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The turn to regulation in digital communication: the ACCC's digital platforms inquiry and Australian media policy

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Abstract

This article provides an overview of the Australian Competition and Consumer Commission (ACCC) Digital Platforms Inquiry, as a case study in the new thinking about digital platform regulation taking place in many nations. With its focus upon the impact of digital platforms on news and journalism, the ACCC Inquiry parallels other reviews, such as the Cairncross Review on the Future of Journalism in the United Kingdom. While the Inquiry had a somewhat 'accidental' history, the core issues that it raised have acquired considerable political resonance in Australia. The concept of harms provides a useful lens through which to understand the ACCC's focus, as it identified harms caused by the market dominance of Google and Facebook for traditional news media businesses, and for consumers and citizens. Responding to the ACCC Final Report will present challenges in identifying the public good dimension of journalism and who should pay for it, the scope and reach of digital platform regulation and its relationship to media policy and regulation, and the scope for small nations to effectively manage the power of global digital platform giants.

Keywords

Australian Competition and Consumer Commission, digital platforms, future of news, journalism, media policy, media regulation, online harms, privacy

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Introduction: the turn to regulation in digital communication

There has been a significant sea change in thinking about the Internet and social media over the course of the 2000s. Whereas the Internet was once thought of as a globally networked 'cyberspace', and hence, not amenable to 'top-down' nation-state regulation (e.g. Mathiason, 2009), there have been a plethora of reports, government enquiries, and new forms of legislation and regulation applied to digital communication, particularly as it is conducted through the largest digital platforms (Flew, 2019a). While government controls over the Internet were long associated with authoritarian governments in China, Iran, Russia, and elsewhere, it is increasingly in the liberal democracies where new forms of digital platform regulation are being developed, in response to a diverse range of concerns, including those about the impact of such platforms on the democratic process itself, through the online circulation of disinformation, hate speech and so-called 'fake news' by politically and ideologically motivated actors, both domestic and international (Benkler et al., 2018; Jack, 2017; Tambini, 2017). At the end of 2019, public enquiries relating to the power of digital platforms were taking place, or had recently been completed, in Australia, Canada, France, Germany, India, The Netherlands, New Zealand, Switzerland, the United Kingdom and the United States.

This has also seen a greater degree of convergence between laws, rules and regulations governing the Internet and those relating to media and communications policy more generally, as the platformisation of the Internet (Flew, 2019b; Van Dijck et al., 2018) combined with the growing centrality of the largest platforms such as Google and Facebook to the media and information ecosystem raises questions around different rules that govern speech in digitally networked environments (Cohen, 2017; Langvardt, 2019; Napoli, 2019a, 2019b). Recognising that such regulatory practices are never simply about media policy as it was applied to 20th century broadcast platforms, the preferred term is that of *governance*, acknowledging that laws, policies and regulations towards digital communication will of necessity be applied by a complex array of governmental, supra-national, corporate and civil society actors (Gillespie, 2018; Ginosar, 2013; Gorwa, 2019a, 2019b; Nash et al., 2017; Puppis, 2010). Governance has also proven to be a more ideologically neutral term since, as van Dijck, Poell and de Waal observe, 'the term "government" is often taken as synonymous with "regulation" – a term that typically causes widespread allergic reactions in Silicon Valley' (Van Dijck et al., 2018: 156). But given that governance is one of the defining characteristics of digital platforms themselves (Gillespie, 2018), but almost two decades of reliance upon platform self-governance has failed to see major public concerns adequately addressed, there has been growing impatience on the part of governments and regulators about reliance upon self-regulation, and a demand for legislative responses that have some administrative 'teeth' and the capacity to extract meaningful sanctions upon powerful corporate actors in the face of infringement of their corporate and societal obligations (Soriano, 2019).

In this article, we wish to analyse these developments through a case study of the Australian Competition and Consumer Commission (ACCC)'s *Digital Platforms*

Inquiry, which was announced by the Liberal-National party government in December 2017, and which presented its Final Report to the government in July 2019 (Australian Competition and Consumer Commission (ACCC, 2019a). The Digital Platforms Inquiry provides a case study in policy-making towards digital communication for a number of reasons. Undertaken by an agency with an explicitly economic and competition policy brief, it nonetheless dealt with major issues in contemporary media and communications, notably around news and the future of journalism. By addressing the relationship between market dominance, control over access to consumer data, and anti-competitive practices, the ACCC went beyond assessing the impact of dominance on competition in particular markets such as search and social media, to wider questions surrounding privacy and third-party uses of online data. It also tapped into the insights of comparable enquiries internationally, and in this article, we show the connection between the issues explored in the Australian policy environment and that of other countries, by comparing the findings of the ACCC inquiry with those of the Cairncross Review in the United Kingdom. Dame Frances Cairncross was provided with terms of reference by the UK Government and delivered her report (Cairncross, 2019), titled *A Sustainable Future for Journalism*, in March 2019.

