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**FOXTEL AND FOX SPORTS RESPONSE TO THE AUSTRALIAN COMPETITION AND
CONSUMER COMMISSION'S DIGITAL PLATFORMS INQUIRY ISSUES PAPER**

APRIL 2018

INTRODUCTION

Foxtel and Fox Sports welcome the opportunity to contribute to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issues Paper.

Our submission is structured as follows:

1. Executive Summary
2. Background
3. Non-News Media Content Should Be in Scope of the Inquiry
4. Digital Platforms, Unauthorised Use of Copyright Material and the Direct Threat to Existing Media Businesses
5. Impact of Digital Platforms on Subscription TV Ad Revenue and Flow On Effects
6. Competition in the Advertising Sector
7. Advantage in Competing for Sports Rights
8. Global OTT Streaming Operators Enjoy Substantial Market Power
9. Conclusion

1. EXECUTIVE SUMMARY

- Foxtel and Fox Sports welcome the ACCC inquiry at a time when the dominance and business practices of the digital platforms are placing traditional media businesses under considerable stress.
- Whilst the ACCC has indicated a focus on journalistic content, there are strong grounds to also consider the impact of the digital platforms on the broader media sector as the sector is exposed to the same market trends and competitive impacts that news media is experiencing as a result of digital platforms.
- The stakes are extremely high, with the dominance and business practices of digital platforms a clear and manifest threat to the public interest in:
 - Australia's capacity to produce popular, world-class local Australian productions and meet cultural policy objectives;
 - Choice and diversity of media content for consumers; and
 - Choice and competition in the sale of advertising.
- The free (but unauthorised) availability of Foxtel and Fox Sports' content on digital platforms is undermining subscription revenue, contributing to churn and threatening the economics of content production.
- The digital platforms are profiting from this unauthorised hosting through the display/insertion of advertising and are not incentivised to invest adequately in effective and efficient procedures to monitor and take down the content.
- This business impact is compounded by the impact of the platforms on subscription television's advertising revenue. The digital platforms' dominance in attracting advertising revenue is fundamentally challenging local media economics.
- If media companies are unable to monetise the content they create or licence, whether through subscription or advertising revenue, it is inevitable that decisions will be made to no longer commission or acquire that content.



- If local production investment falls substantially, the underlying economics of the local production sector may fail, which could see Australia lose the capacity to produce culturally relevant content. This would have significant economic, employment and public policy implications.
- There would also be a loss of quality, diversity and choice for consumers of media content.
- This submission also highlights the impact that the digital platforms' dominance in the market for the supply of digital advertising, and some controversial business practices, are having on advertisers.
- Finally, we outline how the emergence of the digital platforms and their increasing interest in sports rights has rendered the anti-competitive anti-siphoning scheme anachronistic and obsolete. It applies only to subscription television and hinders only our ability to respond positively to the increased competition brought by the digital platforms.

2. BACKGROUND

About Foxtel

Foxtel is one of Australia's most innovative and dynamic media companies and home to award winning local drama plus the widest choice in live sport, hit international TV and movies and a host of complete TV seasons. Foxtel believes in the importance of telling Australian stories, and its ongoing commitment to creating the best in Australian programming has garnered numerous industry awards for its Foxtel Original productions.

Foxtel has helped put Australian talent on the world stage with highly acclaimed international exports and it proudly invests in the people who help tell those stories by employing thousands of Australians directly and indirectly across Australia's creative industry.

It has also pioneered advancements in entertainment technology with the iQ3 set top box; the Foxtel app for mobile devices; streaming service, Foxtel Now and Foxtel broadband, home phone and entertainment bundles.

The wider subscription television industry is a key part of the film and television production sector in Australia. In addition to its cultural contributions, the subscription television industry makes substantial economic contributions.

In 2016–17 the subscription television industry invested a record \$918 million in Australian screen content (including drama and other genres). Over \$6 billion has been invested over 10 years. Local broadcasters are the key underwriters of the Australian production industry, and in 2016 provided over half of the total finance for the Australian TV drama slate.

About Fox Sports

FOX SPORTS Australia Pty Limited (FOX SPORTS) is Australia's leading producer of sports coverage and is home to Australia's favourite subscription television sports channels as well as Australia's number one multi-sports website and app.

FOX SPORTS compiles and produces live content across seven dedicated high definition channels – FOX SPORTS 1, FOX LEAGUE, FOX SPORTS 3, FOX SPORTS 4, FOX SPORTS 5, FOX FOOTY and FOX SPORTS MORE all available via the Foxtel subscription television platform. The FOX SPORTS channels are also available in more than 5,100 hotels and licensed venues through the FOX SPORTS Venues service as well as 180,000 hotel rooms.



FOX SPORTS has also launched two international OTT services, Watch AFL and Watch NRL targeted at Australian expats and travellers.

FOX SPORTS delivers the very best sport from Australia and around the world, including every match of the Toyota AFL Premiership, NRL Telstra Premiership, Hyundai A-League and Super Rugby, along with every practice, qualifying and race of the Supercars, Formula 1 and MotoGP. All this plus live coverage of international cricket, tennis, golf, MMA, surfing, World Superbikes and more.

In 2017 FOX SPORTS introduced a brand new 24/7 dedicated NRL channel as part of a commitment to delivering the best Rugby League viewing experience for fans.

Broadcasting over 13,000 hours of live content in 2016 involving over 750 outside broadcasts and seven studios, FOX SPORTS is the largest production company in Australia. Committed to improving the viewing experience for fans across Australia, FOX SPORTS is at the vanguard of sports broadcast innovation, having been responsible for the introduction of several new technologies in recent years, including Foxkopter, Cornerpost Cam, Helmet Cam, Line Eye, AFL Cap Cameras and the award-winning FOX Vision Supercars AR app for Bathurst.

FOX SPORTS' digital platforms also continue to go from strength to strength. Foxsports.com.au is the number 1 multi-sports website in Australia, attracting a unique audience of 2 million in Australia, and nearly 5 million videos streamed each month.

In FY2017, FOX SPORTS invested \$237 million acquisition of sports rights, \$152.2 million in production including outside broadcasts, studios, talent and production staff, \$15 million in programming staff and technical delivery costs, \$6.8 million in broadcast including presentation, media services and traffic. FOX SPORTS employs 536 people full time.



3. NON-NEWS MEDIA CONTENT SHOULD BE IN SCOPE OF THE INQUIRY

Foxtel and Fox Sports provide a range of content that extends beyond news and information content, to general and specialist entertainment, sport, movies, documentaries and children's programming. We note the ACCC's stated intention to focus its inquiry on the impact of digital platforms on the production and publication of journalistic content, however there is a strong public interest in considering the impact on other types of media content.

The Foxtel and Fox Sports businesses rely on a combination of advertising and subscription revenue, in the same way as many media businesses, including those which primarily produce and distribute journalistic content. The subscription television industry is exposed to the same market trends and competitive impacts that news media is experiencing as a result of digital platforms, and is impacted in some similar ways by the business models of digital platforms. There are also a range of public policy outcomes at stake, in the same way as there are in relation to journalistic content. These are explored in more detail in section 4.

It is understandable that primary focus in public debates has been on journalistic content, given the immediate and substantial impacts being felt by publishers and the clear threat to the economics of that industry that digital platforms pose.

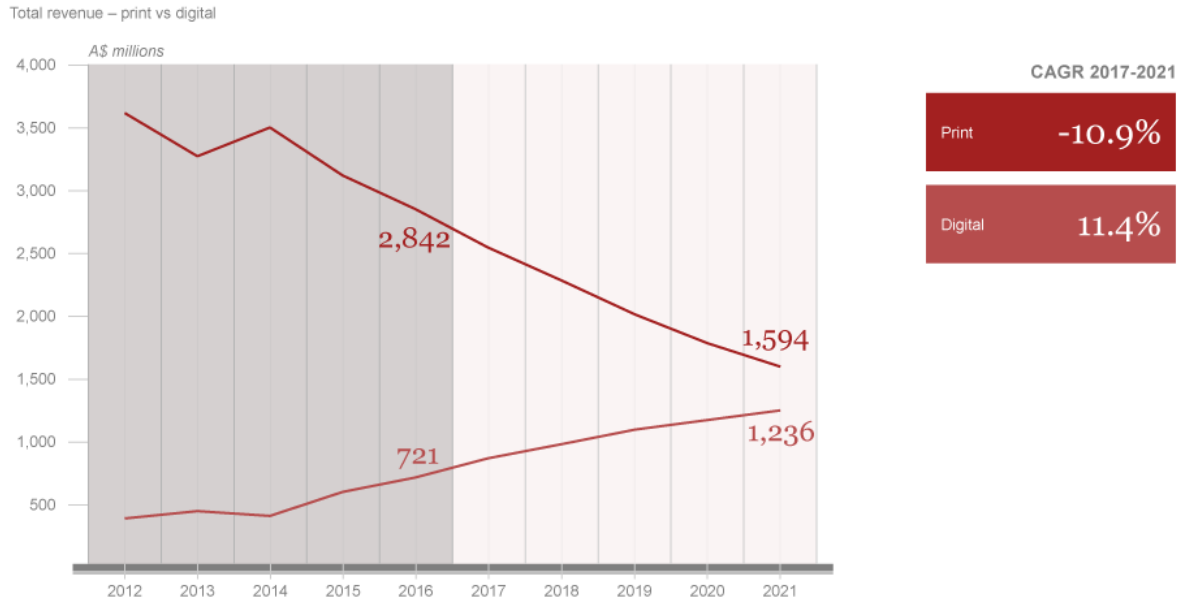
However, we feel there is an opportunity to look forward and see the emerging and prospective impacts which are being felt by other media businesses. A review such as this could reasonably inquire into and assess likely future impacts on some sectors, based on its assessment of current impacts on other sectors. There is considerable potential value in such inquiry, given it could provide the basis on which to take preventative action against unduly deleterious impacts on existing businesses before they get to an advanced, critical and irreversible stage.

