

**‘Search and social digital platforms, democracy and
citizen exposure to speech pluralism in Australia.’**

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August 2023

ABSTRACT

The business success of search and social digital platforms relies on an atomised approach to content dissemination. Algorithms rank and prioritise content to engage users and sell targeted advertising opportunities. Scholarship has produced divided results on the question of whether platform algorithms are harming democracy by limiting citizens' exposure to a plurality of speech in several respects (including, though not limited to, by way of creating echo-chambers). Arguably, this division is a product of two methodological issues. Firstly, scholars struggle to obtain *quantitative* data measuring whether platforms limit exposure to speech; and secondly differences in their theoretical understandings of the purpose and structures of democracy have led to the absence of a uniform standard across scholarship against which harm to democracy is measured. In light of this, the Australian Government has suggested regulation cannot be justified. This thesis further considers this question. Its object is to yield a practical result for Australian lawmakers and as such, it looks to navigate the existing methodological issues. It does this firstly by employing doctrinal analysis – considering whether 'exposure to speech pluralism' is a structural requirement of Australia's democracy as established by the Constitution. It finds that although no such requirement exists, *the Legislature* has, to some degree, sought to establish it. Specifically, the Legislature has made two value judgements about the extent to which this should be established. This thesis then assesses platform markets and products against these value judgements – finding that their concentrated market structure, and feed of content, personalised *for (not by)* the citizen, fall short. As such, it suggests Australian democratic standards require platform algorithms to facilitate a greater availability of plural political communication; and consequently, that regulation is warranted. This paper concludes by briefly recommending areas of law which may successfully regulate this aspect of platforms, for further research.

ACKNOWLEDGEMENTS

I would like to thank my supervisor, Mr. Tarunabh Khaitan, Wolfson College and the Faculty of Law at the University of Oxford for their assistance over the last year. My gratitude also extends to the Faculty of Law for their financial support of my studies; and to the many professors who I worked under as a research fellow who have become personal and academic mentors.

Thank you to the Honourable Justice Pamela Tate for her time reviewing and discussing my analysis of the Australian constitutional law aspect of my research into search and social platforms.

My thanks also go to the professors at the Australian National University, particularly those in the Faculty of Law, who equipped me with the undergraduate education, and later the encouragement and references to study at the University of Oxford. Similarly, they go to Professor Geoff Andrews for his encouragement to pursue postgraduate study. My thanks also goes to King & Wood Mallesons, for providing me with unprecedented leave for absence for this study during my Graduate Program. Finally, I would like to thank my family and friends in Somerville, Sydney, Canberra and Oxford, for their unwavering love and support.

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Word count: 29,998.

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Abbreviation	Full Description
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
BSA	The <i>Broadcasting Services Act 1992</i> (Cth)
AI	Artificial Intelligence
OAIC	Office of the Australian Information Commissioner
US	United States of America

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INTRODUCTION

The business success of search and social digital platforms relies on a marketplace, atomised approach to the dissemination of content. Algorithms – formulas of digital code opaquely protected by intellectual property law, packaged into user-friendly interfaces – rank and prioritise content that is designed to engage users and sell targeted advertising opportunities.¹ This content is the news stories, personal and public conversations that help shape people’s political understandings, and consequently the democratic decisions they make. While search and social platforms are an invaluable asset to democratic society for the ease with which they enable information and opinions to be sourced and shared, these platforms also largely operate in its blind spot – the part of democracy which acknowledges the importance of, but often struggles to decide the extent to which, individuals need to be exposed to a plurality of speech in order to provide them with the ‘facts and arguments’² relevant to the ‘making of the decisions’³ which affect themselves and society. Some political psychology scholarship is concerned that search and social platforms are limiting citizens’ exposure to a plurality of speech by the way that they disseminate content. As systematic literature reviews have demonstrated, scholars are fractured in their understanding of this concern.⁴ Some are

¹ Australian Competition and Consumer Commission (ACCC) *Digital Platforms Inquiry Report* (Final Report 2019) 61 <<https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf%3E>> accessed 2 December 2022.

² *Attorney-General v Times Newspapers* [1974] A.C. 273, 315 (Lord Simon of Glaisdale), cited in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (*‘Nationwide News’*), 49 (Brennan J).

³ Ibid.

⁴ See: Amy Ross Arguedas, Richard Fletcher, Rasmus Kleis Nielsen and Craig Robertson, *Echo Chambers, Filter Bubbles, and Polarisation: a Literature Review* (Report, Reuters Institute, the Royal Society and the University of Oxford, 2022) 9 <[https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Echo Chambers Filter Bubbles and Polarisation A Literature Review.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Echo%20Chambers%20Filter%20Bubbles%20and%20Polarisation%20A%20Literature%20Review.pdf)> accessed 8 December 2022; Pablo Barberá ‘Social Media, Echo Chambers, and Political Polarization’ in Nathaniel Persily and Joshua Tucker (eds), *Social Media and Democracy The State of the Field, Prospects for Reform* (Cambridge University Press, 2020) 34.

concerned that search and social platforms are making ‘editorial-like’ decisions about content they disseminate to citizens with no editorial standards or regulatory guidance.⁵ Others are worried by the limited amount of market competition among search and social platforms leaving citizens with little choice but to consume the single feed of personalised content selected for them by leading platforms. A third group are concerned that there is little-to-no transparency of platform algorithms and minimal user-agency over the collection and use of data to personalise content.⁶ Finally, some political-psychologists fear that personalisation algorithms are indulging human cognitive heuristics, leading people to enjoy content that reinforces their existing beliefs as it is processed ‘more fluently’.⁷ These scholars allege that by collecting and making inferences from data, platforms are personalising users into ‘echo-chambers’ of their own opinions, for profit – to the detriment of a democratic need to exchange and contest ideas.⁸ However, despite these concerns, there is a sizeable body of competing scholarship suggesting these fears are either ‘overstated’ or indeed unfounded.⁹

Arguably, this division stems from two methodological issues. Firstly, as Arguedas et al. explains, scholars have struggled to *quantifiably measure* both whether search and social platforms are limiting citizens’ exposure to speech, and to what degree individual pieces of

⁵ Ansgar Koene, Elvira Perez Vallejos, Derek McAuley, Helena Webb, Marina Jirotko, Menisha Patel, and Sofia Ceppi ‘Editorial Responsibilities Arising from Personalization Algorithms’ (2017) 1/1 The ORBIT Journal 1, 3-8.

⁶ Ebony Bennett ‘Facebook and Google having too much market power is a threat to democracy’ (article online, Australia Institute, 6 February 2021) <<https://australiainstitute.org.au/post/facebook-and-google-having-too-much-market-power-is-a-threat-to-democracy/>> accessed 27 June 2023.

⁷ Aumyo Hassan and Sarah Barber ‘The effects of repetition frequency on the illusory truth effect’ (2021) 6/38 Cognitive Research: Principles and Implications (online) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8116821/>> accessed 12 February 2022, 1-3.

⁸ Cass Sunstein, *#Republic Divided Democracy in the Age of Social Media* (Princeton University Press 2018) 59-97.

⁹ Elizabeth Dubois and Grant Blank ‘The Myth of the Echo-Chamber’ (2018) Oxford Internet Institute (online article) <<https://www.oii.ox.ac.uk/news-events/news/the-myth-of-the-echo-chamber/>> accessed 3 December 2022; and Elizabeth Dubois and Grant Blank ‘The echo chamber is overstated: the moderating effect of political interest and diverse media’ (2018) 21/5 Communication, Information Technologies, and Media Sociology 729, 729.

content impact citizens' formation of political opinions.¹⁰ Scholars routinely encounter practical difficulties in attempting to track the full spectrum of an individual's engagement with content online, determining whether a user had 'meaningful [or] superficial engagement' with a news source, and in assessing whether an online interaction influenced a citizen's political opinion.¹¹ These challenges are exacerbated for researchers by the absence of transparency from platforms as to what factors their algorithms consider when filtering and ranking content.¹² Moreover, consistency among scholars' findings undermined by collective practical challenges of (i) defining what is 'impartial' or 'opinionated' news content; and (ii) determining what quantity of diverse content (that is what 'threshold' of diverse content) a user must be exposed to, in order to have been 'exposed to a plurality of speech'.¹³ The second methodological issue lies in differences of theoretical understandings between scholars of the purpose and structures of democracy. Such differences mean there is no uniform understanding across scholarship as to (i) what structures are required to protect democracy; and consequently (ii) how harm to it should be measured or assessed.