The politics of the Inquiry pitted the largest digital platforms, Google and Facebook, up against the giants of traditional media, most notably Rupert Murdoch's News Corporation. The ACCC chose to focus upon Google and Facebook on the basis of their ubiquity, their market dominance in the search and social media markets, and the fact that such market dominance rendered doing business with them unavoidable for news businesses, in contrast to, say, Bing or Twitter. As dominant firms in their markets, the ACCC took the view that they 'have a special responsibility that smaller, less significant businesses do not have', but also that 'the opaque operations of digital platforms and their presence in inter-related markets mean it is difficult to determine precisely what standard of behaviour these digital platforms are meeting' (ACCC, 2019a: 1). In the context of the Inquiry, civil society organisations were often caught in an awkward bind between a desire on the one hand to rein in the power of the digital giants, and a long-standing reluctance on the other hand to take up the issues raised by the traditional media sectors around copyright and terms of access to online content. The Inquiry came about at a time of significant transition in the political economy of the Internet, where there has been growing concentration in digital media industries overall, and near-monopolies emerging in sectors such as search and social media. It is noted in the ACCC Final Report that Google accounted for 95% of all online search activity in Australia and 50% of browser usage, while Facebook accounted for 75% of time spent on all social media by Australians (ACCC, 2019a: 65, 69, 77). As authors such as Tim Wu (2018) and Lina Khan (2018) have observed, this has brought questions of antitrust in response to perceived anti-competitive practices to the fore in ways that have parallels with the rise of monopolies and oligopolies in late 19th and early 20th centuries capitalism, rather than the promised era of continuous disruptive innovation and user-driven innovation. As with the era of 'Robber Barons', this raises the question of what forms of regulation are required to tame the giants of digital platform capitalism (Shapiro, 2018).

The ACCC digital platforms inquiry and Australian media policy

The ACCC was instructed in December 2017 by the then-Treasurer (now Prime Minister) of Australia's governing Liberal-National Party coalition, Scott Morrison MP, to

> hold a public inquiry into the impact of digital platforms services on the state of competition in media and advertising markets . . . in particular in relation to the supply of news and journalistic content, and the implications of this for media content creators, advertisers and consumers. (ACCC, 2018b)

It was to provide a Preliminary Report no later than December 2018 and a Final Report by June 2019. In the Ministerial Direction, the Chair of the ACCC, Rod Sims, was instructed to ensure that the Inquiry considered the following:

1. The extent to which platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers.
2. The impact of platform service providers on the level of choice and quality of news and journalistic content to consumers.
3. The impact of platform service providers on media and advertising markets.
4. The impact of longer term trends, including innovation and technological change, on competition in media and advertising markets.
5. The impact of information asymmetry between platform service providers, advertisers and consumers, and the effect on competition in media and advertising markets (ACCC, 2018b: 23).

The political context of the Inquiry was that it emerged almost by accident. The Liberal-National party coalition government, narrowly returned to office in 2016, had long been seeking to reform Australia's media ownership laws. In particular, they sought the removal of the restriction upon owning media assets across the three platforms of print newspapers, broadcast television networks and broadcast radio networks. Laws restricting ownership and control to only one of these platforms in any local area had been introduced by the Hawke Labor government in the 1980s, but diluted by the Howard Liberal-National government so that ownership across two platforms (along with foreign ownership) has been allowed since 2007. Despite this significant reform of the last decade, relatively few cross-media transactions had occurred before 2017, the most notable of which was the acquisition of several newspapers including a metropolitan daily in the state of Western Australian by the Seven Television network. Given that Australia has one of the most concentrated systems of media ownership in the OECD, and that its largest player – Rupert Murdoch's News Corporation – has a well-documented history of using its newspapers to support the political interests of the Liberal-National Party coalition (McKnight, 2012), the push for further deregulation in 2016–2017 had little prospect of getting support from the opposition Australian Labor Party or the Greens. This meant that in order to pass its legislation, the Coalition required the support of at least 7 of the 11 independent or crossbench Senators.

