Digital Platforms Inquiry, Department of the Treasury, Structural Reform Division

Submission on the final report of the Australian Competition and Consumer Commission's Digital Platforms Inquiry

12 September 2019

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We are academics and scholars with expertise in the law and economics of competition, antitrust, privacy, security, innovation, media, and technology policy. We have written extensively on all the issues addressed in the Final Report of the Australian Competition and Consumer Commission's Digital Platforms Inquiry and have strong reservations concerning the way that the ACCC has approached many of these issues and the conclusions and recommendations it has drawn. In this submission, we summarize our main concerns.

We submit these comments in our personal capacities. They do not necessarily reflect the views of our employers or other organizations with which we are affiliated.

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The Limits of the Digital Platforms Inquiry

The emergence of "Big Tech" has caused some observers to claim that the world is entering a new gilded age.[1] In the realm of competition policy, these fears have led to a flurry of reports in which it is asserted that the underenforcement of competition laws has enabled Big Tech firms to crush their rivals and cement their dominance of online markets.[2] They then go on to call for the creation of novel presumptions that would move enforcement of competition policy further away from the effects-based analysis that has largely defined it since the mid-1970s.[3]

Australia has been at the forefront of this competition policy rethink. In July of 2019, the Australian Competition and Consumer Commission (ACCC) concluded an almost two-year-long investigation into the effect of digital platforms on competition in media and advertising markets.[4]

The ACCC Digital Platforms Inquiry Final Report spans a wide range of issues, from competition between platforms to their effect on traditional news outlets and consumers' privacy.[5] It ultimately puts forward a series of recommendations that would tilt the scale of enforcement in favor of the whims of regulators without regard to the adverse effects of such regulatory action, which may be worse than the diseases they are intended to cure. These include mandated "platform neutrality" obligations,[6] tighter merger rules,[7] firm and industry-level codes

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[1] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

[2] *See* JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE, HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA FINAL REPORT (2019) ("Cremer, et al. Report"), *available at* http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf. *See also*, CHICAGOBOOTH STIGLER CENTER COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE REPORT (May 15, 2019) ("Stigler Center Report"), *available at* https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure--report-as-of-15-may-2019.pdf?la=en&hash=B2F11FB118904F2AD701B78FA24F08CFF1C0F58F. *See also*, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 2019) ("Furman Report"), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf, p. 87

[3] *See, e.g.*, Cremer, et al. Report, *id.* at 4, ("*In such cases, there may be, for example, a presumption in favour of a duty to ensure interoperability. Such a presumption may also be justified where dominant platforms control specific competitively relevant sets of user or aggregated data that competitors cannot reproduce*."). *See also*, Furman Report, *id.* at 87, ("*There is a strong body of economic theory and evidence underlying modern competition policy. This can allow some use of structural presumptions. More could be done to develop this area, in particular in light of the digital economy, and appropriate enhancements would remain fully consistent with the use of a customer welfare standard*.").

[4] The investigation was initiated on December 4, 2017, by then-Treasurer, the Hon Scott Morrison MP.

[5] *See* AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY FINAL REPORT (June 2019) ("ACCC Final Report"), *available at* https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/final-report-executive-summary. ("ACCC Final Report" or "the report").

[6] *Id.* at 30.

[7] *Id.*

of conduct over which the ACCC would have a discretionary oversight,[8] and the adoption of more stringent privacy rules.[9]

To the extent that these proposed reforms reflect presumptions of harm or impose prescriptive restraints, they would thus imply a lighter investigation of *actual* anticompetitive effects and reduced attention to the avoidance of false positives. The mandate given to the ACCC is particularly enlightening in this respect:

> It is important to note that the Terms of Reference for this Inquiry **do not require** the ACCC to focus on whether digital platforms **have misused their market power**. The Terms of Reference **instead** pose broader questions, including whether the digital platforms are exercising their market power in their dealings with advertisers and content creators **in ways that could, for example, cause market failure**.[10]

The implication is clear: Australian policymakers are afraid that large tech firms *might* harm competition in ways that are hard to identify. And, the concern continues, these firms' conduct *might* escape prosecution if the underlying competition rules (as well as some existing legislative provisions) remain unchanged.

Some scholars have praised the report for striking a delicate balance between claims that Big Tech firms should be broken up, on the one hand,[11] and counterarguments that these firms compete fiercely against one another, on the other.[12] For instance, in a recent CPI piece, Caron-Beaton Wells welcomed the ACCC's decision to reject potential breakups of Big Tech firms, as well as its "cautious" approach to addressing competition issues with new regulations.[13]

This submission offers a dissonant view. It argues that many of the report's recommendations are highly imprudent, and that the report's "precautionary principle" approach would do real damage to the very consumers it purports to protect.[14]

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[8] *Id.* at 32 & 34.

[9] *Id.* at 35.

[10] *See* ACCC Final Report, *supra* note 5, at 10 (emphasis added).

[11] *See, e.g.*, Nicholas Thompson, *Tim Wu Explains Why He thinks Big Tech Should Be Broken Up*, WIRED, Jul. 5, 2019, https://www.wired.com/story/tim-wu-explains-why-facebook-broken-up/.

[12] *See, e.g.*, Nicolas Petit, *Technology Giants, the Moligopoly Hypothezis and Holistic Competition: A Primer*, Working Paper (2016).

[13] *See* Caron Beaton-Wells, *Ten Things To Know About The ACCC's Digital Platforms Inquiry*, CPI OCEANIA COLUMN 6-10 (2019) ("*Despite the strong language of the Report and the ACCC Chairman in his press conference announcing its release, the Inquiry has not made recommendations for any significant changes (yet) to Australia's competition law.*").

[14] On the wider problems with the "precautionary principle", *see* Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASHINGTON & LEE LAW REV. 851 (1996). *See also*, Aurélien Portuese and Julien Pillot, *The Case for an Innovation Principle: A Comparative Law and Economics Analysis*, 15 Manchester Journal of International Economic Law 214 (2018).

The ACCC Final Report claims that competition is "not working" in the media, communications, advertising and other markets it investigated,[15] and that substantial regulatory and legislative changes are necessary to solve—and *would* solve—the problems caused by ineffective competition.[16] But the premise is not well supported by the report, and there is considerable reason to believe that the stated concerns are unfounded.[17] Moreover, even if the report's premise were accurate, its conclusion misses the bigger picture: Government intervention is appropriate only if it produces net social benefits. The fact that a market does not satisfy some idealized benchmark is irrelevant if regulation merely exacerbates the perceived failure or creates new and greater costs.[18] Yet the ACCC Final Report almost entirely omits consideration of possible *regulatory* failure. It is thus of little practical value in evaluating the merits of potential regulatory interventions.

This submission tackles three significant oversights. First, the ACCC's recommendations on platform neutrality and the proposed creation of a "digital platforms branch" underestimate the limits of regulators' ability to identify market failure and the major difficulties that regulators face when attempting to design markets. For instance, it is not clear that forcing Google to introduce browser and search engine choice screens will either accelerate the entry of competitors or improve users' experience. Second, the ACCC's attempts to prop up local media firms appear

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[15] *See, e.g.*, ACCC Final Report, *supra* note 5, at 2 ("*The ACCC considers that the regulatory frameworks governing media, communications and advertising also need to be addressed, as they do not allow competition on the merits.*."); *id.* ("*The competition concerns extend beyond specific sets of advertisers.*"); *id* ("*The opacity of this ad tech supply chain leads participants to question its efficiency. Where problems do occur, they may be impossible for participants to detect.*").