To date, experience suggests that the impact of digital platforms on content creating businesses is substantial and long-lasting. Pre-existing businesses are looking to

establish alternative ways to monetise their content, however these revenue streams are nowhere near able to replace the revenue lost to digital platforms.

For example, in the print industry, digital gains are not forecast to come close to offsetting print losses.

TABLE 1: NEWSPAPER REVENUE SOURCES¹

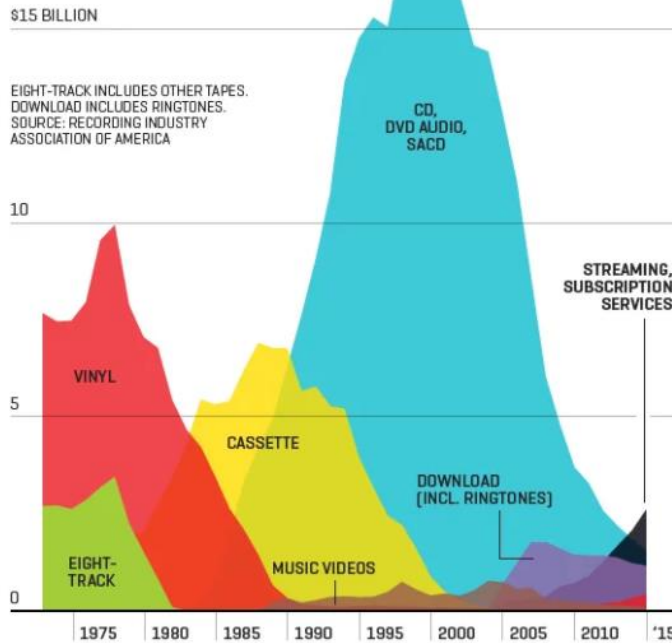


A similar trend is evident in the recorded music industry.

TABLE 2: US RECORDED MUSIC REVENUES (2015 DOLLARS)²



U.S. RECORDED MUSIC REVENUES
IN 2015 DOLLARS



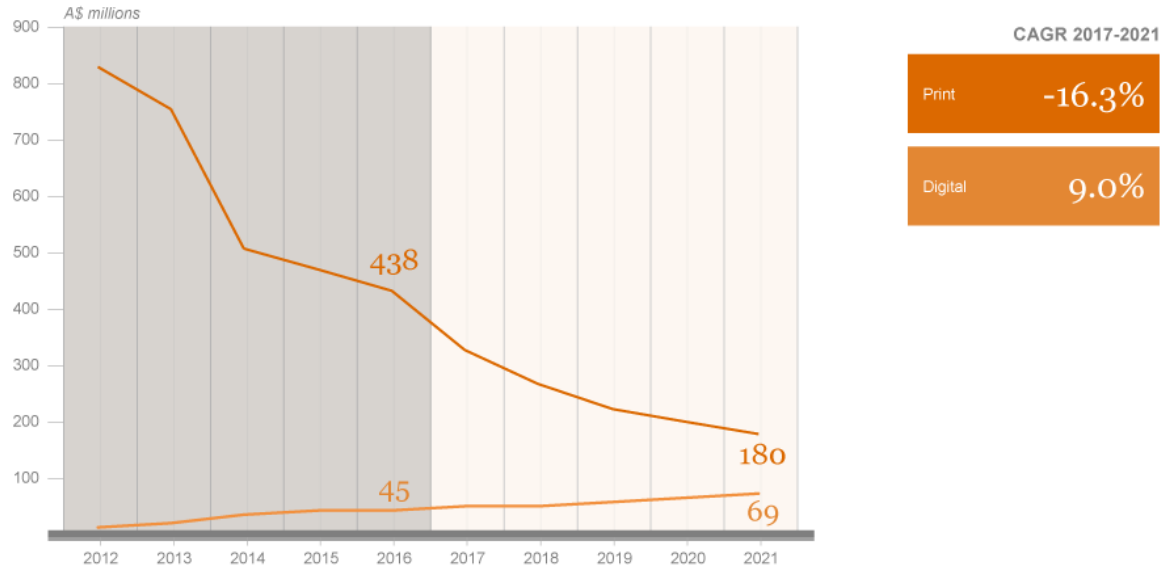
Further, the same trend is evident in the magazine industry.

¹ PwC Outlook Australian Entertainment and Media 2017-2021

² <http://fortune.com/2016/10/27/music-record-industry-streaming-revenue/>

TABLE 3: MAGAZINE CIRCULATION REVENUE³

Magazine circulation revenue – print vs digital



The revenue trends for content-based businesses are clear and traverse industry sectors. It would be consistent with the Government’s concerns regarding the impact of digital platforms on journalistic content, to also consider the impact on other content-based industries, particularly where important public policy impacts are present.

As outlined later in this submission, the Government relies on subscription TV to help achieve certain of its cultural policy outcomes (as regards Australian screen content production). The impact of digital platforms on subscription TV’s ability to meet those public policy outcomes can fit well into the ACCC’s inquiry and should be considered carefully by Government. There is also the broader consideration of the impact on consumers of a derogation in choice, quality and diversity of media content, which is the likely outcome of the dominance of digital platforms.

Foxtel and Fox Sports also submit that this line of inquiry would be consistent with the terms of reference, which require the ACCC to take into consideration:

- The impact of platform service providers on media and advertising markets; and
- The impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets.

Hence, whilst the ACCC’s focus may be on journalistic content, we submit there is substantial scope and justification for the inquiry to also consider broader media businesses. This submission explores this in further detail.

4. DIGITAL PLATFORMS, UNAUTHORISED USE OF COPYRIGHT MATERIAL AND THE DIRECT THREAT TO EXISTING MEDIA BUSINESSES

The key digital platforms, facebook and Google, operate a business model whereby they attract large numbers of users to their platforms using content that they have typically made little or no investment in. Access to those users is then sold to advertisers. As outlined below, our overwhelming experience has been that the digital platforms are not set up to appropriately manage the prevalence of unauthorised content on their platforms, even where rights-holders are proactive and invest heavily in seeking to have that content removed. Foxtel and Fox Sports submit that it is unreasonable and unfair that this burden falls to legitimate content producers.

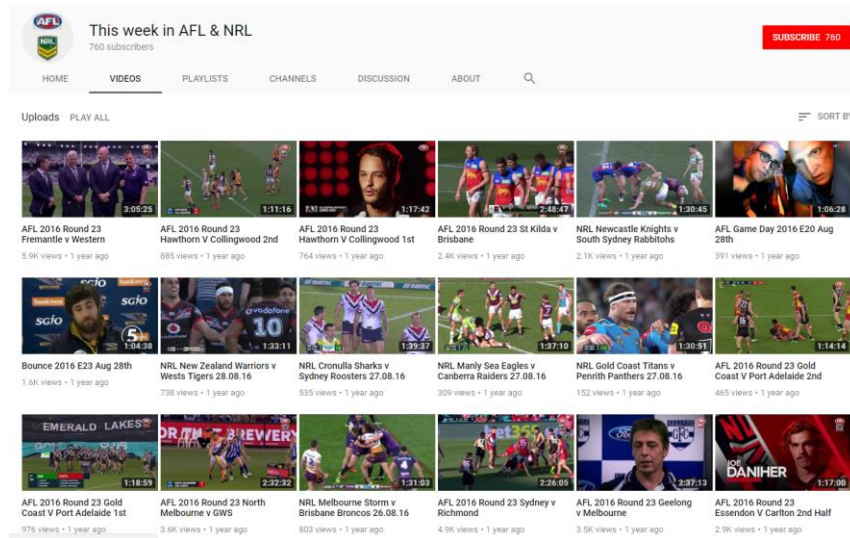
³ PwC Outlook Australian Entertainment and Media 2017-2021

This lack of investment in content contrasts sharply with subscription television, which seeks to attract subscribers with a varied range of high quality content, which requires substantial outlay or investment.

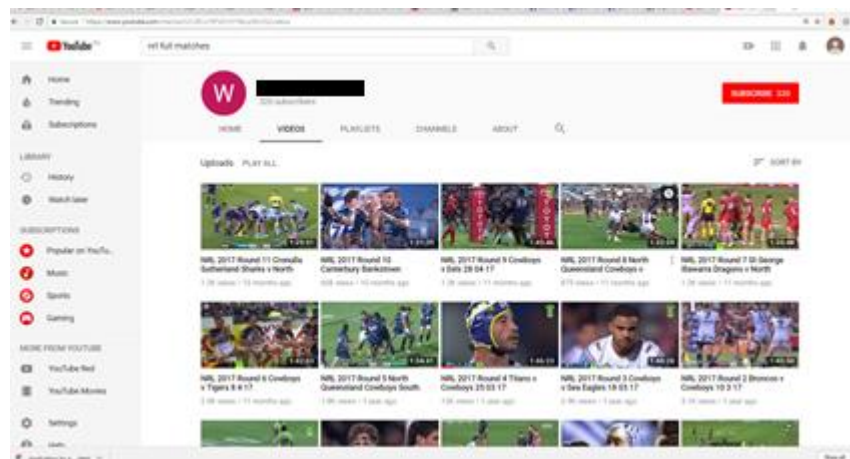
The unauthorised hosting and distribution of copyright material by digital platforms, material that is created and paid for by the platforms' competitors, is directly impacting on Foxtel and Fox Sports. Whole series of programs created by Foxtel and Fox Sports, at considerable cost, are freely available on YouTube and facebook, who monetise this content through the insertion or display of pre-roll advertising.