In light of this division, the Australian Government has concluded that although 'algorithmic curation...[has] the potential' to limit exposure to a plurality of speech through 'echo-chamber' and other effects, 'the extent of any harm caused...is not yet clear' and as such regulation cannot be justified.¹⁴ The Australian Government has, however, expressed

¹⁰ *Arguedas et al.* (n 4) 9.

¹¹ *Ibid* 8-9.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *ACCC 2019 Final Report* (n 1) 345; and see 'Government Response and Implementation Roadmap for the Digital Platforms Inquiry' (12 December 2019) <<https://treasury.gov.au/sites/default/files/2019-12/Government-Response-p2019->

some concern about Artificial Intelligence (AI), platforms and algorithms. It is currently directing a number of inquiries – (i) the Australian Competition and Consumer Commission (ACCC) 2025 Digital Platform Services Inquiry; and (ii) the Department of Industry, Science and Resources Inquiry into Supporting Responsible AI; it is also (iii) considering recommendations from the Attorney-General Department’s review of the Privacy Act; and has previously considered recommendations from the ACCC’s 2019 Digital Platforms Inquiry.¹⁵ However, no current inquiry considers whether this aspect of search and social platforms is harmful to Australia’s democracy.

While existing scholarship has made a valuable contribution to general understanding of the issues surrounding the question of whether search and social platforms are limiting citizens’ exposure to a plurality of speech (and in turn harming democracy); these two methodological issues have prevented Australia from utilising and relying on it. The object of this thesis is to further consider this question and yield practical result for Australian lawmakers. As such, it seeks to navigate the existing methodological issues. As such following, *Chapter One* (which contains an overview of prominent systematic literature reviews explaining both how search and social platforms operate and the division in existing scholarship on this question) this thesis then structures its inquiry by firstly considering whether exposing citizens to a plurality of political communication *is a structural feature of*

[41708.pdf](#)> 9-10, where the Government implicitly endorsed the ACCC’s findings by not including such algorithmic regulation in the national ‘roadmap for implementation’ paper, responding to the ACCC’s recommendations.

¹⁵ *Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020* (to the ACCC for 2025 Digital Platform Services Inquiry, 10 February 2020) <<https://www.accc.gov.au/system/files/Ministerial%20direction%20-%20Digital%20platform%20services%20inquiry.pdf>>; Press Release the Hon. Ed Husic (Minister for Industry and Science) ‘Safe and Responsible AI’ (Inquiry announcement, this inquiry also considers the Chief Scientist’s ‘Rapid Response Information Report: Generative AI’ Report 2023) <<https://www.minister.industry.gov.au/ministers/husic/media-releases/safe-and-responsible-ai>>; Privacy Act Review Report (January 2023) Attorney-General Department’s <https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf>; *ACCC 2019 Final Report* (n 1).

Australia's democracy (Chapter Two). Specifically, this thesis uses doctrinal analysis to consider whether this is a structural feature of *Australia's particular type* of democracy – ‘representative and responsible government’¹⁶ – that is established by its Constitution.¹⁷ This doctrinal methodology anchors the analysis of this question to *Australian democracy*, and thereby avoids the ‘hurdle’ Australian lawmakers confront in relying upon existing scholarship which typically considers differing *theoretical* models of democracy in their approach to this inquiry.

This doctrinal analysis finds that exposing citizens to a plurality of political communication is not a structural requirement of Australian democracy. Instead, the Constitution assumes that citizens will naturally organise to expose themselves to the required level of political communication plurality. This analysis, however, suggests that the *availability of*, and *citizen choice to*, a plurality of political communication is nonetheless something the Constitution and Australia's system of government *values*. Parliament is left to determine *whether* (and if so, *how and to what extent*) this value should be facilitated as a structural feature of Australia's democracy. This thesis finds that Parliament *has* determined that that the availability of a plurality of political communication should be such a structure, in its regulation of certain aspects of society (particularly of the traditional media industry). In this regulation, it has made several value judgements about the extent to which this should be pursued. These are, that while the ‘availability’ of a plurality of political communication should be facilitated as part of a structural feature of Australian democracy (value judgement one), this pursuit must be tempered such that it does not cause any ‘unnecessary interference

¹⁶ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*‘Lange’*) 557.

¹⁷ *The Constitution of the Commonwealth of Australia*.

into business’¹⁸ (value judgement two). Specifically, Parliament has suggested that it should facilitate citizen choice to a minimum number of five independent editorial voices (value judgement two (a)); and beyond this, it should only legislate to make a plurality of political communication available to citizens (both generally in the market and from individual platforms) by incentivising this to occur by acting on the market generally, and not coercively dictating editorial-like (or similar) standards to individual firms (value judgements two (b) and (c)).

This thesis then applies these value judgements to search and social platform markets, products and regulatory frameworks, to determine whether platforms are making available a sufficient plurality of political communication for citizens to choose from (*Chapter Three*). In doing so, this thesis navigates the second issue identified as a ‘roadblock’ for Australian regulation in earlier scholarship, as it assesses whether platforms are limiting the availability of plural political communication not by using quantitative analysis, *but by the qualitative outcomes and standards Australians have previously set for themselves*. This thesis finds that the concentrated market structure, and the nature of the product disseminated (typically a single feed of content personalised *for, not by* the citizen), fall short of these standards. As such, it concludes that Australian democratic standards require platforms to facilitate a greater availability of plural political communication; and consequently, that regulation is warranted. This paper concludes by briefly recommending areas of law (specifically a hybrid consumer and competition law approach) which may successfully regulate this aspect of platforms, for further research.

(i) *Definitions and scope*

¹⁸ Commonwealth Parliament, *Parliamentary Debates Second Reading Speech Trade Practices Act 1965*, House of Representatives, 19 May 1965, the Hon. B.M Snedden (Attorney-General), 1655.

Prior to commencing analysis of the question, as whether ‘search and social platforms are limiting citizens’ exposure to a plurality of speech’, it is important to define key terms and the scope of this inquiry. The term ‘a plurality of speech’ would seemingly refer to all opinions and beliefs on every topic. This thesis initially defines it as such, though limits its breadth to topics related to political issues. As such, initially this thesis defines ‘exposure to speech pluralism’ as the ‘situation in which citizens come into contact with, or are otherwise made aware of the existence of, all opinions and beliefs on every *political* topic relevant to and existing in *Australian* society; to a degree that is reasonably possible’¹⁹ (this scope will further be refined in Chapter Two). This thesis excludes misinformation and harmful speech from this definition of ‘speech pluralism’. This thesis does not in any finding intend to suggest that individuals should be exposed to speech that is harmful to their person, nor does it address misinformation or issues pertaining to ‘hate speech’. It proceeds on the assumption that the Australian Government has separate regulation in place to address each of these areas. Furthermore, this thesis limits itself to consider algorithmic dissemination of content, in considering whether platforms are limiting citizens’ exposure to speech. As such, it excludes issues relating to platform removal or ‘take-down’ of content. It also excludes any international law obligations from its scope. Additionally, as part of its inquiry, this thesis considers whether citizen exposure to a plurality of political communication (as just defined) is a *structural feature and requirement* of Australian democracy. This thesis defines ‘structural feature’ and ‘structural requirement’ of Australian democracy as a ‘feature of social governance that is deemed necessary for the functioning of Australian democracy and is contained in (or otherwise can be derived from) Australian law’.²⁰

¹⁹ Original definition. What is ‘reasonably possible’ is not substantiated, as this is irrelevant to the inquiry that follows.

²⁰ Original definition.

