privacy Act, s. 98.

871 GDPR, Article 79.

872 GDPR, Article 78.

- meet increasing demand in relation to its privacy functions as community awareness of information-handling and information-access issues continues to increase, and
- perform any additional regulatory functions arising from the ACCC's proposed recommendations.

The increasing prominence of privacy issues is reflected in the rise in privacy complaints received by the OAIC: 2947 complaints were received in the 2017–18 financial year, which is an 18 per cent increase from complaints received in 2016–17, which in turn was a 17 per cent increase in complaints received in 2015–16.<sup>873</sup>

Since the introduction of the notifiable data breaches scheme on 22 February 2018, the OAIC has also had to respond to much larger number of data breach notifications, despite not receiving any additional funding to support its functions under this scheme.<sup>874</sup> Table 5.8 shows the number of data breaches received by the OAIC in the past three years.

**Table 5.8: Data breach notifications received by the OAIC**

Year	2015–16	2016–17	2017–18
Notifiable data breaches (NDB)	-	-	305
Voluntary notifications	107	114	174
Mandatory notifications ( <i>My Health Records Act 2012</i> )	16	35	28
<b>Total</b>	<b>123</b>	<b>149</b>	<b>507</b>

Source: OAIC, Annual Report 2017–18, p. 60.

It may also be appropriate for the Government to consider whether the OAIC should be granted additional legislative powers in its enforcement functions, for example the power to require publication of notifiable data breaches and steps taken to minimise the risks of harm.<sup>875</sup> Additional legislative powers to accompany some of the OAIC's increased functions could significantly improve its ability to enforce the Privacy Act.

### ***Preliminary recommendation 9—OAIC Code of Practice for digital platforms***

The ACCC proposes to recommend that the OAIC engage with key digital platforms operating in Australia to develop an enforceable code of practice under Part IIIB of the Privacy Act to provide Australians with greater transparency and control over how their personal information is collected, used and disclosed by digital platforms. A code would allow for proactive and targeted regulation of digital platforms' data collection practices under the existing provisions of the Privacy Act.

The code of practice should contain specific obligations on how digital platforms must inform consumers and how to obtain consumers' informed consent, as well as appropriate consumer controls over digital platforms' data practices. The ACCC should also be involved in the process for developing this code in its role as the competition and consumer regulator.

The Inquiry has found that there are economy-wide concerns raised by current data practices, which are targeted in recommendation 8. However, the review also found that there are certain issues that are different or particularly problematic in relation to digital platforms.

873 OAIC, [Annual Report 2017–18](#), p. 52.

874 Official Committee Hansard, [Legal and Constitutional Affairs Legislation Committee](#), 24 May 2018, p. 85.

875 Official Committee Hansard, [Legal and Constitutional Affairs Legislation Committee](#), 22 October 2018, p. 10.



The ACCC considers that, the OAIC should register a code for digital platforms operating in Australia. A digital platform-specific code would allow for regulation to be better tailored to address the concerns raised in this Inquiry that relate to particular business practices of digital platforms without impacting other businesses subject to the Privacy Act.

The ACCC recommends the registration of an enforceable code under the Privacy Act to address the information asymmetries and bargaining power imbalance specific to the relationship between consumers and digital platforms. In addition to addressing concerns regarding information asymmetry and bargaining imbalance, any code created under the Privacy Act is enforceable by the OAIC which may impose sanctions on data practices that do not comply with the code.

## Overview of the proposed Privacy Code of Practice

Part IIIB of the Privacy Act empowers the Australian Information Commissioner to approve and register enforceable codes of practice which may be (1) developed by entities on their own initiative;<sup>876</sup> (2) developed by entities on request from the Australian Information Commissioner;<sup>877</sup> or (3) developed by the Australian Information Commissioner directly.<sup>878</sup>

The ACCC invites stakeholder views regarding an appropriate development mechanism for the Privacy Code of Practice and whether the developer of this code should be the Australian Information Commissioner or another entity with relevant knowledge and expertise.

Issues covered by this Privacy Code of Practice should include:

- (a) an obligation for digital platforms to provide information on the data that is or could be collected by a digital platform about its Australian users and what it is used for
- (b) an obligation for digital platforms to notify a user when changes are made to privacy or data policies and to provide a clear explanation
- (c) an obligation for digital platforms to inform users on what information is being, or may be, collected from them on third-party sites
- (d) an obligation for digital platforms to disclose to users every entity that has provided the digital platform with information on a user and what that information was
- (e) a prescribed process for digital platforms in downloading or transferring personal information of users
- (f) a prescribed process for digital platforms in deleting and/or destroying an individual's user data
- (g) record keeping requirements for digital platforms for an Australian individual's user data
- (h) a consumer complaint handling process for users in relation to digital platforms and matters covered by the Code that is accessible, fair, transparent and free, and
- (i) specific protections for vulnerable consumers.

A code of conduct containing obligations such as (a) to (c) would address the information asymmetry regarding how personal information is collected, used and shared by DPs. Obligations such as (d) to (h) would address the finding that consumers have little practical or actual control over the collection, use and disclosure of their personal information. Obligation (i) would help prevent against the harms that are particularly suffered by vulnerable consumers through the collection of their personal information.

The specificity of these obligations would serve to complement the broader protections recommended in recommendation 8 by prescribing how digital platforms must act to meet these protections. Likewise, by providing obligations more specific than those under the APPs, it will be easier for digital platforms, and regulators, to identify when data practices are below the standard expected from the privacy regulation.

The ACCC recognises that some digital platforms may already meet the obligations of the proposed Privacy Code within their current data collections practices. Nevertheless, a prescribed industry code

<sup>876</sup> Privacy Act, s 26E(1).

<sup>877</sup> Privacy Act, s 26E(2).

<sup>878</sup> Privacy Act, s. 26G(2).



would provide clarity to digital platforms about how they can clearly communicate their data use practices to consumers, thereby reducing uncertainty.

### Proposed consultation process

The ACCC recognises that the code would require consultation with relevant parties to the code and other stakeholders. In addition, a number of issues would need to be addressed, including:

- what obligations should be included within the code (noting the list above is not exhaustive), and
- what protections for vulnerable consumers would be appropriate to include in the code.

The ACCC proposes to recommend that the OAIC engages with key digital platforms operating in Australia, such as Google, Facebook, Apple, Twitter, and Snapchat, to develop, register and enforce a code of practice to provide Australians with greater transparency about how their information will be handled.<sup>879</sup> It may also be appropriate for the ACCC to also be involved in the development of the code in its capacity as competition and consumer regulator.

### Enforcement and remedies

The ACCC notes that a breach of such a code constitutes an interference with the privacy of an individual<sup>880</sup>, and that the Australian Information Commissioner may investigate, and make a determination regarding<sup>881</sup>, the breach. The ACCC considers that this enforcement power is an important element of the code, as it serves as a deterrent for businesses using practices that do not meet the obligations under the code.

#### ***Preliminary recommendation 10—serious invasions of privacy***

The ACCC proposes to recommend that the Government adopt the ALRC's recommendation to introduce a statutory cause of action for serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

The ACCC recommends the introduction of a new statutory cause of action for individuals, which would lessen the bargaining power imbalance between consumers and digital platforms by providing Australian consumers with an additional way of seeking redress for poor data practices by digital platforms. In addition, introducing a new cause of action for individuals would also increase the deterrence effect of Australian privacy laws against poor data practices.

### Key elements of the statutory tort

The ACCC recommends the adoption of the ALRC's recommendation to introduce a new statutory cause of action in the form of a tort of serious invasions of privacy.<sup>882</sup> The ALRC's proposed tort comprises the following key elements:

- **Two types of invasion:** The invasion of privacy must be either by intrusion into seclusion or misuse of private information.<sup>883</sup>
- **Reasonable expectation of privacy:** The plaintiff must prove that they had a reasonable expectation of privacy in all the circumstances (the ALRC recommended a series of factors that a court may consider when determining whether a person had a reasonable expectation of privacy).<sup>884</sup>
- **Fault element:** The invasion of privacy must have been committed intentionally or recklessly.<sup>885</sup>

879 See OAIC, [Guidelines for developing codes](#), 27 September 2018.

880 Privacy Act, s. 13.

881 Privacy Act, s. 40.

882 A full outline of the ALRC's recommendation can be found in their 2014 report: ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014.

883 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 5-1.

884 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 6-1 and 6-2.

885 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 7-1.

- **Seriousness:** The invasion of privacy must be serious.<sup>886</sup>
- **Proof of damage:** The invasion need not cause actual damage and damages for emotional distress may be awarded.<sup>887</sup>
- **Public Interest:** The court must be satisfied that the public interest in privacy outweighs any countervailing public interests (including freedom of speech, and freedom of the media).<sup>888</sup> This will incorporate a balancing consideration to address potential media concerns regarding the publication of information in the public interest.

The ACCC likewise supports the ALRC recommendation that courts should be empowered to award: damages, including for emotional distress; exemplary damages (in exceptional circumstances); an account of profits; injunctive relief at any stage of the proceedings; the delivery up and destruction or removal of material; and the publication of a correction.<sup>889</sup>

## Key benefits

Giving Australian consumers a direct cause of action to enforce their privacy rights would fill gaps in the existing law regarding breaches of privacy and enable consumers to have greater control over their privacy and personal user data.<sup>890</sup> It would also reduce the burden on the OAIC, which currently has sole responsibility for taking representative action for breaches of privacy under the Privacy Act.

Whilst this recommendation seeks to increase the deterrence effect of Australian privacy law in a similar way that recommendation 8(e) above does, the ACCC considers that the two are complementary solutions for individuals in Australia. As stated by the Office of the Privacy Commissioner (which was integrated into the OAIC in 2010), 'a dedicated privacy based cause of action could serve to complement the already existing legislative based protections afforded to individuals and address some gaps that exist both in the common law and legislation.'<sup>891</sup> In particular, a statutory tort could provide individuals with a means for redress against organisations or data practices that are otherwise exempt under the Privacy Act.

The ACCC also notes the risks of a statutory tort interfering with other public interests, particularly the right to freedom of expression and freedom of the press. This concern would be mitigated by inclusion of the element that balances the public interest of privacy against other public interests.<sup>892</sup> An additional way to address this concern is to introduce explicit defences to safeguard these public interests. In its most recent report on this topic<sup>893</sup>, the ALRC recommended that a range of defences should be available, including a defence that the defendant's conduct was required or authorised by law; a defence for conduct that was proportionate, necessary and reasonable to defend a person or property; a defence of necessity; a defence of consent; a defence of absolute privilege; a defence of publication of public documents; a defence of fair report of proceedings of public concern; and an exemption for children and young persons.<sup>894</sup>

886 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 8-1.

887 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 8-2.

888 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendation 9-1.

889 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 12-1, 12-4, 12-6, 12-8, 12-9, 12-10.

890 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 51.

891 Submission of the Office of the Privacy Commissioner, cited in ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014 on page 2557.

892 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, p. 143.

893 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014.

894 ALRC, [Serious Invasions of Privacy in the Digital Era Final Report](#), 3 September 2014, recommendations 11-1 to 11-8.

## ***Preliminary recommendation 11—unfair contract terms***

The ACCC proposes to recommend that unfair contract terms should be illegal (not just voidable) under the ACL, and that civil pecuniary penalties should apply to their use, to more effectively deter digital platforms from leveraging their bargaining power over consumers by using unfair contract terms in their terms of use or privacy policies.

Due to the significant information asymmetries and bargaining power imbalances in the relationship between consumers and digital platforms, consumers are unable to negotiate a fair bargain with digital platforms for the collection, use and disclosure of their personal data. This bargaining imbalance results in terms within the consumer bargain that are potentially unfair contract terms (UCTs) under the ACL.

However, as the laws currently apply, it is not a contravention of the ACL to include UCTs in contracts and, therefore, no penalties for breach can be sought. Rather, if declared unfair, the provision is simply voidable. Introducing this prohibition, backed by penalties for the use of UCTs, would increase the deterrent effect of the current law. The amendment would allow the ACCC to hold businesses to account for including UCTs, not just to have UCTs declared void (as is currently the case).<sup>895</sup> The ACCC notes that these amendments would have broader application than consumer bargains with digital platforms, and would apply to the use of UCT in other contracts.

The ACCC has previously made this recommendation in the broader context of business to business contracts. The ACCC Deputy Chair Mick Keogh has previously stated that 'lacking a legal impediment, and without fear of financial penalties, businesses have an incentive to include potentially unfair terms in their contracts'<sup>896</sup>. The ACCC's submission to the present review of the Franchising Code of Conduct, recommends that including a UCT in a standard form contract be made illegal under the CCA and that civil pecuniary penalties and infringement notices be made available for breach.<sup>897</sup>

The recognition of contractual rights and remedies being available where services are provided in exchange for personal data has been raised in other jurisdictions in the past. The European Commission's 'Digital Single Market Strategy' foresaw that consumers should be entitled to contractual remedies not only under contracts where they pay a price for the digital content or service, but also in cases where they only provide personal data that will be processed by suppliers.<sup>898</sup>

### ***Box 5.25: Area for further analysis and assessment: Prohibition against unfair practices***

In its 2017 review of the Australian Consumer Law, Consumer Affairs Australia and New Zealand recommended to governments that exploration be undertaken as to how an unfair trading prohibition could be adopted within the Australian context to address potentially unfair business practices.<sup>899</sup> The Final Report into the ACL Review had found that the value of introducing an unfair trading prohibition was 'uncertain', but stated that exploring an unfair trading prohibition in Australia would be an ongoing priority, in particular, in its capacity to address market-wide or systemic unfair conduct.<sup>900</sup>

The ACCC is considering whether its exposure to issues through this Inquiry support a general prohibition against the use of unfair practices in the ACL to deter digital platforms (and other businesses) from engaging in conduct that consumers are uncomfortable with or that falls short of societal norms but which is not currently captured under the ACL.

895 ACCC, [Inquiry into the operation and effectiveness of the Franchising Code of Conduct: ACCC submission](#), 11 May 2018, p. 6.

896 ACCC, Media Release, [Stronger penalties required for franchising codes and UCT laws](#), 14 October 2018.

897 ACCC, [Inquiry into the operation and effectiveness of the Franchising Code of Conduct: ACCC submission](#), 11 May 2018, Recommendation 3.

898 European Commission, [directive of the European parliament and of the council on certain aspects concerning contracts for the supply of digital content](#), 9 December 2015, (13)—(14).

899 Consumer Affairs Australia and New Zealand, [Australian Consumer Law Review—Final Report](#), p.96.

900 CAANZ, [Australian Consumer Law Review Final Report](#), March 2017, p. 51.

The significant bargaining imbalance between consumers and digital platforms means that digital platforms may be able to engage in conduct that customers are uncomfortable with, or that falls short of societal norms, without losing customers.

The ACL contains a number of provisions that assist to protect consumers, including regarding unconscionable conduct, conduct that is misleading or deceptive, and unfair contract terms. The ACCC is considering whether existing legislation is broad enough to catch all conduct that should be prohibited. For example:

- Conduct which is merely unfair may not be unconscionable. While the Federal Court has adjusted the bar to unconscionability over time and introduced concepts of consistency with societal norms, in other instances it has also observed that “unjustness and unfairness are of a lower moral or ethical standard than unconscionability”.<sup>901</sup>
- The prohibition against misleading or deceptive conduct only applies to conduct that is, or is likely to be, misleading or deceptive. While the law may cover implied representations and omissions or silence in certain circumstances, the provisions will not deal with practices that are unfair but which are not misleading. For example where conduct is upfront or consistent with stated practices but nevertheless unfair.
- The unfair contract terms provisions only apply to standard form consumer or small business contracts and is limited to assessing the specific contractual terms, rather than practices that might be engaged in by a platform.

The ACCC is considering whether addressing the conduct identified in this chapter would be assisted by the adoption of an unfair practices provision in the ACL and whether such a provision would better ensure that the ACL covers practices that fail to meet community standards of fairness.

The ACCC has considered other jurisdictions which have unfair practices and trading provisions and in particular, their capacity to address the consumer data collection issues identified in this chapter.

Comparable jurisdictions (including in the EU, UK, USA, Canada and Singapore) adopt a combination of general and specific protections in relation not only to unconscionable and misleading practices, but also to unfair trading practices.<sup>902</sup> As such, these jurisdictions provide potential models for an Australian prohibition against unfair practices. For example, the USA Federal Trade Commission Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce’.<sup>903</sup> The FTC, as a federal agency charged with protecting consumers in the US, uses this provision to take cases against organisations ‘that have violated consumers’ privacy rights, or misled them by failing to maintain security for sensitive consumer information, or caused substantial consumer injury’.<sup>904</sup>

In the US, the FTC views that its ‘unfairness authority’ under the FTC Act, along with its ‘deception authority’ (similar to the ACL’s misleading or deceptive conduct provisions) provide a complementary set of provisions which allow it to address the types of harm that are not otherwise captured by a standalone ‘deception authority’. In the data collection industry, this includes providing a cause of action against companies that may operate behind another company (for example, to sell data), but which have not made representations to a consumer, or to address conduct where consumers do not have oversight as to whether a company is treating their personal data carelessly or illegally.<sup>905</sup>

Importantly, it is not an unrestrained prohibition, with boundaries that are codified in law. It prohibits practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.<sup>906</sup>

901 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50 at [363].

902 Queensland University of Technology, [Comparative analysis of overseas consumer policy frameworks](#), April 2016, 2–3.

903 Federal Trade Commission Act, s. 5(a).

904 Federal Trade Commission, Media Resources, [Privacy and security enforcement](#), accessed 14 November 2018.

905 Jessica Rich (Director, Bureau of Consumer Protection FTC), ‘[Built to last: Section 5 and the changing marketplace](#)’, speech delivered at section 5 Symposium Washington, D.C., 26 February 2015.

906 Federal Trade Commission Act, s. 5(n).

In Europe, practices are unfair where they are contrary to the requirements of professional diligence, and materially distort (or are likely to) the economic behaviour of the average consumer.<sup>907</sup> Professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity.<sup>908</sup> Further, in order to provide greater legal certainty, the EU Directive contains a list of practices which shall in all circumstances be regarded as unfair.

The ACCC is considering whether an unfair practices prohibition, if introduced into Australian law, would be valuable in capturing conduct such as:

- conduct by businesses that consumers are not aware of, such as the collection or disclosure of data without express informed consent
- failing to comply with reasonable standards, including failing to put in place 'reasonable' security measures to protect data
- changing the terms on which products are provided without reasonable notice or ability for the consumers to consider them, including in relation to products with subscriptions or contracts that automatically renew
- inducing consent or agreement by very long contracts or providing insufficient time to consider them or all or nothing 'click wrap' consents, and
- business practices adopted to dissuade a consumer from exercising their contractual or other legal rights, including requiring the provision of unnecessary information in order to access benefits.

The ACCC notes that an unfair practices provision would apply economy-wide to ensure the consistent application to market-wide and systemic unfair practices, beyond those that occur in data-focused industries. It is particularly apt though in the context of this report with a number of overseas examples involving data practices.

## Further ACCC actions

The ACCC is investigating the conduct of certain digital platforms under the Competition and Consumer Act.

The ACCC's investigations include:

- Investigating whether a particular digital platform's representations to users regarding the collection of particular types of data may have breached the Australian Consumer Law.
- Investigating potential breaches of the Australian Consumer Law relating to changes to a digital platform's Privacy Policy that may enable the digital platform to combine different sets of user data.
- Investigating whether a particular digital platform may have breached the Australian Consumer Law by failing to adequately disclose changes to its terms and conditions which allowed them to share consumers' user data with third parties.
- Investigating whether digital platforms' terms of use and privacy policies may contain unfair contract terms under the Australian Consumer Law.

These investigations are continuing and the ACCC has not yet reached a view as to what enforcement outcomes, if any, may be appropriate.

The ACCC will also continue to investigate whether any other conduct of digital platforms raises concerns under the Competition and Consumer Act and whether it is appropriate for the ACCC to take enforcement action.

<sup>907</sup> EU Unfair Commercial Practices Directive 2005, Article 5.

<sup>908</sup> EU Unfair Commercial Practices Directive 2005, Article 2.

# Chapter 6: Choice and quality of news and journalistic content

## Key findings

- News and journalism provide significant contributions to the public interest. Plurality of editorial voices contributes to the public interest.
- News and journalism risk under-provision for a number of reasons, including the public nature of news and information and the general inability of commercial news media businesses to monetise societal benefits of journalism.
- Media businesses, particularly print publishers, have experienced a significant fall in advertising revenue as advertisers follow audiences who have migrated online to access news and other content. This has coincided with strong growth in advertising online which now accounts for half of all advertising expenditure. Google and Facebook together account for over half this online advertising expenditure.
- Digital platforms significantly altered the incentives for the production of different aspects of journalistic coverage. There are relatively poor incentives online for types of coverage that may have smaller audiences, regardless of their significant contributions to the public interest (e.g. local news, court reporting).
- Census data show that from 2006 to 2016, the total number of people in journalism-related occupations fell by 9 per cent, but that the fall in traditional print journalist numbers (including those working for print/online news media businesses) was 26 per cent. Data provided by companies show the number of journalists in traditional print (now print/online) businesses fell by 21 per cent from 2014 to 2017. New media entrants, particularly digital natives, have added a modest number of journalism jobs.
- The influence of digital platforms is likely to have contributed to the increased number of media voices consumed by Australians by facilitating the entrance of digital native publishers. These publishers have varied in their journalistic focus, although they have all tended to employ relatively small newsrooms. Six of the larger digital natives, with a combined monthly unique audience close to five million, collectively employ fewer than 250 full-time-equivalent editorial staff.
- While issues relating to authenticity and quality of news are not new or confined to journalism accessed via digital platforms, these problems are potentially magnified online, due in part to incentives to use emotive 'click bait'. There is a risk that consumers accessing news via digital platforms may receive greater exposure to less reliable news, including dis-information and mal-information ('fake news') and potential filter bubbles. However, there is currently no strong evidence of filter bubbles arising from digital platform use in Australia.
- Snippets, which are used by digital platforms to provide information to consumers about the news items behind search results, have potential benefits for:
  - consumers, who obtain information relevant to their choice of news item
  - for news businesses, which attract visitors to their online news service
  - for the platforms themselves, which maintain the quality of their search or social media platforms.
- There may also be detriments for news businesses if the snippet satisfies the consumer's need and does not lead to a visit to its website. This may reduce the incentives to produce news content which, in turn, may impact the amount of news and journalism available to consumers.
- There may be valuable roles for government and industry in improving digital media literacy, including promoting awareness of how news items are ranked by digital platforms and the risks that news items may come from unreliable sources.
- Public broadcasters will continue to have an important role to play in the production of reliable news and journalistic content in the public interest.
- There may be benefit in the government providing forms of targeted assistance to ensure the continued production of news and journalistic content.

This chapter considers the extent to which digital platforms have had an impact on the level of choice and quality of news and journalistic content to consumers a matter to be taken into consideration under item (ii) of the Terms of Reference. The chapter:

- considers the definition of news and journalism (section 6.1), why it is of public value, and why it is inherently difficult to finance its production (section 6.2)
- discusses the inherent difficulties in providing news and journalism (section 6.3)
- outlines the approach taken by this Inquiry to the concepts of ‘choice’ and ‘quality’ in the context of public policy (section 6.4)
- provides a brief history of journalism production in Australia and a description of the media landscape (section 6.5)
- discusses how the media business model has been transformed by online marketplaces and by the various roles that digital platforms play in today’s media environment (section 6.6)
- discusses the extent to which digital platforms have had an impact on level of choice and quality of journalistic content, with respect to:
  - the resourcing of production and incentives toward coverage (sections 6.7 and 6.8 respectively)
  - consumption of journalism (section 6.9)
- identifies areas for further assessment, including potential policy proposals to address some of the issues identified in this chapter (section 6.10).

## 6.1 What are ‘news’ and ‘journalistic content’?

The Terms of Reference for this Inquiry make specific reference to ‘news and journalistic content’. Both ‘news’ and ‘journalism’ are terms that have been the subject of a wide range of definitions (box 6.1). And, while many common themes emerge across the various definitions, the distinction between the terms ‘news’ and ‘journalism’ is not drawn consistently, if at all. Each term has been conceptualised in a number of ways, through various academic disciplines, with descriptors including profession, literary genre, industry, social system, and ideology.<sup>909</sup>

For the purpose of the discussion in this preliminary report, the ACCC considers that definitions should capture policy-relevant aspects of news and journalism. This should include factors that:

- distinguish news and journalism from other forms of publication, such as entertainment or advertising
- capture the breadth of news and journalism as they currently exist in contemporary Australia
- allow economic consideration of production and consumption
- lend themselves to an analysis of choice and quality.

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909 M Deuze, ‘[What is journalism? Professional identity and ideology of journalists reconsidered](#)’, *Journalism*, 6(4) (2005), p. 442–464.



### **Box 6.1: Various definitions of news and journalism**

News and journalism can be defined from the perspective of media companies, journalists, or according to the role they play in society.<sup>910</sup> For example, they have been described as ‘the first rough draft of history’, a phrase dating from the 1940s and commonly attributed to *The Washington Post* publisher Philip Graham.<sup>911</sup> They have also been considered as ‘anything that will make people talk’.<sup>912</sup>

More formal definitions capture different aspects of news and/or journalism, as shown by the American Press Association:

*Journalism is the activity of gathering, assessing, creating, and presenting news and information. It is also the product of these activities. ... Journalism can be distinguished from other activities and products by certain identifiable characteristics and practices. These elements not only separate journalism from other forms of communication, they are what make it indispensable to democratic societies. History reveals that the more democratic a society, the more news and information it tends to have.*<sup>913</sup>

and by Tony Harcup, who defined journalism as:

*A set of practices through which information is found out and communicated, often involving making public what would otherwise remain private, and which is typically published or broadcast in a format such as a newspaper, magazine, bulletin, documentary, website, or blog. Journalism entails discovering or uncovering fresh, topical, factual material and making it publicly available, but it goes beyond that to include amplifying, contextualising or commenting on facts and comments that have already been made public.*<sup>914</sup>

Michael Schudson distinguished ‘journalism’ from ‘news’, defining journalism as:

*... information and commentary on contemporary affairs, normally presented as true and sincere, to a dispersed and usually anonymous audiences so as to publicly include that audience in a discourse taken to be publicly important.*

whereas news was defined separately as:

*a standardized nonfiction literary form and only one of the many kinds of a journalistic output.*<sup>915</sup>

It is useful for this report to consider ‘news’ as a distinct concept to ‘journalism’ as per the Schudson definition above, and to consider journalism as describing both a process and a product, as defined by the American Press Association. For the purposes of this preliminary report, we use the following concepts:

- **News:** information and commentary on contemporary affairs that are taken to be publicly important.
- **Journalism:** the activity of discovering, gathering, assessing, producing, and publicly presenting the reporting, analysis, and commentary on news and other affairs taken to be publicly important. It is a process undertaken by journalists, acting in accordance with their interpretations of professional ethics.
- **Journalistic content:** any product of the defining processes of journalism, presented as the work of journalists. These products may also be referred to as journalism.

910 M Deuze, ‘[What is journalism? Professional identity and ideology of journalists reconsidered](#)’, *Journalism*, 6(4) (2005), pp. 442–464.

911 J Shafer, ‘Who Said It First?’, *Slate*, 30 August 2010, accessed 20 November, 2018, as cited in D Wilding, P Fray, S Molitorisz, and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018.

912 S Lambie, *News As It Happens: An Introduction to Journalism*, Oxford University Press, Melbourne, 2010, p. 34, as cited in D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 16.

913 American Press Association, [What is Journalism?](#), accessed 20 November 2018.

914 T Harcup, *Oxford Dictionary of Journalism*, Oxford, Oxford University Press, 2014, p. 148.

915 M Schudson, *The Sociology of News*, New York, WW. Norton & Company, 2003, p. 11.

In other words news relating to an issue or event may reach consumers in a number of ways. It may be presented as journalistic content, having been produced and presented by journalists. Alternatively, it may come from other areas of public discourse, including:

- from friends and acquaintances reporting information second (or third) hand
- directly from businesses, governments, and other organisations, in the form of newsletters, media releases, and other forms of public relations
- indirectly through works of fiction, popular culture or satire.

In this context, it is useful to restrict the term journalistic content to refer to information that has been processed by journalists, and presented by journalists on their own behalf. It may still be based on information sourced from businesses, governments, and other organisations, although it would have undergone processes of journalism, and would be seen as the work of a journalist. In these ways, journalism may provide a different perspective for consumers compared to other sources of news, even where the same information is covered.

The concepts of news and journalism referred to in our Terms of Reference are broader than ‘public interest journalism’, which relates only to certain characteristics of journalism. However, in considering issues of ‘quality’ and ‘choice’ of news and journalism in the policy context, it is important to consider how news and journalism contribute to the public interest.

## 6.2 The public interest value of news and journalism

### Key points

- The production and private consumption of news and journalism provide significant benefits to both individuals and society as a whole.
- Choice in journalism and plurality of editorial voices both contribute to the public interest, as they are likely to contribute to a full and diverse set of information relevant to an individual's decision-making and engagement with social, economic and political affairs.

This section considers some of the ways in which news and journalism contribute to the public interest, as discussed in the prevailing literature. The section also considers, in this context, why diversity and plurality are relevant to the public interest value of journalism. It also looks at the nature of journalism funding, and the potential for news and journalism (or subsets thereof) to be under-provided.

### 6.2.1 Public benefits that arise from private consumption

Individuals value news and journalism as it contributes to their knowledge and understanding of the issues and events that directly or indirectly affect them. The information obtained enables and influences consumers' decision making and participation in social, economic and democratic processes.<sup>916</sup> The private benefits of consuming news and journalism can be obtained whether or not an individual pays to obtain information or acquires information that is publicly available (see Section 6.3).

However, the private consumption of news and journalism also provides broader social value. Society as a whole benefits from having its members able to make well-informed economic, social and political decisions.

News and journalism on health issues provides an illustration. Survey evidence suggests that most Australian adults view health as an important topic of news.<sup>917</sup> Such information may lead to decisions that could benefit the health of individual news consumers, and would not necessarily be a form of participation in public institutions (such as democracy). However, as the Productivity Commission points

916 The Civic Impact of Journalism Project, [Submission to the Senate Select Committee on the Future of Public Interest Journalism](#), 2017, pp. 2.

917 Participants in the ACCC news survey were asked what genres of news content are important in allowing people to participate and engage in Australian society. Around 54 per cent of respondents chose Health as one such genre. See Roy Morgan Research, *Consumer Use of News*, November 2018.

out, improvements in personal health would have significant positive impacts on society, including on people's wellbeing, labour markets, productivity, and avoided health care costs.<sup>918</sup>

More generally, consumers may also benefit from the analysis, opinion, and perspective provided by news and journalism. For instance, Bücher states that the editorial function itself transforms news publishers into 'carriers', 'leaders', and 'dealers' in public opinion.<sup>919</sup> To the extent that the opinions of consumers are influenced or informed by news and journalism, this also has implications for broader society.

## 6.2.2 Benefits that are public in nature

Aside from influencing the knowledge, opinions, and decisions of individuals, news and journalism also contribute to the public interest more directly. While there is no single definitive description of the various roles that news plays in society, some commonly raised examples relevant to the public interest include the role of journalism in:

- **Holding others to account**—investigative journalism may uncover examples of corruption, abuse, or mismanagement in institutions, and as such, journalism has historically been a mechanism to hold institutions to account.<sup>920</sup> For example, Joanne McCarthy at *The Newcastle Herald*, wrote more than 350 articles between 2006 and 2013 on the topic of institutional sexual abuse, which helped to spark the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>921</sup>

This value of investigative journalism exists in the context of other public institutions designed to more formally hold institutions to account. These include law enforcement, as well as processes of public transparency, accountability and administrative review.

- **Campaigning**—journalism can play a role in campaigning for social or policy changes, and can contribute to setting political agendas. For example, *The Melbourne Herald Sun's* 2013-14 'Take a Stand' campaign helped to raise the profile of domestic violence as a policy issue, and played a role in carrying the issue into the agenda for the subsequent state election.<sup>922</sup>

This function can be considered public in its effect, given that it may have impacts across society (beyond direct consumers). At the same time, campaigns run by media outlets may not benefit all parts of society equally, and may even negatively affect some sections of society in the case of divisive issues.

- **A journal of record**—reporting on public forums, such as courts, public meetings, and parliamentary sittings of the various levels of government. Simons and Buller note the importance of 'journal of record' reporting, and that it 'should not be seeking impact beyond that which comes from disseminating information' (in contrast to its 'watchdog' or 'campaign' roles).<sup>923</sup>

To some extent, this function could be undertaken outside of the media, including by public institutions themselves publishing transcripts, judgments, and other documentation of proceedings.

- **A forum of ideas**—the Civic Impact of Journalism project at Melbourne University notes that journalism plays a role in providing a forum for debate and the exchange of ideas and opinions, enabling discourse, as well as providing material to serve as a basis for a 'common conversation'. While this may relate to discussion and debate of issues of the day, it may also relate to information that forms the basis for community, such as local or regional news.

This function of journalism exists within much broader constructs of societal communication and debate.

918 See Productivity Commission, [Why a Better Health System Matters](#), Supporting Paper 4, 3 August 2017, p. 2.

919 As cited in J Habermas, [The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society](#), MIT Press, Cambridge, 1962, p. 182.

920 See D Wilding, P Fray, S Molitorisz, and E McKewon, The Impact of Digital Platforms on News and Journalistic Content, Centre for Media Transition, University of Technology Sydney, NSW, 2018 The Civic Impact of Journalism Project, [Submission to the Senate Select Committee on the Future of Public Interest Journalism](#), p. 29.

921 As discussed in D Wilding, P Fray, S Molitorisz, and E McKewon, The Impact of Digital Platforms on News and Journalistic Content, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 19

922 As discussed in Simons, M, Tiffen, R, Hendrie, D, Carson, A, Sullivan, H, Muller, D & McNair, B, 2016, Understanding the civic impact of journalism, *Journalism Studies*, pp. 1400-1414.

923 M Simons and B Buller, 2014, [Dead Trees and Live Links – What Good Are Newspapers?](#), A paper submitted for publication in the proceedings of the Australian and New Zealand Communication Association Annual Conference, Swinburne University, Victoria, 9-11 July, 2014.

In these ways, journalism provides society with something akin to a public institution, although not in isolation from other public institutions. In fact, many conceptualise the contribution of journalism to the public interest in accordance with its support of other established institutions, which themselves have benefits for society at large. For example, journalism is arguably a key actor in the ‘public sphere’<sup>924</sup> democracy<sup>925</sup>; and the economy.<sup>926</sup>

### The public interest value in the process of journalism

Professional journalism arguably provides a level of information and analysis that would not otherwise be readily available to the public. As such, journalistic content may differ to other sources of news in the way it contributes to the public interest. For example, the process of gathering news and information by professional journalists provides information that would not otherwise be in the public domain, leading to a greater volume, depth, and breadth of information being available .

Therefore, there is a public value in the professional journalistic standards of accountability, accuracy and ethical conduct, both internal and external to media organisations. News media outlets (publishers and broadcasters) and regulators play an important role in maintaining professional journalism as there is a public interest in ensuring journalistic standards are upheld.

### 6.2.3 The public interest value of ‘choice’ between multiple voices

The concept of ‘choice’ in journalism is also directly relevant to its value in the public interest. In markets generally, competition between providers can result in lower consumer prices, increased production, improved quality of production, innovation in production techniques, or a more diverse range of choices. These benefits potentially also apply to journalism, as media outlets compete for audiences.

As noted in Wilding et al, the diversity of editorial voices in journalism contributes to the public interest in ways such as through providing competing views or perspectives on issues of public policy or interest.<sup>927</sup> Editorial voice not only influences how things are reported, but what stories are covered. As described by Bettag, editorial decisions play a key role in determining what is newsworthy.<sup>928</sup> These include decisions on how to use scarce newsroom resources, which stories are of public importance or interest, and what kind of reporting would meet public (and private) interests.<sup>929</sup> Plurality of editorial voices potentially provides a greater range of perspectives to consumers and is likely to provide a fuller set of information than would otherwise be possible, which is particularly relevant to individual and group decision-making.

However, if the benefits of greater numbers of independent producers were taken to their logical conclusion, it could be argued that consumers would be better off if they were served only by freelance journalists. In practice, there are benefits of having journalists work within organised media outlets, and benefits associated with their increasing size, including:

- allocation of resources to a wider range of stories
- greater resourcing (particularly for investigative work which carries higher up-front costs, more commercial uncertainty, and the risk of legal action)
- mechanisms within the organisation to maintain consistent professional standards

924 J Habermas, [The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society](#), MIT Press, Cambridge, 1962, p. 182. Habermas defined the ‘public sphere’ as a societal construct that encapsulates how society considers, debates, and communicates information and ideas, and which is broader in scope than news and media. Within this context, the ‘mass media’ has played various roles throughout history, including informing and manipulating public opinion, and acting as a vehicle for public and private interests.

925 As per the examples discussed above, this may include its role in cultivating and informing public discourse; providing perspectives and opinions; holding government institutions to account; and generally allowing citizens to make more informed decisions.

926 Some aspects of journalism that are beneficial to the functioning of a democracy are also likely to be beneficial to the economy. This may include, for example, allowing consumers to make better and more informed commercial decisions; or exposing corruption or incompetence within public and commercial institutions.

927 D Wilding, P Fray, S Molitorisz and E McKewon, [The Impact of Digital Platforms on News and Journalistic Content](#), Centre for Media Transition, University of Technology Sydney, NSW, 2018 pp. 44–45.

928 T Bettag, [What’s News? Evolving Definitions of News](#), *The Harvard International Journal of Press/Politics* 5.3 2000, pp. 105–107.

929 T Bettag, [What’s News? Evolving Definitions of News](#), *The Harvard International Journal of Press/Politics* 5.3 2000, pp. 103–104.

- shared standards and ethics across individual journalists within an organisation
- familiar news brands acting as signals of quality for consumers.

Thus, news media outlets play important roles, both in maintaining journalistic processes and in resourcing the production and dissemination of journalistic content.

## 6.3 The inherent difficulties in providing news and journalism

### Key points

- The production and consumption of news and journalism create public interest benefits that commercial media outlets are unable to monetise.
- News and journalism are at risk of under-provision due to difficulties media businesses encounter in capturing their full value to individuals and society.
- The public nature of this information means it can be passed on to others in society, or re-published by other media outlets. This limits total consumer willingness to pay for news and journalism which, in turn, reduces incentives to invest in original journalistic content.

While news and journalism provide various benefits that are public in nature, these same characteristics produce risks that the provision of news and journalism is less than socially optimal. Such risks arise from the public nature of information and of mass media, and more generally, the separation between the public interest and commercial value of news and journalism.

### 6.3.1 The public nature of information

Information has characteristics that differentiate it from typical goods. Consumption of information by one individual does not diminish its availability for others to consume, and it can be difficult or impossible to prevent consumption by someone who has not paid for the right to do so.<sup>930</sup> Moreover, once information is known privately it can rapidly become publicly known. These factors are relevant to why news and journalism may be under-provided by market forces in some circumstances.

For example, people may not feel the need to pay for a newspaper because they are able to obtain the information it contains second-hand. This information could be passed on to them by people who purchased a newspaper. Consequently, the degree to which society values the news (and, thereby, the newspaper) does not fully translate into revenue from purchases or subscriptions by consumers. This reduces the commercial incentive for businesses to invest in the gathering and production of news and journalistic content.

<sup>930</sup> Goods that exhibit these characteristics of non-rivalrous and non-excludable consumption are referred to as public goods. See A Mas-Colell, MD Whinston and JR Green, [Microeconomic Theory](#), Oxford University Press, New York 1995, pp. 359–360.

### 6.3.2 The public nature of mass media

Free-to-air broadcast content similarly has many characteristics of a public good.<sup>931</sup> If a news bulletin is broadcast, each additional consumer of that broadcast does not reduce the amount of content available for others. That is, it may be consumed equally by many consumers at once. In these ways, the consumption of free-to-air broadcast content is public in nature. Also, the public, non-excludable nature of free-to-air broadcast content means that it is not subject to a traditional pricing mechanism where consumers pay per unit of the product: rather, all consumers pay indirectly, through their consumption of advertising.<sup>932</sup>

Newspapers differ from broadcast media, as the newspaper publisher is able to exclude non-paying consumers. However, they are not strictly excludable in practice, given that newspapers can be passed on by paying consumers to others, or read as a public copy in libraries, airports, cafes and so on. Further, the informational content itself can be shared between individuals.

### 6.3.3 Separation between public interest and commercial value

The extent to which journalism contributes to the public interest also contributes to why it is under-produced by market forces. As noted above, the revenue received by producers of journalistic content (either directly or indirectly from consumers) may not account for any flow-on benefits to society. For instance, commercial media businesses would be unable to monetise societal benefits, particularly where:

- information published is passed to non-purchasing consumers (either by purchasing consumers or by other publishers who have picked up a news story)
- consumers' valuation of news and journalism (i.e. willingness or ability to pay) does not account for the societal benefits such as through its scrutiny of public institutions.<sup>933</sup>

Importantly, consumer preferences alone are insufficient to determine the socially optimal level of production of journalism.

Some forms of journalism may be at greater risk of under-provision than others. The ACCC has heard a range of views regarding the types of journalism that might promote the public interest. Some considered that investigative journalism was the most likely to be under-provided, given its 'potential risks and upfront costs' while others consider that there are a much broader group of journalistic endeavours that carry some form of public benefit and are at risk of under-provision by market forces. These included day-to-day reporting on the judicial system, and forms of topic-specific 'beat' journalism, such as reporting by infrastructure or health specialists.

### 6.3.4 How journalism production is resourced

Journalism is inherently difficult to adequately resource, given the public nature of information, the public characteristics of mass media, and the wide-ranging public benefits which are difficult to monetise.

In Australia, advertising revenue and public funding have traditionally accounted for the vast majority of journalism funding. Funding approaches differ internationally: while the United Kingdom also has a significant public funded broadcaster, the United States places less emphasis on public funding and more on direct donations and philanthropy.

It is important to note that, under these arrangements, the production of journalistic content in Australia and other jurisdictions is dependent on mechanisms other than consumer preferences alone.

931 Productivity Commission, [Broadcasting](#), Inquiry Report 11, 3 March 2000, p. 93.

932 V Pickard, [Confronting Market Failure: Past Lessons Toward Public Policy Interventions](#), published in M Llod, LA Friedland, [The Communications Crisis in America \(and How to Fix It\)](#), Palgrave Macmillan, New York, 2016 p. 128.

933 C Ali, [The Merits of Merit Goods: Local Journalism and Public Policy in a Time of Austerity](#), *Journal of Information Policy*, 6 (2016), p. 116.



## 6.4 Analytical framework for assessing ‘choice’ and ‘quality’

### Key points

- Aspects of quality that relate to the contribution made by journalism to the public interest considered in this Inquiry are:
  - the contribution of different forms of news and journalism to the public interest
  - the provision of news and journalism relevant to local and regional communities
  - the provision of reliable information on which consumers may base choices as participants in political, economic and social life
  - the provision of news and journalism generally, given the public benefits of news and journalism and their inherent risk of under-provision.
- This preliminary report focuses on aspects of plurality of journalism, where the term plurality will be used to describe various aspects of journalism, including:
  - the number of independent editorial voices
  - the variety of coverage, as it relates to issues including topic, format, or geographic focus
  - the variety of perspectives.

The Terms of Reference for this Inquiry include the impacts that digital platforms may have had on the level of choice of news and journalistic content for consumers. This section clarifies how concepts like ‘quality’ and ‘choice’ will be considered; and how disruption is affecting journalism and its consumers.

### 6.4.1 The ACCC’s approach to ‘quality’

The concept of quality journalism is not easily defined, and has been the subject of debate among academic researchers and professional journalists.<sup>934</sup> The Centre for Media Transition report ‘The Impact of Digital Platforms on News and Journalistic Content’ prepared for this Inquiry provides a comprehensive list of quality indicators, ranging from accuracy to presentation.<sup>935</sup>

In order to focus on the most policy-relevant aspects of quality, this preliminary report broadly focuses on aspects of quality that are relevant to the ability of journalism to contribute (in various ways) to the public interest. It does not, for example, address aspects of quality that would be relevant to consumers’ preferences (e.g. the topic or subject, the quality of writing, the tone of argument).

To this end, various methods to establish the quality of journalism are already formalised in Australia through co-regulatory mechanisms and industry codes, including those outlined in chapter 4’s summary of Australian media regulation. The ACCC notes that these industry codes and bodies administer frameworks for holding journalists and media companies accountable for maintaining high journalistic standards. Many of these codes and standards aim to uphold important ‘process aspects’ of quality, which are determined by characteristics such as objectivity, accuracy and accountability, and the extent to which journalism performs functions such as analysis and investigation.

Other relevant aspects of the quality of journalism include, for example, the breadth and depth of coverage. Various forms of coverage (political journalism, celebrity coverage and reporting on local events) can all contribute to the public interest in different ways; and a reduction in one form of coverage would not necessarily be supplemented by another.

Survey evidence from the ACCC News Survey suggests that Australians consider a wide variety of news genres to be ‘important in allowing people to participate and engage in Australian society’.<sup>936</sup> The majority of respondents considered this to include local, national, and international news (71, 70, and

934 See D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 73-97.

935 D Wilding, P Fray, S Molitorisz, and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 86-87

936 Roy Morgan Research, ‘Consumer Use of News’, November 2018.



58 per cent respectively); news of the day (65 per cent); as well as news on Australian politics (65 per cent); the environment (58 per cent); health (54 per cent); and crime, justice, and security (55 per cent). For the purposes of this preliminary report, we do not seek to limit the discussion to particular genres of journalism, but recognise that they may differ in their risk of under-provision.

In assessing the potential effects of digital platforms on the quality of news and journalism, this preliminary report will focus on their impacts on the public interest. This includes the impacts of digital platforms on:

- the ability of and incentives for media organisations to produce journalism that contributes to the public interest
- the exposure to and consumption of the kinds of news and journalism that contributes to the public interest

where the contribution of journalism to the public interest, relates to:

- the scale of journalism production as well as the breadth and depth of coverage
- the various genres of journalism that contribute to the public interest (e.g. investigative, breaking news, beat journalism, commentary etc.)
- the various topics of journalistic coverage that contribute to the public interest (e.g. politics, finance, sport, culture and the arts etc.)
- news and journalism relevant to local and regional communities
- the reliability of information on which consumers may base choices as participants in political, economic and social life.

For the purposes of this preliminary report, we have not undertaken an empirical assessment of journalistic content against criteria of quality standards. We have attempted to make use of the best available data relating to various aspects of ‘quality’. We also recognise that the relationship between digital platforms, journalism, and the public interest involves several qualitative aspects that are not easily quantified.

Neither have we relied on consumer behaviour or views alone to indicate whether (or how) assessment of the quality of news and journalistic content has changed. Unlike many other goods and services, a reduction in consumption of news and journalism may not necessarily be evidence of a reduction in the societal value of news and journalism. As discussed earlier, the market mechanisms for news and journalism are complicated by the public nature of its consumption.

#### 6.4.2 The ACCC’s approach to ‘choice’

On the issue of ‘choice’, the term has historically been conceptualised in Australian media regulation as relating to diversity of ownership.<sup>937</sup> For example, ‘diversity’ as it is used within the *Broadcasting Services Act 1992* (Cth) relates only to media ownership and control, and is not used to refer directly to diversity of perspectives, sources, or any other factors. In addition, diversity within this framework is treated as a purely quantitative concept. However, there are several definitions of diversity and plurality that have been adopted by academics and regulators internationally (box 6.2).

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<sup>937</sup> See D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018.

### **Box 6.2: Various definitions of media diversity and plurality**

The term ‘diversity’ can hold several meanings for journalists. For instance, as noted by Pearson et al:

*The notion of ‘diversity’ was interpreted variously by news producers. Some linked it with ownership and control, and viewed it as an indication of the number of voices expressed through the news and current affairs media. Others linked it with multiculturalism, and the extent to which different ethnic sectors of society had expression through the media.*<sup>938</sup>

Regulators such as Ofcom in the UK use the following elements to define ‘plurality’:

*Ensuring that there is diversity in the viewpoints that are available and consumed, across and within media enterprises. There should be a diverse range of independent news media voices across all platforms, a high overall consumption across demographics and consumers and active use of a range of different news sources.*

*Preventing any one media owner, or voice, having too much influence over public opinion and the political agenda. This can be achieved by ensuring that no organisation or news source has a share of consumption that is so high that there is a risk that people are exposed to a narrow set of viewpoints.*<sup>939</sup>

For the purposes of this preliminary report, we have not defined a metric to empirically measure plurality in Australia. We have attempted to make use of the best available data, and to consider multiple aspects of plurality in as much detail as the data allows.

We note that many concepts are potentially important in describing ‘choice’ of journalistic content for consumers. For example, diversity of media ownership may be an important factor in determining the number of editorially independent voices, even though the two concepts are not necessarily equivalent. In turn, the number of editorially independent voices, and the diversity of their influences, are likely to play important roles in creating a greater variety of products, more information, a wider coverage of issues, and a greater breadth of perspectives. These latter factors are all elements of consumer choice that relate directly to the public interest value of journalism.

Therefore, this preliminary report will focus on any influence that digital platforms may have on aspects of plurality of journalism, where the term plurality will be used to describe various aspects of journalism aside from ownership of media businesses, including:

- the number of independent editorial voices
- the variety of coverage, as it relates to issues including topic, format, or geographic focus
- the variety of perspectives.

Where ownership of media businesses is relevant, we will refer to ‘diversity’ as meaning the number of businesses under separate ownership, in accordance with its meaning in Australian legislation. We interpret ‘choice’ as covering aspects of plurality in terms of what is available in the market; what is distributed or made accessible to consumers; and what is consumed.

938 M Pearson, JE Brand, D Archbold and H Rane, [Sources of News and Current Affairs](#), Bond University, Gold Coast, 2001, p. 213.

939 Ofcom 2015, [Measurement framework for media plurality: Ofcom’s advice to the Secretary of State for Culture, Media and Sport](#), 5 November 2018, Ofcom, London, p. 6.

## 6.5 A brief history of journalism production in Australia

### Key points

- Australia's media landscape is characterised by a number of long-established print, radio, and television outlets.
- A significant part of Australia's media landscape relates to local news, particularly in regional areas. Radio plays an important role, despite employing a relatively small share of Australia's journalists.
- Several waves of disruption have impacted the media since the 1990s; including significant changes within the television and radio industries, the digitalisation of the media landscape in the 1990s, and the growth of the internet and rise of digital platforms since 2000.

Media companies and public broadcasters have historically been responsible for the production and publication of journalism in Australia, and this continues to be the case. At the time of this report, the social media platforms and other digital platforms that are the subject of this Inquiry have not yet ventured into the production of journalistic content in Australia.

### 6.5.1 Print and broadcast formats

Historically, media companies have worked in the formats of print, radio, and television, each of which tends towards larger-scale production. As such, Australia's media landscape is characterised by a number of long-established outlets in print, radio, and television. This includes the nation-wide presence of public broadcasters, the ABC and SBS.

Print news, now print/online news, is particularly concentrated, with News Corporation and Fairfax<sup>940</sup> controlling 57.6 per cent and 30.6 per cent of the newspaper publishing market respectively.<sup>941</sup> Seven West Media is the next largest publisher, with a 7.7 per cent market share.<sup>942</sup>

These traditional formats remain significant in the production of news. For example, in the most recent Census, 68 per cent of people who identified as journalists worked in the print or broadcast fields.<sup>943</sup> Print and broadcast media are also significant in the consumption of news: survey evidence suggests that around 73 per cent of Australians had accessed news on television in the past week, and 60 per cent had accessed news on radio.<sup>944</sup> <sup>945</sup> Around 55 per cent of Australians still use print or broadcast formats as their main source of news.<sup>946</sup>

While print and broadcast formats are currently well-established, they were the subject (and agent) of technological disruption in the twentieth century. Globally, the advent of television was associated with the reduction in newspaper readership, largely due to changes in consumption habits.<sup>947</sup>

940 At the time of writing, Fairfax was in the process of merging with Nine Entertainment Co. At 8 November 2018, the ACCC confirmed that it would not oppose the merger. At 19 November, Fairfax shareholders approved the merger scheme. See ACCC, [Nine Entertainment Co Holdings Limited \(Nine\) - proposed merger with Fairfax Media Limited \(Fairfax\)](#), 8 November 2018, Fairfax Media, [Fairfax shareholders approve scheme of arrangement for merger with Nine](#), media release, 19 November 2018.

941 IbisWorld, [Newspaper Publishing in Australia](#), June 2018, pp. 23-24.

942 IbisWorld, [Newspaper Publishing in Australia](#), June 2018, p. 25.

943 ABS Census 2016. Those self-identifying as print journalists may include those working for publishers that produce both printed publications and publications in other media formats (e.g. online).

944 Roy Morgan Research, [Consumer Use of News](#), November 2018, p. 12.

945 While the ACCC news survey found that 60 per cent of respondent had accessed news via radio in the past week, Park et al (2008) found that 37 per cent of respondents had done so. It is unclear why these results differ. The two surveys asked respondents about the news sources used in the past week. The sampling approach for both surveys used quotas for age group and region, which are factors likely to affect radio usage. Both samples are weighted according to Australian population demographics, and contained around 2000 respondents. See Roy Morgan Research, [Consumer Use of News](#), November 2018; S Park, C Fisher, G Fuller, and J Y Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, pp. 71-76.

946 In the ACCC news survey, around 32 per cent of Australian respondents used television as their main source of news, compared to 15 per cent for radio, and 8 per cent for print sources. See Roy Morgan Research, [Consumer Use of News](#), November 2018.

947 Communications Management, [Sixty years of daily newspaper circulation trends](#), discussion paper, 2011, p. 4.

## 6.5.2 Regional and local news

A significant part of Australia's media landscape relates to local news, particularly in regional areas. Each of the predominantly metropolitan broadcast networks (Seven Network, Nine Network and Network Ten) has program affiliation agreements with one or more of the predominantly regional networks (Prime, WIN and Southern Cross Austereo (SCA)). The programming available to regional and remote audiences is essentially the same as that transmitted to metropolitan audiences, with the exception of some localised advertising and news.

There are around 500 regional and community newspapers operating in Australia, many of which are under the ownership of the three largest commercial press companies: News Corp Australia, Fairfax, and Seven West Media. Many regional areas are serviced by one newspaper.

Radio news is particularly significant in regional areas and production of local radio news in these areas forms part of regional commercial broadcasters' licence conditions. Larger regional commercial radio broadcasters must broadcast three hours of 'material of local significance' each day as a condition of their broadcasting licence, and smaller regional commercial radio broadcasters (in areas with populations of under 30 000) must broadcast at least 30 minutes per day.<sup>948</sup> As news content is considered material of local significance, this encourages commercial radio broadcasters to provide local news to their audiences.

Regional commercial radio broadcasters that have experienced a significant change in ownership or control are also subject to a licence condition specifically requiring minimum levels of local news. These broadcasters must provide local news bulletins at least five days per week, with these bulletins comprising at least 12.5 minutes of programming each day. At the time of this preliminary report, 145 regional radio broadcasters throughout Australia were subject to these local news requirements.

SCA, which owns 78 commercial radio stations in Australia, broadcasts over 21 000 hours of local radio news each year.<sup>949</sup> Again, the public broadcasters supplement the commercial sector with the ABC's 24-hour radio news service capable of reaching 96.5 per cent of the population.<sup>950</sup> SBS's news radio services focus on foreign-language broadcasting and produce almost 70 radio programs in languages other than English.<sup>951</sup>

The provision of news and journalism in areas of smaller population is difficult, given the importance of scale in both production and in advertising. Consequently, the number of working journalists per capita in regional areas has historically been lower than in metro areas (figure 6.1).

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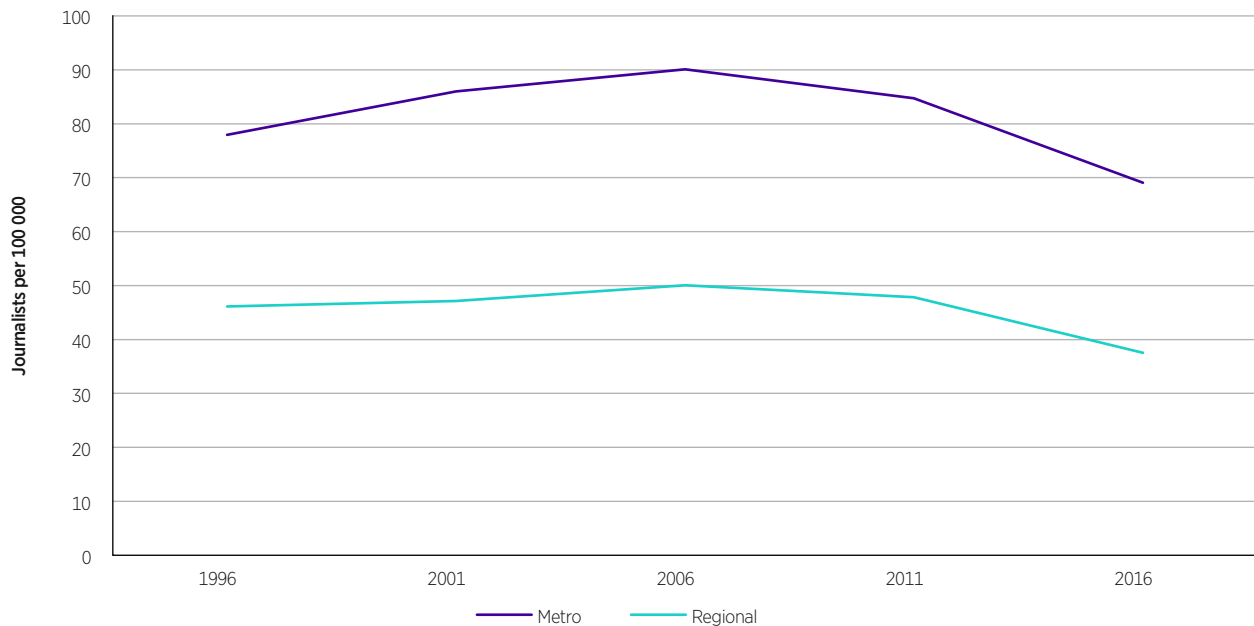
948 Material of local significance is defined as material that is 'hosted in', 'produced in' or 'relates to' the broadcaster's local area. See *Broadcasting Services Act 1992* (Cth), s. 43C.

