CHAPTER 9

Big Tech and News: A Critical Approach to Digital Platforms, Journalism, and Competition Law

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Introduction

Platform companies have contributed to several worrying trends in journalism. On 26 July 2019, the Australian Competition and Consumer Commission (ACCC) released the final report of its "Digital Platforms Inquiry" (DPI), which outlines the significant challenges faced by Australian news media businesses resulting from the competition posed by Google and Facebook. According to the report, over the past decade, over

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100 Australian newspapers have closed. This resulted in a 15% decline in the total number of newspapers and the formation of 'news deserts', large areas which are no longer serviced by a local news company. The number of journalists employed in Australia declined by 9% between 2006 and 2016. There have been drastic reductions in the coverage of public interest news such as local government, courts, and science. These developments threaten to reduce media diversity and have repercussions for democracy in Australia. Furthermore, digital platforms have increased the potential for users to be exposed to disinformation and 'fake news' (ACCC 2019, 280). The DPI attributes the declining financial viability or Australian news companies and the resulting reductions in public interest news to their inability to compete with Google and Facebook for advertising revenue. Google has captured an estimated 96% of search advertising, while Facebook and its subsidiary Instagram have secured 51% of online display advertising in Australia (ACCC 2019, 6–9).

While the impacts of digital platforms on the news industry are significant and multifaceted, digital platforms have avoided accountability. In 2019, Australian policymakers began to take these challenges seriously. The DPI report made several recommendations to update competition law and to level the playing field between news producers and digital platforms. While competition law has played an increasing role in governing Australian media, the DPI represented the first application of the *Competition and Consumer Act 2010* (*CCA*) in digital platform markets. In light of the uncertainty surrounding the application of the *CCA* to competition between big tech and news companies, we find Australia at a critical juncture. The pendulum may swing back towards regulation across the media sector.

This chapter combines media theory and a doctrinal legal studies perspective to explore the suitability of applying competition law to news referrals on digital platforms. First, we outline arguments for the regulation of media ownership that are founded on principles of media pluralism. We then chart the changing regulatory framework governing the media industry in Australia. Finally, we assess the appropriateness of the *CCA* as a framework to address the competition between news media businesses and digital platforms, and the ACCC's main DPI recommendations that govern this relationship. The chapter investigates whether competition law frameworks can or should be extended to protect non-economic values such as media pluralism.

Media Plurality and the Provision of Public Interest News

The concepts of 'plurality' and 'diversity' are deeply ingrained in thinking about the media and democracy. They inform public debates and guide government policy concerning the regulation of media ownership, content, and distribution. 'Pluralism' primarily refers to media ownership, while 'diversity' can be used to describe the range of content available to audiences (McGonagle 2011). As such, we focus on the term 'pluralism' in this article. The argument for pluralism in the media is that no single person or company should dominate the public debate to ensure that a plurality of perspectives is made available. There are limitations to this rationale. Most significantly, political economists of the media contend that the profit imperative of commercial media outlets means that they share a narrow set of interests that tend towards homogeneity and do not necessarily align with the interests of the public (McChesney 1999; Mosco 1996). Despite disagreements, "media pluralism has emerged as a common aim, shared by almost all sides in media policy debates" (Karppinen 2015, 287). At the very least, regulating media ownership can help to limit the closure of newsrooms and reductions in the number of reporters that are associated with media concentration.

The regulation of media ownership is largely predicated on the implicit argument that news media companies serve a public good that extends beyond their commercial function. As Brian McNair et al. (2017, 3) argue, "public access to accurate and timely knowledge about political issues is crucial to the construction and maintenance of a democratic culture". Journalism keeps the public informed, provides analysis and advocacy, facilitates public debate, and holds those with power to account. It also provides a resource and vehicle for civic engagement. The significance of news media has justified government interventions including the establishment of publicly funded news organisations, subsidies, laws protecting journalists, and specific regulations governing media ownership. In short, the regulation of media ownership is intended to limit the ability of one company to set the agenda through their news coverage and a plurality of news media sources is considered imperative to fostering a healthy public debate by including a range of voices.