The revised media ownership laws were passed in September 2017, with the support of the right-wing populist Pauline Hanson's One Nation Party (which had four Senators) and the Nick Xenophon Team (later to be renamed Centre Alliance), which had three Senators. The deal made by the Government for the One Nation votes was an inquiry into the power of the Australian Broadcasting Corporation, and its impact on 'competitive neutrality'. To secure the votes of the Nick Xenophon Team, a package of measures was agreed to which included a commitment to investigate the power of the digital platform giants and their impact on journalism and news businesses.

Some of the issues that would form the basis of the ACCC Inquiry were flagged in a Senate Select Committee Report on Public Interest Journalism (Senate, 2018), which Senator Xenophon was a significant contributor. This report identified the precarious state of journalism in Australia, observing that there had been a 25% decline in journalism jobs between 2012 and 2017, with print newspapers being particularly hard hit. The Senate Select Committee identified three interlocking trends that had clearly played a role in this jobs crisis: the shift in news consumption to digital platforms, and away from more traditional formats; the associated shift in shift of advertising away from traditional media to online platforms; and the collapse in revenues for print publications. In the face of such dramatic changes, Australian print media companies had struggled to develop sustainable business models, as has been the case in many parts of the world (Bell, 2018; Newman and Fletcher, 2018; Van Dijck et al., 2018: 49–72).

Conduct of the ACCC inquiry

The ACCC released its Issues Paper in February 2018 to open the process of public consultation. It received 76 submission in response to the Issues Paper, from individuals, academics, community and civil society organisations, industry bodies, media companies, technology companies, and others. It quickly became apparent that the primary line of division in the inquiry would be between the digital platforms on the one hand, including Google, Facebook, Twitter and the Digital Industry Group as an industry advocacy group, and traditional media companies on the other hand, including Free TV, the major broadcast radio and television networks, and – perhaps most vocally – News Corporation. As a company that has been a long-time critic of platforms such as Google and Facebook, and of other news providers who make their content freely available through such platforms, News Corporation argued in a 144-page response to the Issues Paper that digital platforms are engaged in anti-competitive practices, with detrimental consequences for the range and quality of original journalism, access to online revenue streams and sustainable relations with advertisers (News Corp Australia, 2018).

The ACCC released its Issues Paper in February 2018 and its Preliminary Report in December 2018 (ACCC, 2018a, 2018b). The Issues Paper received 76 submissions in response, and these responses formed the basis of the Preliminary Report. In the Preliminary Report, the ACCC made 11 recommendations including, closer investigation of mergers and acquisitions that expand the reach of the dominant digital platforms; restricting default browser and search engine settings; investigating discriminatory conduct by digital platforms towards advertising businesses with which they are associated; a review of media regulations to achieve greater platform neutrality (i.e. regulations based upon conduct and

content rather than mode of delivery); and stricter rules around the use and collection of personal information. It also made the controversial recommendation, which was excluded from the Final Report, that regulatory authorities monitor the ranking and referral practices of digital platforms with regard to news and advertising, and to investigate the consequences of any changes. This proposal, which came to be known as the proposal for an 'algorithmic regulator', was vehemently opposed by Facebook and Google, who saw it as misdiagnosing the problems for news business models, and were of the view that 'people, not regulators, should decide what is in their News Feeds' (Milner, 2019).[1]

The Preliminary Report attracted 124 submissions in response. There were a significantly higher number of submissions from civil society organisation, academics and representatives of the advertising and marketing industries than was the case with responses to the Issues Paper, suggesting that it was only gradually becoming apparent that the scope of the ACCC Digital Platforms Inquiry went well beyond a narrow competition policy remit. The Digital Platforms Inquiry was also attracting significant international interest: in addition to global companies, the Preliminary Report attracted submissions form US-based entities such as the American Bar Association Section on Antitrust Law, the Global Antitrust Institute, the Progressive Policy Institute, and the U.S. Chamber of Commerce, as well as from the UN Rapporteur on the Right to Privacy. The ACCC also released a series of commissioned research studies, including reports on the impact of digital platforms on news and journalistic content (Wilding et al., 2018), consumer surveys on news and on behaviours on digital platforms (Bagga and Heyden, 2018; Varley and Bagga, 2018), and on public funding of high-quality journalism (Foster and Bunting, 2018). It also conducted a series of public forums around Australia, on topics such as the future of journalism, advertising, privacy, and consumer and small business issues.