[16] *See, e.g., id.*, at 3 ("*The ACCC is concerned that the existing regulatory frameworks for the collection and use of data have not held up well to the challenges of digitalisation and the practical reality of targeted advertising that rely on the monetisation of consumer data and attention.*"); *id.* ("*Policy makers must ask whether the principles that have applied in the past are still fit for purpose and must review legislative tools, principles and oversight to address further technological and consumer-driven developments.*"); *id.* ("*The pace of technological change needs to be matched by the pace of policy review. As digital markets and the use of data continue to grow and change, governments need to continue to consider the appropriate level of oversight. The recommendations in this Report allow for this: they both address current problems and allow the Government to identify and address new problems as they arise.*").

[17] *See, e.g.*, INTERNATIONAL CENTER FOR LAW & ECONOMICS: CONCLUDING COMMENTS: THE WEAKNESSES OF INTERVENTIONIST CLAIMS (June 2019), available at https://laweconcenter.org/wp-content/uploads/2019/07/Concluding-Comments-The-Weaknesses-of-Interventionist-Claims-FTC-Hearings-ICLE-Comment-11.pdf, p. 5. ("*Some participants claimed that network effects create winner-take-all markets for tech platforms. While it may be true that some markets are naturally winner-take-most, from the perspective of consumer welfare, this is not necessarily a negative outcome. In the case of communications networks, it is intuitively obvious why consumers would be better off participating in a few large networks than in many small ones. Furthermore, critics ignore the potential for Schumpeterian innovation, i.e., when innovation occurs at the platform level, and platform owners leapfrog each other, maintaining a temporary monopoly long enough to be compensated for putting startup capital at risk.*"). *See also*, Catherine Tucker, *Digital Data, Platforms and the Usual [Antitrust] Suspects: Network Effects, Switching Costs, Essential Facility*, 54 REVIEW OF INDUSTRIAL ORGANIZATION 684 (2019). ("*I find little evidence that digital data augments market power due to either network effects or switching costs. Instead, digitization may have weakened these two economic forces, because it frees a user from a particular hardware system. Last, it seems unlikely that data can ever meet the criteria for an essential facility, simply because it is often not very valuable and because, since digital data is non-rival, many sources usually exist.*").

[18] *See, e.g.*, Harold Demsetz, *Information and efficiency: another viewpoint*, 12 JOURNAL OF LAW & ECONOMICS 1 (1969). ("*This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements. In practice, those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient. Users of the comparative institution approach attempt to assess which alternative real institutional arrangement seems best able to cope with the economic problem*").

to be driven by nostalgia for a bygone, pre-modern era, rather than a rigorous assessment of the costs and benefits of media regulation. The ACCC is quick to assume that its recommendations would produce tangible benefits for consumers, but it overlooks the potential market distortions—and impediments to ongoing innovation—that might be generated in the process. Previous problematic attempts at media regulation suggest that the report may be far too optimistic regarding its ability to improve markets for consumers. Finally, the report's recommended extension of Australia's privacy legislation completely ignores the tremendous compliance costs that doing so would impose on firms and, indirectly, on consumers. The recent introduction of privacy legislation in the EU and California suggests that these compliance costs might well outstrip the benefits to users.

I. The overlooked costs of enforced platform "neutrality"

The ACCC Final Report puts forward many recommendations to address perceived competitive concerns in digital platform industries. In asserting the existence of these competitive failures, the report disregards traditional tools of competition policy in favor of a much looser approach. Most notably, the ACCC relies upon a piecemeal market definition exercise and departs from traditional antitrust theories of harm. This methodological frailty also ripples through the report's recommendations. Indeed, the report does not sufficiently defend its conclusions that mandated platform neutrality and the establishment of a digital platforms branch would alleviate the concerns identified by the ACCC.

While the recommendations put forward by the ACCC might seem familiar to most competition policy scholars, its underlying analysis is much less so. In all modern competition jurisdictions the imposition of competition-related remedies is subject to a detailed market definition analysis, the establishment of market power, and proof that defendants violated some pre-established theory of harm. The ACCC Final Report contains none of these.

The report claims that Google controls a large share of the "general search advertising" and "vertical search advertising" markets.[19] It similarly asserts that Facebook commands a 51% share of "display advertising".[20] Yet the report fails to put forward a coherent—let alone quantitative—argument that these are indeed relevant markets for competition policy purposes. Readers are left to guess why it is that large players, such as Amazon, as well as the massive range of offline advertising and marketing outlets, are excluded from this analysis. This is particularly problematic given the report's clear conclusion that online advertising is successfully competing with offline (e.g., print media and broadcast) advertising. While it may be true that online advertising earns an increasingly large share of the advertising market, the ACCC Final Report's own (unscientific and casual) presentation of its analysis seems to show online advertising

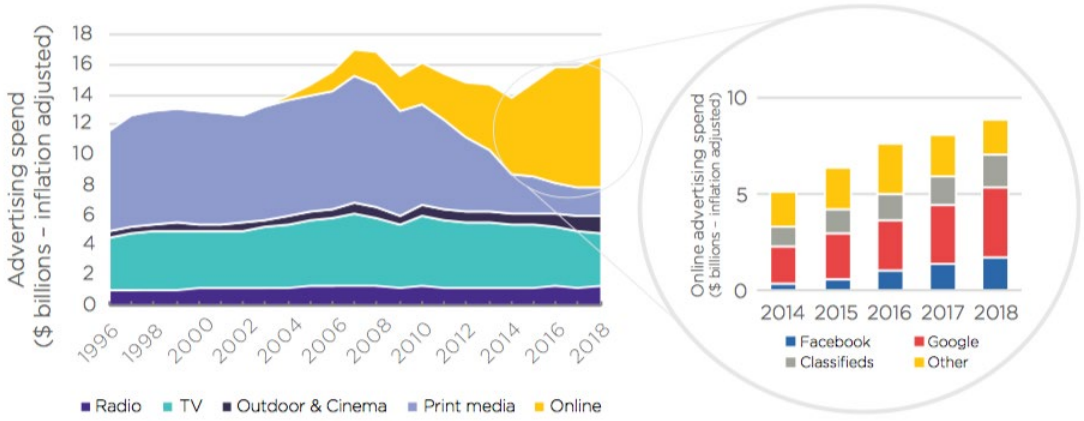
[19] *See* ACCC Final Report, *supra* note 5, at 94.

[20] *Id.* at 97.

holding around 50% of advertising overall—and Google and Facebook *combined* holding only about 61% of the purported online market (see "Figure 1.3" below).[21]

It is true that the report mentions—and then dismisses—the possibility of competition between online and offline advertising: "The ACCC considers that, while there may be a degree of substitutability between online and offline advertising, it does not follow that offline advertising places a substantial competitive constraint on online advertising."[22] But the report's means of distinguishing between the two markets does not turn on the antitrust-relevant criteria of demand and supply substitution; rather, it turns on the differences between the specific matching mechanisms employed by each.[23] Further gradations (e.g., between online search and display advertising) turn on similarly inapposite characteristics.[24]

Figure 1.3 Advertising expenditure by media format and digital platform, adjusted for inflation



Note: Amounts adjusted to 2018 dollars.

Source: Commercial Economic Advisory Service of Australia, Advertising Expenditure in Main Media, 1996 – 2018[27], accessed 11 April 2019. ACCC Analysis. Data provided to the Inquiry.

The problem—especially for the report's frequent claims that it permits "dynamic" and forward-looking assessments—is that it accepts as inviolable the status quo, even as the status quo itself is a recent and still-evolving state of affairs. Moreover, the assumption that the dominance of online advertising is unassailable is seemingly in tension with the report's assertions that online advertising causes irrevocable harm to consumers, media, and the like. If true, as the relevant constituencies become increasingly aware of these problems, they should naturally serve to decrease the attractiveness of online advertising relative to many of its offline counterparts.

