Damned Down Under
Regulatory Storm in Australia Clouds
Global Outlook for Facebook and Google

By James Panichi

FOR THE PAST two years, a relatively small competition watchdog at the edge of Asia has been keeping Silicon Valley’s most powerful players on tenterhooks. What started off as a modest, narrowly defined investigation into the impact Facebook and Google have on Australia’s media and advertising industries has ballooned into a groundbreaking regulatory behemoth that’s expected to frame the global response to the online platforms’ seemingly unstoppable accumulation of power and wealth.

It’s not that the proposals put forward by the Australian Competition & Consumer Commission in its final report will be binding — Canberra will be free to embrace or dismiss the recommendations. But that’s not the point: the American tech giants know that once these regulatory ideas are out in the open, endorsed by the ACCC’s hard-won credibility, it will be impossible to put the genie back in the bottle.

Take the idea of a digital regulator. The draft recommendations of the ACCC’s digital-platforms inquiry pointed to the establishment of a government body tailor-made to oversee Facebook and Google’s operations, equipped to carry out deep dives into the algorithms that select news stories, prioritize advertising and design feeds that can pander to your every prejudice. The platforms see this as a radical and unwelcome development — an industry-specific body that no other country has been ready to embrace. Yet a digital regulator is now on the table, and the ACCC’s final report, due out in the coming weeks, may be the first step in bringing such a regulator to life by giving it both a name and a mission. Even if the Australian government were to reject the idea out of hand, its mere presence on the drawing board would be enough to set Silicon Valley’s collective heart racing.

It’s not that Facebook or Google — the two platforms singled out for attention by the ACCC — don’t know that there’s a wave of regulation heading their way in countries around the world. But for a national competition watchdog — even one overseeing a small and faraway market — to suggest that authorities have a right to put the tech companies’ secret formula under the microscope, or to publicly air proposals that could prioritize the user’s right to privacy over the tech companies’ need to vacuum up data ... Well, there will be no turning back.

Australian policy-makers appear to be enjoying their time in the international limelight, but they also know that the establishment of the groundbreaking digital-platforms inquiry had nothing to do with their insight into what most politicians now agree has been the inadequate regulation of digital platforms. The only reason why Australia is today at the forefront of global regulation is that the ACCC’s stars happened to align, one by one, over the past two years.

ANATOMY OF AN INQUIRY

The Australian government agreed to this inquiry as a result of political horse-trading. After struggling to get an unrelated media overhaul through the two houses of parliament, the government found itself signing a last-minute deal with a small group of independent senators from the state of South Australia. The quid pro quo was that the government would direct the ACCC to conduct an inquiry into the platforms’ impact on Australia’s advertising and media markets. The terms of reference were both broad and bland,
clearly designed to push the country's competition regulator toward the complaints of struggling media companies as they hemorrhaged advertising revenue to the digital platforms. The ACCC exploited the wide remit of the terms of reference by delving into issues of privacy and data use, while also brainstorming on how best to regulate the tech companies' knack for acquiring potential competitors before they have a chance to become actual competitors. Yet the inquiry's underpinning concern with the media landscape and the platforms' fraught relationship with publishers gave it political relevance, as media organizations across Australia filed feisty and often resentful submissions accusing the platforms of both holding substantial market power and abusing that market power. The platforms were quick to fight back, and the public submissions process soon turned into a bloodbath, with Rupert Murdoch's News Corp., which owns the majority of Australia's newspapers, relishing its role as fustigator-in-chief.

The submissions had the effect of placing key competition and privacy concerns firmly on the public agenda. What algorithms were the platforms using to prioritize one newspaper's content over that of a rival? Should the newspapers be entitled to gain access to the data acquired from users as they read an article from a Facebook feed? What are the privacy implications of using such data to then target advertising at the reader? Were third-party companies using Google's advertising services being treated fairly when they then found themselves competing against Google? Have the platforms benefited from a regulatory imbalance that has allowed them to takeovers. But the ACCC had often criticized what it saw as a lack of competition in the financial sector, warning that this would lead to poor outcomes for consumers. In what became a zero-sum game of credibility, ACCC's moral authority rose just as that of APRA and ASIC was in freefall. This solid public standing has provided the digital-platforms inquiry with a framework of respectability; the tech companies wouldn't be able to dismiss its recommendations as the irrelevant thought-bubble of a crackpot regulator.

**MORAL LOW GROUND**

More importantly, though, the inquiry has been overshadowed by the sharp decline in the digital platforms' public standing — something that wouldn't have been apparent when the inquiry was established at the end of 2017. In the Cambridge Analytica scandal, the UK-based research company was revealed to have acquired the personal data of Facebook users — a revelation that prompted upheaval among Australia's regulators and politicians. By the end of 2018, Australia's home affairs minister, Peter Dutton, had gone full Trump on Silicon Valley, referring to the US tech companies as tax-dodging, privacy-violating scoundrels who were too busy cozying up to dictators to worry about their social responsibilities. The relationship between the government and the platforms was at an all-time low when an Australian gunman entered two mosques in the New Zealand city of Christchurch in March 2019, shooting dead 51 people. The gunman, a white supremacist, broadcast the massacre live on Facebook, with the platform dragging its feet in removing the content. This prompted the Australian government to unleash the most forceful regulatory backlash the world has seen against the California-based social media company. Within weeks of the killings, the Australian parliament had adopted laws that included prison sentences for local employees of digital platforms that fail to remove “abhorrent violent material” in an “expeditious” way. Executives with Facebook or Google business cards could wind up spending three years behind bars in Australia for content uploaded anywhere in the world.

The laws marked the nadir of the relationship between Canberra and big tech. And while these political atmospherics aren't likely to affect the work of the fiercely independent ACCC, they do mean that recommendations put forward by the watchdog in its final report will be examined closely by a government that has a track record of sticking the boot into Silicon Valley. The digital-platforms inquiry is now a threat to the tech companies not just for the regulatory ideas it will put on the table, but for the likelihood that the Australian government will adopt even some of the more adventurous recommendations put forward by the ACCC.

Put succinctly: this is the beginning of what may yet become a global regulatory backlash against the operations of online platforms. What had been expected to be a leisurely discussion paper about the future of newspapers by a regulator usually in favor of allowing market forces to take their course is now set to fire the first salvo in a regulatory arms race that could undermine the digital platforms' business model.

What’s more, the final report will award an otherwise peripheral regulatory jurisdiction at the bottom end of the Pacific Ocean the best prize of all: global relevance.