949 Southern Cross Austereo, [Submission to the ACCC Issues Paper](#), April 2018, p. 2.

950 Australian Broadcasting Corporation, [Submission to the ACCC Issues Paper](#), April 2018, p 14.

951 Special Broadcasting Services Corporation, [Submission to the ACCC Issues Paper](#), April 2018, p 3.

Figure 6.1: Journalists per 100 000 Australians by Metro/Regional



Source: ABS Census.

### 6.5.3 Digitalisation and moving the news online

Several waves of disruption have impacted the media since the 1990s, including significant changes within the television and radio industries (box 6.3) as well as the digitalisation of the media landscape in the 1990s and the growth of the internet since 2000. These are trends that have occurred globally, although not always on the same timeline.

In the mid-1990s, news publication in Australia began to move online. For example, in 1995, Fairfax launched smh.com.au, at first containing only a computers and communications section and entertainment news, before becoming a daily news site in 1996. In 1998, Fairfax added a 'breaking news' service, signalling that the site was 'no longer an online version of the newspaper'. In 2012, Fairfax announced that it would move to a 'digital-first editorial model', integrating its print and digital platforms.

The most recent additions to the Australian news landscape are the digital natives; publications that, in Australia, only have an online presence. Most digital natives in Australia are less than 10 years old (table 6.1). Compared with the traditional print market, the digital native market is more fragmented, with a number of local and international news outlets operating in Australia.

Digital natives employ a number of different business models. Some follow the lead of traditional print media companies and offer subscription-based access to their publications (e.g. *Crikey*). Others are free but have subscription/membership options, asking readers for donations, and also generating some revenue from advertising (e.g. *The Guardian Australia*). Others do not impose any monetary charge audiences, and generate revenue solely from advertising (e.g. *The Daily Mail Australia* and *Buzzfeed News Australia*).

Their presence tends to be small in terms of editorial employment. *The Guardian* lists 50 journalists<sup>952</sup> in its Australian team, while *Buzzfeed News Australia* has around 40 employees in Australia (including journalists and others).<sup>953</sup> *The Conversation* has around 24 editorial staff, and the *New Daily* around 18.<sup>954</sup>

952 *The Guardian Australia*, '[Guardian Australia—Meet the Team](#)', accessed 13 November 2018.

953 Samios, Z, '[Why BuzzFeed Australia isn't screwed](#)', *Mumbrella*, 8 February 2018, accessed 13 November 2018.

954 *The Conversation*, '[Our Team and Boards](#)', accessed 13 November 2018; *New Daily*, '[About](#)', accessed 13 November 2018.

### **Box 6.3: Changes in broadcast television and radio**

In 1995, subscription television services launched in Australia, increasing competition for existing broadcasters. Competing services were initially rolled out by each of the two telecommunications networks at the time, Telstra and Optus, in conjunction with media companies including News Corporation, the Seven Network, and Publishing and Broadcasting Ltd. Optus Vision operated between 1995 and 2009, with around 220 000 subscribers in 2000. Austar was also established in 1995, providing subscription television to rural and regional Australia. Its user base grew to around 750 000 subscribers by 2011, before a merger with Foxtel was completed in 2012. Foxtel continues to operate, with around 2.7 million subscribers.

Aside from entertainment services, these subscription broadcasters gave consumers access to dedicated international news channels, increasing competition for audience attention. This includes Sky News Australia, which launched in 1996. However, take-up of subscription television has always remained well below the combined audiences for free-to-air television.

Digital broadcast television commenced in Australia in 2001, with analogue broadcasts being switched off between 2010 and 2013. Commercial broadcasters began transmitting multiple channels from 2009. The ABC launched a dedicated news channel in 2010.

The ABC was the first Australian broadcaster to offer catch-up content on the internet, launching iView in 2008. Metropolitan commercial television networks launched similar catch-up services in the following four years, although iView remains among the most popular of these services, with 3.3 million unique visitors per month in 2017–18.<sup>955</sup>

Digital radio services commenced in Australia in 2009, using the DAB technology. These services were, and continue to be, a supplement to analogue radio (AM and FM), rather than a replacement (as was the case with digital free-to-air television). Services now operate in all capital cities, provided by a mix of commercial, public, and community broadcasters, and there are proposals to commence services in certain regional markets. As a platform, digital radio has slowly been increasing in popularity. More than 3.6 million people in 2017 listened each week to digital radio using the updated Digital Audio Broadcasting (DAB+) standard in the five metropolitan capitals, up from 3.2 million in 2015. Hobart was the last capital city to launch DAB+ services, with the ABC and SBS commencing digital broadcasts in March 2018.<sup>956</sup>

In recent years, online video streaming services have also launched within Australia, including Netflix (2015), Stan (2015) and Amazon Prime (2018). These services had a significant impact on entertainment viewing habits, but have not entered the news and journalism space.

955 Screen Australia, [Online & on demand 2017](#), February 2018, p.17; Australian Broadcasting Corporation, *2017–18 Annual Report*, October 2018, p. 71.

956 ABC, 2018. '[ABC and SBS launch digital radio \(DAB+\) services in Hobart](#)', 19 March 2018, accessed 13 November 2018; Australian Communications and Media Authority, '[Stay tuned: digital radio expanding to all capital cities](#)', accessed 20 November 2018.

**Table 6.1: Digital native publishers in Australia**

Format	Media outlet	Founding date
Digital Natives	<i>Crikey</i>	2000
	<i>PedestrianTV</i>	2005
	<i>Politico</i>	2007
	<i>The Conversation</i>	2011
	<i>Vox</i>	2011
	<i>The Guardian Australia</i>	2013
	<i>Vice News</i>	2013
	<i>The New Daily</i>	2013
	<i>Buzzfeed News/Buzzfeed News Australia</i>	2011/2014
	<i>The Daily Mail Australia</i>	2014
	<i>Huffington Post Australia</i>	2015
	<i>The New York Times Australia</i>	2017

## 6.6 How the internet and digital platforms disrupted the commercial media business model

### Key findings

- Advances in technology, particularly the rapid growth and uptake of the internet, significantly reduced the cost of publishing and distributing news and journalistic content for media outlets. In this digital environment, digital platforms provide new ways for media outlets to reach audiences.
- As audiences moved online, Australian print publishers lost significant amounts of classified advertising revenue, largely due to the emergence of specialised online marketplaces.
- The advertising revenue of Australian print publishers (now print/online publishers) continued to decline after the vast majority of classified revenue had shifted online. At the same time, the large online advertising platforms of Google and Facebook took an increasing share of online advertising expenditure in Australia.
- News and journalism accessed on digital platforms is 'atomised', a term used to describe the effect where consumers access journalistic content on a story-by-story basis. Media businesses are incentivised to optimise their content for algorithmic ranking and, in the case of social media, to ensure 'sharing' behaviour among users. This can result in a preference for producing emotional or sensationalised content to act as 'click bait' to attract consumer attention.
- The changes to the production and distribution of news and journalistic content caused by digital platforms have created a state of flux for media businesses around the world. It is unclear which business models for news media will prove viable.



This section looks at how the move to an online world is impacting traditional media. We first consider the broader effects of the internet before turning to the specific impacts of the digital platforms. As discussed in chapter 1, technological changes and, in particular, the growth of the internet have had implications for media businesses. The most relevant to this preliminary report include:

- significant changes to production and distribution costs
- the loss of classified advertising from news publishers to online marketplaces
- transformation of the online media model due to the role of digital platforms, including the continued reduction in advertising revenue, particularly for the traditional print and online news publishers.

### 6.6.1 Significant changes to production and distribution costs

When newsrooms embraced digital technologies, this drastically altered the way news was sourced and produced. For example, the use of computers significantly changed the writing, editing, and technical production processes. The development of digital photography removed the costs and constraints associated with film. Mobile phones put reporters in constant contact with sources and newsrooms. In a relatively short space of time, the newsroom completely transformed from the pen and typewriter to the monitor and keyboard; from analogue to digital recording and broadcasting.

Some of the clearest changes occurred to the costs of production and distribution of digital news as opposed to print newspapers. This is significant for newspapers globally, given the high costs of printing and distribution.

Online distribution has lowered costs relative to traditional physical production and enabled some publishers to drop physical print altogether or for special supplements and magazines.<sup>957</sup> This trend is evident in Australia and internationally.

The significance of printing costs are demonstrated in Australia by the example of Fairfax which, in 2012, announced that it would reduce the print editions of *The Age* and *The Sydney Morning Herald* to 'compact formats', as well as closing printing facilities in Chullora and Tullamarine. In 2018, Fairfax and News Corp Australia reached a deal to share printing facilities, reportedly saving \$30 million per year.<sup>958</sup>

To the extent that news media businesses have been able to switch from traditional media formats to digital, this is likely to have significantly reduced the costs of production and distribution. For many established media businesses that maintain their traditional distribution format, online news represented an additional form of distribution, albeit one with the advantages of extensive reach and very low marginal cost.

### 6.6.2 The loss of classified advertising from print to online marketplaces

One of the most significantly disruptive aspects of the internet was the loss of advertising revenue from classified advertisements to online competitors. Speaking about global trends in advertising in 2005, then Chairman and CEO of News Corporation Rupert Murdoch said:

*This is a generational thing; we've been talking a 15- or 20-year slide on this. Certainly I don't know anybody under 30 who has ever looked at a classified advertisement in a newspaper. With broadband, they do more and more transactions and job-seeking online.*<sup>959</sup>

In 2002 classified advertising spend represented 54 per cent of the total print advertising spend in Australia.<sup>960</sup> Classifieds provided the potential for a large number of small advertisements to be placed, often with a geographic focus (e.g. for second hand cars and other goods, real estate, or jobs available in a particular area). Newspapers with a local or metro distribution were particularly suited to this sort of advertising.

957 Both the Pittsburgh Times and the *Seattle Post Intelligencer* have moved to all-digital publishing—see KPMG, '[Stop the presses! White Paper](#)', 2016, p. 6.

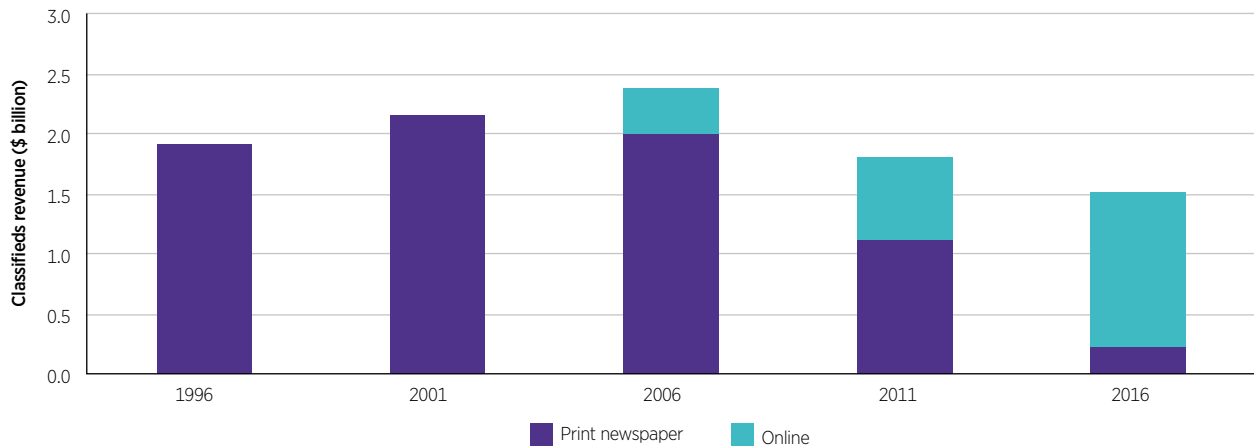
958 Ryan, P 2018, '[Fairfax Media and News Corporation agree to share printing facilities to offset newspaper decline](#)', ABC News, 18 July 2018, accessed 1 November 2018.

959 Ian Reeves, '[Press Gazette archive interview: Rupert Murdoch tells all](#)', 2 December 2005, accessed 21 November 2018.

960 ACCC analysis of CEASA data.

As discussed in chapter 1, in the 2000s, Australians rapidly adopted both fixed and then mobile internet services. With the rise of the internet, specialist platforms (such as eBay, Gumtree, carsguide.com.au, Seek and realestate.com.au) provided classified advertising with the benefits of digital searching, at much lower costs to users. The result was rapid decline in print classified revenue, which occurred across the 2000s for various publishers, but continued into the 2010s (figure 6.2).<sup>961</sup>

**Figure 6.2: Changes in print and online classified revenue in Australia**



Source: ACCC analysis of CEASA data.<sup>962</sup>

The unbundling of classified advertising from the print news product meant that newspapers, which were traditionally some of the largest producers of journalistic content, would progressively lose a significant revenue stream. At the same time, newspaper readership for metro publications fell across the 2000s, particularly in the latter part of the decade, compounding the impact on classified revenue by reducing the number of potential customers of print classified advertising.<sup>963</sup>

### 6.6.3 How digital platforms changed the online media business model

As discussed earlier in this report, digital platforms have a significant role in both advertising and media (see chapters 1, 3 and 4). This sub-section considers the various ways in which digital platforms have changed commercial incentives for media businesses, disrupting core elements of the established business models as:

- significant rivals for advertising spend
- key providers in the advertising supply chain
- facilitators in the ‘atomisation’ and dilution of journalistic content
- providing new opportunities for low-cost production.

#### Digital platforms capture a significant share of online attention and advertising spend

As noted earlier, advertising has historically played a significant role as a revenue stream for media businesses in Australia. This has been true not only of free-to-air broadcasters, which rely exclusively on advertising, but also of newspapers, for which advertising had heavily supplemented revenue from circulation.

However, there are now more options competing for consumers’ attention: the internet in general, and digital platforms specifically (see chapter 2). For instance, in the 12 months to March 2018, Australians are estimated to have spent 21.9 billion hours online, 18.6 billion hours watching television, 14.6 billion hours listening to the radio, and 1.8 billion hours reading newspapers<sup>964</sup> (by comparison, they spent to

<sup>961</sup> Based on ACCC analysis of classified advertising revenue data from CEASA.

<sup>962</sup> Data are adjusted for inflation.

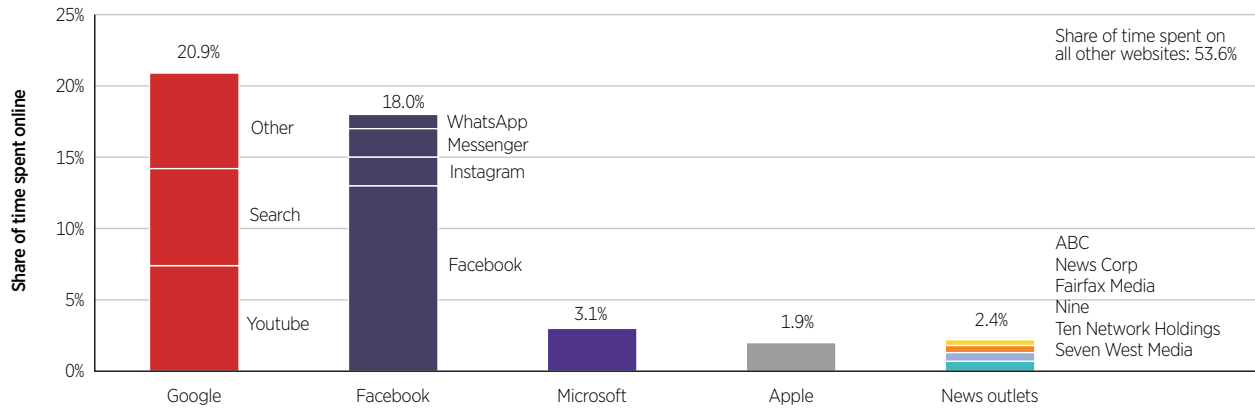
<sup>963</sup> Analysis of Roy Morgan Single Source Australia shows that readership for most metro newspapers fell between 2003, 2008, and 2010.

<sup>964</sup> Roy Morgan 2018, Single Source Research.

20.5 billion hours in paid work). The internet thus provides considerable potential to advertisers in terms of reach.

Evidence suggests that when Australians are online, they spend much of their time using the major digital platforms (figure 6.3). And while media businesses have a significant online presence, their value as platforms for advertising is likely to be less than that of search and social media platforms, due to the relative amount of contact time they have with consumers.

**Figure 6.3: Share of online time spent on selected websites, August 2018**



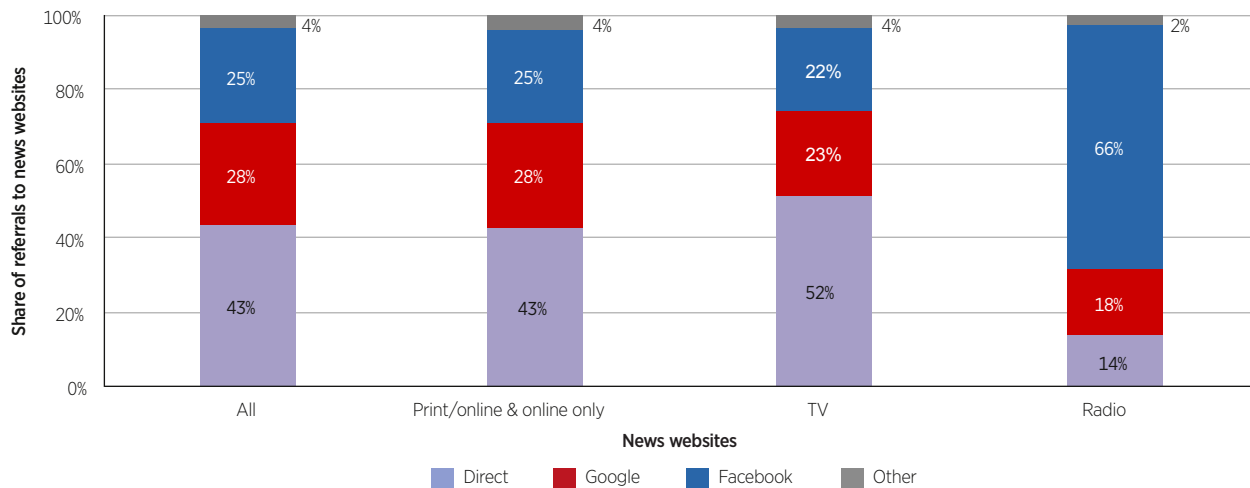
Source: Nielsen Digital Panel.

Further, as discussed in chapters 2 and 3, the key digital platforms (Google and Facebook) are able to collect and harness greater volumes of personal data from their users which can be used for highly targeted advertising. This significantly differentiates their advertising offerings from those of other websites. It also means that the more time consumers spend on digital platforms, the more the platforms are able to collect user data and improve their ability to offer targeted advertising opportunities. For media businesses, this means the pursuit of advertising revenue involves the need for both audience attention and user data.

### A gateway for a large proportion of traffic to news websites

As described in chapters 1, 2 and 4, even where consumers spend their time on news websites, they often arrive via a digital platform. In particular, referrals from Google and Facebook account for just over half of the visits to Australian news websites overall (figure 6.4). This means that, even where media businesses are able to improve their ability to attract consumers and advertisers, this is unlikely to detract from the popularity of digital platforms that serve as gateways to those websites. In this way, the online business of news websites is fundamentally tied to the operation of digital platforms and their algorithms.

**Figure 6.4: Referrals and direct visits to news websites in 2017**



Source: ACCC analysis based on data provided to the Inquiry.

Note: Referrals to news websites, including those operated by print publishers, radio broadcasters, television broadcasters, and digital natives.

## The ‘atomisation’ and dilution of journalistic content

When news and journalism are accessed via search engines, social media platforms, and news aggregators, it tends to be served to the consumer as a mixture of content from different online media sites. For example, search engines and news aggregators tend to serve links to journalistic content from different outlets, curated according to topic. Social media platforms serve news articles from media businesses one post at a time, as part of a curated news feed, mixed with user generated content. These curation processes inherently involve the ‘atomisation’ of journalistic content: a term used to describe the effect where consumers access journalistic content on a story-by-story basis.

This has the effect of decoupling journalistic content from its producer and may limit consumers’ ability to obtain information they consider important when choosing which articles to read. For example, data from the ACCC News Survey show that when consumers are presented with news articles on their social media feed, search results, or in a news aggregator, 66 per cent of respondents said that recognising and trusting the provider was ‘very important’ (35 per cent) or ‘important’ (31 per cent) as a factor in their decision.<sup>965</sup> By contrast, a separate survey of 1000 school-aged students in 2017 found that around 46 per cent of respondents paid ‘very little’ or ‘no’ attention to the source of news stories found online.<sup>966</sup>

Survey evidence from the UK suggests that consuming news in the atomised environments of social media or search platforms effectively reduces the importance and recognition of brands, compared to when news websites are visited directly (figure 6.5). Around 1600 news consumers were asked to recall which news brand they had used to access a particular online news article. Where consumers had used the news websites of their preferred ‘main brand’ of news publisher, they were able to recall the publisher’s brand 92 per cent of the time. This fell to 80 and 72 per cent respectively when accessing articles from the same publisher’s brand via search and social media platforms. However, where consumers had accessed news articles via search and social media platforms from news publishers other than their ‘main brand’, the majority could not correctly recall the publisher’s brand. In each case, consumers were less likely to recall the publisher’s brand if the article were accessed via search or social media platforms than directly from the publisher’s website.

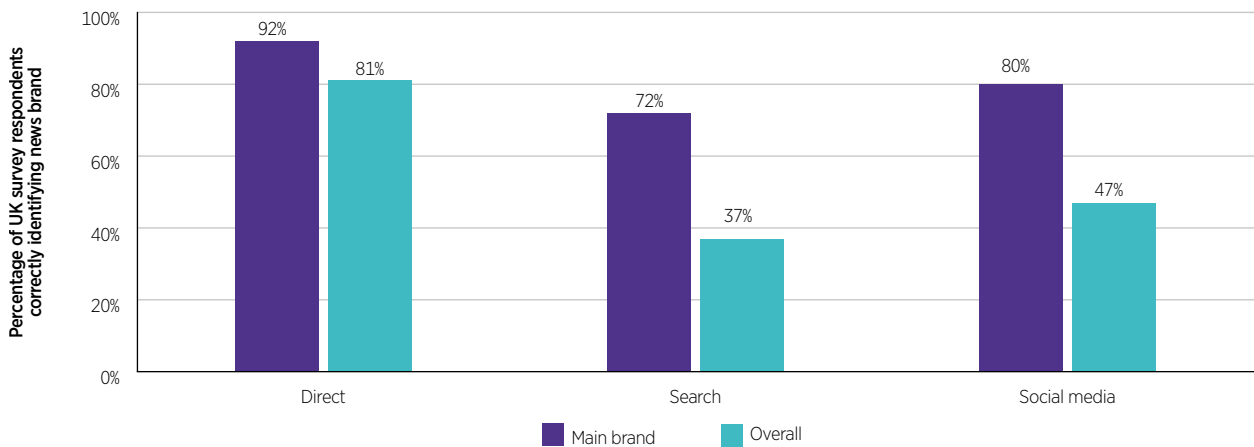
In this way, digital platforms may reduce the value of having an established, familiar brand, as less familiar outlets are able to compete for new audiences on the basis of a single article. On one hand, this may be considered likely to lower barriers to entry, allowing less familiar brands to compete for

<sup>965</sup> Roy Morgan Research, Consumer Use of News, November 2018.

<sup>966</sup> This includes 44 per cent of respondents aged 13–16 years, and 49 per cent of students aged 8–12 years. See T Notley, M Dezuanni, HF Zhong and S Howden., S, [News and Australia’s Children: How Young People Access, Perceive and Are Affected by the News](#), *Crinkling News*, Western Sydney University and Queensland University of Technology, Sydney 2017, p. 9.

audiences. On the other hand, limited brand recognition may also reduce the incentives for new brands to build recognition and trust via the platforms and reduce the ability for media organisations to convert readers to subscribers.

**Figure 6.5: Brand attribution for online news, by method of access**



Note: Based on a survey of 1609 adults in the United Kingdom, responding to 3128 surveys about their clicks on news stories.<sup>967</sup>

Moreover, under this atomised model, the success of a particular piece of journalistic content depends on both the operation of any algorithms in the digital platform and, in the case of social media, the ‘sharing’ behaviour among users (box 6.4). This creates an imperative for media companies to optimise their content for algorithms, on an article-by-article basis. This may manifest as a preference for emotional or sensationalised content to act as ‘click bait’ to attract consumer attention.

**Box 6.4: Social media users and unfamiliar news sources<sup>968</sup>**

On Twitter:

*Additionally, when we identify a Tweet, an account to follow, or other content that’s popular or relevant, we may add it to your timeline. This means you will sometimes see Tweets from accounts you don’t follow. We select each Tweet using a variety of signals, including how popular it is and how people in your network are interacting with it. Our goal is to show you content on your Home timeline that you’re most interested in and contributes to the conversation in a meaningful way, such as content that is relevant, credible, and safe.*

On Facebook:

Posts that you might see first include:

- A friend or family member commenting on or liking another friend’s photo or status update.
- A person reacting to a post from a publisher that a friend has shared.
- Multiple people replying to each other’s comments on a video they watched or an article they read in News Feed.
- Keep in mind that if you feel you’re missing posts you’d like to see, or seeing posts in your News Feed that you don’t want to see, you can adjust your settings.

**Citizen journalism and public discourse**

Digital platforms have also enabled governments, corporations and other non-news organisations to directly reach audiences outside of traditional modes of reporting. Effectively, this has allowed individuals and organisations to communicate their message to mass audiences while bypassing journalists and resulted in more sources of news that are not the product of journalistic processes. One

967 A Kalogeropoulos and N Newman, 2017, Brand Attribution when Accessing News from Distributed Environments, Digital News Project 2017, Reuters Institute for the Study of Journalism, Oxford University.

968 Facebook, ‘[Help Centre: What kinds of posts will I see in News Feed](#)’, accessed 26 November 2018; Twitter, ‘[About your Twitter timeline](#)’, accessed 26 November 2018.

example is the use the United States Government has made of the Twitter platform. It has significant Twitter audiences for The White House (17.5 million), the official POTUS account (24.3 million), and the President's personal Twitter account (55.5 million), which are comparable to the reach of large news outlets (*The New York Times* has 42.4 million Twitter followers and 79 million<sup>969</sup> unique visitors per month).<sup>970</sup>

In other cases, digital platforms have allowed individuals to effectively act as journalists, giving rise to online 'citizen journalism'. Through digital platforms, news can be produced, disseminated, analysed and commented upon outside traditional news outlets and publications. Numerous stories have been reported first by individuals on Twitter before being reported by professional journalists.<sup>971</sup> Thus, journalists face some competition from the broader public discourse, even in their core function of reporting news.

### **New possibilities for low-cost production**

A further influence of digital platforms on the media business model is as a means of producing lower-cost journalism. Search engines, as well as social media services (particularly Facebook and Twitter), have become tools for journalists in the news-gathering and reporting process. Journalists use these services as sources for leads, stories, comments and quotes, or photo and video content. Journalists also make use of social media to monitor traditional sources, such as governments and public institutions; to stay current with the stories being published by competing outlets; and to gauge public opinion on various issues.

This function of digital platforms has proven to be a significant influence on business models for media outlets, as a means of reducing production costs. For example, one business model applies to news which has international demand and is therefore scalable with a fixed cost base (box 6.5). There is likely to be less scope for international scale to consistently apply to Australian news.

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969 Refers to data for July 2018, [CNN Remains Dominant in Digital: #1 in All Key Metrics](#), CNN Digital Press Releases, accessed 21 November 2018.

970 As at 1 November 2018.

971 Journalist and media academic Marie K Shanahan provides numerous examples of stories that were first reported on Twitter by non-journalists, from the crash of US Airways Flight 1549 into the Hudson River in 2009, to the police shooting of Michael Brown in Ferguson, Missouri in 2014; see M Shanahan, *Journalism, Online Comments, and the Future of Public Discourse*, Routledge, New York, 2018, p. 28. Wilding et al describe the more recent example of the rescue of a boys' soccer team and its coach in Thailand on July 12 2018; see D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, p. 14.

### **Box 6.5: One example of how digital platforms have impacted business models**<sup>972</sup>

Daily Mail and General Trust proprietor, Lord Rothermere, described to the Shift conference in London how the use of digital platforms played a role in the choice of business model and expansion for the Mail Online:

*“We’re the most shared site on Facebook in the UK, and growing to become the same in the US. Twitter could be a big marketing tool if we used it more effectively, but I don’t think we do that yet. But as a primary source material, we are finding it is one of the major sources of new stories. So I think we are co-dependent.”*

*“If we were looking at just a UK environment we would be absolutely forced down the road of charging for content, because there would be no other way of replacing our total revenue. But I think the opportunity of reaching an English speaking audience globally with a pretty fixed cost base, so that it’s not going to grow in line with the number of audience, means that there is potentially a much larger ad cake out there.*

*“And if you keep your fixed cost base tight and you start growing your traffic and you get your advertising in then eventually you’ll start becoming quite profitable quite quickly. With newspapers you grow your audience and you have a higher marginal cost. So it’s a different kind of business model. That’s the game we’re trying to play at the moment.”*

*“If we don’t get to the right size then that will be the issue and we’ll have to start becoming more focused on charging for content.”*

#### **6.6.4 Exploring different business models**

Overall, digital platforms have significantly changed the commercial environment and incentives facing media businesses.

- Advertising revenue is no longer tied to print and broadcast infrastructure, and online advertising revenue is heavily geared towards intermediary platforms as opposed to content producing websites themselves
- Media businesses cannot avoid partnering with digital platforms, in relationships where they are unlikely to have bargaining power regarding terms
- The competition among producers of news and journalism is now on a story-by-story basis, as media businesses are less able to rely on their established brands.

Box 6.6 explains how media businesses generate revenue online, either via their own websites or via key digital platforms.

<sup>972</sup> Press Gazette, [How The Guardian inspired Mail Online to become a global brand](#), 23 April 2013, accessed 21 November 2018.



## Box 6.6: Advertising on online content

News websites:

- Advertising revenue on news websites is generated through display advertising. These ads are priced in one of the following ways:
  - Cost-per-click (CPC)—the advertiser pays every time the ad is clicked.
  - Cost-per-mille (CPM)—the advertiser pays each time their ad is displayed and the price is per one thousand impressions.
  - Cost-per-acquisition (CPA)—the advertiser pays when an ad leads to a sale/conversion. This is also referred to as cost-per-conversion.

Facebook:

- Where content is posted by media organisations on Facebook, users who click on a given article are referred to that publisher's website. Publishers are paid according to the advertising on their own news websites.
- Where content is hosted directly on Facebook as Instant Articles, publishers can sell direct ads where they keep 100 per cent of the revenue. Alternatively, publishers that sell their advertising space via Facebook Audience Network service have received the majority of the revenue collected from the advertiser and the remainder is kept by Facebook. Directly sold and Audience Network ads can be priced using any of the above methods.<sup>973</sup>
- Where publishers post videos on Facebook, ads can be served before the video and are priced based on the number of ten-second views of the video or on a CPM basis.<sup>974</sup>

Google:

- Where users of Google Search or Google News click on a given article, they are referred to that publisher's website. Publishers are paid according to the advertising on their own news websites.
- Where video content is hosted on YouTube, ads can be served before the video and revenue is split between Google and the publisher (the details of the split are not public)<sup>975</sup>. Ads are priced on a number of views and CPM basis.<sup>976</sup>

Apple News:

- Where users of Apple News click on a given article, they are referred to that publisher's website. Publishers are paid according to the advertising on their own news websites.
- Publishers can also generate revenue by selling advertising in Apple News. Ads can be direct-sold by the news publisher (retaining 100 per cent of the revenue) or sold by Apple on the publisher's channel and articles (with publishers retaining 70 per cent of the revenue). Ads appearing between articles in Apple-curated feeds (e.g. For You; Today; Technology etc.) allows a 50 per cent revenue split.<sup>977</sup> Ads are sold on a CPM basis.<sup>978</sup>

## Emergence of other business models

One of the main forms of experimentation is with regard to paywalls for digital news content. Of 98 newspapers surveyed by American Press Institute, 62 used metered paywalls for digital content, 12 Freemium paywalls, and 21 relied on ad-funding.<sup>979</sup> Of 171 European news publishers surveyed by the Reuters Institute, around two thirds are also adopting digital pay models.<sup>980</sup>

The Reuters Institute notes that:

973 Facebook for Developers, [FAQ Monetization](#), accessed 21 November 2018.

974 Facebook Business, [About video ad bit types](#), accessed 21 November 2018.

975 YouTube Help, [YouTube partner earnings overview](#), accessed 21 November 2018.

976 Google Ads Help, [About video ad formats](#), accessed 21 November 2018.

977 Apple, [Advertising platforms: Apple News for publishers](#), October 2018, accessed 21 November 2018, p. 6.

978 Apple, [Advertising platforms: Apple News for publishers](#), October 2018, accessed 21 November 2018, p. 40.

979 A Williams, [How digital subscriptions work at newspapers today](#), American Press Institute, 29 February 2016, accessed 3 December 2018.

980 A Sehl, A. Cornia, RK Nielsen, and F Simon, [Pay Models in European News](#), Reuters Institute, 2017, accessed 3 December 2018.

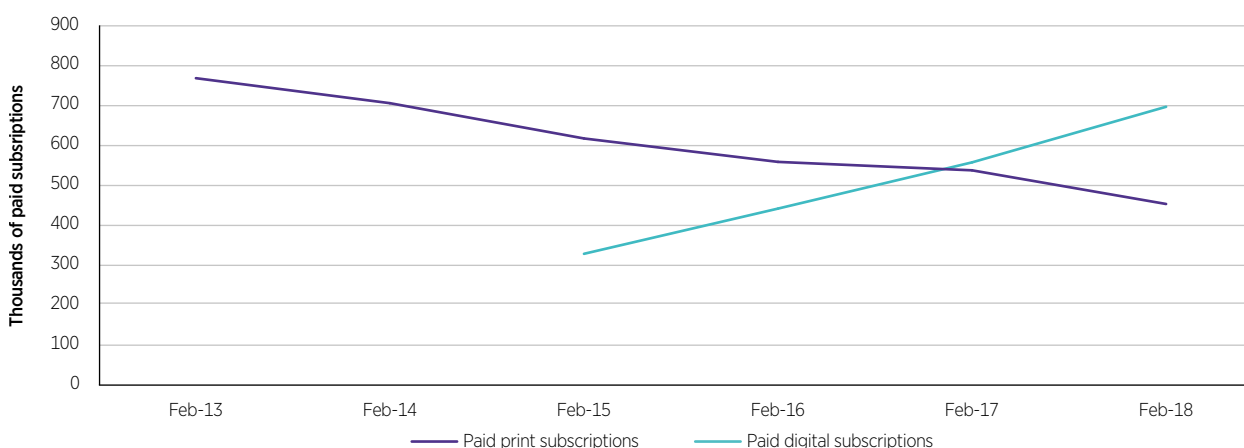
*For now it seems as though many publishers are hedging their bets. Most print and digital-born publishers in (their) survey are pursuing multiple revenue streams, with an average of six different options viewed as very or quite important.<sup>981</sup>*

Many of the changes in the Australian media landscape are inextricably linked to the significant and varied influence of digital platforms on the commercial environment for media businesses, and the implications for media business models. Emerging media business models are discussed further in chapter 7.

## Subscriptions in Australia

News subscriptions are of increasing significance in Australia (figure 6.6). Data obtained by the ACCC from the major print news publishers (Fairfax, News Corp Australia, and Seven West Media) show that subscriptions for their print newspapers alone have fallen by around or 40 per cent in the past five years. However, the available data suggests those same publishers have experienced an increase in the number of subscriptions with regard to digital editions (or combinations of digital and print editions) or around 400 000 subscriptions since late 2014. On balance, there has been a net increase in total paid subscriptions for the three major print publishers in the past four years, with most subscriptions having some digital element.

**Figure 6.6: Paid print and digital subscriptions for major print publishers**



Source: ACCC analysis based on data provided to the Inquiry.

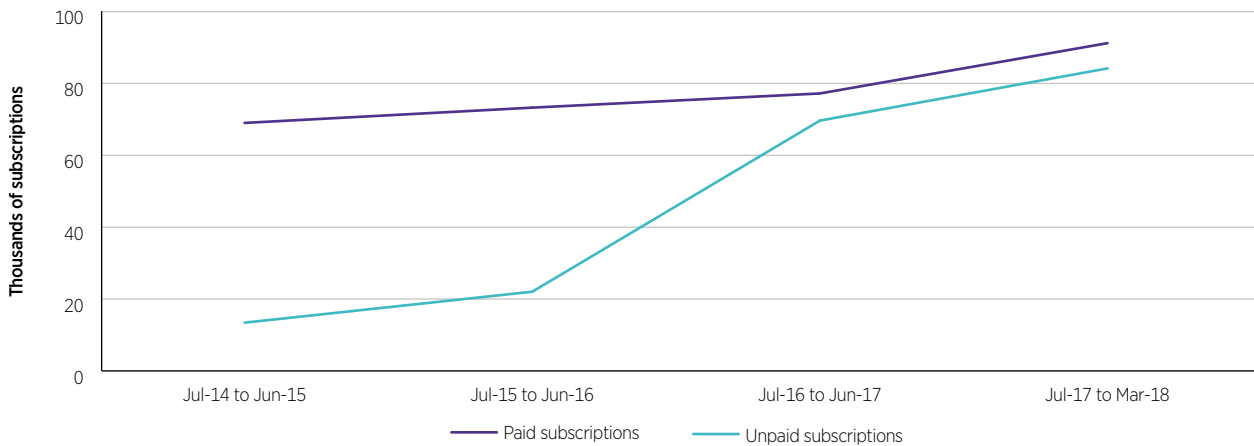
In the past four years, some smaller digital publishers have collectively accounted for increasing numbers of subscriptions (figure 6.7). Data obtained by the ACCC show that for three such businesses, the sum of paid subscriptions had grown by 27 per cent in the past four years, although remaining under 100 000 in number. However, subscription growth for these companies has been much stronger for unpaid subscriptions (which require users to sign up and log in, potentially providing personal details, but not monetary payment). This suggests that they are using subscriptions to build an audience more than as an immediate additional source of revenue.

The overall relatively low level of subscriptions across both traditional print and smaller, new entrant media businesses evident in figures 6.6 and 6.7 is consistent with consumer surveys of consumer habits and attitudes. Survey results suggest that relatively few Australians are in the habit of paying for journalistic content. While the 2018 University of Canberra survey found that the proportion of respondents paying for online news rose from 10 per cent in 2016 to 20 per cent in 2018, the majority of Australians still did not intend to pay for news.<sup>982</sup>

981 N Newman, [Journalism, media, and technology trends and predictions 2018](#), Digital News Project, 2018.

982 S Park, C Fisher, G Fuller, and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, pp. 71-76.

**Figure 6.7: Paid and unpaid digital subscriptions for three smaller digital news businesses**



Source: ACCC analysis of information provided to the Inquiry.

## 6.7 Impacts on the resourcing of journalism in Australia

### Key findings

- While experiences vary between businesses, the general trend in advertising revenue has been negative for print (now print/online) publishers. This has been caused by:
  - the loss of classified advertising revenue
  - the loss of non-classified and display advertising revenue
  - the movement of audiences from print to digital publications.
- Regional print publishers and broadcasters have suffered a decline in advertising revenue. This may be partly due to a decline in audience numbers for these services.
- The number of journalists employed in Australia has decreased over the past 12 years, with significant reductions occurring within the past five years:
  - print publications (now print/online publications) have seen the most significant decrease in journalist numbers
  - new entrants, particularly digital natives, have added a modest number of journalist jobs.

Changes to the media business model have had significant implications for the production of journalistic content in recent years, particularly in terms of:

- the impacts on advertising revenue of established outlets, and the subsequent impacts on the production of journalism
- the impacts on the entrance and growth of new competitors, particularly digital natives, and their contribution to the production of journalism.

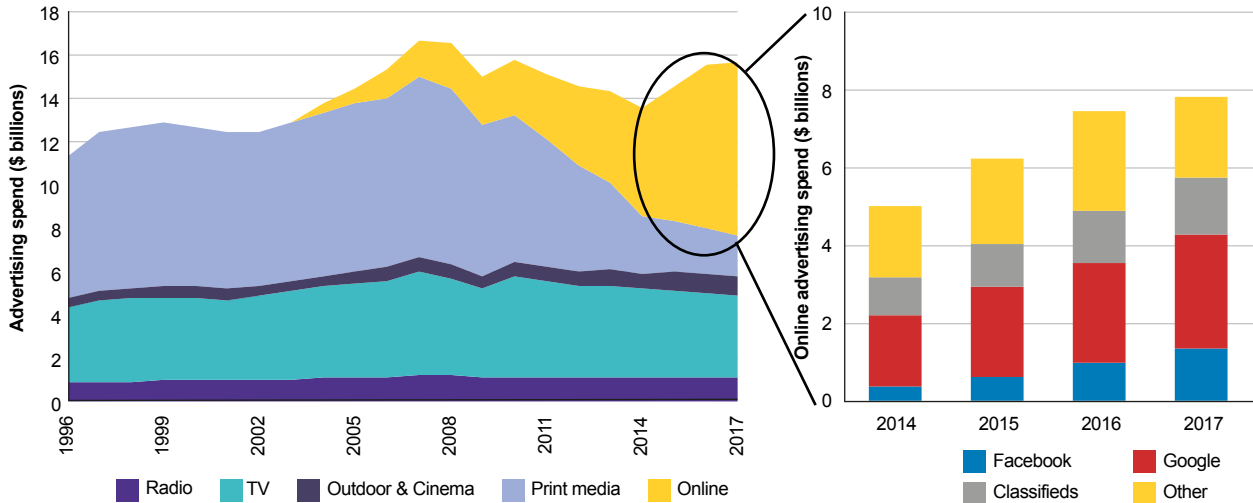
### 6.7.1 Impact on the advertising revenue for media businesses

Overall, advertising revenues flowing to the print (now print/online) sector have changed dramatically in the past decade. A reduction in the print advertising revenue of commercial Australian media publishers has been accompanied by a rise in spending on online advertising (figure 6.8, left panel). It is also clear that digital platforms have taken an increasing share of advertising expenditure with a significant portion of the increase in online advertising revenue from 2014–2017 going to Google and Facebook (figure 6.8, right panel).

The ACCC has sought to isolate causes for the reduction in the advertising revenue of the large media businesses, and in particular whether the reduction in advertising revenue may reflect a potential reduction in overall consumption (i.e. fewer eyeballs to sell) rather than an increased difficulty to monetise the publisher’s or broadcaster’s audience.

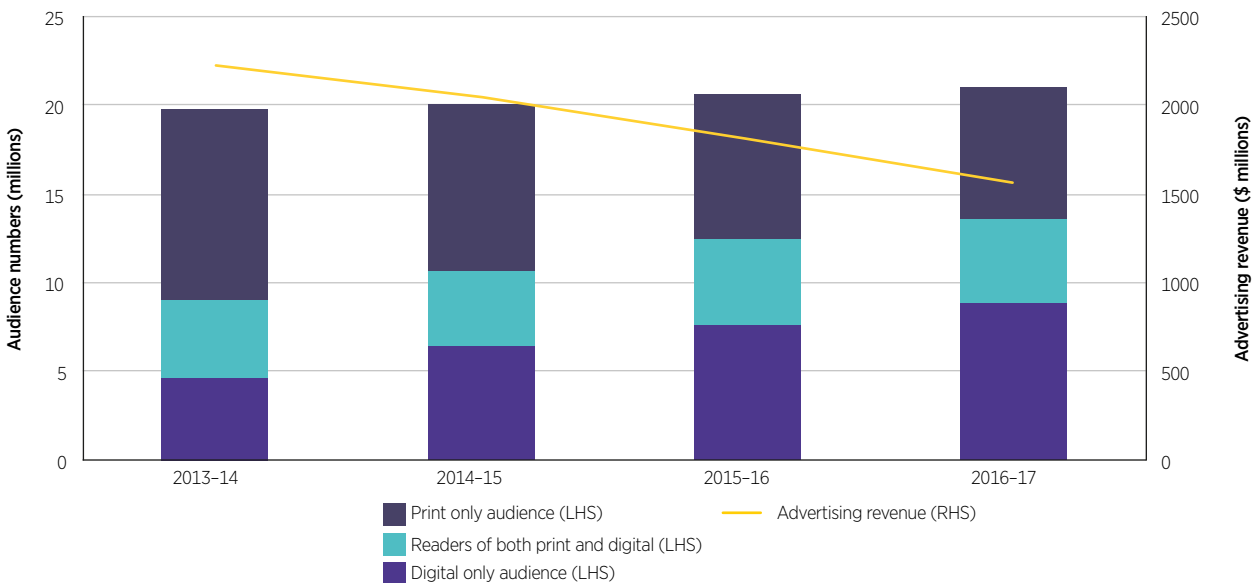
However, our analysis suggests that in the past five years, the three largest print/online publishers have, collectively, seen an increase in total cross platform audiences, driven by increases in website and app usage (figure 6.9). This suggests that reductions in advertising revenue are not due to an overall decrease in audience numbers, but to changes in the ability to monetise an increasingly digital product mix.

**Figure 6.8: Australian advertising expenditure by media format and digital platform**



Source: ACCC analysis based on CEASA data and information provided to the Inquiry.<sup>983</sup>

**Figure 6.9: Advertising revenue and readership for selected print mastheads**



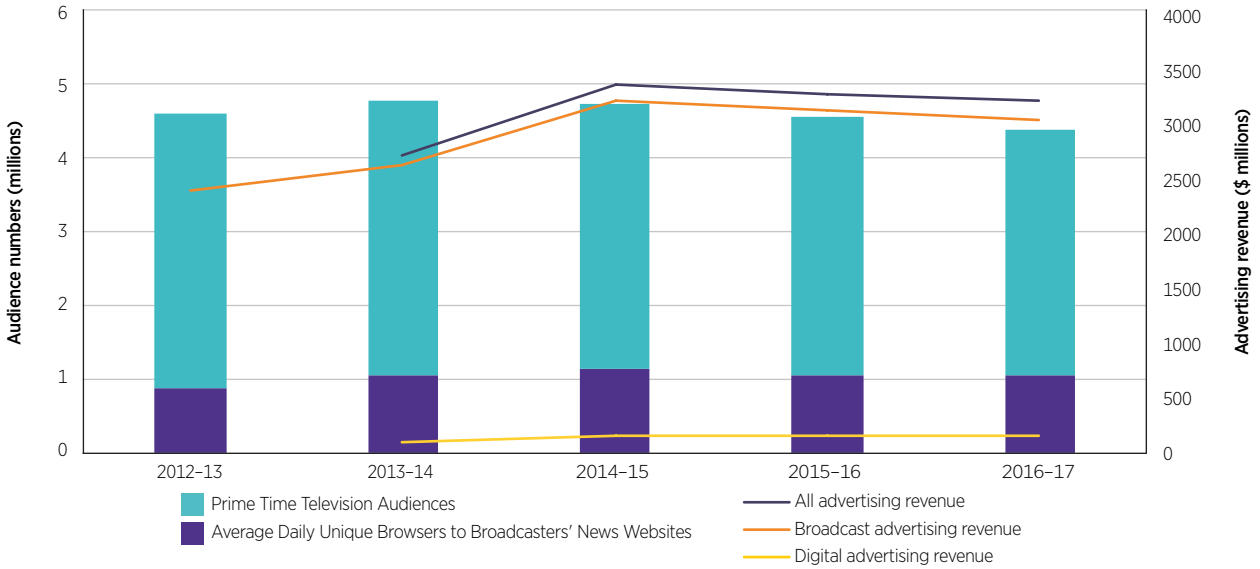
Source: ACCC estimates based on information provided to the Inquiry and Roy Morgan Single Source Australia: Jan 2010–Dec 2017.

Trends for other media formats have differed from those of print (now print/online) publishers. For example, television broadcasters have not experienced shifts in their audience from their television offerings to their news websites. Radio use in Australia remains high with 88 per cent of Australian adults listening to some radio in an average seven-day period in the 12 months to June 2017.<sup>984</sup> This may reflect the fact that news accounts for a small part of the overall television offering (figure 6.10) and also because of the ways, and also the time of day, in which television is typically consumed, which remains different to print and online news sources. Advertising revenue for metro television broadcasters remains largely tied to broadcast audience numbers.

983 Data are adjusted for inflation.

984 ACMA, [Communications Report 2016-17, 2017](#), p 65.

**Figure 6.10: Advertising revenue and audience figures for commercial broadcasters**

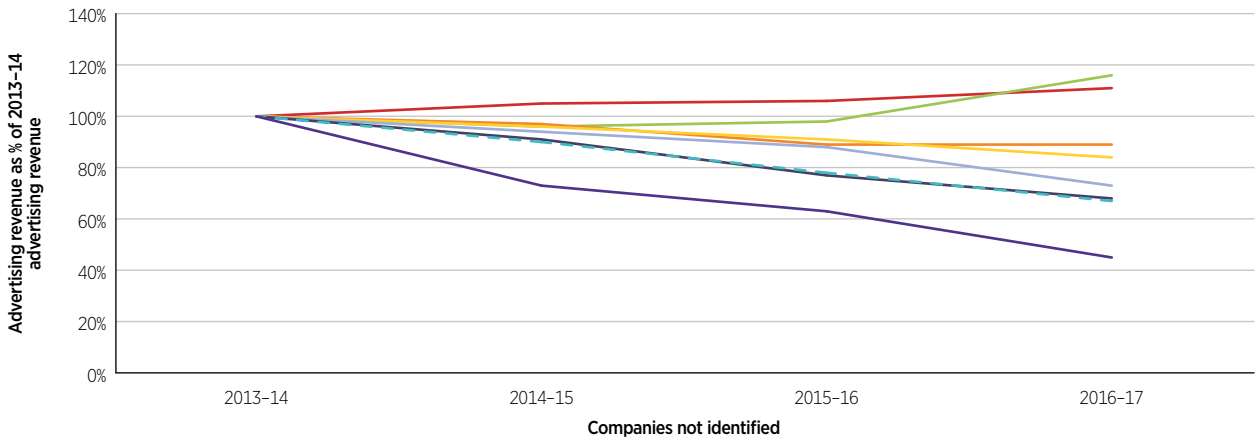


Source: ACCC estimates based on data provided to the Inquiry and OzTAM, Regional TAM, Nielsen Digital Panel.

### Regional advertising revenue

Advertising revenues for most regional newspapers and broadcasters fell over the past five years (figure 6.11). However, unlike publishers and broadcasters with a metro or national focus, regional outlets have experienced reductions both in readership for newspapers, and viewership for television. The combined readership for community newspapers under Fairfax and News Corp Australia (many of which are in regional areas) fell by for 37 per cent between 2010 and 2017.<sup>985</sup> At the same time, the combined prime time daily audiences regional television fell by 38 per cent.<sup>986</sup> And unlike metro television broadcasters, regional broadcasters have been less likely to expand into running a text-based news website.<sup>987</sup>

**Figure 6.11: Reductions in advertising revenue for regional newspaper publishers and television broadcasters**



Indices of advertising revenue for selected regional newspaper groups and television broadcasters (not identified); 2013-14 = 100

Source: ACCC analysis of data provided to the Inquiry.

985 Roy Morgan Single Source Australia: Jan 2010–Dec 2017.

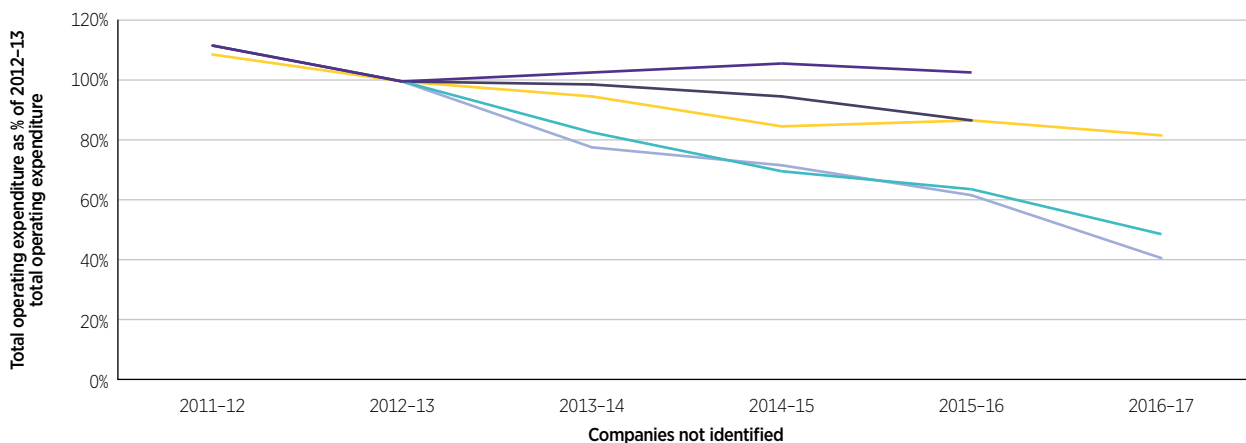
986 Regional TAM database.

987 For example, at the time of writing, WIN does not operate a dedicated news website. Southern Cross Australia's news is an embedded catch-up of the previous televised bulletin. By contrast, Nine Entertainment Co. runs several dedicated news websites. Seven West Media runs a dedicated news website in a joint venture with Yahoo!.

## 6.7.2 Cuts to costs and employment

The reductions in advertising revenue have reportedly led to reductions in both operational expenditure and employment of editorial staff. Major metro and national newspaper mastheads implemented significant reductions in operational expenditure in the past five years, with some halving their expenditure during this period (figure 6.12). Regional newspapers and television broadcasters have also implemented significant reductions in operational expenditure (figure 6.13). The available data indicates the reductions in expenditure generally reflect cuts to both staffing and non-staffing costs. It appears likely that the reductions in advertising revenue across the board have had some impact on the amount of resourcing for the production of content by various media businesses.

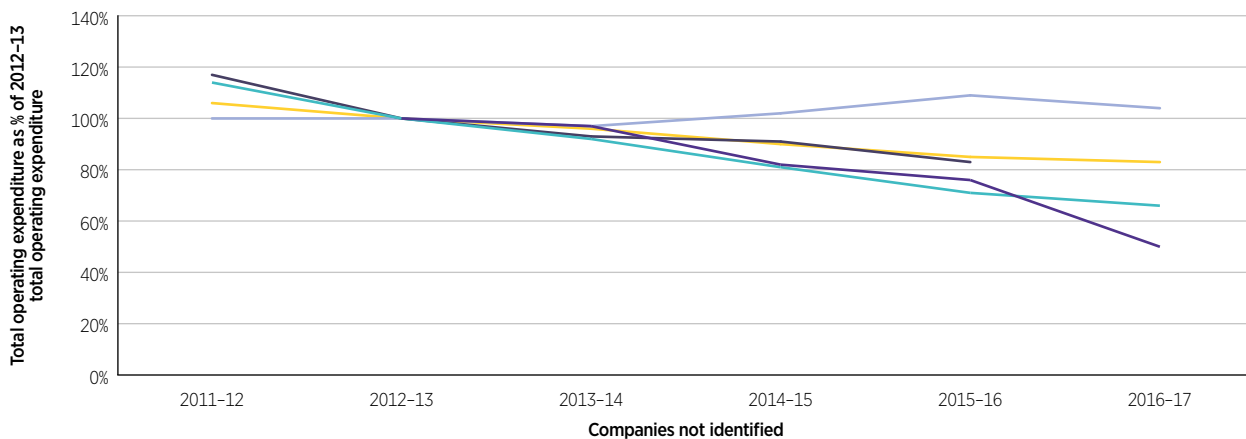
**Figure 6.12: Cuts to expenditure in major metro and national newspapers**



Indices of operational expenditure for selected metro and national newspapers (not identified); 2012-13 = 100

Source: ACCC analysis of data provided to the Inquiry.

**Figure 6.13: Cuts to expenditure in regional newspaper and television**



Indices of operational expenditure for selected regional newspaper groups and television broadcasters (not identified); 2012-13 = 100

Source: ACCC analysis of data provided to the Inquiry.