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[21] ACCC Final Report, *supra* note 5, at 46. And none of this includes the larger marketing market, of which advertising is just a part.

[22] *Id.* at 92.

[23] *Id.* at 91 (distinguishing between the *degree*–not even the existence per se—of "targeting" in online versus offline advertising).

[24] *See, e.g., id.* at 92-94.

Meanwhile, the report's premise is precisely that online advertising (and Google and Facebook uniquely and especially) has imperiled the financial well-being of offline media. The two positions are irreconcilable: either online advertising is a substitute for offline advertising that has drawn away considerable revenue, or else the two are not in competition and the failing fortunes of the one cannot be laid at the feet of the other.

The defects of the report's analysis are even more problematic given that the ACCC seemingly infers both the existence of market power and anticompetitive harm from its cursory analysis. For a start, the report mostly alludes to the existence of market power on the basis of "market shares" in these ill-defined markets.[25] This a far cry from modern antitrust practice, where authorities and courts question whether firms will be able to durably charge prices that are markedly above the competitive benchmark.[26]

Likewise, the ACCC's "theory of harm" amounts to little more than an observation that digital platform markets have features that purportedly complicate market entry by rivals, thus leading to concentrated market structures. Take the ACCC's conclusions regarding Google:

> The ACCC identified customer inertia as a barrier to expansion and considered that that customer inertia is reinforced by a default bias that exists with Google Search being the default search engine on a number of internet browsers, and Google Chrome being the default internet browser on a number of operating systems.[27]

In fact, it is likely that a majority of consumers simply prefer Google's browser and search offerings. In the desktop environment, Google's ChromeOS has less than 1% market share in Australia, whereas Microsoft's Windows has a market share of 69% and Apple's IOS a 24% market share.[28] The default browser on Windows is Edge, while the default browser on IOS is Safari, yet Chrome is chosen by about 70 percent of users in Australia.[29] Meanwhile, about 90% of desktop searches in Australia are performed using Google.[30] Given the demonstrable preference for Google's browser and search engine, forcing consumers to go through a choice

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[25] *Id.* ("*Facebook has substantial market power in the supply of display advertising in Australia, with a market share of around 51 per cent.*").

[26] Scholars have consistently shown that market shares alone are insufficient to establish the existence of market power. *See, e.g.*, William M. Landes & Richard A. Posner, *Market power in antitrust cases*, HARVARD LAW REVIEW, 952 (1981). ([E]*quation (2) makes clear that a given market share is neither necessary nor sufficient for a firm to be able to raise prices above the competitive level*).

[27] *See* ACCC Final Report, *supra* note 5, at 110.

[28] *See* Desktop Operating System Market Share Australia Aug 2018 - Aug 2019, STATCOUNTER GLOBALSTATS, https://gs.statcounter.com/os-market-share/desktop/australia.

[29] See Desktop Browser Market Share Australia Aug 2018 - Aug 2019, STATCOUNTER GLOBALSTATS, https://gs.statcounter.com/browser-market-share/desktop/australia/#monthly-201808-201908.

[30] *See* Desktop Search Engine Market Share Australia, Aug 2018 - Aug 2019, STATCOUNTER GLOBALSTATS, https://gs.statcounter.com/search-engine-market-share/desktop/australia/#monthly-201808-201908.

screen may at best be a waste of time, and at worse a paralyzing choice between indiscernible options.[31]

In spite of having failed to demonstrate actual harm to competition or consumer welfare, the ACCC calls for the imposition of stringent "platform neutrality" obligations. Most notably, it would require Google to provide users of the Android platform with a choice of internet browsers and search engines, rather than make its own services the default option.[32] Moreover—and contrary to what will likely be the case in Europe[33]—Google would not be able to auction off these "ballot box" slots. Instead, Google would have to include internet browsers and search engines based on their popularity, showing them in random order.[34] Finally, the ACCC would investigate whether similar obligations should be imposed upon other digital platforms, via a newly established digital platforms branch.[35]

Unfortunately, the ACCC mostly ignores the potential costs of platform neutrality obligations, as well as the potential rent-seeking opportunities created by a branch dedicated to digital platforms. From an error-cost perspective, it is thus unlikely that the ACCC Final Report achieves the right balance between over and under-enforcement.

Along similar lines, an ill-designed choice screen may actually *slow down* the adoption of more efficient products. As things stands the ACCC is demanding that Google rank alternative search engines and browsers according to their present popularity (in the EU, by contrast, Google is planning to auction off these slots—which at least in principle would enable entrants[36]). But the present popularity of these products may greatly differ from their adoption trends (*i.e.* those products that are exhibiting the most rapid growth), and the latter may be a much more important metric than the former. For example, consumers might be looking to join the platform that will have the most users in the future. If this is the case, adoption trends are arguably a more important decisional parameter. Similarly, ranking options according to their global popularity (*i.e.* their total number of users across all platforms) may ignore the complementarity/compatibility of these products with a specific platform. And when consumers opt for a browser/search engine that is weakly compatible with their chosen platform, they may misattribute its failings to the platform, hurting its reputation in the process.

Designing the type of choice screen envisaged by the ACCC is thus a highly complex task. Competition authorities likely have neither the entrepreneurial experience nor the information

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[31] This is akin to the contested behavioral economics literature on choice overload. *See, e.g.* Benjamin Scheibehenne, Rainer Greifeneder & Peter M Todd, *Can there ever be too many options? A meta-analytic review of choice overload*, 37 J. CONSUMER RESEARCH, 409-425 (2010).

[32] *Id.* at 110.

[33] See, Paul Gennai, "An update on Android for search providers in Europe", GOOGLE OFFICIAL BLOG, Aug. 2, 2019, https://www.blog.google/around-the-globe/google-europe/update-android-search-providers-europe/.

[34] *See* ACCC Final Report, *supra* note 5, at 112.

[35] *Id.* at 135-136.

[36] *See* Gennai, *supra* note 33.

to divine the optimal product design. As Friedrich Hayek forcefully argued, the price system is usually far better suited to deal with these complex matters.[37] As a result, allowing market forces to determine whether multiple choices are offered to consumers, and how these options are selected likely has important advantages over the ACCC's recommended solution.

More broadly, the ACCC's recommendation may also increase firms' incentive to partake in rent-seeking. By its own admission, the ACCC has decided to put its thumb on the scale in the internet browser and search engine markets. For instance, the decision to circumscribe neutrality obligations to the Google Android platform (rather than all devices and tablets, as the ACCC's preliminary report had recommended[38]) is an overt attempt to prop-up rivals at Google's expense. In other words, the ACCC did not just attempt to create a "level playing field", it explicitly sought to protect the special interests of some rivals:

> Feedback from stakeholders regarding this preliminary recommendation has been mixed. [...] **Microsoft suggested that** it would further entrench dominant companies by reason of their strong brand recognition, raising barriers to entry and expansion of smaller rivals who would no longer benefit from being installed as default search engines or browsers on some devices....
>
> The ACCC considers that offering this choice screen for Australian consumers, for both search engines and internet browsers, would improve consumer choice and be pro-competitive. [...] It would also remove the requirement that third party search engines and internet browsers offer a similar choice; **for those that are vertically integrated, this would help preserve their competitive advantage in the face of a dominant supplier**.[39]

This surrender to special interests does not bode well for the ACCC's rulemaking going forward. The public choice literature suggests that rent-seeking is most pronounced in cases where its benefits are concentrated but its costs are diffused across society.[40] Yet this is precisely the type of troublesome incentives that –if fully implemented– the ACCC's report will likely create. In simple terms, the ACCC discarded rules that would apply across the board, opting instead for a much narrower recommendation that particularly favored a handful of Google's competitors.