YouTube

Below are examples of unauthorised streams of Fox Sports content on YouTube.⁴



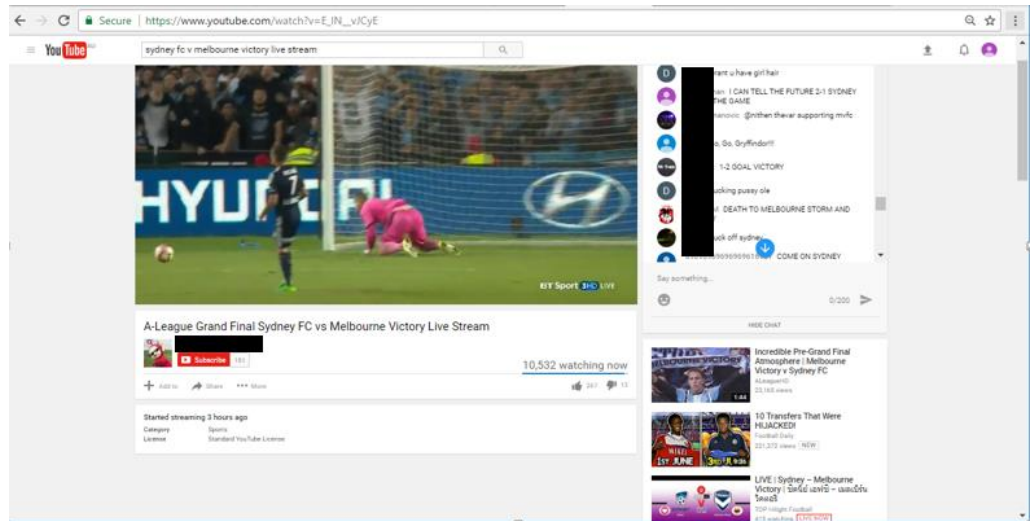
Below is a screen shot from a YouTube channel which has full NRL matches available, some of which have over 10,000 views.⁵ Fox Sports pays over \$200 million per year for the NRL broadcast rights.



Below is a screenshot of the 2017 FFA A-League Grand Final as hosted on YouTube. This single user's account attracted over 10,000 viewers. Fox Sports pays \$50 million per year for the exclusive rights for this content.

⁴ <https://www.youtube.com/channel/UCtQjvO2YCN3WoYDPutU01xg/videos>.

⁵ <https://www.youtube.com/channel/UC2RCo7EPVICUYYWcp3IExTQ/videos>



In the case of unauthorised content uploaded onto YouTube, it falls to the content rights holder to seek to have it taken down. However, given the volume of Fox Sports content uploaded onto YouTube, and the fact that the YouTube take down process treats each individual video in isolation (there is no bulk take down process), it would require a substantial investment in time and cost for a rights holder to effectively target problem content.

It is our experience that rights holders are required to send multiple webform takedown notices before YouTube will consider terminating a user's account. For example, Fox Sports has sent over ten webform notices to YouTube to take down videos (one by one) on a single user's channel and YouTube has failed to terminate the infringing user's account. This appears to be inconsistent with YouTube's own Terms of Service.

The Terms of Service state:

7. Account Termination Policy

YouTube will terminate a user's access to the Service if, under appropriate circumstances, the user is determined to be a repeat infringer.

[...]

8. Copyright Policy

YouTube operates a clear copyright policy in relation to any Content alleged to infringe the copyright of a third party. Details of that policy can be found here https://www.youtube.com.au/t/copyright_notice.

As part of YouTube's copyright policy, YouTube will terminate user access to the Website if a user has been determined to be a repeat infringer. A repeat infringer is a user who has been notified of infringing activity more than twice.

Termination of a YouTube account remains at YouTube's sole discretion and if a user's account is terminated, there are no processes which prevent a terminated user instantly creating a new YouTube channel, and continuing to host unauthorised content.

YouTube also hosts a large number of instructional videos for the set up and operation of illicit streaming devices (ISDs), also known as 'kodi' boxes. The videos show viewers how to load 'add ons' which enable access to hundreds of overseas television channels, which frequently feature content that Foxtel and Fox Sports have purchased the licence to broadcast in Australia.





Kodi boxes are a fast growing means of accessing unauthorised content and every kodi box represents a lost potential subscriber.

Facebook

The advent of video posting on facebook, and the subsequent launch of 'facebook live' has enabled widespread unauthorised use of an access to large-scale live events bought and paid for by rights holders, including Foxtel and Fox Sports, as well as original drama and general entertainment programs.

In the last 18 months, Foxtel has broadcast a number of blockbuster boxing matches on its pay-per-view Main Event channel. During that time Facebook live has been used by facebook account holders to live stream Foxtel's broadcasts without authorisation. . Typically, a person will use their mobile phone or web cam to record and stream the Foxtel broadcast on facebook live, in contravention of copyright law and facebook's Statement of Rights and Responsibilities. This process is often not detected by facebook's Rights Manager, the technology facebook uses to address unauthorised streaming. For a live boxing event, a live stream on facebook can attract to thousands of users in minutes.

The current webform takedown process offered by facebook is too slow to adequately address the problem of live streamed sporting events. The webform takedown process can take between 10 minutes and several hours, depending on whether facebook is monitoring the event.

To be effective, legitimate sports broadcasters and platforms would require a direct line of communication to the IP teams at facebook to expedite the removal of unauthorised streams.

It is also our view that facebook users who are hosting unauthorised streams should have their accounts terminated under clause 14 of the facebook Statement of Rights and Responsibilities:

14 Termination

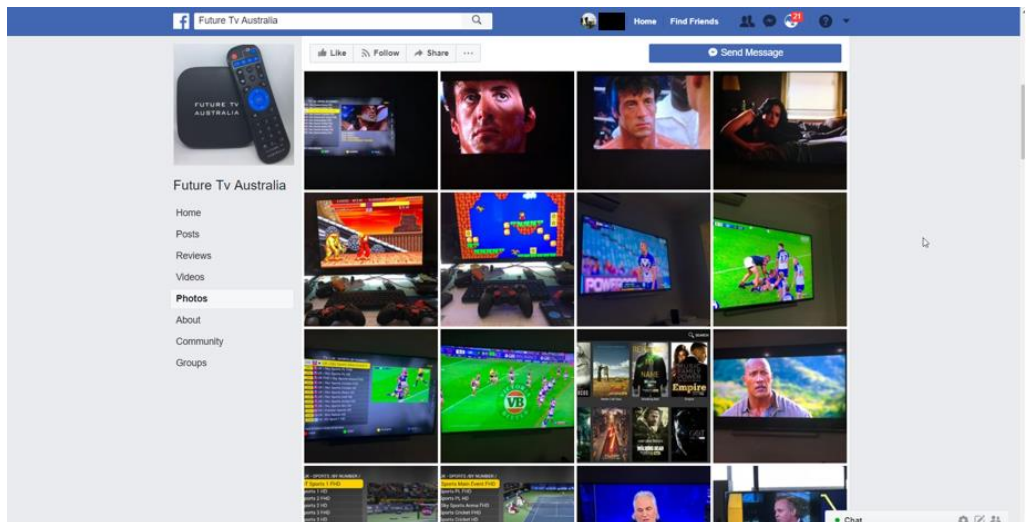
If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account

Unfortunately, the facebook user profile that streamed Foxtel's pay-per-view boxing event to over 100,000 people was not terminated or suspended.

We are also currently monitoring a facebook user who regularly streams live V8 Supercar content broadcast by Fox Sports. Despite Fox Sports and V8 Supercars successfully taking down live streams from the user's profile on several occasions, the user's two accounts remain active.



Facebook is also the main platform used to promote ISDs (kodi boxes). As noted above, these boxes redistribute hundreds of overseas channels, often with content that Fox Sports has exclusively licensed for Australia. Note the NRL content in the screen shot below.



Business impact of unauthorised streaming

Every live stream and every unauthorised hosting of content that is created by, or licensed to our businesses represents lost subscriber revenue, lost advertising revenue and arguably contributes to platform churn. There is also a potential impact on the future viability of the broadcast of major events.

It is extremely difficult to attract paying consumers for a product which is also available 'free' due to unauthorised use. The impact of this trend is made worse by the lack of an efficient and effective means to prevent and stop the unauthorised use. Many consumers will look online to assess whether content is available free before considering a paid option. Our own experience is that when illegal streams of boxing undercards are taken down, there is an increase in traffic to our customer service lines and sites from customers wanting to purchase access to the main event.

CASE STUDY – Experience working with facebook to remove infringing content

Foxtel and Fox Sports are actively engaged in working with social media platforms to disrupt and prevent unauthorised streaming. However, the scale of the problem is global and rights holders continue to experience substantial barriers to timely and effective take downs. Foxtel and Fox Sports' progress in improving processes within facebook has been gradual and incremental and is the result of a substantial investment in time and resources.

Social media live streaming technology is very easy to use (one click live stream). The combination of one click streaming and the global scalability of these platforms in such short periods of time creates a constant challenge for content owners seeking to effectively protect content. It is very easy for users to find these streams and some of these platforms also automatically upload the next available stream of the same content if the original is blocked.

Our initial experience in seeking take-down of our content from facebook was in July 2016, when we became aware that users on the facebook page for *Real Housewives of Melbourne* were promoting illegal streams/downloads of the series. Our first response was for Foxtel staff to manually take down the posts which included the links to the content. We then reached out to facebook to seek their assistance, however we were unable to locate Australian-based staff with responsibility for dealing with this issue.

In December 2016, Foxtel and the Seven Network jointly broadcast special long-form episodes of *Home and Away*. Unauthorised streams were hosted on facebook and within 3 days there had been 300,000 views. As copyright holder, the Seven Network was in contact with facebook, who at that stage informed us of their Rights Manager tool (which matches streams to an ingested⁶ copy of the content supplied by the rights holder, and then blocks matching streams).⁷

The process of learning about the tool and gaining authorisation from facebook to use it, took approximately 4 weeks.