This thesis further limits the scope of digital platforms it considers in its inquiry to *search and social* platforms only. ‘Search platforms’ are defined as online software systems, owned and operated by private corporations, which use algorithms to search for and rank content contained in a database that houses publicly available websites and files (including for example, platforms like Google, YouTube and Yahoo!); some search platforms like ChatGPT have an additional ability to generate new content by drawing together information on its database to generate an original output.²¹ ‘Social platforms’ are defined as online software systems owned and operated by private corporations, which allow users to connect with one another and access entertainment.²² Social services involve the exchange of text and also ‘place a heavy emphasis on visual content, including photos and short form videos’²³ and ‘are increasingly used for entertainment services, as well as to access social connections.’²⁴ Consequently, platforms like Amazon and Netflix are excluded. Additionally, this thesis excludes paid advertisements (including political advertisements) from consideration. It similarly excludes all direct messaging services (for example ‘Facebook messenger’), dating apps and gaming platforms.²⁵

²¹ Original definition, with aspects derived from the Merriam Webster Dictionary definition of ‘search engine’ (online) <<https://www.merriam-webster.com/dictionary/search%20engine>> accessed 13 June 2023; and from *ACCC 2019 Final Report* (n 1) 41.

²² Original definition with aspects derived from: Caleb Carr and Rebecca Hayes ‘Social Media: Defining, Developing, and Divining’ (2015) 23/1 *Atlantic Journal of Communications* 46, 47-52; and the ACCC Digital Platform Services Inquiry 2025, *Interim Report 6: Report on Social Media Services* (2023) 6-9, 19-24.

²³ *ACCC Interim Report 6* (n 22) 8.

²⁴ *Ibid*; see also *ACCC 2019 Final Report* (n 1) 47-51.

²⁵ This exclusion is made given the length restrictions of this MPhil, and because these communications typically occur between two (or a small group of) individuals.

CHAPTER ONE: LITERATURE REVIEW & METHODOLOGY – THE PRODUCTS AND BUSINESS MODEL OF SEARCH AND SOCIAL PLATFORMS; AND EXISTING CONCERNS ABOUT DEMOCRACY.

1 Understanding the products and business model of search and social platforms.

Search and social platforms offer online searching and/or social networking services (product one) to people as consumers (consumer one), ‘for a zero monetary price’.²⁶ In using these services, consumers provide their ‘attention and data’ which platforms ‘sell as target advertising opportunities’ (product two) to corporations and other ‘advertisers’ alike (consumer two).²⁷ This is how the ACCC have articulated the business model of search and social platforms.²⁸ It showcases how these platforms use a business model of ‘cross-subsidisation’²⁹ – that is, where product one is sold at an ‘artificially low’ (or, free) price, in order to produce product two, which can be sold at a higher price.³⁰ It is important to understand that product two – the sale of advertising opportunities – is the end-financial

²⁶ *ACCC 2019 Final Report* (n 1) 61.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Michael Honore ‘Public Activities on Commercial Markets: The Issue of Cross-Subsidisation’ (2017) 16/2 *European State Law Quarterly* 181, 190.

product sold by these platforms. However, targeted advertising, in turn, provides an ability to influence consumer behavior.³¹ Thus, and as Lanier suggests, the *ultimate* product of platforms is ‘the gradual, slight, imperceptible change in [consumer] behavior and perception.’³²

Search and social platforms disseminate two types of content – content that is paid advertisements, and content that forms part of a users’ regular feed. Each type is disseminated by algorithms programed to consider similar factors.³³ This thesis is concerned with the second type of content dissemination – that which forms part of a users’ regular feed. In a submission to a House of Representatives Select Committee on Social Media and Online Safety, Meta defined ‘an algorithm’ as ‘a set of rules that help computers and other machine-learning models make decisions’.³⁴ On search and social platforms, these decisions are about how to ‘rank and distribute content’.³⁵ This thesis adopts this definition of ‘an algorithm’. Accurately, the definition does not illuminate factors algorithms are programmed to consider. The content of each feed and the factors that are taken into consideration in its algorithmic generation depend on, the type of communication and societal relationships that the platform corporation has chosen to facilitate; as well as the ranking priorities the corporation has programed it to consider.

³¹ Jaron Lanier in Coombe, Jeff Orlowski, Davis Vickie Curtis (documentary) *The Social Dilemma* (transcript accessed 2 December 2022) <<https://scrapsfromtheloft.com/movies/the-social-dilemma-movie-transcript/>>; see also Jaron Lanier *Ten Arguments for Deleting Your Social Media Accounts Right Now* (Bodley Head, 2018).

³² Ibid.

³³ *ACCC 2019 Final Report* (n 1) 61-66, 345-358.

³⁴ Submission 49 (Meta) to Select Committee on Social Media and Online Safety (House of Representatives) *Inquiry Into Social Media And Online Safety* (January 2022), 57.

³⁵ Ibid.

The type of communication and societal relationships that search and social platforms seek to facilitate differs between platform types. *Search* platforms generally facilitate connections between the individual and publicly available information – they respond to a query the user has put in. *Social* platforms generate feeds of different interactions depending on the nature of the platform. Platforms like Facebook disseminate content from friends and family, community or other ‘groups’, and public figures or organisations (including news media organisations). Other social platforms, like Instagram and TikTok, generate a hybrid feed of content, from both users the individual has ‘followed’, and those unknown to the user (based on algorithmically determined similarities between the accounts).³⁶

The ranking factors considered by algorithms, are decided by individual platform corporations (even if ultimately platforms decide to consider similar factors). O’Neil explains that in recommending content, algorithms must be ‘optimised to some definition of success’.³⁷ That is, when platform corporations determine the ‘set of rules’³⁸ their algorithms will use to rank content, they must have some idea of what a ‘successful’ outcome, or ‘good ranking’, would look like. Google has suggested that it understands that a ‘successful outcome’ occurs when users are provided with ‘the most useful information’.³⁹ This sentiment is typically shared among firms across the search platform industry; although, each platform makes its own assessment as to what is ‘useful information’. Google suggests that its definition of ‘useful information’ is dependent on a number of factors ‘including the

³⁶ Facebook also does this in its ‘watch’ (video-only) feed.

³⁷ Cathy O’Neil in Coombe, Jeff Orlowski, Davis Vickie Curtis (documentary) *The Social Dilemma* (transcript accessed 2 December 2022) <<https://scrapsfromtheloft.com/movies/the-social-dilemma-movie-transcript/>>; see also Cathy O’Neil *Weapons of Math Destruction* (Crown Publishers, 2016).

³⁸ *Meta* (n 35) 57.

³⁹ Submission 30 (Google Australia) to Select Committee on Social Media and Online Safety (House of Representatives) *Inquiry Into Social Media And Online Safety* (January 2022) 15.

words of [the user's] query, relevance and usability of pages, expertise of sources, [and] the user's context' – the latter as understood from personal data that platform has collected about the user.⁴⁰ Indeed, Larry Page, the Co-Founder of Google, suggested the 'ultimate search engine ... would understand exactly what you mean, and give back exactly what you want.'⁴¹ Practically, what Page is suggesting is that if a consumer was to (by way of simple illustrative example) input the search query 'what is the definition of the word 'bark'', the consumer would not receive an answer with as much breadth as possible, but rather the answer 'they want'. What the user may 'want' would arguably depend on personal factors – for example, if the user was querying this at work or school, the answer they 'wanted' could depend on what profession or topic that user was interested in. 'Bark' could mean the sound a dog makes, or the material on the outside of a tree. What Page is suggesting, is that the 'ultimate search engine' would understand *a user's specific* search query even in ways they did not know to articulate to it. This is useful for the immediate needs of the consumer and therefore is likely to lead to consumer retention which is *useful for the platform*.⁴²

Social platforms generally understand that their algorithms will produce a 'successful outcome' when they display the content that 'is most meaningful', 'valuable' or 'relevant' to an individual for their use and enjoyment, in the hope of ultimately retaining them as a user of the platform.⁴³ Users are typically presented with 'take-it-or-leave-it terms in relation to the way their data is collected and used to influence the content disseminated to them.'⁴⁴ As

⁴⁰ Ibid.

⁴¹ Larry Page interview 'Fortune Exclusive: Larry Page on Google' (11 December 2012) in *Fortune* <<https://fortune.com/2012/12/11/fortune-exclusive-larry-page-on-google/>> accessed 12 December 2022.

⁴² *ACCC 2019 Final Report* (n 1) 346-350.

⁴³ *Meta* (n 35) 64, 58, 61 (respectively).