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[37] *See* Friedrich A. Hayek, *The use of knowledge in society*, 35 AMERICAN ECONOMIC REVIEW, 524 (1945). ("If we can agree that the economic problem of society is mainly one of rapid adaptation to changes in the particular circumstances of time and place, it would seem to follow that the ultimate decisions must be left to the people who are familiar with these circumstances, who know directly of the relevant changes and of the resources immediately available to meet them. We cannot expect that this problem will be solved by first communicating all this knowledge to a central board which, after integrating all knowledge, issues its orders. We must solve it by some form of decentralization.").

[38] *See* AUSTRALIAN COMPETITION AND CONSUMER COMMISSION: DIGITAL PLATFORMS INQUIRY, PRELIMINARY REPORT (February 2019), *available at* https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/final-report-executive-summary.https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf, p. 10. ("ACCC Preliminary Report").

[39] *See* ACCC Final Report, *supra* note 5, pp. 111 & 114.

[40] *See* Robert D Tollison, *Rent seeking: A survey*, 35 KYKLOS, 590 (1982). ("*Politicians will have incentives to search for the issues on which well organized groups gain transfers at the expense of the diffuse general polity*.").

This opportunity for rent-seeking is compounded by the ACCC's proposed creation of a digital platforms branch.[41] While there is nothing inherently wrong with institutional bodies of this sort, there is a real possibility that the digital platforms branch will act as a magnet for rivals' rent-seeking efforts. It effectively gives firms a one-stop shop through which to advance their agendas.

Couple this with the type of individualized decision-making that the ACCC exhibits throughout its report, as well as its openness to further intervention[42], and there is a significant opportunity for rivals to obtain through regulation what they could not achieve through the market. In turn, this may incentivize them to shift some of their expenditures from competition in the market towards competition through the regulatory sphere. If this were to occur, consumers would be the ultimate losers.

Finally, and perhaps most importantly, the ACCC Final Report fails to assess the magnitude of the benefits offered by platforms like Facebook and Google, even for traditional media and other actors about which the ACCC is concerned. As Scott Kupor, managing partner at venture capital firm Andreessen Horowitz, pointed out at the recent US FTC hearings, targeted advertising on large platforms also *enables* startups in other sectors of the economy:

> It's the existence of these platforms that in many ways explains the significant growth we've seen in the last seven to ten years in consumer startup and VC financing activity. Simply put, the math works. Companies can experiment with customer acquisition via these channels and fund their marketing companies iteratively based on which yields the highest return on capital.
>
> Without these platforms, I would venture that the economics of customer acquisition might be cost prohibitive for most startups and, thus, that the venture capital economy would shift its investment into other more cost-effective areas.[43]

Whether increased regulations of the sort recommended by the ACCC would result in outcomes worth the loss of customer acquisition, decrease in advertising revenue, and search-cost increases for other firms such regulation would also entail is unknown. But that is precisely the point: it is incumbent upon regulators considering invasive, new regulations to consider not only what may be gained from those regulations, but also what may be lost.

All of this is not to say that the ACCC's commitment to platform neutrality is necessarily all costs and no benefits. Rather, it is to say that the report's recommendations are not sufficiently well-supported, and the ACCC pays too little attention to the potential costs of its recommendations. Put simply, the potential benefit of this policy (i.e., the possibility (but by no

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[41] *See* ACCC Final Report, *supra* note 5, at 31.

[42] *Id.* at 115. ("*Once the recommendation is implemented, the ACCC could also, through the functions of the specialist digital platforms branch proposed in Recommendation 4, monitor the effectiveness of this remedy and consider whether any other recommendations should be made to the Government to improve consumer choice and competition.*").

[43] *Competition and Consumer Protection in the 21st Century: FTC Hearing #3 Day 1: Multi-Sided Platforms, Labor Markets, and Potential Competition; Before the FTC*, FTC Transcript 65 (Oct. 15, 2018) at 185 (statement of Scott Kupor, Managing Partner, Andreesen Horowitz).

means the guarantee) of increased competition) does not obviously outweigh its costs. As things stand, there is insufficient evidence for the imposition of strong *ex ante* rules. A case-by-case approach—based on the proof of actual anticompetitive effects—seems far more appropriate.[44]

II. Micromanaging the news industry

The ACCC falls prey to the same sort of miscalculations when it discusses platforms' dealings with traditional news outlets. While its aspirations may be laudable, the final report fails convincingly to show that government intervention would alleviate most of the ACCC's concerns and produce net social benefits.

The ACCC's key concerns relate to the bargaining power (or lack thereof) of small media firms relative to global internet platforms, and the potential effect that these platforms may have on the market for journalism.[45]

To address this purported lack of market power, the report recommends that platforms should be made to establish regulator-approved codes of conduct that would bind them in their future dealings with media outlets (it also recommends that copyright enforcement against platforms should be streamlined[46]):

> Given the imbalance in the relationships between the leading digital platforms and Australian news media businesses, the ACCC recommends that designated digital platforms should each separately be required to provide a code of conduct to the Australian Communications and Media Authority (the ACMA) to govern their commercial relationships with news media businesses....
>
> The ACCC considers that if a digital platform is unable to submit an acceptable code to the ACMA within nine months of designation, the ACMA should create a mandatory standard to apply to the designated digital platform.[47]

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[44] For example, throughout the report, the ACCC repeatedly relies on the conclusions (and assertions) reached by the European Commission in its Google decisions. *See, e.g.*, ACCC Final Report, *supra* note 5, at 12. ("*Anti-competitive discrimination by digital platforms in favour of a related business has been established by cases in other jurisdictions. For example, in the European Commission's 2017 decision, Google was found to have systematically given prominent placement to its own comparison shopping service (Google Shopping) and to have demoted rival comparison shopping services in its search results. The European Commission found that this conduct was capable of having, or was likely to have, anti-competitive effects in a comparison shopping services market.*"). Regardless of the merits of the European Commission's decision, there are strong reasons for different authorities to each conduct their separate investigations rather than rely on the findings of their peers. Failing to do so may give rise to groupthink.

[45] *See id.* at 16.

[46] *Id.* at 17.

[47] *Id.* at 16. ("[T]*he inability of news media businesses to individually negotiate terms over the use of their content by digital platforms is likely indicative of the imbalance in bargaining power. Individual news media businesses require Google and Facebook referrals more than each platform requires an individual media business's content.*")

The ACCC also contends that local news outlets have been declining in Australia. To forestall this decay, it recommends that a series of fiscal policies be put in place in order to prop up Australia's struggling local journalism industry:

> The ACCC considers that continued production of the types of public interest journalism most at risk of under-provision is likely to require government assistance, and that the form of this assistance should be carefully evaluated.[48]

A. Media diversity, "filter bubbles", and "fake news"

Underpinning these ACCC's proposals is a broader concern regarding media diversity—a highly contested value. As the ACCC recognizes, in Australian public policy, ownership has typically been seen as either a proxy for diversity or the relevant diversity metric itself.[49] Concerns about media diversity have been tied up in political economy disputes about the appropriate role of government and the market and claims about the dominance of media 'moguls'. The ABC's journalism function was established specifically in order to counter the allegedly conservative bias of the newspaper industry.[50] Indeed, regulators' and policymakers' worries about diversity are a perennial feature of Australian public policy, apparently immune to the effect of new technology.[51] It is welcome that the ACCC Final Report recognises the great diversity and pluralism brought about by online sources.[52]

What the ACCC Final Report does not adequately examine is the economic role that digital platforms play in helping consumers navigate this diversity of sources. In the pre-digital environment consumers received content on a limited number of platforms: primarily local and national newspapers, radio, and television stations. That content was 'curated' by a limited number of editors and producers who chose what would be displayed or aired based on their (and their companies') beliefs about what was important, or newsworthy, or otherwise desirable. Editors and producers therefore performed a dual role—both facilitating the content production and providing a 'search' function for consumers.