Recently, research on media pluralism has begun to focus on the impact of digital platforms. Some studies have found that social media users are exposed to news content from diverse sources that they would not

have sought out themselves (Lee et al. 2017) and news from different ideological positions (Masip et al. 2020). Others have demonstrated the emergence of 'echo chambers' and a reduced likelihood of encountering news from different viewpoints on platforms such as Facebook and Twitter (see for example, Quattrociocchi et al. 2016). The mixed results of these studies indicate that the effects of digital platforms are complex and uneven. Nonetheless, traditional questions of media plurality remain important, as the economic models of digital platforms have arguably undermined the commercial viability of many news organisations that communities rely on for local, public interest journalism.

Social media users in Australia may be exposed to diverse sources, however, there are now far fewer sources providing local, public interest journalism. The impacts of digital platforms on the provision of local news in Australia are stark. After decades of decline associated with competition for online advertising, The Public Interest Journalism Initiative's Australian Newsroom Mapping Project chartered a further retraction of the industry related to the economic impacts of COVID-19. They found a net reduction of 135 news organisations in Australia in the two years from January 2019 to 2021. This represents a drastic decrease in media plurality, which may have lasting effects on the diversity of perspectives and quality of information available to Australians.

The Changing Regulation of the News Media Industry in Australia

Despite the democratic rationales for promoting media plurality, Australia has moved towards an increasingly market-driven approach to media governance. Laws regulating the ownership of broadcast media, and to a lesser extent print media, are common across liberal democracies (Dwyer 2014, 266). Some jurisdictions have prioritised regulation intended to promote diversity, fairness, and balance, while others privilege 'free market' principles. In Australia, Lesley Hitchens (2015) argues that media policy has been narrowly defined in terms of limits on media ownership based on the medium of distribution and regional markets, while public broadcasters are tasked with representing diverse perspectives. Yet, in recent decades, even limited safeguards of media plurality have been repealed as Australia pivots towards an increasingly market-oriented approach to news media. The repeal of media-specific regulations

has led to an increased reliance on competition law to govern the media industry.

The Federal Government is empowered to legislate broadcast media based on section 51(v) of the *Commonwealth Constitution*, and commercial radio and television are regulated by the *Broadcasting Services Act 1992* (*BSA*).[1] Section 3(1) (a) and (e) of the *BSA* articulate objectives related to the provision of diverse radio and television services and acknowledge the role of broadcasters in developing cultural diversity. Further, the plurality of ownership is addressed in section 3(1) (c), which stipulates the need for "diversity in control of the more influential broadcasting services" (*BSA* 1992, 8). The tension between the plurality of ownership and commercial viability is reflected in the *BSA*'s objectives to: (1) foster diversity in the control of broadcasting services; and (2) provide a regulatory environment that will help to develop a broadcasting industry which is efficient, competitive, and responsive to audience needs. However, recent reforms have tipped the balance away from ensuring plurality as a public good and towards a focus on market mechanisms promoting competition and commercial viability.

In the name of competition, the centre-right Federal Government passed a media reform package in 2006. It included three major changes to the *BSA*: First, it removed the regulation of media concentration from the remit of the *BSA*, so that these issues would be governed by the more general *Trade Practices Act 1974* (now *CCA*). Second, the package repealed the restrictions on foreign investment from the *BSA*. This change corresponded with the simultaneous removal of restrictions on foreign ownership of newspapers from the Foreign Investment Guidelines established under the *Foreign Acquisitions and Takeovers Act 1975*. Third, it loosened cross-media ownership rules (Butler and Rodrick 2015, 956). Hitchens (2007, 257) suggests that the reform package was rushed through parliament with little deliberation. The public, who were largely excluded from the process, were framed by policymakers as consumers rather than citizens.