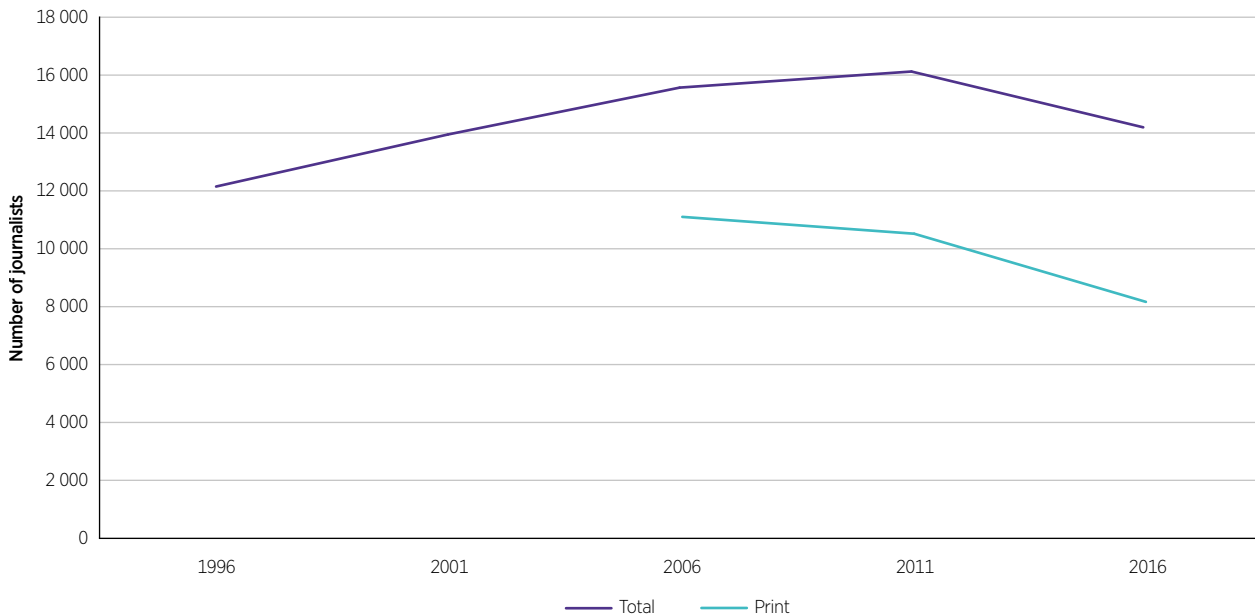
### Reductions in the number of print journalists

Evidence suggests that one of the main ways in which media businesses have cut their costs has been through the reduction in the employment of editorial staff (boxes 6.7 and 6.8). Data from the Census show that the number of journalists employed in 2016 was lower than five and 10 years prior, with the decline occurring largely among print journalism in particular (figure 6.14). The data show that from 2006 to 2016, the number of people in journalism-related occupations fell by 9 per cent, and by 26 per cent for traditional print journalists. While these estimates are based on large samples, they do rely on individuals self-identifying as journalists, and include those employed part-time, full-time, as well

as freelance journalists.<sup>988</sup> This decline in journalist jobs occurred at a time when Australia’s population and economy were growing strongly.

Data on full-time equivalent journalist jobs, provided to the ACCC from Australian media companies, confirms that the reductions in the employment of journalists have largely occurred in print media (figure 6.15). Data provided by companies show the number of journalists in traditional print industries fell by 20 per cent from 2014 to 2017. And while experiences vary between individual companies, there has been less change in the numbers of journalists employed within radio and television, for both commercial and public broadcasters. The reductions in print journalist numbers are also consistent with reported information (box 6.7).

**Figure 6.14: Employment of journalists in Australia by total and print media**



Source: ABS Census

The number of journalists in the Census data is substantially higher than the full-time equivalent journalist numbers obtained from media companies. This is partly because Census numbers include freelance journalists, do not distinguish between part-time, full time and casual employees and rely on self-identification by citizens. Census data also include magazine journalists, periodical editors and other journalists working for companies from which the ACCC did not receive data. While the two data sets therefore show significantly different absolute numbers and are not directly comparable, they are consistent in showing a downward trend in the number of print journalists over the past five to 10 years.

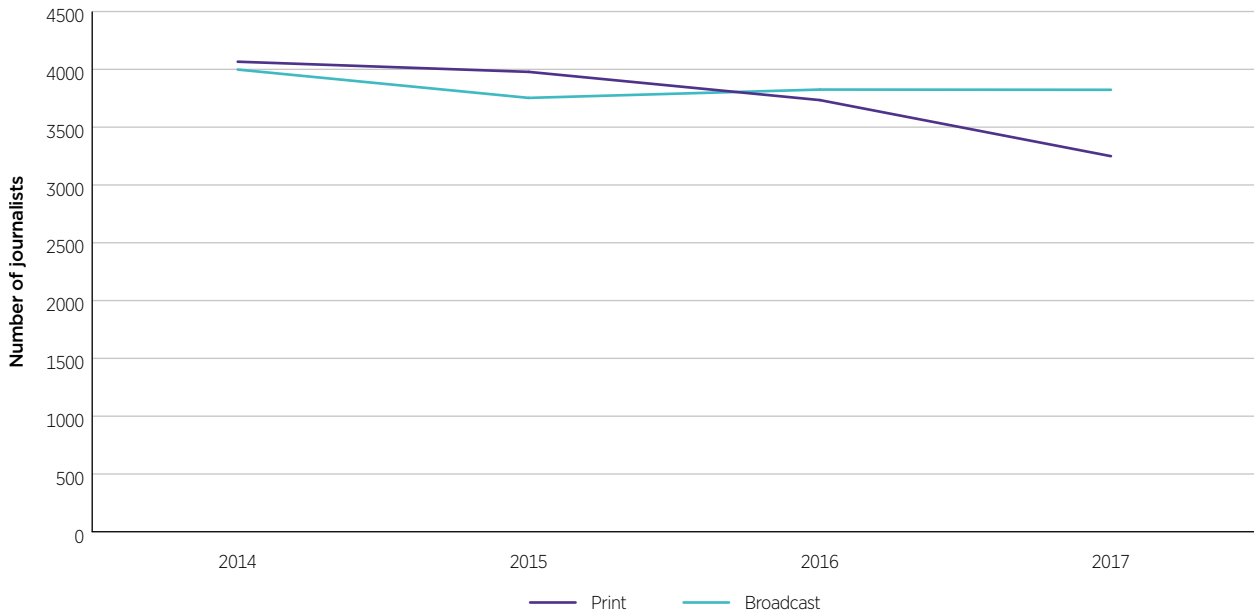
The observed reductions in the numbers of print journalists is consistent with observations that advertising revenue has reduced more significantly for print media businesses than for businesses in other media formats. Neither the Census nor other data suggest that the journalist jobs lost in print media companies have been counteracted by corresponding increases in employment in other media formats.

Cost reductions have not been limited to staffing expenses. Among regional publishers and broadcasters, for example, cost reductions have taken other visible forms (box 6.8). These range from the closure of newspapers, to the consolidation of broadcasting operations.

988 Due to these characteristics, Census data is not comparable to data collected by the ACCC from media companies on the full-time equivalent number of journalists employed.



**Figure 6.15: Full time equivalent employment of journalists in Australia by media format**



Source: ACCC analysis of data provided to the Inquiry.

### **Box 6.7: Examples of reported job cuts by Australian newspapers**

News Corp Australia (formerly News Ltd)

- On 20 June 2012, News Ltd announced a restructure with an unspecified number of redundancies.<sup>989</sup>
- Leaked financial documents in August 2014 revealed approximately 1000 jobs were lost from 2012–13.<sup>990</sup>
- On 28 May 2015, 30 further jobs were lost with News Corp’s decision to close MX, a free newspaper in Melbourne, Sydney and Brisbane.<sup>991</sup>
- In September 2016 *The Australian* announced that News Corp’s planned acquisition of APN’s Australian Regional Media would result in up to 300 job losses through ‘back office synergies’. In December it announced that another 42 editorial positions would be lost due to measures to save \$40 million.<sup>992</sup>
- In May 2017, 70 photographers were made redundant. *The Guardian* reported that five News Corp photographers will remain in Queensland (down from 20), and 20 will remain in NSW, down from at least 55. *The Guardian* claimed that there will be further cuts to production staff next.<sup>993</sup>

Fairfax Media

- On 17 March 2016, Fairfax Media announced that it proposed to reduce costs across its News and Business units in Sydney and Melbourne newsrooms by the equivalent of 120 full-time employees through a combination of redundancies, tightened budgets and reduced travel expenses.<sup>994</sup>
- This marked the latest in a series of rationalisation and staffing cuts following an announcement on 18 June 2012 that the company would cut 1900 jobs.<sup>995</sup>
- On 5 April 2017, Fairfax Media announced a further 125 editorial staff job losses, or a quarter of editorial staff, and its intention to reduce its editorial budget by \$30 million.<sup>996</sup>

989 News Limited, [News Limited announces new strategic actions for growth](#), media release, 20 June 2016

990 A Meade, [News Cop Australian leaked accounts show 1000 jobs cut across mastheads](#), *The Guardian Australia*, 20 August 2014.

991 J Rolfe, [MX commuter newspaper closes](#), news.com.au, 28 May 2016

992 *The Australian*, 300 jobs to go in news corps ARM acquisition, 12 September 2017

993 A Meade, [Up to 70 News Corp Australian photographers made redundant](#), *The Guardian Australia*, 15 May 2017.

994 Fairfax Media, [Statement relating to unprotected industrial action](#), media release, 17 March 2016.

995 Fairfax Media, [Fairfax of the future](#), media release, 18 June 2012.

996 A Meade, [Fairfax Media to cut a quarter of journalists at SMH, the Age and AFR](#), *The Guardian Australia*, 3 May 2017.

#### Seven West Media

- On 11 June 2013 Western Australian Newspapers (WAN) announced a loss of 100 jobs.<sup>997</sup>
- This was reported to be the company's third round of redundancies in the previous six years.<sup>998</sup>
- In June 2016 Seven West Media purchased *The Sunday Times* from News Corp. Thirty editorial positions were cut from *The West Australian* in preparation of the takeover, and 20 positions were expected to be cut from *The Sunday Times*.<sup>999</sup>

#### **Box 6.8: Reported cuts and closures in local and community news**<sup>1000</sup>

- In January 2018, NewsLocal, NCA's community newspaper business in New South Wales, reduced print publication of *The Manly Daily* to just two days per week.
- In December 2017, Fairfax's Australian Community Media closed six Sydney newspapers, citing unsustainable long-term commercial viability. This included *Hills News*, *Rouse Hill Courier*, *Penrith City Gazette*, *St Marys-Mt Druitt Star*, *Blacktown Sun* and *Parramatta Holroyd Sun*.
- In June 2016, Leader Community Newspapers, News Corp's community newspaper business in Victoria, ceased publishing seven Leader mastheads that were no longer commercially viable. The Leader publications affected included Wyndham, Hobsons Bay, Melton, Brimbank, Melbourne/Yarra, Berwick and Free Press.
- In March 2016, as part of an ongoing operational restructure and review of its community publishing business, Fairfax Media announced the move to a compact print format for *The Canberra Times*, the closure of two community print newspapers and their associated websites (*Cooma-Monaro Express* and *Summit Sun* in Jindabyne) and the merger of *The Queanbeyan Age* with the Queanbeyan edition of *The Chronicle*.
- In 2017, Nine Entertainment Co restructured its Darwin newsroom and consolidated it with its Queensland Bureau. The local Darwin bulletin was integrated as part of the broader state-wide Queensland regional bulletin.
- In 2018, WIN Television moved the presentation and broadcast of its Tasmanian news bulletin to studio facilities in Wollongong, NSW, halving its Tasmanian newsroom from 18 to nine staff.<sup>1001</sup>
- In 2018, Community Newspaper Group closed five of its 17 community newspapers in Perth.

### 6.7.3 Impact of new entrants

Evidence suggests that digital platforms have played an influential role in enabling the entry of new competitors, increasing the diversity of news sources available to Australians. A range of businesses have entered as 'digital natives' in the past five to 10 years (see table 6.1). The rise of digital natives has coincided with the influence of digital platforms in:

- the atomisation of journalistic content, allowing less familiar brands to compete for audiences on an article-by-article basis
- the ability to access and compete for large pooled audiences via the platforms' large user bases
- opportunities to exploit low fixed-cost methods of production of journalistic content.

These changes have been linked directly to decisions by media businesses to expand into new markets (section 6.6, box 6.5).

In Australia, the evidence suggests that digital natives typically rely significantly on digital platforms for website referrals (particularly from Google and Facebook). However, the reliance varies: for example, news outlets like *Buzzfeed News Australia* use Facebook posts extensively as a means of reaching audiences.

997 R Greenslade, [More Australian journalists set to lose their jobs](#), *The Guardian Australia*, 11 June 2013.

998 P Cai, [Seven West cuts jobs](#), *Sydney Morning Herald*, 12 June 2013.

999 ABC News, [The West Australian newspaper to cut 30 editorial jobs ahead of Sunday Times takeover](#), 30 June 2016.

1000 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p. 122; Nine Entertainment Co., [Submission to ACCC Digital Platforms Inquiry](#), 3 May 2018; E Young and H Hastie [Perth media diversity takes next hit as five community newspapers shut](#), *WA Today*, 9 August 2018.

1001 R Shine, [WIN Television's local news bulletin signs off in Tasmania, audience decline feared](#), *ABC News*, 18 August 2018.

To date, most digital natives have operated with relatively small newsrooms, with many employing fewer than 20 journalists, with a few exceptions employing up to 70 and 100 FTE staff.<sup>1002</sup> The ACCC estimates that fewer than 250 editorial staff were employed across six of the larger digital native outlets in 2018, whose collective monthly unique audience was around five million people in 2018.<sup>1003</sup> Collectively, the number of journalists employed by digital natives appears to be much smaller than the number of editorial job losses among print publishers over recent years.

Data provided to the ACCC suggests that many new entrants initially run at a loss, particularly during the first years after launching.

#### 6.7.4 Overall impact of digital platforms on resourcing of journalism

Media businesses are in a period of transition as they seek ways to respond to loss of traditional sources of revenue, largely to the digital platforms, and changing consumer preferences and habits. The traditional print media businesses are most significantly affected by these changes and, while they are moving to online business models and seeking to economise on costs, there has been a decline in employment of journalists in the print sector as advertising revenue has declined.

Television and radio broadcasters, by comparison, have continued to rely more heavily on their traditional media formats for advertising revenue. While they are involved in online media, and have been exposed to the same elements as online newspapers, they are currently less reliant on their online presence for revenue.

Regional news outlets have also fared poorly overall in terms of advertising revenue, although this appears to result from a number of factors. For instance, regional audiences have declined for both broadcasters and publishers. In addition, regional outlets have not had the same shift to online editions experienced by major print mastheads. As such, their challenge continues to be providing a public good to a relatively small and declining audience.

In terms of plurality and the level of 'choice' available to consumers, digital platforms appear to have had some influence in increasing the number of news outlets operating in Australia. However, the focus of the new entrants has tended to be national news and not local or regional news or issues. This reflects the fact that digital natives tend to be smaller outlets and are likely to sacrifice breadth or depth of coverage compared to larger outlets. The next section considers the influence of digital platforms on coverage, and implications for plurality.

#### Implications of revenue reduction on journalism quality

While loss of advertising revenue appear to have led to a reduction in the resourcing of journalism production, it is difficult to clearly identify the extent to which this has affected the choice and quality of journalism. There is evidence that news media businesses have implemented cost-savings in areas other than in core journalistic activities where possible. This includes cutting unnecessary costs and obtaining efficiencies from improvements in technology or increasingly shifting away from traditional, more expensive, distribution models towards lower cost models based online and on digital platforms.

Notwithstanding these cost savings, print/online media has also made substantial reductions in the number of employed journalists with consequences for journalism production. This reduction in the resourcing of journalistic activities could potentially be reflected in a reduction in either the quantum or the quality of journalism produced or a combination of the two. These reductions could potentially be reflected in the type or depth of journalistic content or in aspects of production such as sub-editing.<sup>1004</sup>

1002 ACCC analysis of data provided to the Inquiry, as well as information from *The Conversation*, 'Our Team and Boards', accessed 13 November 2018; and from *New Daily*, 'About', accessed 13 November 2018.

1003 ACCC analysis of data provided to the Inquiry, as well as Nielsen Digital Panel 2018 data; information from *The Conversation*, 'Our Team and Boards', accessed 13 November 2018; and information from *New Daily*, 'About', accessed 13 November 2018.

1004 A Hayes, [70 jobs in the air after Fairfax proposes moving NZ sub-editing hubs back to Pagemasters](#), *Mumbrella*, 16 February 2016; A Meade, [Fairfax Media to get rid of subeditors and photographers at regional papers](#), *The Guardian Australia*, 16 October 2014.

A further question pertains to whether this financial constraint has had a disproportionate impact on the production of those types of journalism that contribute most to the public interest. The next section considers how digital platforms may have influenced the types of journalistic content produced.

## 6.8 Impacts of digital platforms on journalistic coverage in Australia

### Key findings

- Digital platforms have significantly altered the incentives for the production of different aspects of journalistic coverage:
  - The commercial importance of scale has led to greater incentives for news of broader appeal, regardless of their public interest value.
  - The ability of journalists to make use of audience metrics and feedback has influenced the production of journalism towards the preferences of digital platform users.
  - The atomisation of news exposes individual topics of journalistic coverage to commercial forces, creating genre-specific risks of under-provision.
- Digital native media outlets have contributed to the plurality of editorial voices, often on issues of national significance. They have been less likely overall to focus on local and regional news.
- The online discourse on social media includes significant incidence of abuse towards journalists. This risks having a ‘chilling effect’ on the practice of journalism.
- Pre-existing issues around the ‘fair use’ provisions in copyright law that apply to news and journalism, and their implications for journalism production, have been exacerbated by internet technology, as well as by the commercial incentives and structures of the digital platform era.
- There is a risk that digital platforms may potentially reduce incentives to invest in original content as a result of key algorithms failing to rank original content higher than re-purposed or effectively duplicated content. However, the ACCC recognises that there are significant difficulties in recognising originality. While the treatment of original content could potentially be settled through revisions to copyright law, or through journalistic or media codes of practice, any changes would need to sufficiently protect the ability of news media to disseminate information to consumers and society.
- Snippets that are used by digital platforms to provide information to consumers about the news items behind search results have potential benefits for consumers, who obtain information relevant to their choice of news item, for news businesses, which attract visitors to their online news service, and to the platforms themselves, which maintain the quality of their search or social media services. However, there may also be detriments for news businesses if a snippet satisfies a consumer’s need and does not lead to a visit to its website.
- There are relatively poor incentives online for types of coverage that may have smaller audiences, regardless of their significant contributions to the public interest (e.g. local and regional news and court reporting).

The ability of journalism to contribute to the public interest depends not only on the ability of businesses and organisations to fund the production of journalism, but also on the kind of content ultimately produced. In the context of changes to the media business model, and their implications for resourcing, some pertinent questions include:

- Will some forms of coverage be inherently more viable than others?
- Given that many types of journalistic content contribute to the public interest, will news outlets still produce the same breadth of coverage?
- Given the value of journalism processes in ensuring the reliability of information, how do digital platforms recognise and reward such processes?
- Will different types of news outlets have the incentive to cover the same breadth of stories? In other words, while there may be a plurality of voices, will this be evident with regard to different topics?

While these questions relate to media organisations' own decisions as producers of journalistic content, the structures and incentives around these decisions are inherently influenced by digital platforms.

### **Different types of coverage now compete with each other**

As noted above, the journalistic content that consumers access via digital platforms has been 'atomised'. That is, while consumers of newspapers, bulletins or websites are exposed to a bundle of journalistic content produced and curated by a single media organisation (and which would typically involve a variety of journalism types), when curation roles are performed by digital platforms, media companies compete for audiences on a story-by-story basis.

This effectively exposes individual articles of journalistic content to the commercial incentives of online news distribution, which has implications for how media organisations allocate resources and determine their coverage across the news spectrum. This provides commercial tension between different forms of coverage, in terms of topic, depth, and presentation.

### **Digital platforms curate content**

The influence of digital platforms on 'coverage' is driven by how content is curated and served to users. For example:

- Search engines may influence coverage to the extent that they may help determine the visibility of news articles from various outlets.
- Similarly, social media platforms determine the circumstances in which journalistic content posted by media organisations is served to platform users, albeit in the context of non-journalistic and user-generated content, and based on the user's profile as opposed to a search undertaken by the user.
- Consumers who rely on social media as their sole source of news could be repeatedly exposed to news stories or sources that share similar views, but may also be exposed to unfamiliar news sources that they have not chosen. This depends not only on the operation of algorithms, but also users' past interactions on the platform, and the links shared by others to whom they are connected.
- News aggregators also curate journalistic content from several providers, either based on what is assumed to be in the user's interest, or based on the user's own search parameters. Newer forms of aggregators, particularly those providing audio news results (such as Google Home or Amazon's Alexa), are potentially more influential in the user's decision-making process, given that they may return a smaller set of results.

In considering the impact of digital platforms on choice and quality of journalism produced, it is important to consider the incentives for news media businesses to maximise referral traffic to their websites rather than producing content that contributes to the public interest. This reflects the overriding commercial imperative that has always existed for media businesses and which is the main driver of choices regarding their editorial approach and decisions, and the positioning of a particular media organisation. Production of public interest journalism is a benefit arising from these commercial considerations.

#### **6.8.1 Giving the people (and algorithms) what they want**

The link between online commercial viability and scale (discussed in section 6.6) has implications for the types of coverage likely to be produced. For instance, Australian news coverage is likely to be most commercially viable where it has significance to a national or, potentially, an international audience. This provides relatively poor incentives for types of coverage that may have smaller audiences, regardless of their significant contributions to the public interest (e.g. local and regional news, court reporting). An example of how these incentives materialise is in the coverage of digital natives, whose editorial focus is typically on social issues of national significance. Moreover, the ACCC is not aware of any digital natives that have sought to limit their coverage to a particular region of Australia.

The implications for quality and choice of journalistic content are mixed. The entrance of digital natives is likely to have contributed to the plurality of voices on issues that are relevant to people Australia-wide. This may include, for instance, matters relevant to democratic processes at the federal level.

At the same time, the same commercial incentives do not appear to have contributed to local or region-specific reporting.

## Optimising content for ‘shares’ and digital platform algorithms

Given the commercial importance of reach and scale in online media, it follows that news media businesses stand to gain commercially from the extent of ‘sharing’ by social media users. Other things being equal, articles that were widely shared (or ‘viral’) are of the most value.

Where journalism focuses on maximising the number of clicks or referrals for each article, this has implications for how articles are chosen, produced, and presented. For example, as noted by a representative of *Buzzfeed News Australia* in 2014:

*The thing for us is really to make content that speaks to people. ... To do that you need to remember that you are a human being as well, you can kind of test out anything you are working on, on yourself. ‘would I share this piece of content?’ ‘Do I think it’s really funny, or really relevant, or really interesting in some way that makes it really special’*

*So I think the thing that has really worked well for us on social media is doing exactly that and focusing on what it is that people share. Why they share things. What core emotions are engaged when people share things online.<sup>1005</sup>*

In practice, journalists today are able to use a number of digital metrics to guide their content production, in an attempt to optimise for both audience and algorithm interaction. For example, News Corp Australia submits that publishers that invest heavily in search engine optimisation in order to accommodate the algorithms used by digital platforms can feature higher in search results, even where they have reproduced content from other publishers.<sup>1006</sup>

In optimising for audience interaction, several digital tools have been developed to inform news producers in Australia of readership, interaction, and what is ‘trending’ across different digital platforms in real time. They include various services describing themselves as tools for ‘content discovery’; ‘research and monitoring’; ‘content intelligence’; and ‘social monitoring’.<sup>1007</sup> These tools and others spot trends, measure audiences and, ultimately, assist news producers and distributors to optimise engagement.

Several stakeholders in the ACCC’s Journalist Forum held on 15 August 2018 noted that increasingly, journalism was geared towards optimisation for audience and algorithm behaviour. And while journalists may have always aimed to produce popular content, they now do so with unprecedented amounts of information, in great detail, and in real-time. Anecdotally, this Inquiry has heard that such targeting is a mainstay of most Australian newsrooms.

The commercial importance of audience numbers and interactions is likely to reduce the viability of some forms of journalism that contribute to the public interest, but are unlikely to garner large audiences. Simons et al gives the example of ‘journal of record’ journalism as being at risk of under-provision in the current environment:

*There is more reason to fear for journal of record reporting—the less glamorous and romantic job of dispassionately reporting public forums. Both Justice Leveson in his report into telephone hacking, and Ray Finkelstein in Australia, commented on the decline of court reporting.<sup>1008</sup> Parliamentary reports are no longer long and comprehensive. Many debates are not reported at all.<sup>1009</sup>*

1005 L Champness, [BuzzFeed in Australia- What they plan to do here, tips on making great social content, the evolving media landscape, audio and....](#) Quokkas, 702 ABC Sydney, 3 February 2018, accessed 21 November 2018.

1006 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p 90.

1007 Websites for [NewsWhip](#); [BuzzSumo](#); [Chartbeat](#); [CrowdTangle](#); accessed 21 November 2018.

1008 R Finkelstein, [Report to the Minister for Broadband, Communications, and the Digital Economy](#), 28 February 2012; and *Dead Trees and Live Links – What Good Are Newspapers?*, A paper submitted for publication in the proceedings of the Australian and New Zealand Communication Association Annual Conference, Swinburne University, Victoria, 9-11 July 2014.

1009 M Simons and B Bull, [Dead Trees and Live Links – What Good Are Newspapers?](#), A paper submitted for publication in the proceedings of the Australian and New Zealand Communication Association Annual Conference, Swinburne University, Victoria 9-11 July, 2014.



Court reporting has been raised by several stakeholders as an example of journalistic coverage that has a relatively important role as public record, but is vulnerable to resourcing cuts due to its relatively small readership.<sup>1010</sup>

## **Bundling news and entertainment to target incidental consumption on digital platforms**

The pursuit of greater audience reach has also been affected by the incidental nature of news consumption on social media platforms. That is, while many Australians make use of digital platforms with the intention of accessing news, many use social media platforms for non-news purposes, but are exposed to news and journalistic content incidentally. Evidence from the Reuters Institute survey suggests that consumers in Australia and other countries who are incidentally exposed to news are likely to use significantly more online news sources than those who do not use social media at all.<sup>1011</sup> In this way, media businesses may compete for audiences who are not necessarily looking for their product.

On social media, users would generally only be incidentally exposed to news and journalistic content posted or shared by a person or organisation within their network (e.g. someone they have connected with as a 'friend' or 'follower'). Those posts would also be subject to any curating algorithms in place. On Twitter, it may be possible for a user to be served content from sources that they are not following; on Facebook, an article or video may be presented to a user if 'multiple people reply to each other's comments' (box 6.4). As such, while users have some control over the sources of news served to them on social media, it is not an absolute control.

For news media businesses, building a network of followers is a way to increase their reach. In this context, media businesses have the incentive to leverage off non-news content. For example, among Australian Facebook pages with the most followers, bands and celebrities dominate, although two of the top five pages are publishers of memes and viral videos. Among all English-language publishers on Facebook, non-news publisher BoredPanda averaged over 42 000 engagements per post, compared to 643 for [bbc.co.uk](http://bbc.co.uk), 4599 for *The New York Times*, 398 for *The Daily Mail* website, and 526 for Fox News.<sup>1012</sup>

Non-news content has been used as a way to fund and promote the launch of a separate news website, as in the case of *Buzzfeed News Australia*. This site produces original journalistic content separate to the *Buzzfeed News Australia* page, which specialises in non-news, entertainment content. In other cases, publishers on social media publish both news and non-news content via the same page, potentially building a following based on non-news content in order to extend the reach of intermittent news content.

The bundling of news and 'viral' content has implications for the levels of trust that consumers place on a news brand. For example, in the US, while *Buzzfeed News* has been a finalist for Pulitzer prizes in both 2017 and 2018, it was also rated lowest of 36 agencies in terms of trust by respondents across the political spectrum.<sup>1013</sup> Social media pages with more followers will still be able to publish to a greater audience. In this way, trust does not necessarily determine which sources of news people are exposed to on social media, as it may be linked to popular non-news content.

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1010 See submissions by the Australian Associated Press, Nine Entertainment Co., and Margaret Simons, as well as Simons, M, M Simons, R Tiffen, D Hendrie, A Carson, H Sullivan, D Muller and B McNair, [Understanding the civic impact of journalism: A realistic evaluation perspective](#), *Journalism Studies*, 2016.

1011 Fletcher, R and Nielsen, R K, 2017, [Are People Incidentally Exposed to News on Social Media? A Comparative Analysis](#), *New Media and Society*, 0(0) (2017)

1012 B Nicholson, [How social data is revolutionizing earned media](#), NewsWhip, accessed 21 November 2018.

1013 S Wang, [The investigations and reporting of BuzzFeed News — \\*not\\* BuzzFeed — are now at their own BuzzFeedNews.com](#), NiemanLab, July 18, 2018.



## Impact of audience feedback on the news and journalism produced

There is also potential for the online public discourse to have a feedback effect, influencing the production of journalism. Digital platforms play a major role in this interaction, with discussion about, commentary on, and sharing of news content now largely occurring on platforms such as Facebook, Twitter and Reddit.

Recent research suggests that attributable comments on platforms requiring the use of real names such as Facebook can be even more aggressive than anonymous comments, particularly on socio-political issues.<sup>1014</sup> It is likely that the toxicity of online discourse discourages large proportions of the news audience from benefiting from, and contributing to, useful active engagement with news content.<sup>1015</sup> The level of vitriol and abuse present in online discourse also has a practical negative impact on journalism when it is directed at journalists themselves. In its worst instances, online harassment of journalists can include orchestrated harassment campaigns coordinated through digital platforms.

This behaviour often targets female journalists. In 2015, a study of 1000 women in Australian media found that '41% of respondents [had] experienced harassment, bullying and trolling on social media, from mild instances to death threats and stalking', and 60 per cent of respondents believed that such harassment was most likely to be directed at women. One in-house print journalist responding to the survey received 'quite constant death and rape threats'<sup>1016</sup>. An editor who had worked in journalism for 11 to 15 years stated that due to online harassment, she was 'less likely to state [her] opinion'. This issue risks having a 'chilling effect' on the practice of journalism, affecting the types of stories that are covered, and potentially making the demographics of professional journalists less diverse and less representative of the general population.

### 6.8.2 Amplifying poor incentives to produce original content

As discussed in section 6.2, the news gathering process of journalism production involves up-front costs, as well as uncertainty around whether investigations will uncover a story of commercial value. At the same time, this process makes significant contributions to the public interest, as it produces information that may not otherwise be in the public domain. In particular, works of investigative journalism require significant up-front fixed costs relative to their likely commercial value, and potentially contribute significantly to the public interest.

At the same time, the information at the core of journalistic content has many characteristics of a 'public good', which may be passed on from consumers to others in society. In addition, this information may be republished by other media organisations; as noted in chapter 4, if copyright exists in material, the Copyright Act allows 'fair use' by third parties if the use may fit within an established exception such as reporting the news.<sup>1017</sup> These 'fair use' provisions in copyright law contribute to the public interest by allowing for information to be disseminated and transmitted freely by the media. However, such provisions are not strictly defined, and they present adverse incentives to the production of original content.

The combination of these factors illustrates some of the key challenges for media businesses in the provision of original journalistic content, which have implications for the public interest. In this context, stakeholders have raised several issues regarding the incentives to produce original journalistic content in the online environment, in the era of digital platforms.

1014 K Rost, L Stahel and B S Frey, [Digital Social Norm Enforcement: Online Firestorms in Social Media](#), PLoS ONE, vol. 11, no. 6, 2016 ; Shanahan, M, *Journalism, Online Comments, and the Future of Public Discourse*, Routledge, New York, 2018, p. 47.

1015 Fiona Martin, [Getting My Two Cents Worth In](#), #/SOJ, vol. 6, no.1, 2016; NJ Stroud, E Van Duyn and C Peacock, [News Commenters and News Comment Readers](#), Center for Media Engagement, The University of Texas, Austin, 2016, accessed 11 October 2018.

1016 Media Entertainment & Arts Alliance, [Mates Over Merit: The Women in Media Report](#), Media Entertainment & Arts Alliance, Sydney, 2016, accessed 11 October 2018.

1017 *Copyright Act 1968* (Cth), s. 42.

## Re-writing, fair use, and ranking of content in algorithms (provenance)

In the past five years, both digital natives and established media organisations have raised the issue of the publication of re-written material, generally noting the increasing incidence in online media.<sup>1018</sup> The ABC notes that while ‘all the media steal stories from time to time’, the issue facing journalism in the present day is that it can be done online on an ‘industrial scale’, where digital natives allegedly produce high volumes of re-written material from other publications.<sup>1019</sup> Examples given include news stories being re-published within hours of the original article, including instances of relatively resource-intensive journalism, such as court-reporting and international investigations.

The fair use provisions in copyright law have been interpreted variously by media outlets. Arguably, the internet and related technologies have allowed media outlets to exploit fair use to a much greater degree than had previously been the case.

While digital platforms have not been the driving cause of these issues, they have a significant role in influencing the commercial incentives that impact on modern media business models. When consumers are exposed to links to news articles on social media platforms, search engines, or news aggregators, they are unlikely to know which article was the original. As such, media organisations that republish articles are able to compete effectively for online audiences with the content originators who may have invested significantly in uncovering and/or producing the story.

Stakeholders such as News Corp Australia have claimed that original content is not rewarded with a higher ranking in Google Search results and that this reduces the incentives for news publishers to invest in original and diverse content.<sup>1020</sup> Search engines use a number of signals as inputs to their algorithms in order to select and prioritise results. It is not clear to the ACCC whether the status as “originator” or source of a story is a variable that promotes a higher ranking.<sup>1021</sup> While it would appear reasonable for the original source of a news story to be a factor considered by a digital platform’s algorithm, the ACCC recognises that:

- digital platforms would need clear signals as to which article is ‘original’, and these signals may not always exist
- originality may be difficult to establish in some cases, given that stories can develop and evolve, and may include a mix of original and attributed content and original analysis
- if originality were used as a signal for the algorithm for the purposes of ranking items of journalistic content, it may be considered alongside other factors, and may not necessarily be the deciding factor.

In the absence of signals from media outlets as to which content was ‘original’, and in the absence of an agreed basis for defining and identifying ‘original’ news content, any attempts by digital platforms to unilaterally determine the originality of journalistic content for the purposes of ranking could be problematic. The definition, identification, and treatment of original content could potentially be settled through revisions to copyright law, or through journalistic or media codes of practice. However, the ACCC is mindful that any such changes would need to sufficiently protect the ability of news media to disseminate information to consumers and society.

1018 N Christensen, [Daily mail fires back at News Corp as copy theft row heats up](#), *Mumbrella*, 16 June 2014; E Watkins, [Casting the first stone more media gender pay gaps revealed recycling \(and recycling\) TV](#), *Crikey*, 15 March 2018; ABC, *Media Watch*, 5 November 2018.

1019 Media Watch, [Media Watch Episode 39](#), 5 November 2018.

1020 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p. 68.

1021 Google, [How Search algorithms work](#), accessed 14 October 2018.

## Snippets

As set out in chapter 4, hyperlinks to news stories are typically accompanied by summaries or article snippets. These snippets or summaries are beneficial to digital platforms, news publishers and consumers.

In relation to consumers these excerpts of text help users choose relevant material from search results with otherwise limited information. As News Corp's initial submission highlights:

*Snippets allow users to consider the identified search keywords in context and determine whether the search result is relevant.*<sup>1022</sup>

Data from the ACCC News Survey show that when consumers are presented with news articles on their social media feed, search results, or in a news aggregator, 69 per cent of respondents said that an 'interesting headline' was an important factor in their choice, while 74 per cent placed importance on the 'text explaining the article' in choosing which article to read.<sup>1023</sup>

To the extent that snippets allow for more informed choices by consumers between different search results, they incentivise media organisation to provide enough information to click through to the article and drive consumers to their websites. They may also provide incentives to media organisations to publish content more in line with consumers' preferences or expectations.

Conversely, as set out in chapter 4, some submissions to the Inquiry asserted that there are potential costs to media businesses if snippets are excessive in length. As noted in chapter 4, digital platforms reproducing a snippet of a copyright-protected news article does not infringe copyright protections if the snippet does not reproduce a substantial part of the article. Only courts may determine whether a snippet reproduces enough of a copyrighted work to constitute copyright infringement. Notwithstanding, a sufficiently long snippet could, at some threshold, become a substantial republication of the journalistic content, and potentially a substitute for the content itself.

The governments of both Germany and Spain enacted legislation to levy Google for the use of snippets, with the proceeds to be paid to media businesses. In Germany, this enabled newspapers to require aggregators to pay a licence fee before using snippets. Google responded by allowing search results to appear with snippets or images only where fees were waived. This resulted in a substantial drop in referral traffic and ultimately each of the publishers took the view that it was in their competitive interests to waive the fee.<sup>1024</sup> In Spain, a similar law applied a mandatory fee for the use of snippets, specifically in news aggregators which could not be waived. Google's response was to close Google News in Spain (Yahoo News and Bing News subsequently stopped providing services in Spain).<sup>1025</sup> The ACCC notes that Europe is currently considering a Directive on Copyright in the Digital Single Market.<sup>1026</sup>

Such systems of levies or fees present several issues. For instance, if media businesses are paid for the production of content regardless of readership, this may reduce the incentive for those businesses to meet the demands of consumers for relevant, reliable, and high quality content. Moreover, it does not move towards a system that rewards producers of original content relative to re-publishers. It may also impact the spread of information from sites that are willing to waive the fee or levy where they are motivated by non-commercial concerns. In practical terms, the ACCC estimates that a levy on the use of snippets by Google in Australia is unlikely to raise a significant amount of revenue. If similar levy rates as those used in Germany were applied to news-related Google searches within Australia, the total amount of revenue payable would likely be less than \$50 million per year.<sup>1027</sup>

There is also a risk in discouraging the use of snippets, given that there are potential benefits of snippets to stakeholders. For instance, even if consumers were to click on fewer links, they may benefit from being able to make a more informed choice. It may be the case that snippets (which are created dynamically with each search query, through the use of an algorithm) could be designed to be

1022 News Corp Australia, [Submission to the ACCC Digital Platforms Inquiry Issues Paper](#), 3 May 2018, p. 68.

1023 Roy Morgan Research, [Consumer Use of News](#), prepared for the ACCC, November 2018.

1024 See JB Nordemann, [Germany's publishers take on Google](#), Kluwer Copyright Blog, 30 August 2016.

1025 See S Athey, M Mobious, and J Pal, [The Impact of Aggregators on Internet News Consumption](#), 11 January 2017; Calzada and Gil, [What Do News Aggregators Do? Evidence from Google News in Spain and Germany](#), 17 October 2017, pp. 1-3.

1026 European Commission, [The Directive on Copyright in the Digital Single Market, 2016/0280 \(COD\)](#), 2016.

1027 ACCC analysis based on estimate data provided to the Inquiry.

sufficiently brief so as not to constitute a substitute for the journalistic content. Ideally, a solution would involve optimising the design of snippets, rather than penalising their usage. The ACCC welcomes further submissions on this issue.

### 6.8.3 Overall implications on the breadth and public interest qualities of journalism produced

In the context of the reduction in advertising revenue, media businesses in Australia (section 6.5), and in particular the businesses of traditional print (now print/online) news media, have faced significant financial challenges (section 6.6). This has generally had a negative impact on the resourcing of journalistic content among print/online media businesses, which have traditionally been responsible for a large proportion of Australia's news and journalism.

The commercial incentives that apply to journalism coverage have also changed, with implications for the level of choice and quality of journalism in the public interest. For example, particularly on forms of social media, there are incentives for outlets to produce a diluted, more emotive, news product, and to leverage off 'viral' entertainment content. This not only erodes consumers' awareness of which online publishers are primarily focused on journalism, but it encourages a model of incidental exposure to journalism.

To the extent that exposure to news content is incidental on social media, and not based on consumers' own decisions about which sources to trust, this improves commercial incentives for smaller, less familiar news outlets to obtain reach and grow their audiences. However, it also reduces the importance of brand trust as a way for media companies to distinguish themselves from their competition.

More generally, the current digital environment provides greater ability for media outlets to produce content in line with user preferences or expectations. While audiences seem to know less about the businesses publishing news, media organisations know more about their audiences than ever before. Potentially, this would provide media businesses with greater incentives to focus on stories with appeal to audiences they are targeting, or on stories that encourage online engagement.

For businesses that continue to produce journalistic content that is in the public interest, the commercial incentives are also relevant. For instance:

- There are unlikely to be strong financial incentives to produce news which is relevant to a small audience even if it contributes to the public interest (e.g. local or regional news and/or court reporting).
- There are complicated incentives around the production of original content, given the expanded potential for competition from re-publishers under fair use.
- There are increased resource needs for media businesses to optimise their content for search engine and other algorithms. These costs may be met at the expense of journalism production.

## 6.9 Impacts on the consumption of journalism

### Key findings

- Digital platforms are likely to have contributed to the increased number of media voices available and consumed by Australians, by facilitating the entrance of digital native publishers.
- Both algorithmic curation on digital platforms and user behaviour on social media have the potential to cause 'echo chamber' and 'filter bubble' effects, although the extent to which these effects occur within Australia is not yet clear.
- The commercial incentives for online content, particularly on social media, have given rise to forms of 'information disorder' in both false news reporting and scam advertising. While the Australian news media can potentially help provide consumers with more trustworthy information, this is potentially undermined by the extent to which consumers also experience unreliable news reporting from news media, both online and in other media formats.

Sections 6.5 and 6.6 examined digital platforms, impact on the production of journalism, with implications for the levels of quality and choice of journalism available to Australian consumers. However, the influence of digital platforms also clearly extends to how consumers access news and journalism. As set out in chapter 1, via their curation of content, digital platforms have played an influential role in the types of news journalism likely to be consumed.

This influence extends to a growing proportion of consumers. While the growth of online news has provided an additional source of news for many Australians, the internet has also become the primary source of news for a growing proportion of the population. The 2018 Digital News Report found that around 47 per cent of Australians use online sources as their primary source of news—similar to trends in the United Kingdom (45 per cent), Canada (45 per cent), and the United States (51 per cent).<sup>1028</sup>

The corollary (Google and Facebook’s share of referrals to Australian news websites) is set out in figure 6.4. Data provided to the ACCC in the course of this Inquiry shows that referrals from Google and Facebook account for:

- more than 50 per cent of traffic to news websites operated by Australian print and digital native publishers
- more than 80 per cent of traffic to news websites operated by Australian radio broadcasters
- more than 40 per cent of traffic to news websites operated by Australian television broadcasters.

In this way, the impact of digital platforms on the quality and choice of news and journalism extends to the choices and experiences of a substantial proportion of Australian news consumers.

### 6.9.1 Changes to the plurality of sources consumed

While there are existing data sources for measuring the consumption of online news, each one generally excludes some significant news websites. Overall, the available evidence suggests that the entrance of digital natives has impacted the sources of news that consumers access online

Roy Morgan survey data from over 50 000 respondents show that digital natives are frequently used news websites across all age cohorts (table 6.2). *The Daily Mail*, *BuzzFeed News*, and *The Guardian Australia* feature prominently across different age cohorts. Other popular sites are operated by established print publishers (Fairfax, News Corp Australia), and television networks (Nine Entertainment Co.).

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<sup>1028</sup> S Park, C Fisher, G Fuller, and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 13.

**Table 6.2: Ranked news websites according to usage within Australia, 2018, by birth cohort**

Rank	Born Pre-1946 Aged 73 years or older	Born 1946–1960 Aged 58–72 years	Born 1961–1975 Aged 43–57 years	Born 1976–1990 Aged 28–42 years	Born 1991–2005 Aged 13–27 years
1	news.com.au	smh.com.au	news.com.au	news.com.au	<i>Daily Mail</i>
2	ABC News	ABC News	smh.com.au	smh.com.au	<i>BuzzFeed News</i>
3	smh.com.au	news.com.au	ABC News	ABC News	smh.com.au
4	MSN	MSN	<i>The Age</i>	<i>Daily Mail</i>	news.com.au
5	9News.com.au	<i>Daily Mail</i>	MSN	<i>The Age</i>	<i>The Daily Telegraph</i>
6	<i>Herald Sun</i>	<i>The Age</i>	<i>Daily Mail</i>	<i>The Daily Telegraph</i>	ABC News
7	<i>The Guardian Australia</i>	<i>The Daily Telegraph</i>	<i>The Daily Telegraph</i>	BBC	<i>The Guardian Australia</i>
8	<i>Daily Mail</i>	<i>The Guardian Australia</i>	<i>The Guardian Australia</i>	<i>The Guardian Australia</i>	BBC
9	<i>The Daily Telegraph</i>	9News.com.au	BBC	<i>The Herald Sun</i>	<i>The Age</i>
10	<i>The Age</i>	<i>Herald Sun</i>	<i>Herald Sun</i>	BuzzFeed News	<i>The Australian</i>

Note: Sample size: n = 50 014 Australians aged 14+  
 Source: Roy Morgan SingleSource: April 2017–March 2018.

## 6.9.2 The potential for filter bubbles and echo chambers

The term ‘filter bubbles’ has been used to refer to scenarios in which the choice of material displayed to a user is selected by algorithms according to the user’s previous behaviours, and this material is ‘devoid of attitude-challenging content’.<sup>1029</sup> In other words, it is a situation where users of digital platforms are repeatedly exposed to the same perspectives, as a result of algorithms curating content, and presenting only material that they might prefer. A similar concept of ‘echo chambers’ describes the repeated exposure to perspectives that affirm a person’s own beliefs, either through algorithms or public discourse.<sup>1030</sup>

Filter bubbles and echo chambers pose risks to the plurality of news sources that consumers access, but also to the reliability of that information. For example, Wardle and Kasakhshan note that:

*Agents who are creating dis-information understand that, when people consume and share these messages, they will be doing so increasingly from inside these echo chambers, with no one to challenge the ideas. ... As such, agents target groups that they know are more likely to be receptive to the message. If they are successful in doing that, it is very likely the message will then be shared by the initial recipient. And, as research shows, we are much more likely to trust a message coming from someone we know, even if we suspect it to be false. This is why dis-information can be disseminated so quickly. It is travelling between peer-to-peer networks where trust tends to be high.*<sup>1031</sup>

1029 E Bakshy, S Messing and L Adamic, [Exposure to ideologically diverse news and opinion on Facebook](#), *Science*, 2015, p. 1130.

1030 D Robson, [The myth of the online echo chamber](#), BBC, 17 April 2018, accessed 21 November 2018.

1031 C Wardle and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making](#), Council of Europe, Strasbourg, 2017, p. 50.

A further risk relates to the potential for consumers to be exposed to content that is increasingly emotive or extreme, particularly in an environment where, as Wardle and Kasakhshan note, there is ‘no one to challenge the ideas’. This concern is particularly relevant to the operation of algorithms, which aim to provide content according to past behaviours and preferences.

It is important to note that this sort of occurrence is not exclusive to the online world. That is, a consumer of offline news media may only use sources they want to see, and discuss the news with like-minded people. A habitual newspaper reader may only get their news from a single newspaper, or from multiple publications that share similar beliefs. In this way, the level of plurality of sources of news and journalism available to consumers will not necessarily determine their exposure to different voices or perspectives.

In digital platform environments, however, consumers are not only exposed to news sources of their choosing, as the range of news sources available on a digital platform is determined by:

- algorithms that curate news feeds, search results, and news aggregations
- the sharing and interaction behaviour of other social media users in their network (including publishers).

Importantly, unlike the case when a consumer deliberately chooses one particular news source, a digital platform user may not fully understand how the sources displayed in their news feed, or in response to their search query, are curated. Accordingly, a digital platform user may not know the extent to which the environment from which they source news amounts to a ‘filter bubble’.

Given the opaque nature of algorithms determining news feeds and search results, it is unclear whether or how algorithms may have contributed to filter bubbles in recent years.

News-sharing behaviour is common in Australia, and has been described by one publisher as ‘a form of self-expression’.<sup>1032</sup> The 2018 University of Canberra survey estimated that 42 per cent of Australian consumers discussed news stories in person with friends and colleagues. Survey respondents were increasingly sharing news content on social media (22 per cent), via email (16 per cent), through instant messaging (14 per cent), in addition to those who reported ‘post[ing] or send[ing] a news-related picture or video’ on social media (8 per cent).<sup>1033</sup> In the same survey, 45 per cent of respondents under the age of 35 noted that their choices of media sources were influenced by user interactions (such as shares, likes, and comments).<sup>1034</sup>

## Evidence suggestive of digital filter bubbles and echo chambers

Some studies suggest the filter bubble effect does have an impact on news consumption. A 2017 study by Brady, Wills, Jost, Tucker and Van Bavel found that tweets expressing moral outrage tend to be widely shared within their political spheres.<sup>1035</sup> The study analysed over 500 000 tweets relating to gun control, same-sex marriage and climate change, and found that most retweets came from people who shared the ideology expressed in the tweet. Figure 6.16 visualises the study’s findings and shows the ideology underlying each tweet and the network of its retweets.<sup>1036</sup> While the study does not relate to the sharing and consumption of news content, it indicates an effect in relation to topical events and its findings shed light on the filter bubble effect.

1032 L Champness, [BuzzFeed in Australia- What they plan to do here, tips on making great social content, the evolving media landscape, audio and...](#) Quokkas, 702 ABC Sydney, 3 February 2018, accessed 21 November 2018.

1033 S Park, C Fisher, G Fuller and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 81.

1034 S Park, C Fisher, G Fuller and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 84.

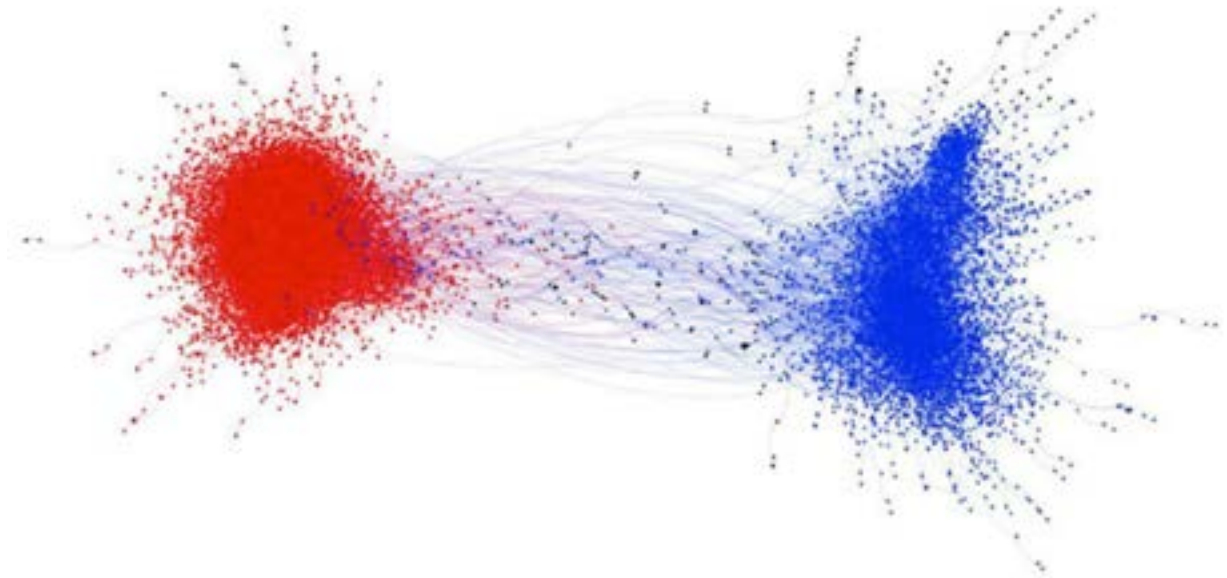
1035 WJ Brady, JA Wills, JT Jost, JA Tucker and JJ Van Bavel, [Emotion shapes the diffusion of moralized content in social networks](#), *Proceedings of the National Academy of Sciences of the United States of America*, 26 June 2017, accessed 21 November 2018, p. 1.

1036 WJ Brady, JA Wills, JT Jost, JA Tucker and JJ Van Bavel, [Emotion shapes the diffusion of moralized content in social networks](#), *Proceedings of the National Academy of Sciences of the United States of America*, 26 June 2017, accessed 21 November 2018, p. 5.



**Figure 6.16: The filter bubble effect**

Depiction of online discourse on Twitter travelling between and within politically aligned groups



Source: Brady, Wills, Jost, Tucker and Van Bavel 2017.

A number of informal studies of YouTube's algorithm have found that it tends to present increasingly extreme content to users. In 2018, researcher Zeynep Tufekci informally tested the YouTube algorithm by creating new accounts and watching relatively mainstream videos relating to right and left wing topics and politicians. In each case, the YouTube algorithm recommended increasingly extreme content until it was suggesting conspiracy theory videos with the relevant political leaning.<sup>1037</sup> *The Wall Street Journal* conducted a similar experiment that again found users were fed far right or left content after watching mainstream news content.<sup>1038</sup> Both studies found this effect was not just news related, and searches for flu vaccines would lead to suggestions for anti-vaccination videos or searches for running would lead to ultramarathon suggestions. These informal studies again show the potential that algorithmic curation has to reinforce and escalate users' existing views.

A 2018 Massachusetts Institute of Technology study found that false news articles on Twitter spread faster than accurate ones as a result of users' sharing behaviour.<sup>1039</sup> This indicates the impact users can have on what appears in content feeds. In a filter bubble context, this may temper any diversity-reducing effects of filter bubbles as users share varied content that broadens the range of what appears in a user's feed.

### **Evidence against digital filter bubbles and echo chambers**

Some evidence suggests that consumers are in fact more likely to be exposed to a diverse range of news on digital platforms.

- The Digital News Report 2017 found that almost half of consumers surveyed who used Facebook as a source of news agreed or strongly agreed that they often see news from outlets they would not normally use.<sup>1040</sup>

1037 Z Tufekci, [YouTube, the Great Radicalizer](#), *The New York Times*, 10 March 2018.

1038 J Nicas, [How YouTube Drives People to the Internet's Darkest Corners](#), *The Wall Street Journal*, 7 February 2018.

1039 S Vosoughi, D Roy and S Aral, [The spread of true and false news online](#), *Science*, 9 March 2018.

1040 J Watkins, S Park, C Fisher, RW Blood, G Fuller, V Haussegger, M Jensen, JY Lee and F Papandrea, [Digital News Report 2017](#), News & Media Research Centre, University of Canberra, 2017, p. 38.

- After the closure of Google News in Spain, the resultant drop in traffic to Spanish news websites was uneven. The top 20 sites saw minimal impact while smaller sites lost 26 per cent of their traffic.<sup>1041</sup> This indicates that news aggregators direct consumers to sites they would not otherwise access, thus increasing the diversity of news to which consumers are exposed.
- A 2018 study by Neuchushtai and Lewis found that Google News provided largely the same recommendations for political news, regardless of the survey respondents' own political leanings.<sup>1042</sup>

### **Conclusion on filter bubbles and echo chambers**

These studies indicate that, while digital platforms provide environments that are susceptible to filter bubbles and echo chambers, some digital platforms may also increase the diversity of news to which consumers are exposed. The specific effect is likely to depend on the algorithm in operation at the time, and the behaviours and cultures of platform users.

Even if filter bubbles and echo chambers do exist to some extent on digital platforms, consumers may already be compensating for them. The ACCC news survey found nearly 60 per cent of digital platform users agreed that platforms filtered the selection of news stories they were exposed to, but that they used a range of sources to help balance the news they consume.<sup>1043</sup> This suggests that the majority of consumers are actively seeking out different sources of news to counteract any impact algorithmic filtering of news may be having.

There is a limited evidence base to study the effect of filter bubbles on online news consumption. The existing research is inconclusive and it is difficult to determine the extent to which these effects occur in Australia. However, Australians are exposed to much the same algorithms as those in the US; if, as some evidence suggests, algorithms do present users with increasingly extreme views or content, this would have a significant impact on the quality of news consumed.

While issues relating to authenticity and quality of news are not new or confined to journalism accessed via digital platforms, the ACCC's preliminary view is that these risks are potentially magnified online. In particular, the ACCC considers that there is a risk that consumers accessing news via digital platforms may be at risk of greater exposure to less reliable news and potential filter bubbles. That said, while there is a real risk of these effects occurring, there is not yet strong evidence of these effects in Australia.

### **6.9.3 Consumption of different types of news in an 'atomised' environment**

As discussed in section 6.6, digital platforms have had some impact on the incentives to produce particular kinds of news coverage. These impacts are largely due to consumption patterns of digital platform users. Survey evidence further suggests that consumers tend to use digital platforms for some forms of news as opposed to others (figure 6.17). For example, 41 per cent of digital platform users accessed celebrity related news on online sources other than news websites, compared to 35 per cent for lifestyle news, 23 per cent for news on crime and justice, and 18 per cent for business and economic news.