By contrast, the enormous array of potential content available online is disintermediated. How users can navigate online content—distributed among millions of servers connected to a non-hierarchical network—has been one of the key entrepreneurial questions of the internet age.[53] Various approaches, such as walled-garden (i.e. AOL) and curated directory (i.e. Yahoo) have provided this function. Google's algorithmic search approach (where websites are 'spidered'

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[48] *Id.* at 19-20.

[49] *Id.* at 287.

[50] *See* CHRIS BERG AND SINCLAIR DAVIDSON, AGAINST PUBLIC BROADCASTING: WHY WE SHOULD PRIVATISE THE ABC AND HOW TO DO IT (2018).

[51] *See* Chris Berg, *Media diversity fears are absurd and obsolete*, THE DRUM, June 14, 2012, http://chrisberg.org/2012/08/media-diversity-fears-are-absurd-and-obsolete/.

[52] ACCC Final Report, *supra* note 5, at 21 ("Digital platforms, and in particular search engines such as Google, have performed an important role in increasing the diversity of news sources accessed by Australian consumers.").

[53] *See* BRIAN MCCULLOUGH, HOW THE INTERNET HAPPENED: FROM NETSCAPE TO THE IPHONE (2018).

automatically and their content made available for keyword search, ranked by the popularity of their links) is one approach. The social media model is another approach; on Facebook, content curation is disaggregated to an individuals' social media contacts, mediated by algorithms that are intended to make the experience more valuable to consumers.

The ACCC would have been on firmer ground had it viewed digital platforms as competitors to traditional media properties, rather than up- or down-stream the value chain. Media consumers face a choice as to which 'service' to use to curate content: a newspaper, television program, or news website where each piece of content has been deliberately chosen by a human editor or producer; one that prioritizes content by algorithm (e.g., Google News); or one that prioritizes content based on one's social network (e.g., Facebook, possibly supplemented by an algorithm).[54] In this sense Google and Facebook compete directly with traditional news sources to distribute curated news. And, for many people and many topics, it is this curation that dominates consumers' choice of news source, more than the specific content on offer.

The ACCC also takes aim at the spread of "filter bubbles" and "fake news" which, it believes, is facilitated by the advent online media platforms.[55] The report concludes that digital platforms have affected the consumption of local news in ways that may ultimately undermine consumers' best interests (notably due to "misleading and harmful news stories"). It thus proposes that platforms should develop industry-wide codes in order to weed out problematic pieces:

> The ACCC also considers that there is a risk of consumers being exposed to deliberately misleading and harmful news when using digital platforms….
>
> The ACCC therefore recommends that digital platforms establish an industry code to govern the handling of complaints about disinformation.[56]

The ACCC's concern about "filter bubbles" is simply misplaced. The ACCC Final Report itself suggests that there is no Australian evidence for the existence of filter bubbles, and empirical evidence around the world supports this. In addition to the literature cited by the ACCC, a recent study in Digital Journalism "found no support for the filter-bubble hypothesis".[57] Another study found that basing recommendations on a consumer's history of prior consumption

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[54] *See* Chris Berg and Gus Hurwitz, *International Center for Law & Economics: Submission to the ACCC's Digital Platforms Inquiry* (April 2019), *available at* https://www.accc.gov.au/system/files/International%20Center%20for%20Law%20and%20Economics.PDF, at 9-10.

[55] ACCC Final Report, *supra* note 5, at 353 ("*Disinformation, misinformation and malinformation are particularly hard to identify on social media, where news content is often presented alongside content that has no relationship to news at all. And while people tend to think highly of their own ability to identify false information, they rate the ability of others much lower. Only 36 per cent of people believed that the average person in Australia could identify 'fake news', but 67 per cent thought that they personally could do so.*").

[56] *Id.* at 21-22

[57] Mario Haim, Andreas Graefe & Hans-Bernd Brosius, *Burst of the Filter Bubble? Effects of personalization on the diversity of Google News*, 6 DIGITAL JOURNALISM 330; See also Frederik Zuiderveen Borgesius, et al., *Should we worry about filter bubbles?*, 5 INTERNET POLICY REVIEW 1 (2016).

increases, rather than decreases, content diversity.[58] The argument that a "high propensity towards sharing content" is one of the environmental factors required to cause filter bubbles is peculiar, and can be sustained only if we assume that social media friends and follows are chosen only on the basis of one margin: political agreement.[59] This does not accord with how most people build their social media networks, where social media relationships are chosen on the basis of work, education, and family relationships and mutual hobbies, in addition to political preferences. Only a small fraction of media consumers filter their consumption on the single dimension of politics.[60]

But even if we grant the possibility of significant filter bubbles in the future, their existence will be a reflection of deliberate consumer decisions to satisfy their own content preferences. Filter bubbles are not a reflection of information asymmetries between digital platforms and consumers, or monopolistic control of the media. In fact, the ability of consumers to choose their content with a high degree of specificity represents the opposite trend: a shift in power from media producers to media consumers. In the pre-digital era, editors and producers were able to present whatever content they chose to consumers because they could exercise market power over content curation. Few alternatives existed to the two major metropolitan newspapers, four or five television networks, and dozen or so radio stations. That power over content curation has been disintermediated—something that the ACCC should be welcoming, not worrying about. It is decidedly not the role of a competition regulator and consumer watchdog to try to second-guess what sort of content—or what mix of content—consumers should consume or prefer.[61]

B. The Failure to Consider Government Failure

Even if one accepts the ACCC's assertion that there is a market failure in the provision of certain kinds of content, it is far from certain that the ACCC's recommendations would produce the desired outcome. Take its rosy view of local journalism. The report hardly considers the possibility that the relative decline of local journalism has not been caused by online platforms (correlation is not causation).[62] Nor does it envisage that local newspapers may no longer be the optimal way to stay informed about local events. Finally, it is not clear that shifting additional revenue towards Australia's struggling local news industry will necessarily lead to the type of

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[58] Judith Möller, Damian Trilling, Natali Helberger, and Bram van Es, *Do not blame it on the algorithm: An empirical assessment of multiple recommender systems and their impact on content diversity*, 21 INFORMATION, COMMUNICATION & SOCIETY 959 (2018).

[59] *See* ACCC Preliminary Report, *supra* note 38, at 289-290.

[60] Seth R. Flaxman, Sharad Goel, and Justin M. Rao, *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 PUBLIC OPINION QUARTERLY 298 (2016); Andrew M. Guess, *(Almost) Everything in Moderation: New Evidence on Americans' Online Media Diets* (2018) Available at https://webspace.princeton.edu/users/aguess/Guess_OnlineMediaDiets.pdf.

[61] Berg and Hurwitz, *supra* note 54, at 10-11.

[62] *See id.* at 5.

content that the ACCC deems essential for Australian consumers; not all problems can be solved by throwing money at them.

To make matters worse, the ACCC Final Report also fails to grapple with the risk of regulatory failure. Subsidizing local news and favoring public broadcast channels raises the prospect of "white elephant" spending—that is, of public expenditures that exceed the social value they create.[63] The ACCC's fear that local news is being underprovided is not set against a relevant economic benchmark. Instead, the report merely observes that local news coverage has declined compared to its previous highs.[64] But this is hardly a convincing argument. All industries go through ebbs and flows. Nor is there any basis for presuming that previously established practices were optimal—especially when they were established under very different technological conditions. Accordingly, if the government acts on the ACCC's calls to subsidize local news and boost public broadcasting, the resultant expenditures may well harm taxpayers through waste rather than create socially valuable pieces of news.