In January 2017, a second long-form episode of *Home and Away* was broadcast. Courtesy of prior discussions with facebook, a process was put in place and infringing streams were able to be taken down as they arose. However, this process involves an investment of time and resources on the part of rights holders, who were required to provide a copy of the content and proof of copyright ownership.

In 2017, Foxtel broadcast four major pay-per-view boxing events that tested its ability to disrupt social media streaming and exposed significant short-comings in facebook's ability to deal with live streams of infringing content:

1. Mundine v Green
2. Pacquiao v Horn
3. Mayweather v McGregor
4. Horn v Corcoran

For the Mundine v Green boxing event, Foxtel assigned a team of staff to monitor online streams and seek take-down where appropriate. This was a manual process of sending a takedown application for each individual stream. Unfortunately, due to time differences, our takedown applications were not responded to until several hours later – long after the live event had finished (ie, not until US office hours commenced). This was a frustrating experience, given the high profile of the event, and the business impact of widespread infringing streams.

From that point on we worked with facebook to improve processes. Foxtel has successfully had content removed where it is able to prove it holds the 'digital online rights' or where it has a letter of authority from the copyright owner.

As these rights are often held by the promoter of the sporting event, and are also often on-sold to other third parties overseas it can be difficult and time consuming for Foxtel or Fox Sports to identify the rights holder and compel the digital rights holder to geo-block or take the content down.

We encountered further issues with the Rights Manager tool, with a large number of streams getting through the filter (and therefore not being taken down) during the Pacquiao v Horn boxing match.

⁶ 'Ingests' refers to the process of uploading licensed content into the facebook rights manager tool. Any streams which match the ingested content are automatically taken down.

⁷ <https://rightsmanager.fb.com/>



When the Rights Manager tool fails, only manual processes remain and these are not effective in dealing with live content. The queue of manual takedown requests during live sporting events is too long to be effectively dealt with. This is a uniform worldwide experience of content owners and subscription television operators. Foxtel is working with facebook to improve this process with a view to shorten the time it takes to complete the form and get the content taken down.

Foxtel continues to meet regularly with facebook to plan for upcoming events and suggest improvements. During major events, Foxtel now ingests separate live content feeds into facebook so it can be matched with infringing streams and automatically blocked. The platforms are also manually monitored by Foxtel.

Foxtel has also been working closely with Fox Sports Australia and the Australian sports federations (eg, AFL, NRL, FFA, V8 Supercars) and various organisations around the world who are all focused on improving content protection measures. Most of the sports organisations are taking responsibility for online and social media monitoring.

Because of the large numbers of Australians who use Google/YouTube and facebook, the impact on the potential subscriber base for Foxtel is extremely large. As of January 2018, facebook had 15 million monthly active Australian users, and YouTube had the same number of unique Australian visitors per month.⁸

Foxtel original productions in the general entertainment (such as *Real Housewives of Melbourne*) and drama (such as *Wentworth*) genres have also been found on the digital platforms, and a google search for 'watch [movie name] free' will return pages of results.

This not only affects the pool of potential Australian subscribers, and the potential subscriber revenue lost. For original series, Foxtel typically negotiates with the producer for a share of international sales revenue. Unauthorised free access to the content on global platforms has the potential to suppress overseas viewer numbers, with the consequent effect on the potential revenue an international broadcaster can derive, in turn affecting their willingness to pay for rights. This depresses international sales prices and reduces Foxtel's international sales income, thereby reducing the amount Foxtel is able to reinvest into other original Australian productions.

The economic and cultural impacts of the unauthorised distribution of copyright content

If media companies are unable to monetise the content they create or licence, it is inevitable that decisions will be made to no longer commission or acquire that content.

Australian content is very expensive to make in comparison to the cost of acquiring content from overseas, and is difficult to finance and monetise. A top-rating overseas acquisition can cost \$200,000 per hour to licence, compared to a local production which can cost \$1.5 million per hour to produce, depending on genre. If broadcasters are unable to raise sufficient advertising or subscriber revenue to offset the difference, the rational decision is to favour overseas acquisitions.

While some Australian content is extremely popular and may deliver high ratings and greater advertising and subscription revenues over time, this will not always offset the substantially higher production costs. The Productivity Commission's report on broadcasting noted that:

"The broadcaster's main concern is the program's ability to generate a profit – that is, its advertising revenue relative to its cost. High cost programs with social and cultural value may be vulnerable to replacement by programs with a better revenue-to-cost ratio, even if the alternative is less popular with viewers and advertisers."⁹

⁸ <https://www.socialmedianews.com.au/social-media-statistics-australia-january-2018/>

⁹ Productivity Commission, *Broadcasting*, report no. 11, 2000, p. 383
<https://www.pc.gov.au/inquiries/completed/broadcasting/report>



The impact of new media platforms and changing industry dynamics on the capacity of media businesses and the production industry to create and fund local content is of such contemporary concern as to result in two Parliamentary reviews and one Government review in the last 6 months.¹⁰

The dominant digital platforms cannot be relied on to replace this lost investment. Facebook has no reported content investments in Australia, while Google's investment is limited to \$250K per year granted to users that create online videos.¹¹ Google is also now working with the Queensland government to give small awards (\$10K to \$30K for individuals) to YouTube creators.¹²

If local production investment falls substantially, the underlying economics of the local production sector may fail, leading to Australia's production practitioners to seek employment opportunities overseas, which could see Australia lose the capacity to produce culturally relevant content. It is also likely that fewer and fewer people would seek training and accreditation in the field.

The production of culturally relevant content has long been an important public policy objective and outcome, supported by successive governments. Since the early days of television broadcasting, governments of all persuasions have sought to ensure that Australian professional content is shown on our screens. This is reflected in the existence of transmission and expenditure quotas on television broadcasters, the existence of a range of tax incentives and the direct funding provided through Screen Australia.

Having Australian stories told in Australian voices is also clearly valued very highly by Australian audiences. The 2016 *Screen Currency* report noted that:

"Despite the vast range of imported programs on Australian screens (large and small), and their large production and marketing budgets, Australians surveyed expressed a strong preference for local content. Only 2% said that they don't watch Australian content, while 64% said that local content accounted for up to half of their media diet, and 22% reported that most or all of their viewing was Australian."¹³

Whilst cultural value is difficult to quantify, Australian productions can generate cultural impact in a number of ways, including through helping to define Australian self-identity and exploring Australian history and current events.¹⁴ Australian screen content also provides a unique avenue for presenting aspects of our culture and country internationally, promoting an understanding of Australian values.

Drama in particular has the ability to explore complex stories and convey social and cultural messages. Documentaries focussing on Australian events, people and issues play an important role in preserving history, educating, informing opinion, applying transparency to government and encouraging democratic debate.

The economic and employment consequences would also be significant. The *Screen Currency* report noted that in 2014-15, the Australian screen production industry contributed over \$3 billion in value to the economy and over 25,000 full time equivalent jobs. Australian screen content attracts around 230,000 international tourists to Australia annually, bringing in an estimated \$725 million in tourism expenditure.

¹⁰ <https://www.communications.gov.au/australian-childrens-screen-content-review>
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/AustralianContent

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Communications/AustralianfilmandTV
¹¹ <https://www.smh.com.au/business/companies/bigger-grants-offered-for-youtube-creators-in-funding-program-20160414-go6nut.html>

¹² <https://advance.qld.gov.au/entrepreneurs-startups/create-qld.aspx>

¹³ <https://www.screenaustralia.gov.au/fact-finders/reports-and-key-issues/reports-and-discussion-papers/screen-currency>

¹⁴ <https://www.screenaustralia.gov.au/getmedia/1dce395e-a482-42d1-b5a9-47bb6307f868/Screen-Currency-Olsberg-SPI-Nov2016.pdf>



We urge the ACCC to consider these potential impacts as part of its inquiry. We submit there are sufficiently immediate threats of a sufficiently serious nature to warrant an examination of the impact of digital platforms' dominance and business model on the ability of Australia to produce and fund cultural content, and subsequent impact this will have on public policy and on consumers.

Do digital platforms adequately deal with unauthorised content?

In Foxtel and Fox Sports' experience, whilst there have been some modest recent improvements, the digital platforms have not invested in the creation of user-friendly, effective and efficient tools and processes to appropriately manage the prevalence of unauthorised copyright content on their platforms.

It is worth emphasising that in all cases, the onus is on the rights-holder to pursue the removal of the content. There is no active monitoring of copyright material on these platforms by these platforms. The time and resources that rights holders are required to expend in order to pursue the removal of content are considerable, which brings its own business impact (see case study below).

Rights-holders such as broadcasters are wholly reliant on the cooperation of the digital platforms in order to combat this kind of piracy and moderate the substantial business impacts. Hence, Foxtel and Fox Sports have invested considerably in good faith negotiations with the digital platforms to improve the processes and procedures associated with removing copyright content from the platforms. At the point at which we started exploring take-down of our content on digital platforms, it was evident the platforms were not undertaking appropriate 'due diligence' or 'duty of care' regarding unauthorised copyright material hosted on their platforms.

Over a period of 18 months, Foxtel and Fox Sports have proactively negotiated some improvements in facebook's processes in the context of key content releases and major events. However, the system developed is still not fully effective in preventing hosting of and access to unauthorised content on the platform. Also, complying with these procedures has necessitated the re-assignment of staff to special teams within the businesses and has required the engagement of specialist content-monitoring vendors, both of which have come at considerable cost.

This contrasts sharply to the situation that local media companies face in relation to their use of copyright content. We are required to clear and licence content for broadcast before we include it in our programs. This process creates a substantial administrative cost and licensing content can also be very expensive. These are costs that are built in to the business models of established and law-abiding, highly regulated media businesses.

Not only do we face greater costs (through the requirement to clear and licence content), our business model is also based on the investment of hundreds of millions of dollars into original content.

