



QUAY INSIGHTS

November 2024

Digital platforms – latest theories of harm and regulatory changes in the Australian media context

When considering theories of harm in the Australian context, the ACCC's groundbreaking Digital Platforms Inquiry, and its more recent Digital Platforms Services Inquiry, are instructive.

The most significant harms brought about by digital platforms to Australia's media are self-preferencing through ad tech services and the rise of generative AI chatbots as search services. The paper argues that the ACCC's recommended approach of a binding code will address these harms in a more practical and flexible way than adopting measures from the EU Digital Markets Act or taking enforcement action through litigation that can only address specific conduct – conduct which may no longer be relevant by the time the hearing date arrives.

This paper has been adapted from a speech given by Angela Flannery, as part of a panel at RBB Economics competition conference on 13 November 2024.

Original purpose of the ACCC's Digital Platforms Inquiry

Theories of harm as they relate to digital platforms in the Australian context can be understood by returning to the origins of the ACCC's groundbreaking 2017-2019 Digital Platforms Inquiry (**DPI**). It should be remembered that the DPI was conducted at the direction of then Treasurer Scott Morrison, who tasked the ACCC with looking at the effects that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets.

In fact, the Government at the time was in effect forced to direct that the ACCC carry out the DPI in order to obtain the support of one of the Senate cross benchers for its legislation to reform Australia's very arcane cross media ownership rules.

Therefore, in my comments, I focus on two specific issues related to digital platforms, related harms and regulatory change that have had the most impact on the media sector in Australia.

These areas are:

- ad tech services and
- the rising use of AI chatbots as an alternative to traditional general search services.

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Theories of harm and regulatory responses

Ad tech services

The first topic links to one specific aspect of the proposed Australian equivalent of the EU's Digital Markets Act and the UK's Digital Markets, Competition and Consumer Act.

Following from the DPI, in 2020 the ACCC was tasked with undertaking a longer 5-year inquiry into Digital Platform Services (**DPSI**), which provided for a much broader scope of issues to be considered by the ACCC and is now close to completion. The fifth interim report from the DPSI released in September 2022 (**DPSI Fifth Interim Report**) contained what are likely to be the most important recommendations made by the ACCC from its investigations.

Competition harms from digital platforms

While the DPSI Fifth Interim Report acknowledged the valuable services that digital platforms make available to both businesses and consumers, the ACCC stated that it had significant concerns about consumer and competition harms.

To address the competition harms, the ACCC recommended to Government that it be given powers to implement legally binding codes of conduct imposed on a service-by-service basis requiring designated digital platforms to address specific competition issues such as (but not limited to) self-preferencing.

The ACCC has proposed that its new codes regime should be able to address self-preferencing in the ad tech services sector, that is, the provision of services for the selling and buying of advertising space on websites or apps.

Ad Tech Inquiry

The ACCC is seeking the power to make codes to address this issue as a result of the significant business and consumer harms that it identified in its (now not much talked) about Digital Advertising Services Inquiry (**Ad Tech Inquiry**) final report completed in 2021 (**Ad Tech Report**).

In the Ad Tech Report, the ACCC concluded that Google has a dominant position in the ad tech supply chain with more than 90% of ad impressions traded on the open internet using at least one Google service. The ACCC also found that Google used its position to preference its own services including, for example, by refusing to allow rival ad tech services to access ads on YouTube.

While no doubt the behaviour of Google has changed since the time the Ad Tech Inquiry was completed in 2021, given that Google remains the dominant provider, it seems likely that anticompetitive behaviour in the ad tech services sector is still prevalent.

The ACCC also concluded in the Ad Tech Inquiry that in 2020 at least 27% of advertiser spend – that is, more than a quarter – of ads sold via ad tech services was retained by the providers of those services, and that higher ad tech fees were paid than would be the case in a competitive market.

For obvious reasons, this matters to the media sector, particularly given the significant negative impacts on the advertising revenues publishers are able to generate to fund the production of their high quality content.

Platform specific and flexible codes

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The ACCC considered in the DPSI Fifth Interim Report that the type of code it has proposed, that is, platform specific and flexible, would be the correct regulatory approach to adopt to address this type of anticompetitive conduct in the ad tech services market.

This is arguably the correct approach – there is a very specific type of service and (at least at the current time) only one digital platform providing that service that is engaging in what the ACCC perceive to be the anticompetitive conduct.

While implementing an ex ante code may still lead to litigation if not complied with, if such a code were to be drafted with sufficient specificity, it would be likely to produce much better outcomes than the ACCC taking enforcement action to address specific conduct such as through a misuse of market power case under section 46 of the Australian Consumer Law.

Code is preferable to specific litigation

Specific litigation will address only one type of conduct and is likely not to have long term positive impacts. The consumer protection cases that the ACCC has taken against Google regarding its data collection practices are illustrative. While the ACCC was successful in the first case that it took against Google, by the time the case had been heard, Google's practices had changed. Given the case was so specific, it is unlikely that the ACCC's win has had any significant impact on Google's ongoing practices or the data collection practices of other digital platforms. A code however can – if properly drafted – provide direct guidance as to acceptable practices that can be followed, not only by the directly regulated platform, but also by others.

There are a number of concerns typically expressed in relation to the EU Digital Markets Act, including that it does not provide certainty as to what conduct would actually breach the regime, which has led in some cases to different platforms not providing specific services in Europe. Additionally, the EU's competition regulatory approach has been recently criticised in the report, *The future of European competitiveness* (the Draghi Report). A specific code does not raise those types of issues.