Beyond this risk of malinvestment, the ACCC pays lip service—but only lip service—to the potential market distortions that subsidies and the public provision of journalism may generate. For a start, public funding may crowd-out market-based initiatives.[65] The ACCC notably expresses doubts that large online players, such as *The Guardian* and *Buzzfeed*, could step into the breach left by the decline of local journalism.[66] But using public funds to prop up local firms will further reduce the prospect of market entry by unsubsidized players. Moreover, as is often the case with these types of public investments, subsidized (or state-run) firms might cross-subsidize their other lines of business, potentially stealing revenue from more efficient rivals.[67] Finally, when monitoring is not sufficiently robust, subsidized firms might be tempted to funnel public funds towards their shareholders, rather than create socially valuable content.

These risks are not just theoretical. The early history of the British Broadcasting Corporation (BBC), recounted by Nobel-winning economist, Ronald Coase, in his 1974 article, "The Market for Goods and the Market for Ideas", is particularly enlightening in this respect:

> The press, which is so anxious to remain unshackled by government regulation, has never exerted itself to secure a similar freedom for the broadcasting industry. [...] In this case the contrast between actions and proclaimed beliefs is even stronger since

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[63] James A Robinson & Ragnar Torvik, *White elephants*, 89 JOURNAL OF PUBLIC ECONOMICS, 197 (2005). (The authors define white elephants as "*investment projects with negative social surplus*").

[64] *See* ACCC Final Report, *supra* note 5, at 320.

[65] *See, e.g.*, Russell D. Roberts, *A positive model of private charity and public transfers*, 92 JOURNAL OF POLITICAL ECONOMIY 136 (1984). ("*This paper explores a model where private charity and public transfers are determined simultaneously. In political equilibrium, the government "overprovides" public transfers, transferring more to the poor than altruistic taxpayers prefer. At this equilibrium, private charity is zero.*").

[66] *See* ACCC Final Report, *supra* note 5, at 19.

[67] Rivals routinely accuse the BBC of using television license revenue in order to outcompete them in unregulated segments. *See, e.g.,* Patrick Gross, *Murdoch criticises the BBC iPlayer*, TECHRADAR, Apr. 25, 2008, https://www.techradar.com/uk/news/television/internet/murdoch-criticises-the-bbc-iplayer-330804.

> what was established in Britain was a government-controlled monopoly of a source of news and information. It might have been thought that this affront to the doctrine of freedom of the press would have appalled the British press. It did not. They supported the broadcasting monopoly, mainly, as far as I can see, because they saw the alternative to the British Broadcasting Corporation (BBC) as commercial broadcasting and, therefore, as involving increased competition for advertising revenue.[68]

The story recounted by Coase holds at least two important lessons for the ACCC. The first is that public intervention (whether through subsidies or the public provision of goods) may distort competition. This is not to say that governments should never intervene, but rather that policymakers must carefully weigh the social benefits of public intervention against its potential costs. On this front, the ACCC's analysis is cursory, to say the least. Although it acknowledges that market distortions are a risk, it merely concludes that subsidies should be designed in ways that mitigate their occurrence—which is a truism:

> **Risk of market distortion —** This risk will depend on how well a grants program is designed and implemented. For example, eligibility criteria should not exclude businesses on the basis of business model or ownership.[69]

Coase's second teaching is that the ACCC's plans create unavoidable incentives for rent-seeking. Rivals will surely attempt to game the approval process for platform codes of conduct. And decisions regarding the allocation of public funding will also be vulnerable to undue influence.

Unfortunately, there is no indication that the recommendations of the ACCC Final Report would effectively prevent this type of undesirable behavior. For instance, the assessment criteria for grants will be designed by a committee comprising journalists, academics, and former industry participants.[70] Allowing industry insiders to play an active role in the allocation of grants is problematic. It is far from clear that these stakeholders will be willing to embrace the potential disruption that digital platforms may bring to the local news industry. They may also have poor incentives to reach efficient decisions. And their involvement may exacerbate the gaming of the system: who better to navigate a complex government grant scheme than those people who have helped design it? In short, as Adam Smith once observed:

> [T]hough the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.[71]

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[68] *See* Ronald Coase, *The market for goods and the market for ideas*, 64 AMERICAN ECONOMIC REVIEW 387 (1974).

[69] *See* ACCC Final Report, *supra* note 5, p. 332.

[70] *See* ACCC Final Report, *supra* note 5, at 332. ("*To ensure independence from the Government, the assessment criteria for these* ***grants should be designed by an independent expert committee made up of journalism industry representatives and other independent experts such as academics and former industry participants****. The committee should also make decisions on the allocation of grants*") (emphasis added).

[71] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

The upshot is that the ACCC's recommendations regarding the local news industry are not targeted at a relevant competition problem, and underestimate the acute potential for regulatory failure. On the basis of the evidence and analysis presented in the ACCC Final Report, there is no reason to expect that they would succeed.

III. Privacy regulation is no free lunch

The report also touches upon the topic of online privacy, focusing in particular on consumers' bargaining power against digital platforms. This attention is understandable but, given the highly dynamic nature of the platforms and their relationship to consumers, any regulation may well be premature.

Globally, consumers and firms are undergoing a rapid and deep social negotiation about the collection and use of data. The ACCC Final Report's description of the privacy policies and approaches to data permissions are a partial snapshot of the state of these policies and approaches at the time the report was written, and they do not represent the static equilibrium result of the ongoing bargaining between consumers, platforms, and advertisers.

These policies are rapidly changing. In part that rapid change is the result of technological development—the new uses of data (such as geolocation services) require changes to how services interact with their consumers. But it is also in a significant way a response to changing consumer attitudes about how data should be used and secured. In recent years, controversies about data loss and data privacy have led to changes in data policies. For example, Facebook made major changes to its privacy settings to encourage usability in the wake of the Cambridge Analytica scandal.[72]

It is possible, of course, to be critical of the current privacy policies and approaches of digital platforms; in some circumstances that criticism is appropriate. But this is an evolving, rapid, and unpredictable negotiation at the nexus of consumers, platforms, advertisers, and technological change. Such negotiations are around privacy are a common feature of the evolution of new social technologies—from the invention of physical homes to the development of telephony.[73] Early stage social technologies tend to expose their users to the visibility of others: fellow occupants, telegraph and telephone operators, parallel users of shared computers, and so forth. Only once the value of privacy (for instance, for commercial, in-confidence communication, or for medical advice over the telephone) has become apparent to consumers is there significant pressure for privacy development.

The importance of data to the economy is a relatively recent development, and individual engagement with digital platforms at scale even more so. The contours of this engagement are currently being figured out. The ACCC's investigation could be seen as a contribution to the

[72] *See* Facebook, "It's Time to Make Our Privacy Tools Easier to Find", FACEBOOK NEWSROOM, Mar. 28, 2018, https://newsroom.fb.com/news/2018/03/privacy-shortcuts/.

[73] *See* CHRIS BERG, THE CLASSICAL LIBERAL CASE FOR PRIVACY IN A WORLD OF SURVEILLANCE AND TECHNOLOGICAL CHANGE (2018).

social negotiation, by joining other reports and analyses that outline the current state of privacy and data protection. But it would be premature and inappropriate to develop new regulation on those grounds.

Unfortunately, the ACCC Final Report fails adequately to consider the dynamics of this social negotiation. Moreover, it pays little attention to the compliance costs that its recommendations would entail. It is thus unlikely that any benefits to users' privacy that might arise would outweigh the significant compliance costs that are involved.