Remaining laws specifically targeting media ownership were repealed a decade later by the centre-right Federal Government led by Prime Minister Malcolm Turnbull. In 2017, the '75% reach' rule and '2/3' cross-media ownership rule were abrogated. The 75% rule had ensured

[1] In addition, the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991* establish and regulate Australia's public service broadcasters.

that one person or company could not control media assets that reach more than 75% of the population in a licence area or 60% of the total Australian population. The 2/3 rule stopped one person from controlling more than two regulated media platforms (television, radio, and newspapers) in one licence area (Broadcasting Legislation Amendment [Broadcasting Reform Bill] 2017). These rules set clear quantitative limits and were relatively simple to enforce (DITRDC 2014, 11). However, as the 2014 Media Control and Ownership policy paper published by the Australian Department of Infrastructure, Transport, Regional Development, and Communications (DITRDC) suggests, the efficacy and enforceability of the rules had diminished.

The government justified these changes as a response to the growth of digital media. Communication accompanying the reforms suggested that advances in technology had made regional markets less important as Australians can now access digital content from around the world and that digital media is increasing competition amongst media outlets (DITRDC 2015). However, the reforms should also be understood as part of a longer trend towards the deregulation of the media industry. Prime Minister Turnbull had previously held the position of Minister of Communication and worked as a lawyer for the Australian Consolidated Press Holdings Group. By repealing these media ownership laws, Turnbull completed a process begun by his predecessor, John Howard. He all but ended the role of media-specific plurality legislation and shifted the governance of media into commercial law.

As provisions are stripped from the *BSA*, the *CCA* is becoming more instrumental in governing media ownership. Section 50 of the CCA bears most directly on media ownership. It prohibits acquisitions or mergers that may substantially lessen competition in any market (Butler and Rodrick 2015, 982–983). The ACCC has ruled on a handful of media mergers in recent years. Most worrying for pluralism in Australian news media, the ACCC approved the acquisition of the Fairfax news company by Nine Entertainment in 2018. The acquisition saw the major broadcaster purchase one of the country's largest newspaper chains. The acquisition would not have been allowed under the previous rules. Even in the ACCC's (2018) own assessment, the Chair Rod Sims said the acquisition "will likely reduce competition" by reducing the number of major Australian news providers from five to four (including the public

broadcasters ABC/SBS). While reforms may have been needed to address changes wrought by digital media, deregulation opened the way for Australia's large media companies to build their portfolios.

The two major trends in Australia's media regulation are: (1) the repeal of laws intended to promote media plurality; and (2) a greater reliance on competition law to govern media ownership. This approach frames news as a business and news audiences as consumers. Graeme Turner (2018, 10–11) argues that "the more fundamental issue is the relationship between the media and democracy for the digital era" and suggests that policymakers "need to do more than regulate the market". Australian news audiences are consumers of news and may benefit from access to cheap information and entertainment. However, they are also political actors that require high-quality, local news (which is expensive to produce) and avenues for meaningful participation in democratic processes. The ACCC assesses the practices of digital platforms in the news media sector from a competition and consumer law perspective in the DPI. As such, we explore whether this market approach can also safeguard media plurality and its associated value to democracy.

The Application of the *CCA* to Competition Between News Media Businesses and Digital Platforms

Prior to the DPI it was far from clear whether the *CCA* was equipped to address competition between digital platforms and news media businesses. The DPI was the first application of the *CCA* in digital platform markets and it emphasises that, "the existing tools and goals of the competition law framework remain applicable for digital markets" (ACCC 2019, 138). While other jurisdictions have implemented more foundational reforms of their competition law regimes to respond to issues posed by digital platforms, Australia has opted to retain its existing competition framework with the addition of the 'New Media and Digital Platforms Mandatory Bargaining Code' amendment (addressed in the next section). The DPI does not specify goals related to media pluralism, nor does it explain the applicability of the *CCA* to protect these non-economic goals.

The Protection of Non-economic Goals Under the CCA

A preliminary but important issue is whether the *CCA* may be used to protect non-economic objectives, such as media pluralism. In terms of section 46, which prohibits the misuse of market power, commentators now consider it established that the goal is to protect the competitive process for the benefit of consumers (Kemp 2014, 344). This was also confirmed by the Harper Panel (2015) in their reforms of the *CCA* (the 'Harper Reform'). In the past, there were strong arguments that the objective of section 46 was solely to maximise economic efficiency. However, economic efficiency is considered to promote consumer welfare. For example, in *Boral,* McHugh J stated: "[w]hile conduct must be examined by its effect on the competitive process, it is the flow-on result that is the key – the effect on consumers" (*Boral*, [261]). In practice, Australian competition law has tended to consider consumer welfare to be an outcome of economic efficiency.

