

CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 37, No 1. March 2018

World First Inquiry Into Digital Platforms in the Media Sector

Dr Martyn Taylor (Partner), Louie Liu (Senior Associate), Emily Woolbank (Associate) of Norton Rose Fulbright consider the ACCC's new inquiry into digital platforms

The Australian Competition and Consumer Commission (ACCC) is conducting a 'world first' inquiry on the impact of digital platforms on competition in media and advertising markets. Public submissions are due by **3 April 2018**.

Why is the inquiry occurring?

Over the last two decades, the media and advertising sector has experienced dramatic technological change both within Australia and globally. These changes have delivered substantial benefits to consumers, but have also shifted advertising revenues away from traditional media. Concerns have been expressed that these changes have adversely impacted the quality of news and journalistic content.

As part of a Parliamentary agreement to pass significant reforms to Australia's media laws, the government agreed to ask the ACCC to conduct an 18-month inquiry into the impact of digital platforms on content creators, advertisers and consumers (**Inquiry**).

The Chairman of the ACCC, Mr Rod Sims indicated that *"the inquiry will have a particular focus on examining whether the changes affect the quality and range of news supplied to Australian consumers"* as well as *"the extent to which digital platforms curate news and journalistic content"*.

The ACCC released an Issues Paper in relation to the Inquiry on 26 February 2018, commencing formal public consultation on the issues it has been asked to consider. The ACCC is expected to produce a preliminary report by 3 December 2018, and to finalise its report by 3 June 2019.

What are digital platforms?

The Inquiry is focussed on the competitive impact of 'platform services' or 'digital platforms'. These are defined as digital search engines, social media platforms, and other digital content aggregation platforms.

Digital platforms sit on top of our 21st Century high technology ecosystem. That ecosystem includes digitalisation of information into binary data, affordable pocket supercomputers (we know as 'smartphones'), global broadband Internet communications, and sophisticated proprietary 'operating system' software that harnesses this technological power.

Platforms involve user-friendly application software (known colloquially as 'apps'). This software is often delivered at very low or no cost to consumers. The application software intermediates the delivery of content, services, and advertising using a diverse range of business models, typically facilitated by Internet-access.

Contents

World First Inquiry Into Digital Platforms in the Media Sector	1
Insights Into the new Notifiable Data Breaches Scheme: Part 1	4
Profile: Martyn Taylor, Partner at Norton Rose Fulbright and CAMLA President	10
Can Robots Collude?	12
Copyright Act Amendments: Safe Harbour and Disability Access	17
Restraints on Media Sector Consolidation: The More Prominent Role of the ACCC	19
Rights Holders Rearmed with Preliminary Discovery Powers by Full Federal Court	23
Anti-money Laundering and Counter Terrorism Financing Requirements Extended to Cryptocurrency Exchanges	25

CAMLA

Editors

Victoria Wark & Eli Fisher

Editorial Assistant

Imogen Yates

Printing & Distribution

BEE Printmail

Editors' Note

Welcome back, dear readers! 2018 is well underway, and as always this area has been abuzz. Where to begin? **Disney** bought the bulk of **21st Century Fox's** business, including its film and TV studios as well as its 39% stake in Sky. 22 February has come and gone, so the **mandatory data breach notification scheme** has come into effect. **Suppression orders** have been getting a lot of press, with News Corp reporting on the number of orders made per state in 2017. According to reports, Tasmania had two orders made; Queensland 10; the Northern Territory 43; South Australia and NSW, 179 and 181 respectively - and **Victoria**, 444 suppression orders. This comes as the Victorian government is reviewing the *Open Courts Act 2013*.

Geoffrey Rush is suing the **Daily Telegraph** for defamation, after it was reported that another actor complained that the actor engaged in inappropriate behaviour during a production of *King Lear* for the Sydney Theatre Company. **Craig McLachlan** is suing **Fairfax** and the **ABC**, after they reported on allegations that he sexually harassed former colleagues. **Seven West Media** is no longer seeking an order that **Amber Harrison** be punished for contempt.

Copyright rightsholders in the US are pleased with the result in *TVEyes v Fox News*, which held that a service that enabled viewing whole programs in 10-minute segments was not transformative enough to be Fair Use. **Spotify** is being sued for \$2 billion in copyright infringement. **Taylor Swift** has successfully shaken off a copyright claim that her song infringed 3LW's *Playas Gon' Play*, with a US judge considering that the "original" work's lyrics lacked the requisite level of creativity to be protected by copyright. In respect of such lyrics as "playas gonna play... haters gonna hate", the Judge reportedly said: "The concept of actors acting in accordance with their essential nature is not at all

creative; it is banal." Judges gonna judge, we suppose. Back home on the copyright front, the Government introduced the *Copyright Amendment (Service Providers) Bill* into Parliament, has received submissions, and is due to report on 19 March 2018. The Bill proposes to extend **safe harbour**, about which proposal there is more information inside. The Government has separately announced a review of the **siteblocking** provision in s115A of the Copyright Act, with submissions due by 16 March 2018. The Australian Site Blocking Efficacy Report commissioned by the **Australian Screen Association** suggests that there has been a 53% decrease in the use of blocked sites since the siteblocking provision came into effect.

In this edition, our friends at **Norton Rose Fulbright** have written about the **ACCC's inquiry into digital platforms**, as well as on **restraints on media merger consolidation**. Speaking of Norton Rose Fulbright, we welcome (and profile) new CAMLA president **Dr Martyn Taylor**, and talk to him about what is in store for CAMLA in 2018. Privacy and data protection guru, **Peter Leonard** gives Part One of his insights into the **data breach notification scheme**. **Gilbert + Tobin** consider whether **robots are able to collude** under Australian competition law. **HWL Ebsworth** comment on the recent and the proposed changes to the *Copyright Act*, as well as the regulation of **cryptocurrencies**. And **Clayton Utz** explores how a recent Federal Court decision may have made things easier for IP rightsholders to use **preliminary discovery**.