The ACCC Digital Platforms Inquiry was required to set clear parameters as to what it was and was not investigating. The ACCC chose to focus primarily upon Google and Facebook as the dominant platforms in search and social media respectively: it restricted its focus on other social media platforms such as Twitter, news services such as Apple News, or platforms primarily involved in the delivery of entertainment media to the home, such as Netflix. It maintained its focus upon news and journalism, and was not investigating other media issues such as the future of television in an age of streaming video, although it recognised that there are areas of media law and policy, such as copyright laws and media content classification, that have a sector-wide impact and require consideration in any revised media regulatory framework which includes digital platforms. Finally, it noted the issues arising from next-generation technological developments such as advances in artificial intelligence and the Internet of Things and their potential impacts upon the future of news and journalism (ACCC, 2019: 511–518), but considered these to be outside of the overall scope of the Report.

Why news and journalism?

The prominence of news and journalism in Australia's response to the impact of digital platforms does not have a single explanation. The impact has, of course, been felt worldwide with many countries in a similar position to Australia now considering the reach and effectiveness of domestic law and regulation in dealing with multi-national corporations

established in other territories. Some of these impacts, such as the payment of company tax and the misuse of private information, are not directly related to the platforms' interactions with news content. The Australian connections with the Christchurch mosque killings in March 2019 heightened the urgency in attempts to bring digital platforms within the regulatory framework, even if this is limited – for the time being, at least – to the criminalisation of 'abhorrent, violent material'. Nevertheless, it is the impact of digital platforms on news that has emerged as the central issue in the case for new regulation, and ACCC Chair Rod Sims has described the recommendation for a 'business code' to govern the relationship between digital platforms and news publishers as 'the most important' recommendation emerging from the ACCC's 619 page report (Merritt, 2019).

Part of the explanation for the centrality of news and journalism in efforts to regulate digital platforms is a newfound, or perhaps rediscovered, recognition of the 'public good' status of news and journalism. This involves an acknowledgement both of a public purpose or benefit to news and journalism that does not attach to many other products and services, and of the difficulty in developing a business model to make it pay (Cunningham et al., 2015; Doyle, 2015). In its Final Report, the ACCC clearly articulates both these aspects. In terms of its benefits, the ACCC says, 'In promoting the public interest, journalism is an important contributor to the "public sphere", democracy and the economy, and has a place within much broader constructs of societal communication and debate' (ACCC, 2019: 284). But it also points to two difficulties faced by commercial media businesses in capturing the value of public interest journalism the following:

- It is difficult to exclude consumers who will not pay for this content, with advertising traditionally offering a means of monetising it;
- The benefits of this content are diffuse and extend to society more broadly, making its social value difficult to capture in economic terms.

With this dilemma comes an obligation on the part of governments to address the market failure that results from the collapse of the traditional business model, as advertising moves from the producers of news and journalism to, in effect, its distributors. While digitalisation and the emergence of more effective forms of classified advertising are important factors in the collapse of the traditional business model, so too are the scale and scope of Google search or Facebook News Feed, which cannot be matched by domestic publishers and broadcasters, and the control the platforms now exercise over consumer data (Cairncross, 2019: 57).

It is this challenge that underpins the attention to news and journalism in the ACCC's Digital Platform Inquiry. It is succinctly articulated by the Cairncross Review in the following terms:

> The goal of the Review has not been to protect news publishing companies themselves, but to advocate measures that will ensure the market in which they operate is efficient, and to defend their most democratically significant outputs. (Cairncross, 2019: 5)

In both reports, the arguments advanced by news media are many and the evidence extensive. A common theme was the unequal bargaining power between media

businesses and digital platforms. In the course of the ACCC inquiry, news producers cited instances of sudden changes to platform algorithms that had a disproportionately harsh impact on their business models as they were struggling to respond to the movement of advertising revenue from their own sites to the platforms. The ACCC also considered questions such as: how to assess 'quality' and 'choice' in the supply of news and journalism; the impacts for rural and regional news services; reductions in the number of journalists employed; the role of public service media; and the overall effect of digitalisation and the arrival of digital platforms on business models for news and journalism. The ACCC also documented the range of laws and regulations that apply to publishers and media businesses, and which do not mostly apply to digital platforms, producing 'regulatory imbalance' between the two sectors.

In general terms, the recommendations for intervention – whether through law and regulation or policy initiatives such as government grants – of both the ACCC Final Report and the Cairncross Review can be expressed in terms of the following two categories of harms said to be caused by digital platforms: (1) the harm caused to news producers and advertisers and (2) the harm caused to consumers and citizens.

Recommendations

Harms caused to news producers and advertisers

First, there is the harm caused to news producers and advertisers and to the markets for news and services such as Internet search, search advertising, social media and display advertising. The ACCC's entry point to this issue was the concept of market power. It observed that while possessing market power is not, of itself, unlawful, the exercise of it might be. Essentially, the unrestrained exercise of market power by digital platforms against advertisers and content creators could lead to market failure (ACCC, 2019: 10).