Additionally, the egalitarian notion of a 'fair go' in Australia seems to be an enduring undercurrent beneath political discourse about section 46. Since the beginnings of modern Australian competition law, there has been a constant debate about whether competition law should be used to prevent large companies from hurting smaller businesses. In the case of the DPI, this approach is evident in the assessment of harm to Australian news companies caused by global digital platforms. The protectionist objective has shaped Australia's definition of 'consumer welfare' to include this egalitarian notion. While 'consumer welfare' could include broader social considerations (Shapiro 2018, 744), in Australia it appears as if these considerations are only used to diagnose the health of the competitive process itself.

This view is in line with the six attributes identified by the Harper Panel to assess the adequacy of Australian competition policy. According to the Panel, effective competition policy should, amongst other things, focus on: making markets work in the long-term interests of consumers; encouraging innovation, entrepreneurship, and the entry of new players; and, securing necessary standards of access and equity (*Report of the Competition Policy Review* 2015, 23). Those attributes are consistent with the objective of consumer welfare protection as they may be used for determining whether competition policy is enhancing welfare (Miller 2018, 3). Provided the plurality of the media is welfare enhancing and can be reconciled with the protection of the competitive process, it could be argued

that such an objective could be promoted indirectly through market competition. In the DPI, the ACCC states that public interest journalism is important for a well-functioning democracy. Hence, an argument could be made that public interest journalism is welfare enhancing.

The view that the objective of competition law should be strictly about maximising consumer welfare through promoting economic efficiency is controversial outside Australia too. This issue has been raised in relation to competition in the media sector. Even in the United States, where the notion of maximising consumer welfare reigns supreme, critics argue that excessive market concentration can be harmful in many ways including by undermining media diversity. For instance, in 2016 the US Department of Justice highlighted the importance of media diversity when suing to block the Tribune Publishing Company from acquiring the *Los Angeles Times* (Khan 2017, 743). This demonstrates an attempt to use the competition law regime to protect media pluralism. On the other hand, when non-efficiency concerns are in principle protected through other laws and cannot be reconciled with the competitive process, the competition law regime should not apply. In the absence of such laws, there would be a need for targeted legislation. Since it is not clear whether the *CCA* can protect media diversity it is understandable why Australian legislators amended the Act to address the significant imbalance in bargaining power between large digital platforms and news media businesses.

The Assessment of Digital Markets Under the CCA

The other important issue is whether the existing substantive provisions in the *CCA* are sufficient to deal with competition problems that arise in digital platform markets. The terms of reference for the DPI made it clear that the ACCC's focus is not on whether digital platforms have misused their market power. Instead, they posed broader questions, including whether digital platforms are exercising their market power in their dealings with advertisers and content creators in ways that could cause market failure. Indeed, the root of Google and Facebook's bargaining power vis-à-vis news media businesses is their market power in the respective markets they operate in. As such, we address the appropriateness of ACCC's assessment of Google and Facebook's market power.

In Australia, and in other jurisdictions, there has been a debate in recent years about adopting new approaches to competition assessment

in digital platform markets.[2] In contrast to other similar countries, the Harper Reform did not introduce any amendments in that respect. Competition assessment under section 46 of the *CCA*, which prohibits the misuse of market power, has been based on an evaluation of market structure. In 1976, Australia's Trade Practices Tribunal (now the Competition Tribunal) handed down its landmark decision in *Re Queensland Co-Operative Milling Association Ltd* ('*QCMA*') where it stressed that the assessment of market power requires the examination of five elements of market structure. These five factors (sometimes referred to as the 'QCMA factors') of this structuralist approach can be summarised as:

a. the number and size of sellers (i.e. market concentration);
b. the height of barriers to entry or expansion;
c. the extent of product differentiation;
d. the character of vertical relationships and the extent of vertical integration; and
e. the nature of any formal, stable, and fundamental arrangements between firms which restrict their ability to function as independent entities (*QCMA*, [512]).