By contrast, digital platforms:

- Pay very little or nothing for most of the content on their platform
- Monetise content paid for and created by competitors, with little or no payment to those competitors
- Pay very little or no clearance or licencing fees
- Provide limited means to take-down and keep down copyrighted content

This uneven playing field speaks for itself, but also has significant knock-on effects as regards investment, employment, cultural objectives and consumer choice, as noted elsewhere in this submission.

CASE STUDY – unauthorised streaming

On Friday 3 February 2017, Foxtel broadcast via its Main Event pay-per-view channel, the boxing match between Anthony Mundine and Danny Green. The fight was a

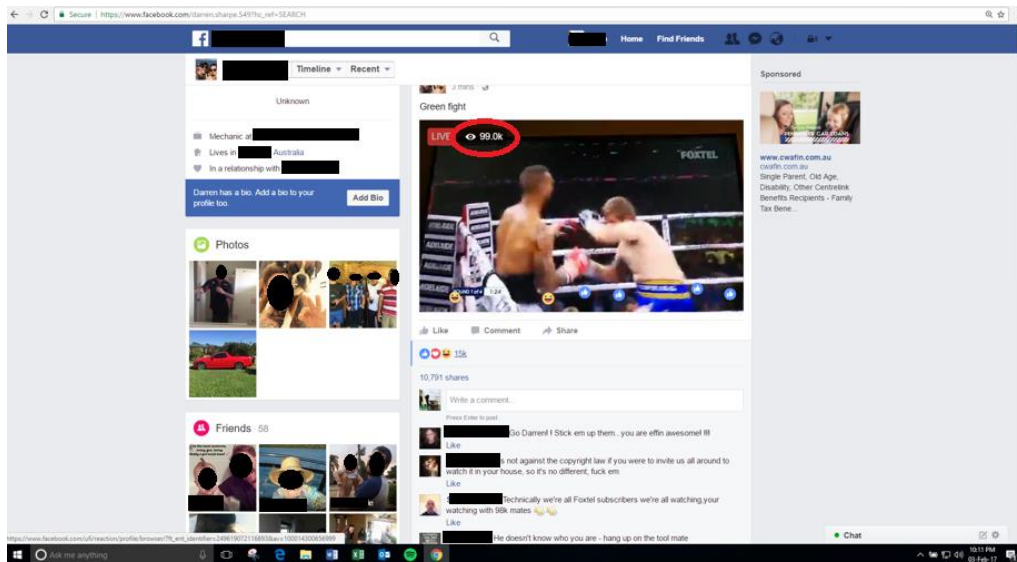


rematch, which had been long talked about in the boxing world and was eagerly anticipated by boxing fans.

Foxtel and Fox Sports monitored facebook for unauthorised streams and several subscribers were camcording Foxtel's broadcast of the match and were communicating it to the public via their facebook pages.

Foxtel provided the subscribers with a number of notices and warnings that they were not authorised to do this. Facebook users were violating facebook's Statement of Rights and Responsibilities (clause 5). Both the user and facebook were infringing Foxtel's exclusive rights in the content. Foxtel and Fox Sports sent webform notices to facebook's IP team, however the content was not taken down.

The screenshot below demonstrates how facebook viewers reached 100,000, even after webform takedown notices were submitted to facebook's IP team.



Events such as this require a significant investment, including by Foxtel and event promoters to produce and broadcast the event. The unauthorised streaming undermines the viability of this. If coverage of the match is available 'for free' without a subscription, the ability of Foxtel and the organisers to attract paying customers and therefore ensure a return on investment is directly threatened, and this will invariably impact on future decisions to invest in and broadcast such events.

5. IMPACT OF DIGITAL PLATFORMS ON SUBSCRIPTION TV AD REVENUE AND FLOW ON EFFECTS

Subscription TV is witnessing a similar impact on its advertising revenue from the dominance of digital advertising platforms as other media and creative businesses. Digital platforms' dominance in attracting advertising revenue is fundamentally challenging local media economics.

PwC figures predict that subscription television advertising revenue will drop from a CAGR of 14.2% in 2013 to a forecast CAGR of 1.7% in 2021.

TABLE 4: SUBSCRIPTION TELEVISION ADVERTISING¹⁵

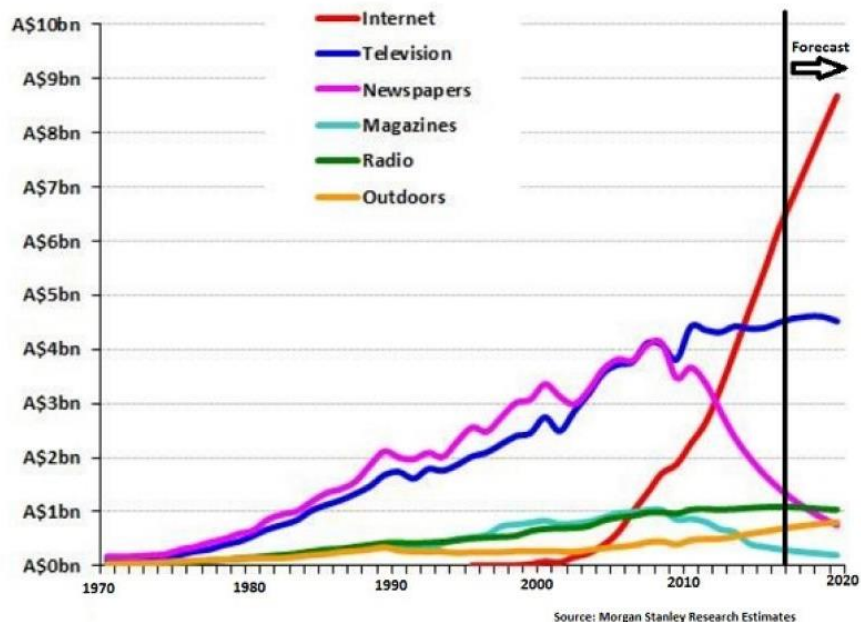
Subscription television advertising (A\$ millions)											
	Historical data					Forecast data					
AUD	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2017-2021 CAGR
Australia	462	527	507	551	541	564	583	600	614	625	
% change		14.2%	-3.8%	8.7%	-1.8%	4.2%	3.5%	2.9%	2.3%	1.7%	2.9%
Asia-Pacific	7,291	8,021	8,888	9,677	10,501	11,466	12,518	13,663	14,908	16,280	
% change		10.0%	10.8%	8.9%	8.5%	9.2%	9.2%	9.1%	9.1%	9.2%	9.2%
Global	47,370	49,053	54,075	56,437	59,325	61,789	64,714	67,755	70,926	74,159	
% change		3.6%	10.2%	4.4%	5.1%	4.2%	4.7%	4.7%	4.7%	4.6%	4.6%

Source: SMI
2012 – 2016 figures have been updated to reflect most recently available information.

By contrast, Google and facebook extracted approximately \$4 billion out of the \$13 billion Australian advertising sector last year, according to Morgan Stanley.¹⁶

TABLE 5: CHANGES IN ADVERTISING SPEND BY SECTOR¹⁷

How the internet is devastating media profits
Australia's changing advertising spend



Whilst advertising revenue is not the primary source of revenue for subscription television, it should also be emphasised that subscription television's primary source of revenue, subscriber revenue, is also being challenged by the dominance and business practices of digital platforms. This is detailed in section 4 above, which examines the ways in which the digital platforms facilitate unauthorised access to subscription television content.

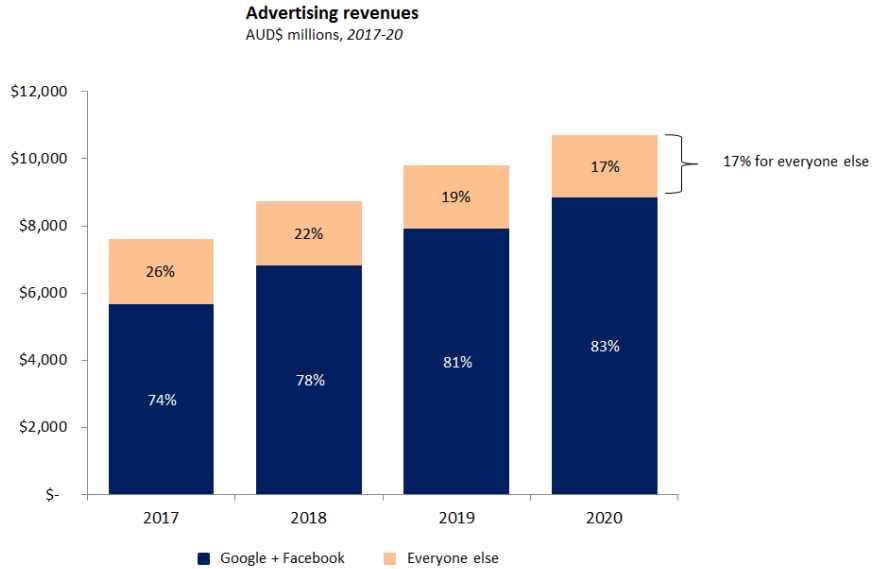
¹⁵ PwC Australian Entertainment and Media Outlook 2017-2021

¹⁶ <http://www.afr.com/business/media-and-marketing/tv/tv-sector-needs-to-accelerate-its-makeover-in-the-attention-economy-20180317-h0xmdk#ixzz5AFAdLOal>

¹⁷ <http://www.abc.net.au/news/2017-09-15/advertising-spend-estimates-from-morgan-stanley/8950300>

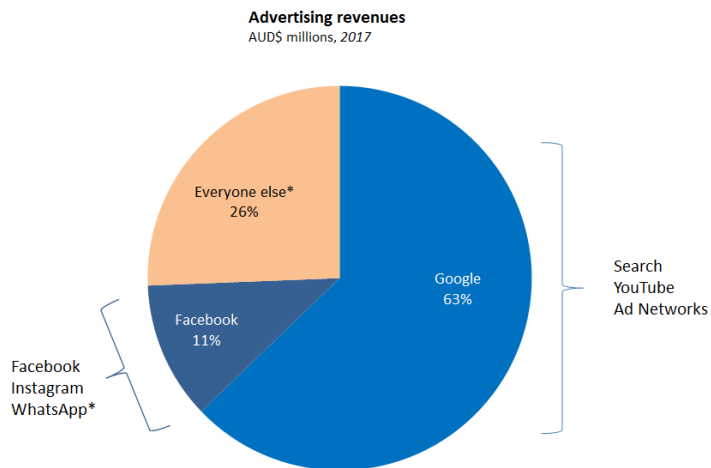
Data forecasts suggest that this concentration will accelerate:

TABLE 6: DIGITAL PLATFORMS' SHARE OF ONLINE ADVERTISING INCREASES EACH YEAR¹⁸



Not only is advertising expenditure migrating at a rapid rate to online platforms, it is increasingly concentrated, with Facebook and Google taking the lion's share. Google and Facebook together accounted for 99% of revenue growth from digital advertising in the US last year.¹⁹ In Australia, there is also a great degree of concentration.