The purpose of the inquiry was not to identify specific instances of market failure,[2] but the ACCC did find that both Google and Facebook possess market power, particularly in regard to volume and value of consumer data acquired by platforms. These findings supported recommendations for improvements to competition law so that large digital platforms would be required to provide advance notice of relevant acquisitions, and for the merger test in competition law to include specific reference to the acquisition of data and to transactions that might lead to the loss of a potential competitor (ACCC, 2019: 91, 95). It supported a specific recommendation regarding Google, which – if it does not voluntarily offer Australian users of Android devices with the option to choose a default search engine and Internet browser – should be subject to new laws that require it to do so (ACCC, 2019: 110).

The ACCC documented the complex value chain for online advertising services, observing a lack of transparency on pricing, cost effectiveness, and overall value of digital advertising that can adversely affect both advertisers and the owners of websites. Having noted that Google and Facebook both operate across different parts of the advertising supply chain, with the potential to favour their own related businesses, it proposed the establishment of a new 'specialist digital platforms branch' within the ACCC which would investigate potential anti-competitive conduct and conduct a wide-ranging inquiry into competition for the supply of ad tech services (ACCC, 2019).

The ACCC also considered that both Google and Facebook have substantial bargaining power in their dealings with news media businesses in Australia. To address the difficulties facing local media businesses in negotiating terms for the use of their content by digital platforms, the ACCC proposed that codes of conduct be developed by individual digital platforms that would govern their business relations with media businesses. This is similar to the codes of conduct proposed by the Cairncross Review in the United Kingdom. The ACCC proposal is these codes should be reviewed, registered and monitored by the communications regulator, the Australian Communications and Media Authority (ACMA), Australia's main media regulator, which would also have enforcement powers. Similarly, in the United Kingdom, codes of conduct would be developed by platforms 'with guidance from the regulator' which would also have 'a full set of legally backed powers to command information and ensure compliance' (Cairncross, 2019: 92). Under both proposals, if satisfactory codes do not develop in this way, the regulator would step in and develop mandatory rules.

Recommendations designed to address the specific harms said to be caused to media businesses in the provision of news and journalism included targeted grants schemes for local and regional journalism and tax deductions for donations to the production of public interest journalism by non-profit organisations. These aspects were also addressed in some way by the Cairncross Review although the UK proposals included tax deductions for consumers paying for online news (an idea considered and rejected by the ACCC) and direct subsidies for local public interest news were to be administered by a new Institute for Public Interest News which would work with the BBC and platforms to promote innovation and local content and would commission research as well as monitor developments in the sector and promote media literacy (ACCC, 2019: 334, 338; Cairncross, 2019: 95–101). Only the proposal to support local and regional journalism was supported by the Australian government.

There was a contrast in the approach taken by each review to the support for public service media. For its part, the ACCC recommended 'stable and adequate funding' be provided to the public broadcasters, observing that threats to the commercial media sector mean that 'the ABC and SBS perform a critical role in addressing the risk that public interest journalism is under-produced and in contributing to the plurality of journalism in Australia' (ACCC, 2019: 327). Cairncross, however, warned of the BBC's drift to 'soft content' and its competition with the private sector, and recommended that Ofcom consider the extent to which the BBC's services are a substitute for, rather than a complement to, the offerings of commercial news providers. The Cairncross Review recommended that the BBC expand efforts to assist local news publishers, and more clearly differentiate its offerings from commercial news providers (Cairncross, 2019: 96–97).

In relation to the impact of digital platforms on competition generally, and on news producers and advertisers more specifically, the ACCC made recommendations for reform to the communications regulatory framework. These were made on the basis of the latter's 'media-like functions' and their role in 'shaping the online news choices of Australian consumers' (ACCC, 2019: 173). Raising the question of whether digital platforms are becoming *de facto* media companies as they are increasingly involved in the commissioning, editing, curating and distribution of media content (Flew et al., 2019; Picard and Pickard, 2017), the ACCC said,

> It is important that there is appropriate and consistent regulation of digital platforms' functions of selecting and curating content, evaluating content based on specific criteria, and ranking and arranging content for display to Australian consumers. (ACCC, 2019a: 173)

Advocating the need for a 'harmonised' platform-neutral regulatory framework in place of the current fragmented approach which included 'redundant' legislation, the ACCC said that while taking account of differences between industry players, regulation should 'establish a level playing field between market participants who perform comparable functions in the production and delivery of content in Australia' (ACCC, 2019a: 200).