These factors are characteristic of competition in the manufacturing industries of the 'old economy' (Balasingham and Jordan 2020, 2). Digital platform markets display some fundamentally different characteristics. A hallmark of many digital platform markets like social media markets is that they typically have capacity for one firm only and the market will tip towards the firm whose product will become the standard. Competition on those markets is characterised as competition *for* the market (i.e. 'winner-takes-all' markets) as opposed to competition *in* the market. A pertinent question is whether this structuralist approach is still adequate for market power assessment in digital platform markets or whether adjustments are necessary.

Digital platforms are multi-sided markets and the ACCC established that (1) Google has simple market power (SMP) in online search and in search advertising; (2) Facebook has SMP in social media services and in display advertising; and (3) that both Google and Facebook have SMP in

[2] See e.g. Report of the UK Digital Competition Expert Panel, 'Unlocking Digital Competition' (March 2019); Jacques Crémer et al., *Competition Policy for the Digital Era*, European Commission Report No B-1049, 4 April 2019.

the market for news referral (ACCC 2019, 99). It is this market power in the news referral market that gives those two digital platforms substantial bargaining power over Australian news media businesses.

The ACCC's market power analysis in the DPI deviated from the conventional assessment approach. Already in the Guidelines on Misuse of Market Power (2018, para. 2.15) the ACCC stated that the list of factors from the *QCMA* judgement is discretionary and non-exhaustive. The Guidelines also omit any reference to market structure and only speak of competitive constraint. While there was no explicit mention of the *QCMA* factors in the DPI, the ACCC still considers the structure of the relevant markets and discusses some of the QCMA factors, albeit implicitly, as part of other market aspects. Importantly, in its assessment, the ACCC supplemented some of the structural factors with dynamic and strategic ones. This was most apparent in relation to market concentration and barriers to entry.

Market concentration is generally regarded as the first indicator of market power (*Queensland Wire*, [189–190]). The higher a firm's market share, the more likely it will hold SMP (*Universal Music*, [412]). The traditional methodology for determining market power involves identifying *actual* competitors in a market (i.e. the companies currently operating in that market) and determining their respective market shares (Sidak and Teece 2009, 614). In winner-takes-all markets, the concentration level is not an adequate indicator of the competitive constraints on the market leader. As a result, a more relevant constraint tends to be exercised by dynamic competition. This type of competition denotes that firms do not compete on price but, rather, strive to develop more innovative products or services in order to render previous ones obsolete. This is particularly the case on markets where products or services are offered for free. Incorporating innovation into an assessment of competition involves considering technologies and design approaches that differ radically from those used by the incumbent, and rivals that are investing in drastic innovations or have the potential to do so (Evans and Schmalensee 2002, 18–20). The state of competition is more difficult to assess because actual or potential competitors could introduce new products that disrupt the market overnight.

In the DPI, the ACCC first defined the markets in which Google and Facebook are active and looked at their current rivals and the market shares. The ACCC found that Google and Facebook hold very large market shares. Cognisant of the limited value of market shares in digital

platform markets, the ACCC examined to what extent dynamic competition places competitive constraints on Google and Facebook (ACCC 2019, 66, 78). For instance, ACCC noted that Facebook was able to replace MySpace. However, they went on to note that:

> The considerable scale of Facebook may serve to protect it from dynamic competition enabling its substantial market power to persist, through the operation of same-side and cross-side network effects, as well as economies of scale and advantages of scope. (ACCC 2019, 78)

There has not been any notable consideration of dynamic competition in previous cases, possibly because the traditional markets in question lacked the necessary potential for innovation.

The ACCC also paid more attention to market dynamics and strategic behaviour of firms in relation to barriers to entry. Barriers to entry describe any substantial difficulties that firms face when seeking to enter a market (Fisher 1979, 18, 23–27). In winner-takes-all markets, market concentration is less relevant and barriers to entry play an even more vital role. The conventional assessment approach takes into account a variety of structural barriers to entry such as economies of scale, sunk costs, and access to essential facilities. Network effects and data collection advantages, which also stem from the market structure, are likely to be the most significant barriers to entry on advertising platforms.