⁴⁴ *ACCC 2019 Final Report* (n 1) 23.

with search platforms, there is very little transparency from these platforms regarding the criteria by which their algorithms assess what is ‘valuable’, ‘relevant’, ‘meaningful’ and useful content. As TikTok summarises, to make these determinations of ‘usefulness’ and ‘value’, platforms collect data, and they do so ‘in three ways’.⁴⁵ Firstly, platforms collect information the user provides directly to the platform (name, date of birth etc.).⁴⁶ Secondly, they collect what TikTok describes as ‘automatically collected information’.⁴⁷ This is data the platform can acquire about the user through their interaction with the service. It includes ‘technical information’ (relating to ‘device model, operating system, keystroke patterns...IP address, and system language’); data about the content a user viewed (including information about ‘the duration and frequency’ of both the users’ use of the platform, and consumption of particular types of content); location data; data on a user’s ‘engagement with other users’; data about a user’s search history; ‘inferred attributes’ about a user’s personality from personal or big data⁴⁸; data from ‘text’ ‘objects’ ‘scenery’ and ‘location’ that form part of a user’s content; and cookies data.⁴⁹ Additionally, the ACCC observes platforms have started

⁴⁵ TikTok *Privacy Policy* ‘What Information We Collect’ (last updated 4 May 2023) <<https://www.tiktok.com/legal/page/eea/privacy-policy/en>> accessed 27 May.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Meaning ‘extremely large data sets’ collected by platforms combining data from multiple individuals ‘that may be analysed...to reveal patterns, trends, and associations, especially relating to human behaviour and interactions’, quoted aspects of this definition are from the Oxford Languages Dictionary definition ‘big data’ (online) <<https://languages.oup.com/google-dictionary-en/>> accessed 15 June 2023.

⁴⁹ TikTok *Privacy Policy* (n 45). ‘Cookies’ are ‘small text files that are put on users’ devices...to facilitate the functionality of a website (functional cookies) or to collect profile information’ – see Edith Smit, Guda van Noort, Joanna Strycharz and Natali Helberger ‘No to cookies: Empowering impact of technical and legal knowledge on rejecting tracking cookies’ (2021) 120/C *Computers in Human Behaviour* (online) <<https://www.sciencedirect.com/science/article/pii/S0747563221000728>> accessed 22 February 2023, 1; see also Edith Smit, Guda van Noort and Hilde Voorveld ‘Understanding online behavioural advertising: User knowledge, privacy concerns and online coping behaviour in Europe’ (2014) 32/A *Computers in Human Behaviour* 15.

to create ‘eco-systems’ by which data can be collected and shared across different products (i.e. across Gmail, Google Search and Google Maps etc.).⁵⁰

Algorithms then use this data to rank and display content. They devise their rankings on the probability that showing a user a particular piece of content will achieve the corporation’s ‘successful outcome’, however defined.⁵¹ Platforms have been largely opaque about the nuances of their ranking system – specifically, as to how each of the aforementioned factors are weighed in relation to each other. For example, Google has suggested that ‘the weight applied to each factor...varies depending on the nature of [the query].’⁵² It explains, for example that ‘the freshness of the content plays a bigger role in answering queries about current news topics than it does about dictionary definitions.’⁵³ Search platforms typically use similar techniques of data-collection.⁵⁴ However, notably DuckDuckGo does not use these personalisation techniques (although what ranking criteria they use instead is largely opaque).⁵⁵ Regarding social platforms, Meta has suggested that its ranking decisions are determined both on data-driven ideas of consumer engagement, and from its broader corporate values. It has programmed its algorithm to rank content as follows – content from ‘friends and family come first’ then considerations of ‘a platform for all ideas, authentic communication, [user controlled] experience, and constant iteration’.⁵⁶ Meta has not

⁵⁰ *ACCC Interim Report 6* (n 22) 69-72.

⁵¹ See for example Meta ‘Facebook Transparency Centre – Our Approach to Ranking’ <<https://transparency.fb.com/en-gb/features/ranking-and-content/#types-of-content-we-demote>> accessed 15 June 2023.

⁵² *Google Australia* (n 39) 15.

⁵³ *Ibid.*

⁵⁴ ACCC Digital Platform Services Inquiry 2025, ‘Interim Report 3: Search Defaults and Choice Screens’ (2021) 12-13, 92.

⁵⁵ DuckDuckGo *Privacy Policy* <<https://duckduckgo.com/privacy>> accessed 27 May 2023.

⁵⁶ *Meta* (n 35) 64.

substantiated what it means by any of these criteria, nor the weight given to the latter four. TikTok has not indicated how they rank content beyond suggesting that they provide personalised recommendations.⁵⁷ X's (formerly 'Twitter's') ranking system is similar to Meta's. It uses 'Real Graph' – 'a model which predicts the likelihood of engagement between two users' – to rank 'X's' ('tweets').⁵⁸ Its algorithm firstly considers posts from a user's followers; before predicting what topics and X's (tweets) a user might find engaging from outside their follower network ('Embedding Spaces').⁵⁹ Notably, all platforms are particularly opaque as to how personalised a user's feed is. Personalised feeds are understood to be more engaging to the user and therefore more likely to lead to increased consumer retention; this in turn provides platforms with a greater opportunity to profit from displaying advertising.⁶⁰ It is a successful strategy. The ACCC reports 70% and 58% of Australians use Google and Meta's platforms daily (respectively),⁶¹ and led to USD\$282.8 billion in revenue for Google,⁶² and USD\$116.6 billion for Meta in the last year.⁶³

⁵⁷ TikTok Safety Centre (policy database) < <https://www.tiktok.com/safety/en/> > accessed 27 May 2023.

⁵⁸ X (formerly 'Twitter') 'Twitter's Recommendation Algorithm' (information webpage) <https://blog.twitter.com/engineering/en_us/topics/open-source/2023/twitter-recommendation-algorithm#:~:text=It%20efficiently%20ranks%20Tweets%20of,of%20engagement%20between%20two%20users> accessed 27 May 2023.

⁵⁹ Ibid.

⁶⁰ Ignacio Siles and Ariana Meléndez-Moran "The most aggressive of algorithms": User awareness of and attachment to TikTok's content personalization?" (Paper presented at the annual meeting of the International Communication Association (ICA), 1996) <https://www.kerwa.ucr.ac.cr/bitstream/handle/10669/83230/TikTok_ICA_Main_2_Cover.pdf?sequence=1&isAllowed=y> accessed 30 July 2023).

⁶¹ ACCC 2019 Final Report (n 1) 44.

⁶² Alphabet Inc., Form 10-K (form lodged with United States Securities and Exchange Commission, for fiscal year ended December 31 2022), 30.

⁶³ ACCC Interim Report 6 (n 22) 36 (data from 2022).

2 Literature review – search and social platforms may be limiting citizens’ exposure to a plurality of speech.

As Barberá observes, the ‘unexpected rise of populist parties and candidates’; reports of radicalization online and increased political polarization; election results which caused considerable surprise to some like that of former US President Donald Trump and Brexit; and ‘the recent uptick in political violence in...Myanmar, Sri Lanka and India’ has championed public concern that search and social platforms may be limiting citizens’ exposure to a plurality of political communication, in turn harming democratic society.⁶⁴ Systematic literature reviews have repeatedly suggested that scholarship is divided on both questions as to (1) whether search and social platforms are limiting citizens’ exposure to a plurality of speech, and (2) whether this, in turn, harms democracy.⁶⁵ The Australian Government has similarly assess that scholarship is divided.⁶⁶ This thesis does not conduct its own systemic literature review given time and length constraints of the MPhil. It proceeds on the assumption that the conclusion that existing scholarship is divided on this question, is correct. This section provides an overview of existing scholarship and its division in this field – drawn largely from two prominent systematic literature reviews in this field (those by Barberá⁶⁷ and Arguedas et al.⁶⁸).

⁶⁴ Among other concerns about platforms including misinformation (which is excluded from this thesis’ scope). *Pablo Barberá* (n 4) 34.

⁶⁵ *Barberá* (n 4); *Arguedas et al.* (n 4).

⁶⁶ *The Australian Government, Response to ACCC Inquiry* (n 14).

