

The ACCC's Proposed Algorithm Regulator: The Right Level of Intervention?

Adam Zwi considers the ACCC's recommendation to create an 'algorithm regulator'.

In January 2018, Facebook announced a major change to its News Feed algorithm. Mark Zuckerberg said Facebook would shift its focus from "helping you find relevant content" to "helping you have more meaningful social interactions".¹ Following this change, users would "see less public content like posts from businesses, brands, and media".²

According to media publishers, the change had a dramatic effect on traffic to their websites. For instance, Seven West Media said that traffic from Facebook to some Pacific Magazines websites fell around 40% from between June 2017 and April 2018.³ Similarly, Southern Cross Austereo said that traffic from Facebook to its *Hit* and *Triple M* websites fell by 65% and 56% respectively between July 2017 and March 2018, with the result that "revenue from the sale of display advertising on [SCA's] radio-related websites collapsed".⁴

In the years leading up to this change, Facebook had been criticised for (among other things) allowing misinformation to be disseminated on the platform,⁵ and was facing growing calls for greater regulation. In this context, some saw Facebook's decision to de-prioritise media content as an effort to quiet these calls.⁶

If viewed this way, the algorithm change may have paradoxically *increased* the case for regulation. It was one of the main factors the ACCC relied on in recommending greater regulatory oversight of digital platforms' algorithms in its Digital Platforms Inquiry Preliminary Report.⁷

This article sets out the ACCC's analysis underpinning this recommendation. It then considers arguments for and against regulation of digital platforms' algorithms, and situates the ACCC's approach in the context of the wider debate on this topic. It concludes with some remaining issues flowing from the ACCC's recommendation.

What did the ACCC recommend?

There are a number of steps to the ACCC's analysis. These broadly follow the steps of a typical competition assessment: defining markets, assessing market power, identifying harms, and imposing (or in this case recommending) remedies to address those harms.

First, the ACCC identified markets. It considered how the platforms monetise their services, analysing the complex relationships between platforms, businesses, media content

creators and consumers.⁸ This enabled the ACCC to identify a set of markets. For present purposes, the relevant markets are those for the supply of:

- search advertising, i.e. the adverts that appear alongside the search results of general search engines (e.g. Google and Bing) and specialised search engines (e.g. Amazon and Expedia);⁹
- display advertising, i.e. banner and video adverts on websites and social media;¹⁰ and
- news media referral services, i.e. links to news websites that appear on search results (e.g. on Google) or social media posts (e.g. on Facebook).¹¹

Second, the ACCC assessed market power within those markets, and made the following findings:

- in the market for the supply of search advertising, Google has substantial market power. It supplies 96% of advertising on general search results,¹² and faces little competitive pressure from suppliers of advertising on specialised search engines;¹³
- in the market for the supply of display advertising, Facebook has

1 Mark Zuckerberg, Facebook post, 11 January 2018, <<https://www.facebook.com/zuck/posts/10104413015393571>>.

2 Ibid.

3 Seven West Media, submission to the ACCC Digital Platforms Inquiry, 23 April 2018, <<https://www.accc.gov.au/system/files/Seven%20West%20Media%20%28April%202018%29.pdf>>, p 25.

4 Southern Cross Austereo, submission to the ACCC Digital Platforms Inquiry, 20 April 2018, <<https://www.accc.gov.au/system/files/Southern%20Cross%20Austereo%20%28April%202018%29.pdf>>, p 7.

5 Mike Isaac, "Facebook Overhauls News Feed to Focus on What Friends and Family Share", New York Times, 11 January 2018, <<https://www.nytimes.com/2018/01/11/technology/facebook-news-feed.html>>.

6 Julia Carrie Wong, "Facebook overhauls News Feed in favour of 'meaningful social interactions'", The Guardian, 12 January 2018, <<https://www.theguardian.com/technology/2018/jan/11/facebook-news-feed-algorithm-overhaul-mark-zuckerberg>>.

7 ACCC, Digital Platforms Inquiry Preliminary Report, December 2018, <<https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf>>.

8 Ibid, pg 37-40.

9 Ibid, pg 54.

10 Ibid, pg 53, 59.

11 Ibid, pg 61.

12 Ibid, pg 57.

13 Ibid, pg 58.

substantial market power.¹⁴ It has a market share of 46%, and the remainder of the market is highly fragmented;¹⁵ and

- in the market for news media referral services, Google and Facebook each have substantial market power.¹⁶ Together they account for more than 50% of traffic to news media websites and are “must have” sources of access.¹⁷

Third, the ACCC considered what harms could result from Google and Facebook’s market power. The ACCC distinguished the harms in advertising markets (display and search) from those in the news referral market.