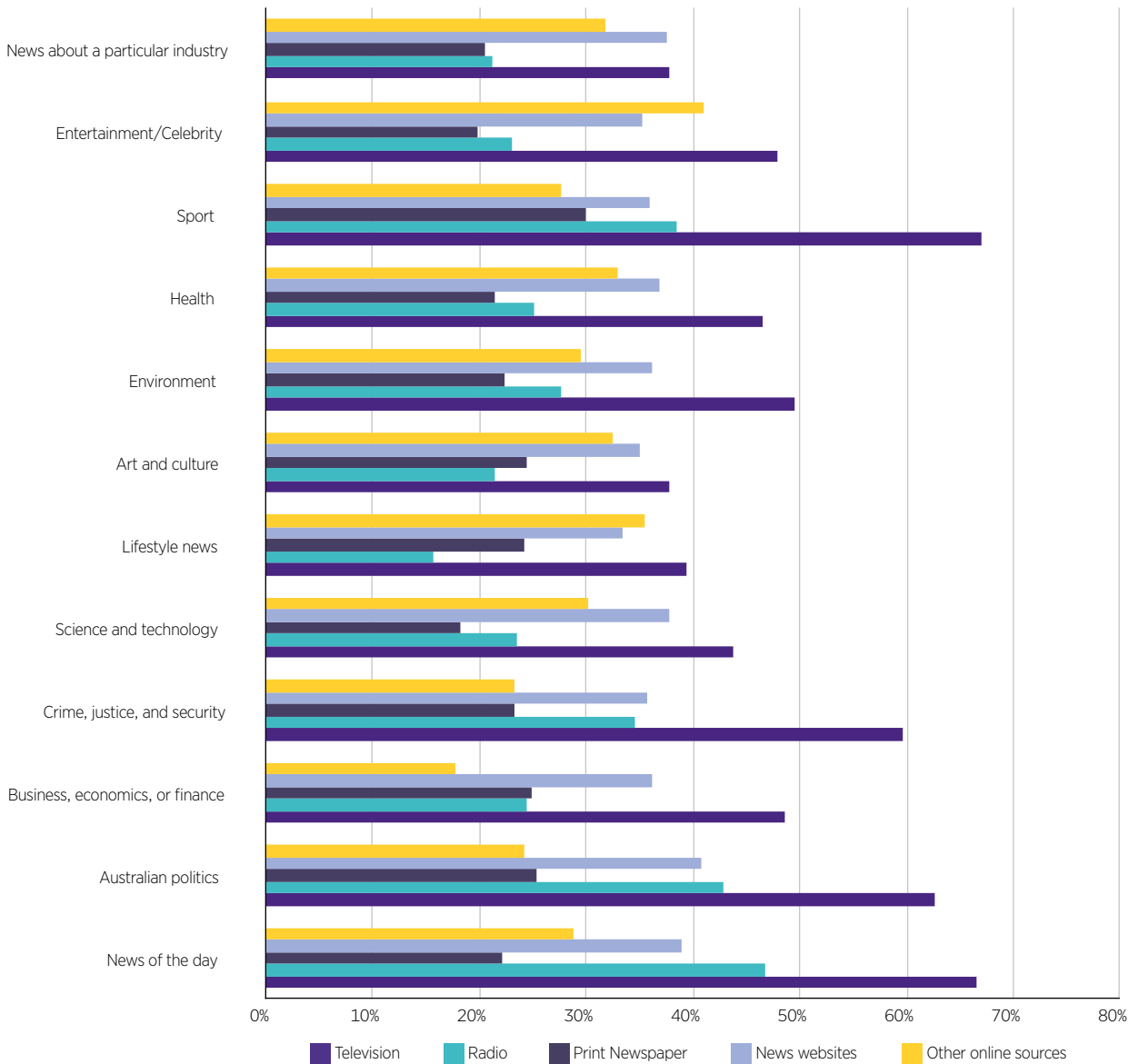
Digital platform users still rely heavily on offline media formats for some forms of news (figure 6.17). For instance, two-thirds of digital platform users accessed 'news of the day' on television, and 63 per cent accessed news on Australian politics. Moreover, the evidence suggests that these patterns reflect consumers' preferences rather than incidental consumption alone. For instance, for 20–22 per cent of digital platform users, social media was their preferred source for celebrity and lifestyle news, while only 11 per cent preferred to use social media for news on Australian politics (figure 6.18). By comparison, 63 per cent accessed political news on television (figure 6.17).

1041 S Athey, M Mobious and J & Pal, [The Impact of Aggregators on Internet News Consumption](#), 11 January 2017, p. 15.

1042 E Nechushtai, [What kind of news gatekeepers do we want machines to be? Filter bubbles, fragmentation, and the normative dimensions of algorithmic recommendations](#), *Computers in Human Behavior*, Computers in Human Behavior, Vol. 90, January 2019, pp. 298–307.

1043 Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018, Q25.

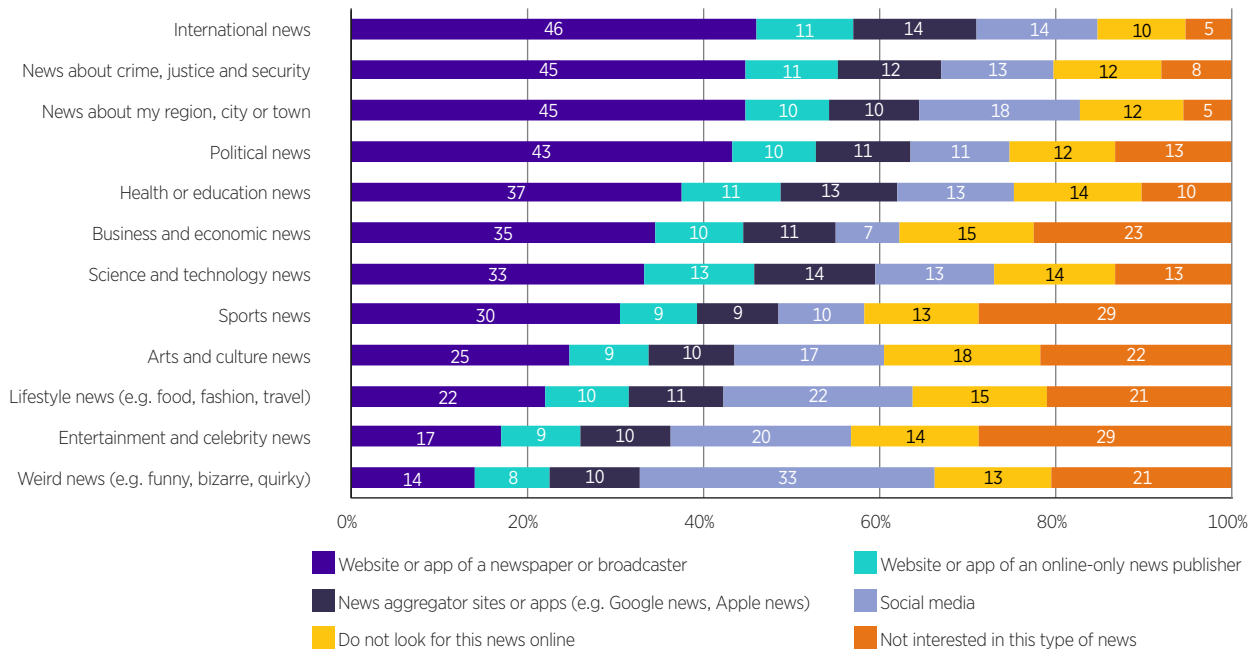
**Figure 6.17: Media format accessed for particular types of news**



Source: Roy Morgan Research, 'Consumer Use of News', November 2018

This suggests that even for people who use digital platforms, other media formats remain important sources for journalism that is particularly significant to the public interest.

**Figure 6.18: Preferred news source**



Source: Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms', November 2018

### 6.9.4 Reliability of reporting

As noted in section 6.2, there are many ways in which news and journalism can be described as contributing to the public interest. However, the value of these contributions depends on the reliability and purpose of the information that news and journalism distribute. Wardle and Derakhshan suggest a framework for different forms of unreliable information, known as 'information disorder':

- Mis-information: when false information is shared, but no harm is meant.
- Dis-information: when false information is knowingly shared to cause harm.
- Mal-information: when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere.<sup>1044</sup>

While 'information disorder' clearly pre-dated the rise of digital platforms (and also the internet), digital platforms have presented new opportunities for these forms of information disorder to take place, particularly in the expansion of online public discourse, beyond the bounds of professional journalism.

#### Information disorder on digital platforms

Australians are experiencing dis-information and mal-information on both websites and digital platforms (see chapter 3 for a discussion of low-quality advertising). However, false and misleading information online and on digital platforms is often difficult to identify. There have been several accounts of fabricated visual content, presented as factual content on social media, often with several million views worldwide.<sup>1045</sup> Wardle and Derakhshan presented examples in Europe where digital platforms have been environments for 'information disorder'.<sup>1046</sup> In describing false political content circulating on Facebook in the US, the Head of Cybersecurity Policy at Facebook notes that:

*... the "news" stories or opinions these accounts and Pages share are often indistinguishable from legitimate political debate.*<sup>1047</sup>

<sup>1044</sup> C Wardle and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making, Council of Europe](#), Council of Europe, Strasbourg, 2017, p. 5.

<sup>1045</sup> GA Fowler, [I fell for Facebook fake news. Here's why millions of you did, too](#), *The Washington Post*, October 2018; T Leslie, N Hoad and B Spraggon, [Can you tell a fake video from a real one?](#), ABC News, 3 October 2018.

<sup>1046</sup> C Wardle and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making, Council of Europe](#), Council of Europe, Strasbourg, 2017, pp. 21-22.

<sup>1047</sup> N Gleicher and O Rodriguez, [Removing additional inauthentic activity from Facebook](#), 11 October 2018, accessed 21 November 2018.

He notes that such activity on Facebook is often commercially motivated, drawing a direct link between the commercial incentives that operate on Facebook, and the provision of ‘clickbait’ and ‘sensational political content’, with organised networks providing links to websites that ‘seem legitimate, but are actually ad farms’.<sup>1048</sup>

Australians are increasingly being subject to scam advertising involving false celebrity endorsements. These scams often appear as online advertisements or promotional stories on social media, or on seemingly trustworthy websites. And while they are essentially advertisements for products such as weight loss pills or investment plans, they often contain falsified elements of news, including doctored or out-of-context photos, and fabricated quotes from celebrities. The ACCC received close to 200 reports of such incidents in the first 9 months of 2018, with losses to consumers totalling more than \$142 000.<sup>1049</sup>

## Reliability of news and journalism

In this context, in 2018 the European Commission pointed out that professional journalism can potentially play an important role in combatting sources of poor quality information, although this is dependent on the reliability of news and journalism.<sup>1050</sup>

Evidence from the ACCC news survey suggests that many Australians have experienced misleading headlines, doctored photographs, misleading news commentary and factual mistakes in the media.<sup>1051</sup> A significant proportion of consumers reportedly experience these issues on digital platforms; most frequently on social media rather than on news obtained via search engines or news aggregators (figure 6.19). This supports the suggestion that digital platforms, or at least social media platforms, have presented new opportunities for various forms of information disorder to take place.

However, the evidence also suggests that poor quality news and journalism is also seen and heard outside digital platforms (figure 6.19). For instance, issues regarding the reliability of information accessed on digital platforms will often relate to material that is published on a news website. Moreover, these issues are not exclusive to online media, particularly insofar as they relate to articles produced by Australian media organisations that also operate print publications or broadcast networks. The 2018 Digital News Report found that consumers generally expected action to be taken against ‘fake news’, not only by social media companies (75 per cent), but by media companies (81 per cent) and governments (68 per cent).<sup>1052</sup>

It is unclear how many incidents of poor quality news were egregious or serious, and how many were not. In the ACCC news survey among respondents who had never lodged an official complaint about journalism, 38 per cent said that they had not seen an issue serious enough to warrant a complaint.<sup>1053</sup> In other words, the evidence suggests that the majority of consumers had seen issues that they had deemed serious, even though only a minority had complained.

Evidence also suggests that consumers are concerned about the extent of poor quality news. Around 92 per cent of respondents to the ACCC news survey had some concern about the quality of news and journalism they were consuming (figure 6.20). Most respondents were concerned about stories being made up for political and commercial reasons (29 per cent), misleading commentary (19 per cent) and factual mistakes (16 per cent).<sup>1054</sup>

1048 N Gleicher and O Rodriguez, [Removing additional inauthentic activity from Facebook](#), 11 October 2018, accessed 21 November 2018.

1049 ACCC, 2018, [Consumers urged to be wary of celebrity endorsement scams](#), media release, 24 September 2018.

1050 European Commission, [A Multi-Dimensional Approach to Disinformation, High Level Expert Group on Fake News and Online Disinformation](#), Directorate-General for Communication Networks, Content and Technology, 2018, p. 11.

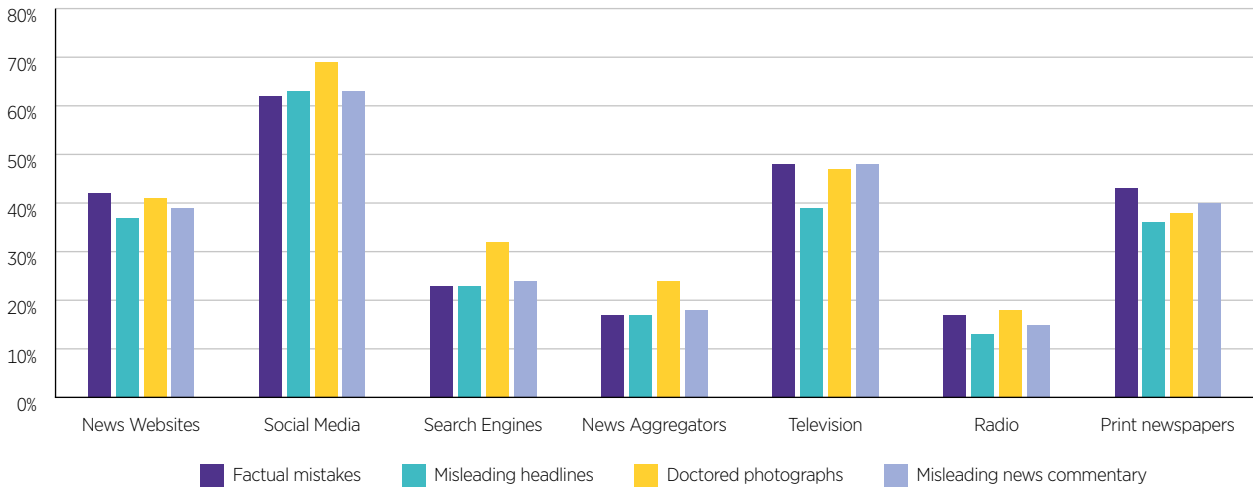
1051 Roy Morgan Research, ‘Consumer Use of News’, November 2018, p. 24.

1052 S Park, C Fisher, G Fuller and JY Lee, [Digital News Report: Australia 2018](#), News & Media Research Centre, University of Canberra, 2018, p. 38.

1053 Roy Morgan Research, Consumer Use of News, November 2018, p. 7., p. 24.

1054 Roy Morgan Research, Consumer Use of News, November 2018.

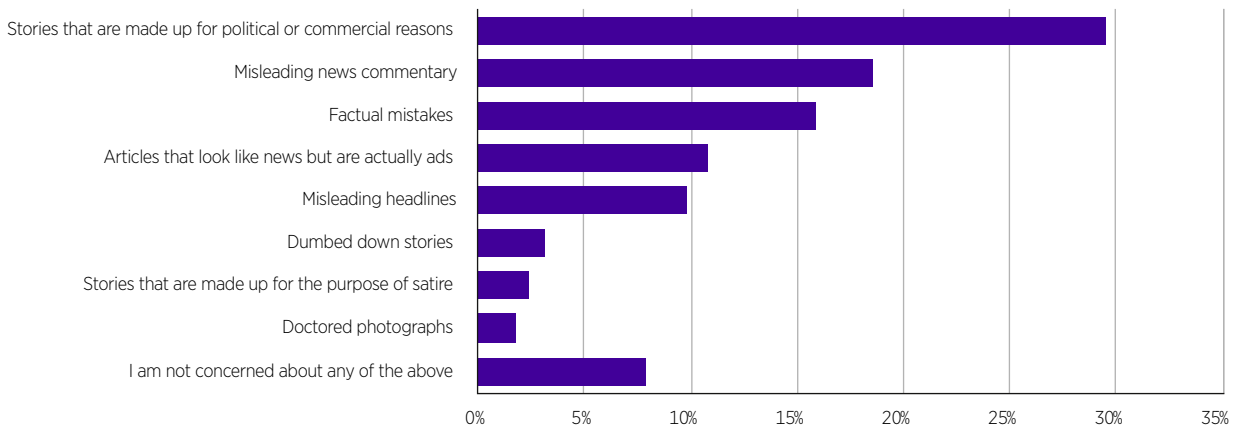
**Figure 6.19: Experience of poor quality news and journalism**



Source: Roy Morgan Research, 'Consumer Use of News', November 2018.

Note: Survey respondents were able to register experiences of poor quality journalism over multiple media formats.

**Figure 6.20: Concern over poor quality news and journalism**



Source: Roy Morgan Research, Consumer Use of News, November 2018.

### 6.9.5 Overall implications for consumption and the public interest

Digital platforms appear to have several substantial impacts on the consumption of news and journalism from a public interest perspective. As discussed in sections 6.5 and 6.5 of this chapter, changes to the media business model have seen the entrance of new media businesses in the form of 'digital natives', increasing the number of available sources of journalism for consumers. This has translated into changes to consumption habits, with a greater level of choice of Australian-based sources for online journalism being accessed.

This impact on plurality is tempered by the fact that consumers are more likely to access lifestyle and entertainment news via social media platforms. Consumers continue to rely heavily on television, radio, and online news websites of established outlets for news on Australian politics, crime, health, and economics. This suggests that multiple media formats remain important sources of journalism that is significant to the public interest, although news websites may also be accessed via digital platforms.

Digital platforms have also expanded the potential to consume news via online public discourse, outside of professional journalism. Consumers are often served a mixture of journalistic content with user-generated and entertainment content, particularly on social media platforms. In addition, some online publishers use 'viral' entertainment content to build their audience reach on social media.

Social media has also led to more incidental consumption of news, where consumers are exposed to sources of news that they may not have chosen, reducing the importance of consumers' trust in news brands. This is particularly the case where publishers mix entertainment and intermittent publication of news stories.

Digital platforms have provided new risks of filter bubbles, given the role of algorithms and sharing behaviour in determining consumers' exposure to news sources. While the empirical evidence does not establish the existence of filter bubbles within Australia, several of the environmental factors required for filter bubbles are present: namely, a high propensity towards sharing content, and a propensity to consume content partly based on user interactions.

Digital platforms have also presented new opportunities for various forms of information disorder to take place. There is evidence of information disorder in Australia outside the bounds of professional journalism: namely, in scam advertising. However, there is also evidence that consumers experience poor quality journalism on digital platforms, on news websites and on other media formats.

## 6.10 Areas for further assessment

### Key findings

- The ACCC has identified for further analysis and assessment proposals for the leading digital platforms to work with the ACMA to improve online media literacy for the population. This could include a broad campaign targeted at all Australians to improve their understanding of how news and journalism is curated and displayed on social media and other platforms.
- The ACCC is also considering a proposal to improve the ability of consumers to recognise the source of news content presented to them by digital platforms and the journalistic credentials of the media entity from which the content is sourced. The proposal is for digital platforms to inform consumers whether a news media businesses has signed up to a code of journalistic practice when displaying journalistic content. This recognition could be by way of a 'badge or signal' on the news content as it appears in search results or a user's news feed.
- The ACCC has identified the following potential proposals aimed at improving the ability of news media businesses to fund the production of news and journalism, as an area for further analysis and assessment:
  - subject to review, the expansion or modification of existing government programs for supporting small and regional media outlets to support quality and plurality beyond their end-date of 2020-21
  - tax incentives for the production of journalistic content
  - tax incentives for personal subscriptions for news and journalism.

The preceding analysis in this chapter aimed to describe digital platforms' impact on choice and quality of journalism. This section will discuss the role of policy in the current environment and potential responses to the impact of digital platforms.

### 6.10.1 Journalism as a source of reliable information for consumers

The Terms of Reference require the ACCC to consider the impact of digital platforms on the level of choice and quality of news and journalistic content to consumers.

Consumers have been, and always will be, faced with the challenge of choosing and considering information from sources that vary in reliability. With respect to journalism, consumers inherently face information asymmetry, in that they are not privy to how the information was gathered, whether the facts were checked, or other considerations within the editorial process that would determine the reliability of the content.

The reliability of information is key to the public interest value of news, and can determine whether it provides a positive or negative impact on society. In some cases, market forces may produce forms of information that have a strictly negative impact on society, such as false information used as part of a



consumer scam (e.g. fabricated celebrity endorsements). Such examples could be described as market failures, with a role for government intervention.

However, ensuring reliable information in journalism and public discourse is more complicated. For instance, if the flow of information is restricted, this also has implications for the public interest. Habermas described the concept of the 'public sphere' as being closely linked with the functioning of a democracy, which, as described by Wardle and Derakhshan, must be inclusive, representative and characterised by respect for rational argument.<sup>1055</sup>

It is apparent that markets for journalism are imperfect. Competition may not be a strong discipline for quality of news, particularly where the number of media organisations is relatively low, and the number of unconstrained voices in the public sphere are relatively high and consumers have little visibility as to quality controls. For the purpose of protecting the health of the 'public sphere', there may be a market failure if reliable news and journalism were systematically under-produced, or, perhaps due to reasons related to information asymmetry, systematically under-consumed.

In this context, policy approaches to media must balance the public benefits of reliability against the public benefits of free-flowing information. For instance, Eisenberg summarised the views of Fred Hilmer—former CEO of Fairfax and chair of the National Competition Policy Review Committee—as being that:

*...There was no perfection - it was an imperfect world and the price of regulation was inhibiting freedom of information and flow of communications and encouraging censorship. He thought that newspapers had tough critics and competition: "No-one has to buy a paper", he said. If it was unbalanced, incorrect or unappealing, then "let the market be the judge, rather than someone in the political process who brings their own view on free speech".<sup>1056</sup>*

Hilmer highlights two fundamental issues with public intervention in journalism. First, that it may risk the loss of independence from political or governmental interests. Second, that it would not be reasonable for policy to aspire towards 'perfection' or absolutism in the veracity of information, either in general public discourse or in articles of journalistic content. Thus, in current Australian law, the bounds on public discourse are largely limited to areas that lead directly towards some form of social harm, such as defamation.

The current policy approach to ensuring reliability of journalism is co-regulation and self-regulation of journalism standards across all media.<sup>1057</sup> As noted in chapter 4, the role of intermediaries such as digital platforms are not accounted for in these codes. Regulation of print and online journalism is voluntary: some digital native news outlets have chosen to become members of the Australian Press Council, some of the most prominent digital native publishers have not.<sup>1058</sup>

## Media literacy programs in Australia

The ACCC considers that consumer choice in relation to news media may be improved by increased media literacy. Equipping individuals to discern when news and information is mal-information or dis-information will reduce their vulnerability to some of the harms that can result from information disorder. These harms may include forming views or making decisions on inaccurate or deliberately misleading information, including susceptibility to scams. These risks are not confined to news and information obtained online and they can and do apply to all generations. There is opportunity for broad awareness raising and educational programs aimed at improving understanding of the existence of information disorder in the media, and in digital media in particular, and to equip individuals to identify when information might be unreliable.

1055 J Habermas, [The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society](#), 1962, as characterised by C Wardle, and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making](#), Council of Europe, Council of Europe, Strasbourg, 2017, p. 49.

1056 J Eisenberg, [Fred Hilmer's Fairfax](#), *Communications Update*, Issue 159, October 1999, p. 20.

1057 See D Wilding, P Fray, S Molitorisz and E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 87-97.

1058 At the time of writing, digital-only publications that were listed as constituent bodies of the Australian Press Council included (but were not limited to): *Daily Mail Australia*, HuffPost Australia, New Daily, nine.com.au, and Private Media. Some notable digital-only publishers not listed include *BuzzFeed News Australia* and *The Guardian Australia*. See Australian Press Council, [Who we are](#), accessed 21 November 2018.

Some digital literacy programs aimed at the broader population currently exist. For example, the ABC held its first media literacy week in 2018. There is likely to be value in supporting further education in this area. However, these initiatives are in early stages and the ACCC considers that more can be done.

### ***Area for further analysis and assessment—Improving digital media literacy***

The ACCC considers there is a need to improve the media literacy of all Australians and is considering how this might best be done. We are focusing analysis and assessment on ways to raise understanding of how news and journalism is curated and displayed on social media and other platforms, and awareness of the presence of mal-information, dis-information and mis-information in media content accessed through both online and traditional means.

## **6.10.2 Digital platforms curating and signalling reliable content**

Some of the main actions taken by digital platforms when surfacing content for users include:

- deciding whether to act on the basis of each piece of content, or on the source
- identifying what is trustworthy or problematic
- signalling different types of content or sources to users
- prioritising of content in news feeds
- removing content or sources from the platform.

### **Approaches taken by social media platforms**

Both Facebook and Twitter provide badges verifying an ‘authoritative’ source, although this only relates to the verification of identity (box 6.9). Different approaches are taken by social media platforms to assess the reliability of information. Facebook also allows user complaints about ‘false news’ as part of its ‘leave feedback’ option for posts. This option allows complaints about breaches of Facebook’s community standards, which also include rules against ‘hate speech’ and ‘unauthorised sales’. By comparison, Twitter allows users to report a post if they are ‘not interested’, or if the post is ‘suspicious’, ‘spam’, ‘abusive’, or ‘harmful’.

In terms of action, both Facebook and Twitter have described that they actively down-rank some content or sources in their respective news feeds, although for Twitter, this relates to abusive comments as opposed to unreliable information.<sup>1059</sup> Facebook’s approach also relies on third-party fact-checkers, and involves commercial restrictions as penalties:

*... If content from a Page or domain is repeatedly given a ‘false’ rating from our third-party fact-checkers ... we remove their monetization and advertising privileges to cut off financial incentives, and dramatically reduce the distribution of all of their Page-level or domain-level content on Facebook.*<sup>1060</sup>

Facebook notes the problems related to sensational or false information, but bans the purveyors of such websites in relation to ‘inauthentic behaviour’, which relates to their strategic commercial interactions as opposed to the content itself:

*... we have a policy banning coordinated inauthentic behaviour — networks of accounts or Pages working to mislead others about who they are, and what they are doing. This year, we’ve enforced this policy against many Pages, Groups and accounts created to stir up political debate, including in the US, the Middle East, Russia and the UK. But the bulk of the inauthentic activity we see on Facebook is spam that’s typically motivated by money, not politics.*<sup>1061</sup>

1059 J Wong, [Twitter announces global change to algorithm in effort to tackle harassment](#), *The Guardian*, 16 May 2018, accessed 21 November 2018; O Darcy, [Facebook touts fight on fake news, but struggles to explain why InfoWars isn’t banned](#), *CNN Business*, 11 July 2018, accessed 21 November 2018.

1060 O Darcy, [Facebook touts fight on fake news, but struggles to explain why InfoWars isn’t banned](#), *CNN Business*, 11 July 2018, accessed 21 November 2018.

1061 N Gleicher and O Rodriguez, [Removing additional inauthentic activity from Facebook](#), 11 October 2018, accessed 21 November 2018.

## Approaches taken by search platforms

Given that search platforms provide directory services across the open web, their role in curating reliable content differs somewhat from social media platforms.

With regard to news and journalistic content, Google has noted that its approach is not to ban content but to use down-ranking in a similar way to social media platforms. The CEO of Alphabet Inc. stated that:

*We don't want to ban the sites. That's not how we operate. I am strongly not in favour of censorship. I am very strongly in favour of ranking. It's what we do.*<sup>1062</sup>

Google has stated publicly that algorithms across its products have been adjusted so as to:

*... recognize these events and adjust our signals toward more authoritative content. There are comparable challenges on YouTube, and we're taking a similar approach, highlighting relevant content from verified news sources in a "Top News" shelf.*<sup>1063</sup>

In the current regulatory framework, digital platforms make their own determinations as to how to rate the trustworthiness of sources, and how to implement this information.

These decisions will be significant in setting the incentives around the production of 'quality' journalism for Australian media companies. To be treated as a 'trustworthy' source by the algorithms of today's major digital platforms is likely to be of significant commercial importance to these companies.

More generally, the current framework implicitly places a great deal of public trust in digital platforms to make decisions about trustworthy news sources. Any bias or preference the platform has, either human or algorithmic, could influence what information is presented to consumers. Chapter 7 discusses issues of algorithmic bias in more detail.

### **Box 6.9: Facebook and Twitter verification**<sup>1064</sup>

Facebook provides the following visual verification of authenticity for public figures and organisations:

*The blue verification badge  lets people know that a Page or profile of public interest is authentic.*

*We apply the blue verification badge to eligible brands, media organizations and public figures. Eligibility for the blue verification badge is based on a variety of factors, such as account completeness, policy compliance and public interest.*

In September 2018, Facebook also launched in Australia the option to click an information icon on links and articles posted by public profiles:

*... including the publisher's Wikipedia entry, related articles on the same topic, information about how many times the article has been shared on Facebook, where it is has been shared, as well as an option to follow the publisher's page. When a publisher does not have a Wikipedia entry, we will indicate that the information is unavailable, which can also be helpful context. ... [Update 19 September] We will now also share website/domain age, which will give people more information about the source ... We're expanding our coverage from articles to all links.*

Twitter also provides visual verification of authenticity for public figures and organisations:

*The blue verified badge on Twitter lets people know that an account of public interest is authentic.*

1062 E Schmidt, [Google will downrank Russian state news agencies](#), *Engadget*, 23 November 2017, accessed 21 November 2018.

1063 P Schindler, [The Google News Initiative: Building a stronger future for news](#), 20 March 2018, accessed 21 November 2018.

1064 Facebook, [What is a Verified page or profile?](#), accessed 21 November 2018; Twitter, [About verified accounts](#), accessed 21 November 2018; Facebook Newsroom, [Helping people better assess the stories they see in News Feed with the Context Button](#), accessed 21 November 2018.

The badge appears next to the name on an account's profile and next to the account name in search results. It is always the same color and placed in the same location, regardless of profile or theme color customizations.

What types of accounts get verified?

An account may be verified if it is determined to be an account of public interest. Typically this includes accounts maintained by users in music, acting, fashion, government, politics, religion, journalism, media, sports, business, and other key interest areas.

A verified badge does not imply an endorsement by Twitter.

## Collaborative approaches

The Reuters Institute suggests that there would be value in collaborative solutions involving digital platforms and other stakeholders. For instance, this may include:

*Working with publishers, fact-checkers, and other content creators to better label different kinds of content will be important. Platforms should also consider taking into account more signals about the quality and origin of content from publishers, improving the branding of trusted brands, and taking steps to reduce the speed with which extreme or disputed content can be spread through the network.*<sup>1065</sup>

Industry-led projects aimed at better labelling and curation are reportedly in progress (box 6.10).

### **Box 6.10: The Trust Project**<sup>1066</sup>

The Trust Project provides indicators about ethical and journalistic standards which were reportedly due to be integrated into some digital platforms' algorithms in 2018. Those digital platforms were to increase the space given to logos of news brands, and introduce tags to describe content such as breaking news or analysis.

Trust Project collaborators decided on a core set of eight Trust Indicators:

- *Best Practices: What are the news outlet's standards? Who funds it? What is the outlet's mission? Plus commitments to ethics, diverse voices, accuracy, making corrections and other standards.*
- *Author/Reporter Expertise: Who made this? Details about the journalist, including their expertise and other stories they have worked on.*
- *Type of Work: What is this? Labels to distinguish opinion, analysis and advertiser (or sponsored) content from news reports.*
- *Citations and References: What's the source? For investigative or in-depth stories, access to the sources behind the facts and assertions.*
- *Methods: How was it built? Also for in-depth stories, information about why reporters chose to pursue a story and how they went about the process.*
- *Locally Sourced? Was the reporting done on the scene, with deep knowledge about the local situation or community? Lets you know when the story has local origin or expertise.*
- *Diverse Voices: What are the newsroom's efforts and commitments to bringing in diverse perspectives? Readers noticed when certain voices, ethnicities, or political persuasions were missing.*
- *Actionable Feedback: Can we participate? A newsroom's efforts to engage the public's help in setting coverage priorities, contributing to the reporting process, ensuring accuracy and other areas. Readers want to participate and provide feedback that might alter or expand a story.*

Separately, the European Commission recently published an EU Code of Practice on Disinformation, which was developed in consultation with Google, Facebook, Twitter, Mozilla and the European Online Platform and Tech Trade Association (EDiMA) (box 6.11).

1065 N Newman and R Fletcher, [Bias, Bullshit and Lies: Audience Perspectives on Low Trust in the Media, Digital News Project 2017](#), Reuters Institute for the Study of Journalism, Oxford University, 2017, p. 6, accessed 21 November 2018.

1066 N. Newman, [Journalism, media, and technology trends and predictions 2018](#), Digital News Project, 2018, p. 18; The Trust Project, [Frequently asked questions](#), accessed 3 December 2018.

### **Box 6.11: EU Code of Practice on Disinformation**

On 26 September 2018, the European Union released the EU Code of Practice on Disinformation. It is a voluntary code that involves obligations for digital platforms, as well as advertisers. It is not focused on news media.

The code defines ‘Disinformation’ as ‘verifiably false or misleading information’ which:

- *“Is created, presented and disseminated for economic gain or to intentionally deceive the public”; and*
- *“May cause public harm”, intended as “threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens’ health, the environment or security”.* The notion of ‘Disinformation’ does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.

The code attempts to balance safeguards against disinformation and improve transparency, while also safeguarding freedom of speech. The code’s purposes include to:

- *Ensure transparency about political and issue-based advertising, also with a view to enabling users to understand why they have been targeted by a given advertisement*
- *Ensure transparency with a view to enabling users to understand why they have been targeted by a given political or issue-based advertisement, also through indicators of the trustworthiness of content sources, media ownership and/or verified identity.*<sup>1067</sup>

### **Media organisations producing and signalling reliable content**

In considering the impact of the digital platforms on quality, the ACCC has not attempted to undertake an empirical assessment of journalistic content. However, consistent with existing codes and frameworks that aim to hold Australian journalists and news media businesses to account, the ACCC considers that there are certain aspects of the process of producing news and journalism that are important indicators of quality.

The rapid digitalisation of news and the growth of the digital platforms have led to the atomisation of news and, for some consumers, a disconnect between news content and its source. These consumers may not know where their news comes from, or whether the creator of that news content has committed to journalist processes, such as fact checking and accuracy. Combined with the algorithmic selection of news, this potentially exposes individuals to the risk of filter bubbles or echo chambers, as well as the risk of unreliable information.

Digital platforms themselves face trade-offs in terms of how to handle unreliable information. For instance, a hands-off, source-agnostic approach would potentially allow unreliable information to be served on equal terms as professional journalism. A more hands-on approach could potentially introduce editorial influence. The major digital platforms have historically chosen to avoid editorial influence, resulting in greater risks of unreliable information. Yet, increasingly, major digital platforms are attempting (to various degrees) to signal and curate content in favour of trustworthy sources of news. Their decisions on how trustworthiness is defined will implicitly determine how ‘quality’ of journalism is defined and commercially rewarded. Those decisions will also help to determine how well media businesses will be able to compete commercially, which will have implications for the level of ‘choice’ for consumers.

The ACCC considers that there are no simple solutions in this area. There is significant value in the traditions of press freedom and consumer choice, where the former is accountable to the latter. Moreover, the ACCC also recognises the value of innovation among digital platforms to design content curation services to best serve their users. However, the ACCC also recognises the potential conflict between these values. Digital platforms that are free to operate with impunity could potentially exert some level of editorial influence on media businesses and on journalism itself (e.g. through ranking decisions). Given their position as ‘unavoidable business partners’, this could pose a risk to editorial

<sup>1067</sup> [EU Code of Practice on Disinformation](#), 26 September 2018, accessed 2 December 2018.

independence. In addition, the definition and treatment of ‘trustworthiness’ by digital platforms could inhibit the set of choices available to consumers, or inhibit their ability to make informed choices of journalistic content.

While steps taken by digital platforms to signal and/or curate with regard to ‘quality’ or ‘trustworthiness’ may be well intentioned, individual decisions by platforms on these key factors may reflect their own interests and may not necessarily serve consumers well in all cases. The ACCC considers that a more transparent approach may be preferable.

The ACCC considers that digital platforms should be free to design curation algorithms, but as distributors and curators of news content, they should also provide relevant information for consumers to make informed decisions on the quality of news content and sources. The ACCC considers that the most important aspects of quality in the process of producing news are likely to be covered in existing codes and frameworks to which Australian journalists and major news media businesses are already accountable and have themselves determined (as discussed in chapter 4). These codes represent accountability to basic professional standards, as well as to consumer complaints (rather than an accountability to government or to digital platforms themselves).

### **Recognition of journalistic standards by digital platforms**

The ACCC is considering whether digital platforms and media businesses should be required to take steps to increase the ability of consumers to make informed choices about news and journalism accessed via digital platforms. The ACCC considers that a transparent method to recognise content from news media businesses that comply with basic journalistic standards would allow consumers to make more informed choices about their consumption of news and journalistic content on digital platforms. Such compliance with basic journalistic standards could be demonstrated by adherence to a code as already occurs under the Australian Press Council’s General Principles<sup>1068</sup> and the FreeTV Commercial Television Industry Code of Practice.<sup>1069</sup>

This would not prevent consumers from accessing/viewing content that is not created by a media entity covered by a relevant code, according to their preferences. Similarly, digital platforms would not be prevented from displaying content which is not covered by a relevant journalism code. However, consumers should be informed about whether or not Australian news content displayed to them on digital platforms is sourced from an accountable media entity.

Such an approach would only be effective if digital platforms signal, by way of a badge or otherwise, whether the news content displayed in a user’s search results or news feed was sourced from a media entity which is party to a relevant journalism code. This requirement on digital platforms could be achieved in a number of ways. One approach would be an obligation to submit to the ACMA (either via an industry group such as DIGI, or individually) a code that broadly reflects the principles identified below, but that also allows the digital platforms to rely on media entities’ code compliance when displaying content from these entities.

The ACCC recognises that this would require consultation between the digital platforms and other stakeholders, including the ACMA, to ensure the way that the information is presented to consumers is useful (e.g. a signal or badge on the content). The ACCC is of the view, given the steps currently being taken by a number of platforms to ascertain trustworthy content, that this obligation would not impose too great a regulatory burden and would allow digital platforms to rely on compliance by media entities to a relevant code rather than taking steps to independently validate trustworthy content.

The ACCC recognises the approach outlined here will not remove the risks of misinformation or inaccurate news on digital platforms. However, it would provide one measure consumers could use to make informed choices about news and journalism content; and one that recognises media outlets’ accountability to journalistic codes of practice.

1068 Australian Press Council, [Australian Press Council, Statement of Principles](#), accessed 21 November 2018.

1069 FreeTV Australia, [Commercial Television Industry Code of Practice](#), accessed 21 November 2018.



## Journalistic standards

The ACCC notes that a significant number of Australian media entities and organisations are parties to arrangements that bind them to journalistic standards, most notably those of the Australian Press Council and FreeTV referred to above. The ACCC considers that the principles developed by these industry organisations identify the basic professional journalistic standards and processes under which media businesses should operate and include:

- accountability and transparency
- avoidance of harm, particularly in relation to children
- accuracy and clarity
- fairness and impartiality
- distinctions between news reporting, commentary, opinion and advertisements
- a complaints handling process that is accessible, transparent and free.

The ACCC is interested in exploring whether the existing sector specific codes of conducts or standards (including those administered by FreeTV or the Australian Press Council) could be the type of codes to be recognised by the ACMA.<sup>1070</sup>

Effective codes would have a complaints handling mechanism to allow consumers to contact media entities about their content. Industry bodies would need to exercise meaningful oversight of the principles through this mechanism. Media entities and industry bodies should also be required to report complaints-handling statistics and outcomes publicly, or to an appropriate authority such as the ACMA on a periodic basis (at least annually).

The ACCC emphasises that the purpose of this approach is to provide consumers with information regarding the reliability of the source of the journalism they are accessing and of the journalistic principles and processes that were followed in its creation. The intent is to provide information on the quality of the journalism process undertaken, and not the nature of the journalistic content itself, which is a matter of individual interest and taste.

The ACCC is of the view that it should not be mandatory to develop or sign up to a code that sets out principles for journalistic standards.

However, where media entities have signed up to a code, there should be mechanisms in place to ensure their continued compliance, and a means of deregistration for non-compliant entities. This will mean that consumers are not misled by signalling adherence to basic journalistic standards.

The ACCC is particularly interested in feedback from news media businesses and journalists as to the potential operation of the proposal below and the relationship with existing codes of journalistic practice.

### ***Area for further analysis and assessment—Improving the ability of consumers to make informed choices about news and journalism accessed via digital platforms***

The ACCC is considering whether digital platforms and media businesses should be required to take steps to increase the ability of consumers to make informed choices about news and journalism accessed via digital platforms. This proposal would not interfere with how the algorithms select and display news and journalism, the news stories which consumers may choose to access (consumer choice) or press freedom. Elements of an approach the ACCC is considering would include:

- (a) Digital platforms would be required to signal, in their display of content to consumers, content from news media businesses that have signed up to certain standards for the creation of news and journalist content by complying with recognised codes of journalistic practice. This signalling could be by way of a 'badge' on the news content as it appears in search results or a user's news feed.

<sup>1070</sup> C Wardle, and H Derakhshan, [Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making](#), Council of Europe, Strasbourg, 2017, p. 26.



- (b) The ACMA would recognise codes of journalistic practice from news media representative groups that contain principles and processes, including but not limited to accuracy (fact-checking), clarity, and avoidance of harm.
- (c) Digital platforms would be required to inform consumers about their accountability system and to better inform consumers about how their news and journalistic content is curated and displayed to them.
- (d) The obligations on digital platforms to take these steps, could be contained in separate ACMA approved code(s) submitted by the digital platforms, or be mandated by the ACMA.

## Improving the ability of news media businesses to fund the production of news and journalism

Australia's existing policy and regulatory arrangements support the production of news and journalistic content in a number of important ways. This public support is particularly focused on broadcast formats primarily through the funding of the public broadcasters. These organisations produce quality, independent news and journalistic content and add to plurality. In addition, SBS provides content specifically to meet the needs of Australia's culturally and linguistically diverse population.

Commercial television and radio broadcasters also receive a level of public support. The broadcast licensing regulatory arrangements include access to radiofrequency spectrum for these broadcasters for fixed fees that are likely below the market price that would be paid for access to this public resource by telecommunications businesses at an open auction.<sup>1071</sup> The ACCC recognises that, as part of these regulatory arrangements, commercial broadcasters are required to comply with content regulation including the provision of minimum levels of Australian and local content. News and journalistic programming contributes to meeting these obligations. However, these obligations are also supported by tax incentive schemes for local content for television.

In contrast, traditional print (now print/online) news media businesses do not receive any direct or indirect subsidy other than tax deductibility of subscriptions limited to certain categories of consumers.

As extensively documented in this preliminary report, the ability of traditional print (now print/online) media businesses to fund the production of journalism through advertising revenue has significantly decreased. Print/online media businesses are continuing to explore strategies to ensure long term sustainability, including through developing new revenue streams and by establishing new partnerships within the broader media sector. The most prominent revenue models, online advertising and subscription, are likely only to be viable for those businesses with sufficient scale and/or low production costs. However, a focus by print/online media businesses on sustainability, presents a risk of under-provision in journalism overall, and in particular, in types of journalism that involve higher up-front costs or which have a smaller audience. The ACCC is carefully considering potential mechanisms which may assist in the continued financial viability of the print/online sector, which performs a critical role in producing certain types of public interest journalism which may be at risk of under-provision. The ACCC considers that the implementation of any of these initiatives should be consistent with relevant government taxation and grants policy.

## Tax incentives for the production of journalism

One potential mechanism to improve commercial resourcing for journalism production would be to allow tax offsets for the costs incurred by news media organisations in producing journalism. Such a program was considered by the Senate Select Committee on the Future of Public Interest Journalism.<sup>1072</sup> Tax incentive schemes already exist to support local content for film and television.

The tax offsets provided to producers of Australian film, television and online video content are designed to incentivise investment in the Australian screen industry. They also provide incentives for producing screen content that portrays Australian subject matter, employs Australian workers, and supports Australian businesses in other parts of the economy.<sup>1073</sup> In this way, these tax incentives are

1071 L Battersby, '[Would a cut to broadcast licence fees help save commercial television](#)', *Sydney Morning Herald*, 25 April 2017, accessed 26 November 2018

1072 Senate Select Committee on the Future of Public Interest Journalism, [Final Report](#), Canberra, 2018, pp. 121-124.

1073 Screen Australia, [Eligibility: Significant Australian Content](#), accessed 13 November 2018.

intended to provide tangible benefits in supporting the Australian film industry, and intangible benefits, such as the cultural value derived through the availability of Australian stories on screen.

An alternative approach would be to provide the support in the form of grants, however there are advantages of a tax incentive over a grants scheme. Significantly, under a tax incentive scheme, decisions regarding choice of journalism project would be made within a commercial framework rather than through bureaucratic processes.

If a tax incentive scheme were implemented, eligibility could be limited to those print/online media businesses that are signatory to a relevant code of journalistic practice as discussed above. The scheme could function by allowing a multiple (for example, 1.5 times) of eligible production expenditure to be deducted for tax purposes. Eligibility could be limited to expenditure incurred in relation to the process of gathering news, as opposed to its presentation or distribution.

There are a number of aspects of the design of such a scheme that would require careful assessment. These include:

- whether the scheme is well targeted at the intended objective
- whether it is open to abuse and
- whether it unfairly advantages large businesses over small.

### **Tax incentives for the consumption of journalism**

A further way of improving the ability for media businesses to resource the production of journalism is to improve their ability to secure revenue from direct consumer payments as opposed to advertising. The ACCC news survey 2018 shows that only 43 per cent of respondents had paid for news in any form over the past year.<sup>1074</sup> Of those who had not paid for news within the past year, nine out of 10 stated that it was unlikely that they would start to pay for news in the next year.

The reluctance to pay for news media is in contrast to the high societal value for news and journalism expressed by survey respondents. Around 77 per cent of survey respondents thought that news was important or very important in allowing participation and engagement in Australian society, while only 43 per cent had paid directly for the commercial provision of news.<sup>1075</sup> This disconnect between value and willingness to pay reflects, at least in part, the ability for consumers to access news without a monetary payment.

The ACCC is considering whether there would be value in improving the incentives for consumers to pay directly for news and journalism, through changes to the personal income tax system. For example, subscriptions to news services (including newspapers, websites, or paid aggregation services) may already be tax deductible under section 8.1 of the *Income Tax Assessment Act 1997*, where those expenses made are in relation to earning an income. There may be value in changing the treatment of such expenses to recognise the public interest benefits arising from the production of news and journalism noted in section 6.2.

One option would be to allow subscriptions to news publications or services to be tax deductible for all Australians, and for this to apply with regard to any purchase of or subscription to news services from outlets that had signed up to relevant industry codes for journalistic standards (under Preliminary Recommendation 13). This may encourage individuals to engage with news and journalistic content of their own choosing and encourage the production of news.

The ACCC recognises that there can be concerns with implementing and proposing tax incentives and subsidies. Nevertheless, such arrangements can on occasion be a suitable option to achieve a particular objective. The ACCC welcomes feedback and suggestions regarding these or other approaches which can maintain the incentives on news media businesses to invest in news and journalism, particularly those types of news and journalism which may be at risk of being under-produced.

<sup>1074</sup> Roy Morgan Research, 'Consumer Use of News', November 2018, p. 25..

<sup>1075</sup> Roy Morgan Research, 'Consumer Use of News', November 2018, p. 25.

## Regional and Small Publishers Jobs and Innovation Package

The Regional and Small Publishers Jobs and Innovations Package is comprised of The Regional and Small Publishers Cadetships Program, the Regional Journalism Scholarships Program and The Regional and Small Publishers Innovation Fund. The Regional and Small Publishers Cadetships Program and the Regional Journalism Scholarships Program will run from 2018–19 to 2019–20.

- The Regional and Small Publishers Cadetships Program is designed to help regional and small metropolitan publishers support early career journalists by providing financial assistance for new cadets for at least 12 months.<sup>1076</sup>
- The Regional Journalism Scholarships Program is intended to help emerging journalists in regional areas acquire the skills and knowledge needed to operate in the contemporary news media industry and be job-ready at the completion of their studies<sup>1077</sup>

The Regional and Small Publishers Innovation Fund (the Innovation Fund) is a competitive grants program that will provide \$16 million per year over three years from 2018–19 to support regional and small publishers to transition to and compete more successfully in the evolving media environment.

The ACCC would encourage a review of these measures to determine whether they should be continued.

### ***Area for further analysis and assessment—Improving the ability of news media businesses to fund the production of news and journalism***

The ACCC is continuing to consider approaches to improve the ability of news media businesses to fund the production of quality news and journalism. The ACCC has identified three potential options on which it would like feedback:

- (a) A review of the impacts of the measures comprising the Regional and Small Publishers' Jobs and Innovation Package in 2018–19 to determine whether the Package should be continued beyond its current three year funding profile (and potentially modified or expanded).
- (b) Tax offsets for the costs incurred by news media organisations to produce particular types of journalism that have high public benefits and are at risk of under-production. The ACCC recognises the difficulties in determining the scope of such a subsidy and the risk of misappropriation or fraud.
- (c) Making personal subscriptions for publications by media businesses that are signatories to an approved ACMA code of practice as set out in the potential proposal described above, tax deductible to encourage production and consumption of news and journalism.

<sup>1076</sup> Grant Connect, [Regional and Small Publishers Cadetships Program](#), Australian Government, accessed 21 November 2018.

<sup>1077</sup> Grant Connect, [Regional Journalism Scholarship Program](#), Australian Government, accessed 21 November 2018.

# Chapter 7: Future trends

## Key Points

- Ongoing technological and business developments in the media and digital platform markets pose significant social and consumer issues that can shape the direction society takes.
- Governments should consider these issues closely, monitoring and updating regulatory and legislative frameworks to ensure the innovation and investment enabled by these trends does not threaten the rights and autonomy of individuals.
- The online markets in which digital platforms and media companies operate will remain dynamic due to ongoing technological developments and business innovations.
- News outlets and media companies are experimenting with innovative business models, advertising mechanisms and content delivery formats in response to challenges and opportunities in the online environment.
- The growing popularity of ‘internet of things’ devices and the introduction of 5G mobile communications technology will present new benefits in the form of new services, but with potential increased risks to privacy and data security.
- Increasingly sophisticated collection and analysis of user data will have applications beyond targeted advertising, including potentially undesirable use of highly detailed information on individuals.
- Artificial intelligence, machine learning and the use of chatbots have potential positive applications in the production of news, and in counteracting the spread of mis-information and dis-information
- In the longer term, there is potential for new platforms to enter, or for existing platforms to exit, digital platform markets.

The Terms of Reference for this Inquiry direct the ACCC to consider the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets.

The previous chapters have considered innovation and evolving technological advances in discussing the current role of the digital platforms and the contemporary media and advertising environment. This chapter focuses on emerging market-driven and technology-driven trends that have not yet had a significant impact on media and advertising markets, but may do so in the future.

The recommendations put forward in earlier chapters are intended to be forward-looking, anticipating a wide range of issues, including emerging trends discussed in this chapter that have potential to threaten the rights, privacy and autonomy of individuals. This chapter includes discussion of some more speculative developments, the wider impact of which is not yet clear. It will be important for governments to continue considering the impact of these developments, and for individuals to be aware of potential implications for their rights, privacy and autonomy.

On this basis, this chapter makes a number of provisional findings, but not specific recommendations to the government. This chapter considers a number of emerging technologies and trends to illustrate potential future developments, and to prompt public consideration of these issues, including the potential need for governmental and regulatory responses. These developments include:

- experimentation with new business models and new delivery methods for news and journalistic content (section 7.1)
- emerging technologies including the ‘internet of things’, voice-activated devices and advancements in data use, security and authentication (section 7.2)
- rapid advancement in artificial intelligence and machine learning, including the introduction of chatbots (section 7.3)
- potential changes to the composition and function of major digital platforms, such as expansion into related markets and entry or exit of market participants (section 7.4).

Following the release of this preliminary report, the ACCC will continue to explore the issues and trends identified in this chapter, and welcomes any submissions from stakeholders on likely future developments in the lead-up to the final report of this Inquiry.

## 7.1 Emerging developments in online news

### Key findings

- While publishers and third parties continue to experiment with innovative business models to provide financial support for journalism, a single successful model has not yet emerged.
- News outlets are beginning to develop innovative content to respond to the migration of news consumers from open social media platforms to private messaging apps.

As has been explored in chapter 1 and chapter 6, the advent of the internet and the rise of digital platforms have had a transformative impact on news media in Australia. In particular, the disruption of traditional media business models has made it more difficult for media businesses to fund the production of journalism.

Additionally, changes in consumption patterns and habits of news consumers have encouraged news producers to experiment with new formats and delivery mechanisms for news content.

This section will:

- survey some of the emerging business models to fund the production of journalism in the online environment
- consider responses of news producers to the recent shift of consumers from 'open' social media platforms to private messaging applications.

While these are two particular issues the ACCC considers relevant to the relationship between digital platforms and news media businesses in the medium to long term, feedback on other relevant emerging developments will also be welcome.

### 7.1.1 Emerging business models for journalism

Following the significant disruption to media businesses caused by the internet and digital platforms, a number of news media businesses and other organisations are experimenting with different business models to support journalism. These include a number of innovative business models and content structures that would not have been possible in the pre-internet media environment.

#### Digital subscriptions

As discussed in chapter 6, Australian news publishers have significantly increased their numbers of digital subscribers over the past five years. Australians appear increasingly willing to pay for online news, with the 2018 Digital News Report finding that 20 per cent of Australian online news audiences were doing so in 2018 compared to 10 per cent in 2016.<sup>1078</sup>

To some extent this trend is a continuation of a traditional business model that has moved online, as news publishers have always derived part of their revenue from subscriptions. However, as discussed in chapter 1, subscriptions and cover charges only ever contributed to a small proportion of total income earned by newspaper companies, with the bulk of their revenues provided by advertising.<sup>1079</sup> The provision of digital subscriptions is allowing some news media businesses to successfully manage the transition away from traditional advertising-based business models. By eliminating the costs of physical production and distribution such as the mass circulation of hard-copy newspapers, online news businesses are more able to rely on subscriptions for a larger proportion of their revenue.

<sup>1078</sup> S Park, C Fisher, G Fuller and J Lee, '[Digital News Report: Australia 2018](#)', News and Media Research Centre, University of Canberra, June 2018, p. 72.

<sup>1079</sup> For example, Fairfax Media's submission to the Digital Platforms Inquiry notes that in 1999 about 80 per cent of the company's revenue derived from advertising, while subscriptions and cover prices only contributed 20 per cent. See Fairfax Media, '[ACCC Digital Platforms Inquiry—Fairfax Media response to issues paper](#)', 20 April 2018.

For example, in the early 2000s, *Crikey* reportedly relied on relatively low subscription revenues of \$27 000 per month for 90 per cent of its revenue<sup>1080</sup>, which allowed it to operate at a scale and staff level that would not have been possible in the pre-internet era.<sup>1081</sup>

At the other end of the spectrum, in August 2018, *The New York Times* reported that subscriptions accounted for ‘nearly two thirds’ of its revenue, with 2.9 million of its 3.8 million subscribers being ‘digital-only’.<sup>1082</sup> This example also demonstrates that the negligible marginal cost and absence of geographic boundaries of news distribution online has allowed certain outlets to build audiences world-wide, with 15 per cent of *The New York Times*’ subscribers based outside of the United States.<sup>1083</sup> Notably, the number of the publication’s Australian subscribers reportedly doubled in the 2017–18 financial year.<sup>1084</sup>

As discussed in chapter 6, a subscription-led business model is most suitable to online news outlets that provide ‘premium’ or specialist journalism—and that attract larger audiences from higher disposable income demographics. On this basis, many publications are experimenting with alternative revenue streams that may be employed instead of, or in combination with, a digital subscription model.

## Crowdfunding

Over the last decade, online services such as Kickstarter and Australian service Pozible have popularised the ‘crowdfunding’ of products, including media content. These platforms allow creators of products and services to elicit large numbers of small contributions from the general public, replacing or augmenting the traditional avenue of sourcing ‘seed funding’ for new ventures.

Contributors are able to choose how much monetary support to pledge towards a crowdfunding campaign, and are usually offered varying levels of ‘reward’ based on how much they contribute. For example, a project may offer a personalised thank you note for contributing several dollars, a copy of the product for contributions at or above its eventual market price, and exclusive content or direct contact with the creators of the project for very high contributions. The majority of crowdfunding platforms and projects for news and journalism do not treat contributors as investors, i.e. there is not the promise or expectation of financial reward for backing a successful crowdfunding campaign.

A number of high-profile outlets have found success in using crowdfunding to support individual public interest journalism projects, including some Australian digital native news publishers. For example:

- following the success of *The Guardian US* with three crowdfunding campaigns in the United States, *The Guardian Australia* raised \$150 000 in early 2018 to support a series of environmental stories entitled *Our Wide Brown Land*<sup>1085</sup>
- *Crikey* raised \$21 415 through Pozible in April 2018 for ‘Crikey Dig’, a 10- to 15-part series of ‘deep-dive civic journalism’ stories that it could not produce within the budget of its regular publication.<sup>1086</sup>

Internationally, some entirely new publications have been launched with the help of crowdfunding, including:

- Dutch news website *De Correspondent*, which raised over €1 million in eight days through crowdfunding in 2013, with contributors signing up for ongoing subscriptions<sup>1087</sup>

1080 *New Matilda*, ‘[How Crikey Kept on Trucking](#)’, 22 June 2010, accessed 20 November 2018.

1081 While *Crikey* does not publicly release revenue information, its website states that its primary sources of revenue are now subscriptions and advertising. See *Crikey*, ‘[About Crikey](#)’, accessed 21 November 2018.

1082 J Peiser, ‘[New York Times Co. Reports \\$24 Million Profit, Thanks to Digital Subscribers](#)’, *The New York Times*, 8 August 2018, accessed 20 November 2018.