Network effects constitute by far the most significant barrier to entry in the platform economy. A network effect arises when the value of a product or service increases with the number of users. While network effects may also arise in some traditional markets, data-driven network effects that stem from the scale, scope, and the spill-over effect of data are unique to digital platform markets (Stucke and Grunes 2016). Network effects (both same-side and cross-side) are the first barriers to entry that the ACCC analyses in relation to Google and Facebook. For instance, in the case of Google, the ACCC found that "all else being equal, a large amount of data improves the relevance algorithm in the search engine, increasing the quality of the search service. A greater quantity of user data, including data on user searches and user interactions with search results, allows the Google relevance algorithm to update in a timely fashion, improving its relevance ranking" (ACCC 2019, 66). A larger network not only attracts more users, but also more advertisers which will lead to more revenue and can then be invested in R&D and acquisitions.

A novel aspect of the ACCC's approach was the consideration of strategic entry barriers. In the case of Google, the ACCC considered as a significant strategic barrier to entry the company's exploitation of customer inertia or 'status quo bias' by making Google Search the default option on the Chrome and Safari internet browsers (ACCC 2019, 68). Google and Facebook's strategic acquisitions are another significant strategic barrier to entry. The ACCC argued that some of those acquisitions have allowed Google and Facebook to entrench their respective incumbent positions. Those acquisitions have weakened the constraint from dynamic competition by eliminating potential competitors.

The expansion into related markets has also provided Google and Facebook with advantages of scope (i.e. conglomeration effects) in order to collect more data (ACCC 2019, 74–75, 80). This illustrates the interplay between structural and strategic barriers to entry. The scope and flexibility in section 46 have allowed the ACCC to establish the SMP of Google and Facebook without explicitly using all of the QCMA factors, nor by coming up with new concepts specifically addressing competition issues in digital markets as recently introduced or proposed in other jurisdictions.[3] The concept of barrier to entry, which is the most important factor to assess market power, is broad enough to cover a number of constraints—both structural and strategic (Balasingham and Jordan 2020, 21). In addition, the notion of dynamic competition can supplement considerations of actual competition. However, one can also argue that establishing the SMP of Google and Facebook in the DPI was not overly difficult given how dominant these two companies are in their respective core markets. It could well be that in less obvious cases the ACCC might struggle to establish SMP with its modified approach. In the absence of more fundamental reform, the uncertainty around the adequacy of section 46 to deal with misuse of market power by digital platforms could be another argument for introducing new regulation in the media sector.

Reforms Proposed in the DPI

With a view to preventing the misuse of market power and market failures due to market power in the future, the ACCC acknowledged the need to reform merger control. Most importantly it proposed an amendment to section 50(3) to incorporate two additional factors that need to

[3] See i.e. the 9th amendment and the proposed 10th amendment of the German Competition Act.

be taken into consideration in a merger assessment, namely: the likelihood that the acquisition would result in the removal from the market of a potential competitor; and the nature and significance of assets, including data and technology, being acquired directly or through the body corporate. Combined, these two factors help to safeguard both potential and dynamic competition on digital platform markets.

While the recommendation in relation to merger control could help to slow down the growth of digital platforms and ensure more competition between platforms, the measure would not directly address their bargaining power vis-à-vis news media businesses, and is therefore less useful for the protection of media diversity. As a more specific remedy, the ACCC proposed a bargaining code to govern the relationships between large digital platforms and Australian news media businesses. The ACCC justified the need for this code by stating that "[w]hile bargaining power imbalances exist in other areas, the bargaining power imbalance between news media businesses and major digital platforms is being addressed as a strong and independent media landscape is essential to a well-functioning democracy" (ACCC July 2020, 3). The code exemplified the balancing of competition and public benefits under the *CCA*. It can thus be argued that the protection of non-economic values such as media pluralism is possible under the *CCA* even if such values were to fall outside the concept of consumer welfare.

