

THE ACCC'S DIGITAL PLATFORMS INQUIRY FINAL REPORT

BRIEFING NOTE

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MERGERS, PRIVACY AND CONSUMER PROTECTION LAWS ALL AFFECTED, IF ACCC'S DIGITAL PLATFORMS RECOMMENDATIONS ARE ACCEPTED

The growing convergence between competition, data protection and privacy, and consumer protection requires broad changes to competition, consumer protection and privacy laws (including a new prohibition on unfair business practices and a statutory tort for serious invasions of privacy), media regulation, specialist monitoring of digital markets and algorithms and an inquiry into ad tech and online advertising services, according to the Australian Competition and Consumer Commission's (ACCC) final report on its Digital Platforms Inquiry (**Final Report**), released on Friday.

Although the Federal Government is yet to respond formally, Treasurer Josh Frydenberg has confirmed that it accepts the ACCC's overall finding that there is a need for reform. These reforms will not just impact digital platforms, media and advertising companies, and we'll be delving into specific issues in future articles.

If you are an Australian consumer-facing business, it's time to start thinking about your privacy policies, data collection processes, contract terms and trading practices and what (if any) changes or strategies you may need to develop in line with the ACCC's proposed recommendations. It's also time to think about whether you will need to make a submission to the Government as part of its planned 12-week public consultation process.

ACCC INCREASED SCRUTINY OF DIGITAL MARKETS, ALGORITHMS AND DATA

The Final Report makes a number of recommendations specific to digital platforms, but also more broadly to address digital markets, algorithms and data.

The key recommendations are:

- ▶ **Proactive investigation, monitoring and enforcement of issues (Recommendation 4):** Formation of a specialist digital platforms branch within the ACCC to monitor potential anti-competitive behaviour or conduct causing consumer harm, conduct inquiries and investigations and take enforcement action where necessary. The formation of a specialist branch will provide the ACCC with dedicated resources to investigate activity in the sector, take enforcement action, monitor market developments and provide recommendations for reform.
- ▶ **Inquiry into ad tech services and advertising agencies (Recommendation 5):** A new 18-month ACCC inquiry into competition for the supply of ad tech and online advertising services by advertising and media agencies. This inquiry would be conducted by the ACCC's specialist digital platforms team, and will investigate issues such as the lack of transparency in the supply of advertising and features of the commercial relationship between suppliers and customers which may give rise to competition issues.
- ▶ **Designated digital platforms to provide codes of conduct (Recommendation 7):** Require designated digital platforms to develop a code of conduct governing their relationship with media businesses, to be approved by the Australian Communications and Media Authority (the **ACMA**). The code of conduct would create a framework with objective criteria for negotiations between platforms and media businesses, including commitments by the platform to share data about user consumption of new content, provide early warning of significant changes to ranking or display of news that may affect referral traffic, and fairly negotiate the sharing of revenue obtained by the platform from media content. The ACMA would be responsible for designating digital platforms, in close consultation with the ACCC, and it is likely that one of the key criteria for designation is the level of imbalance in bargaining power between the designated platform and news media businesses.
- ▶ **Mandatory ACMA take-down code (Recommendation 8):** Introduce a mandatory industry take-down code for copyright infringements, to be enforced by the ACMA. This recommendation seeks to address uncertainties in the operation of authorisation liability (which is a challenge for rightsholders seeking to enforce rights against platforms) and to reduce the risk of delays and inefficiencies in the take-down of copyright-protected content. The ACCC envisages that the take-down code will include appropriate sanctions and penalty provisions.

Consumer Data Right

The ACCC has also indicated it will revisit and further consider the application of the Consumer Data Right to digital platforms. The Final Report states that the ACCC does not consider that data portability will significantly reduce barriers to entry or expansion in certain digital platform markets in the short term (since there are other barriers such as network effects and scalability that would need to be addressed), but recognises that it may deliver benefits through promoting innovation and the development of new services.

MEASURES TO PROMOTE COMPETITION

Chapter 2 of the Final Report sets out the ACCC's findings on the market power of digital platforms, and the ACCC's finding that the acquisition of potential competitors, and the economies of scope created via control of data sets, are two contributing factors to the position of digital platforms in their respective markets.