1083 S Wang, ‘[As The New York Times extends its reach across countries \(and languages and cultures\), it looks to locals for guidance](#)’, *Nieman Lab*, 2 July 2018, accessed 20 November 2018.

1084 S Wang, ‘[As The New York Times extends its reach across countries \(and languages and cultures\), it looks to locals for guidance](#)’, *Nieman Lab*, 2 July 2018, accessed 20 November 2018.

1085 *The Guardian*, ‘[Our wide brown land](#)’, accessed 20 November 2018; P Wallbank, ‘[Guardian Australia crowdfunds environmental journalism project](#)’, *Mumbrella*, 30 January 2018, accessed 20 November 2018.

1086 P Wallbank, ‘[Crikey successfully completes journalism crowdfunding campaign](#)’, *Mumbrella*, 11 April 2018, accessed 20 November 2018; P. Wallbank, ‘[Crikey launches crowdfunding campaign to finance investigative journalism project](#)’, *Mumbrella*, 7 March 2018, accessed 20 November 2018.

1087 L Witschge, ‘[A Dutch crowdfunded news site has raised \\$1.3 million and hopes for a digital-native journalism](#)’, *NiemanLab*, 5 April 2013, accessed 20 November 2018.



- German online ad-free newsmagazine *Krautreporter*, which raised USD\$1.38 million in June 2014<sup>1088</sup>
- Spanish publisher *El Espanõl*, which raised over USD\$3.1 million from 5500 supporters across the European Union in March 2015 in a crowdfunding campaign that also offered equity to contributors.<sup>1089</sup>

Despite these high-profile international success stories, there has not been a global surge of new news sources launched through crowdfunding over the last few years, and particularly not in Australia. This suggests that the crowdfunding model is most suitable for distinct one-off projects or limited series such as those recently employed by *The Guardian Australia* (its *Our Wide Brown Land* series).

## Direct support

Services such as Patreon (launched in 2013) and Drip (launched in 2012, acquired by Kickstarter in 2016 and relaunched in 2017) allow small, passionate audiences to directly support artists and content creators through regular monthly contributions. This model combines crowdfunding with the traditional subscription model, with content creators often leveraging already-popular work that is released for free by offering contributors various tiers of exclusive material based on their level of support.

This 'direct support' model has been particularly successful for individuals and small groups of online content creators releasing work through online videos and podcasts. For example, American left-wing political commentary podcast Chapo Trap House earns over USD\$100 000 per month through the support of over 24 000 Patreon users ('patrons'),<sup>1090</sup> and educational YouTube video creators SciShow earn over USD\$20 100 per month from over 5400 patrons.<sup>1091</sup>

A handful of individual independent journalists and news organisations have found some success using this model to produce work without relying on employment or commissions from larger publications. These include:

- American sports journalist Jeff Gluck, who earns a reported USD\$6500 per month on Patreon from 800 patrons for coverage of NASCAR racing<sup>1092</sup>
- British writer and journalist Laurie Penny, who earns over USD\$3800 per month on Patreon from over 625 patrons<sup>1093</sup>
- Australian journalist Andrew P. Street, who earns over USD\$2400 per month on Patreon for a politics newsletter released three times per week.<sup>1094</sup>

While this business model has not yet been adopted widely by journalists or news organisations, its ongoing and growing popularity suggests that its use for news production may increase in coming years, particularly in support of specialist and niche reporting.

Additionally, some larger digital native publications are adopting elements of the 'direct support' model using their own online infrastructure rather than going through services such as Patreon. For example, *The Guardian Australia* runs a 'Supporter program' that allows readers to make ongoing voluntary contributions of \$10 per month to receive benefits including access to an ad-free version of the publication's mobile app and 'behind the scenes' updates from its newsroom.<sup>1095</sup> However, unlike the traditional subscription model, all substantive *Guardian Australia* news content remains available free to non-members. *The Guardian Australia* announced in July 2018 that it had received voluntary

1088 K Johnson, '[Krautreporter: Crowdfunding journalism is a movement](#)', *Through the Cracks*, 20 April 2018, accessed 20 November 2018.

1089 K Johnson, '[The story behind \(and tips from\) the most successful crowdfunding campaign in the history of journalism](#)', *Through the Cracks*, 28 April 2015, accessed 20 November 2018.

1090 Patreon, '[Chapo Trap House is creating Chapo Trap House Podcast](#)', accessed 20 November 2018.

1091 Patreon, '[SciShow is creating YouTube Videos about Science](#)', accessed 20 November 2018.

1092 T Biasotti, '[I thought I'd give it a shot': Two sportswriters find success crowdfunding](#)', *Columbia Journalism Review*, 27 March 2017, accessed 20 November 2018.

1093 Patreon, '[Laurie Penny is creating journalism, features and stories](#)', accessed 20 November 2018.

1094 Patreon, '[Andrew P Street is creating a two/three-times-a-week Australian politics newsletter](#)', accessed 20 November 2018.

1095 The Guardian Members, '[Become a Guardian Australia Supporter: Help protect our independent journalism](#)', accessed 20 November 2018.



contributions from 65 000 readers in the two years since the launch of this program, and that the program accounts for 36 per cent of its revenue.<sup>1096</sup>

## Microtransactions

Similar to the revenue issues currently being experienced by news publishers, the recorded music and film industries faced significant challenges to their business models due to the widespread availability of free content online. These industries combated this trend and successfully monetised content on the internet through online storefronts like iTunes and Google Play. These storefronts brought together a wide range of content from different producers, allowing consumers to sign up once to pay small fees to access individual songs, movies and television programs.

Dutch online news platform Blendle, which launched in 2013, adopts a similar business model. It collects content from a variety of newspapers and magazines, and allows users to pay a small fee (under USD\$0.50) for each article they want to read. This service reached one million users in 2016, and is now in 'open beta' testing in the United States, offering content from publications including *The New York Times*, *The Washington Post* and *The Wall Street Journal*.<sup>1097</sup>

The success of this model is far from assured, particularly given the failure of numerous previous attempts at launching a microtransaction model for journalism from start-ups including Beenz, BitPass and Peppercoin. Commentators have noted that obstacles for such a business model include a general unwillingness to pay for news content due to availability of competing content online, and some degree of friction raised by the requirement for users to make a conscious decision to pay before reading every article.<sup>1098</sup>

## Collective subscriptions

More recently, the music, film and television industries have successfully monetised online content through 'collective subscription' or 'all you can eat' models employed by services such as Spotify, Apple Music, Netflix and Amazon Prime Video. Through these services, users pay a single monthly subscription fee for unlimited access to content from a wide range of different producers.

Magazine aggregation platform Texture has adopted this collective subscription model, providing smartphone and tablet apps that allow access to full issues of over 200 magazines for a single monthly subscription price. Apple acquired Texture in March 2018, publicly stating that this acquisition was part of an effort to ensure the availability of high-quality journalism on its devices.<sup>1099</sup>

Australian start-up Inkl combines elements of both microtransactions and collective subscriptions. It allows its users to either pay \$0.10 for each article they read, pay \$15.00 per month for unlimited access to a range of different publications, or pay \$25.00 per month for unlimited access to all publications on the service. Inkl has content partnerships with major publishers including Fairfax Media and Reuters; digital natives including *Crikey* and *The Guardian*; prominent international services including Al Jazeera, *The Wall Street Journal*, *The Atlantic* and *The Jerusalem Post*. Notably, the service does not feature any content from News Corp.<sup>1100</sup>

The success of the collective subscription model and its value to subscribers depend on the participation of a wide variety of publishers. For example, in the online video sector, consumers are showing a limited appetite to pay for multiple subscriptions in an environment where desirable content is increasingly split across numerous existing and new subscription platforms.<sup>1101</sup> It is also not yet clear whether such a business model can feed enough revenue back to individual publishers to meaningfully

1096 A Meade, '[Guardian Australia reports its first profit in 2018 annual results](#)', *The Guardian*, 31 July 2018, accessed 20 November 2018.

1097 S Winkelman, '[I tried Blendle, the 'Netflix of journalism,' for a week and went broke—but you might not](#)', *Digital Trends*, 25 April 2018, accessed 20 November 2018.

1098 See, for example, R Bilton, '[Why micropayments for news schemes struggle to take off](#)', 15 April 2018, *DigiDay*, accessed 20 November 2018.

1099 A Hartmans, '[How to use Texture, the beautiful 'Netflix for magazines' app Apple just bought](#)', *Business Insider Australia*, 14 March 2018, accessed 20 November 2018.

1100 K Joshi, '[How Melbourne start up Inkl is shaking up news distribution](#)', *Media Week*, 1 February 2018, accessed 20 November 2018.

1101 B Barrett, '[You're about to drown in streaming subscriptions](#)', 14 October 2018, *Wired*, accessed 20 November 2018; M Scott, '[Can Australian streaming survive a fresh onslaught from overseas?](#)', *The Conversation*, 20 August 2018, accessed 20 November 2018.

support journalism production; as an illustration, Spotify reportedly generates very low royalty payments, even for extremely popular musicians.<sup>1102</sup>

## Live events as a revenue stream

Some news outlets also seek to support the production of journalism by leveraging a popular brand into the promotion and management of live events and conferences. While media businesses have historically held such events to incentivise increased print advertising, many organisations now successfully generate profit through events themselves, combining revenue from highly-integrated corporate sponsorship and ticket prices.<sup>1103</sup> These events also allow media businesses to solidify their relationships with audiences by directly connecting journalists and editorial staff with event attendees in the real world.<sup>1104</sup>

This business model is particularly popular in the United States, where media businesses of all sizes are increasingly turning to live events to diversify their revenue streams. For example, in 2015 *The New York Times* reported that it expected to earn US\$20 million per year through conferences<sup>1105</sup>, and Philadelphia local news outlet *Billy Penn* launched with an events-focused business model in 2014, earning 80 per cent of its revenue through live events by 2015.<sup>1106</sup>

While most of Australia's news media businesses are not yet adopting this potential revenue stream, this may occur in the short to medium term. Nine Entertainment Co is testing this model through the launch of its new Future Women brand, which will have a focus on live events.<sup>1107</sup> *The Australian Financial Review* holds a number of branded events each year<sup>1108</sup>, and some Australian industry publications already generate revenue through live conferences and events, such as the CommsDay Summit<sup>1109</sup> and the Retail Week held by *Inside Retail* magazine.<sup>1110</sup> Some Australian niche publications are also starting to move into events. Pop culture website *Junkee* holds both the 'Video Junkee' video festival and the 'Junket' conference for media influencers<sup>1111</sup>. Media news site *Mumbrella* hosts around 30 events per year, which reportedly account for 'more than half' its revenue.<sup>1112</sup>

While this model may provide an important new revenue stream to support journalism, commentators have questioned the lack of actual journalistic content of live events<sup>1113</sup>, the potential for heavy sponsorship to compromise journalistic integrity<sup>1114</sup>, and potential long-term issues with this revenue model due to difficulties in building scale.<sup>1115</sup>

1102 See, for example, L Marshall, '[Let's keep music special. F-Spotify: On demand streaming and the controversy over artist royalties](#)', *Creative Industries Journal* 8:2, 2015, pp. 177-189.

1103 C Kaydo, '[Why the New Yorker Festival is the model of a modern magazine event](#)', BizBash, 15 October 2014, accessed 20 November 2018; E Bazilian '[How The New Yorker Festival has become a magnet for brands](#)', AdWeek, 6 October 2014, accessed 20 November 2018.

1104 C Hu, '[Rushing for revenue, magazines are spending millions on their own pop culture festivals](#)', *Forbes*, 9 August 2016, accessed 20 November 2018.

1105 M Sullivan, '[As print fades, part 1: 'live journalism' at The Times](#)', *The New York Times*, 10 August 2015, accessed 20 November 2018.

1106 A Clark, '[Amid big changes in Philly media, start-up Billy Penn sticks to its vision](#)', *Columbia Journalism Review*, 4 February 2016, accessed 20 November 2018.

1107 M Mason, '[Nine's Helen McCabe readies Future Women for launch](#)', *Australian Financial Review*, 15 July 2018, accessed 20 November 2018.

1108 *Australian Financial Review*, '[Our Events](#)', accessed 20 November 2018.

1109 CommsDay, '[CommsDay Summit 2019](#)', accessed 20 November 2018.

1110 Retail Week, '[Join the movement: Raising the Retail Industry across Australia through events, collaboration, networking & ideas](#)', accessed 20 November 2018.

1111 A Carson and D Muller, '[The Future Newsroom: A report commissioned by Facebook](#)', *The University of Melbourne*, September 2017, p. 38.

1112 A Carson and D Muller, '[The Future Newsroom: A report commissioned by Facebook](#)', *The University of Melbourne*, September 2017, p. 38.

1113 C Hu, '[Rushing for revenue, magazines are spending millions on their own pop culture festivals](#)', *Forbes*, 9 August 2016, accessed 20 November 2018.

1114 S Lacy, '[The events business won't save American journalism](#)', *Pando*, 12 August 2015, accessed 20 November 2018.

1115 S Lacy, '[The events business won't save American journalism](#)', *Pando*, 12 August 2015, accessed 20 November 2018.

## 7.1.2 Use of messaging apps for news

### Move to private messaging

The use of social media platforms to access news remains extremely popular, as explored in earlier chapters. However, there are signs that the popularity of using traditional 'open' social media such as Facebook for this purpose may no longer be growing.

The 2018 Digital News Report surveyed news consumers in 37 countries, and found that more than half of these global consumers used social media to access news, with 17 per cent using social media as their main news source. However, this report also found that use of social media for news had not grown globally since 2017, and had actually decreased since 2017 in countries including the United Kingdom and the United States. In this respect, Australia was an outlier, with social media use for news increasing by 6 per cent.<sup>1116</sup>

The report also found that 'news consumers are turning to more private spaces to access and share news' at the same time as this global decline, and are increasingly using instant messaging apps and services such as WhatsApp, Facebook Messenger, Instagram and Snapchat for this purpose.<sup>1117</sup>

In September 2018, Kantar Media released a qualitative study of Facebook users in Brazil, the United States, the United Kingdom and Germany that corroborated the trends identified by the Digital News Report. This study found that the move away from 'open' social media for sharing news was driven by a number of benefits offered by messaging apps:

- users can tailor their audiences to connect directly and privately with individuals and groups selected for shared interests and values
- the self-selecting and targeted communication through messaging apps ensures that messages received are likely to be more relevant
- the private environment offered by messaging apps grants users a sense of safety, and allows them to express themselves more openly and authentically
- the immediacy of messaging apps allows communication to feel quicker and more personal than posts to open social media platforms.

Businesses have followed the migration of users from open social media platforms to messaging apps, and numerous companies are beginning to use messaging apps rather than email for customer service, marketing and sales.<sup>1118</sup> In doing so, many businesses are managing this communication through artificially intelligent 'chatbots', which are able to carry out simple human-like text interactions with users natively on messaging apps. The broader use of chatbots on digital platforms, and potential impacts on consumers, are explored further in section 7.3.

Opening private messaging apps up for business use has been a key monetisation strategy for these services. Facebook (which owns WhatsApp) launched the stand-alone WhatsApp Business application in January 2018, attracting over three million users by April 2018.<sup>1119</sup> Facebook (for both WhatsApp and Facebook Messenger), Apple, Twitter and Microsoft have all released application programming interfaces (APIs) allowing businesses to easily configure and implement their own chatbots on their private messaging services.<sup>1120</sup>

1116 S Park, C Fisher, G Fuller and J Lee, '[Digital News Report: Australia 2018](#)', News and Media Research Centre, University of Canberra, June 2018, p. 14.

1117 S Park, C Fisher, G Fuller and J Lee, '[Digital News Report: Australia 2018](#)', News and Media Research Centre, University of Canberra, June 2018, p. 14.

1118 A Asli, '[How Facebook Messenger bots are revolutionising business](#)', Forbes, 6 June 2018, accessed 20 November 2018.

1119 K Johnson, '[Facebook: WhatsApp business has over 3 million users](#)', *Venture Beat*, 25 April 2018, accessed 20 November 2018.

1120 J Constine, '[Facebook launches Messenger platform with chatbots](#)' *TechCrunch*, 12 April 2016, accessed 20 November 2018; K Johnson, '[WhatsApp launches Facebook chat ads and Business API for automated messaging with customers](#)', *Venture Beat*, 1 August 2018, accessed 20 November 2018; K Johnson, '[Apple's Business Chat plans to take on WhatsApp, Skype and Facebook Messenger](#)', *Venture Beat*, 6 June 2017, accessed 20 November 2018.

## Use by news services

Like other businesses, news outlets are also moving into the realm of private messaging services, with international publishers including the BBC, *The New York Times* and *The Washington Post* beginning to use these services to deliver news directly to audiences. Locally, the ABC launched a news service through Facebook Messenger on 1 November 2016. By 2017, this service attracted an average of 152 000 monthly users, with users averaging 23.2 sessions per month.<sup>1121</sup>

One of the obvious benefits of providing news through private messaging is the presence of engaged audiences, particularly in light of movement of audiences away from open platforms, and Facebook's recent changes to news feed algorithms which have de-prioritised news content, as discussed in chapter 6.<sup>1122</sup> But news organisations have also found benefits in the nature of the delivery mechanism, which allows news to be more interactive and more personal than broadcast journalism, print news, and even more conventional online news services.

In assessing the success of the ABC's Facebook Messenger news service, an ABC journalist stated that 'on Messenger, we're existing alongside our readers' personal chats with loved ones and group chats with friends about reality TV shows.'<sup>1123</sup> This personal and interactive nature is reflected in the example below, which demonstrates the conversational tone of the service, as well as the ability of the reader to choose to receive more detail on certain stories based on points of interest.

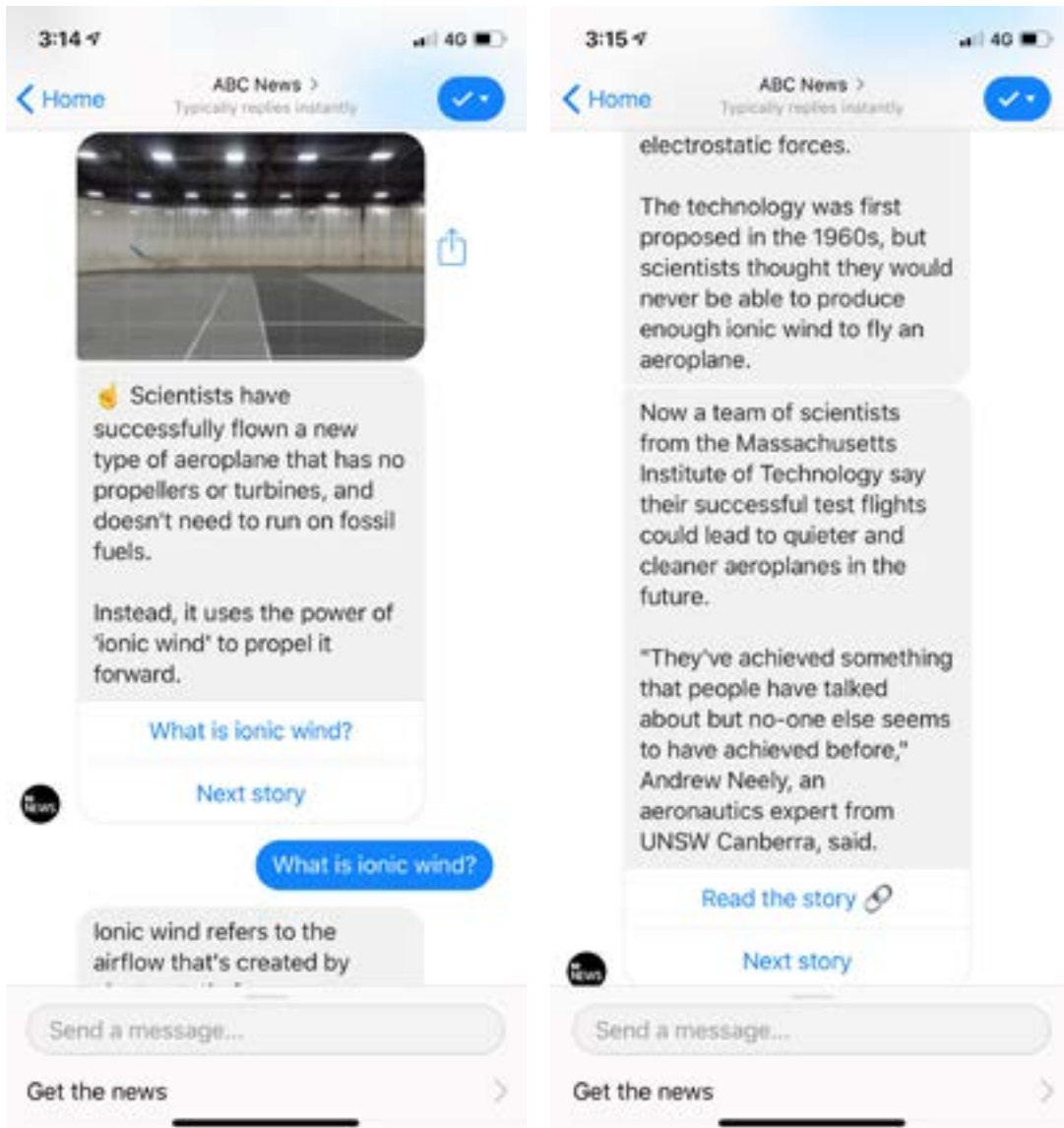
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1121 ABC, '[Submission to the ACCC Digital Platforms Inquiry](#)', 20 April 2018, p. 20.

1122 C McCosker, '[Fishing where the fish are: ABC News on Facebook Messenger](#)', *The Walkley Foundation*, 24 February 2017, accessed 20 November 2018.

1123 P Marsh, '[Backstory: Getting personal on Facebook Messenger](#)', *ABC*, 7 October 2017, accessed 20 November 2018.

Figure 7.1: ABC News on Facebook Messenger (example article)<sup>1124</sup>



<sup>1124</sup> Facebook Messenger, Chat with ABC News, accessed 22 November 2018.

Most messaging-based news services use simple chatbots to guide users through pre-authored content, similar to the example above. However, delivering news through messaging provides the flexibility to allow a degree of personalised communication between news audiences and particular journalists. For example, coverage of the 2017 Budget on the ABC's Messenger service focused on the experience of journalist Peter Marsh, who attended the Budget lock-up for the first time that year.<sup>1125</sup> Similarly, *The New York Times'* coverage of the 2016 Rio Olympics was based around observations, pictures and personal text messages from sports editor Sam Manchester.<sup>1126</sup> Another innovative feature of this style of news delivery is the ability of audience members to quickly, directly and privately respond to stories. The ABC's Head of News Digital has stated that:

*One of the key characteristics of our foray into messaging is the interaction with the audience that it allows. This could go in a number of interesting directions. For example, the natural behaviour in a messaging app is to reply to messages. This offers the prospect of us "harvesting" reactions to news stories which we can then incorporate into our coverage.*<sup>1127</sup>

The use of private messaging is an extremely new format for news, with the capacity to change and evolve significantly over coming years. For example, it is not yet apparent how publishers may monetise this delivery mechanism. The introduction of display advertising and sponsored content ('advertorials') may seem particularly intrusive given the personal tone and feel of these services. In this respect, it is telling that the only Australian news service to offer news through messaging is the ABC, which is publicly funded and does not need to make a return through the provision of its content.

In the context of this Inquiry, it is worthwhile noting potential (if still hypothetical) issues private messaging may pose to the choice and quality of journalism. One such issue is the lack of transparency inherent in the private nature of this medium. For example, a news outlet could use a combination of user data and private messaging to serve a particular news story to a certain user or group of users, and not to others—or even two different stories based on the same set of facts, each with different political slants, to different groups of users. As it is not easily possible to know which stories are being served to other users, this could reduce the accountability of previously entirely public-facing news outlets.

This kind of activity may exacerbate potential issues of online filter bubbles or, in a worst-case scenario, promote the spread of mis-information, dis-information and mal-information explored in chapter 6. In some countries, racially-charged hoax messages shared widely on WhatsApp have been reported as directly leading to mob-lynching.<sup>1128</sup> Additionally, in the lead-up to the 2018 Presidential election in Brazil, political campaigners reportedly used WhatsApp to involuntarily add citizens to political chat groups and to send thousands of messages without the consent of recipients.<sup>1129</sup> While in these examples, material appears to have been spread by individuals and political organisations rather than news organisations, they demonstrate the difficulty of combating the dis-information and mal-information through private messaging services.

Additionally, the delivery of news through messaging relies entirely on hosting of these services by private platforms such as Facebook. This means that this news format will constantly be subject to the threat that the hosting service may begin to influence, rank, moderate or charge for its use by news outlets.

If the delivery of news through private messaging becomes more popular over coming years, the content, accountability and control of these services should be considered as part of the any broader updates to the regulatory frameworks governing media and journalism.

1125 P Marsh, '[Backstory: Getting personal on Facebook Messenger](#)', ABC, 7 October 2017, accessed 20 November 2018.

1126 A Phelps, '[This is how The New York Times is using bots to create one-to-one experiences with readers](#)', NiemanLab, 26 April 2017, accessed 20 November 2018.

1127 S Watt, '[And now the news...via Facebook Messenger](#)', ABC, 7 November 2016, accessed 20 November 2018.

1128 M Safi, '[WhatsApp murders: India struggles to combat crimes linked to messaging service](#)', *The Guardian*, 3 July 2018, accessed 20 November 2018.

1129 M Magenta, '[How WhatsApp is being abused in Brazil's elections](#)', BBC, 24 October 2018, accessed 20 November 2018.



## 7.2 New devices, new data

### Key findings

- The increased uptake and rapid development of internet of things devices has expanded data collection by digital platforms, which may in turn increase risks to consumers' privacy, autonomy and bargaining power with companies.
- The introduction of 5G mobile technology will also facilitate increased data collection, including more accurate location tracking through cell densification in mobile networks, which has the potential to allow digital platforms and advertisers to tailor advertising to a highly localised degree.
- The growth in consumer uptake of voice-activated devices, and access to news via such devices, is likely to affect competition in the supply of news media in Australia.
- Traditional broadcasters are beginning to offer addressable television advertising (tailored ads dynamically inserted into online television streams), which may provide advertisers with an alternative to other forms of targeted advertising.
- Emerging authentication technologies and systems are being developed and implemented in order to increase security online.
- The increased collection of individuals' data made possible by new technologies and devices has significant implications for consumers and society as a whole, and will require serious consideration by citizens and governments.

The internet of things (IoT) generally refers to 'an ecosystem in which applications and services are driven by data collected from devices that sense and interface with the physical world'.<sup>1130</sup> Accordingly, IoT can cover a wide range of currently-available products and services, as well as those that are still being developed. The Organisation for Economic Co-operation and Development (OECD) considers that the products currently in the market include three broad categories<sup>1131</sup>, which are listed below alongside examples of products available, or soon to be available, in the Australian market:

- Wearables, health monitors, and implantable devices—items worn by, or implanted into, a consumer. This can include exercise trackers, smart watches and technology-enabled glasses.
- Smart home applications—including voice-activated smart speakers and addressable TV and other connected devices such as fridges, as well as online e-readers such as Amazon's Kindle. Voice activated smart speakers from Amazon, Apple and Google are available in Australia; Facebook has recently unveiled its smart speaker device, Portal.
- Connected vehicles—car manufacturers are installing technology in cars to enable them to interact. Renault, Nissan and Mitsubishi recently entered into a partnership with Google<sup>1132</sup>, and Mercedes Benz, Audi and Volvo have entered into partnerships with Alibaba to install its digital assistant into cars sold in China.<sup>1133</sup>

The increased uptake and rapid development of IoT devices have expanded the potential for data collection and use by digital platforms, and may have an impact on media and advertising in the future. The following section focuses on devices most relevant to the Terms of Reference.

1130 OECD, [The Internet of Things: Seizing the benefits and addressing the challenges](#), 13 May 2016, p. 8.

1131 OECD, [The Internet of Things: Seizing the benefits and addressing the challenges](#), 13 May 2016, p. 9.

1132 P Campbell, [Renault, Nissan and Mitsubishi in car tech deal with Google](#), The Australian Financial Review, 18 September 2018, accessed 20 November 2018.

1133 L Chen, [Alibaba Gets its Smart Assistant into Chinese Mercedes](#), Bloomberg, 23 April 2018, accessed 20 November 2018.



## 7.2.1 Voice-activated devices

Voice-activated devices are devices controlled by means of the human voice that are able to understand and carry out spoken commands. Accordingly, voice-activated devices have two primary components—the hardware (the physical device) and the software that enables the device to understand and process spoken commands (often known as virtual assistants).

The most common type of voice-activated device is the smart speaker, which is a type of combined internet-connected speaker and microphone that features an integrated virtual assistant (that is, the software); these microphones are programmed to start recording in response to the user's voice.

Virtual assistants are also available on mobile and desktop devices, with some mobile phones integrated with virtual assistants, such as the Apple iPhone with Siri and the Google Pixel with Google Assistant.

The uptake of smart speakers as a form of voice-activated device is growing rapidly in Australia. A survey by market research company Accenture projected that digital voice assistant devices in Australia are projected to increase more than five-fold this year, with 23 per cent of Australians owning a device by the end of 2018, up from 4 per cent in 2017.<sup>1134</sup> Telsyte projects that the number of Australian households that own a smart speaker will increase from 1.15 million in June 2018 to 3 million by 2022.<sup>1135</sup> Similarly, the Reuters Institute for the Study of Journalism (Reuters Institute) reports that the adoption of voice-enabled smart speakers is taking off rapidly, and that 'these stand-alone devices are reshaping home ecosystems'.<sup>1136</sup>

Smart speakers are also becoming an increasingly common way for Australian consumers to access news. The 2018 Digital News Report found that 'voice activated speakers have started to emerge as a device to access news, with one in three users of voice activated speakers using them for news'.<sup>1137</sup> The Reuters Institute also noted that 58 per cent of media companies polled in its survey said that they would be investing more in audio-based media.<sup>1138</sup>

The most popular voice-activated devices and the associated software offered in Australia are set out in table 7.1.

**Table 7.1: Popular voice-activated devices**

Manufacturer	Smart speaker	Virtual assistant
Google	Home	Google Assistant
	Home Mini	
Amazon	Echo	Amazon Alexa
	Echo Dot	
	Echo Plus	
Apple	Homepod	Apple Siri
Microsoft	Invoke	Microsoft Cortana
Samsung	Galaxy Home	Samsung Bixby
	One	
Sonos	Beam	Amazon Alexa

1134 D Sovie, L McMahon, G Roberts, M Schoelwer and R Murdoch, '[Time to navigate the Super Myway: Give the digital consumers exactly what they're looking for](#)', *Accenture*, referenced in J Brookes, '[Digital Voice Assistant Impacting Smartphone use: Accenture](#)', *Which-50*, 9 January 2018, accessed 20 November 2018.

1135 Telsyte, '[Smart speakers help send Australian IOT@Home market skyward](#)', 15 May 2018, accessed 20 November 2018.

1136 N. Newman, '[Journalism, Media and Technology Trends and Predictions 2018](#)', *Reuters Institute for the Study of Journalism*, p. 34.

1137 S Park, C Fisher, G Fuller and J Lee, '[Digital News Report: Australia 2018](#)'; News and Media Research Centre, University of Canberra, June 2018, p. 58.

1138 N. Newman, '[Journalism, Media and Technology Trends and Predictions 2018](#)', *Reuters Institute for the Study of Journalism*, p. 35.

On 8 October 2018, Facebook announced its own smart speaker (with the added attachment of a camera and screen), known as Portal and Portal+, which will have voice-activated virtual assistant Amazon Alexa integrated into its functions.<sup>1139</sup>

The adoption of voice activated devices and their growing popularity as a channel to access news may raise issues about how these devices select and present news items in response to consumer requests. Stakeholders have highlighted the potential for competition issues to emerge in the supply of news.<sup>1140</sup> In particular, some are concerned that, similar to the operation of algorithms that rank and display news on search engines and social media platforms, the selection, presentation and sourcing of news content may lack transparency. These concerns are exacerbated in the case of smart speakers, as rather than being presented with a selection of news sources on a screen, a user of a voice-activated device is typically only presented with one result.

The following risks of smart speakers have been identified:

- potential foreclosure of news companies in the form of refusing to supply their news content on a voice activated device, or charging exorbitant fees to the supplier for featuring their content on the device
- reduced consumer choice of news supplier depending on how news content is presented and whether consumers are able to select their preferred news sources
- where devices supply news based on consumer preferences or previous searches, this could create an echo chamber or filter bubble effect
- increased threats to consumer privacy due to increased data collection.

These risks are discussed below as part of broader discussion of IoT devices in the section below. The ACCC welcomes any views in relation to:

- the uptake of voice activated devices in Australia and its potential effect on competition in media markets
- the extent to which news businesses will be able to monetise news content available on voice activated devices
- the extent to which any of its recommendations regarding transparency and regulation should apply to voice activated devices.

## 7.2.2 Increased data gathering through IoT devices

As with other data collection practices, there are likely to be some benefits for consumers in new and increased collection of data through IoT devices, including convenience and remote control and automation of living spaces.<sup>1141</sup>

However the increased uptake of IoT devices provides specific new avenues for data collection, particularly passive data collection, by businesses including digital platforms. The OECD has stated that ‘the sheer volume of data that devices can generate is stunning’ noting that ‘fewer than 10 000 households using [a] company’s IoT home automation product can generate 150 million discrete data points a day’.<sup>1142</sup>

This may include the collection of data that was not previously available to digital platforms and other third parties (for example, heart rate monitors).<sup>1143</sup> The OECD has noted that the data collected through IoT devices can often be more intimate, sensitive and revealing than anything consumers would ordinarily divulge online (or off).<sup>1144</sup> Devices such as Amazon’s Echo Show, Google’s Home Hub and

1139 Facebook, [Introducing Portal from Facebook: New Video Calling Devices to Connect You with Friends and Family](#), 8 October 2018, accessed 20 November 2018.

1140 See, for example, Southern Cross Austereo, [Submission to ACCC’s Digital Platforms Inquiry](#), April 2018, pp. 4–5; News Corp Australia, [Submission to ACCC’s Digital Platforms Inquiry](#), April 2018, p. 8; Australian Society of Authors, [Submission to ACCC’s Digital Platforms Inquiry](#), April 2018, p. 2.

1141 OECD, [Consumer Product Safety in the Internet of Things](#), 2 March 2018, p. 18

1142 FTC, [Internet of Things: Privacy & Security in a Connected World](#), January 2015, p.14 cited in OECD, [Consumer Policy and the Smart Home](#), 5 April 2018, p. 19.

1143 OECD, [Consumer Product Safety in the Internet of Things](#), 2 March 2018, p. 9.

1144 OECD, [Consumer Policy and the Smart Home](#), 5 April 2018, p. 19.

Facebook's Portal, for example, are intended to integrate seamlessly and invisibly into the routines, and homes, of users<sup>1145</sup>, becoming active in response to users' voices.<sup>1146</sup>

The increased collection of data through such IoT devices may therefore result in the risk of loss of privacy, and may increase the severity of data breaches due to the more intimate nature of the data collected. For example, in 2017, Google moved to fix an issue with Google Home mini devices that were recording even when the user was not intending them to.<sup>1147</sup>

In addition, the presence of these devices in households presents new avenues for misuse by third parties beyond the misuse of data. As IoT devices are increasingly incorporated into consumers' homes and security systems through household automation, information breaches and the third party misuse of data will also carry the risk of actual physical consequences.<sup>1148</sup> There have also been media reports of new patterns of behaviour in domestic abuse cases tied to the rise of smart home technology, including the use of these devices to control or harass abuse victims.<sup>1149</sup> Concerns have also emerged about the safety of children due to unsecured wireless connections, location tracking and poor data protections in IoT devices such as toys.<sup>1150</sup>

As the popularity of IoT devices continues to increase, the collection of data and associated issues are also likely to continue to evolve, and may require ongoing monitoring by governments and regulators, as discussed later in this chapter.

### 7.2.3 5G technology

5G is the fifth generation and latest iteration of mobile technology, and is expected to provide significantly higher peak connection speeds and lower latency (time delays) in mobile data communication.<sup>1151</sup> The first large Australian auction of radiofrequency spectrum suitable for 5G commenced in November 2018<sup>1152</sup>, and service providers in Australia have already begun trialling 5G services in preparation for the widespread introduction of 5G capable devices to the market.<sup>1153</sup>

The introduction of 5G technology is expected to play a role in supporting a wider deployment of IoT in Australia.<sup>1154</sup> Telsyte predicts that 5G will account for 32 per cent of all Australian mobile connections by the end of June 2023.<sup>1155</sup> Global mobile industry body GSMA projects that 1.2 billion people will be using 5G technology worldwide by 2025, and that growth in 5G will be significantly boosted by IoT technology, which it expects to account for 25 billion connections worldwide by 2025.<sup>1156</sup>

One feature of 5G technology is an increase in the accuracy of location tracking, with the majority of 5G devices expected to benefit from 'positioning technologies that achieve a location accuracy of the order of one meter'.<sup>1157</sup> Increased location accuracy will have a broad series of applications including important safety functions, for example, improving the functioning of self-driving cars, and allowing better-targeted public disaster and safety communications.<sup>1158</sup>

1145 For an example of the wide variety of functions offered, see Google, '[Get the Most out of Google Home](#)', accessed 21 November 2018.

1146 See, for example, '[Alexa FAQ](#)', accessed 20 November 2018.

1147 Google, '[Google Home Mini Touch Controls Behaving Incorrectly](#)', accessed 20 November 2018.

1148 OECD, '[Consumer Policy and the Smart Home](#)', 5 April 2018, p. 20.

1149 N Bowles, '[Thermostats, Locks and Lights; Digital Tools of Domestic Abuse](#)', *The New York Times*, 23 June 2018, accessed 20 November 2018.

1150 M Maras, '[4 Ways 'Internet of Things' Toys Endanger Children](#)', *The Conversation*, 10 May 2018, accessed 20 November 2018.

1151 J Rabaey, '[What is 5G? The next generation of wireless, explained](#)', *The Conversation*, 17 May 2018, accessed 20 November 2018.

1152 ACMA, '[Australia's 5G spectrum action on its way](#)', 6 August 2018, accessed 20 November 2018.

1153 See, for example: Telstra, '[Media Release: Telstra turns on free 5G enabled Wi-Fi and Australia's first 5G connected car](#)', 27 March 2018, accessed 20 November 2018.

1154 ACMA, '[5G and mobile network developments—Emerging issues](#)', February 2016, p. 1.

1155 Telsyte, '[Household Interest in 5G Gathers Space](#)', 16 October 2018, accessed 20 November 2018.

1156 GSMA, '[Intelligent Connectivity: How the combination of 5G, AI and IOT is set to change the Americas](#)', p. 1.

1157 R Taranto, S Muppirisetty and L Raulefs, '[Location-aware communications for 5G networks: How location information can improve scalability, latency and robustness of 5G](#)', *IEEE*, 31(2014), p. 102.

1158 ACMA, '[5G and mobile network developments—Emerging issues](#)', February 2016. p. 27.

The pinpoint accuracy offered by 5G technology is also likely to benefit the provision of targeted advertising. At the Consumer Policy Research Centre's 2018 conference on data, 5G technology was described as a paradigm shift, with the extreme accuracy of location tracking making geographical ad targeting possible.<sup>1159</sup> This is likely to exacerbate and amplify issues regarding location tracking by digital platforms discussed in chapter 5.

## 7.2.4 Addressable television advertising

One already-common example of consumers integrating IoT devices into their homes is the adoption of smart TVs and set-top boxes, which allow the viewing of online streaming video not just on phones, tablets and computer screens, but on televisions. Television broadcasters are attempting to harness this development through the introduction of 'addressable advertising', in order to capture some of the benefits of targeted advertising that are already enjoyed by online publications and digital platforms.

Similar to the targeted nature of digital advertising offered by Google, Facebook and other digital platforms, addressable television provides advertisers with the ability to utilise data and target their advertisements to particular segments of the market. Addressable television advertising can be delivered through a variety of online video services including on-demand 'catch-up' video services operated by traditional television broadcasters (e.g. SBS on Demand and Tenplay) and internet-enabled services delivered through proprietary set-top boxes such as Foxtel's iQ.

As Roy Morgan states:

*Addressable TV will ... enable broadcasters to fight back and compete with the likes of Facebook and Google by enabling them to move from simply selling ad slots based on broad demographics to allowing advertisers to use sophisticated first and third party data to target individuals or households and show them different ads during the same programme. This will bridge the gap between the traditional TV advertising model and the personalisation of advertising enabled by the 'Big Data' analytics that the interactive nature of the Internet empowers.*<sup>1160</sup>

Roy Morgan further notes that addressable television advertising already has a potential audience of over 9 million Australians who use smart TVs and streaming devices.<sup>1161</sup>

Australian commercial broadcasters, including Seven and Nine, already offer addressable television advertising to viewers using their online streaming services. Seven first launched addressable television advertising in 2017 during its live coverage of the Rugby League World Cup.<sup>1162</sup> On 2 August 2018, Nine announced that it had used data from 9Now (Nine's broadcast video on-demand service) to build up a database of more than 6.5 million people.<sup>1163</sup>

### Box 7.1: How broadcasters can use addressable advertising

- Broadcasters can use addressable advertising to supply different advertisements to different households, based on data the broadcaster holds or acquires on the household. For example, two households may both have accounts with and stream programming from Seven's video on demand service 7Plus. Household A consists of a professional couple in their thirties with no children, and Household B consists of a family with three school-aged children. While both households may watch the same program (e.g. the 2018 Australian Open), they may receive different ads. For instance, Household A may receive ads for Uber Eats, while Household B may receive ads for family holiday destinations. Viewers in Households A and B may not know that they are being served targeted advertising, or that they have been watching a different ad to viewers in other households.

1159 Consumer Policy Research Centre, query: data Consumer Data Conference, 2018.

1160 Roy Morgan, [Addressable TV will challenge existing attitudes to TV advertising](#), 4 July 2018.

1161 Roy Morgan, [Addressable TV advertising technology already reaches over 9 million Australians](#), 26 August 2018.

1162 Seven West Media, [Seven launches Addressable TV via Dynamic Ad Insertion at Scale](#), October 2017, accessed 20 November 2018.

1163 M Mason, ['Nine Entertainment tackles Facebook and Google with addressable TV'](#), *Australian Financial Review*, 6 August 2018; Nine Entertainment Co., [Nine Launches Real Addressability To The Australian Market](#), 2 August 2018, accessed 20 November 2018.

Addressable television advertising may present an alternative option for advertisers seeking to target consumer groups of a certain demographic or with specific characteristics. However, addressable television advertising in Australia is still developing, and the extent to which advertisers consider addressable television advertising to be substitutable for online advertising is unclear. It is also unclear which businesses are likely to obtain data on consumers and control the delivery of the addressable advertisements.

The ACCC notes that as addressable television advertising becomes more prevalent, it may raise consumer and privacy issues that are similar to those raised by targeted online advertising, as discussed in chapter 5. The ACCC invites submissions about this trend and in particular:

- the take-up of addressable television advertising by advertisers in Australia relative to other forms of advertising, and
- the effect of addressable television advertising on competition in the supply of news media and consumer choice of news outlets.

## 7.2.5 Implications of increased data collection

The increased volume and granularity of data collection made possible by the uptake of IoT technology and the rollout of 5G form part of a broader trend of increased collection and use of consumer data. This trend is likely to have significant implications for the social contracts between consumers, companies and governments.

The incorporation of increasingly sophisticated data analysis into decision-making can bring both benefits and detriments for consumers, as extremely detailed information on individuals' behaviour and attributes can be collected, compiled and accessed by both governments and private companies.

The ability to tailor a profile of an Australian user through data has a range of applications beyond already ubiquitous targeted advertising discussed earlier in this preliminary report. This may include harnessing user data to make commercial decisions relating to individuals, including exclusion or exploitation of individuals based on online profiling.

### Online profiling and exclusionary targeting

As noted by the Consumer Policy Research Centre in its *Consumer data & the digital economy report*, online profiling based on the collection and combination of user data may be used to exclude some consumers from accessing products or services, thereby promoting inequality. Conversely, there is the potential for profiles to be developed for the purpose of marketing to vulnerable consumers.<sup>1164</sup> Though exclusionary targeting may be used for legitimate means, it is also open to misuse.

An example of exclusionary targeting is using online profiling to exclude vulnerable consumers from being able to view or access certain offers. For example, in September 2017, *ProPublica* found that its journalists could purchase rental ads from Facebook that excluded categories of users, including categories relating to ethnicity, language, and (dis)ability.<sup>1165</sup> In April 2018, in response to feedback regarding exclusion advertising, Facebook stated that it had 'removed thousands of categories from exclusion targeting ... [and] focused mainly on [removing] topics that relate to potentially sensitive personal attributes, such as race, ethnicity, sexual orientation and religion'.<sup>1166</sup>

Notwithstanding this, in November 2018, *The Intercept* reported that it was able to promote two articles to a pre-defined 'detailed targeting' category on Facebook called 'white genocide conspiracy theory', which was defined as 'people who have expressed an interest or like pages related to white genocide conspiracy theory' and had 168 000 Facebook users.<sup>1167</sup> *The Intercept* reported that after it contacted Facebook for comment, Facebook promptly deleted the targeting category and apologised.<sup>1168</sup>

1164 P Nguyen, L Solomon, [Consumer data & the digital economy](#), Consumer Policy Research Centre, 17 July 2018, p. 25.

1165 J Angwin, A Tobin, M Varner ['Facebook \(Still\) Letting Housing Advertisers Exclude Users by Race'](#), 21 November 2017, accessed 20 November 2018.

1166 Facebook, [Reviewing Targeting to Ensure Advertising is Safe and Civil, 24 April 2018](#), accessed 20 November 2018.

1167 S Biddle, ['Facebook Allowed Advertisers to Target Users Interested in "White Genocide"'](#), *The Intercept*, 3 November 2018, accessed 20 November 2018.

1168 S Biddle, ['Facebook Allowed Advertisers to Target Users Interested in "White Genocide"'](#), *The Intercept*, 3 November 2018, accessed 20 November 2018.

## Online profiling and exploitation

Online profiling may enable companies not only to negatively target or exclude customers based on vulnerabilities, but also to exploit or exacerbate vulnerabilities and trigger irrationalities in consumers.<sup>1169</sup> Further, different advertisements may be targeted to consumers based on algorithmic determinations of a user's emotional state.<sup>1170</sup>

Technological advances may increasingly assist with the detection of a user's emotional state. For example, *The Atlantic* has reported that Amazon has patented a new technology that would empower Alexa to analyse the pitch and volume of speaker commands to monitor users' emotions such as 'happiness, joy, anger, sorrow, sadness, fear, disgust, boredom, [or] stress' and to respond to commands appropriately, potentially with 'highly targeted audio content, such as audio advertisements or promotions.'<sup>1171</sup> Google holds a similar patent on using one or more processors of a device to detect a negative emotion of a user.<sup>1172</sup> Google also owns a patent that would help search engines return results based on a user's current emotional state, which may be identified in various different ways—including a camera and facial recognition program, a microphone, or a monitoring device connected to the user such as a smartwatch.<sup>1173</sup>

There are clear applications of mood detection technology by digital platforms for a range of purposes, including customising services for users and in the better targeting of advertising services. Earlier this year, *The Australian* reported that Facebook told advertisers it could identify when teenagers felt 'insecure', 'worthless' or 'need[ed] a confidence boost'.<sup>1174</sup> In response, Facebook stated that this research was done with the intention 'to help marketers understand how people express themselves on Facebook. It was never used to target ads and was based on data that was anonymous and aggregated'.<sup>1175</sup>

## Increased price discrimination

The collection of increasingly sophisticated data on individual consumers may enable and encourage highly targeted price discrimination—businesses charging different prices to individuals based on their perception of the individual's ability or willingness to pay.

As discussed in chapter 5, there has to date been fairly limited evidence of personalised price discrimination online<sup>1176</sup>, with retailers setting prices based on relatively broad categories or demographics, such as the customer's geographical location or whether they visited a website directly or through a referral from a discount aggregator.<sup>1177</sup> However, the scope for personalised pricing will grow in the future as the volume and quality of user data collected expands and algorithms become more sophisticated. Businesses may be able to collect and use highly detailed profiles of their customers' behaviours and attributes to offer each customer a different price for a product or service.

Recent academic research suggests that online retailers could theoretically employ user data to introduce 'first degree' or 'perfect' price discrimination. A 2016 study found that:

*[t]ailoring prices based on web browsing histories increases profits by 14.55 per cent, and results in some consumers paying nearly double the price others do for the same product [while] [u]sing only demographics to personalise prices raises profits by only 0.30 per cent, suggesting the per cent profit gain from personalised pricing has increased 48-fold.*<sup>1178</sup>

1169 R Calo, '[Digital Market Manipulation](#)', *The George Washington Law Review*, August 2014, p. 999, pp. 1017–18.

1170 R Calo, '[Digital Market Manipulation](#)', *The George Washington Law Review*, August 2014, pp. 996–7.

1171 S Fussel, '[Alexa Wants to Know How You're Feeling Today](#)', *The Atlantic*, 12 October 2018, accessed 20 November 2018.

1172 Google Patents, '[Providing help information based on emotion detection](#)', accessed 20 November 2018.

1173 Google Patents, '[Web search based on browsing history and emotional state](#)', accessed 20 November 2018.

1174 D Davidson, '[Facebook targets 'insecure' young people to sell ads](#)', *The Australian*, 1 May 2017.

1175 Facebook Newsroom, '[Comments on Research and Ad Targeting](#)', 30 April 2017, accessed 20 November 2018.

1176 Competition and Markets Authority, '[Pricing algorithms: economic working paper on the use of algorithms to facilitate collusion and personalised pricing](#)', 8 October 2018, p. 3.

1177 J Mikians, L Gyarmati, V Erramilli, N Loaooutaris, '[Detecting price and search discrimination on the Internet](#)', *Universitat Politècnica De Catalunya Barcelonatech*, 2012, accessed 31 January 2018.

1178 B Shiller, '[Personalized Price Discrimination using Big Data](#)', *Working Papers*, Brandeis University, 108 (2016).



Recent media reports suggest that online retailers are increasingly making use of user data for personalised pricing purposes, with vendors using ‘fingerprinting’ technology to track users across multiple browsers, and shopping platforms such as Amazon updating prices for each customer ‘every 10 minutes’.<sup>1179</sup> Even ‘bricks and mortar’ retailers appear to be trialling technology that would allow price discrimination based on user data—including combining offline and online purchasing behaviour through customer loyalty programs tied to user accounts (‘omnichannel shopping’)<sup>1180</sup> and installing ‘smart shelves’—digital price displays that allow for quickly changing prices—in physical retail stores.<sup>1181</sup>

Some consumers may gain from increasingly personalised pricing—for example, consumers with limited ability to pay may be offered a lower price for products they otherwise could not afford. However, many consumers are likely to pay more—particularly in circumstances where consumers have limited choice of who to buy from, or have a limited inclination to shop around.

## New authentication and security technology

As well as the potentially harmful developments in data use described above, there have been a number of recent developments aimed at ensuring greater user control of personal data.

For example, Tim Berners-Lee, inventor of the world-wide web and co-lead of the Decentralized Information Group at MIT’s Laboratory for Computer Science and Artificial Intelligence, advocates for user control of how data is accessed and where it is stored.<sup>1182</sup> His advocacy has called for consumers to nominate a company they trust to store different types of information.<sup>1183</sup>

In some jurisdictions, governments have sought to create digital identities that store and govern data, and which can be used by businesses to allow consumers to easily sign up to commercial services. For example, in New Zealand the government verification program RealMe<sup>1184</sup> allows consumers to prove who they are online and log in to 129 services, including government internal affairs and 37 verified private businesses like Westpac banking.<sup>1185</sup> More than 500 000 verified identities have been created through this system, with 92 million transactions recorded as at October 2018.<sup>1186</sup> Consumers who sign up through RealMe must provide the New Zealand Government with their current passport, local residential address and a photograph before being allocated a RealMe verified account.<sup>1187</sup>

The Australian Government is currently testing a digital identity program, myGovID,<sup>1188</sup> ahead of a full public launch in 2019.<sup>1189</sup> The trial will allow consumers with a myGovID to apply for a tax file number online. The purpose of the testing is to facilitate a broader digital identity program which would allow Australian citizens and permanent residents a single digital identity to access government services online through a single secure mechanism. The government has indicated it will continue to undertake a series of pilot programs until mid-2019 to test and evaluate myGovID, and the broader program.<sup>1190</sup>

The extent to which these government programs could be used to facilitate greater control by consumers over their own data, including in the commercial context, is not yet clear. In particular, it is not clear how individuals would react to a government program to replicate the ‘Subscribe with Google’ or ‘Sign up with Facebook’ options which are commonly used to link a consumer’s use of a separate service with the data profile collected by these platforms.

1179 N Howe, ‘[A Special Price Just for You](#)’, *Forbes*, 17 November 2017, accessed 20 November 2018

1180 N Howe, ‘[A Special Price Just for You](#)’, *Forbes*, 17 November 2017, accessed 20 November 2018.

1181 T Walker, ‘[How Much? The Rise of dynamic and personalised pricing](#)’, *The Guardian*, 20 November 2017, accessed 20 November 2018.

1182 K Finley, ‘[Tim Berners-Lee, inventor of the web, plots a radical overhaul of his creation](#)’, *Wired*, 4 April 2017, accessed 31 October 2018.

1183 K Finley, ‘[Tim Berners-Lee, inventor of the web, plots a radical overhaul of his creation](#)’, *Wired*, 4 April 2017, accessed 31 October 2018.

1184 Real me, [About us](#), accessed 1 November 2018.

1185 Real me, [What it is](#), accessed 1 November 2018.

1186 Real me, [About us: Where we’ve been](#), accessed 1 November 2018.

1187 Real me, [Get verified with Real Me Now](#), accessed 8 November 2018.

1188 Digital Transformation Agency, [Testing digital identity](#), 31 October 2018, accessed 1 November 2018.

1189 Digital Transformation Agency, [Creating a digital identity](#), accessed 1 November 2018.

1190 Digital Transformation Agency, [Testing digital identity](#), 31 October 2018, accessed 8 November 2018.



## Implications for governments

As the sections above demonstrate, new devices and technology are enabling increasingly sophisticated data collection and use. This trend will continue to present significant societal issues, including an unprecedented capacity for government agencies and private companies to gain oversight and control of the lives of individuals. Governments will need to actively engage with the implications of these developments when formulating policy, which may include potential regulatory action.

## 7.3 Artificial intelligence, machine learning and chatbots

### Key findings

- Artificial intelligence may have significant applications for the production and distribution of news, including in either counteracting or facilitating the spread of mis-information, dis-information and mal-information. The use of artificial intelligence in these fields raises a number of issues including: concerns about algorithmic bias; further increasing the influence of digital platforms on the production and consumption of journalism; and potentially making information disorder harder to identify.
- Chatbot technology is progressing its ability to imitate human interactions. This technology has the potential for consumer harm, particularly in relation to scams and fraudulent economic and social activities. As this technology advances, existing legislative frameworks should be monitored to ensure that they capture these potential detriments, and also that they do not impede potential innovation and investment in this area.

Artificial intelligence (AI) refers to a branch of computer science that enables computers to undertake tasks of sufficient difficulty to appear intelligent.<sup>1191</sup> While there are multiple subset technologies within the broad category of AI, those most relevant to this section's discussion include 'machine learning' and 'natural language' techniques:

- 'Machine learning' and related 'deep learning' technologies enable software to autonomously improve its knowledge and processes through iteration and experience, without being explicitly programmed with new information or instructions.<sup>1192</sup> This can include:
  - algorithms that teach machines to learn cause and effect by analysing samples of data that were manually labelled in order to highlight clear distinctions between different features of data (supervised learning)
  - algorithms that try to identify hidden structures and patterns from unlabelled data (unsupervised learning), and
  - algorithms performing tasks and learning through trial and error (reinforced learning).<sup>1193</sup>
- 'Natural language processing' and 'natural language generation' techniques allow software to collect, analyse, interpret and produce 'natural' language in the form of text and speech.<sup>1194</sup>

This section briefly explores how these emerging technologies are currently being used by news producers and digital platforms to produce journalism, and the practical implications of chatbots that use these technologies to communicate with consumers.

### AI in News Production

News producers have begun employing AI technologies to support the production of news. These technologies have applications in news-gathering, analysis of data and even the generation and publication of stories.

1191 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 9.

1192 D Wilding, P Fray, S Molitorisz, E McKewon, op.cit., p. 62; MI Jordan, TM Mitchell, ['Machine learning: Trends, perspectives, and prospects'](#), *Science*, vol. 349.6245, 2015, pp. 255–260.

1193 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 9.

1194 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 9.

## Automated newsgathering

Several news producers use machine learning to quickly collect, sort and analyse large volumes of data to aid newsgathering processes. This use of AI is intended to increase efficiency of newsrooms, potentially allowing news media businesses to redirect journalists to other tasks, or to reduce the number of journalists they employ.