⁶⁷ *Barberá* (n 4).

⁶⁸ *Arguedas et al.* (n 4).

2.1 A literature review of scholarship *endorsing the concern* that search and social platforms limit citizens' exposure to a plurality of speech, harming democracy.

There are two internal parts to this argument – these are, that (1) search and social platforms are limiting citizens' exposure to a plurality of speech; and (2) that exposing citizens to a plurality of speech is an important structural feature required, on some level, by democracy.

Van Alstyne and Brynjolfsson were the first to iterate this argument in their 1996 presentation to the 17th International Conference on Information Systems.⁶⁹ Their original argument was supported by theory only. Scholars have since suggested quantitative data supports their theory – however, these scholars differ both in their understanding as to *how* search and social platforms may be limiting citizen exposure to speech pluralism; and *why* this is harmful to democracy.

2.1.1 The first level of this finding – search and social platforms are limiting citizens' exposure to a plurality of speech.

Some scholars of consumer psychology and political theory have found, using both quantitative analysis and theory, that search and social platforms limit citizens' exposure to a plurality of speech. There are a number of specific concerns that arise within this literature.

The foundational concern is that algorithms are making unregulated 'editorial-like' decisions as to the suite of news content that individuals consume. Search and social platform algorithms are valuable tools for sorting through vast amounts of information. They provide citizens with access to at least some part of a breadth of information which the citizen would

⁶⁹ Marshall Van Alstyne and Erik Brynjolfsson 'Electronic Communities: Global Village or Cyberbalkans?' (17th International Conference on Information Systems Cleveland, Ohio, 1996).

not otherwise have had the capability to consume. However, some scholars suggest that algorithms are making ‘editorial-like’ decisions about the plurality of speech citizens are being exposed, although without any of the regulation or ‘editorial standards’ that traditional media is typically subject to. They do this often in circumstances where there is limited opportunity for users to influence the factors algorithms consider; and there no mechanism of public accountability of its editorial decisions, as each feed is personalized to the individual.⁷⁰ To use O’Neil’s language, the concern is that the ‘definition of success’⁷¹ algorithms are ‘optimized to’⁷² by each platform corporation, may be steering political debate and/or individuals’ understanding of politics – in a manner that is unregulated, unaccountable, not subject to the safeguards seen in other similar industries, and therefore possibly occurring in a way that is harmful to democratic society. Some scholars suggest concerns are amplified by the level of market power in the search and social platform industries – further reducing the number of ‘editorial feeds’ available to consumers, and the overall accountability of players in the market.⁷³

The second layer of concern is that search and social platforms, in their use of personalization algorithms, are creating political echo-chambers around citizens online. As established in *Section One*, search and social platforms routinely personalize content. Consumer psychology scholarship suggests people are more likely to enjoy content that reflects their own existing understanding of the world – and for two reasons. Firstly, Quattrociocchi et al. explain, people find information that confirms their understanding of

⁷⁰ Koene et al. (n 5) 3-8.

⁷¹ O’Neil (n 37).

⁷² Ibid.

⁷³ *ACCC Interim Report 6* (n 22) 93-120.

society, soothing.⁷⁴ Humans release and receive dopamine when they are shown areas of the public realm that confirm the narrative they have of themselves and the society.⁷⁵ Lieberman explains this is because receiving such information suggests to humans that they belong and are liked in society, and the human brain evolved to release a chemical reward when experiencing this feeling.⁷⁶ This was an evolutionary response – an individual’s safety (and reproductive survival of humans as a species generally) depends them being ‘liked’ by others.⁷⁷ This initially appears counter-intuitive to evolutionary processes – as seemingly, the act of individuals seeking to confirm, rather than challenge, their existing beliefs would render them vulnerable to new dangers. However, Kilpatrick and Ellis explains that this tendency to mentally ‘update’ and learn based on news or information that reinforces existing convictions is pivotal to self-esteem, which in turn perpetuates resilience and survival.⁷⁸ Furthermore, this research suggests that individuals process ‘confirming’ information ‘more fluently’ – that is, with less effort – and consequently they prefer to consume such information as against that which is contradictory to their existing beliefs.⁷⁹ This phenomenon is termed ‘confirmation bias’ in psychology scholarship.⁸⁰

⁷⁴ Walter Quattrociocchi, Antonio Scala, Cass Sunstein ‘Echo Chambers on Facebook’ (online article) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795110> ; see also Cass Sunstein *Republic.com 2.0* (2007 Princeton University Press); Cass Sunstein *#Republic* (Princeton University Press 2018).

⁷⁵ Ibid.

⁷⁶ Harriet Over ‘The origins of belonging: social motivation in infants and young children’ (2016) 371/1686 *Philosophical Transactions Of The Royal Society Of London Series B - Biological Sciences* (online) <<https://royalsocietypublishing.org/doi/epdf/10.1098/rstb.2015.0072>> accessed 30 July 2023.

⁷⁷ Ibid.

⁷⁸ Lee Kirkpatrick and Bruce Ellis ‘An Evolutionary-Psychological Approach to Self-esteem: Multiple Domains and Multiple Functions’ in Garth Fletcher and Margaret Clark (eds) *Blackwell Handbook of Social Psychology: Interpersonal Processes* 411, 411-436.

⁷⁹ Hassan and Barber (n 7) 1-3.

⁸⁰ Gilat Levy and Ronny Razin ‘Echo Chambers and Their Effects on Economic and Political Outcomes’ (2019) *Annual Review of Economics* 303, 303-328.

Given this understanding, some scholars are concerned that platforms in personalizing content to ‘give people what they want’ (as Google Co-Founder Larry Page suggested⁸¹) are actually placing individuals into echo-chambers that confirm their existing beliefs – as ‘what individuals want’ is actually to consume information that confirms, rather than challenges, their existing beliefs.⁸² These scholars suggest that platforms have a financial incentive to do this, for providing consumers with ‘what they want’ is likely to keep users on the platform, increasing the opportunity for advertising and revenue.⁸³ That is, platforms have a financial incentive to place users in speech echo-chambers – ‘situations[s] in which people only hear opinions of one type, or opinions that are similar to their own.’⁸⁴ A number of quantitative studies, measuring citizen exposure to a plurality of speech on these platforms (such as those by Bakshy et al. and Kaiser and Rauchfleisch) find that echo-chambers are regularly created around users on platforms.⁸⁵

The third layer concern derives from a school of consumer psychology scholarship which suggests humans are particularly susceptible to engaging with emotional content, and often seek to do so rapidly and irrationally. The suggestion is that in turn, platforms (being facilitators of rapid communication) are creating an environment where democratic speech is

⁸¹ *Larry Page interview* (n 41).

⁸² See for example: *Sunstein #Republic* (n 74) 15.

⁸³ *Ibid.*

⁸⁴ Definition of ‘echo chamber’, from the Cambridge Dictionary term for ‘echo chamber’ (online) <<https://dictionary.cambridge.org/dictionary/english/echo-chamber>> accessed 19 June 2023.

⁸⁵ Eytan Bakshy, Solomon Messing and Lada Adamic ‘Exposure to ideologically diverse news and opinion on Facebook’ (2015) *Science* (online) <<https://www.science.org/doi/10.1126/science.aaa1160>> accessed 16 April 2023; Jonas Kaiser and Adrian Rauchfleisch ‘Birds of a Feather Get Recommended Together: Algorithmic Homophily in YouTube’s Channel Recommendations in the United States and Germany’ (2020) 6(4) *Social Media + Society* (online) <<https://doi.org/10.1177/2056305120969914>> accessed 18 April 2023.

not as considered as society has previously been exposed to (prior to the digital).⁸⁶ Berger and Milkman demonstrates that emotive content is largely addictive; and they suggest that this is a biproduct of evolution – for rapid responses to emotions (for example to love and fear), are important survival mechanisms (by encouraging reproduction and quick responses to dangers).⁸⁷ Some scholars are concerned that online echo chambers contain a substantial level of emotive content, which in turn compromises a citizen’s level of rational decision-making.⁸⁸ Although these scholars do not dispute that citizens have always made emotional decisions, they do suggest such decisions are heightened, more frequent and more rapidly shared online.