The ACCC's privacy recommendations are articulated around three important axes: platforms must notify consumers about the personal information that is being collected and its intended use; consumers must be able to freely consent to this data processing (with the possibility of opting-out and continuing to use services when such data processing is not "necessary"); and consumers should be given the right to retain the data they have provided to platforms (the ACCC refers to this as the "right to request erasure").[74] This is very similar to the path followed by the European Union in the General Data Protection Regulation (GDPR)[75], and California in the California Consumer Privacy Act (CCPA)[76].

These recent privacy regulations offer some insight into the significant compliance costs that the ACCC's privacy recommendations would entail. For instance, it has been estimated that American S&P 500 companies and UK FTSE 350 companies alone spent a combined total of $9 billion to comply with the GDPR in the year running up to its entry into force.[77] Likewise, a survey of American companies with over 500 employees found that three out of four planned to allocate over $1 million do GDPR compliance.[78]

Things are similar for California's CCPA. One estimate places the upfront costs of compliance with the CCPA (including lost advertising revenue) at $24.5 billion—even as it identifies comparably modest benefits of roughly $6-9 billion.[79] Likewise, in a recent a survey of privacy professionals, 70 percent of respondents estimated that their firms would pay at least $100,000 to comply with the CCPA, while a further 20% believed these costs would be higher than $1

[74] *See* ACCC Final Report, *supra* note 5, at 470.

[75] *See* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), O.J. L. 119/1.

[76] The California Consumer Privacy Act of 2018 requirements will take effect from 1 January 2020.

[77] *See* Oliver Smith, *The GDPR Racket: Who's making money from this $ 9 bn business shakedown*, FORBES, May 2, 2018, *available at* https://www.forbes.com/sites/oliversmith/2018/05/02/the-gdpr-racket-whos-making-money-from-this-9bn-business-shakedown/#33232d9834a2

[78] *See* PWC, *GDPR compliance top data protection priority for 92% of US organizations in 2017, according to PWC survey*, PWC.COM, Jan. 23, 2017, https://www.pwc.com/us/en/press-releases/2017/pwc-gdpr-compliance-press-release.html.

[79] *See* Roslyn Layton, *The costs of California's online privacy rules far exceed the benefits*, AEIDEAS, March 22, 2019, http://www.aei.org/publication/the-costs-of-californias-online-privacy-rules-far-exceed-the-benefits/.

million.[80] Meanwhile, it has also been argued that compliance programs cannot be recycled from one jurisdiction to another, despite the superficial similarities of the different privacy regulations that have been adopted across the globe.[81]

And compliance costs are not the only problem. One study found that, following the GDPR's entry into force, weekly venture capital deals in the EU decreased by 17.6%, compared to the US, and the amount raised in an average deal decreased by 39.6% percent.[82] Furthermore, it has been argued that data regulations may have a significant impact on competition between platforms, arguably limiting the entry of smaller firms, entrenching established incumbents, and disincentivizing increases in product quality on privacy dimensions.[83] As economists James Campbell, Avi Goldfarb and Catherine Tucker have argued:

> [A] potential risk in privacy regulation is the entrenchment of the existing incumbent firms and a consequent reduction in the incentives to invest in quality. These incentives are stronger when firms have little consumer-facing price flexibility, as is the case in online media.[84]

Indeed, "privacy regulation can shield a large, general incumbent from potential competition because regulation raises the threshold quality and scope for profitable entry by a challenger.... This is more likely for relatively strong incumbents: the stronger the incumbent, the better the marginal entrant must be."[85]

The ACCC's failure to consider these potential costs is somewhat paradoxical. Elsewhere, the report repeatedly stresses that digital platforms have a competitive advantage over traditional media outlets because of compliances costs.[86] The ACCC seems much less preoccupied by these same costs when it comes to its own recommendations. In other words, the ACCC readily notes that varying compliance costs may distort competition between online and traditional media, but conveniently overlooks this same problem when it cuts against its own recommendations.

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[80] *See* Ginny Marvin, *Businesses prepare to spend heavily on CCPA compliance*, MARTECHTODAY, March 19, 2019, https://martechtoday.com/businesses-prepare-to-spend-heavily-on-ccpa-compliance-231938.

[81] *See* Lothar Determann, *Analysis: The California Consumer Privacy Act of 2018*, IAPP, Jul. 2, 2018, https://iapp.org/news/a/analysis-the-california-consumer-privacy-act-of-2018/, ("*But companies cannot just expand the coverage of their EU GDPR compliance measures to residents of California.*").

[82] *See* Jian Jia, Ginger Zhe Jin & Liad Wagman, *The short-run effects of GDPR on technology venture investment*, NBER WORKING PAPER SERIES, 4 (2018).

[83] *See, e.g.,* Antonio Garcia Martinez, *Why California's Privacy Law Won't Hurt Facebook or Google*, WIRED, Aug. 31, 2018, https://www.wired.com/story/why-californias-privacy-law-wont-hurt-facebook-or-google/.

[84] *See* James Campbell, Avi Goldfarb & Catherine Tucker, *Privacy Regulation and Market Structure*, 24 JOURNAL OF ECONOMICS & MANAGEMENT STRATEGY 47, 68 (2015) (emphasis added).

[85] *Id.*

[86] *See* ACCC Final Report, *supra* note 5, at 189. ("*Regulatory imbalance may impede the ability of media businesses to compete with digital platforms for advertising revenue by imposing greater costs on media businesses.*").

IV. The ACCC's false premises reconsidered

A unifying theme pervades all of the ACCC's findings. Its report advocates a series of rule changes—from new legal presumptions to detailed regulations—that would dramatically tilt the scales in favor of enforcers. Doing so would ultimately enable the ACCC to further advance its idiosyncratic policy preferences, which include the promotion of digital startups, artificial advancement of local news outlets, and heightened protection of consumers' online privacy. However, as Milton Friedman astutely observed, "*there's no such thing as a free lunch*".[87] If there were genuine market failures and the if the benefits of taking action exceeded the costs, pursuing these goals would be unobjectionable. Unfortunately, it is not at all clear that there is a market failure (or, at the very least, not clear that any market failures are nearly as significant as the ACCC presumes). Moreover, as we have discussed, the report's recommended actions would entail significant costs that, in most cases, would likely exceed their benefits.

As to the existence of market failure, it is worth reiterating two important points alluded to above. First, the market analysis offered by the ACCC falls well outside of the norms of typical competition analysis. It arbitrarily defines separate markets, including "social media services," "search advertising," "display advertising," and "news and media referral services." These "markets" appear to be defined around specific business lines carried out by specific firms—rather than by reference to established analytic frameworks such as consumer substitution between firms, diversion ratios between firms or products, or metrics like upward pricing pressure. It is, for instance, entirely arbitrary to define search and display advertising as separate markets without rigorously considering whether and how much they in fact substitute for one another.

Even more problematic are the ACCC Final Report's discussions of multi-sided markets and dynamic competition. The report's presentation of the concept of multi-sided markets, for instance, is peculiar to say the least. The report asserts that:

> Typically, multi-sided platforms have an incentive to cross-subsidise. That is, the platforms have an incentive to set a relatively low price to users on one side of the platform, in order to increase the revenue earned on another side of the platform. The prices charged by Google and Facebook involve a cross-subsidy, with individual users being charged a zero monetary price so as to enable them to increase the revenue earned from advertisers.[88]

By conflating a direct effect (cross subsidy) with an indirect effect (cross-side network effect), this misconstrues the functioning of two-sided markets. While it is true that platforms sometimes charge lower (often zero) prices to users on one side of the market, they do so in order to *increase use of* the platform, which *indirectly* enables the platform to generate more revenue from the other side of the market. This is an indirect cross-side network effect; it is *not* a direct "cross-subsidisation" effect.

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[87] *See* MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (1975).

[88] *See* ACCC Final Report, *supra* note 5, at 63.

