

ACCC Seeks to Restore Balance in the Media Industry

Tess McGuire, graduate at MinterEllison, discusses the final report of the ACCC's Digital Platform Inquiry.

The ACCC's Digital Platforms Inquiry Final Report (**Report**) has made recommendations that could significantly impact the regulation of the media industry and digital platforms, and the future for media organisations in the digital era.

Key takeouts:

- Digital platforms such as Google and Facebook could be required to 'fairly negotiate' with media organisations and apportion revenue they receive from their original content.
- The ACCC found that digital platforms are subject to virtually no media regulation, and have recommended the introduction of a platform-neutral regulatory framework to address this imbalance.
- The ACCC has proposed that digital platforms also develop an industry code of conduct that addresses the dissemination of harmful disinformation.

The ACCC's Digital Platforms Inquiry Final Report (**Report**) has delved into the disruption that digital platforms – largely, Facebook and Google – have prompted within the media industry. It seeks to shine a light on the costs and consequences, as well as ways we can embolden traditional media and journalism to survive in the digital era.

The ACCC's findings

The Terms of Reference for the Inquiry specifically requested the ACCC consider the impact of digital platforms on the level of choice and quality of news and journalistic content to consumers, and the broader impact on media and advertising markets. As a consequence, the Report provides insights into the operation of the modern media industry.

Some of these findings include:

- **Platforms are a news gateway:** Many Australians access news websites through digital platforms, with 32 per cent using Google, and 18 per cent using Facebook as a gateway.
- **Advertising revenue decline:** Commercial media has suffered from the reduction in advertising revenue over the past 20 years. The decline has been significant – from AU\$2 billion in classified advertising revenue in 2001 to AU\$200 million in 2016. This contrasts with digital platforms such as Google and Facebook which have grown to together account for nearly two-thirds of online advertising expenditure.
- **Reduction in professional journalists:** From 2006 to 2016, the number of Australian journalists working for traditional print and online news media businesses fell by 26 per cent.
- **Reduced regional coverage:** Between 2008 and 2018, 106 local and regional newspaper titles closed across Australia. This represents a net 15 per cent decrease, and has left 21 local government areas without coverage from a single local newspaper, 16 of which are in regional Australia.
- **Reduced public interest coverage:** Over the past 15 years, there has been a reduction of reporting relating to local government, local court, and health and science issues. For example, in 2018 Australia's major metropolitan newspapers published 40 per cent fewer articles on local court matters than at the peak of local court

reporting in 2005, and 42 per cent fewer articles on science issues than at the peak of science reporting in 2006.

Many of the ACCC's recommendations focus on bolstering the commercial media industry in the face of these challenges and creating a more effective and consistent competition and regulatory landscape.

Recommendations addressing the imbalance

1. Codes of conduct

One of the more significant recommendations that could lead to practical ramifications for the bottom line of media companies is that designated digital platforms provide codes of conduct governing their relationships with media businesses to the Australian Communications and Media Authority (**ACMA**).

This stems from particular concerns the ACCC states were raised during the Inquiry, regarding the ability of digital platforms to alter key algorithms with no notice, and introduce policies or modifications that have the potential to significantly impact the dissemination of news and journalism (and the consequential monetisation).

The ACCC states that each platform's code of conduct should ensure that they treat news media businesses fairly, reasonably and transparently in their dealings with them, and contain at least the following commitments:

- the **sharing of data** with news media businesses;
- the early **notification of changes** to the ranking or display of news content;

- that the digital platform's actions will not impede news media businesses' opportunities to **monetise their content** appropriately on the digital platform's sites or apps, or on the media businesses' own sites or apps; and

where the digital platform obtains value, directly or indirectly, from content produced by news media businesses, that the digital platform will fairly negotiate with news media businesses as to the how that **revenue should be shared**, or how the news media businesses should be **compensated**.

The final point is significant and even radical, as it introduces the prospect of revenue-sharing or compensation going from digital platforms to news media organisations – a proposal with potential to realign the trajectory of the media industry.

The ACCC has tasked the ACMA with the role of designating which digital platforms should be required to implement a code, creating guidelines regarding how platforms should develop a code and what should be included, approving proposed codes and dealing with breaches.

The Report recommends a strong enforcement mechanism be introduced, vesting the ACMA with power to impose sufficiently large sanctions that will act as an incentive for digital platforms to comply, and lead to real change.

2. Harmonised media regulatory framework

As a consequence, the ACCC proposes a process to implement a platform-neutral regulatory framework that would have oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms.

Again, the underlying purpose of this recommendation is to create a level playing field in our markets where current regulatory codes have failed

to keep pace with technological changes that have revolutionised our consumption of news and media content more broadly.

The Report recognises that moving from disparate regulatory systems for publishers and broadcasters to a platform-neutral framework that sees obsolete regulations repealed is a significant reform. In light of this, a staged approach is recommended, but one that sees disparities of immediate concern addressed as a priority. These include the differences in election advertising restrictions and local content obligations that particularly, TV and radio broadcasters must adhere to.

3. Other targeted initiatives

The Report also recommends adjusting the tax settings to encourage philanthropic support for journalism. This would be through establishing new categories of charitable purpose and deductible gift recipient (**DGR**) status for not-for-profit organisations that create, promote or assist the production of public interest journalism.

Other proposals to improve the standard of media content include a grants program that supports the production of original local and regional journalism, as well as stable and adequate funding for the public broadcasters, the ABC and SBS.

What about #FakeNews?

A critical issue facing digital platforms in recent years has been the active dissemination of disinformation, colloquially dubbed 'fake news'. This has generated global discussion, as governments have had to consider the impacts on the free-flow of communication any regulation could have.

The ACCC has addressed this through a recommendation that would see digital platforms implement an industry code of conduct to govern the handling of complaints about disinformation (which is defined

as 'inaccurate information created and spread with the intent to cause harm') in relation to news and journalism.

In order to avoid the abuse of such a regulatory system, the application of the code would be restricted to complaints about disinformation that meet a 'serious public detriment' threshold. The code would outline suitable responses to complaints of disinformation.

This recommendation is coupled with proposals that digital media literacy in both schools and the community more broadly is improved, and that the ACMA be directed to monitor the initiatives of digital platforms to implement credibility signalling to their users – allowing more trustworthy news sources to be recognised and relied upon.

Going forward

The ACCC's recommendations clearly have the potential to impact the nature of the relationships between digital platforms and media organisations, as well as how each are regulated. The federal government has committed to responding to the Report, in full, by the end of 2019.

Notable announcements since the Report include Google updating their algorithm to better promote and prioritise original journalism in the search results, as well as Facebook rolling out the 'Facebook News' tab in the United States which is intended to host content from quality journalistic sources. Facebook has also committed to paying some (but not all) participating publishers for their work – a response that goes directly to the issue of revenue imbalance. Perhaps 'Facebook News' is coming to Australia soon?

Tess McGuire is a graduate at MinterEllison. For further advice on these issues, please reach out to MinterEllison's Media Partner, Peter Bartlett, or Competition Risk & Regulatory Partners, Miranda Noble and Paul Kallenbach.