In relation to advertising markets, the ACCC considered that Facebook and Google have an incentive to favour their own business interests rather than optimise outcomes for advertisers and websites.¹⁸ This incentive stems from the fact that Google and Facebook are vertically integrated; i.e. they offer a range of products and services along the advertising supply chain.¹⁹ While this supply chain is complex, the most intuitive examples of this risk are the following:

- Google and Facebook do not just sell advertising that appears on their own websites; they also sell advertising that appears on third parties’ websites.²⁰ They could

rank adverts for these third party websites (with whom they have a commercial relationship) above adverts for other websites;²¹

- Google and Facebook could rank ‘organic’ (i.e. unpaid for) content from companies that buy their advertising services over content from companies that do not;²² and
- Google and Facebook could rank their own advertising services (e.g. Google Shopping or Facebook Marketplace) over those of others.²³

Thus, the ACCC found that Facebook and Google may hinder competition.²⁴ They could maintain or advance their position along various points of the advertising supply chain by restricting or undermining their rivals’ ability to compete, rather than by offering a better product than their rivals.²⁵ This risk, coupled with the lack of transparency about how the platforms’ algorithms rank content and adverts,²⁶ could create “uncertainty and the inefficient allocation of resources” which could result in “poorer outcomes for consumers as resources are diverted”.²⁷

The ACCC’s conclusions on harms in the news referral market were somewhat less definitive (perhaps reflecting the fact that these harms may not be purely economic). The

ACCC appeared to refrain from making explicit findings on harm, but referred to the two main concerns expressed by news publishers:

- There is a lack of warning around platforms’ changes to their algorithms which impact the way news content is displayed.²⁸ The ACCC accepted this has “some effect on news publishers’ ability to monetise their news content”.²⁹ In particular, Facebook’s decision in 2018 to change its algorithm, with little notice, significantly reduced traffic to publishers’ websites.³⁰ This required some news publishers to invest more in understanding the algorithm to reach the same level of referral traffic as previously;³¹
- Certain formats and policies may negatively impact publishers’ ability to monetise their content.³² For instance, Google uses a format which enables fast loading of webpages on mobile devices.³³ Webpages in this format are hosted on Google’s servers rather than the original publisher’s, giving Google a degree of control over the content it would not otherwise have.³⁴ Importantly, this format limits the advertising appearing on the page, with the result that news publishers may be less able to generate revenue from pages in this format.³⁵

¹⁴ Ibid, pg 59.

¹⁵ Ibid, pg 59-60.

¹⁶ Ibid, pg 61-63.

¹⁷ Ibid, pg 61-63. Interestingly, the ACCC found that Facebook has a particularly strong role in referring consumers to radio websites; two-thirds of traffic to these websites is from Facebook (pg 62).

¹⁸ Ibid, pg 80.

¹⁹ Ibid, pg 5.

²⁰ Ibid, pg 71-72.

²¹ Ibid, pg 80.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid, pg 36, 80.

²⁶ Ibid, pg 80.

²⁷ Ibid.

²⁸ Ibid, 125.

²⁹ Ibid, pg 111.

³⁰ Ibid, pg 110.

³¹ Ibid, pg 111.

³² Ibid, pg 125.

³³ Ibid, pg 116-117.

³⁴ Ibid, pg 117.

³⁵ Ibid, pg 117-118.

However, although stakeholders complained that Google ranks pages in this format above other content, the ACCC did not make a finding to this effect.³⁶

Fourth, the ACCC proposed remedies to address the harms above. Before turning to the ACCC's proposed remedies, it is worth noting that the harms mentioned above generally stem from the importance of ranking, i.e. the notion that content or adverts which are ranked highly in search results or social media news feeds is more likely to be seen or clicked on by consumers. This ranking is determined by the platforms' algorithms.

In light of this, the ACCC recommended that a regulatory authority be established to ensuring greater transparency of the platforms' algorithms.

In relation to advertising markets, the authority would "monitor, investigate and report on whether digital platforms ... are engaging in discriminatory conduct³⁷ ... by favouring their own business interests above those of advertisers or potentially competing businesses".³⁸ It could consider matters such as the "ranking and display of advertisements and also organic content" and whether purchasing a product or service from a platform "affects the display or ranking of advertisements or content".³⁹

In relation to the news referral market, the authority would "monitor, investigate and report on

the ranking of news and journalistic content by digital platforms and the provision of referral services to news media businesses."⁴⁰ It could also review the implications of changes to algorithms or the implementation of new policies or formats.⁴¹

The authority would have jurisdiction over digital platforms which generate more than AU\$100 million per annum in revenue in Australia.⁴² It could have the power to investigate complaints, initiate its own investigations, make referrals to other government agencies and to publish reports and make recommendations.⁴³

What about enforcement?