The fourth and final layer of concern is that each of the aforementioned concerns – of exposure to unaccountable, echo-chambered and/or emotive speech – are exacerbated by the increasing levels of use, reliance and in some cases addiction, citizens have to search and social platforms. Kim et al. suggests features like ‘push notifications’, feed ‘refresh’ features and ellipses to suggest another user is responding to their comment or post, act as ‘positive intermittent reinforcements’ similar to those used to promote engagement with gambling machines.⁸⁹ Henzel and Håkansson explain that these notifications act as small social ‘wins’ – positive reinforcement of social acceptance and belonging – which cause individuals to

⁸⁶ There are also misinformation concerns around platforms facilitating rapid emotive communications, however misinformation concerns are excluded from the scope of this thesis.

⁸⁷ Jonah Berger and Katherine Milkman ‘What Makes Online Content Viral?’ (2012) American Marketing Association 192, 192, 199-203.

⁸⁸ Jason Weismueller, Kristof Coussement, Paul Harrigan and Tina Tessitore ‘What makes people share political content on social media? The role of emotion, authority and ideology’ (2022) 129/107150 Computers in Human Behaviour (online) <https://www.sciencedirect.com/science/article/pii/S0747563221004738?casa_token=zZuFWWR62HgAAAAA:a32jqS320eNXQhunziOFMNpI1W8c_0Q3vJOH9zcojdRXNABqfvpLXqOCmKwqiV2jnyEKXi3vJA> accessed 12 December 2022.

⁸⁹ Seul-Kee Kim, So-Yeong Kim, and Hang-Bong Kang ‘An Analysis of the Effects of Smartphone Push Notifications on Task Performance with regard to Smartphone Overuse Using ERP’ (2016) Computer Intelligence Neuroscience (online) <<https://www.hindawi.com/journals/cin/2016/5718580/>> accessed 14 December 2022.

produce dopamine.⁹⁰ They suggest that their occurrence at ‘unexpected intervals’ in turn encourages users to frequently return to the platform in search of this dopamine ‘reward’.⁹¹ As such, the concern of scholars is not only that search and social platforms are limiting citizens’ exposure to speech, but that the effects of this are compounded by citizens increasing reliance on these platforms.

2.1.2 The second aspect of the finding – exposure to speech pluralism is a structural feature required by democracy.

The second aspect of the finding of these scholars is the suggestion that citizens’ exposure to a plurality of speech, is a structural requirement of democracy. Scholars concurring with this assertion come from a range of democratic schools of thought. Some scholars from ‘direct democracy’ or similar schools, suggest political discussion is needed for the individual to be able to form and clarify their own preferences.⁹² Other scholars subscribe to aspects of the deliberative school of democracy which understand democracy to require citizens to be exposed to the ideas of others for a variety of reasons.⁹³ Some suggests that democracy is about ‘self-interest...constrained by fairness’ – that is, to some degree, democracy is about the ‘collective good’ and collaboration, and as such citizens need to be exposed to others’ understanding of the world.⁹⁴ A second deliberative-influenced theory, presented by Sunstein,

⁹⁰ Vincent Henzel and Anders Håkansson ‘Hooked on virtual social life. Problematic social media use and associations with mental distress and addictive disorders’ (2021) 16/4 *PLoS One* (online) <<https://doi.org/10.1371/journal.pone.0248406>> accessed 10 March 2022.

⁹¹ Ibid.

⁹² Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark Warren ‘Deliberative Democracy: An Introduction’ in Andre Bächtiger, John S. Dryzek, Jane Mansbridge, Mark Warren (eds) *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018) 42.

⁹³ Ibid 35-54.

⁹⁴ Ibid 5-8; and Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin, José Luis Martí ‘The Place of Self-Interest and the Role of Power in Deliberative Democracy’ (2010) 18/1 *Journal of Political Philosophy* 64, 64-100; Amir Ebrahimi Fard, Dirk Hovy, Federico Bianchi,

suggests that there is an element of democracy that is about building ‘social cohesion’ which echo-chambers and other aspects of digital platforms erode in polarizing political opinions and thereby dividing society.⁹⁵ Indeed, Sunstein goes further to suggest reducing echo-chambers is an important safeguard in preventing political polarization and/or the rise of violent extremism.⁹⁶ Other scholars draw on the ideas of John Stuart Mill, suggesting echo-chambers are unhelpful as in part, democracy is about a quest for some level of social truth – which can only emerge from marketplace of ideas.⁹⁷ Finally, some scholars suggest democracy should involve the slow and careful deliberation, and consideration, of others’ viewpoints to achieve reasoned and considered outcomes.⁹⁸ These suggest that search and social platforms do not facilitate an environment that is conducive to this, as both emotive hyperbolic content, and ‘fake news’ is eye-catching – which plays on human cognitive weaknesses, to spread at pace.⁹⁹

Each of these branches of scholarship have struggled to present a solution to the problem that they have identified. The primary suggestion is that there should be ‘editorial standards’¹⁰⁰ for search and social platform algorithms about the content they disseminate;¹⁰¹

Nava Tintarev, Patricia Rossini, Rebekah Tromble and Rishav Hada (2023) ‘Beyond Digital "Echo Chambers": The Role of Viewpoint Diversity in Political Discussion’ (16th International Conference on Web Search and Data Mining, February 2023) 33-41.

⁹⁵ Sunstein (n 8) 59-97.

⁹⁶ Cass Sunstein *Going to Extremes: How Like Minds Unite and Divide* (Oxford University Press, 2019) 21-99.

⁹⁷ Silke Van Dyk ‘Post-Truth, the Future of Democracy and the Public Sphere’ (2022) 39/4 *Theory, Culture and Society* 37; see also John Stuart Mill *On Liberty* (J. W. Parker and Son 1859) 28-92.

⁹⁸ Bence Bago, David Rand and Gordon Pennycook ‘Fake News, Fast and Slow: Deliberation Reduces Belief in False (but Not True) News Headlines’ (2020) 149/8 *Journal of Experimental Psychology* 1608.

⁹⁹ Ibid.

¹⁰⁰ Koene *et al.* (n 5) 8-10.

¹⁰¹ Ibid.

‘incentives’ for platforms ‘to become trusted and trustworthy organizations for facilitating, organizing, and curating public discourse’;¹⁰² and facilitate greater levels of competition between platforms.¹⁰³

2.2 A literature review of scholarship *finding against or minimizing* the concerns that search and social platforms limit citizens’ exposure to a plurality of speech, harming democracy.

A substantial body of scholarship downplays, or indeed wholly finds against, the aforementioned research. This scholarship finds that (1) search and social platforms do not limit citizens’ exposure to a plurality of political communication; and/or (2) do not harm democracy.¹⁰⁴

2.2.1 The first level of this finding – search and social platforms are not limiting citizens’ exposure to a plurality of speech.

As Barberá and Arguedas et al. suggest, there is a substantial body of scholarship using quantitative analysis, which finds that search and social platforms do not limit their users’ exposure to a plurality of political communication.¹⁰⁵ This scholarship does not deny that the content disseminated by these platforms is personalized; but rather suggest this is unproblematic for personalization can come a variety of forms, for example by *topic* as opposed to by *partisan view* of that topic, and as such does not necessarily limit citizens’

¹⁰² Jack Balkin ‘To Reform Social Media, Reform Informational Capitalism’ in Lee Bollinger and Geoffrey R. Stone (eds) *Social Media, Freedom of Speech, and the Future of our Democracy* (Oxford University Press 2022) 234.

¹⁰³ Ibid, see also *ACCC Interim Report 6* (n 22) 134-136.

¹⁰⁴ Discussed in *Arguedas et al.* (n 4) 4-7; and *Barberá et al.* (n 4) 34-35.