As foreshadowed in the Preliminary Report, the Final Report recommends that the merger factors in section 50(3) of the Competition and Consumer Act be amended to address this issue, and that large digital platforms provide the ACCC with advance notice of acquisitions potentially impacting competition:

- ▶ **Changes to merger law (Recommendation 1):** The merger factors be amended to incorporate two additional factors:
 - » the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
 - » the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.
- ▶ **Advance notice of acquisitions (Recommendation 2):** Even though notification of mergers and acquisitions to the ACCC is voluntary, large digital platforms should agree to a notification protocol which makes it mandatory for those platforms to provide the ACCC with advance notice of any proposed acquisitions potentially impacting competition in Australia. The protocol will specify the type and minimum transaction value of transactions requiring notification, and the minimum notification period prior to completion.

Search engine and browser default bias

The Final Report also expresses concern about the need to address consumers' default bias, including in search engines and internet browsers. Consistent with changes Google is implementing in Europe following a European Commission ruling in 2018, the Final Report recommends that Google give Australian Android users a choice of default search engine and internet browser (**Recommendation 3**).

STRONGER CONSUMER PROTECTIONS

The Final Report found that current data practices in the industry may give rise to the potential for consumer harm, and includes a number of recommendations to address this:

- ▶ **Statutory tort for serious invasions of privacy (Recommendation 19):** Introduce a statutory tort for serious invasions of privacy. This cause of action would protect individuals against serious invasions of privacy that may not currently be captured by the Privacy Act.
- ▶ **Prohibition against unfair contract terms (Recommendation 20):** Amend the Competition and Consumer Act 2010 so that unfair contract terms are not only voidable, but also prohibited. There has been longstanding concern from the ACCC that these provisions are ineffective to deter companies from imposing unfair contract terms because the current framework does not impose civil penalties for breach.
- ▶ **Prohibition on certain unfair trading practices (Recommendation 21):** Introduce a prohibition on certain unfair trading practices, which has been used in other comparable jurisdictions, including the European Union, the United Kingdom, the United States, Canada and Singapore. The scope of this recommended prohibition is not entirely clear from the Final Report. The purpose of this new prohibition would be to address data practices that do not fit neatly within the existing Australian consumer laws.

- ▶ **Compliance with internal dispute resolution requirements (Recommendation 22):** The ACMA to develop and require platforms to comply with minimum internal dispute resolution standards. The ACCC recommends that these standards apply to all digital platforms that supply services in Australia with over one million monthly active users.
- ▶ **Establishment of an ombudsman scheme (Recommendation 23):** Establish an independent ombudsman scheme to resolve complaints and disputes between consumers, businesses and digital platforms providers.

PROTECTING CONSUMER PRIVACY

One of the ACCC's key observations is that transparency in the collection and use of consumers' personal information is critical to ensure that consumers have the opportunity to understand what data they are providing, and how it is being used so that they can make informed and genuine choices. The Final Report notes that there is a lack of consumer protection and effective deterrence under the existing privacy laws. As stated by ACCC Chair Rod Sims, the ACCC is "very concerned that current privacy policies offer consumers the illusion of control but instead are almost legal waivers that give digital platforms broad discretion about how they can use consumers' data". Accordingly, the Final Report includes a range of privacy-related recommendations:

- ▶ **Strengthening protections in the Privacy Act (Recommendation 16):** Amend the Privacy Act to better enable consumers to make informed decisions by
 - » updating the definition of "personal information" in the Privacy Act to ensure that it covers technical data (eg. IP addresses);
 - » requiring any APP entity collecting personal information (whether directly from the consumer or as a third party) to provide clear notice to the consumer setting out how the entity will collect, use and disclose the consumer's personal information;
 - » strengthening consent requirements and pro-consumer defaults by requiring consent to be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity;
 - » enabling the erasure of personal information upon request by the consumer;
 - » introducing direct rights of action for individuals; and
 - » increasing penalties for breach of the Privacy Act in line with penalties under the Australian Consumer Law.
- ▶ **Broader reform of Australian Privacy Law (Recommendation 17):** In addition to the specific amendments above, the Final Report recommends broader changes to the Privacy Act to ensure effective protection of consumer's personal information in the long term, having regard to the current objectives and scope of the Privacy Act. These considerations include (among other things) whether there should be greater emphasis and a higher standard of privacy protection, whether the Privacy Act should apply to some exempt entities (eg. small businesses), and whether the Privacy Act should include protections for inferred information and de-identification of personal information.
- ▶ **Office of the Australian Information Commissioner privacy code for digital platforms (Recommendation 18):** The Office of the Australian Information Commissioner to develop an enforceable Code in consultation with key stakeholders in order to provide greater transparency and control over how consumers' personal information is collected, used and disclosed by digital platforms. The Code should apply to all digital platforms supplying online search, social media and content services to Australian consumers which meet an objective threshold regarding the collection of consumers' personal information. The Code should address specific issues, including information and consent requirements, opt-out controls, children's data, information security, retention of information period, and complaints handling. The same penalties that apply for breaches of the Privacy Act should apply to breaches of the Code.

