

27 September 2019

Mr Hamish McDonald
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Dear Mr McDonald,

ACCC DIGITAL PLATFORM INQUIRY FINAL REPORT

Thank you for the opportunity to comment on the Final Report of the Australian Competition and Consumer Commission's Digital Platforms Inquiry.

The Australian Publishers Association represents the interests of companies involved in trade, educational and scholarly publishing. Members of the Association account for the bulk of activity in those sectors in Australia.

Like many others, we welcomed the Government's initiative in commissioning the Inquiry, and congratulated the ACCC on the delivery of a significant report.

Findings

We support the core findings of the Inquiry.

Although it might have seemed obvious, it is important that the ACCC has recorded authoritatively that digital platforms, especially Google and FaceBook, use consumer attention and data to sell advertising, and that they have substantial market power. This finding makes clear that the content that secures consumer attention is of fundamental importance to the revenue of digital platforms. That importance affects the incentives platforms face. For example, as the Report notes: "It is clear that the incentives Google faces on one side of the market (attracting users) influences [sic] its conduct.... These incentives have flow-on effects to media businesses in Google's supply of referral services. In this sense, Google is able to appropriate the value of content produced by media businesses, which it then uses to enhance its offering to advertisers."¹

¹ ACCC Digital Platforms Report Final Report, June 2019, p.235

The Report identifies several characteristics of digital platforms that present special challenges to achieving the Government's competition policy objectives within the current regulatory framework:

- The fundamental bargaining power imbalance between platforms and the media businesses that must deal with them;
- Same and cross-side network effects that provide economies of scale and entrench the market power of 'hub' firms²
- The role of data in the market power of digital platforms and the opacity and bias in their use of that data.

The Commission's findings are consistent with publishers' experience.

We particularly welcome the findings in Chapter 5: *Digital platforms and media - commercial relationships and monetisation* that recognise the incentive for digital platforms to provide access to free content and that the challenges in enforcing copyright against digital platforms create detriments for rightsholders.

Recommendations

In our response to the Inquiry's Issues Paper, we recommended that the Commission include Amazon within its investigations. However, Amazon's business activities are largely outside the focus of the Terms of Reference and it was not included within the scope of this Inquiry. Although the main concerns that gave rise to the Inquiry related to the impact of digital platforms on news and journalism, the Commission's analysis has identified issues that apply to what Marco Ianiati and Karim Lakhani call 'hub firms', including Amazon.

We support the general direction of the Inquiry's recommendations, and recommend that their application should not be limited to digital platforms, but should extend to all firms that share the same key characteristics.

- **Recommendation 7:** Designated digital platforms to provide codes of conduct governing relationships between digital platforms and media businesses to the ACMA.

The issues that give rise to this recommendation are not limited to Facebook and Google. They apply equally to other hub firms and there is a need also to mitigate the anti-competitive impacts of those other large digital monopolies. This recommendation would make a greater contribution to the Government's competition objectives if it applied more widely. The issue of data sharing, in particular is of wider relevance.

- **Recommendation 8:** Mandatory ACMA take-down code to assist copyright enforcement on digital platforms.

We welcome the Inquiry's recognition of the situation facing rightsholders and we support any efforts to ensure that copyright infringement is addressed on digital platforms. However, we are concerned that the recommendations may not be sufficient to have the effect envisaged. The Report notes at section 5.4.3, the submissions made about the importance of clear rules on authorisation liability to

² Marco Ianiati and Karim R Lakhani, Harvard Business Review, September-October, 2017 p.86

ensure that online content hosts have incentives to act, but the Commission has concluded that it was not 'appropriate to propose broad amendments altering the operation of the Copyright Act as part of this Inquiry.'

We noted above that the Inquiry recognises elsewhere the importance of incentives and in particular the incentives for digital platforms to provide access to free content. The experience of rightsholders in the publishing industry and more generally suggests that the detriments identified in the Inquiry's findings will not be addressed without action that affects those incentives. We support the submissions of the Australian Copyright Council and of the Screen Producers Association in relation to authorisation liability.

- **Recommendation 20:** Prohibition of unfair contract terms
- **Recommendation 21:** Prohibition of certain unfair trading practices

We welcome the Inquiry's finding that the rise of hub firms including digital platforms has resulted in smaller firms depending on them for almost any access to their customers. The Report notes that this fundamental bargaining power imbalance results in businesses accepting terms that are less favourable with disadvantages both for dynamic competition and consumers.

We also welcome the Commission's finding on the value of the 'public sphere'. Journalism is an important contributor to the public sphere, but not the only one. The Australian publishing industry makes a very substantial contribution to how Australia 'considers, debates, and communicates information and ideas'. (Report, p. 284) The Inquiry's recommendations should apply more broadly, and include hub firms whose behaviour risks detriment to that contribution.

The firms examined by the Inquiry operate globally and the issues raised are not limited to Australia. The Association of American Publishers raised similar relevant concerns in a recent submission to Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century:

"The dominant technology platforms that concern us exercise extraordinary market power in the markets for book distribution and Internet search, respectively [...] Amazon 'sells substantially more than half of the books in the United States, including new and used physical volumes as well as digital and audio formats.'³ Amazon is also a publisher, a printer, a self-publisher, a review hub, a textbook supplier, a platform for third-party sellers and resellers, as well as a distributor that now runs its own chain of brick-and-mortar stores.⁴ Amazon also owns Audible, which is the largest audio book supplier in the U.S. [...] No publisher can avoid distributing through Amazon and, for all intents and purposes, Amazon dictates the economic terms, with publishers paying more for Amazon's services each year and receiving less in return."⁵

³ David Streitfeld, What Happens After Amazon's Domination is Complete? Its Bookstore Offers Clues, N.Y. Times, June 23, 2019.

⁴ *ibid.*

⁵ Comments of the Association of American Publishers
<https://presspage-production-content.s3.amazonaws.com/uploads/1508/aapcommentstoftc-final06262019-858379.pdf?10000>

In 2017, both the Japanese Fair Trade Commission (JFTC)⁶ and the European Union (EU)⁷ sought to curb the market power and anti-competitive contractual terms that Amazon imposed on book publishers.

The Government's establishment of the Inquiry was widely recognised, both domestically and internationally as important and innovative. The Inquiry's recommendations, especially those mentioned above, provide practical steps to begin addressing significant threats to competition for which current regulatory arrangements are not adequate. It would unfortunately limit the effect of implementing those recommendations if they were limited only to the digital platforms considered in the inquiry. They would make a substantially greater contribution to public policy objectives if they were applied to all hub firms with the relevant characteristics.

Thank you again for the opportunity to comment.

Yours sincerely,

Michael Gordon-Smith
Chief Executive

⁶ <https://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.html>

⁷ europa.eu/rapid/press-release_IP-17-1223_en.pdf