¹⁰⁵ *Barberá* (n 4); *Arguedas et al.* (n 4).

exposure to a plurality of opinions. Indeed, using quantitative data analysis of speech exposure online, Masip et al. and Fletcher and Nielsen found that social platforms actually act as a gateway for exposure to a greater plurality of communication than users would otherwise receive offline.¹⁰⁶ Möller et al. found that algorithmic recommendations provide a ‘diverse set of recommendations’ of opinions which ‘are on par with human editors’¹⁰⁷; and Silver et al. have suggested that platforms have facilitated a greater number of connections than a citizen would have offline – which necessarily widens the breadth of speech the user is exposed to.¹⁰⁸

Some scholars suggest their quantitative data on breadth of speech citizens are exposed to online, reveals that while search and social platforms may somewhat restrict citizens’ exposure to a plurality of speech on the platforms, these effects are mitigated by other interactions individuals have elsewhere online or offline. Boulianne et al. found ‘offline discussion with those who are similar in race, ethnicity and class positively correlates with support for populist candidates more so than online discussions’.¹⁰⁹ Blank and Dubois suggest echo-chamber effects are mitigated by the frequent interactions citizens have with non-personalized news sources (including by citizens often seeking out alternative viewpoints) such that less than 10% of adults have any risk of being caught in echo-chamber

¹⁰⁶ Pere Masip , Jaume Suau and Carlos Ruiz-Caballero ‘Incidental Exposure to Non-Like-Minded News through Social Media: Opposing Voices in Echo-Chambers’ *News Feeds*’ (2020) 8/4 *Media and Communication* 53-62; and Richard Fletcher and Rasmus Kleis Nielsen ‘Are people incidentally exposed to news on social media? A comparative analysis’ 20/7 (2017) *News Media and Society* 2450-2468.

¹⁰⁷ Judith Möller, Damian Trillinga, 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’ (2018) 21/7 *Information, Communication and Society* 959, 959.

¹⁰⁸ Laura Silver, Christine Huang and Kyle Taylor ‘In Emerging Economies, Smartphone and Social Media Users Have Broader Social Networks’ (Pew Research Center Paper 2019) 6.

¹⁰⁹ Shelley Boulianne, Karolina Koc-Michalska, and Bruce Bimber ‘Right-wing populism, social media and echo chambers in Western democracies’ (2020) 22/4 *News Media and Society* 683, 683.

effects.¹¹⁰ In addition to this research, some scholars like Stephens-Davidowitz argue that even if echo-chambers exist on platforms, their existence causes no new harm to democracy, for citizens live in echo-chambers in society *generally* – namely by choosing, who they interact with socially, what news sources consume, and by the very nature the workforce which structures citizens into ‘professions’ of (often) likeminded individuals.¹¹¹

2.2.2 The second aspect of the finding – exposure to speech pluralism is not a structural feature required by democracy.

Some scholars go further to suggest that in any event, exposing citizens to a plurality of speech is not a structural feature required by democracy. Indeed, liberal democracies themselves are often hesitant to pass judgement on the content of speech, and the breadth of it that is being disseminated. Liberal democracies are predicated on an understanding that each individual (i) has ‘inherent dignity’¹¹²; is (ii) ‘endowed with reason and conscious’¹¹³; and as such is largely a ‘rational’, ‘autonomous and responsible self’.¹¹⁴ Consequently, liberal democracies are hesitant to pass judgement on whether any opinion of any voter is ‘good or bad’ or ‘better or worse’ than any other. They similarly often struggle to suggest that there are environments in which people make ‘better or worse’ decisions. Specifically in the digital platform context, they struggle to acknowledge that there might be environments created by

¹¹⁰ This study was a UK study. See both: Blank and Dubois (n 9) (online); and Blank and Dubois (n 9) (journal) 729-745, 729.

¹¹¹ Seth Stephens-Davidowitz *Everybody Lies: Big Data, New Data, and What the Internet Can Tell Us about Who We Really Are* (Dey Street Books 2017) 20-352.

¹¹² Art.1, United Nations General Assembly Universal Declaration of Human Rights, (10 December 1948) adopted G.A Res 217 A(III) U.N. GAOR 3rd Sess. (1948-1949).

¹¹³ Ibid; Perry Keller *European and International Media Law: Liberal Democracy, Trade, and the New Media European and International Media Law: Liberal Democracy, Trade, and the New Media* (Oxford University Press, New York 2011) 38-40.

¹¹⁴ Elizabeth Adams *A Critique of the Rational Individual of Liberal Democracy* (disseminated by the Educational Resources Information Center 1997) <<https://files.eric.ed.gov/fulltext/ED407441.pdf>> accessed 18 March 2023.

new technologies, in which human cognitive weaknesses are exploited such that individuals might make decisions that are not as rational or informed as perhaps they would have been in other circumstances.

This is not to imply that offline individuals always make rational decisions – rather, only that platforms have the effect of steering human decision-making away from *the level* of rational decision-making that democracy *might once have expected*. Equally, it is not to suggest that liberal democracies have not previously assessed that there are circumstances in which individuals do not make rational and sensible decisions. Indeed, liberal democracies routinely suggest individuals do not make rational decisions under, for example, the influence of alcohol. There is simply a substantial hesitancy that is observable in liberal democracies, to make decisions which question an individual’s rationality, *particularly* when it comes to their formation of political decisions and regulating the dissemination of speech that assisted in shaping them.

3 Analysis of the literature review & an outline of methodology.

While existing scholarship has made a valuable contribution to a general understanding of the issues surrounding the question as to whether search and social platforms are limiting citizens’ exposure to a plurality of speech (and in turn harming democracy); the division in scholarship has led the Australian Government to conclude that ‘extent of any harm caused by these effects in Australia, is not yet clear’ and as such, regulation cannot be justified ‘at this time’.¹¹⁵ It is important to determine whether in fact platforms are limiting citizens’ exposure to a plurality of speech. As if they are, this would mean (to repeat what is

¹¹⁵ *ACCC Final Report 2019* (n 1).

increasingly becoming an adage of concern in this space), that technology companies are making decisions about Australians' consumption of the news, their personal interactions and their public conversations, in ways that may harm democratic functioning. The object of this thesis is to yield a practical result for Australian lawmakers on this question.

Arguably, the division in existing scholarship is a product of two methodological issues. In the first instance scholars have endeavoured to *quantifiably measure* (i) whether echo-chambers exist; (ii) whether other aspects of algorithmic dissemination of content reduce the plurality of the speech environment; and (iii) whether this in turn is influencing citizens formation of political opinions. As Arguedas et al. explain the practicalities of acquiring quantitative data are challenging.¹¹⁶ There is 'no single-source' of data that accurately 'captures all media use, [as] online tracking struggles to capture behaviour inside apps such as Facebook [and] does not [fully] capture online use'.¹¹⁷ Even when this data is captured, it is challenging for researchers to determine whether the citizen had a 'meaningful [as against a] superficial, engagement' with the content; as well as to define and determine whether such content is 'impartial news' as distinct from 'left-or-right-leaning opinion'.¹¹⁸ Not only that, but each scholar has their own definition of what level of speech exposure constitutes a 'plural', 'deficient' or 'echo-chamber' environment.

Additionally, it is practically challenging for researchers to conduct a 'control test' against what a citizen's political opinion would have been if they had not been exposed the algorithmically disseminated content. Moreover, liberal democracies are hesitant to endorse

¹¹⁶ Arguedas et al. (n 4) 9.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

this methodology – as to suggest any political opinion (here that of the control group) is better than that of any other opinion (for example the citizen’s current opinion as formed from online) seemingly falls foul of the democratic state’s commitment to the idea that the opinion of each individual must be largely respected (arguably, regardless of what it is or how the individual formed it).

The second methodological fault line similarly comes from the absence of a consistent metric, albeit this time at the second level of inquiry. The second level of inquiry asks whether democracy is harmed where citizens are not exposed to a plurality of speech. The answer to this question will necessarily turn on each scholar’s own theoretical understanding of the purpose and outcomes of democracy, as this necessarily dictates what structures they understand are required to protect it from harm (and as such, whether ‘exposing citizens to a plurality of speech’ is one of these structures). The absence of a shared metric means (in a regulatory context) that this question must be answered by each state on its own understanding of democracy.