TABLE 7: AUSTRALIA'S DIGITAL AD MARKET SIZE IS \$7.6bn – GOOGLE AND FACEBOOK CONTROL 74%²⁰



Note: 'Everyone else' represents all other digital properties from news sites to other classifieds to blogs, etc.

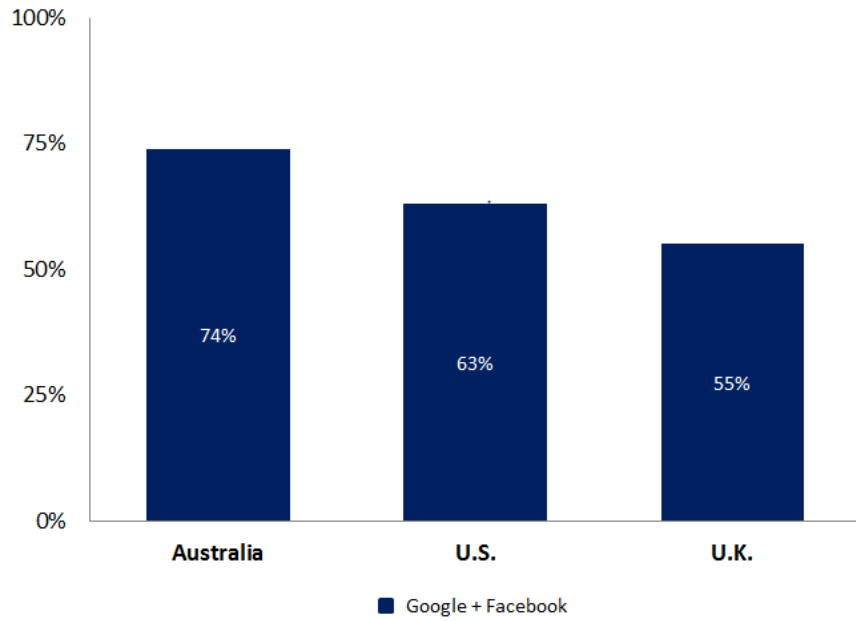
It should also be noted that Google and Facebook dominate digital advertising in Australia more than comparable jurisdictions.

¹⁸ Sources: eMarketer, Magna Global, PwC, Internal Revenue Service, IAB Australia, Media Partners Asia, Jason Kint, Digital Content Next, CNBC, Internal Modeling

¹⁹ <https://www.businessinsider.com.au/facebook-and-google-dominate-ad-industry-with-a-combined-99-of-growth-2017-4>

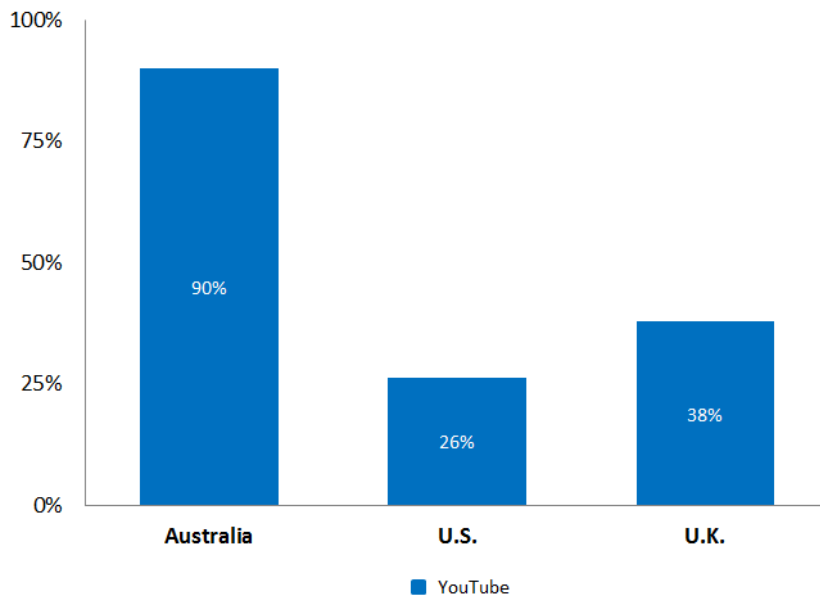
²⁰ PwC, Media Partners Asia, eMarketer

TABLE 8: GOOGLE AND FACEBOOK SHARE OF DIGITAL ADVERTISING 2017²¹



YouTube's dominance in online video advertising in Australia far exceeds the US and the UK.

TABLE 9: YOUTUBE SHARE OF ONLINE VIDEO ADS 2017²²



This is leading to giant profits for Google and Facebook, while other media companies' profits are in decline.

The primary way in which these shifting industry economics will be felt will likely be in the production of distinctive, high quality screen content. It is conceivable that these revenue and profitability trends may result in market failure in the local market for content creation.

It is traditional Australian media companies which have invested heavily in local content. In 2016-17, subscription TV invested a record \$918 million in Australian screen content. Over \$6 billion has been invested over 10 years. This investment helps create around 8000 local jobs and contributes to the ongoing health of the Australian

²¹ PWC, Media Partners Asia, eMarketer, Company Reports, IRS

²² Media Partners Asia, eMarketer, OfCom



production sector. In turn, consumers are able to access a diverse range of Australian and overseas content across popular and niche genres. In addition, free-to-air commercial television broadcasters invested \$1.5 billion in Australian content and \$2 billion overall,²³ also contributing to local employment and a diversity of content choice for consumers.

The decline in local media businesses' profitability has the clear potential to lead to the creation of less and less original Australian content. Refer to section 4 above for a discussion of the likely economic and cultural impacts of such an outcome.

6. COMPETITION IN THE ADVERTISING SECTOR

We note the clear dominance of the digital platforms in the Australian and global advertising market, as demonstrated in tables 5 to 9 above. As demonstrated above, not only is advertising spend moving to digital platforms at a rapid rate, that digital advertising is highly concentrated between Facebook and Google. And this concentration is expected to increase in the near future. As businesses which operate advertising platforms, this raises significant concerns for Foxtel and Fox Sports.

We are concerned that these changes are only partly attributable to technology and consumer changes, and that monopoly behaviour accounts for a proportion of these effects. With a near monopoly in the online advertising space, the digital platforms are able to drive down the cost of ad units in a way that local media companies cannot. By keeping rates artificially low, the platforms are able to depress competition.²⁴ Not only does this imbalance in competition impact on the economics of traditional advertising businesses, it also leads to less and less choice for advertisers.

Some advertisers are expressing explicit concern regarding the monopoly status of the digital platforms:

"What our clients want and what our agencies want is more competition of the space, anything that gives more competition to the duopoly of Facebook and Google" – Martin Sorrell²⁵

Sorrell also notes the lack of meaningful alternatives makes it extremely difficult for advertisers to look to transact elsewhere as pulling advertising from the digital platforms means withdrawing from the most powerful platforms for reaching potential consumers.

We refer to and support the submission by News Corp Australia which provides further detail regarding the impact on advertisers and publishers of the digital platforms' market power and the ways in which it is abused.

Data dominance

Data is key to successful online advertising businesses. The clearest example is where a user is shown advertisements for products that they have recently viewed online. The ability to hyper-target advertising online is one of the key selling points for online inventory. Advertising is about connecting advertisers to potential consumers and data is the 'critical currency' in doing so.

The digital platforms have become monopolistic in this area due to their unmatched access to large volumes of extremely granular longitudinal user data, combined with their reach. They have used data collected through one part of their businesses (social platform, search engine) to effectively subsidise their advertising businesses, and this has led to substantial market power. It is straightforward to observe that these

²³ <https://www.acma.gov.au/theACMA/Library/Industry-library/Broadcasting/broadcasting-financial-results-report>

²⁴ <http://www.afr.com/business/media-and-marketing/advertising/how-google-and-facebooks-trillion-dollar-duopoly-strangles-the-internet-20170328-gv7zxi>

²⁵ <https://www.cnbc.com/2017/04/06/martin-sorrell-brands-want-digital-competitor-to-facebook-google.html>



companies' dominance in advertising gives them tremendous power to dictate terms with media buyers and advertisers:

“Where the quality and quantity of data increasingly become a fact which is critical for the success of placing targeted advertising, concentration in this field could have considerable competitive feedback effects on the online advertising market. This in particular applies where individual companies have exclusive access to particularly relevant data volumes, for instance on account of interacting directly with users.”²⁶

Scale and network effects have compounded this outcome. Traditional advertising businesses are unable to replicate the data offerings of the digital platforms, and lack of access to data now constitutes a significant barrier to entry for potential new entrants. Some have suggested that the digital platforms are now natural monopolies in that they supply almost an entire market's demand for a service, at a price lower than what would be offered by competing firms.²⁷

It is considered unlikely that conditions are conducive to new competitors emerging. “The economics have also changed for internet start-ups hoping to reinvent the web. Early-stage capital has dried up, dropping more than 40% since 2015, as investors have become pessimistic that any new Googles and Facebooks will ever be capable of disrupting the deeply entrenched incumbents.”²⁸

Hence, it is extremely unlikely that the market will correct this monopoly behaviour. We also note that Google and Facebook have an established pattern of purchasing emerging competitors. For example, Facebook has purchased WhatsApp and Instagram, and Google has purchased YouTube, Android, Deep Mind, Waze and Doubleclick. These are just the most notable examples, and both companies have made extensive acquisitions which have enabled substantial expansions in their service offering. Bloomberg data shows that Alphabet, Amazon, Apple, Facebook and Microsoft have made 436 acquisitions worth \$131 billion over the last decade.²⁹ It is said that at one point, Google was buying roughly one company per week.³⁰

We urge the ACCC to consider the long-term impacts of this dominance on traditional media platforms, advertisers and consumers in terms of diversity, choice and competition. We refer to and support the submission of News Corp Australia on these issues.