- The BBC's 'News Juicer' tool monitors and collates news published by 850 global news sources, extracting data (such as names of people, places and organisations), automatically assigning tags and collating this data in an easily searchable form. The BBC makes this tool available to its own journalists and those from other outlets in the form of an online database and an API, allowing easy and quick analysis of trends evident in the collated reports.<sup>1195</sup>
- *The New York Times* 'Editor' program uses similar principles to the BBC's News Juicer but operates to identify and gather information based on key words in articles written by the publication's journalists in real-time. This speeds up fact-checking by linking journalists to relevant information during drafting of articles, and ensures that all new content is appropriately tagged even before publication, assisting other journalists' future research of similar subjects.<sup>1196</sup>
- The 'News Tracer' algorithm developed by wire service Reuters uses machine learning to monitor Twitter for breaking news. This algorithm seeks out 'clusters' of potentially newsworthy tweets and makes automated judgments about the veracity of accounts on which they originate. The technology is designed to give Reuters journalists a head start on other outlets in covering major world events, and the company credits News Tracer with enabling its staff to be the first to report on over 50 world news stories in 2016 and 2017.<sup>1197</sup>

## Automated journalism

News outlets are also increasingly using machine learning, natural language processing and natural language generation to automate the writing and publishing of content.

- *The Los Angeles Times* uses its 'Quakebot' AI to monitor emails from the US Geological Survey about earthquake activity in the area, and to automatically generate and publish stories about earthquakes above a certain Richter scale threshold.<sup>1198</sup>
- The wire service Associated Press and online publisher Yahoo! Sports publish stories using the 'Wordsmith' natural language software developed by Automotive Insights. This software is capable of quickly generating and publishing simple plain English stories based on data, such as financial information released by publicly-listed companies and the results of sports events.<sup>1199</sup>
- *The Washington Post's* 'Heliograph' bot was first launched to generate stories based on the results of events at the 2016 Rio Olympics, and has since been used to cover results of American elections and high-school football games.<sup>1200</sup>
- Digital platforms including Google and Facebook have been using machine learning and natural language processing and generation technologies for the purpose of 'abstractive summarisation'. This allows AI-generated summaries of large portions of text, such as summarising long news articles into the snippets of news content discussed in chapter 6.<sup>1201</sup>

## Combating the spread of dis-information and mal-information online

As discussed in chapter 6, digital platforms have created more potential for consumers to be exposed to dis-information, mis-information and mal-information. It appears highly likely that AI has a role to play

1195 BBC News, [The Juicer API](#), accessed 20 November 2018.

1196 *The New York Times*, [Editor, an experiment in publishing](#), accessed 20 November 2018.

1197 J S tray, [The age of the cyborg](#), Columbia Journalism Review, 2016, accessed 20 November 2018; Reuters, [Reuters News Tracer: Filtering through the noise of social media](#), 15 May 2017, accessed 20 November 2018.

1198 W Oremus, [The First News Report on the L.A. Earthquake Was Written by a Robot](#), *Slate*, 17 March 2014, accessed 20 November 2018.

1199 S Stroh, [As AI Technology Advanced, So Does its Ability to Assist Journalists](#), *Editor & Publisher*, 1 December 2017, accessed 20 November 2018; Automated Insights, [Yahoo! Sports uses NLG to produce over 70 million reports and match recaps](#), accessed 20 November 2018.

1200 L Moses, [The Washington Post's robot reporter has published 850 articles in the past year](#), *DigiDay*, 14 September 2017, accessed 20 November 2018.

1201 D Wilding, P Fray, S Molitorisz, E McKewon, *The Impact of Digital Platforms on News and Journalistic Content*, Centre for Media Transition, University of Technology Sydney, NSW, 2018, pp. 65–6.

in helping digital platforms and other parties to identify and filter out such material more efficiently and quickly than direct human intervention. For example, machine learning and natural language processing can be used to analyse the text of news stories to evaluate how well its contents matches its headline; to compare facts across similar articles; and to de-prioritise content from social media accounts and news sources that have been identified as spreading low-quality news.<sup>1202</sup> This technology is already being funded, developed and used, including by the leading digital platforms:

- In May 2018, Google announced that its Google News service was using machine learning and natural language processing to highlight and prioritise high-quality news sources, in addition to serving the news stories most relevant to individual users.<sup>1203</sup>
- Google's Digital News Initiative also recently funded Belgian start-up Veriflix, which uses machine learning to scan user-submitted videos to determine the authenticity of their contents.<sup>1204</sup>
- Facebook has publicly stated that it uses machine learning to identify and block fake accounts and those that violate its terms of service by spreading spam and fraudulent material.<sup>1205</sup>

### *Issues with AI in news*

The increasing use of AI in news production and consumption may raise issues of 'AI bias'. As noted in *The Impact of Digital Platforms on News and Journalistic Content*, 'AI systems that exhibit statistical biases in their models or algorithms can result in actions that cause undesirable, unequal and/or unfair outcomes'.<sup>1206</sup> Such outcomes may reflect unconscious biases on the part of the programmers of AI software or evident in the datasets used by AI algorithms. The use of machine learning tools in other fields has frequently demonstrated potential issues of AI bias, with recent examples including:

- a recruitment AI developed by Amazon, which was reportedly scrapped by the company after repeatedly developing tendencies to favour male job applicants over females<sup>1207</sup>
- the popular smartphone application FaceApp used machine learning for a feature that automatically made photos 'more attractive', and exhibited a tendency to do so by whitening users' skin-tones and making their features look more European.<sup>1208</sup>

These examples show that issues of AI bias may lead to extremely concerning outcomes if replicated in the socially important functions of producing, distributing and consuming news.

In the context of this Inquiry, it is also worth highlighting that the operators of the leading digital platforms are also at the forefront of AI development, including the development of AI for journalism purposes. For example, in September 2017 the Google News Initiative publicly encouraged news publishers to start using the company's proprietary and open source machine learning and natural language tools to aid their businesses.<sup>1209</sup> As the use of AI in the newsroom becomes increasingly common, this may present another avenue by which digital platforms influence the production of news. Additionally, the further development and take-up of 'abstractive summarisation' techniques by digital platforms to automatically generate news snippets may exacerbate the issues associated with snippets discussed in chapter 6.

Finally, some commentators and academics have also publicly doubted the ability of AI technologies to effectively combat fake news in the near future. A 2018 study found that even the best AI model

1202 A Susarla, '[How artificial intelligence can detect and create fake news](#)', *The Conversation*, 3 May 2018, accessed 20 November 2018.

1203 S Sharma, '[Google News is now powered by AI to fight fake news](#)', *Digit*, 10 May 2018, accessed 20 November 2018; T Upstill, '[The new Google News: AI meets human intelligence](#)', Google, 8 May 2018, accessed 20 November 2018.

1204 B Marr, '[This Google-Funded Company Uses Artificial Intelligence To Fight Against Fake News](#)', *Forbes*, 18 July 2018, accessed 20 November 2018.

1205 T Lyons, '[Hard Questions: What's Facebook's Strategy for Stopping False News?](#)', *Facebook News Room*, 23 May 2018, accessed 20 November 2018.

1206 D.Wilding, P Fray, S Molitorisz, E McKewon, F Daniel, C Cappiello, B Benatallah, '[Bots Acting like Humans: Understanding and Preventing Harm](#)', *IEEE Internet Computing*, p. 2–4, accessed 17 October 2018. (Note: this document is a working version of the paper published by the author. A final version is expected to be published in the *IEEE Internet Computing Magazine* in March/April 2019.), p. 67.

1207 BBC, '[Amazon scrapped 'sexist AI' tool](#)', *BBC News*, 10 October 2018, accessed 20 November 2018.

1208 S Emerson, '[That Viral 'FaceApp' Is Making Everyone Look Whiter](#)', *Motherboard*, 25 April 2017, accessed 20 November 2018.

1209 V Nicholson, '[How publishers can take advantage of machine learning](#)', *Google*, 19 September 2017, accessed 20 November 2018.

for predicting the trustworthiness of news sources could only accurately make predictions 65 per cent of the time.<sup>1210</sup> Academic analysis has also noted that AI's effectiveness in this area will be severely challenged by current limitations of natural language processing, difficulties with analysing online video content, and the use of AI tools to generate mal-information and evade detection.<sup>1211</sup>

### **Consumer implications of chatbots**

As briefly described in section 7.2, chatbots<sup>1212</sup> are machine learning algorithms that interact with humans. They are commonly used in client and customer services, such as providing financial advice<sup>1213</sup>, but also include conversational intermediaries with cloud services such as Apple's Siri, Microsoft's Cortana and Amazon's Alexa.

More sophisticated chatbot virtual assistants can seamlessly switch to another AI bot or a human if the query becomes too complex.<sup>1214</sup> Australian Government agencies such as the Australian Tax Office<sup>1215</sup> and IP Australia use the virtual assistant chatbot 'Alex'.<sup>1216</sup>

Some submissions to the Inquiry raised that the use of chatbots and machine learning algorithms may aid scams and deception as well as the dissemination of mis-information badged as news and journalistic content.<sup>1217</sup>

Chatbot harm has been broadly characterised as falling into five detriment categories: psychological, legal, economic, social and democratic.<sup>1218</sup> Two examples of such harms include:

- Economic harm: such harm can occur where bots imitate professional services usually provided by humans such as the provision of financial advice without disclosing they are not human.<sup>1219</sup>
- Democratic harm: such harm can occur when an article containing mis-information attains prominence on digital platforms through interactions with chatbots rather than humans. This may create artificial consensus for a particular idea.<sup>1220</sup> Researchers found about 20 per cent of election-related conversations during one month of activity on Twitter in 2016 was generated by chatbots.<sup>1221</sup>

These risks may grow as language fluency and natural language expression improves in chatbots.<sup>1222</sup> Trials of Google's Duplex Assistant demonstrated that it was able to make voice phone calls to carry out tasks such as booking restaurants, and that its communication was so realistic that humans were not aware they were talking to a bot (Google notes Duplex will disclose the caller is a bot in future).<sup>1223</sup> Although Duplex did not pass the Turing test<sup>1224</sup>, under specific conditions it was able to mimic human interaction to a level that made it indistinguishable from a human.

1210 K Hao, ['Even the best AI for spotting fake news is still terrible'](#), *MIT Technology Review*, 3 October 2018, accessed 20 November 2018.

1211 W Knight, ['Three problems with Facebook's plan to kill hate speech using AI'](#), *MIT Technology Review*, 12 April 2018, accessed 20 November 2018.

1212 In this section the term 'chatbots' is used, but they are also known as Software Agents, Virtual Agents, Intelligent Personal Assistants or Intelligent Conversational Agents.

1213 OECD, [Financial markets, insurance and pensions: Digitisation and Finance](#), 9 April 2018, p. 16.

1214 OECD, [Algorithms and collusion: Competition policy in the digital age](#), 14 September 2017, p. 17.

1215 Australian Tax Office, [Introducing Alex, our new web assistant](#), 15 September 2015, accessed 17 October 2018.

1216 IP Australia, [Alex: IP Australia's virtual assistant](#), 7 October 2016, accessed 17 October 2018.

1217 See, for example [Freedom Publishers Union Submission to the ACCC's Digital Platforms Inquiry](#), April 2018, pp. 2-3. There have also been reports over several years of dating scams run via chatbots; see, for example, R Epstein, ['From Russia, with Love'](#), *Scientific American Mind*, November 2007, p. 16, accessed 17 October 2018.

1218 F Daniel, C Cappiello and B Benatallah, ['Bots Acting like Humans: Understanding and Preventing Harm'](#), *IEEE Internet Computing*, p. 2-4, accessed 17 October 2018. (Note: this document is a working version of the paper published by the author. A final version is expected to be published in the *IEEE Internet Computing Magazine* in March/April 2019.)

1219 F Daniel, C Cappiello, B Benatallah, ['Bots Acting like Humans: Understanding and Preventing Harm'](#), *IEEE Internet Computing*, p. 7, accessed 17 October 2018. For example, a bot collecting information on a form of cryptocurrency and providing information as tips on a social network (Reddit) without disclosing it was a bot. Researchers indicated they viewed this as an economic harm, see [r/dogecoin](#), [Final poll—are automated posts from wise\\_shibe welcome?](#), *Reddit*, 2014, accessed 24 October 2018.

1220 F Manjoo, ['How Twitter is being gamed to feed misinformation'](#), *New York Times*, 31 May 2017, accessed 24 October 2018.

1221 A Bessi, E Ferrara, ['Social bots distort the 2016 US presidential election online discussion'](#), *First Monday*, 7 November 2016, accessed 24 October 2018.

1222 F Daniel, C Cappiello and B Benatallah, ['Bots Acting like Humans: Understanding and Preventing Harm'](#), *IEEE Internet Computing*, p. 7, accessed 17 October 2018.

1223 Google AI Blog, [Google Duplex, An AI System for Accomplishing Real-World Tasks Over the Phone](#), 8 May 2018, accessed 17 October 2018.

1224 H Levesque, [Common Sense, the Turing Test and the Quest for Real AI](#), The MIT Press, London, 2017, pp. 8-10. The 'Turing test' refers to a machine's ability to exhibit intelligent behaviour indistinguishable from that of a human during verbal or written contact.

Bots are also present in Twitter, Facebook, Instagram, Q&A sites, on-line newspapers, emails, and Messenger chats. As these technologies improve, it will be relevant to consider whether existing laws can address both harms to individuals and any resultant societal harms.<sup>1225</sup>

To this extent, New Zealand's Harmful Digital Communications Act 2015 lists 10 communication principles that may result in abuse if violated. For example, Principle 5 states that a digital communication should not be part of a pattern of conduct that constitutes harassment, remaining technology-neutral in the manner it defines 'digital communication' as 'any form of electronic communication'. The new civil enforcement regime provides for initial complaints about harmful digital communications to be made to an 'Approved Agency'. The Approved Agency may investigate a complaint and attempt to resolve it by negotiation, mediation and persuasion. Where the Approved Agency cannot resolve the complaint, an individual may make an application to the District Court for a number of civil orders, including requiring harmful digital communications to be taken down and requiring a defendant to cease the harmful conduct.<sup>1226</sup>

This legislation created new offences and penalties, including a maximum of two years imprisonment or a fine of \$50 000 for individuals<sup>1227</sup>, and fines of up to \$200 000 for companies.<sup>1228</sup> New Zealand has also amended the Harassment Act 1997, the Human Rights Act 1993 and the Privacy Act 1993 to clarify their application to digital communications.

This approach may be worth future consideration as harms from emerging technologies are further understood. However, as these and other technologies continue to develop, it will also be important to ensure that innovation and investment are not constrained by regulatory frameworks that do not keep pace with such developments.

## 7.4 Future market developments in digital platforms

### Key findings

- Google and Facebook currently offer some specialised search services and may further expand their supply in this area. This may have potential foreclosure effects for existing suppliers of specialised search services.
- Dynamic market changes may affect the degree of competition in the relevant markets. In particular, entry by new digital platforms and exit of existing digital platforms may alter the structure of the relevant markets.

The markets for the supply of online search services, social media services and other related digital markets are subject to rapid change and innovation, with key suppliers expanding and changing their product and service offerings and firms entering and exiting these markets. This may affect the structure of, and degree of competition in, these markets. These dynamic changes may also influence the extent to which competing firms are able to constrain the activities of Google and Facebook.

This section explores key market-driven trends identified by the ACCC in the relevant markets, including:

- the potential for Google and Facebook to expand into adjacent services markets and foreclose suppliers of specialised search, and
- potential dynamic market changes, such as entry and exit of digital platforms in the relevant markets.

1225 F Daniel, C Cappiello and B Benatallah note that '[s]pamming, spreading misinformation, mimicking interest in people or topics, and cloning profiles to make these actions look credible may cause democratic harm, e.g., by diverting the attention of lawmakers to topics of little interest to society as a whole or even by altering the outcome of elections', F Daniel, C Cappiello, B Benatallah, '[Bots Acting like Humans: Understanding and Preventing Harm](#)', *IEEE Internet Computing* p. 7, accessed 17 October 2018.

1226 Harmful Digital Communications Bill (NZ) Section 19 (3)(a)(b) [Explanatory Note](#) 5 November 2013, p. 2, accessed 8 November 2018.

1227 Section 6, Harmful Digital Communications Act 2015.

1228 Harmful Digital Communications Bill (NZ) Section 19 (3)(a)(b) [Explanatory Note](#) 5 November 2013, p. 8, accessed 24 October 2018.

## 7.4.1 Expansion into adjacent markets

A potential trend is the continued expansion by Google and Facebook into digital markets adjacent or related to their respective supply of online search services and social media services.<sup>1229</sup> In particular, stakeholders have raised concerns about the potential for Google and Facebook to expand into vertical or specialised search services.

As discussed in chapter 2, there are two types of online search services—general and specialised search services (also known as ‘vertical search services’). The ACCC considers that there is limited substitutability between these services.

One of the reasons for this is that the scope of information provided by general search services is far greater than information provided by specialised search services. Unlike general search services, specialised search services only index pages for particular topics. In addition, some information is only available on specialised search services and not on general search services. Examples of specialised search services include platforms that connect buyers and sellers of real estate, and services providing information on travel, including flights, tours and accommodation.

The ACCC understands that Google and Facebook already offer some specialised search services. For example, the Facebook platform offers a ‘Marketplace’ feature which allows Facebook users to buy and sell goods and services without leaving the platform. In addition, Google operates Google Flights, which provides users with the ability to search for flights, track flight prices and explore potential destinations, and shopping comparison service Google Shopping.

With Google and Facebook continuing to expand into specialised search services, there is some concern that these companies may be able to foreclose suppliers in certain specialised search services markets. As discussed previously in this report, Google and Facebook are effectively gateways to the internet for many consumers and are able to gather large amounts of data to improve the quality of their services and offer new services.

The ACCC considers that there are at least two ways in which Google and Facebook could use their market power in general search and social media services to foreclose competition in related markets:

- by leveraging their large databases to expand into the supply of specialised search services, and
- by using their search engine or social media ranking algorithms to restrict the amount of referral traffic to a supplier of specialised services or to redirect traffic to their own competing services.

In terms of the first point, REA Group submits that global digital platforms would be able to foreclose competition from suppliers of specialised services by leveraging their large user bases and ability to target services.<sup>1230</sup> That is, the global platforms have access to a large amount of data that they can process in close to real time, which allows them to improve the services they offer (including specialised services) and better target advertising. This provides the global platforms with a powerful competitive advantage relative to other suppliers.<sup>1231</sup> In addition, as Google and Facebook are effectively gateways to the internet, they may be able to leverage this status to offer specialised services on their own platform, providing a convenient channel or ‘one stop shop’ for consumers.

In relation to the second point, the ACCC notes that there is a potential for Google or Facebook to manipulate their algorithms or alter the display of content on their search engine results page or news feed (as relevant) to affect traffic to websites. For example, comparison shopping websites, a type of specialised search service, typically rely on traffic from general search services to reach consumers. As discussed in box 7.2, in 2017 the European Commission (EC) found that Google effectively leveraged its market power in general search services into the market for comparison shopping services, providing itself with an unfair competitive advantage. In the media release announcing this decision, the EC noted that it ‘continues to examine Google’s treatment in its search results of other specialised Google search services’.<sup>1232</sup>

1229 See, for example, REA Group, [Submission to ACCC’s Digital Platforms Inquiry](#), 3 May 2018, p. 3.

1230 See, for example, REA Group, [Submission to ACCC’s Digital Platforms Inquiry](#), 3 May 2018, p. 8.

1231 See, for example, REA Group, [Submission to ACCC’s Digital Platforms Inquiry](#), 3 May 2018, p. 16.

1232 European Commission, Antitrust: [Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#), 27 June 2017, accessed 20 November 2018. [http://europa.eu/rapid/press-release\\_IP-17-1784\\_en.htm](http://europa.eu/rapid/press-release_IP-17-1784_en.htm)



### **Box 7.2: The EC's Google Shopping case**

On 27 June 2017, the EC fined Google €2.42 billion for abusing market dominance as a search engine by giving illegal advantage to its own comparison shopping service, Google Shopping. The EC found that from 2008, Google changed its strategy to:

- systematically give prominent placement to its own comparison shopping service, and
- demote rival comparison shopping services in its search results.

The EC found that Google's practices relied on Google's dominance in general internet search, instead of competition on merits in comparison shopping markets, and amounted to an abuse of Google's dominance in the general internet search industry by restricting competition in comparison shopping markets.

Relevantly, the EC also found that:

- Comparison shopping services rely to a large extent on traffic to be competitive. More traffic leads to more clicks and generates revenue. Furthermore, more traffic also attracts more retailers that want to list their products with a comparison shopping service. Given Google's dominance in general internet search, its search engine is an important source of traffic for comparison shopping services.
- By reducing the visibility of rival comparison shopping services, Google effectively deprived consumers of a genuine choice of services and the full benefits of innovation.

In September 2017, Google appealed the €2.42 billion fine which is currently pending. It also introduced the following changes in the same month:

- giving competitor comparison shopping services access (allocated via a bidding process) to the Google Shopping unit box (found on the general search results page), and
- separating accounts between Google Shopping and Google Search.

However, competitors argued that the changes are having little effect and further fines should be made.<sup>1233</sup>

These concerns are not limited to Google Shopping. Following this EC ruling, in May 2018, Yelp Inc renewed a complaint, originally made to the EC in 2014, that Google had unfairly promoted its own local search service Google Reviews above Yelp's service in search results.<sup>1234</sup> Yelp Inc has also called for the United States to take action on this issue.<sup>1235</sup>

## **7.4.2 New entry and exit**

This section discusses the potential for new digital platforms to emerge or exit. The ACCC notes that the purpose of this section is not to assess the likelihood of any new entry or exit, but to observe and note potential trends in this area.

### **WeChat**

WeChat is a social media platform that is popular in China, with approximately one billion monthly active users globally as at March 2018.<sup>1236</sup> WeChat is specifically designed for communicating within networks and friendship groups, and offers features similar to Facebook, including a news feed and direct messaging. It also specifically commissions content, including journalistic content and entertainment content<sup>1237</sup>, and operates a payment mechanism known as WeChat Pay.

<sup>1233</sup> J Titcomb, '[Google faces fresh EU showdown as rivals attack search giant's response to record fine](#)', *The Telegraph*, 16 December 2017, accessed 20 November 2018.

<sup>1234</sup> P Dave and M Vengattil, '[Yelp seeks to revive EU antitrust complaint against Google](#)', *Reuters*, 23 May 2018, accessed 20 November 2018.

<sup>1235</sup> L Lowe, '[Regarding the European Commission's Guilty Verdict Against Android](#)', *Yelp*, 18 July 2018, accessed 20 November 2018.

<sup>1236</sup> J Kilbride, '[WeChat: Chinese social media app reaches 1 billion monthly users, makes waves in Australia](#)', *ABC*, 7 March 2018, 20 November 2018.

<sup>1237</sup> M Simons, [Submission to the ACCC Digital Platforms Inquiry](#), 3 May 2018, p. 3.



In describing the extremely broad and integrated suite of functions available on WeChat, technology analyst Connie Chan notes that:

*Along with its basic communication features, WeChat users in China can access services to hail a taxi, order food delivery, buy movie tickets, play casual games, check in for a flight, send money to friends, access fitness tracker data, book a doctor appointment, get banking statements, pay the water bill, find geo-targeted coupons, recognize music, search for a book at the local library, meet strangers around you, follow celebrity news, read magazine articles, and even donate to charity ... all in a single, integrated app.*<sup>1238</sup>

WeChat is owned by Tencent, which also operates the QQ instant messaging platform. A commentator submitted to the ACCC that Tencent intends to launch WeChat in the west.<sup>1239</sup> While WeChat is currently used in Australia (mostly by members of diasporas from Chinese speaking countries), its full functionality is not available here. There are media reports suggesting a growing uptake of WeChat in Australia, particularly by Australian businesses, as they seek to reach out to Chinese-speaking customers residing in or visiting Australia.<sup>1240</sup>

## Baidu

Baidu, based in China, supplies general online search services and vertical search-based products, such as Maps, Image Search, Video Search and News Search.<sup>1241</sup> Baidu is reported to have a 66 per cent share of the search market in China<sup>1242</sup> and recently announced that it has 150 million daily active users of its app, which offers its search engine and news feed.<sup>1243</sup>

Baidu was reportedly preparing to launch into the Australian market in 2012<sup>1244</sup>, but there have not been any significant developments publicly announced since then. There have been media reports regarding Baidu's expansion of its mapping service into 'Europe and the rest of the world'.<sup>1245</sup>

1238 C Chan, '[When One App Rules Them All: The Case of WeChat and Mobile in China](#)', *Andreessen Horowitz*, 6 August 2015, accessed 20 November 2018.

1239 M Simons, [Submission to the ACCC Digital Platforms Inquiry](#), 3 May 2018, p. 3.

1240 See, for example, R Goncalves, '[Too good an opportunity: Australian small businesses harnessing power of WeChat](#)', *SBS*, 16 February 2018, 20 November 2018; N Shah, '[Why more Australian businesses are turning to WeChat](#)', *AdNews*, 17 April 2018, accessed 20 November 2018.

1241 Baidu, [Company Overview](#), accessed 20 November 2018.

1242 Stat Counter Global Stats, [Search Engine Market Share in China 2017–2018](#), accessed 20 November 2018.

1243 Baidu, [Baidu App Reaches 150 Million DAUs after Launching Ads-Free Search](#), 5 June 2018, accessed 24 October 2018.

1244 T Burrowes, '[Baidu International launches Australian office led by Dean Capobianco and Paul Christy](#)', *Mumbrella*, 2 May 2018, accessed 20 November 2018.

1245 S Shead, '[The 'Google of China' has partnered with a mapping company owned by Audi, BMW, and Daimler to plot the world](#)', *Business Insider*, 16 January 2017, accessed 20 November 2018.

## DuckDuckGo

The ACCC also notes the presence of DuckDuckGo as a potential alternative search engine to Google. In October 2018, DuckDuckGo reached 30 million direct searches in one day on its search engine.<sup>1246</sup> While this is much smaller than the volume of searches run on Google on a daily basis, it demonstrates the growth of DuckDuckGo as an alternative search engine, noting that it had taken DuckDuckGo seven years to reach 10 million searches in one day, two years after that to reach 20 million and less than a year later to reach 30 million.<sup>1247</sup> This may also indicate an increased consumer interest in privacy, noting that DuckDuckGo's main selling point is in keeping users' search history private and blocking advertising trackers.

## Future of the Facebook platform

In this section, the ACCC notes that there is speculation regarding the potential exit of Facebook the platform (as distinct from Facebook the company) from the social media services market. This follows on from media articles reporting on the 'fall of Facebook', which cite contributing factors including privacy concerns about the platform and the perception of the platform as an 'echo chamber' or 'filter bubble' for news.<sup>1248</sup> The declining use of open social media services such as Facebook for news is discussed in more detail in section 7.1.2.

While Facebook remains extremely popular in Australia, its year-on-year growth for new monthly active users has recently slowed.<sup>1249</sup> However, this may be due to the fact that with a user base of 17 million users aged 14+ in Australia<sup>1250</sup> and over two billion users globally<sup>1251</sup>, Facebook's future growth may be limited by its significant existing degree of market penetration.

One distinct international trend is the decline in Facebook's use by younger people. Recent reports have shown that:

- in the United Kingdom, 700 000 fewer 18 to 24-year-olds are projected to regularly use Facebook in 2018 than did so in 2017, with these younger users shifting use towards more private services<sup>1252</sup>
- in the United States, only 51 per cent of teenagers say they use Facebook, compared to 71 per cent in 2015<sup>1253</sup>
- 42 per cent of adults in the United States have taken a break from Facebook in the past year, and 26 per cent have deleted the Facebook app from their smartphones (including 44 per cent of respondents aged 18 to 29).<sup>1254</sup>

The ACCC notes that while Facebook as a platform may be stagnating in terms of user growth, its other apps (Instagram, Messenger and WhatsApp) continue to grow.

The ACCC will continue to monitor developments in the markets for digital platforms, including those that may indicate potential longer-term trends. In this context, the ACCC would welcome any submissions from stakeholders on these issues.

1246 DuckDuckGo, [DuckDuckGo Traffic](#), accessed 20 November 2018.

1247 DuckDuckGo, [Tweet—DuckDuckGo fun fact](#), *Twitter*, 11 October 2018, accessed 20 November 2018.

1248 See, for example, A. Wolk, [The Fall of Facebook](#), *Forbes*, 30 July 2018, accessed 20 November 2018; A. Madrigal, [The Fall of Facebook](#), *The Atlantic*, December 2014, accessed 20 November 2018.

1249 N Statt, [Facebook's growth continues to slow down](#), *The Verge*, 30 October 2018, accessed 20 November 2018.

1250 Roy Morgan, [Facebook Watch set to leverage off 17m user base](#), 31 August 2018, accessed 20 November 2018.

1251 Facebook, [Our Mission: Stats](#), *Facebook Newsroom* accessed 20 November 2018.

1252 M Sweney, [Is Facebook for old people? Over-55s flock in as the young leave](#), *The Guardian*, 12 February 2018, accessed 20 November 2018; eMarketer, [UK: Younger Audiences Moving Off Facebook](#), 12 February 2018, accessed 20 November 2018.

1253 M Anderson, J Jiang, [Teens, Social Media & Technology 2018](#), *Pew Research Center*, 31 May 2018, accessed 20 November 2018.

1254 A Perrin, [Americans are changing their relationship with Facebook](#), *Pew Research Center*, 5 September 2018, accessed 20 November 2018.

## 7.5 Conclusion

The technological and market-driven trends explored in this chapter will have a range of implications for businesses and individuals.

Media businesses will continue to experiment with innovative content and revenue models to sustain the production of news and journalism. While the composition of the various digital platform markets may vary over the longer term, it is likely that these markets will continue to thrive by developing and implementing new technologies and services that provide value to consumers while also collecting and harnessing their data for use by advertisers and other businesses.

Consumers are welcoming new devices and services into their homes and daily lives. These new technologies provide benefits through increased connectivity and convenience, but present risks to the privacy and autonomy of users.

These developments have potentially significant implications for society as they re-balance the power relationship between individuals and the private and public entities that have access to increasing amounts of user data and increasingly sophisticated capabilities to obtain value from that data. Governments will have a role in monitoring these developments and considering how they can best be managed through public policy and, where required, regulation.

The ACCC welcomes submissions from stakeholders and members of the public about any of the potential trends identified in this chapter, or about any other emerging issues that are likely to have implications for the media, advertising and digital platform markets.

# Glossary

Term	Description
AANA	Australian Association of National Advertisers.
ABC	Australian Broadcasting Corporation.
ACCC	Australian Competition and Consumer Commission.
ACCC consumer survey	Roy Morgan Research, 'Consumer Views and Behaviours on Digital Platforms' prepared for the ACCC, November 2018.
ACCC news survey	Roy Morgan Research, 'Consumer Use of News' prepared for the ACCC, November 2018.
ACCC review of terms and policies	ACCC review of the privacy policies and terms of use for several large digital platforms.
ACL	Australian Consumer Law.
ACMA	Australian Communications and Media Authority.
Addressable television advertising	Targeted advertising that appears on smart televisions, via set-top boxes or on online television catch-up services.
Ad exchange	An advertising marketplace that connects and matches supply from websites and apps selling advertising space with demand from advertisers purchasing ads.
Ad fraud	Fraudulently creating clicks, impressions and/or conversions in order to generate digital advertising revenue.
Ad network	A network that purchases digital advertising impressions from different websites and repackages and sells these opportunities to advertisers, directly or through ad exchanges.
Ad Standards	Industry body responsible for regulating the advertising industry, formerly referred to as the Ad Standards Bureau.
Ad tech	Ad tech is a common abbreviation for 'advertising technology'. It refers to intermediary services involved in the automatic buying, selling and serving of some types of display advertisements.
Ad tech stack	Ad tech stack is a common abbreviation for 'advertising technology stack'. It refers collectively to the combination of ad tech involved in the whole digital advertising supply chain between the advertisers and websites/apps. For example, this may include DSPs, SSPs, ad servers and ad exchanges.
Ad verification	Services that verify whether advertisements appear on intended websites or apps and/or reach the targeted audience.
Advertiser ad server	A server used by advertisers to manage and track all digital advertising and campaign information in one location.
AFCA	Australian Financial Complaints Authority.
AHRC	Australian Human Rights Commission.
AI	Artificial intelligence—the ability of computer software to perform tasks that are complex enough to simulate a level of capability or understanding usually associated with human intelligence.
Algorithm	A sequence of instructions that performs a calculation or other problem-solving operation when applied to defined input data. In this report, 'algorithm' generally refers to the algorithms used by major digital platforms to rank and display content on their services.
ALRC	Australian Law Reform Commission.
AMP	Accelerated mobile pages—an open-source publishing format for mobile devices that enables the near-instant loading of content.

<b>Term</b>	<b>Description</b>
Android fork	An independently developed operating system that uses the Android operating system as its base, but is not certified by Google.
APC	Australian Press Council.
APIs	Application programming interfaces—tools for building software that interacts with other software, for example, how apps interact with operating systems.
APPs	Australian Privacy Principles as set out in the <i>Privacy Act 1988</i> (Cth).
B&C Package	The Australian Government’s ‘Broadcast and Content Reform Package’, which made changes to Australian media law in 2017.
BSA	<i>Broadcasting Services Act 1992</i> (Cth).
CAANZ	Consumer Affairs Australia and New Zealand.
CCA	<i>Competition and Consumer Act 2010</i> (Cth).
Chatbots	Machine learning algorithms that interact with humans by simulating conversations through natural language. They are commonly used in client and customer service, but also include conversational intermediaries with cloud services such as Apple’s Siri, Microsoft’s Cortana, Google Assistant and Amazon’s Alexa.
Clickwrap agreements	Online agreements using digital prompts that request users to provide their consent to online terms and policies without requiring them to fully engage with the terms and policies of use.
Coalition for Better Ads	A group of associations and companies involved in online media that aims to improve consumers’ experience with online advertising.
Content Code	Content Services Code 2008.
Copyright Act	<i>Copyright Act 1968</i> (Cth).
CPA	Cost-per-acquisition—the amount an advertiser pays when an online ad leads to a sale or conversion. This is also referred to as cost-per-conversion.
CPC	Cost-per-click—the amount an advertiser pays every time an internet user clicks their online ad.
CPM	Cost-per-mille—the amount an advertiser pays each time their online ad is displayed, with the amount measured per one thousand impressions.
CPRC	Consumer Policy Research Centre.
CPRC survey	‘Consumer data and the digital economy’ survey, published 13 May 2018.
Crawling	The process by which search engines systematically and continuously search the internet for new pages and add them to their index of known pages so they can be surfaced in search results.
Cross-side network effects	Effects that are present when the number of users in one type of user group increases (or decreases) the value of a platform for users in another type of user group on the platform.
Cross-subsidisation	In the context of multi-sided platforms, cross-subsidisation refers to the practice of setting a relatively low price for a product or service supplied on one side of the platform, in order to increase the revenue earned from a product or service supplied on another side of the platform.
DAB	Digital audio broadcasting.
Data analytics	Tools used by websites and advertisers to measure and track the performance of advertising, as well as the behaviours of users more broadly, online.
Data practices	The collection, use and disclosure of user data.
DBCDE	Department of Broadband, Communications and the Digital Economy. DBCDE performed functions generally now undertaken by DOCA.

<b>Term</b>	<b>Description</b>
Digital content aggregation platforms	Online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product. Users may be able to customise or filter their aggregation, or use a search function. Examples include Google News, Apple News and Flipboard.
Digital native	A news outlet that only publishes content online and not in print or via broadcast.
Digital platforms	Digital search engines, social media platforms and other digital content aggregation platforms.
DIIS	Department of Industry, Innovation and Science.
Dis-information	False information that is knowingly shared to cause harm.
DMCA	Digital Millennium Copyright Act (US).
DMP	Data Management Platform—a platform used by websites and advertisers to store, manage and analyse data collected which can then be used in the selling and buying of advertising.
DOCA	Department of Communications and the Arts.
DSP	Demand side platform—a platform used by advertisers to optimise and automate the purchase of digital advertising.
Dynamic competition	Competition resulting from the potential for development of innovative products and services that allow a competitor to enter and/or expand in a market.
EC	European Commission.
Echo chamber	Repeated exposure to perspectives that affirm a person’s own beliefs, either through algorithms or public discourse.
EU	European Union.
Facebook Ad Manager	Facebook’s self-service interface to purchase ads that can be placed on Facebook, Instagram, Messenger and third party websites and applications that sell inventory through Facebook Audience Network.
Facebook Audience Network	A service where websites and applications make advertising space available via Facebook. Advertisers can purchase these ads through Facebook Ad Manager.
Facebook Instant Articles	A publishing format offered by Facebook that is designed to allow pages to load faster on the Facebook app. It is only accessible on mobile devices.
FCF	First Click Free—a policy Google discontinued in October 2017 which required news publishers to provide a certain number of subscription articles free of charge to consumers.
Filter bubble	A situation where users of digital platforms are repeatedly exposed to the same perspectives, as a result of algorithms presenting content to users which they may prefer to see.
Finkelstein Review	‘Report of the Independent Inquiry into Media and Media Regulation’ conducted by the Honourable Ray Finkelstein QC, published 28 February 2012.
Flexible Sampling	Google’s policy that allows publishers to choose the number of free news articles provided to users of Google Search.
Freemium	A model in which a supplier provides both free and paid content. In the case of news publishers, these suppliers provide a certain number of news articles for free before requiring consumers to pay for additional content.
FTC	Federal Trade Commission.
GDPR	General Data Protection Regulation, established by the European Union.

<b>Term</b>	<b>Description</b>
Google Ad Manager	Google's service offered to websites selling advertising inventory via the ad tech supply chain. It includes services such as a publisher ad server, supply side platform and ad exchange. This includes the products previously called DoubleClick for Publishers and DoubleClick Ad Exchange.
Google AdMob	Google's service offered to mobile application developers to help monetise their applications by allowing Google to sell advertising opportunities on their applications on their behalf.
Google Ads	Google's service offered to advertisers which allows them to create ads in a number of formats which can appear on Google owned and operated sites and third party websites that sell inventory through Google AdSense or Google AdMob.
Google AdSense	Google's service offered to websites which involves websites supplying inventory to the Google Display Network or Google Search Network. Google sells ads on those websites on their behalf and shares the revenue generated with the website.
Google Marketing Platform	Google's service offered to advertisers for the purchasing and measurement of ads via the ad tech supply chain. It includes services such as a demand side platform, advertiser ad server, data management platform and data analytics tool.
ICCPR	International Covenant on Civil and Political Rights.
ICN	International Competition Network.
ICPEN	International Consumer Protection and Enforcement Network.
Information disorder	The inability of consumers to rely on news and journalistic content as a result of dis-information, mal-information and mis-information.
Internet Code	Internet Industry Codes of Practice 2005.
IoT	Internet of Things—the use of internet-connected technology in physical devices that have not traditionally featured such technology, such as cars, household appliances and speakers. This allows these devices to collect, share and make use of data.
IP	Intellectual property.
IPEC	UK Intellectual Property Enterprise Court.
ISP	Internet service provider.
Machine learning	The ability of some computer software to autonomously improve knowledge and processes through the repetition of tasks, without the manual entry of new information or instructions.
Mal-information	Genuine information that is shared to cause harm, often by moving information designed to stay private into the public sphere.
MEAA	Media, Entertainment and Arts Alliance.
Mis-information	False information that is shared, but no harm is meant.
MRC	Media Ratings Council.
Multi-sided platform	A platform that is characterised by the following pair of properties: <ul style="list-style-type: none"> <li>■ two or more distinct types of users or parties ('economic agents') interact on the platform, and</li> <li>■ an increase in usage by one type of user or party increases the value of the platform to users or parties of another type.</li> </ul>
National Defamation Law	The national uniform defamation legislation enacted by each of the states and territories in 2005 to 2006.



Term	Description
Natural language processing/natural language generation	Technology that allows computer software to collect, analyse, interpret and produce 'natural' language in the form of text and speech.
NBN	National Broadband Network.
NCC	Norwegian Consumer Council.
NDB Scheme	Notifiable Data Breaches Scheme in Part IIIC of the Privacy Act.
Network effects	The effect whereby the more users there are on a platform, the more valuable that platform tends to be for its users. Precise definitions are provided for the two types of network effects that are of concern for this report (cross-side network effects and same-side network effects).
OAIC	Office of the Australian Information Commissioner.
OAIC survey	'Australian Community Attitudes to Privacy Survey 2017', published May 2017.
Paywall	A feature of a website that requires users to subscribe and/or pay to access content on the website.
Personal information	Defined within the Privacy Act as  'Information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not, and (b) whether the information or opinion is recorded in a material form or not.'
Price discrimination	Pricing identical or very similar goods differently based on the supplier's belief regarding a consumer's willingness to pay for the goods.
Privacy Act	<i>Privacy Act 1988</i> (Cth).
Programmatic advertising	Automated buying, selling and serving of advertising, which occurs in real time and allows advertisers, publishers and intermediaries to use various data sources for targeting users.
Public broadcaster	A broadcaster that is established under federal legislation and receives the majority of its funding from public sources. In Australia and many other countries, public broadcasters are not state broadcasters and are independent of government.
Publisher ad servers	A server used by websites to organise and manage advertising space. It determines which ads will be shown, it serves ads, and also collects information on the performance of ads.
RA	<i>Radiocommunications Act 1992</i> (Cth).
Referral	Where a user is directed from one website to another via a hyperlink.
Same-side network effects	Effects that are present when the number of users in one type of user group increases (or decreases) the value of the platform for users in that same type of user group.
SBS	Special Broadcasting Services Corporation.
SCA	Southern Cross Austereo.
SEO	Search engine optimisation.
SMEs	Small and medium-sized enterprises.
Snippet	A small amount of text, an image, or a short video that is provided in addition to a hyperlink generated in response to a search query. The purpose of a snippet is to provide context to the hyperlink and an indication of the contents of the relevant website to a user.

<b>Term</b>	<b>Description</b>
SSP	Supply side platform—a platform used by websites to optimise and automate the sale of digital advertising inventory.
Subscribe with Google	A service that allows users to buy subscriptions, using their Google account, on participating news websites. This allows users to ‘Sign in with Google’ to access the publisher’s products, with the payments processed through Google.
TCP Code	Telecommunications Consumer Protections Code.
Telecommunications Act	<i>Telecommunications Act 1997</i> (Cth).
Third party data	Information from an entity that does not have a direct relationship with the person the data has been collected about. Common types of third party data that may be purchased by websites or advertisers include purchasing history, geographic data and sociodemographic data.
TIO	Telecommunications Industry Ombudsman.
Top Stories	A specialist search result offered by Google that displays sets of related results horizontally with images and includes articles, live blogs and videos on breaking news stories. Top Stories can contain news articles from different publishers, or from one news publisher.
Trading desk	An entity that specialises in the purchasing of digital advertising. Trading desks are often in-house departments found in the major advertising agencies.
UCTs	Unfair contract terms.
UDHR	Universal Declaration of Human Rights.
Universal search	A form of specialised search offered by Google that utilises a specialised content-specific algorithm designed to provide relevant results for a particular content category, such as images, videos, maps and news. This algorithm considers two main criteria in displaying and ranking specialised search results: user intent and the quality and relevance of potential results.
Vertical search	Search engines that specialise in different types of search. For example, Expedia provides vertical search services for travel.
VLRC	Victorian Law Reform Commission.
VPN	Virtual private network—services that create a virtual encrypted tunnel between users and a remote server operated by the VPN service.

# Appendix A: Results of the ACCC’s experiment searching for news-related content on Google Search

**Table 1: Search term ‘Banking Royal Commission’**

Number of times different publishers had their articles appearing in top stories carousel		Number of times different publishers had their articles appearing in organic search results	
ABC	58	<i>Australian Financial Review</i>	20
<i>Sydney Morning Herald</i>	14	ABC	10
<i>The Australian</i>	6	News.com.au	5
<i>The Guardian</i>	4	<i>Sydney Morning Herald</i>	4
News.com.au	3	Choice	2
<i>The Australian Financial Review</i>	3	Business Insider	1
Business Insider	2	Macrobusiness	1
Cuffelinks	1	SBS	1
<i>Herald Sun</i>	1	<i>The Guardian</i>	1
<i>The West Australian</i>	1		
<b>Total</b>	<b>93</b>	<b>Total</b>	<b>45</b>

**Table 2: Search term: ‘Scott Morrison’**

Number of times different publishers had their articles appearing in top stories carousel		Number of times different publishers had their articles appearing in organic search results	
<i>The Guardian</i>	17	News.com.au	7
News.com.au	15	<i>Sydney Morning Herald</i>	6
<i>The Australian</i>	13	ABC	5
<i>Sydney Morning Herald</i>	11	<i>The Guardian</i>	5
<i>Financial Review</i>	8	<i>The Australian</i>	4
ABC	7	<i>The Monthly</i>	3
9News	6	9News	1
<i>Daily Telegraph</i>	4	<i>Australian Financial Review</i>	1
<i>The New Daily</i>	3	<i>Daily Telegraph</i>	1
<i>Herald Sun</i>	3	SBS	1
2GB.com	3	<i>The New Daily</i>	1
The Conversation	2		
SBS	2		
Pedestrian TV	1		
New Matilda	1		
3AW	1		
Music Feeds	1		
Junkee	1		
The West Australian	1		
<b>Total</b>	<b>100</b>	<b>Total</b>	<b>35</b>

**Table 3: Search term: 'AFL'**

<b>Number of times different publishers had their articles appearing in top stories carousel</b>		<b>Number of times different publishers had their articles appearing in organic search results</b>	
Fox Sports	43	Fox Sports	5
News.com.au	15	News.com.au	3
AFL	14		
Herald Sun	12		
Wwos—Nine	6		
The Age	3		
The Advertiser	2		
Carlton Football Club	1		
ESPN	1		
Sydney Morning Herald	1		
The Roar	1		
Triple M	1		
<b>Total</b>	<b>100</b>	<b>Total</b>	<b>8</b>

# Appendix B: Recent reviews of media industry laws and regulations

The ACCC notes there has been numerous government reviews and reports in relation to various different and sometimes overlapping issues in media and intellectual property regulation in recent years. Key reviews relevant to media services providers (and their equivalent regulation) are noted below.

## B1 Media laws and regulations

Outlined below are relevant key government reviews, inquiries or reports over the past 15 years in relation to Australian media law and regulations, in reverse chronological order:

### 2013-18

- [Inquiry into the competitive neutrality of the national broadcasters](#), Department of Communications and the Arts, 2018—ongoing
- [Communications sector market study: final report](#), Australian Competition and Consumer Commission, April 2018
- [Inquiry into impacts on local businesses in Australia from global internet-based competition](#) (the Internet Competition Inquiry), Standing Committee on Industry, Innovation, Science and Resources, March 2018
- [Report on The Future of Public Interest Journalism](#), Australian Senate Select Committee, February 2018
- [Local content in regional Australia—2017 report](#), Australian Communications and Media Authority, May 2017
- [Review of the Australian Communications and Media Authority: final report](#), Department of Communications and the Arts, October 2016
- [Digital disruption: what do governments need to do?](#) Productivity Commission, June 2016
- [Reconnecting the customer: estimation of benefits](#), Australian Communications and Media Authority, November 2015
- [The Australian internet security initiative: interviews with industry participants](#), Australian Communications and Media Authority, October 2015
- [Five-year spectrum outlook 2015-19: the ACMA's spectrum demand analysis and strategic direction for the next five years](#), Australian Communications and Media Authority, September 2015
- [Digital radio report](#), Department of Communications, July 2015
- [Independent cost-benefit analysis of broadband and review of regulation](#), Department of Communications and the Arts, August 2014
- [Broken Concepts—The Australian Communications Legislative Landscape](#), Australian Communications and Media Authority, originally published in August 2011 and updated June 2013
- [Connected citizens—A regulatory strategy for the networked society and information economy](#), Australian Communications and Media Authority, June 2013.

## 2012 and earlier

- [Convergence Review](#) by Glen Boreham, Department of Broadband, Communications and the Digital Economy, May 2012
- [Classification—Content Regulation and Convergent Media](#), Australian Law Reform Commission, March 2012
- [Report of the independent inquiry into the media and media regulation](#) by Ray Finkelstein and Matthew Ricketson (the Finkelstein Review), Department of Broadband, Communications and the Digital Economy, February 2012
- [Enduring Concepts—Communications and media in Australia](#), Australian Communications and Media Authority, November 2011
- [Digital Australians: expectations about media content in a converging media environment](#), Australian Communications and Media Authority, October 2011
- [Draft children’s television standards 2008](#), Australian Communications and Media Authority, September 2008
- [Survey of the community radio broadcasting sector 2002–03](#), Australian Communications and Media Authority, August 2005.

Importantly, most of the studies and reports listed above have focused on specific media or communications sectors or on a specific category of rules (e.g. content classification). The relatively fragmentary approach taken by past reviews is illustrated in table 5. As such, there has been limited opportunity to consider the overarching media and communications regulatory framework, as proposed in Preliminary Recommendation 6.

**Table 1: Focus of past inquiries, reviews and reports**

Inquiry/review/report	Focus of inquiry/review/report <sup>1255</sup>					
	Print publishing?	Online publishing and broadcasting?	TV broadcasting?	Radio broadcasting?	Information communications technology?	Advertising?
Inquiry into the competitive neutrality of the national broadcasters <i>2018—ongoing</i>	✗	✗	✓	✓	✗	✗
Report on Public Interest Journalism <i>February 2018</i>	✓	✓	✓	✓	✗	✗
Communications sector market study: final report <i>April 2018</i>	✗	✗	✗	✗	✓	✗
Internet Competition Inquiry <i>March 2018</i>	✗	✗	✗	✗	✓	✗
Local content in regional Australia—2017 report <i>May 2017</i>	✓	✓	✓	✓	✗	✗
Review of the Australian Communications and Media Authority: final report <i>October 2016</i>	✗	✓	✓	✓	✓	✗
Digital disruption: what do governments need to do? <i>June 2016</i>	✗	✗	✗	✗	✓	✗

<sup>1255</sup> The table provides a general and high-level summary of the relevant sectors that are considered in detail by the inquiries, reviews, and reports listed. The ticks denote sectors that were areas of focus, whereas the crosses denote sectors that were not discussed in depth (although some of these were mentioned peripherally in the inquiries, reviews, and reports).

Inquiry/review/report	Focus of inquiry/review/report <sup>1255</sup>					
	Print publishing?	Online publishing and broadcasting?	TV broadcasting?	Radio broadcasting?	Information communications technology?	Advertising?
Reconnecting the customer: estimation of benefits November 2015	✗	✗	✗	✗	✓	✗
The Australian internet security initiative: interviews with industry participants <i>October 2015</i>	✗	✗	✗	✗	✓	✗
Five-year spectrum outlook 2015–19: the ACMA's spectrum demand analysis and strategic direction for the next five years <i>September 2015</i>	✗	✗	✓	✓	✗	✗
Digital radio report <i>July 2015</i>	✗	✗	✗	✓	✗	✗
Independent cost-benefit analysis of broadband and review of regulation <i>August 2014</i>	✗	✗	✗	✗	✓	✗
Broken Concepts—The Australian Communications Legislative Landscape Published Aug 2011, <i>updated June 2013</i>	✗	✓	✓	✓	✓	✗
Connected citizens—A regulatory strategy for the networked society and information economy <i>June 2013</i>	✗	✓	✓	✗	✓	✗
Convergence Review <i>May 2012</i>	✗	✓	✓	✓	✓	✗
Classification—Content Regulation and Convergent Media <i>March 2012</i>	✗	✓	✓	✓	✓	✓
News Media Regulation (the Finkelstein Review) <i>February 2012</i>	✓	✓	✓	✓	✗	✓
Enduring Concepts—Communications and media in Australia November 2011	✗	✓	✓	✓	✓	✗
Digital Australians: expectations about media content in a converging media environment October 2011	✗	✓	✓	✗	✓	✗
Draft children's television standards 2008 September 2008	✗	✗	✓	✗	✗	✗
Survey of the community radio broadcasting sector 2002–03 August 2005	✗	✗	✗	✓	✗	✗



## B2 Intellectual property laws and regulations

The ACCC notes that in the past 20 years, there have been numerous reviews undertaken by various departments and organisations in relation to copyright and defamation law, including an ongoing consultation being conducted by the Department of Communications and the Arts. A number of these discuss the provision of businesses providing media services (along with a range of other matters).

### 2013-18

- [Copyright modernisation consultation](#), Department of Communications and the Arts, 2018—ongoing
- [Consumer survey on online copyright infringement 2018](#), Department of Communications and the Arts, August 2018
- [Statutory Inquiry into NSW Defamation Act 2005](#), New South Wales Department of Justice, June 2018
- [Cost benefit analysis of changes to the Copyright Act 1968](#), Ernst and Young, commissioned by the Department of Communications and the Arts, December 2016
- [Intellectual Property Arrangements](#), the Productivity Commission, August 2016.
- See also [Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements](#), August 2017
- [Inquiry into Australia's Innovation System](#), Senate Standing Committees on Economics, December 2015
- [Inquiry into Copyright and the Digital Economy](#), Australian Law Reform Commission, November 2014

### 2012 and earlier

- [Review of intellectual property legislation under the Competition Principles Agreement](#), Intellectual Property and Competition Review Committee, Attorney-General's Department, September 2000
- [Numerous past inquiries](#) by the Copyright Law Review Committee (no longer in existence), Attorney-General's Department, 1984-2005.

# Appendix C: ACCC review of digital platforms' processes, terms and policies

This appendix provides an overview of the ACCC's desk-based review in relation to a selection of digital platforms' sign-up processes (**section C1**), opt-out processes (**section C2**) and terms of use and privacy policies (**section C3**). These findings are referenced, where relevant, in chapter 5. Details of the methodology for each of these reviews are provided as relevant below.

## C1 Review of sign-up processes

### C1.1 Summary of findings

- The ACCC reviewed the sign-up processes to create new accounts on Google's Gmail, Facebook, Twitter and Apple (Apple ID) in July and November 2018.
- Three of the four digital platforms reviewed used clickwrap agreements where a user proceeding with the signing-up process is deemed by the digital platform to constitute acceptance of its terms of use and privacy policies.
- In each of the sign-up processes reviewed, the fastest way to creating an account does not require users to review or edit their privacy settings.
- Google gives new Gmail users the option to review and edit their privacy settings before creating their account; if new users do not edit any of these six privacy settings, four of the settings are preset to saving the relevant information to the user's Google Account by default<sup>1256</sup>, whilst two of the settings are preset to not saving the information to the user's Google Account.

### C1.2 Methodology

In July and November 2018, staff members of the ACCC reviewed the sign-up process for new Australian users<sup>1257</sup> of Google (Gmail), Facebook, Twitter and Apple (Apple ID). This research was conducted by ACCC officers on a Windows PC using the Chrome internet browser and on a MacBook Pro using the Chrome internet browser.

The following steps were taken to create new accounts:

1. Visit 'create account' page:
  - (a) Gmail: <https://accounts.google.com/>
  - (b) Facebook: <https://www.facebook.com/r.php>
  - (c) Twitter: <https://twitter.com/i/flow/signup>
  - (d) Apple: <https://appleid.apple.com/account#!&page=create>
2. Follow prompts to create an account on each platform. All links such as 'learn more' within the sign-up process were followed and screenshots recorded.
3. Flowcharts were created to visually represent the path a new user takes through the sign in process, see section 1.3. Where applicable, the headings of the screens have been extracted in the flowcharts.
4. Relevant screenshots of the sign-up process from the time of the ACCC's review are extracted below. The ACCC notes that the web pages may have been updated since the time this review was conducted and that each screenshot used in this appendix is accompanied by a reference stating the date on which the web page was last accessed by the ACCC team.

<sup>1256</sup> For the avoidance of doubt, 'default' means 'a procedure which has preset parameters which operate unless changed by the user' (as defined by the [Macquarie Dictionary](#)). 'Default setting' accordingly refers to the preset function of a setting which applies unless changed by the user.

<sup>1257</sup> That is, users accessing an account from a device with an IP address located within Australia.

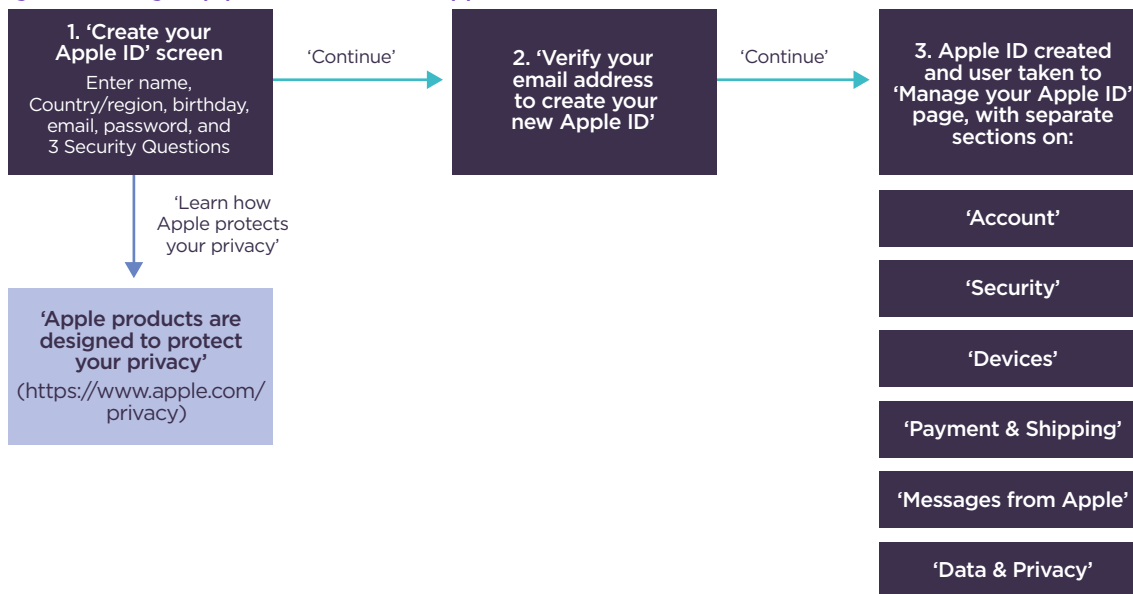
## C1.3 Sign-up flowcharts

The following flowcharts represent the path a new user can take when making an account and any possibility to opt-out of data collection. In particular:

- **Dark purple boxes** represent the fastest steps for a user to take to create a new account on each digital platform.
- **Light blue boxes** represent a separate web page outside the sign-up process, some of which include pages setting out the digital platforms' terms of use and privacy policies.<sup>1258</sup>
- **Green boxes** represent pop-ups with additional information that do not take the user away from the sign-up process.
- **Orange boxes** represent the user being taken to a separate page or section with more options to change privacy settings.