Harms caused to consumers and citizens

The second aspect of harm said to result from the activity of digital platforms is the harm caused to consumers and citizens. The consumer-based recommendations included a suite of measures aimed at protecting privacy. These include a broad proposal for reform of privacy law and the standards and obligations it imposes, along with some specific suggestions for reform, including the following: an expansion in the scope of 'personal information' that is subject to obligations under privacy legislation and an increase in penalties for breaches of the law; strengthening notification and consent requirements; allowing consumers the right to require erasure of personal information; and introducing both a personal cause of action for breaches of privacy legislation, rather than having to rely on the actions of a statutory agency, and a statutory tort for serious invasions of privacy – as previously recommended by the Australian Law Reform Commission (Australian Law Reform Commission, 2014) – that would cover invasions of privacy not within the scope of specific obligations in privacy legislation. In addition, the ACCC recommended a new privacy code of practice for digital platforms that would include obligations relating to matters such as consent, opt-out, data retention and complaint-handling. Other consumer-related recommendations include a significant amendment to consumer law that would impose civil penalties on the use of unfair contract terms (in place of current laws which simply make them void); other amendments to consumer law to prohibit certain unfair trading practices; the establishment of an ombudsman for consumer complaints over matters such as consumer scams and business complaints over the purchase or performance of advertising services; and a related recommendation for the adoption of minimum internal dispute resolution standards.

The citizen-focused recommendations concerning news and journalism took account of existing initiatives from digital platforms to address problems such as the spread of disinformation, such as the blue verification badges used by Facebook and Twitter to designate authentic sources. The ACCC recommended that a government regulator, for example the ACMA, be charged with responsibility for monitoring and reporting on such initiatives (ACCC, 2019: 369). The Cairncross Review made more of a similar recommendation, characterising it as a 'news quality obligation' (Cairncross, 2019: 94) under which online platforms would be required to 'improve how the users understand the origin of an article of news and the trustworthiness of its source, thereby helping readers identify what "good" or "quality" news looks like'. This was said to involve the defining of objectives and measuring improvements, although in the first instance the only

specific obligation on platforms would be to report on initiatives and the only obligation of the regulator would be to gather information, with stricter provisions developed over time, if needed (Cairncross, 2019: 95).

The ACCC referred to its own previous designation as an area for further investigation and proposed the development of a code of practice that would require digital platforms to badge and promote content from news providers that are members of a news standards scheme. As with the Cairncross Review, the ACCC acknowledged problems with this proposal when it was considered further and in the light of industry submissions. However, while Cairncross stops at the point of the 'news quality obligation', the ACCC turns to the recently developed EU Code of Practice on Disinformation (European Commission, 2018), recommending a code of practice that would require participants with more than 1 million monthly active users in Australia to implement complaint-handling practices and a framework for responding to content that meets a 'serious public detriment' threshold. While the code's principal target was to be disinformation (meaning 'inaccurate information created and spread with the intent to cause harm'), the ACCC said it should also consider responses to 'malinformation', defined as 'information inappropriately spread by bad-faith actors with the intent to cause harm, particularly to democratic processes' (ACCC, 2019: 370). Like the business code mentioned earlier, the disinformation code would be registered with and enforced by the government regulator, the ACMA, with consumers able to 'appeal' to the ACMA in cases where they are dissatisfied with the platform's handling of their complaint. And as with the business code, the failure of digital platforms to develop such a code within a specified time would result in the ACMA itself drafting the rules.

Although these aspects are not taken up in the Cairncross Review, the subsequent *Online Harms White Paper* issued 2 months later by the UK Government did include 'online disinformation' as a matter for which there would be a new duty of care. This would be set out in codes of practice that apply to 'companies that allow users to share or discover user-generated content or interact with each other online' (UK Government, 2019: para. 29). Other citizen-based recommendations included resourcing for digital media literacy in the community generally and, more specifically, in schools.

Responses to the ACCC digital platforms inquiry

In contrast to the Cairncross Review, where the UK Government had not formally responded by the end of 2019, the Australian Federal Government has responded promptly to the recommendations of the ACCC Digital Platforms Inquiry. After a 3-month period of consultation conducted by the Department of the Treasury, The Treasurer, Josh Frydenberg; the Minister for Communications, Cyber Safety and the Arts, Paul Fletcher; and the Attorney-General, Christian Porter, issued a joint statement where they indicated that they had noted or accepted all but 2 of the ACCC's 23 recommendations. Accepting the general merits of the case for regulatory intervention into matters relating to news and journalism and their relationship to digital platforms, it was observed that