All that makes for happy reading, but not, if you are a #younglawyer, on **14 March 2018**, when you should be at **King & Wood Mallesons** for the **CAMLA Young Lawyers Networking Event** (more details inside).

Victoria and Eli

What is the focus of the inquiry?

The focus of the Inquiry is on the impact of digital platforms on the state of competition in media and advertising services markets. Particularly, the impact of these platforms on the supply of news and journalistic content, and the implications for media content creators, advertisers and consumers.

Under the Government's Terms of Reference, the ACCC must consider:

- the extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers;
- the impact of platform service providers on the level of choice and quality of news

and journalistic content to consumers;

- the impact of platform service providers on media and 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 platform service providers, advertisers and consumers and the effect on competition in media and advertising markets.

In its Issues Paper, the ACCC has identified that it will also consider any underlying structural and behavioural issues in the relevant markets to determine whether there are competition issues. The ACCC will examine:

- whether network effects increase barriers to entry and deter effective competition from taking place;
- whether platform companies can leverage their dominance through tying or other unilateral conduct to enhance their market position, including through their ownership of personal data;
- whether transparency in media reporting and advertising has been reduced, through the use of advanced algorithms to process user data and deliver targeted content; and
- whether the advertising revenue shift away from traditional media companies could impact the creation of journalistic content and lower the quality of journalistic content.

Likely concerns for the ACCC

The Inquiry highlights the tension between the business models of traditional media (such as print media, television and radio broadcasting mediums) and the disruptive platform businesses.

Consumers are increasingly choosing to access news online, as opposed to traditional sources such as newspapers, television and radio. The ACCC has identified that these changes in consumption habits have shifted significant proportions of advertising spend towards digital platforms. Consequently, digital platforms have become increasingly important as a source of news and journalistic content for consumers, leading to concerns regarding the quality of content.

At one level, this is manifested in concerns regarding 'fake news' that became widespread during 2017. At another level, this is also manifested in concerns regarding foreign influence in electoral processes in various countries around the world. Australia's Inquiry is part of the global trend to look in greater detail at the impact of digital platform on media markets.

At the same time, the ACCC will likely closely examine the market power of digital platforms, building on work that has already been undertaken in Europe and the United States. For example:

- Digital platforms are often described as "multi-sided" in that they can generate revenue in one market (e.g. advertising) to cross-subsidise content or services in another (e.g. search).
- Digital platforms exhibit 'network effects' in that each new user add incremental value for all existing users, leading to a 'snowball' effect that is difficult for competitors to replicate.

The ACCC can be expected to consider such issues in detail over the next 18 months.

The benefits of digital platforms

As well as the concerns with digital platforms, the ACCC will consider the many benefits

From a competition law perspective, digital platforms have lowered barriers to entry for creators of content, whether it be news, journalist, or otherwise. For example, digital platforms enable a consumer to upload and share original content on a global basis at very low cost. In some cases, consumers may also receive a share of any resulting advertising revenue.

Furthermore, greater access to content via digital platforms have provided consumers with greater choice. The Internet has provided access to the entire library of knowledge and content produced by anyone, anywhere on the planet. Consumers can be significantly more selective in the content they consume, subject to the limitations of the digital platforms that they use. Bespoke content feeds are now the norm.

Historically, media was delivered through vertically-integrated platforms, such as broadcasting for free-to-air television, cable for subscription television, and print newspapers for news content. In the 21st century, any of these forms of media may be delivered via the Internet on a digital platform on virtually any Internet-enabled device. The resulting disruption is having a profound impact on the evolution of media markets, but also delivering significant value to consumers.

The questions for the ACCC, ultimately, are whether the substantial benefits delivered by digital platforms have been accompanied by detriments and, if so, whether such detriments can be appropriately addressed by competition law and policy. One does not envy the ACCC in grappling with the many nuances and complexities of this issue.

While this Inquiry is stated by the ACCC to be a 'world first', the ACCC is not alone in examining digital platforms and may consider the experiences of international regulators in other markets. For example, in 2017, a record fine of €2.42 billion was awarded by the European Commission following an investigation into alleged abuses of market dominance by a major global search engine provider.

Implications for the Inquiry

The Inquiry is being undertaken against a complex backdrop. Broader policy considerations are likely required, including the interaction of competition law, media regulation and data protection.

While the ACCC could make recommendations regarding legislative change, we think it more likely that the ACCC will use the Inquiry to better understand digital platforms and to make a series of recommendations to guide future competition policy and the ACCC's own operations.

Likely areas to watch include:

- The ACCC has a key role in reviewing mergers and acquisitions in the media sector and recently updated its Media Merger Guidelines. The findings of the Inquiry will provide an important insight into the ACCC's future approach in providing merger clearances.
- In late 2017, updates to Australia's competition laws saw changes to the misuse of market power provisions and the introduction of a new concerted practices prohibition. The ACCC may well consider whether any conduct raises issues under these provisions.
- A focus on the quality of journalistic content does not fit squarely within the remit of the ACCC. The ACCC may focus on whether any reduction in quality is due to anti-competitive behaviour or market concentration. Beyond this, the ACCC may also consider the relevance of journalistic quality for public benefit authorisations in the media sector.

Self-evidently, this Inquiry may well have global implications. This is the first time a major competition regulator has commenced an open-ended public inquiry of this nature. Consequently, we expect major stakeholders around the world will watch the developments in Australia over the coming 18 months with significant interest.