### Apple ID sign-up flow chart

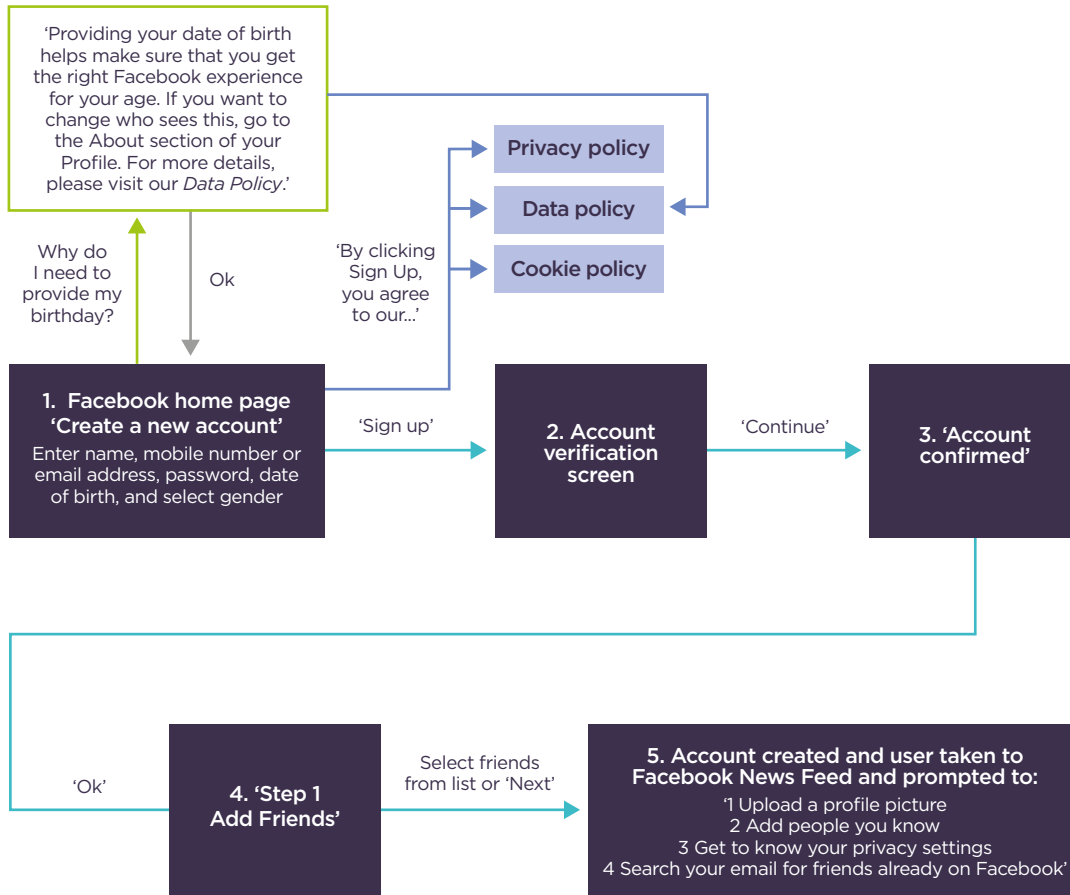
Figure 1: Sign-up process for a new Apple ID



<sup>1258</sup> If the user was directed to an external page such as the platform's privacy policy, further links from the external page were not followed as no direct changes to settings can be made from pages such as the privacy policy. While there may be links to further information from such pages, the user has been taken away from the main sign-up process.

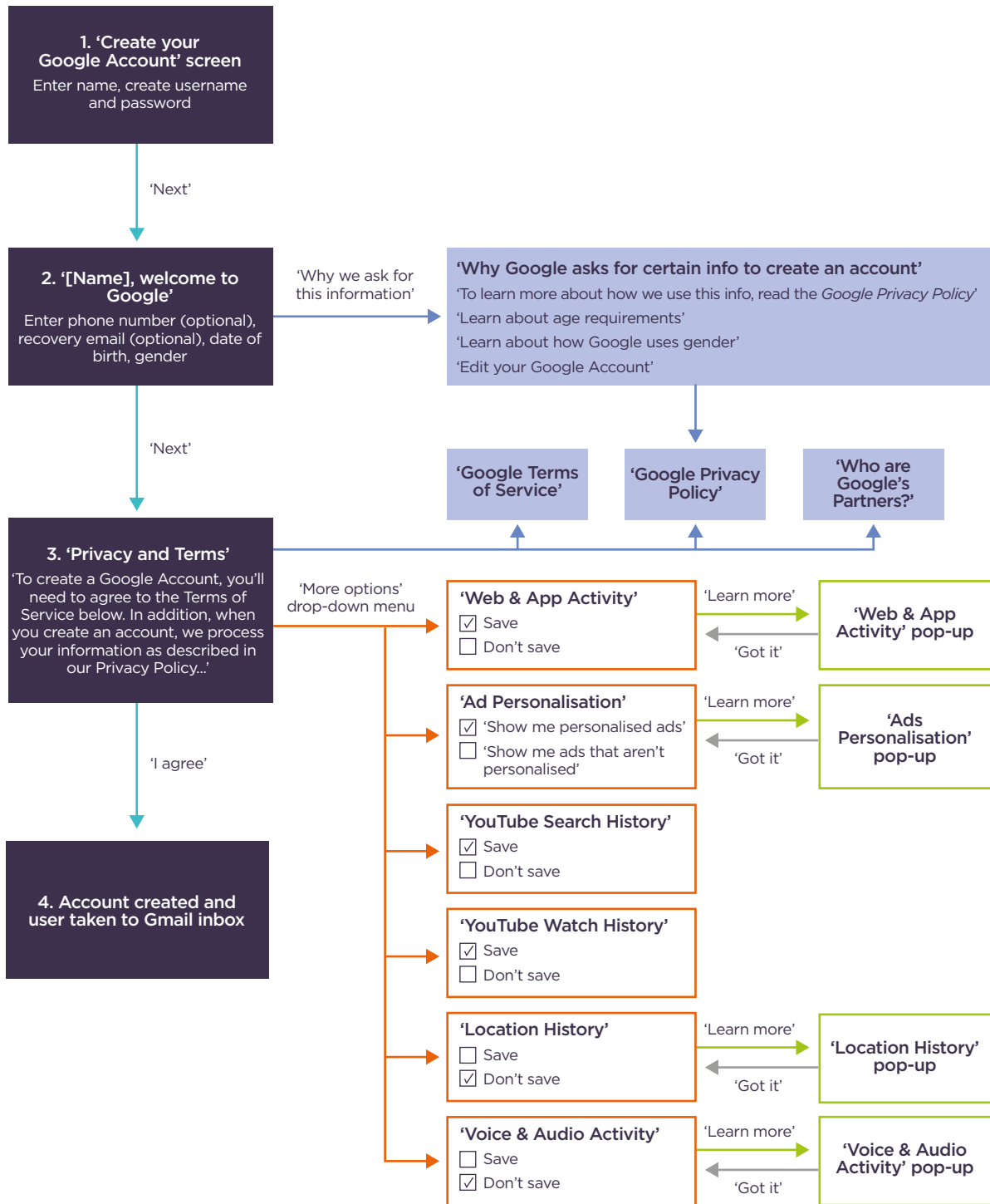
## Facebook sign-up flow chart

Figure 2: Sign-up process for a new Facebook account



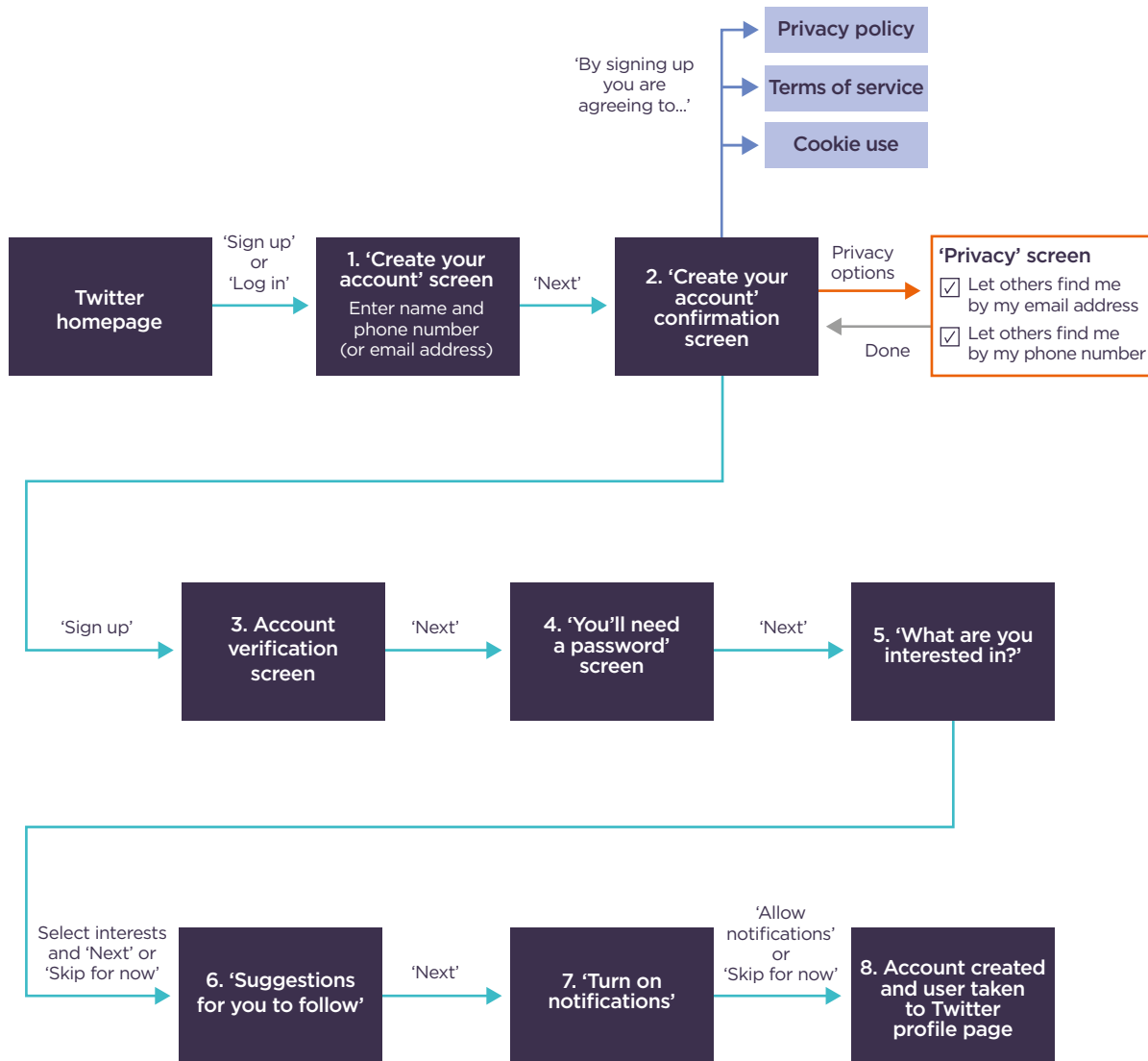
# Gmail sign-up flow chart

Figure 3: Sign-up process for a new Google Gmail user



## Twitter sign-up flow chart

Figure 4: Sign-up process for a new Twitter account



### C1.4 Clickwrap agreements

As shown in the **light blue boxes** in the above flowcharts for Facebook, Google and Twitter, each of these three digital platforms use a ‘clickwrap agreement’ where new users are deemed to have accepted their terms and conditions (which incorporate their privacy policies) by proceeding with the sign-up process.

The screenshots at figures 5, 6 and 7 show the wording used on each digital platform to let users know that signing-up will mean that they have accepted the terms of use.

For example:

- Facebook’s ‘Create an account’ page states ‘By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy’ in small font (figure 5).<sup>1259</sup> This means that users signing up to Facebook can agree to Facebook’s terms, including consenting to Facebook’s collection and use of the user’s data, without being asked to read or understand any of the terms of service.

1259 Wording used by Facebook on sign-up. Facebook, [Create a new account](#), accessed 31 October 2018.

- Google's 'Privacy and Terms' screen states that 'To create a Google account, you'll need to agree to the Terms of Service below'. Google also states that 'when you create an account, we process your information as described in our Privacy Policy, including these key points...' (figure 6). Whilst users may agree to Google's Terms of Use and Privacy Policy without reviewing these web pages, Google provides some dot points summarising its privacy policy on this screen to allow new users to review a summary of some key points relating to Google's privacy policy and data practices.
- Twitter's 'Create your account' screen states 'By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie GUse.', with hyperlinks to separate pages for Twitter's Terms of Service, Privacy Policy, and Cookie Use web page (figure 7). This means that users signing up to Twitter can agree to its terms and data practices without seeing any of its terms of service or privacy policies.

Apple did not require new users to accept its terms of service or privacy policy as part of the sign-up process for creating an Apple ID. The Apple Media Services Terms of Service specifically governs the use of Apple's services which are: iTunes Store, App Store, Apple Books, Apple Music, and Apple News.<sup>1260</sup> Use of the Apple ID or any other Apple services aside from those listed are therefore not covered under the Apple Media Services Terms of Service.

### Clickwrap agreements and engagement with terms and conditions

The use of clickwrap agreements to gain consent is relevant to consider as it may affect the engagement of consumers with the terms and conditions for the services provided. For example, research conducted by the European Commission in 2016 found that a low amount of consumers (9.4 per cent) would click through to view the terms and conditions in a clickwrap agreement, whereas a significant higher proportion (77.9 per cent) would read or scan at least part of the terms and conditions if they were provided to users within the acceptance process (e.g. in an embedded window on the page that users could scroll through).<sup>1261</sup>

Figure 5: Facebook 'Create an account' screen<sup>1262</sup>

The screenshot shows the Facebook 'Create an account' form. At the top, it says 'Create an account' and 'It's free and always will be.' Below this are four input fields: 'First name', 'Surname', 'Mobile number or email address', and 'New password'. Underneath is a 'Birthday' section with three dropdown menus for day (19), month (Jul), and year (1993), followed by a small link 'Why do I need to provide my date of birth?'. There are two radio buttons for 'Female' and 'Male'. A small disclaimer states: 'By clicking Sign Up, you agree to our Terms, Data Policy and Cookie Policy. You may receive SMS notifications from us and can opt out at any time.' A large green 'Sign Up' button is at the bottom. At the very bottom, there is a link: 'Create a Page for a celebrity, band or business.'

1260 See Apple '[Apple Media Services Terms and Conditions](#)', accessed 22 November 2018.

1261 European Commission (2016), [Study on consumers' attitudes towards Terms and Conditions](#), accessed on 20 November 2018.

1262 Screenshot taken from sign-up process commenced at <https://www.facebook.com/r.php>, accessed on 20 July 2018.



Figure 6: Google 'Privacy and Terms' screen<sup>1263</sup>

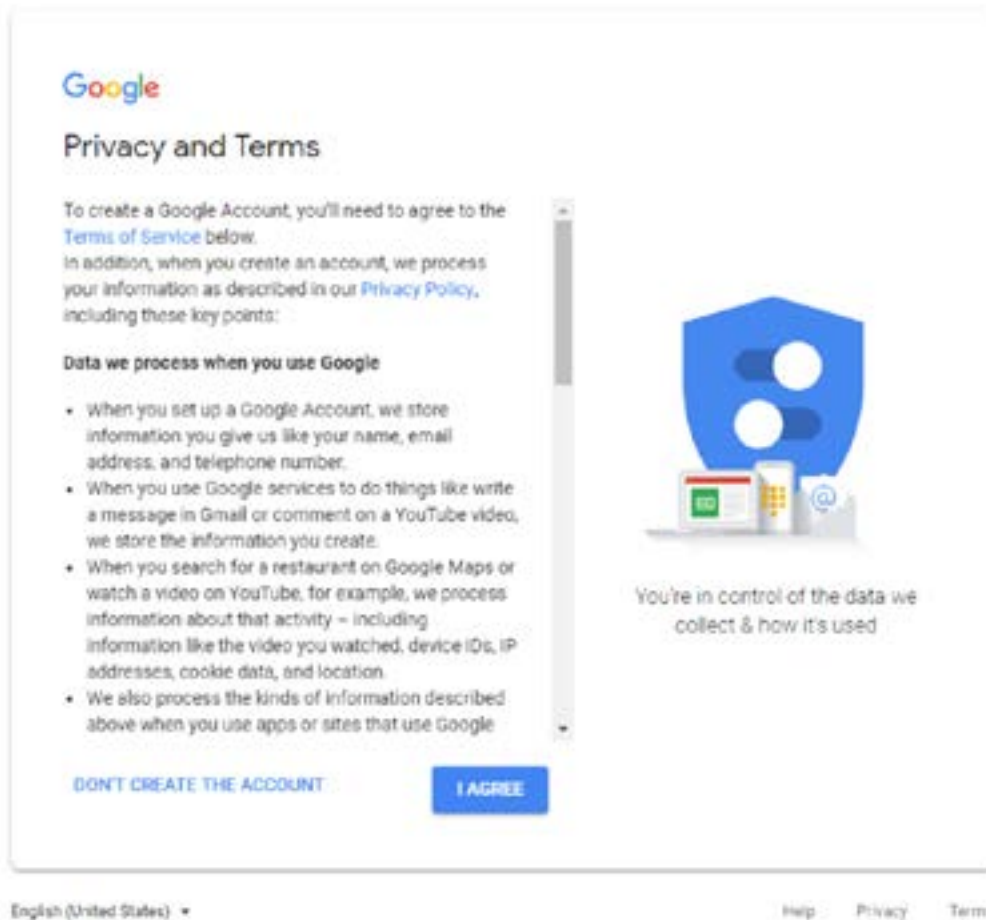
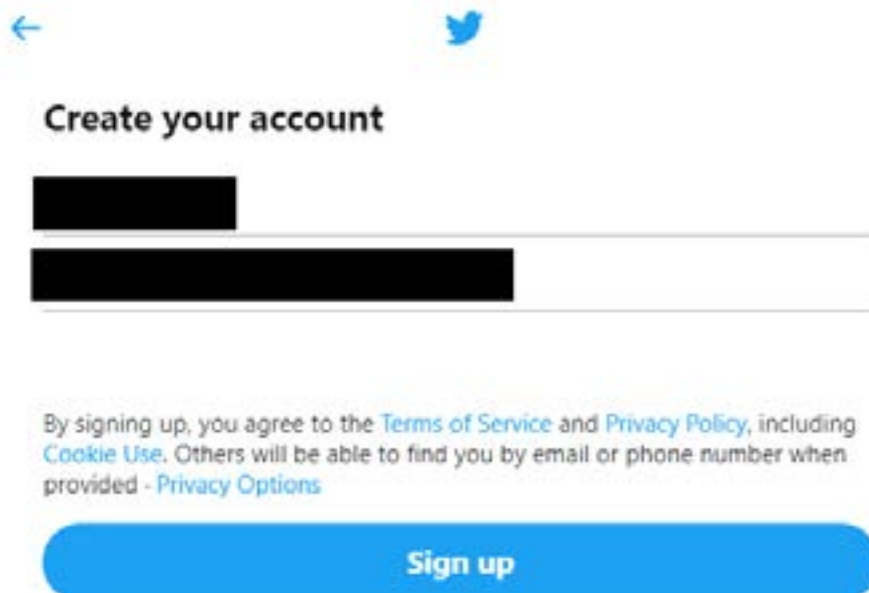


Figure 7: Twitter 'Create your account' screen<sup>1264</sup>



1263 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

1264 Screenshot taken from sign-up process commenced at <https://twitter.com/i/flow/signup>, accessed on 24 July 2018.

## C1.5 User prompts to review and edit privacy settings

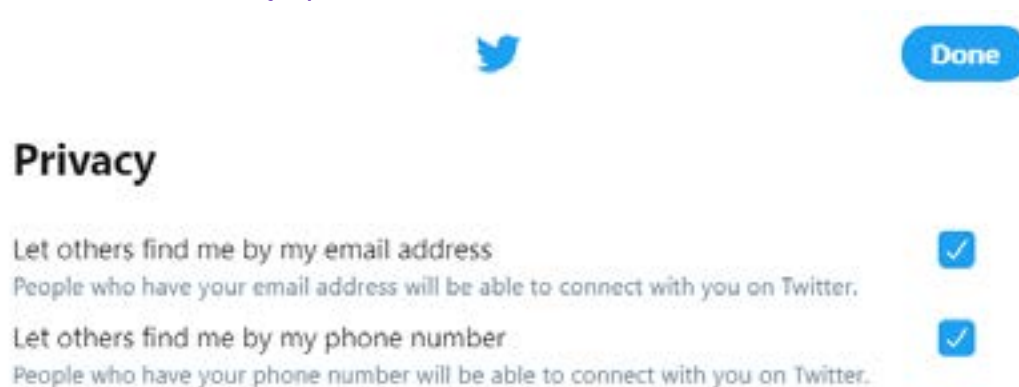
In each of the sign-up processes reviewed, the ACCC found that the fastest way to creating an account, as denoted by the line of **Dark purple boxes** in the flowcharts above did not include new users reviewing or editing their privacy settings.

Whilst none of the sign-up processes required a user to review and edit their privacy settings *before* a new account is created, Apple and Facebook took users to a page with either privacy settings or prompts to check their privacy settings directly *after* a new account is created:

- Once a new Apple ID is created, users were taken directly to a ‘manage account’ web page where they can review and edit information and settings in relation to their account, including in relation to ‘Data & Privacy’.
- Once a new Facebook account was created, the user was taken to their Facebook News Feed page and prompted to do the following: 1. upload a profile picture, 2. ‘Add people you know’, 3. ‘Get to know your privacy settings’, and 4. search email for friends already on Facebook. However, the ACCC notes that, whilst ‘Get to know your privacy settings’ can be viewed by a user scrolling down, a user may have to scroll through a lengthy ‘people you know’ list before reaching the ‘Get to know your privacy settings’ section.

The review further found that Twitter’s sign-up process allows users to click on a link to ‘Privacy Options’ (see figure 7), but this link only allowed new users to select whether other Twitter users can connect with the new user on Twitter by searching their email address or phone number (see figure 8). These user-to-user privacy settings did not appear to affect how Twitter collects, uses and discloses the new user’s information except in relation to other Twitter users.

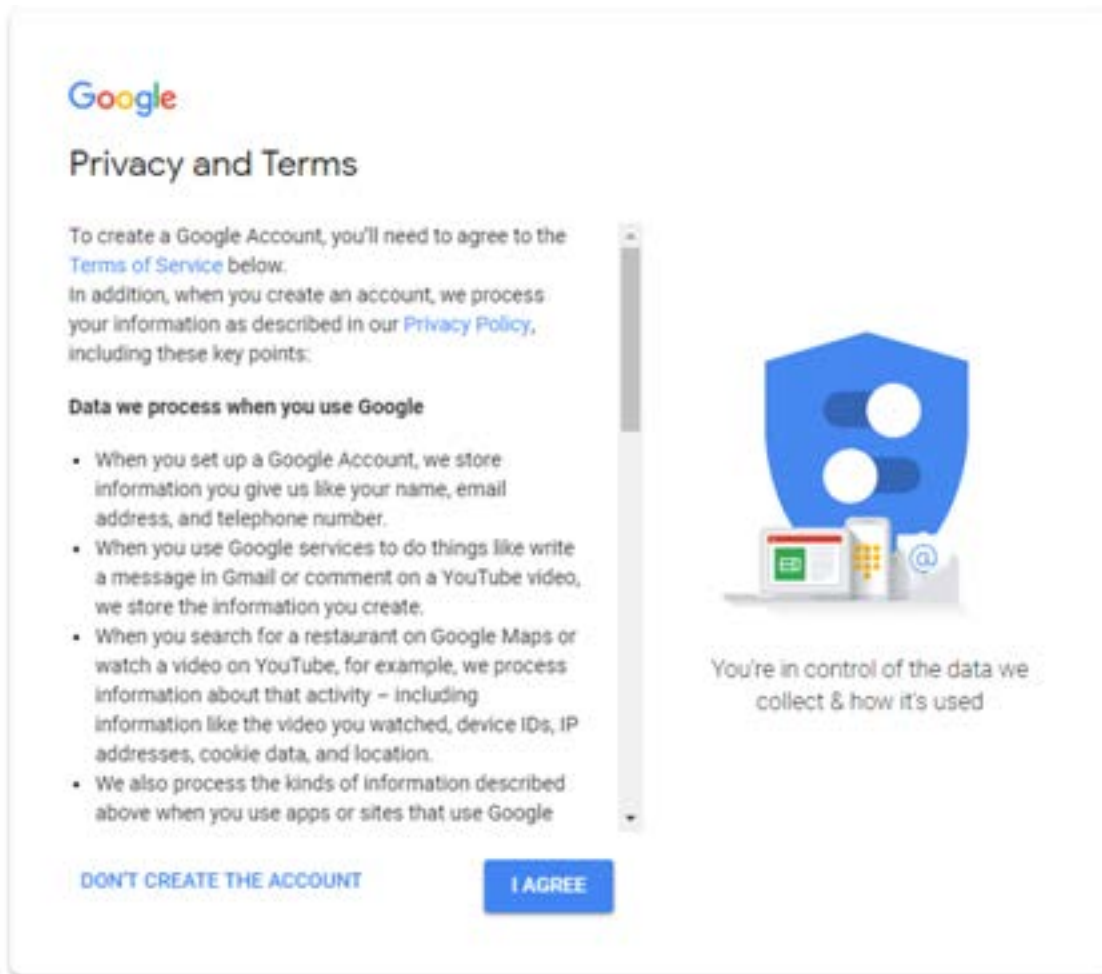
Figure 8: Twitter ‘Privacy Options’ screen<sup>1265</sup>



The review also found that Google offers Gmail users creating a new Google Account the option of customising their privacy settings as part of step 3 on the ‘Privacy and Terms’ web page, although this option has limited visibility. That is, the options to edit Google’s default privacy settings is only visible to new users who first scroll down past Google’s key points on their privacy policy to see the ‘More Options’ link, and then clicked on the ‘More Options’ link to open a drop-down menu that sets out the privacy settings (see figures 9 and 10). Because these privacy settings are folded within a drop-down menu, and the link to this drop-down menu is at the end of a scrolling passage of text, new users may be less likely to see these options to customise the data collected and associated with their Google Account.

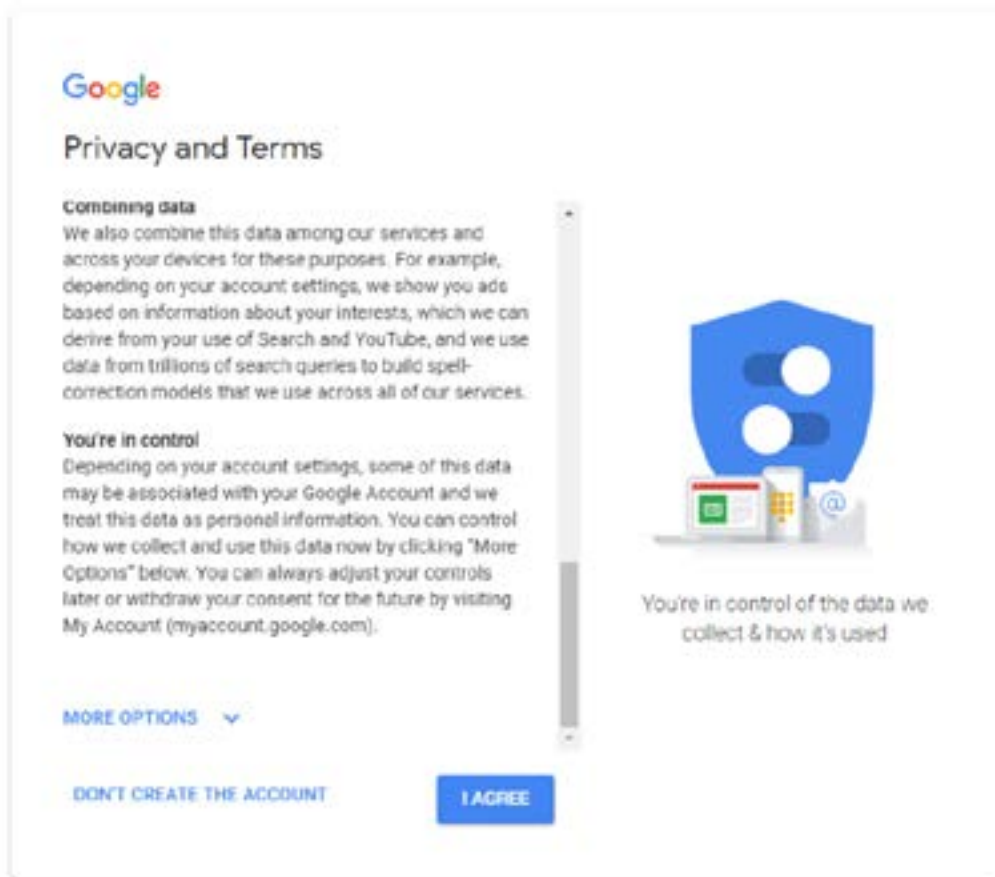
<sup>1265</sup> Screenshot taken from sign-up process commenced at <https://twitter.com/i/flow/signup>, accessed on 24 July 2018.

Figure 9: Google 'Privacy and Terms' screen before scrolling to the end of the text ('More Options' link not visible)<sup>1266</sup>



<sup>1266</sup> Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Figure 10: Google 'Privacy and Terms' screen after scrolling to the end of the text ('More Options' link visible)<sup>1267</sup>



## C1.6 Use of defaults

The privacy settings available in the 'More Options' drop-down menu for new users creating a Google Account had different pre-selected defaults. That is, without editing any of the privacy settings in the 'More Options' drop-down menu, ACCC officers found that some of the privacy settings were pre-selected to save certain activity to the user's Google account and some of the privacy settings were pre-selected not to save certain activity.

Overall, four of the six settings were preset to save information to a user's Google Account, while two settings were preset not to do so. Specifically:

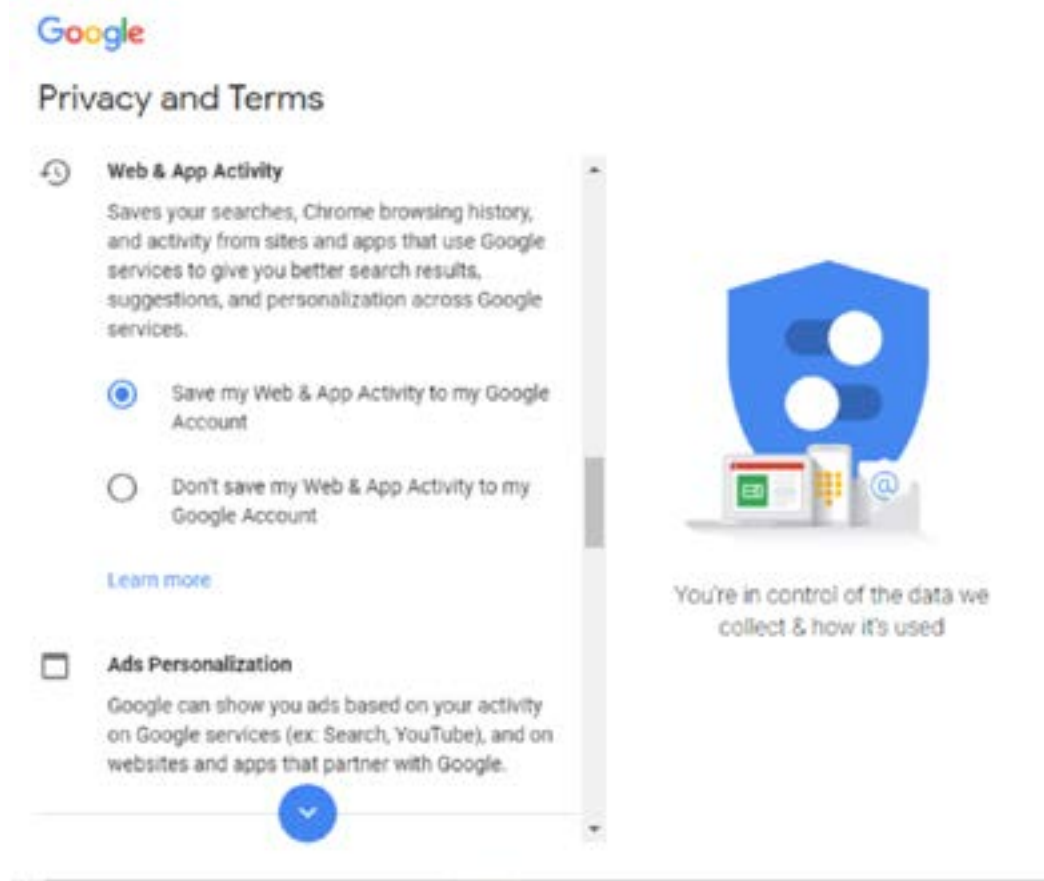
- 'Web & App Activity' has 'Save my Web & App Activity to my Google Account' pre-selected (see figure 11)
- 'Ad Personalisation' has 'Show me personalised ads' pre-selected (see figure 12)
- 'YouTube Search History' has 'Save my YouTube Search History to my Google Account' pre-selected (see figure 13)
- 'YouTube Watch History' has 'Save my YouTube Watch History to my Google Account' pre-selected (see figure 14)
- 'Location History' has 'Don't save my Location History to my Google Account' pre-selected (see figure 15)
- 'Voice & Audio Activity' has 'Don't save my Voice & Audio Activity to my Google Account' pre-selected (see figure 16)

<sup>1267</sup> Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

## Use of defaults and effect on consumer decision making

The default settings used by digital platforms is important because a key lesson from behavioural insights is that consumers tend to keep the default option (i.e. the status quo) rather than actively choosing another alternative.<sup>1268</sup> Research suggests that there are a number of possible reasons for consumers' tendency to choose the default setting, including 'favouring inaction, avoiding cognitive effort, inferring that the default option is the best recommended, or tending to favour the status quo'.<sup>1269</sup> Therefore, whether the default settings are in the consumers' best interest may impact on consumer welfare.<sup>1270</sup>

Figure 11: 'Web & App Activity' default setting<sup>1271</sup>



1268 OECD, 'Improving online disclosures with behavioural insights' (2018), p.31.

1269 Ahmetoglu et al, (2010), [Pricing Practices: Their Effects on Consumer Behaviour and Welfare](#), Prepared for the Office of Fair Trading, pp.13-14, accessed on 20 November 2018.

1270 OECD, 'Improving online disclosures with behavioural insights' (2018), p.31.

1271 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Figure 12: 'Ad Personalisation' default setting<sup>1272</sup>

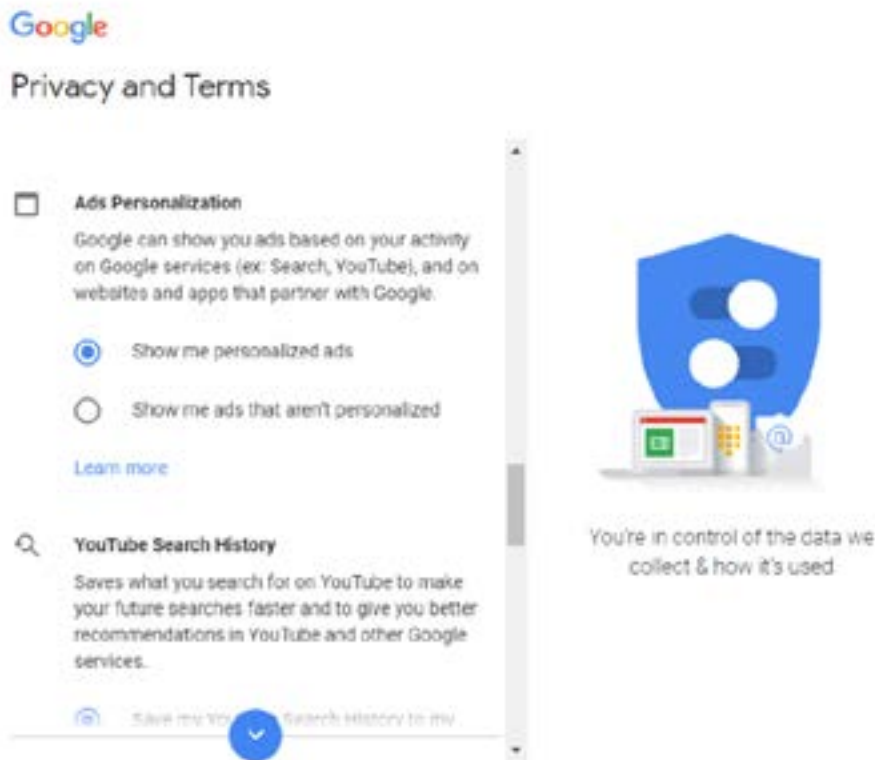
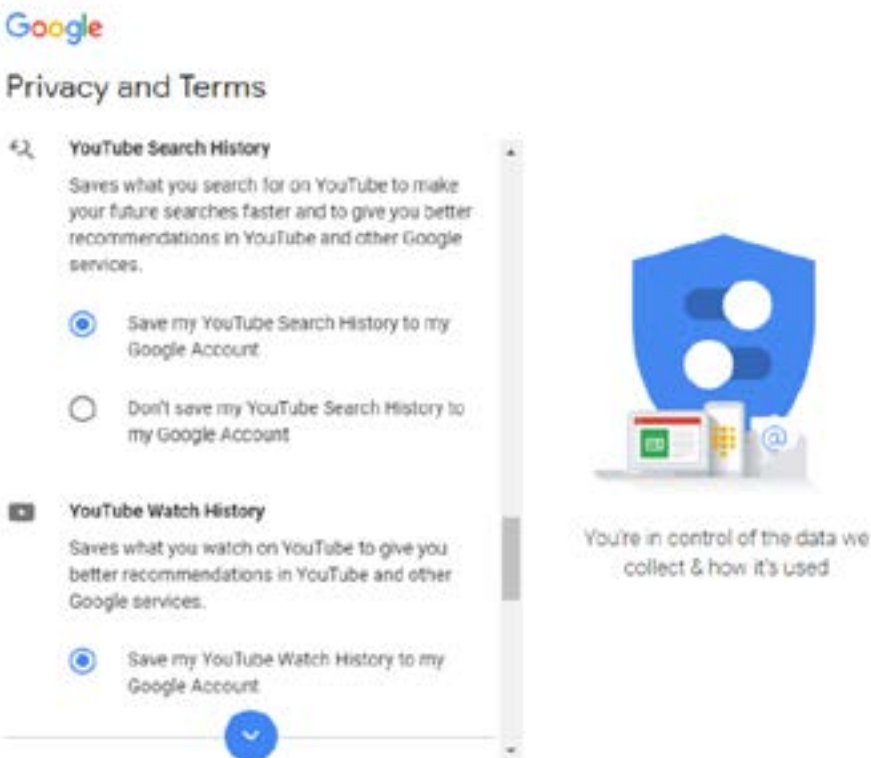


Figure 13: 'YouTube Search History' default setting<sup>1273</sup>



1272 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

1273 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

Figure 14: 'YouTube Watch History' default setting<sup>1274</sup>

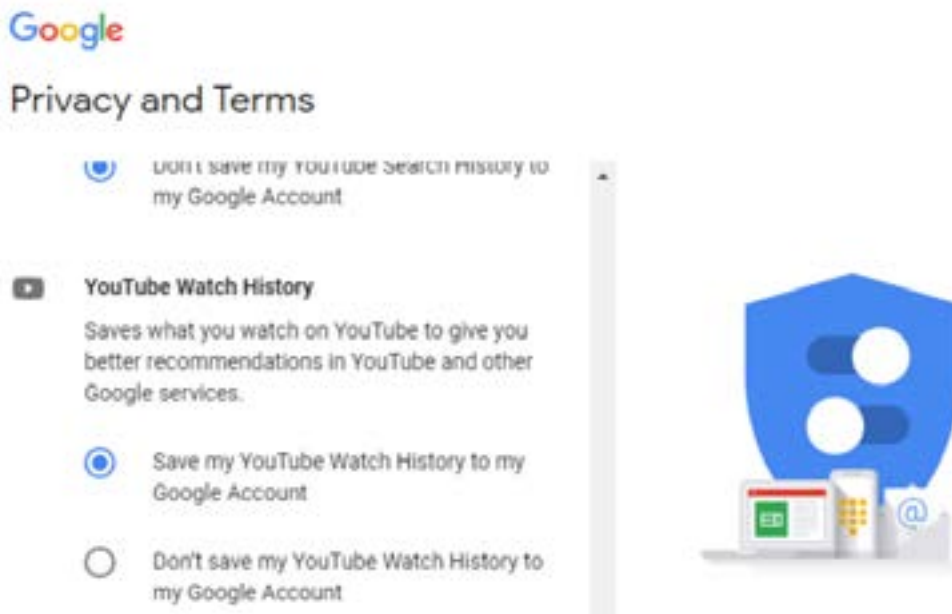
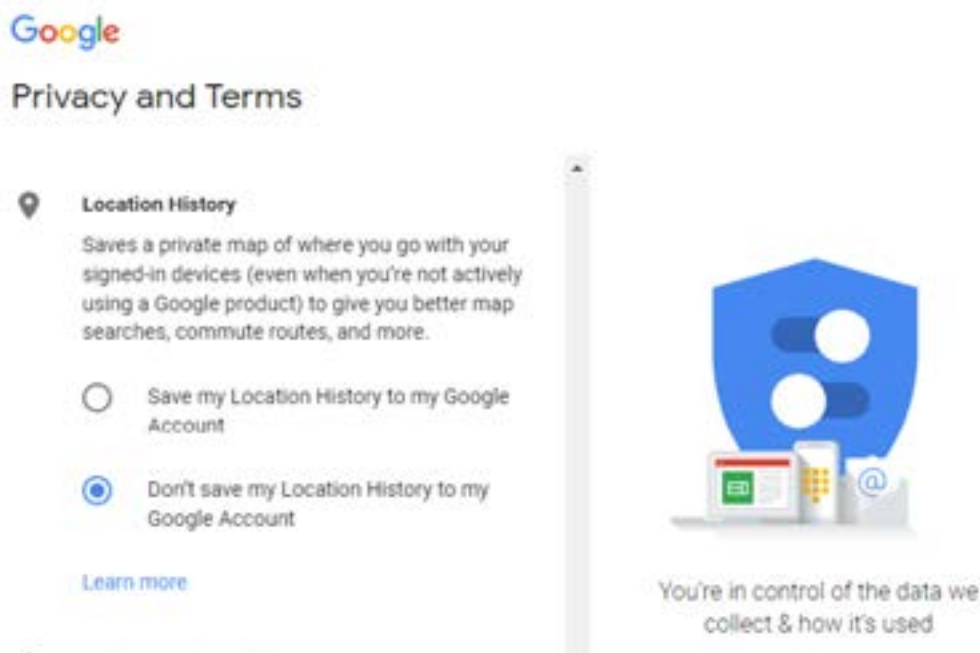


Figure 15: 'Location History' default setting<sup>1275</sup>

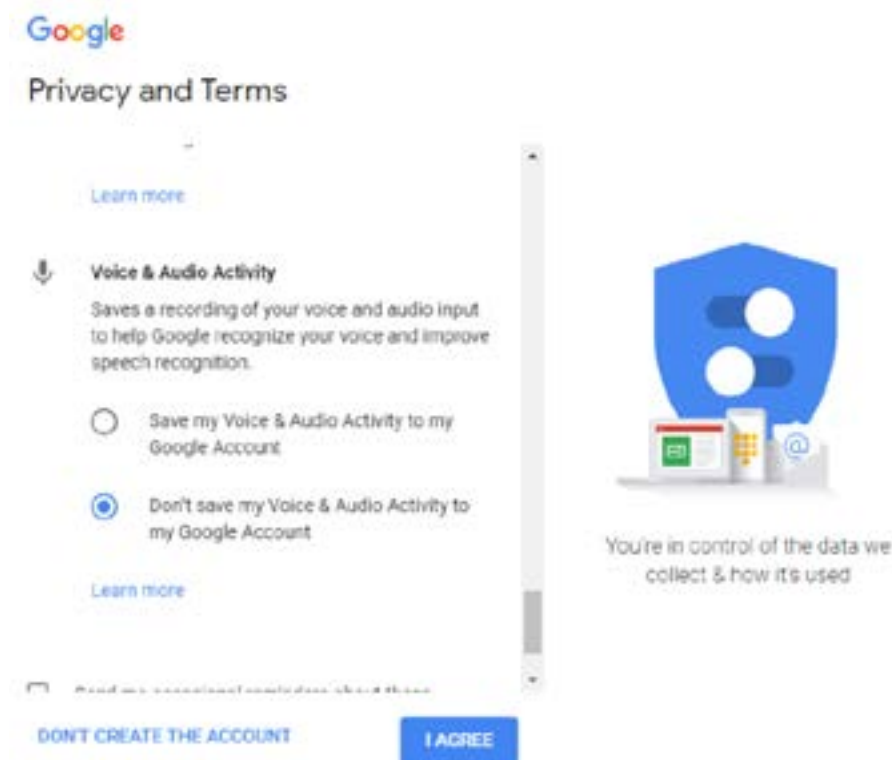


1274 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

1275 Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.



Figure 16: 'Voice & Audio Activity' default setting <sup>1276</sup>



## C2 Review of opt-out processes

### C2.1 Summary of findings

- The ACCC reviewed select opt-out processes on a Google Account between August and November 2018.
- ACCC staff found there were several pre-selected settings where a user is, by default, taken to have opted in to certain uses of their user data unless the user actively seeks out and de-selects the setting. In the case of 'Ad personalisation', the pre-selection is not immediately visible to the user, who must click on a 'more options' link to see the pre-selection.
- Google's policies indicate that turning off Google's 'Ad personalisation' setting does not opt-out users to all types of targeted advertising because Google states it may still target ads to a user 'based on general factors' and, in addition, turning off 'Ad personalisation' will not turn off online tracking for advertising purposes by other ad networks.
- Generally, the explanations around the data collection settings frame the data collection in positive terms with descriptions of how the data may be used to improve services to the user, whilst opting-out of the data collection tends to be framed in negative terms in terms of limiting or disabling the personalised services a user may receive.

### C2.2 Methodology

On various dates between August and November 2018, staff members of the ACCC researched the opt-out processes in an existing user's Google Account. This research was conducted by ACCC officers on a Windows PC using the Chrome internet browser and on a Macbook Pro using the Safari internet browser. The research involved documenting the steps to opt-out of the following settings in a user's Google Account:

<sup>1276</sup> Screenshot taken from sign-up process commenced at <https://accounts.google.com/>, accessed on 20 July 2018.

- Google's 'Ad personalisation' setting
- Google's 'Location History' setting
- Google's 'Web & App Activity' setting

Relevant screenshots of the opt-out process from the time of the ACCC's review are extracted below. The ACCC notes that the web pages may have been updated since the date this review was conducted and that each screenshot used in this appendix is accompanied by a reference stating the date on which the web page was last accessed by the ACCC team.

## C2.3 Opting-out of targeted advertising

### Steps for opting-out

The ACCC documented the process for opting-out of the 'Personalised Advertising' setting on an existing user's Google Account:

- When visiting <https://myaccount.google.com/> and after signing in, users are presented with a number of customisable settings divided into 'Sign-in & security', 'Personal info & privacy', and 'Account preferences'.<sup>1277</sup>
- In the 'Personal info & privacy' section, users can click on 'Manage Ad Settings' (see figure 17) to view their 'Ad Personalisation' setting, which is turned ON by default (see figure 18).
- A user can click 'More Options' to see an additional option to 'Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. This stores data from websites and apps that partner with Google in your Google Account'. This is also pre-selected to ON by default (see figure 5.19).
- When a user selects 'Turn Off' to disable 'Ad Personalisation', users are presented with a pop-up explaining the consequences of turning off this setting (see figure 20).
- Google notes that turning off 'Ad Personalisation' will not stop ads from being targeted to a user 'based on general factors, like the subject of what you're looking at, the time of day, or your general location' (see figure 20).
- Once 'Ad Personalisation' has been turned off, users are presented with a pop-up with additional information stating that 'It may take some time before this change is reflected across our systems' and 'You can also turn off ads personalisation for the Google ads that you see when you're signed out and 100+ other online ad networks' followed by a link to 'Visit Your Online Choices' (see figure 21).

<sup>1277</sup> See <https://accounts.google.com/> and signing-in to an existing Google account, accessed on 9 August 2018 and 16 November 2018.

Figure 17: Google's 'Ad Settings'<sup>1278</sup>

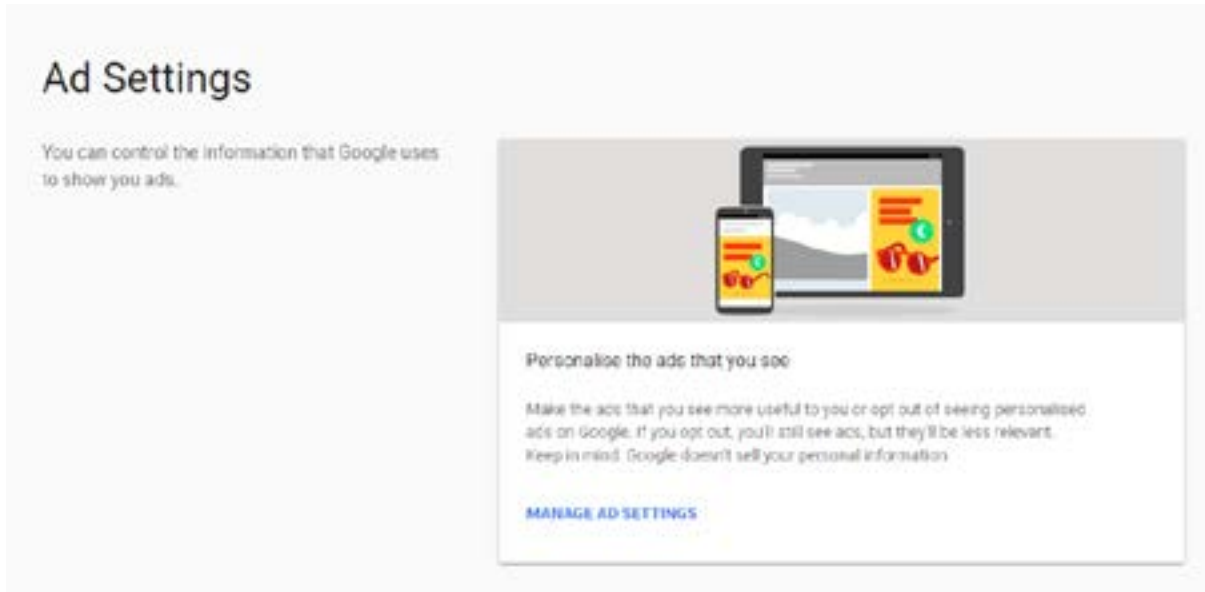
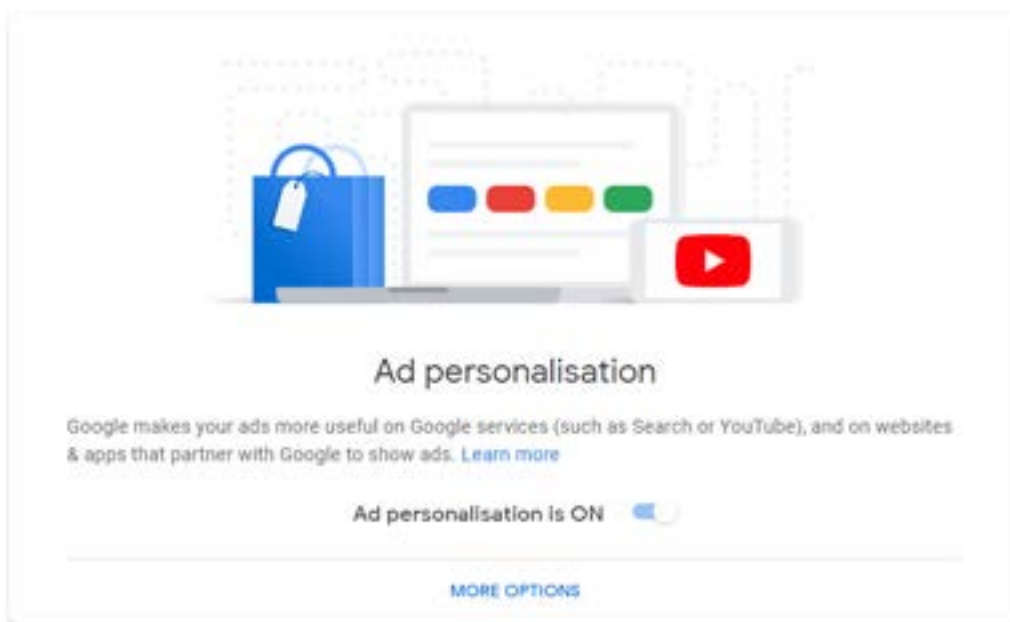


Figure 18: Google's 'Ad personalisation' setting<sup>1279</sup>



1278 Screenshot taken from opt-out process described above: <https://accounts.google.com/> > Ad Settings, accessed on 19 November 2018.

1279 Screenshot taken from opt-out process described above: <https://accounts.google.com/> > Ad Settings > Manage Ad Settings, accessed on 19 November 2018.

Figure 19: Google's 'Ad personalisation' setting after clicking on 'More Options'<sup>1280</sup>

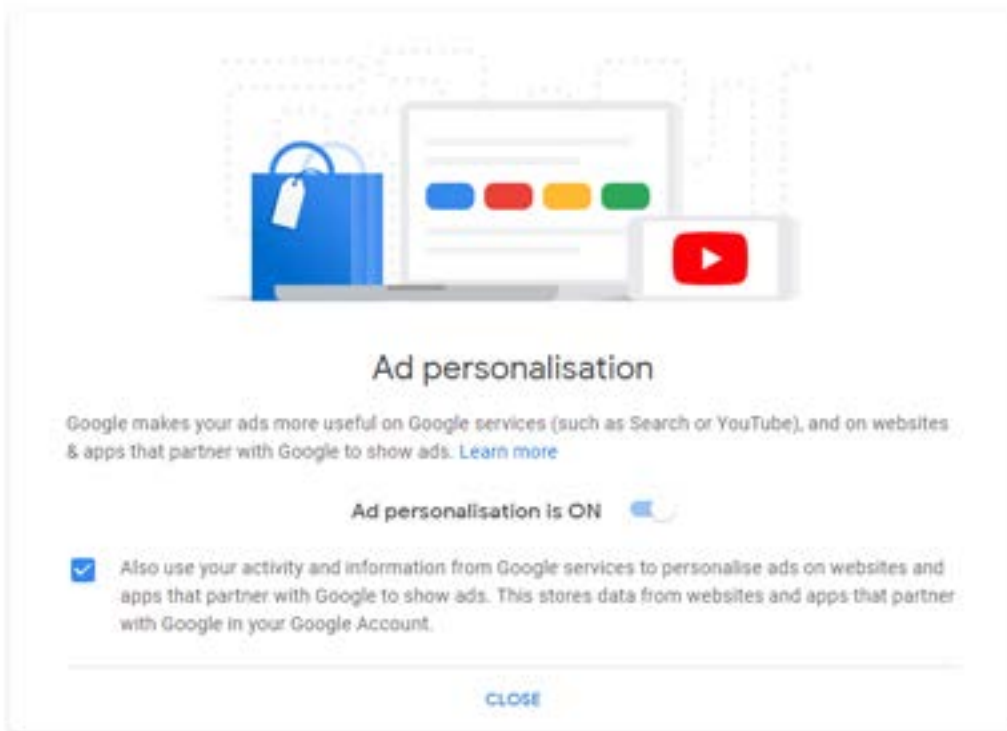
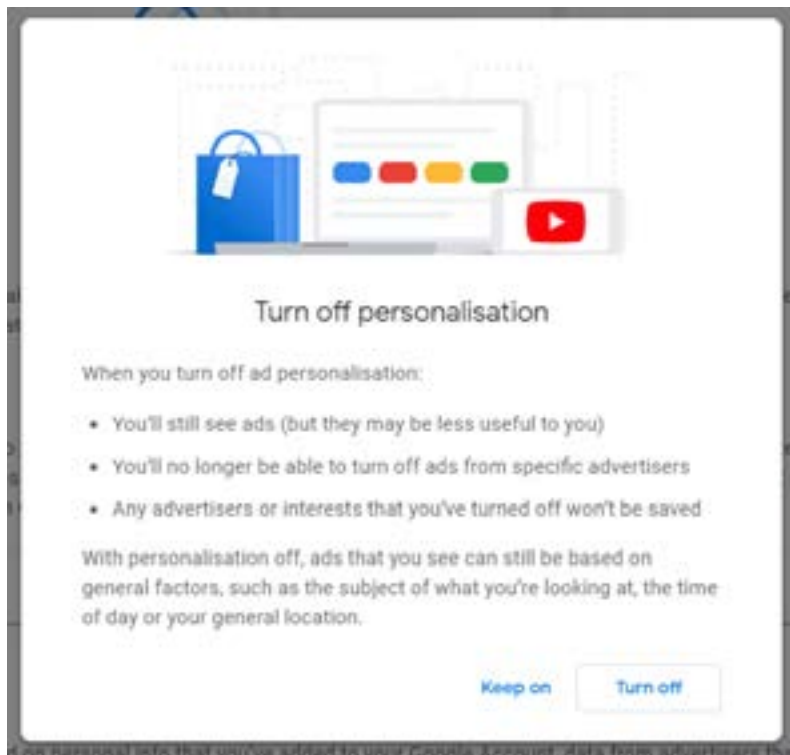


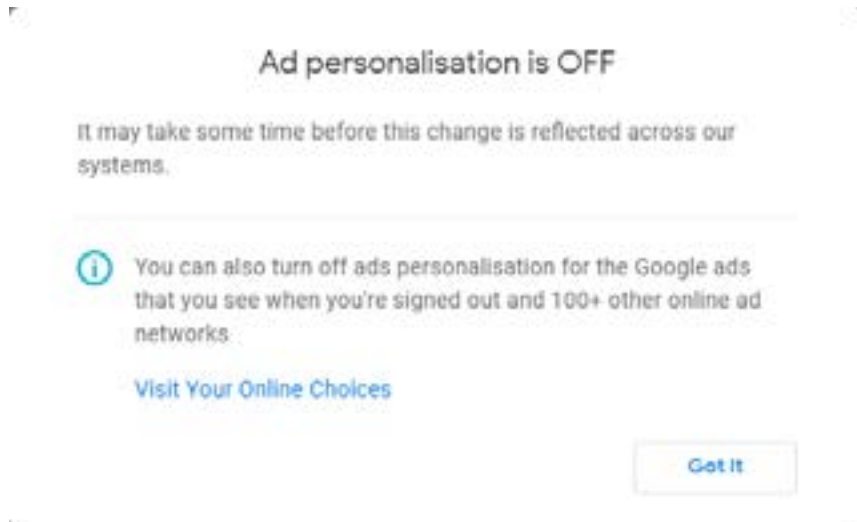
Figure 20: 'Turn off personalisation' pop-up<sup>1281</sup>



1280 Screenshot taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > More Options, accessed on 19 November 2018.

1281 Screenshot taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > Turn off Ad Personalisation, accessed on 19 November 2018.