> The Government accepted the overriding conclusion was that there is a need for reform – to better protect consumers, improve transparency, recognise power imbalances and ensure that

> substantial market power is not used to lessen competition in media and advertising services markets. (Australian Government, 2019)

The government's response has prioritised four areas for policy action. The first is the establishment of a special unit in the ACCC to monitor and report on the state of competition and consumer protection in digital platform markets. It will be empowered to act against anti-competitive behaviour, and has been tasked with investigating competition in online advertising and the supply of ad tech services, to determine whether there is any evidence of anti-competitive practices given the opacity and apparent lack of transparency in programmatic advertising through Google and Facebook. In doing so, it follows the recommendations of the Digital Competition Expert Panel in the United Kingdom in seeking to unlock the digital advertising value chain, and determine 'whether any exclusive or preferential practices have an adverse effect on competition within the ad tech sector' (Digital Competition Expert Panel, 2019); the development of a voluntary code of conduct to address bargaining power concerns between digital platforms and news media businesses. In an attempt to apply 'soft law' principles to the platform-publisher relationship (Van der Sluijs, 2013), the ACCC has been advised to work with the relevant parties to develop and implement these voluntary codes, with the Government to only develop 'alternative options' which 'may include the creation of a mandatory code' (Australian Government, 2019: 15), should voluntary agreement not be reached. In terms of the content of these codes of conduct, the proposal includes a recommendation for terms that promote sharing of user data and advance warning of algorithmic changes that might significantly affect news ranking and referral (ACCC, 2019), which is similar to the Cairncross recommendations for new codes of conduct to govern commercial arrangements between digital platforms and news publishers:

> To address the unbalanced relationship between publishers and the online platforms upon which they increasingly depend for referral traffic . . . the Review **recommends** that these platforms should be required to set out codes of conduct . . . The process would be overseen by a regulator, with powers to insist on compliance and particular skills in understanding both economics and digital technology. Once approved by the regulator, these codes can form the basis for individual negotiations between publishers and online platforms. In time, the regulator might move to set out a compulsory set of minimum requirements for these codes . . . If those powers proved insufficient, government should implement stronger measures. (Cairncross, 2019)

The third priority has been to 'commence a staged process to reform media regulation towards an end state of a platform-neutral regulatory framework covering both online and offline delivery of media content to Australian consumers' (Australian Government, 2019). In commencing this work, which could prove to be a long and contentious process based upon prior experience, the Government has announced a Review of the National Classification Scheme, that will build upon the Australian Law Reform Commission's (2012) report, and focus primarily upon consistency between the classification categories across platforms, as distinct from the ethics or morality of regulating sexually explicit content, or other content areas such as Australian content requirements (Department of Communication and the Arts, 2019). The Government also announced it would release a

report on Australian content in early 2020, followed by further work on advertising restrictions and other aspects of regulation in the second-half of that year (Australian Government, 2019: 9). Related to this work on media content is the enhancement of an existing funding programme supporting journalism, particularly public interest journalism and the production of news in regional areas. The Government will also support media literacy programmes and the ACMA will oversee the development of voluntary codes of conduct that encourage digital platforms to tackle disinformation and that 'support the ability of Australians to discern the quality of news and information' (Australian Government, 2019).

Finally, the Government will commence a review of the Privacy Act 1988 in order to strengthen Privacy Act provisions with regard to the definition of 'personal information' to include technical data and other online identifiers, increasing penalties for privacy breaches, and enabling consumers to more easily take action against those who breach their personal privacy. A review of privacy laws in the online environment has long been unfinished business in Australian law reform (Australian Law Reform Commission, 2014), and international events such as the Cambridge Analytica scandal, where the data of up to 87 million Facebook users were harvested by political campaigns such as the 2016 UK 'Brexit' referendum and Donald Trump's 2016 Presidential election campaign in the United States, have given change in this area considerable momentum (AUTHOR DELETED, 2019b). The Government was more circumspect about some of the ACCC recommendations on privacy, with concern for law enforcement and national security investigations in relation to a right of erasure of personal information (Australian Government, 2019: 17–18).