For these reasons, while one might be somewhat sceptical as to whether the ACCC has large enough teams to engage in what is likely to be a very exhausting process of both undertaking the necessary consultation to put the codes in place, and to then enforce them, the codes approach does have merits over the broader principles based approach that is in the Digital Markets Act.

Codes – An important vehicle

In conclusion, the importance of the proposed codes must be stressed. There has been much talk in recent times about the potential for implementing regulation for alternative sources of funding for Australian news media businesses, but a properly implemented code targeting anticompetitive behaviour in relation to ad tech services will go a long way towards addressing the issue of increasing funding for Australian media businesses.

The rise of Chatbots as search services

The second issue connects with commentary in relation to the US Google search services monopolisation case.

ACCC and general search services

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The penultimate report that the ACCC has prepared for the DPI, which was provided to the Government at the end of September, addressed general search services.

While the ACCC's report on search services has not been publicly released, it has been completed and the ACCC's views in relation to the state of competition regarding search services are demonstrated by the action that it has recently taken against Australia's three mobile network operators.

On 2 July the ACCC announced that it had accepted undertakings from the two largest mobile network operators in Australia – Telstra and Optus – in relation to the pre-installation of Google search service as the default search service on the Android mobile devices that they offer to their customers. On 13 August, the ACCC announced it had accepted an equivalent undertaking from TPG, the remaining operator. These undertakings were obtained as the ACCC was concerned that the agreements these telecommunications service providers had entered into with Google regarding that pre-installation had the potential to be anticompetitive because they limited consumer choice and had the potential to deter innovation.

The ACCC has been at pains to point out that it is still investigating Google's conduct – however, if one can be cynical for a moment it seems that the ACCC has gone for the “low hanging fruit” by not first taking action against the global digital platform that instigated these agreements.

Search services and Australian media

While it appears likely that the ACCC's report on search services will focus on competition in relation to search services themselves, not the impact that search services may have on other markets (as was the case when the ACCC undertook its DPI) it remains the case that general search services have the potential to, and actually do, have a negative impact on the Australian media sector.

The final report of the DPI concluded that news media content was important to Google in the provision of its search services, particularly through providing snippets of news content to users.

While media companies benefited from snippets of their content and consumers did as well, the negative impact was that the use of such snippets disintermediates media companies from their audiences and, where users do not visit the websites of those media businesses, limits their ability to generate revenue from those sites.

This was occurring in an environment where the ACCC concluded that the imbalance of bargaining power between the global digital platforms and news media businesses meant that news media businesses were not being adequately compensated by those platforms for the use of that content.

Generative AI chatbots as search engines

The market failure identified by the ACCC in this earlier work is exacerbated by the fairly recent advent of chatbot services based on generative AI technologies which are becoming increasingly popular. It is a fairly safe bet that it will not be very long before these type of chatbots replace general search services.

This can be demonstrated by looking at Google's recent release of its new AI search engine known as “AI Overviews” in the Australian market, discussed further below.

The competition issues in relation to these generative AI services relates to the use of content of media businesses without payment. First, these AI chatbots are developed on the basis of large

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language models (LLMs) that are built by training on data that includes the data of media companies – though how much of that content is used for such purposes is unknown given the general lack of transparency as to how that training occurs.

In addition, that content of media companies is used to “ground” the output of these AI chatbots. For example, in relation to Google’s AI Overviews product, Google states that AI Overviews are designed to surface reliable and relevant information. Google’s publicly available material¹ states that Google is using content from verified sources in that service to reduce “hallucinations,” which is where a chatbot provides information that is not correct:

Because accuracy is paramount in Search, AI Overviews are built to only show information that is backed up by top web results.

This means that AI Overviews generally don't “hallucinate” or make things up in the ways that other LLM products might.

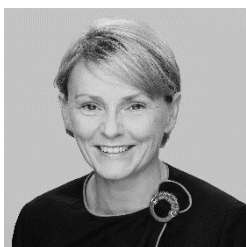
Further, although the use of snippets meant that often users did not click through to underlying news media sites, links to those sites would be provided, and in some cases users will click through to the underlying site. On the other hand, where AI chatbots provide more complete details in response to questions, and may not even provide links to the sites of the relevant media company, this makes it significantly less likely that users will access the content on the news media sites.

Australian media missing out on deals

While deals have been done internationally between different global AI companies and media organisations (which is an acknowledgement of the importance of news content in the development of LLMs that underpin generative AI services) no deals have been done between those companies and domestic Australian media companies.

This makes the case for regulation in this area very important, given the substantial risks of market failure – the use of content for training and grounding without payment, together with audience disintermediation – has the potential to have a significant impact on the creation of Australian news and journalism. And while there might be arguments that it is too soon to implement broad regulation to AI, there is clearly a need for some form of regulation to address this specific problem.

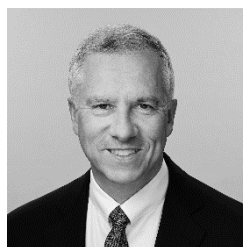
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¹ AI Overviews: About last week – May 2024 - <https://blog.google/products/search/ai-overviews-update-may-2024/#:~:text=Because%20accuracy%20is%20paramount%20in,that%20other%20LLM%20products%20might.>