Questionable business practices

Questions have also been raised regarding certain business practices which impact negatively on advertisers.

Firstly, concerns have been raised regarding the lack of reliable, standardised metrics to measure the impact of online advertising, leading some to question if advertisers are being misled about the impact of their advertising:

“We accepted multiple viewability metrics, publisher self-reporting with no verification, outdated agency contracts, and fraud threats – with the somewhat delusional thought that digital is different and that we were getting ahead of the digital curve,”³¹

This information asymmetry between platform service providers and advertisers is likely to affect competition in relevant media and advertising markets. This is a subject that

²⁶ https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_III.pdf?__blob=publicationFile&v=5

²⁷ https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html?_r=2

²⁸ <https://www.wsj.com/articles/its-time-to-bust-the-online-trusts-1509487518>

²⁹ <https://www.bloomberg.com/news/articles/2017-07-13/antitrust-built-for-rockefeller-baffled-by-bezos-quicktake-q-a>

³⁰ <https://www.theguardian.com/commentisfree/2017/nov/02/facebook-google-monopoly-companies>

³¹ <https://www.marketingweek.com/2017/01/30/pg-media-buying/>



has recently attracted the attention of competition authorities in Germany.³² We note and support the submission made by News Corp Australia regarding asymmetries between advertisers and platforms, and between publishers and platforms.

Secondly, several figures in the advertising and marketing industries have raised concerns regarding a lack of transparency regarding rebates and incentives paid by digital platforms to media buyers and ad agencies, which could be accelerating the shift in advertising spend to these platforms:

"Currently many marketers are paying for digital advertising in environments lacking in control measures, at prices which include significant undisclosed margins taken by their agency and partner suppliers across the digital supply chain,"³³

An analysis of regional and global agency deals by global marketing management consultancy Trinity P3 and the Melbourne Business School has shown that a digital media ad buy is up to three times more profitable for ad agencies than alternatives offered by traditional advertising platform:

"The commission-based fees, incentives, free ad space and bonuses media agencies can earn as a percentage of an advertiser's ad spend range from about 7 per cent to 10 per cent with Google and Facebook on average, whereas television, radio, newspapers and outdoor media pay about 3 per cent."³⁴

Whilst agency commissions are commonplace, there are concerns that some agencies are prioritising digital spend in order to maximise profits, regardless of whether digital inventory is the right fit for the advertising client.³⁵

Thirdly, concerns have been raised regarding the potential for ad fraud in the online space and the damaging impact for advertisers:

Ad fraud occurs when computer programs (bots) generate fictitious traffic on websites with embedded ads or automatically generate clicks on banners. In both cases ads are delivered which no-one actually sees and which are then invoiced to the advertiser. Other types of fraud involve the masking of URLs (domains) and the manipulation of sites on which the invoiced ads are not even displayed to users. Ad fraud causes the advertising companies financial losses because they pay for ad delivery although the ads never actually reach the intended audience. The digital market research firm Juniper Research has calculated that ad fraud will cost advertisers a total of 19 billion dollars globally in 2018. This is said to be due above all to the growth in programmatic advertising and the lack of transparency of walled gardens, where closed platforms restrict the flow of advertising performance data and thus make it more difficult or even impossible to control ad delivery.³⁶

We submit these questionable business practices, the potential for fraud and the impact on advertisers warrant the close attention of the ACCC in its inquiry.

³²http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/01_02_2018_SU_Online_Werbung.html

³³<http://www.afr.com/business/media-and-marketing/advertising/how-google-and-facebooks-trillion-dollar-duopoly-strangles-the-internet-20170328-gv7zxi#ixzz5BZiGX4NK>

³⁴<https://www.theaustralian.com.au/business/media/digital-commissions-more-profitable-for-adbuying-agencies/news-story/ed7fb53a66f97363cde74e3afcb864b6>

³⁵<https://www.theaustralian.com.au/business/media/opinion/news-media-ad-buy-question-receives-a-clowning-response/news-story/9a91c8f8b983586b7f4ebba30452b454>

³⁶https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_III.pdf?__blob=publicationFile&v=5



7. ADVANTAGE IN COMPETING FOR SPORTS RIGHTS

The existence of certain regulations which apply only to legacy media, but not to digital platforms, provides those platforms with a distinct competitive advantage. This is well demonstrated in the example of the anti-siphoning scheme, contained in the *Broadcasting Services Act 1992*.

This scheme has an inherent anti-competitive impact through the provision of first access to premium sports rights to one sector of the media – the free-to-air broadcasters, to the detriment of subscription television broadcasters and viewers.

However, the anti-competitive effect of the scheme has recently been amplified and concentrated by the arrival of digital platforms and their participation in the contest for sports rights. These are additional competitors for subscription television who are not subject to the restrictive anti-siphoning scheme and against whom subscription television is required to compete from a restricted position. In seeking to respond to the competition introduced by these platforms, subscription television broadcasters are at a substantial disadvantage, arising from legacy regulation which only applies to holders of subscription broadcasting licences.

Facebook, twitter and Amazon are actively pursuing sports rights, showing that this is a manifest problem, and not a potential one. Locally, there is nothing to stop an OTT provider from acquiring exclusive rights to any event on the anti-siphoning list, and nothing to stop them from putting coverage behind a paywall.

The scheme therefore, may no longer be effective in meeting its policy objectives as it cannot prevent exclusive access to high profile sports events from being moved behind a paywall.

Hence, the scheme is now both substantially more detrimental to subscription television than before, and potentially ineffective at the same time, calling into question how it can retain a place in modern industry regulatory policy. We do not argue that this demonstrates a need to extend the scheme to new operators. Rather, this example demonstrates that old regulatory models are no longer fit for purpose in the contemporary digital environment. The anti-siphoning scheme is inherently anti-competitive and is now anachronistic, stopping only subscription television broadcasters from responding fully to the competition introduced by digital platforms.

With a substantially altered competitive environment in the media sector since its inception, action must be taken to address the anti-competitive nature of the scheme. The appropriate way to alleviate these anti-competitive effects and ensure a level playing field is to abolish the scheme.

CASE STUDY – Digital platforms and sports rights

Digital platforms such as facebook, Google (via YouTube) and Amazon are already assertive bidders for premium sports rights and the indications are they are preparing to be more ambitious in this space.

To date, facebook has already acquired streaming rights for:

- Major league Soccer (MLS)
- Major League Baseball (MLB) (exclusive rights to 25 games plus 30 team-specific weekly recap programs in 2018, 20 games in 2017)
- Mexico's Liga MX football
- UEFA Champions League
- US College basketball (47 exclusive games)
- US College football
- World Surfing League



Facebook also bid US\$600 million for the rights to show the Indian Premier League cricket competition globally.³⁷

Amazon has been active in acquiring live streaming rights for National Football League (NFL) matches, and pay-per-view Ultimate Fighting Championship (UFC) live events.³⁸ It has also secured rights for tennis and pro beach volleyball.

YouTube TV is also the 'presenting partner' for NBA, Women's NBA and MLB in the US and has agreements for exclusive coverage of select MLS games.

It is thought that digital companies are using these smaller deals as a testing ground, allowing them to collect the data they need in order to bid for more premium games which will be coming up for renewal in 2019 and 2020.³⁹ Amazon and Facebook are likely to become major players in sports rights thanks to their large audiences and deep pockets.⁴⁰

This is part of an increasing trend where streaming outlets are competing for sports subscribers. Sports organisations are also incentivised to partner with streaming companies as they seek to attract and retain younger viewers.⁴¹

The global head of YouTube TV, Angela Courtin, has stated that YouTube TV is targeting live sports as "an ideal area to drive home its message that the brand is the same as cable TV, 'just delivered in a new way'". Courtin has also said that "Just like in [linear TV], where watch time for live sports is always significantly higher, we see the same thing happening at YouTube TV. So we know that sports was a place that we wanted to double down."⁴²

Facebook has recently appointed a former CEO of Eurosport to oversee Facebook's efforts to strike deals for live sports content.⁴³ One analyst has said that Facebook is "in the early strategic steps of building out a massive wave of sports content spending over the coming few years."⁴⁴ Facebook has said it has more than 650 million sports fans on the platform worldwide, and sees a rich opportunity to keep that audience engaged with more live programming.⁴⁵ Dan Reed, Facebook's head of global sports partnerships has said "We think sports is a natural fit for Facebook. It's inherently social and it's very popular."⁴⁶

In the UK, Amazon is thought to be a serious contender to secure English Premier League football rights, up against incumbents BT and Sky.⁴⁷ For Amazon, live sport (and content more generally) is seen as a driver to get consumers to Prime, a membership program offering free shipping for purchases on Amazon's retail site.⁴⁸