An important question is whether the regulator's powers would be limited to making the platforms' algorithms more *transparent*, or whether it would also *prohibit* discrimination and enforce breaches. Both transparency and non-discrimination are aimed at levelling the playing field, but "while transparency only tempers the benefit a platform can derive from favouring its own services over those of certain suppliers, non-discrimination limits or even eliminates this possibility".⁴⁴

On the face of the report, the ACCC recommends that the authority has a transparency and advisory role only. It would "monitor", "investigate", "publish reports" and "make recommendations". According to UNSW's Katherine Kemp, "the most the regulator would do is introduce

some "sunshine" to the impacts of these algorithms which are currently hidden from view, and potentially refer the matter to the ACCC for investigation if this was perceived to amount to a misuse of market power".⁴⁵

Is this enough? On the one hand, many argue that it would be inappropriate to impose additional enforceable rules on digital platforms (e.g. a non-discrimination obligation or a requirement that algorithm changes be pre-approved). The arguments supporting this view include:

- Competition law can address behaviour which is truly anti-competitive. For instance, in Europe, Google was found to have broken competition law by systematically promoting its own comparison shopping website while demoting those of rivals;⁴⁶
- Search algorithms are complex and are tweaked hundreds of times a year. These factors mean that *ex ante* regulation (i.e. rules imposed prospectively to address future potential harms) is not feasible;⁴⁷
- The lack of understanding about how platforms work provides reason to doubt that top-down regulation would be effective. It could lead to "ill-suited principles" that may "stifle innovation, ending up harming platforms and the economy"; and could lead to rules which "may not be enforceable or be very burdensome to enforce";⁴⁸

36 Ibid, pg 119-111.

37 Including, but not limited to, conduct which may be anti-competitive.

38 Ibid, pg 81.

39 Ibid.

40 Ibid, pg 125.

41 Ibid.

42 Ibid, pg 81, 125.

43 Ibid.

44 Friso Bostoën, "Neutrality, fairness or freedom? Principles for platform regulation", Internet Policy Review, Volume 7 Issue 1, 31 March 2018, pg 12.

45 Katharine Kemp, "ACCC wants to curb digital platform power – but enforcement is tricky", The Conversation, 11 December 2018, <<http://theconversation.com/accc-wants-to-curb-digital-platform-power-but-enforcement-is-tricky-107791>>.

46 Bostoën, pg 7, referring to European Commission Summary Decision No 2018/C 9/08 (Case AT.39740 – *Google Search (Shopping)*), 2018 O.J. C 9/11. However, critics may argue that such investigations are hugely resource- and time-intensive. The *Google Search (Shopping)* decision was issued seven years after the investigation commenced.

47 Torsten Korber, "Common errors regarding search engine regulation – and how to avoid them", European Competition Law Review, 2015, 36(6), 239-244 at pg 243.

48 Michèle Finck, "Digital co-regulation: designing a supranational legal framework for the platform economy", European Law Review, 43(1), 47-68, pg 52 and the sources cited therein.

- Until economic research and decisions by competition authorities shows that competition law is insufficient, “it appears prudent to shy away from an *ex ante* obligation of non-discrimination for online platforms”.⁴⁹

On the other hand, the concerns identified by the ACCC suggest that competition law alone may not be sufficient. If this is accepted, additional intervention appears necessary. Some have suggested that imposing transparency obligations on digital platforms could be an appropriate first step, and that enforceable obligations (which are more intrusive) should only be imposed if subsequently transparency proved ineffective.⁵⁰

The ACCC’s proposal is consistent with this view. With its focus on transparency, it is tailored to levelling the playing field between platforms and their suppliers and could produce substantial efficiency benefits. For instance, it could give advertisers more information about the quality of the advertising opportunities offered by a particular platform, allowing them

to make more informed choices; and could allow advertisers and news publishers to divert resources away from understanding how the algorithms work and towards more productive activities. It could also help uncover anti-competitive conduct, which could then be referred to the ACCC.

Remaining questions?

There are two remaining difficulties with the ACCC’s proposal. The first is a practical one: how will the proposed algorithm regulator strike a balance between providing enough information about the platforms’ algorithms to produce the benefits referred to above, while protecting the platforms’ confidential business information? The ACCC has asked for further submissions on this question, which no doubt will be addressed in its final report.⁵¹

The second relates to algorithm changes of the sort referred to at the start of this article. The ACCC recognised that such changes (without adequate notice) are a specific form of harm in the news referral market. Yet it is unclear how the ACCC’s proposed algorithm regulator would substantially

mitigate the harm caused by such changes. Its role would be limited to retrospectively reporting on the impact of such changes. One might argue this could indirectly increase pressure on the platforms to consult with publishers in advance of making future changes to their algorithms. However, this is unlikely to satisfy media organisations whose traffic was dramatically reduced following Facebook’s 2018 algorithm change. A secondary difficulty is that (as noted above) platforms’ algorithms are tweaked hundreds of times a year. It would be difficult for a regulator to monitor and report on all such changes. Therefore, any regulator tasked with oversight of the platforms’ algorithms will need to grapple with difficult questions of how material an algorithm change is, and whether it would be proportionate to investigate it.

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49 Bostoen, pg 14.

50 Ibid.

51 ACCC, pg 111.

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