On 25 February 2021, the Australian Parliament enacted the News Media and Digital Platforms Mandatory Bargaining Code as an amendment to the CCA. The code allows Australian news media businesses that fall under its scope to negotiate remuneration for news content made available on digital platforms that have a significant bargaining power over those news businesses. An important aspect of this behavioural remedy is that news media businesses are allowed to collectively bargain with digital platforms, and this would allow them to negotiate from a stronger position than negotiating individually. Such arrangements are captured by section 45 and the cartel laws, which both prohibit anticompetitive agreements. Apart from the bargaining provisions, the code stipulates minimum standards to govern non-payment related issues that cannot be negotiated away. While the code is an example of mandated self-regulation rather than a fully fledged application of competition law, it arguably constitutes a critical juncture in terms of regulation and competition. It comes at a time where Australian competition law in its current form may have reached its limit when applied in digital markets and needs to be

complemented with sector-specific regulation in order to keep the market power of large digital platforms in check.

Conclusion

In this chapter, we have argued that, through the ACCC's novel approach, competition law can be applied to the assessment of market power on digital markets and can be extended to address some non-efficiency goals, such as media pluralism. In the DPI, the ACCC evaluates Google and Facebook's SMP in their respective markets by adapting the conventional market power assessment approach to consider dynamic competition and strategic barriers to market entry. It is Google and Facebook's market power in their respective markets that gives them substantial bargaining power vis-à-vis Australian news media businesses. The *CCA* may protect non-efficiency goals such as media plurality if they are welfare enhancing and can be reconciled with the protection of the competitive process. In particular, the ACCC states that public interest journalism is essential for a well-functioning democracy and thereby it indirectly indicates that public interest journalism is beneficial to consumer welfare.

There are also significant limitations to the application of competition law in media markets. Nicolas Petit (2020, 239) argues that a broad conception of antitrust legislation has placed increased pressure on competition law bodies to focus on protecting consumer welfare and, in doing so, has transformed competition law into a form of government regulation. This is the case in Australia, where industry-specific regulation has been repealed with competition law stepping into the vacuum. Petit reminds us that many of the issues related to digital platforms, including the problems of fake news, hate speech, and privacy concerns do not primarily stem from the near-monopoly status of platforms such as Google and Facebook. In these cases, media-specific regulation is more likely to address the root causes. However, issues of media pluralism are more strongly related to antitrust concerns over ownership. As such, the objectives of encouraging media plurality and the provision of public service news are likely to be best served by an approach that combines competition law and sector-specific legislation.

A brief review of the recent trajectory of Australian media policy, characterised by deregulation and a steadily increasing reliance on competition mechanisms, might warn us against expecting the development of new

regulations on the media sector. Yet, there are growing calls to address the concentration of media ownership. In late 2020, the Senate opened an inquiry into "the state of media diversity, independence and reliability in Australia". Amongst the terms of reference, the inquiry investigated: "the effect of media concentration on democracy"; "the impact of Australia's media ownership laws"; "the impact of online global platforms such as Facebook, Google and Twitter"; and, "the barriers faced by small, independent and community news outlets" (*Media Diversity in Australia*, 2020). In tandem, the DPI and the media diversity inquiry have the potential to instantiate a regulatory environment that better promotes media pluralism.

Addressing problems in the sector will be difficult. The news media bargaining code was introduced as a bill by the Federal Government in December 2020 and received immediate challenges from Google and Facebook. These challenges included Facebook's removal of access to news content on its platform in Australia, Google's threat that the company would pull its services out of Australia, as well as the release of public relations material and political lobbying against the bill launched by both companies. The reaction mirrored responses to legislation intending to regulate or tax digital platforms in other jurisdictions (McAuley 2019). Because attempts to regulate digital platforms will continue to face fierce resistance, it is important to develop comprehensive and well-suited policy instruments in the sector that are most likely to produce their intended results. Competition law will remain an important tool in the news media sector. However, it must be paired with other mechanisms for supporting public interest journalism if Australia is going to address the impacts of digital platforms on the country's news environment and political culture.

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