DIGITAL PLATFORMS AND NEWS MEDIA BUSINESS

Chapters 4, 5 and 6 of the Final Report examine digital platforms and news media businesses, including the relevant regulatory frameworks for the provision of similar services, commercial relationships between news media businesses and digital platforms, and the disruptive effects of digital platforms on Australian news media and the resulting risk of underinvestment in journalism.

The Final Report concludes that inconsistencies in the current sector-specific approach to media regulation in Australia has given rise to an uneven playing field between digital platforms and some news media businesses, although digital platforms increasingly perform similar functions to media businesses such as content curation, evaluation and arrangement. The Final Report recommends that media regulatory frameworks are updated, to ensure comparable functions are effectively and consistently regulated:

- ▶ **Process to implement a harmonised media regulatory framework (Recommendation 6):** A new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms. This would create a level playing field that promotes competition in Australian media and advertising markets.

The Final Report notes that digital platforms have created opportunities and cost savings for online media by enabling news media businesses to reach a larger potential audience and by lowering the costs of research, production and distribution. However, it expresses concern at the declining number of professional journalists focusing on Australian news and the reduction in certain forms of reporting, as well as the impact of digital platforms on the consumption of news and journalism.

The Final Report makes a suite of recommendations which seek to mitigate the disruption of Australian media by digital platforms, including:

- ▶ **Stable and adequate funding for the public broadcaster (Recommendation 9):** Stable and adequate funding should be provided to Australia's public broadcasters, the ABC and SBS.
- ▶ **Grants for local journalism (Recommendation 10):** A targeted, platform-neutral grants program should be established to support the production of original local and regional journalism, including content related to local government and local courts.
- ▶ **Tax settings to encourage philanthropic support for journalism (Recommendation 11):** Australia's tax settings should be amended to establish new categories of charitable purpose and deductible gift recipient status for not-for-profit organisations that create, promote or assist the production of public interest journalism.
- ▶ **Monitoring efforts of digital platforms to implement credibility signalling (Recommendation 14):** An independent regulator such as the ACMA should monitor the voluntary initiatives of digital platforms to implement credibility signalling which enables users to identify the reliability, trustworthiness and source of news content featured on their services.
- ▶ **Digital Platforms Code to counter disinformation (Recommendation 15):** Digital platforms with more than one million monthly active users in Australia should implement an industry code of conduct to govern the handling of complaints about disinformation (inaccurate information created and spread with the intent to cause harm) in relation to news and journalism, or content presented as news and journalism, on their services.

WIDE-RANGING RECOMMENDATIONS WILL MEAN LENGTHY CONSULTATION

The breadth of the ACCC's recommendations reflect the ACCC's view that, as stated by ACCC Chair Rod Sims, "[a]ction on consumer law and privacy issues, as well as on competition law and policy, will all be vital in dealing with the problems associated with digital platforms' market power and the accumulation of consumers' data".

The implementation of any of these recommendations will be done cautiously. Although it has accepted the need for reform, the Government will not provide its final response until the end of the year, following a 12-week public consultation process.

Businesses that deal with Australian consumers should be getting ready now by considering the impact these recommendations (if enacted) would have upon:

- ▶ merger and acquisition plans;
- ▶ business models;
- ▶ privacy policies;
- ▶ data collection processes; and
- ▶ contract terms, including standard form contracts.

If you would like more information about how the ACCC's findings in the Digital Platforms Inquiry Final Report may apply to you, please get in contact with us.

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