This is part of a larger trend whereby digital platforms are investing heavily in content as a way to increase engagement with its users. By keeping its users more engaged, Facebook is attempting to make its site the premier destination for entertainment.⁴⁹ It is estimated that Facebook will spend between US\$1 billion and US\$1.5 billion on content in 2018, with a sizeable portion of this dedicated to live sports programming.⁵⁰ It is

³⁷ <https://www.ft.com/content/e00bf808-2301-11e8-ae48-60d3531b7d11>

³⁸ <https://www.fool.com/investing/2018/03/20/will-facebooks-baseball-deal-be-a-home-run-with-us.aspx>

³⁹ <https://www.mediapost.com/publications/article/316325/amazon-facebook-poised-to-acquire-more-streaming.html>

⁴⁰ <https://www.cnbc.com/2018/03/13/amazon-will-be-major-disruptive-force-to-live-sports-rights-analyst.html>

⁴¹ <https://www.fool.com/investing/2018/03/20/will-facebooks-baseball-deal-be-a-home-run-with-us.aspx>

⁴² <http://www.adweek.com/tv-video/after-presenting-the-world-series-youtube-tv-will-do-the-same-for-the-nba-finals/>

⁴³ <https://www.hollywoodreporter.com/news/facebook-taps-eurosport-ceo-peter-hutton-lead-live-sports-partnerships-1097282>

⁴⁴ <https://www.cnbc.com/2018/03/13/amazon-will-be-major-disruptive-force-to-live-sports-rights-analyst.html>

⁴⁵ <http://variety.com/2018/digital/news/facebook-mlb-exclusive-25-games-global-rights-1202722652/>

⁴⁶ <http://variety.com/2018/digital/features/olympics-rights-streaming-nbc-winter-games-1202680323/>

⁴⁷ <http://variety.com/2018/digital/features/olympics-rights-streaming-nbc-winter-games-1202680323/>

⁴⁸ <http://variety.com/2018/digital/features/olympics-rights-streaming-nbc-winter-games-1202680323/>

⁴⁹ <https://www.fool.com/investing/2018/03/20/will-facebooks-baseball-deal-be-a-home-run-with-us.aspx>

⁵⁰ <https://www.iol.co.za/business-report/international/amazon-and-facebook-set-to-disrupt-sport-broadcasters-13764514>

[broadcasters-13764514](https://www.iol.co.za/business-report/international/amazon-and-facebook-set-to-disrupt-sport-broadcasters-13764514)



estimated that Amazon will spend US\$5 billion on content in 2018, and will be well placed to disrupt competition for sports rights.⁵¹

8. GLOBAL OTT STREAMING OPERATORS ENJOY SUBSTANTIAL MARKET POWER

In its Discussion Paper the ACCC invites comment on which digital platforms should be considered relevant to the inquiry. As outlined above, Foxtel and Fox Sports submit that the ACCC should not confine its inquiry to journalistic content only, and should also consider general media content, given the same trends, business impacts and public policy implications are at play.

If the ACCC is minded to consider general media content, Foxtel and Fox Sports submit that Over the Top (OTT) video content providers are extremely relevant to the inquiry. We submit that there exists with these platforms a similar concentration of market power, and similar questionable business practices, as exist with platforms such as YouTube and Google.

For example, Netflix dominates the delivery of online video services to a similar degree as Facebook and Google dominate in the delivery of search, social, data and advertising. In terms of establishing size and market share, in its most recent quarterly report Netflix reported that international membership grew by 8.33 million in 2017 Q4, and that its global subscriber base now amounts to 117.58 million members. In 2018 it expects to spend almost US\$8 billion on content.⁵²

Amazon Prime is still building its subscriber base, but is backed by the US\$700 billion broader Amazon business, the world's third most valuable company.⁵³ The \$99 annual membership that provides users with free two-day shipping, as well as its streaming package, boasts an estimated 90 million subscribers overall.⁵⁴ This gives it a competitive advantage in terms of content acquisition and production that local broadcasters will never be able to rein in. The Amazon video budget in 2017 was US\$4.5 billion⁵⁵ – a budget well out of reach of most local broadcasters globally.

Global OTT players, scale and competition for content

There are also significant imbalances in terms of the ability for local broadcasters to invest in compelling, original and high quality content. It should be noted that with the variety of choice available to consumers of content services, the ability of local broadcasters to offer high quality content that draws in viewers and keeps them on the platform is of vital business importance.

As well as enjoying a free pass on regulatory imposts, the other key advantage held by global competitors in the media space is their ability to invest and grow scale in ways that local operators are not equipped to match.

An example is Amazon Prime Video, Amazon's video streaming service which was recently made available to Australian customers. This service is a comprehensive video streaming service, however it has also been described by some as being primarily intended as a means of attracting customers to Amazon's core online retail business (rather than the video service being a primary business objective).⁵⁶ Therefore, the viability of Amazon Prime Video is of less consequence to Amazon's broader business goals, and also due to Amazon's global scale, Amazon can afford to invest and compete for premium content at rates local Australian businesses simply cannot compete with.

⁵¹ <https://www.iol.co.za/business-report/international/amazon-and-facebook-set-to-disrupt-sport-broadcasters-13764514>

⁵² <https://ir.netflix.com/static-files/0c060a3f-d903-4eb9-bde6-bf3e58761712>

⁵³ <http://fortune.com/2018/02/15/amazon-microsoft-third-most-valuable-company/>

⁵⁴ <http://observer.com/2018/03/amazon-netflix-hulu-handmaids-tale-lord-rings-jeff-bezos/>

⁵⁵ <http://www.businessinsider.com/amazon-video-budget-in-2017-45-billion-2017-4/?r=AU&IR=T>

⁵⁶ <https://www.fool.com/investing/2017/02/22/amazon-prime-instant-video-is-a-huge-loss-leader.aspx>



Similarly, Netflix operates on a global scale model in order to minimise their monthly fees and attract customers, which they can afford due to the sheer scale of their truly global business.

As noted above, Netflix's global subscriber base now amounts to 117.58 million members.⁵⁷ It plans to spend US\$7.5 – 8.0 billion in content in 2018.⁵⁸

This allows Netflix to produce original shows such as *The Crown* which was budgeted at \$US13 million per episode, making it on a dollar per hour basis the most expensive television series ever produced.

The effect of the introduction of large scale businesses into the Australian environment is to force broadcasters to rapidly increase investment in original and existing content in order to try and differentiate their own offerings and to remain competitive with new players.

For example, in 2015 Foxtel committed to doubling its investment in new Australian scripted, factual, lifestyle and entertainment programming by 2018, creating original premium content such as *Secret City*, *The Kettering Incident* and *Picnic at Hanging Rock*.

This marked increase in content costs, whilst in some ways beneficial to the local content industry, comes at a time of increased price competition and falling audience numbers, placing considerable pressure on the local broadcasting industry's long-term outlook.

This increase in investment may appear as largely beneficial to the local television industry however, local television broadcasters do not have access to the funds which are available to international SVOD service providers and this content 'arms race' cannot continue indefinitely.

For example, if Netflix were to invest \$1 per subscriber per production, this would enable them to invest \$104 million per production.

By contrast, Foxtel's maximum addressable market is 20 million people, which greatly limits our ability to invest in series of comparable quality. Even for the productions Foxtel does commission, this lack of scale means we are required to spend many more multiples per subscriber than a global business may be required to.

It is very difficult for local broadcasters with smaller scale business models and larger local costs to match overseas funding levels.

The market power of Netflix globally is also affecting Foxtel's ability to compete for the acquisition of premium content. In 2016, the broadcast rights to new series *Designated Survivor* were in market. The series was identified as a high priority acquisition for Foxtel and in order to make the most competitive bid, Foxtel teamed with a range of broadcasters in other jurisdictions, including the UK, Europe, Latin America, Israel and Canada to participate in an aggregated offer to buy the rights from eOne. While the individual territories were close, Netflix offered to exceed any other offer by an additional \$500k per episode and consequently won the exclusive worldwide (outside North America) rights to the series.

Netflix was only able to do this due to its massive global scale, which gives it an unmatched ability to bid overs for content rights. Local broadcasters such as Foxtel simply do not have the scale to match Netflix's capacity for acquisitions, not even in partnership with broadcasters in other jurisdictions.

⁵⁷ <https://ir.netflix.com/static-files/0c060a3f-d903-4eb9-bde6-bf3e58761712>

⁵⁸ <https://ir.netflix.com/static-files/0c060a3f-d903-4eb9-bde6-bf3e58761712>



9. CONCLUSION

Foxtel and Fox Sports understand that changing technologies and consumer behaviour have led to major changes in the economics of local media businesses. New competitors have established themselves and Foxtel and Fox Sports have and are responding through improving content offerings, adopting new technologies, changing pricing and packaging arrangements and improving advertising sales arrangements.

However, in the case of digital platforms, Foxtel and Fox Sports face competitors who now have an entrenched market dominance that is affecting all key aspects of our businesses.

Our ability to attract subscribers and advertisers, and in turn obtain a return on our investment in content, is being seriously undermined by platforms which host our content without our permission, make it available for free to our entire potential subscriber base, and use that content to attract advertisers away from our platform.

If unaddressed, these business practices, combined with the near-universal reach of the platforms, will seriously threaten the economics of local media companies. What's at stake is the ability of Australia to produce local, culturally relevant content, and the choice, quality and diversity of content available to Australian consumers.

The imbalance between local media companies and the digital platforms in terms of data volumes and granularity, and some questionable media practices, is leading Australia towards an entrenched monopoly situation in advertising services, which is much more serious than in other comparable jurisdictions.

Foxtel and Fox Sports would welcome the opportunity to discuss these issues with the ACCC and to discuss potential solutions to these problems.