Conclusion

The ACCC Digital Platforms Inquiry came at a time of significant downturn in the traditional news media industries, albeit in a country where the concentration of ownership of print and broadcast media has been acute and a public concern spanning decades (Papandrea and Tiffen, 2016). Faced with the twin threat of local exposure to global news brands such as *The Guardian*, *Daily Mail Online* and *Buzzfeed* and the transfer of advertising revenue to Google and Facebook, the public policy goal of encouraging media diversity has been overtaken by the much more expansive efforts to regulate digital platforms. While locally, there may be a tendency to overlook lingering problems with media concentration, one interesting aspect of the recent attention to platform regulation is the public acknowledgement – in Australia and in at least some other countries – of the public value of journalism. And although aspects of platform regulation play out differently across jurisdictions, the comparison (set out earlier) to the findings of the Cairncross Review in the United Kingdom shows that many of the issues are similar, as are some of the solutions. The UK Government's *Online Harms White Paper* and its response released in February 2020 (UK Government, 2020) further demonstrate the desire on the part of national governments to find ways of regulating online platforms. The White Paper itself connects with the recommendation of an earlier report of a House of Commons committee in February 2019 investigating disinformation and fake news, which recommended that the regulatory framework embrace a 'new category of tech company' (House of Commons, 2019: 10, 16).

Such efforts to characterise digital platforms in regulatory terms are being pursued around the world; in covering competition law, privacy, copyright and consumer law as well as news and journalism, the ACCC report demonstrates the difficulty of neatly containing 'platform regulation'. It also raises important questions about the capacity of small nations such as Australia, which has a population of 25 million, to influence the conduct of global digital platform giants. The significance of whether small nations can act effectively has been illustrated with initiatives such as the Christchurch Call, led by the New Zealand government, for Facebook and other live streaming services to take greater responsibility for content distributed across their platforms, in the wake of the livestreamed murder of over 50 people at 2 Christchurch mosques in March 2019 (Christchurch Call, 2019). This collaborative, international approach to platform governance stands in contrast to the Australian Parliament's swift response to the killings, by which Australia's criminal law was amended to prohibit the streaming of 'violent, abhorrent material'. As doubts remain over the enforceability of some aspects of this law, so too are there questions about the relevance of national sovereignty, the capacity to enact national laws towards Internet content in an age of global platforms, and whether this will lead to fragmentation of the global Internet and the rise of the 'splinternet' (Flew et al., 2019; Mueller, 2017).

Finally, the ACCC's report and the response from the Australian Government highlight the 'unfinished business' of reforming media regulation in order to address the contemporary platform environment. In some ways, the current policy moment marks a return to the debates about convergent media policy that were a feature of the Rudd-Gillard Labor governments of the early 2010s, in seeking both to address regulatory imbalances between legacy media (especially broadcasting) and the largely unregulated digital platforms, as well as adapting media laws and policies to be focused upon issues of market conduct and media content, rather than upon modes of delivery (Australian Law Reform Commission, 2012; Convergence Review Committee, 2012; Flew, 2016). In Australia at least, few of the issues identified in earlier reviews have been addressed in regulatory reform. But while the earlier debates characterised the challenge in terms of 'media convergence', the prominence of digital platforms now prompts concerns for 'harmonisation' of laws to address the imbalance between platforms and publishers. In the era of media convergence, policy-makers struggled to respond to the collapse of analogue world 'silos' of telephony, broadcasting, print and the Internet; in the age of digital platforms, harmonisation is mostly about finding ways to regulate those who control the online environment, but there is still the need to address long-standing problems with legacy regulation. Hence, there are calls for new regulation – for example, laws to prohibit harmful content – alongside appeals for deregulation that would relieve traditional media providers from some long-standing social and cultural policy obligations. While there is no doubt a good case for removing or adapting some aspects of regulation, in Australia and perhaps elsewhere, there is a risk that the urgency in tackling platform power could overshadow other aspects of public policy. The Australian Government's multi-faceted response to the Digital Platforms Inquiry appears to address some of this risk; its implementation will be closely watched in this country and will provide important insights for regulators and policy-makers internationally.

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Notes

1. Algorithmic regulation refers to

   > decision-making systems that regulate a domain of activity in order to manage risk or alter behaviour through continual *computational* generation of knowledge by systematically collecting data (in real time on a continuous basis) emitted directly from numerous dynamic components pertaining to the regulated environment in order to identify and, if necessary, automatically refine (or prompt refinement of) the system's operations to attain a pre-specified goal. (Yeung, 2018: 505)

   As companies themselves already engage in such regulation of their own algorithms, the term is commonly used to refer to government regulations that aim to reconfigure the operations of algorithms in support of particular policy goals. In this instance, the proposal was to regulate search and social media algorithms so as to prioritise news content from sources considered to be more legitimate, such as traditional news publishers.
2. Although the inquiry itself did not address specific matters where the ACCC considered digital platforms had breached existing law, separate enforcement action is being considered in some cases. One example is the ACCC's action against Google for what it alleges was conduct that misled users of Android devices in relation to the collection of location data (ACCC, 2019).

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