Figure 21: Google's 'Ad personalisation is OFF' pop-up<sup>1282</sup>



## ACCC observations

The ACCC found a number of design features that either introduced potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of hidden pre-selections: When a user sees that 'Ad personalisation is ON' (see figure 18), the user must click on the 'more options' link to see that there is another option pre-selected for 'Also use your activity and information from Google services to personalise ads on websites and apps that partner with Google to show ads. This stores data from websites and apps that partner with Google in your Google Account' (emphasis added) (see figure 19). As noted above, default pre-selections can impact consumer decision-making as consumers are more likely to remain with a default. Moreover, by designing the user interface such that it is only visible to users who click on 'more options', many users may not be aware that they have the setting turned on or that they have the option to turn this off.
- Lack of clarity: The 'Turn off personalisation' popup notes that the ads shown to a user can still be targeted to that user 'based on general factors, such as the subject of what you're looking at, the time of day or your general location' (see figure 20). ACCC officers were unable to find a definition of what 'general factors' means from Google's policies and therefore could not determine the scope of the 'general factors' that can continue to be used to target advertising to a user with 'Ad Personalisation' turned off.
- Framing: Google's description of the 'Ad personalisation' setting is framed in positive terms: 'Google makes your ads more useful on Google services (such as Search or YouTube), and on websites & apps that partner with Google to show ads' (see figure 5.19). Additionally, the 'Turn off personalisation' popup focusses on the negative aspects of turning off ad personalisation, noting that 'You'll still see ads (but they may be less useful to you)', 'You'll no longer be able to turn off ads from specific advertisers', and 'Any advertisers or interests you've turned off won't be saved' (see figure 20). By framing 'Ad personalisation' in such positive language, and focusing on the potential negative consequences of turning this off, users may be nudged to keep their 'Ad personalisation' turned on.

## C2.4 Opting-out of the collection of location data

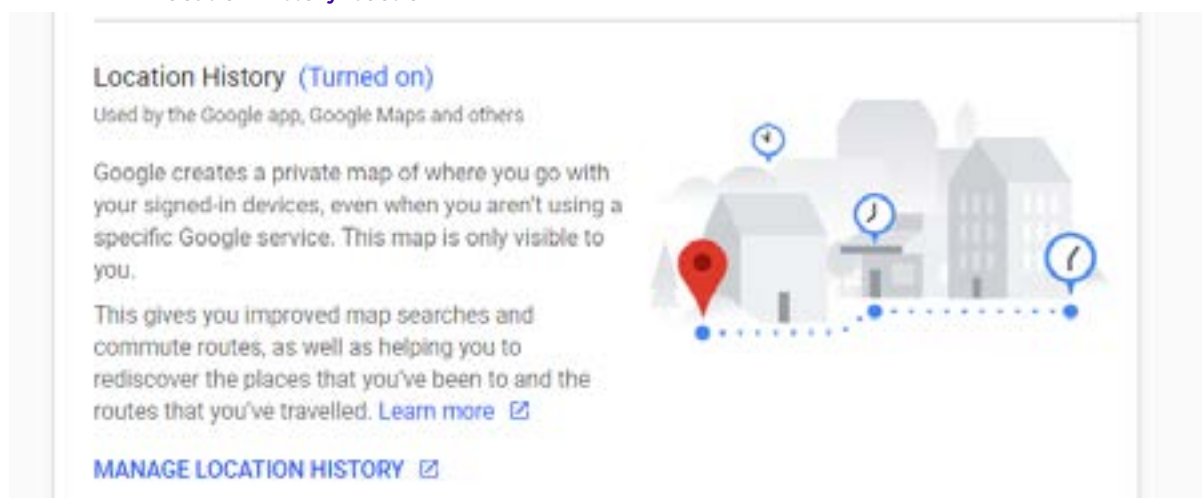
### Steps for opting-out

The ACCC documented the process for opting-out of the 'Location History' setting on an existing user's Google Account:

<sup>1282</sup> Screenshot of popup taken from opt-out commenced at <https://accounts.google.com/> > Ad Settings > Manage Ad Settings > Turn off Ad Personalisation > Turn off, accessed on 19 November 2018.

- When visiting <https://myaccount.google.com/> and after signing in, users are not provided with a direct menu option to edit their location settings.
- However, users may manage their location information by selecting 'Privacy Checkup'. This displays the following settings to users:<sup>1283</sup>
  - Web & App Activity
  - Location History
  - Device Information
  - Voice & Audio Activity
  - YouTube Search History
  - YouTube Watch History
- A user may complete the following steps to turn 'Location History' off:
  - Select 'Manage Location History' (see figure 22). This takes a user to their Timeline along with a pop-up titled 'Explore your timeline' (see figure 23).
  - Scroll through the three screens of the pop up and click on 'Learn more' on the final screen of the pop-up (see figure 24). This takes users to a web page with instructions on how to change their location data collection settings (see figure 25).
  - Following these instructions, a user can then click back to timeline page, and navigate, through the Settings cog icon, to the web page with their 'Location History' setting (see figure 26).
  - Toggle the setting OFF and then click 'Pause' on the popup titled 'Pause Location History?' (see figure 27).

**Figure 22: Google's Privacy Checkup web page displaying the 'Location History' section<sup>1284</sup>**



1283 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed on 19 November 2018.

1284 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed on 20 November 2018.

Figure 23: Google's 'Explore your timeline' pop-up<sup>1285</sup>

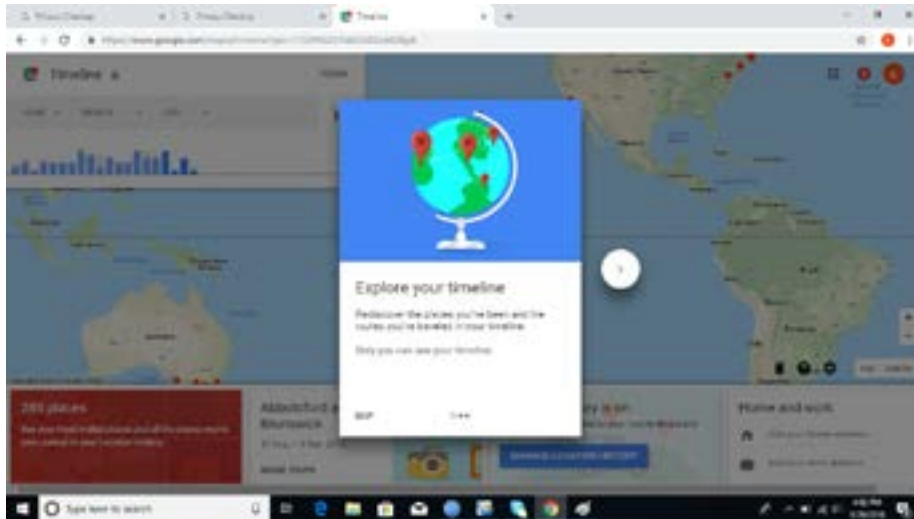


Figure 24: Google's 'You're in control' pop-up<sup>1286</sup>

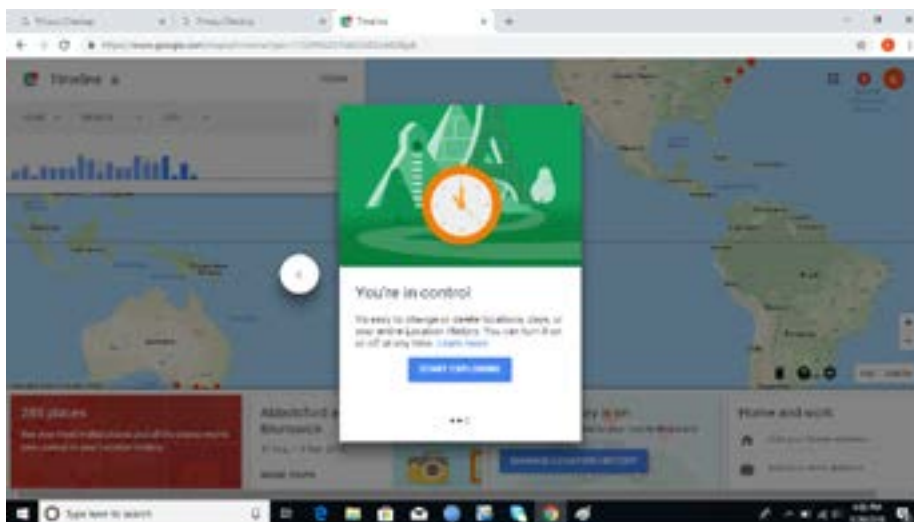


Figure 25: Google's instructions on how to 'Turn on or pause Location History'<sup>1287</sup>

## Turn on or pause Location History

When you enable Location History, Google records your location data and places in your Google Account, even when you're not using Google Maps. To turn on or pause your Location History, follow the steps below:

1. On your computer, go to [your timeline](#).
2. Click Settings > Enable Location History or Pause Location History.

Learn more about how to [manage or delete your Location History](#).

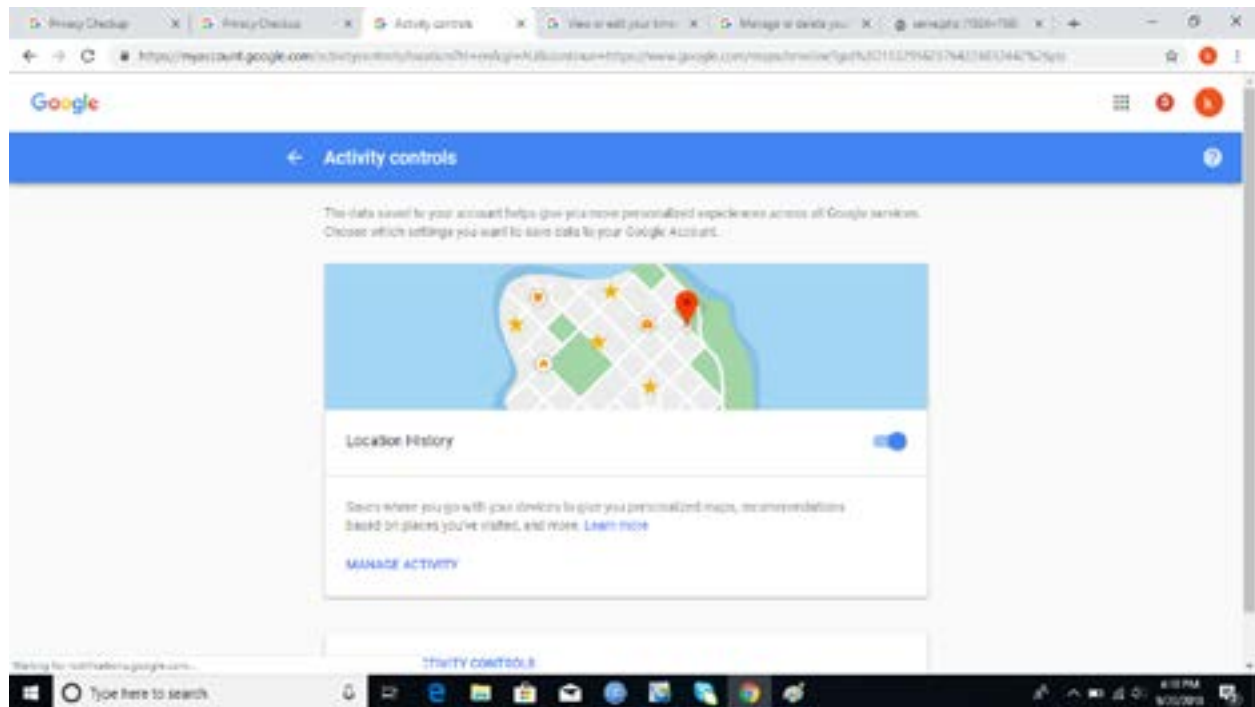
1285 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 1), accessed on 20 September 2018.

1286 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2), accessed on 20 September 2018.

1287 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More, accessed on 20 September 2018.

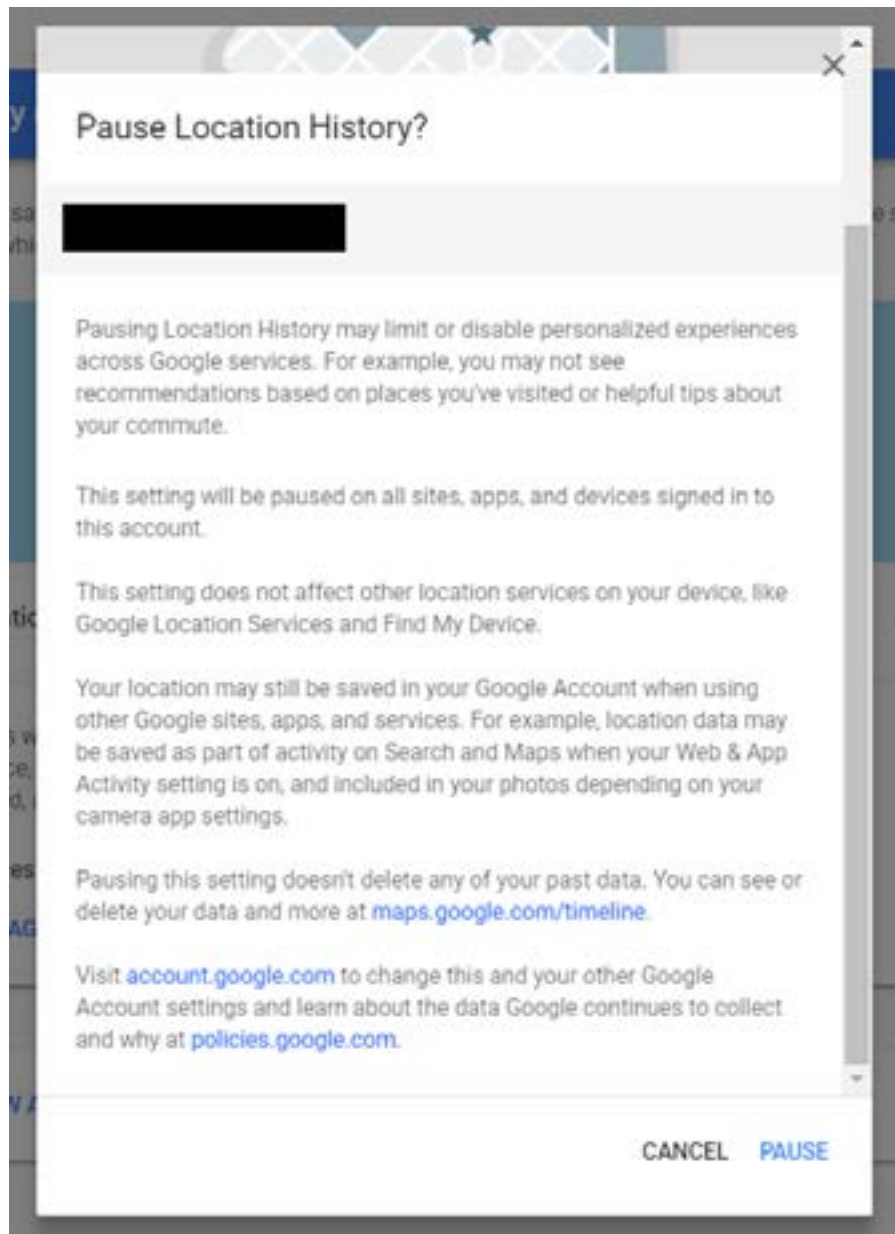


Figure 26: 'Location History' page<sup>1288</sup>



1288 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More > Settings, accessed on 20 September 2018.

Figure 27: 'Pause Location History?'<sup>1289</sup>



## ACCC observations

The ACCC found a number of design features that either introduced potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of Distractions: A user who uses Google's 'Privacy Checkup' function to 'Manage Location History' are faced with numerous options before being provided with information on how to turn off location history. Clicking on 'Manage Location History' takes the user to their Timeline with a pop-up titled 'explore your timeline' (see figure 20). There is also a much more prominent 'Start Exploring' button below the smaller 'learn more' link that takes the user to a web page with instructions on how to turn off their Location History setting.
- Framing: Google uses wording that emphasises the privacy of a user's Location History, stating that 'Google creates a private map of where you go with your signed-in devices, even when you aren't using a specific Google service. This map is only visible to you' (emphasis added) (see figure 22). However, Google's privacy policy also states that 'We use the information we collect from all our

<sup>1289</sup> Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Location History (Screen 2) > Learn More > Settings > toggle off, accessed on 20 September 2018.

services for the following purposes', which would include the use of location information for the purpose of providing 'personalised services, including content and ads'.<sup>1290</sup>

- Lack of clarity: Google suggests to users that its services may be less useful with 'Location History' disabled by stating 'Pausing Location History may limit or disable personalized experiences across Google services. For example, you may not see recommendations based on places you've visited or helpful tips about your commute' (see figure 27). However, Google does not provide any expanded detail about how and to what extent pausing Location History will 'limit or disable' a user's experiences across Google's services.

## C2.5 Opting-out of the collection of Web & App Activity data

### Steps for opting-out

The ACCC documented the process for opting-out of the 'Web & App Activity' setting on an existing user's Google Account:

- When visiting <https://myaccount.google.com/> and after signing in, users are not provided with a direct menu option to edit their 'Web & App Activity' setting.
- However, users may manage their location information by selecting 'Privacy Checkup'. This displays the following settings to users:<sup>1291</sup>
  - Web & App Activity (see figure 24)
  - Location History
  - Device Information
  - Voice & Audio Activity
  - YouTube Search History
  - YouTube Watch History
- A user may complete the following steps to turn 'Web and App Activity' off:
  - Select 'Manage Web & App Activity' (see figure 28)
  - Select 'Change setting' (see figure 29)
  - Turn the toggle to turn 'Web & App Activity' off (see figure 30)
  - A pop-up is displayed titled 'Pause Web & App Activity?' Users then choose between 'Cancel' or 'Pause' (see figure 31).

1290 See [Google Privacy Policy](#), accessed 20 November 2018.

1291 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed on 19 November 2018.

Figure 28: Google's Privacy Checkup displaying the 'Web & App Activity' setting<sup>1292</sup>

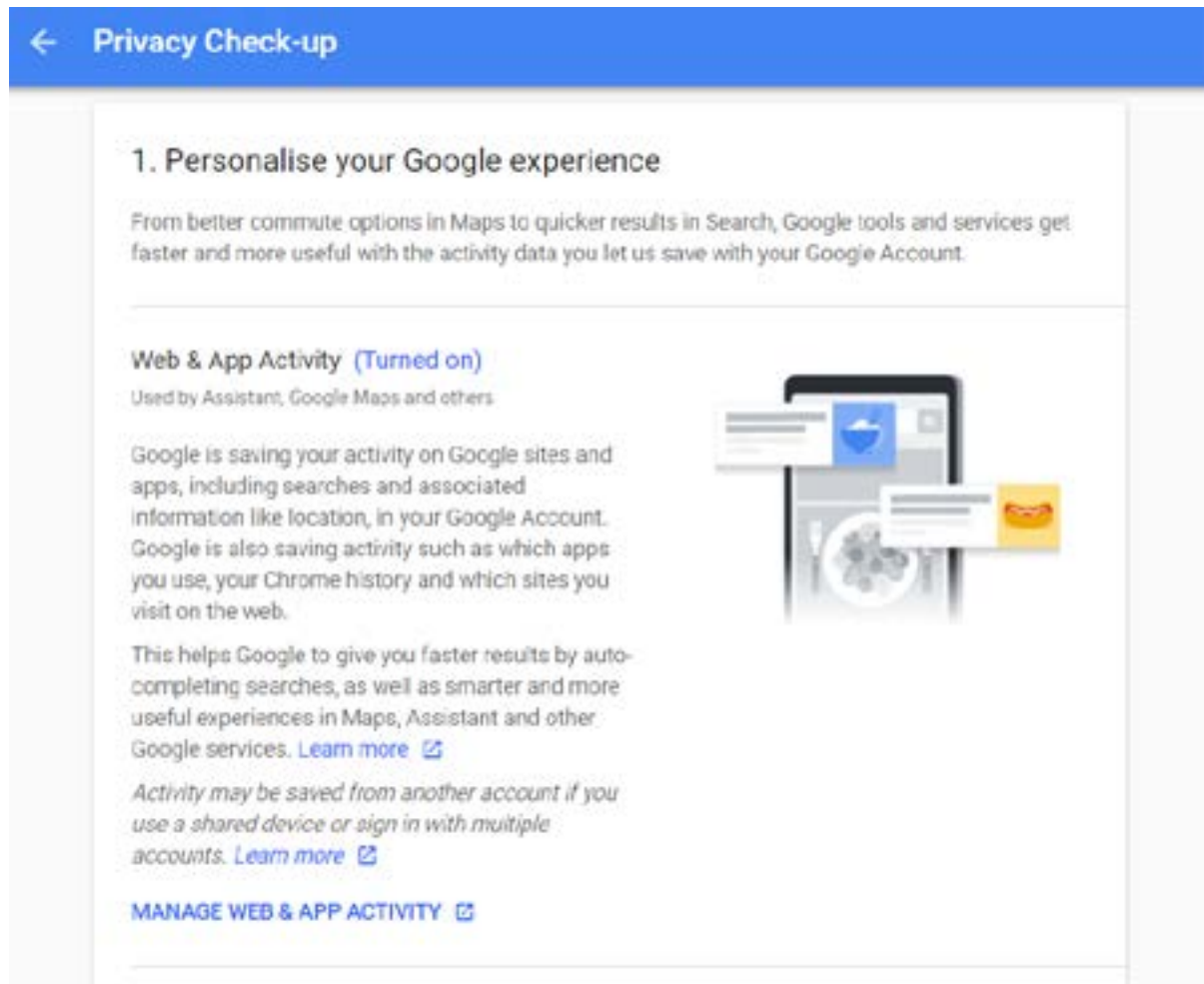
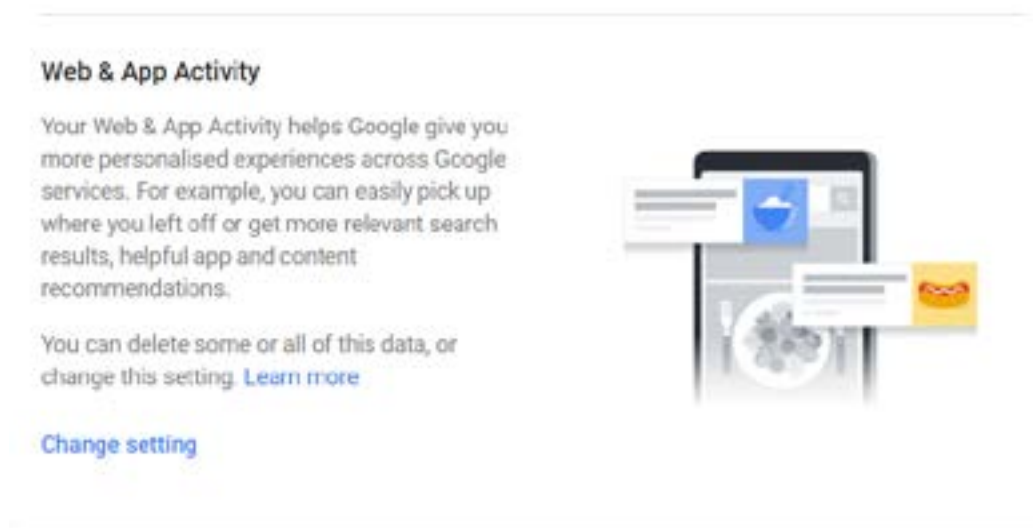


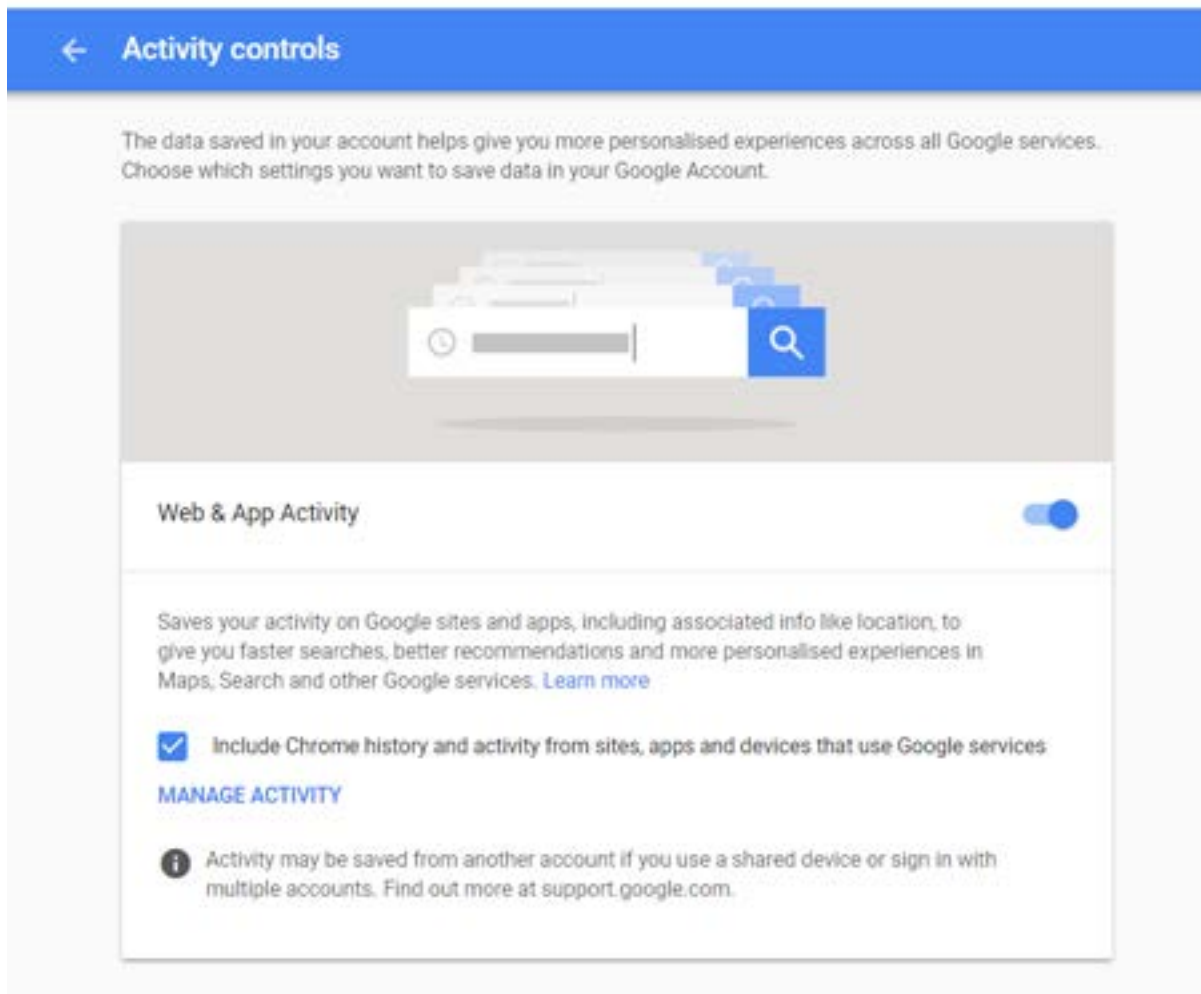
Figure 29: My Activity > 'Web & App Activity'<sup>1293</sup>



1292 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now, accessed on 20 November 2018.

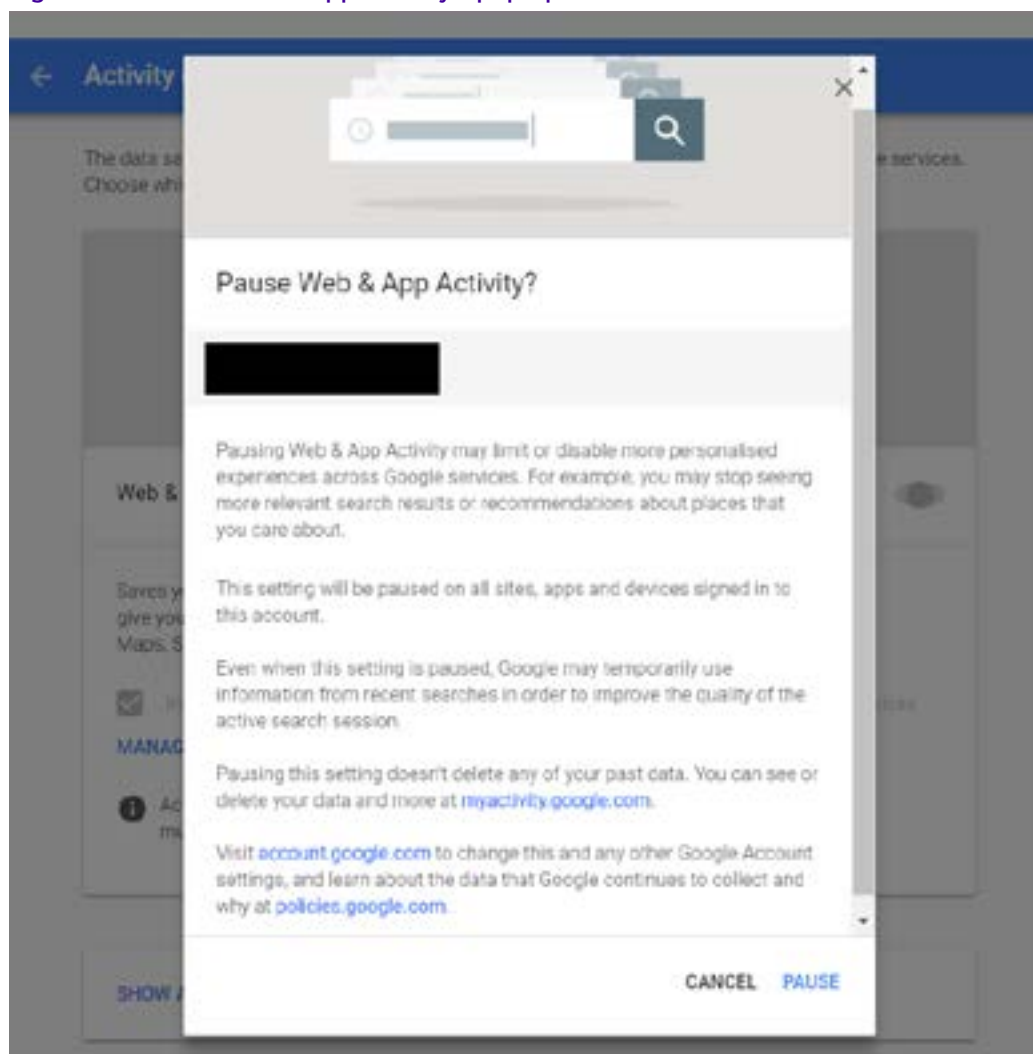
1293 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity, accessed on 20 November 2018.

Figure 30: 'Web & App Activity' control<sup>1294</sup>



1294 Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity > Change Setting, accessed on 20 November 2018.

Figure 31: 'Pause Web & App Activity?' pop-up<sup>1295</sup>



## ACCC observations

The ACCC found a number of design features that either introduced potential confusion or may nudge users against selecting settings that minimised the extent of data collection:

- Use of pre-selections: 'Web & App Activity' is turned on by default for new users. In addition, when a user visits the web page for 'Web & App Activity', they will also see that the setting has the option 'Include Chrome history and activity from sites, apps and devices that use Google services' pre-selected (see figure 30). As noted above, default pre-selections can impact consumer decision-making as consumers are more likely to remain with a default.
- Framing: the description of the Web and App activity setting highlights its potential benefits for the user in helping Google 'to give you faster results by auto-completing searches, as well as smarter and more useful experiences in Maps, Assistant and other Google services' (see figure 31). This may encourage users to permit the saving of 'Web & App Activity' to their Google Account.
- Lack of clarity: it may also be unclear to some users that, after they have turned off 'Location History', they must also turn off 'Web & App Activity' to turn off Google's collection of 'associated info like location' to their Google Account (see figure 30).

<sup>1295</sup> Opt-out commenced at <https://accounts.google.com/> > Privacy Checkup: Get Started > Start Now > Manage Web & App Activity > Change setting > toggle off, accessed on 20 November 2018.

## C3 Review of terms of use and privacy policies

Over June and July 2018, ACCC officers undertook a research project to examine the terms and conditions in consumer agreements with digital platforms that were in effect as at 31 July 2018, in order to inform the ACCC's consideration of the extent and impact of any information asymmetry between digital platforms and consumers (Term of Reference (iv)).

The purpose of the review was to inform the ACCC's analysis as to how digital platforms communicated their data practices to users and, combined with other research, whether there were features of privacy policies and terms of use<sup>1296</sup> that may make it less likely for consumers to be able to make an informed choice about their use of different digital platforms.

### C3.1 Summary of findings

The review of the privacy policies and terms of use found:

- There were a number of common terms and data practices that are featured in many digital platforms' terms and conditions.
- A number of these features may discourage consumers from reading digital platforms' privacy policies and terms of use; or could impede users from understanding the actual data practices of digital platforms even if they did read the privacy policies and terms of use.
- All digital platforms reviewed had, in some form, terms that granted the digital platforms rights over user data, including personal information.

### C3.2 Methodology

ACCC staff members conducted reviews of the terms of use and of privacy policies of key digital platforms in order to help consider how digital platforms and consumers interact. The ACCC reviewed privacy policies that were in effect at 31 July 2018 for Facebook, Google, Twitter, Microsoft, Apple, WhatsApp, Instagram, and Snapchat and terms of use for Facebook, Google, Twitter, Apple, WhatsApp, Instagram, and Snapchat.

The review also covered the most recent previous versions of the terms and policies to compare changes to the terms. The privacy policies and terms of use of a number of media companies were also included in the review. A list of terms and policies that formed part of the review are found at table 2.

ACCC officers read each privacy policy and terms of use and noted terms and features that may affect a consumer's ability to understand the terms and policies they are presented with. These reviews included looking at the length of each document, the number of links within the documents, and the language used in describing how personal information is collected, used and shared by digital platforms. The review also involved analysing each policy and term to produce an estimated reading time<sup>1297</sup>, and an indication of complexity of the language using the Flesch-Kincaid reading score.<sup>1298</sup> In undertaking the review, staff members took note of features individually, as well as in the context of features from the other terms and conditions, to determine whether there were terms and features that appear across multiple digital platforms. The team also noted common provisions present in the terms of use and privacy policies of different digital platforms and media companies.

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1296 The platforms examined have varying names to describe their Terms of Use. For consistency, this paper will refer to them by the catch-all 'Terms of Use'.

1297 Using an estimated average reading speed of 200 words per minute.

1298 The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 60.0–50.0 are classified as 'fairly difficult to read', which translates to around a US 10th to 12th grade school level; documents scoring between 50.0–30.00 are 'difficult to read', at a US college reading level.



### C3.3 Findings

#### Length and complexity of language

The ACCC review of terms and policies found that each of the digital platform’s privacy policies reviewed (excluding the numerous links to separate web pages) were between 2500 and 4500 words and would take an average reader between 10 and 20 minutes to read.

Combined with the Flesch-Kincaid reading score, the review also estimated that the language used within most of the policies was complex—with the exception of Snapchat, the policies and terms reviewed required at least a US college level of reading to understand.

**Table 1: estimated reading time and reading level**

Digital Platform	Word count (current policy)	Est. reading time	Flesch readability score
Google	4047	20 minutes	44.5
Facebook	4266	21 minutes	42.4
Instagram	4266	21 minutes	42.4
WhatsApp	2475	12 minutes	45.9
Twitter	4364	22 minutes	39.1
Apple	3642	18 minutes	31.8
Snapchat	3906	20 minutes	51.5
Microsoft	2523	13 minutes	38.0

#### Incorporation of documents and navigability

The review found that, of the digital platform’s reviewed, privacy policies and terms of use were often difficult to navigate, with numerous separate, interlinked policies that all contain important information regarding the digital platform’s data practices. Examples of interlinked documents include:

- Google’s Privacy Policy states that ‘This Privacy Policy doesn’t apply to services that have separate privacy policies that do not incorporate this Privacy Policy’<sup>1299</sup>, but it was only by reading each of the eight separate privacy policies for other Google services (being Chrome and Chrome OS, Play, Books, Payments, Fiber, Project Fi, G Suite for Education, YouTube Kids, and Google Accounts Managed with Family Link) that a user would identify that each of those separate privacy policies do incorporate Google’s main policy and therefore Google’s privacy policy does apply to all of its services.<sup>1300</sup>
- Facebook’s Terms of Service states ‘To provide these services, we must collect and use your personal data. We detail our practices in the Data Policy, which you must agree to in order to use our Products’<sup>1301</sup>; the Terms of Service also contains a section in its table of contents to ‘other terms and policies that may apply to you’, including Facebook’s ad controls, Privacy Basics and Cookies Policy.

The review also found that of the digital platform’s reviewed, some policies and terms contained hyperlinks that resulted in popup additional information or new pages, taking users away from the primary document. For example, Facebook’s Data policy contains over 70 hyperlinks, which link to other Facebook policies and terms, definitions of terms that are within the data policy, Facebook ‘help centre’ articles and other pages.

1299 Google, [Privacy policy](#).

1300 Google, [Privacy policy](#).

1301 Facebook, [Terms of Service](#).

## Ambiguous or unclear language

The review found that the language within privacy policies of digital platform’s reviewed were often ambiguous to the reviewers, either because of unclear, or very broad, language. One example of broad language used in multiple privacy policies reviewed was the use of the word ‘may’ in relation to how digital platforms collect, use and share user’s data. Instances included:

- Twitter’s privacy policy states: ‘We may also disclose personal data about you to our corporate affiliates in order to help operate our services and our affiliate’s services, including the delivery of ads’<sup>1302</sup>
- Instagram’s cookies policy states: ‘Third-party cookies may be placed on your device by someone providing a service for Instagram’<sup>1303</sup>
- WhatsApp’s privacy policy states: ‘As part of the Facebook family of companies, WhatsApp receives information from, and shares information with, this family of companies. We may use the information we receive from them, and they may use the information we share with them, to help operate, provide, improve, understand, customize, support, and market our Services and their offerings(emphasis added)’.<sup>1304</sup>

The review also found some ambiguity in what the digital platforms reviewed considered was ‘personal information’ under their terms and conditions, as often a definition was not included in the terms and conditions, and digital platforms often provide only examples about what is encompassed by the term.

Source	Definition of ‘personal information’?
<b>Google’s privacy policy</b>	‘information that you provide to us which personally identifies you, such as your name, email address, or billing information, or other data that can be reasonably linked to such information by Google, such as information we associate with your Google Account’. <sup>1305</sup>
<b>Facebook’s data policy</b>	‘information such as your name or email address that by itself can be used to contact you or identifies who you are’. <sup>1306</sup>
<b>Twitter’s privacy policy</b>	including ‘a display name (for example, “Twitter Moments”), a username (for example, @TwitterMoments), a password, and an email address or phone number’. <sup>1307</sup>
<b>Apple’s privacy policy</b>	‘Personal information is data that can be used to identify or contact a single person.’ <sup>1308</sup>

The review further found that the ambiguity regarding personal information in the policies reviewed lead to an ambiguity regarding in what circumstances, and what types of information, the reviewed digital platforms may share with third parties:

- Google: ‘We do not share your personal information with companies, organizations, or individuals outside of Google except in [specific] cases’.<sup>1309</sup>
- Facebook: ‘We provide advertisers with reports about the kinds of people seeing their ads and how their ads are performing, but we don’t share information that personally identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are)’.<sup>1310</sup>
- Apple: ‘personal information will only be shared by Apple to provide or improve our products, services and advertising; it will not be shared with third parties for their marketing purposes’.<sup>1311</sup>

1302 Twitter, [Privacy policy](#).

1303 Instagram, [About Cookies](#).

1304 WhatsApp, [Privacy policy](#).

1305 Apple, [Privacy Policy](#).

1306 Facebook, [Data Policy](#).

1307 Twitter, [Privacy policy](#).

1308 Apple, [Privacy Policy](#).

1309 Google, [Privacy policy](#).

1310 Facebook, [Data Policy](#).

1311 Apple, [Privacy Policy](#).

## Large variety of data collected

The terms and conditions of the digital platforms reviewed often gave broad discretion as to the data the digital platform can collect from a user who is signed up to their service, and in some cases, from someone who is not signed up as a user of their services.<sup>1312</sup> Some examples of these types of data collection are outlined below.

### (i) Location Data

- Google's privacy policy covers the collection of user location data via GPS, IP addresses, sensor data from the user's mobile device, and information from Wi-Fi access points, cell towers, and Bluetooth-enabled devices.<sup>1313</sup> A footnote in the policy further discloses that sensor data from a mobile device can provide granular data on the user's movement: 'an accelerometer can be used to determine your speed and a gyroscope to figure out your direction of travel'.<sup>1314</sup>
- Facebook's data policy (which covers Facebook, Instagram and Messenger) discloses that information it obtains from users' devices includes 'Bluetooth signals, information about nearby Wi-Fi access points, beacons and mobile phone masts', 'the name of your mobile operator or ISP, language, time zone, mobile phone number, IP address, connection speed and, in some cases, information about other devices that are nearby or on your network'<sup>1315</sup>, and GPS location information.
- Twitter's privacy policy states: 'Subject to your settings, we may collect, use, and store additional information about your location—such as your current precise position or places where you've previously used Twitter—to operate or personalize our services including with more relevant content like local trends, stories, ads, and suggestions for people to follow'.<sup>1316</sup>

### (ii) Placement of cookies

- Google: 'In some cases we may also collect your personal information through the use of cookies and other tracking devices. ... This enables us to recognise your computer and greet you each time you visit our website, without bothering you with a request to register or log-in. It also helps us keep track of products or services you view, so that we can send you news about those products or services. We also use cookies to measure traffic patterns, to determine which areas of our websites have been visited, and to measure transaction patterns in the aggregate. We use this to research our users' habits so that we can improve our online products and services.'<sup>1317</sup>
- Facebook: 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in.'<sup>1318</sup>
- Twitter: 'When your browser or device allows it, we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences.'<sup>1319</sup>

## Broad or unclear discretion regarding use, combination and sharing of user data

As stated above, the policies of the digital platforms reviewed generally required users to allow for a large amount of data to be collected. That is, the terms and conditions of the digital platforms' reviewed generally included broad discretions to collect, use, and disclose user data for targeted advertising purposes. Further, those policies reviewed did not generally inform users about the specific purposes for which each type of user data is collected.

1312 For example, Facebook's cookie policy (which is linked to from its privacy policy) states 'Cookies enable Facebook to offer the Facebook Products to you and to understand the information we receive about you, including information about your use of other websites and apps, whether or not you are registered or logged in': Facebook, [Cookies Policy](#).

1313 Google, [Privacy Policy](#).

1314 Google, [Privacy Policy](#).

1315 Facebook, [Data Policy](#).

1316 Twitter, [Privacy Policy](#).

1317 Google, [Privacy Policy](#), [Key Terms](#),

1318 Facebook, [Cookies Policy](#),

1319 Twitter, [Privacy Policy](#).

### (i) Combining of data

- Google’s privacy policy: ‘We may combine the information we collect among our services and across your devices for the purposes described above’.<sup>1320</sup>
- Twitter: ‘we may also associate your account with browsers or devices other than those you use to log into Twitter (or associate your logged-out device or browser with other browsers or devices)’.<sup>1321</sup>
- Facebook: ‘We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their Terms and Policies.’<sup>1322</sup>

### (ii) Sharing with third parties for advertising purposes

The majority of policies reviewed included a broad discretion regarding sharing data with third parties, or using data from third parties, for the purposes of advertising. The review found that within these policies, the identity, and types, of third parties with whom user data may be shared were often high-level or vague:

Company	Third parties who may <u>receive</u> user data	Third parties who may <u>provide</u> user data
Google	‘our advertising partners’ ‘trusted businesses or persons’	‘our advertising partners’ ‘trusted partners, including marketing partners .. and security partners’ ‘our partners’
Facebook	‘partners’ ‘measurement partners’ ‘partners who use our analytics services’ ‘advertisers’ ‘partners offering goods and services in our Products’ ‘vendors and service providers’ ‘research partners and academics’	‘partners’ ‘select group of third-party data providers’ ‘third-party partners’ ‘website owners and publishers, app developers, business partners (including advertisers)’
Twitter	‘advertisers’ ‘partners’	‘ad partners and affiliates’ ‘partners (including ad partners), or our corporate affiliates’ third parties who are not our ad partners’, ‘partners who help us evaluate the safety and quality of content on our platform’
Apple	‘strategic partners that work with Apple to provide products and services, or that help Apple market to customers’ ‘our partners’	‘other persons’ ‘datasets such as those that contain images, voices or other data that could be associated with an identifiable person’
Snapchat	‘Snapchatters’ ‘third parties’ ‘business partners’ ‘the general public’	‘third-party services’
WhatsApp	‘third-party providers’ ‘Facebook family of companies’	‘third-party providers’ ‘Facebook family of companies’

<sup>1320</sup> A different web page provides some additional information: ‘Many websites and apps use Google services to improve their content and keep it free. When they integrate our services, these sites and apps share information with Google’: Google, Policy, [How Google uses information from sites or apps that use our services](#).

<sup>1321</sup> Twitter, [Privacy Policy](#).

<sup>1322</sup> Facebook, [Data Policy](#).

The lack of clarity means that users are not able to identify who they are agreeing to have their information shared with.

For instance, when agreeing to Twitter's terms of use, a user accepts that 'We may also disclose personal data about you to our **corporate affiliates** in order to help operate our services and our affiliate's services, including the delivery of ads'<sup>1323</sup> Similarly, Snapchat's terms of use requires a user to 'agree that we, Snap Inc., **our affiliates, and our third-party partners** may place advertising on the Services, including personalised advertising based upon the information you provide us or we collect or obtain about you'.<sup>1324</sup>

#### **(iv) Targeted advertising purposes**

The review found that some digital platforms may also describe the purpose of targeted advertising within a long list of other purposes beneficial to users rather than stating it at the outset:

- Google's privacy policy states that it collects data from its users to: provide its services; maintain and improve its services; develop new services; provide personalised services, including content and ads; measure performance; communicate with users; and protect Google, its users, and the public (emphasis added).<sup>1325</sup>
- Facebook's data policy states that it collects user data to: 'provide, personalise and improve its products (including to select and personalise ads, offers and other sponsored content); provide measurement, analytics and other business services, promote safety; integrity and security; communicate with its users; and research and innovate for social good' (emphasis added).<sup>1326</sup>
- Twitter: 'we use both session cookies and persistent cookies to better understand how you interact with our services, to monitor aggregate usage patterns, and to personalize and otherwise operate our services such as by providing account security, personalizing the content we show you including ads, and remembering your language preferences' (emphasis added).<sup>1327</sup>

#### **Take-it-or-leave-it terms and bundling consent**

In addition to the inclusion of other documents and pages into terms and policies (discussed above as part of information asymmetry), all the terms and policies reviewed required a user to accept the terms of use and privacy policy on take-it-or-leave-it terms.

Some digital platforms' policies reviewed also bundled consents, including:

- Google's privacy policy states that it collects user information across its services and that 'We may combine the information we collect among our services and across your devices for the purposes described above'.<sup>1328</sup> As stated above, Google's privacy policy is incorporated into the terms of use.
- WhatsApp's privacy policy (which users must agree to as part of its terms of use) states that WhatsApp collects information that it shares with Facebook.<sup>1329</sup>

#### **Granting of licenses to user-uploaded content**

All of the Terms of Use reviewed state that, as part of the agreement to use the service, a user grants a broad license to the digital platform to store, display, or otherwise use any content uploaded by the user.

Some platforms include a further agreement for the user to license their name and likeness for use in advertising:

- Facebook: 'you give us permission to use your name and profile picture and information about actions that you have taken on Facebook next to or in connection with ads, offers and other sponsored content that we display across our Products'<sup>1330</sup>

<sup>1323</sup> Twitter, [Terms of Service](#).

<sup>1324</sup> Snap, [Terms of Service](#).

<sup>1325</sup> Google, [Privacy Policy](#).

<sup>1326</sup> Facebook, [Data Policy](#).

<sup>1327</sup> Twitter, [Privacy Policy](#).

<sup>1328</sup> Google, [Privacy Policy](#).

<sup>1329</sup> WhatsApp, [Privacy policy](#).

<sup>1330</sup> Facebook, [Terms of Service](#).

- Snapchat: ‘when you appear in, create, upload, post or send Public Content, you also grant Snap Group Limited, Snap Inc. and our affiliates and business partners the unrestricted, worldwide right and licence to use your name, likeness, and voice’<sup>1331</sup>
- Google: ‘we may display your Profile name, Profile photo, and actions you take on Google or on third-party applications connected to your Google Account (such as +1’s, reviews you write and comments you post) in our Services, including displaying in ads and other commercial contexts’<sup>1332</sup>.

## Changes to terms and conditions and services

The terms of use reviewed each contained a term that allowed digital platforms to changes to the terms of use without user’s consent. Across all platforms reviewed, a user’s continued use of the service following any change was taken as acceptance of the change.

The majority of the digital platforms’ terms of use also include terms that allow the platform to unilaterally vary the services provided under the contract, including adding or removing functions or services:

- Google ‘Google may also stop providing Services to you, or add or create new limits to our Services at any time’<sup>1333</sup>
- Snapchat: ‘...we may add or remove features, products, or functionalities, and we may also suspend or stop the Services altogether. We may take any of these actions at any time, and when we do, we will try to notify you beforehand—but this won’t always be possible.’<sup>1334</sup>

## Transfer of user data

Each of the digital platforms reviewed, either within the privacy policy or terms of use, required users to grant the digital platform the right to transfer the user’s data to a third party in the event of change to the digital platforms’ existence, such as merger, acquisition or bankruptcy.

- Apple: ‘in the event of a reorganization, merger, or sale we may transfer any and all personal information we collect to the relevant third party’<sup>1335</sup>
- Facebook: ‘All of our rights and obligations under these Terms are freely assignable by us in connection with a merger, acquisition or sale of assets, or by operation of law or otherwise’<sup>1336</sup>
- Twitter: ‘In the event that we are involved in a bankruptcy, merger, acquisition, reorganization, or sale of assets, your personal data may be sold or transferred as part of that transaction. This Privacy Policy will apply to your personal data as transferred to the new entity’<sup>1337</sup>
- WhatsApp: ‘All of our rights and obligations under our Privacy Policy are freely assignable by us to any of our affiliates, in connection with a merger, acquisition, restructuring, or sale of assets, or by operation of law or otherwise, and we may transfer your information to any of our affiliates, successor entities, or new owner’.
- Google’s privacy policy does not explicitly state that data would be transferred in such events, but implies that this is the case:
  - ‘If Google is involved in a merger, acquisition, or sale of assets, we’ll continue to ensure the confidentiality of your personal information and give affected users notice before personal information is transferred or becomes subject to a different privacy policy.’<sup>1338</sup>

1331 Snap Group, [Terms of Service](#).

1332 Google, [Terms of Service](#).

1333 Google, [Terms of Service](#).

1334 Snap Group, [Terms of Service](#)

1335 Apple, [Privacy Policy](#).

1336 Facebook, [Terms of Service](#).

1337 Twitter, [Privacy Policy](#).

1338 Google, [Privacy Policy](#).

## C3.4 List of terms and policies reviewed

**Table 2:** List of terms and policies reviewed

Digital Platform (version current as at 31 July 2018 except where otherwise indicated)	Link
<b>Terms of Service</b>	
Google	<a href="https://policies.google.com/terms">https://policies.google.com/terms</a>
Facebook, Instagram, Messenger	<a href="https://www.facebook.com/legal/terms/update?ref=old_policy">https://www.facebook.com/legal/terms/update?ref=old_policy</a>
WhatsApp	<a href="https://www.whatsapp.com/legal/#terms-of-service">https://www.whatsapp.com/legal/#terms-of-service</a>
Apple	<a href="https://www.apple.com/au/legal/internet-services/itunes/au/terms.html">https://www.apple.com/au/legal/internet-services/itunes/au/terms.html</a>
Twitter	<a href="https://twitter.com/en/tos#update-intlTerms">https://twitter.com/en/tos#update-intlTerms</a>
Snapchat	<a href="https://www.snap.com/en-US/terms/#terms-row">https://www.snap.com/en-US/terms/#terms-row</a>
<b>Privacy Policy</b>	
Google	<a href="https://policies.google.com/privacy?hl=en&amp;gl=AU">https://policies.google.com/privacy?hl=en&amp;gl=AU</a>
Chrome and Chrome OS	<a href="https://www.google.com/intl/en/chrome/privacy/">https://www.google.com/intl/en/chrome/privacy/</a>
Google Play Books	<a href="https://play.google.com/books/intl/en/privacy.html">https://play.google.com/books/intl/en/privacy.html</a>
Google Payments	<a href="https://payments.google.com/payments/apis-secure/get_legal_document?ldo=0&amp;ldt=privacynotice&amp;ldl=en">https://payments.google.com/payments/apis-secure/get_legal_document?ldo=0&amp;ldt=privacynotice&amp;ldl=en</a>
Google Fiber	<a href="https://fiber.google.com/legal/privacy/">https://fiber.google.com/legal/privacy/</a>
Google Project Fi	<a href="https://fi.google.com/about/tos/#project-fi-privacy-notice">https://fi.google.com/about/tos/#project-fi-privacy-notice</a>
G Suite for Education	<a href="https://gsuite.google.com/terms/education_privacy.html">https://gsuite.google.com/terms/education_privacy.html</a>
YouTube Kids	<a href="https://kids.youtube.com/t/privacynotice">https://kids.youtube.com/t/privacynotice</a>
Google Accounts Managed with FamilyLink	<a href="https://families.google.com/familylink/privacy/child-policy/">https://families.google.com/familylink/privacy/child-policy/</a>
Facebook, Instagram, Messenger	<a href="https://www.facebook.com/about/privacy/update?ref=old_policy">https://www.facebook.com/about/privacy/update?ref=old_policy</a>
Facebook Cookies Policy	<a href="https://www.facebook.com/policies/cookies/">https://www.facebook.com/policies/cookies/</a>
Instagram Cookies Policy	<a href="https://help.instagram.com/1896641480634370?ref=ig">https://help.instagram.com/1896641480634370?ref=ig</a>
WhatsApp	<a href="https://www.whatsapp.com/legal/">https://www.whatsapp.com/legal/</a>
WhatsApp	<a href="https://www.whatsapp.com/legal?eea=1#privacy-policy">https://www.whatsapp.com/legal?eea=1#privacy-policy</a>
Apple	<a href="https://www.apple.com/au/legal/privacy/en-ww/">https://www.apple.com/au/legal/privacy/en-ww/</a>
Twitter	<a href="https://twitter.com/en/privacy">https://twitter.com/en/privacy</a>
Twitter (Previous version)	<a href="https://twitter.com/en/privacy/previous/version_13">https://twitter.com/en/privacy/previous/version_13</a>
Snapchat	<a href="https://www.snap.com/en-US/privacy/privacy-policy/">https://www.snap.com/en-US/privacy/privacy-policy/</a>