Newspapers are a good example. Newspapers obtain revenue from a combination of user fees and advertisements. In many cases, publishers sell newspapers at a price that doesn't cover their marginal costs. Publishers do this in order to increase circulation, which enables them to offer a attractive distribution outlet for advertisers from whom they can, in principle, earn sufficient profit. Newspapers, whether in print or digital form, are thus a platform technology that benefits from cross-side network effects.

By seemingly conflating direct and indirect effects (and mislabelling them as falling under a rubric of "cross-subsidisation"), the report at the very least underemphasizes the importance of network effects such as these. Yet, they are incredibly important, as they increase the value of the platform by facilitating transactions that otherwise would not be possible. That is, they *create* new value.

Thus, for instance, the ACCC Final Report's concern that

> if a news publisher were to refuse referrals from Google, the direct effect is likely to be a substantial loss to the news publisher regarding the revenue earnt on its websites and apps. While this loss may be offset, to some extent, by mitigating effects, these mitigating effects are likely to be relatively small.[89]

is wholly inapposite to any competitive concerns. The relevant counterfactual world to which a refusal to obtain referrals from Google must be compared is one in which Google does not exist—one in which the value created by Google's platform has not been created—as opposed to a hypothetical Nirvana in which the social welfare created by Google exists *independent* from Google's having created it.

This basic analytical error is further seen in the report's discussion of dynamic competition. The report's following conclusion as to Google, for instance, demonstrates a fundamental lack of comprehension of the concept of dynamic competition:

> Further, suppose that, despite these difficulties, a rival search platform were eventually able to successfully enter and expand. It is plausible that the new search platform would then become the dominant platform in the market because of (i) same-side network effects (ii) cross-side network effects (iii) economies of scale and (iv) advantages of scope. The presence of these four characteristics in the supply of general search services ensures that the market has the characteristics of a 'winner takes all' market. In the absence of changes to the regulatory environment, concerns regarding the limited extent of competition in the online search market in Australia could potentially re-emerge as the new platform attains its dominant position. Note, however, for the reasons given above, the threat of a rival search platform successfully entering and expanding is unlikely in the short- to medium-term.[90]

First, in a multi-sided market, the very effects lamented in this paragraph and the discussion leading up to it allow a platform to create value for its users. The report's discussion is

[89] *Id.* at 102.

[90] *Id.* at 76.

tantamount to saying, "the successful firm, having more effectively served its customers, developed new products, and benefitted society, has an unfair advantage over those rivals that lack customer loyalty, have lower quality products, and have done less to benefit society." Basing competition enforcement and regulation on such a premise is certain to harm, not help, consumers and competition itself.

Even more troubling is this conclusion's failure to appreciate the competitive dynamics of dynamic competition. The very fact that the ACCC recognised the possibility that Google could be displaced by a competitor demonstrates the legitimacy of potential competition as a constraint on Google's conduct. Google surely knows the precariousness of its position better than does the ACCC, which is among the most significant competitive constraints a firm can face—especially in industries such as these where efficient scale dictates a relatively small number of firms.

If the ACCC is to engage in a competition analysis of digital markets, it should do so using the standard methods long used in competition analysis and not forego them because it has been giving a too-narrow charge. To the extent that its charge is too narrow or otherwise not compatible with sound application of competition principles, the ACCC should adopt the role of competition advocate—as its peer agencies around the world regularly do—and respond to any convening or charging authority in terms that defend and champion the importance of sound competition policy in improving the functioning of markets of flourishing of consumers.[91]

V. Conclusion: The Limits of the ACCC's Digital Platform Inquiry

In his groundbreaking "The Limits of Antitrust," Frank Easterbrook famously argued that the task of competition enforcers and regulators is not crudely to maximize certain policy preferences.[92] Instead, their task is to maintain a delicate balance between the societal harms of anticompetitive conduct on the one hand and, on the other, the administrative and societal costs of unavoidable, if occasional, enforcement errors that invariably follow even modest enforcement activity.

Easterbrook's findings are often disregarded (or, sometimes, vociferously and derisively dismissed) by the various recent reports on competition in the digital economy, which argue that the advent of the digital economy has significantly increased the number of false negatives in the system.[93] These critics thus urge policymakers to create novel presumptions that would ease the burden of antitrust enforcers.

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[91] Hurwitz and Berg, *supra* note 54, at 15-16.

[92] *See* Frank H Easterbrook, *Limits of antitrust*, 63 TEX. L. REV., 16 (1984). ("*The legal system should be designed to minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself.*").

[93] *See, e.g.*, Cremer et al., *supra* note 2, at 4, ("[I]*n the context of highly concentrated markets characterised by strong network effects and high barriers to entry (i.e. not easily corrected by markets themselves), one may want to err on the side of disallowing potentially anticompetitive conducts, and impose on the incumbent the burden of proof for showing the pro-competitiveness of its*

But calling for more cases and more convictions is just populist rhetoric if enforcers cannot adequately sort the wheat from the chaff. Reducing false negatives is worse than useless if a policy simultaneously increases the harm from false positives by an even larger amount. Myopic calls to "do something" thus turn antitrust enforcers into Robert Bork's metaphorical sheriff of a frontier town, who "*merely walked the main street and every so often pistol-whipped a few people*".[94]

As we have argued throughout this comment, the ACCC Final Report fails to grapple with this complex tradeoff. While it claims to show pervasive market failures throughout the digital economy, it ignores the specter of regulatory failure. This goes against a commendable trend that has seen Australian competition enforcement move towards a more effects-based system.[95]

The ACCC's lackadaisical assessment of regulatory costs is all-the-more troubling given that its report focuses on an extremely dynamic industry. What is only a small regulatory cost today could severely hamper competition in the future. Ironically, the ACCC Final Report acknowledges this much when it states that:

> Advertising regulations imposed on media businesses can constrain their commercial decisions and thereby limit their opportunities to generate revenue relative to the digital platforms. In general, digital platforms have far greater flexibility regarding the frequency and number of ads shown (for example, YouTube's introduction of stacked ads) in comparison to commercial TV broadcasters who are limited to 13–16 minutes of advertising content per hour.…
>
> Submissions from stakeholders have noted that additional regulations specific to radio and broadcasters directly impacted on their ability to generate advertising revenue.[96]

Yet, rather than reconsider how ham-fisted regulation might be throttling traditional media firms, or how it may further entrench today's dominant technology platforms, the ACCC advocates more of the same. Could excessive media regulation be preventing traditional media from competing against digital platforms (and might the ACCC's recommendations have a similar effect in the future)? Has this type of regulation really produced net social benefits? And could ill-designed regulation act as a barrier to entry? By almost completely ignoring these questions, the ACCC Final Report all but guarantees that its conclusions would be heavily skewed in favor of increased government intervention—and potentially ineffective or even harmful intervention, at that.

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conduct"). *See also*, Stigler Center Report, *supra* note 2, at 73. For a critique of these reports, *see* INTERNATIONAL CENTER FOR LAW & ECONOMICS, CONCLUDING COMMENTS: THE WEAKNESSES OF INTERVENTIONIST CLAIMS (June 2019), *available at* https://laweconcenter.org/wp-content/uploads/2019/07/Concluding-Comments-The-Weaknesses-of-Interventionist-Claims-FTC-Hearings-ICLE-Comment-11.pdf.

[94] *See* R.H. BORK, ANTITRUST PARADOX 6 (Simon & Schuster. 1993).

[95] *See* IAN HARPER, PETER ANDERSON, SU MCCLUSKEY AND MICHAEL O'BRYAN, COMPETITION POLICY REVIEW, COMMONWEALTH OF AUSTRALIA (March 2015), *available at* http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf.

[96] *See* ACCC Final Report, *supra* note 5, at 190-91.