This understanding of the methodological fault lines of existing scholarship, as observed in the systematic literature reviews discussed, has shaped the methodology of this thesis. This thesis seeks to navigate the existing methodological issues in order to produce a practical result for Australian lawmakers. It does this by using doctrinal analysis and reversing the order in which the two levels of inquiry are typically considered. Instead of asking first whether search and social platforms are limiting citizens’ exposure to a plurality of speech (though quantitative analysis), this thesis opens its analysis by considering whether ‘exposing citizens to a plurality of speech’ is a structural feature of Australia’s *particular*

type of democracy as established by the Australian Constitution¹¹⁹ and related legislation (*Chapter Two*). By anchoring its analysis to Australian democracy, this thesis avoids having to consider any general theoretical understanding of democracy, thereby providing a more practical result for Australian lawmakers.

Through the process of this doctrinal analysis, this thesis is led to consider how the Legislature has previously sought to establish the availability of plural political communication as a structural feature of Australia's democracy. Specifically, it has done this in its regulation of the traditional media industry. In its prior assessment, Parliament has not used quantitative metrics to assess whether citizens' exposure to speech has fallen below a sufficiently 'plural' (harming democracy). Rather it has suggested harm occurs when certain *structural features* in markets, business models and products that disseminate political communication, are not present. This thesis then seeks to apply these qualitative value judgements to search and social platform markets and products – using them as metrics to assess whether harm is occurring to democracy (*Chapter Three*). As such, the threshold of 'harm' used in this thesis is a qualitative one, and not a quantitative one. This navigates the methodological 'roadblock' that quantitative analysis has proven to be to Australian lawmakers, in determining whether Australia should regulate this area of search and social platforms.

¹¹⁹ *The Constitution* (n 17).

CHAPTER TWO: IS ENSURING CITIZENS ARE ‘EXPOSED TO A PLURALITY OF SPEECH’ A CONSTITUTIONALLY MANDATED STRUCTURAL FEATURE OF AUSTRALIAN DEMOCRACY?

The object of this Chapter is to determine, by way of doctrinal analysis, whether exposing citizens to a plurality of speech is a structural feature of Australian democracy, such that private corporations like search and social platforms should, through some existing constitutional requirement, be prevented from engaging in such restriction.

1 Locating the structural features of Australia’s constitutional democracy.

The structural features of Australia’s democracy are far from neatly housed in one readily attainable list in the nation’s Constitution.¹²⁰ The Constitution is, as Arcioni and Stone reflect, ‘thin’ in substance.¹²¹ It was devised for the purpose of federating a number of states into a nation – and does so without pomp and circumstance. It establishes the basic outline of the federal institutions of government and spends the remainder of its text carving up the allocation of power and fiscal resources between the states and the newly federated nation.¹²²

¹²⁰ *The Constitution* (n 17).

¹²¹ Elisa Arcioni and Adrienne Stone, ‘The small brown bird: Values and aspirations in the Australian Constitution’ (2016) 14/1 *International Journal of Constitutional Law* 60, 60.

¹²² *Ibid.*

As such, the Constitution contains only a minimal number of expressly stated structural features of Australian democracy – these include, for example, that Members of the Senate and the House of Representatives be ‘chosen by the people’ (of each state and the Commonwealth, respectively)¹²³; the bicameral passage of legislation¹²⁴; and Royal Assent.¹²⁵ Many of these procedural provisions contemplate that the Parliament can alternatively ‘provide’ for how they should operate¹²⁶ – including, for example, how the election system will be structured¹²⁷ (now determined as a ‘preferential voting system’).¹²⁸

Beyond establishing the consolidated revenue fund, the document largely does not proceed in expressly outlining the structural requirements of Australia’s democracy.¹²⁹ However, it has been judicially established that provisions in the Constitution must be understood in ‘context’ of one another as *together* establishing the structural features of government.¹³⁰ This method of interpretation has led the High Court to find that, among others, sections 7 and 24 in prescribing that the Senate and the House of Representatives be ‘chosen by the people’¹³¹; section 64 in mandating that Ministers of the Executive must ‘sit in

¹²³ ss7 and 24 *the Constitution* (n 17).

¹²⁴ *Ibid* ss57, 58.

¹²⁵ *Ibid* s58.

¹²⁶ *Ibid*, for example ss7, 10, 24 and 29.

¹²⁷ See *the Constitution* (n 17) ss 7, 9, 10, 24, 27, 31, 51(xxxvi), 51(xxxix).

¹²⁸ ss 239, 240, 272, 273 and 274 *Commonwealth Electoral Act 1918* (Cth).

¹²⁹ Note *the Constitution* (n 17) also contains a handful basic rights – trial by jury (s80); freedom of religion (s116); the acquisition ‘on just terms’ (s51(xxxi)); and a prohibition against discrimination derived from state-based residency (s117).

¹³⁰ *Lange* (n 16) 557 (plurality); see also *Grannall v Marrickville MarKarine Pty Ltd* (1955) 93 CLR 55, 77.

¹³¹ ss7 and 24 *the Constitution* (n 17).

Parliament'¹³²; and section 128 in its requirement that *the Constitution* only be amended by a referendum,¹³³ *together* create a system of government in which 'elected representatives exercise the sovereign power on behalf of the Australian people'.¹³⁴ That is, a system of '*representative and responsible government*'.¹³⁵

'Representative and responsible government' is now understood as 'part of the fabric...of the Constitution'.¹³⁶ This has important consequences for locating and understanding the structural underpinnings of Australian democracy. The Court has determined that such a 'constitutionally entrenched system of representative democracy carries with it those legal incidents which are essential to the effective maintenance of that form of government'.¹³⁷ Following this initial finding, there was immediate concern from many Australian legal scholars that the Court had departed from its traditional approach of 'legalism' and found that the structural tenants of Australian democracy could be decided by reference to a 'freestanding' principle of representative and responsible government.¹³⁸ The Court has since clarified in *Lange* that such implied 'incidents' are limited only to those required by the system of representative and responsible government *in the form established by sections 7, 24, 64 and 128*; and as such, any structural requirements of this system of

¹³² Ibid s64.

¹³³ Ibid s128.

¹³⁴ *Australian Capital Television v the Commonwealth* ('ACTV') (1992) 177 CLR 106, 138 (Mason CJ).

¹³⁵ *Lange* (n 16) 557 (plurality).

¹³⁶ *ACTV* (n 134) 135 (Mason CJ), quoting Isaacs J *Grannall v Marrickville MarKarine Pty Ltd* (1926) 37 CLR 393, 413 (Isaacs J).

¹³⁷ *Nationwide News* (n 2) 48 (Brennan J).

¹³⁸ Adrienne Stone 'Expression' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press 2018), 957; Stone also cites Jeffrey Goldsworthy 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2007), 106 and his discussion of Australian 'legalism'; for a discussion of this concern see for example Tom Campbell and Stephen Crilly 'The Implied Freedom of Political Communication, Twenty Years On' (2011) *University of Queensland Law Journal* 59, 62.

government are ‘*limited*’ to what is ‘necessary for...representative and responsible government...to the extent that the text and structure of the Constitution establish it.’¹³⁹ General and theoretical understandings of the structures required to maintain representative and responsible government have no bearing.

As such, the immediate question for the inquiry of this thesis is naturally whether Australia’s particular system of ‘representative and responsible government’, as contemplated by the Constitution, requires citizens to be exposed to some degree of plural speech. The answer to this question must logically build on an understanding of the existing relationship at law between ‘speech’ and Australia’s model of representative and responsible government – this relationship is established by the doctrine of the implied freedom of political communication.

2 The existing constitutional relationship in Australia between ‘speech’ and Australia’s system of representative and responsible government.

The existing constitutional relationship between ‘speech’ and Australian democracy arose in the same series of 1990s cases which found for ‘representative and responsible government’.¹⁴⁰ The facts of each of these cases pertained to circumstances in which the Parliament had legislated to restrict the content of speech, or methods of its dissemination – *Australian Capital Television Pty Ltd v Commonwealth (ACTV)* contemplated a substantial legislative prohibition on the broadcasting of political advertisements and a tiered system of advertising time allocation (largely based on prior first-preference vote)¹⁴¹; *Nationwide News*

¹³⁹ *Lange* (n 16) 557-567 (plurality).

¹⁴⁰ *ACTV* (n 134); *Nationwide News* (n 2); later *Lange* (n 16) and *McCloy v NSW* (2015) 257 CLR 178 (*‘McCloy’*).

¹⁴¹ *ACTV* (n 134).

Pty Ltd v Willis (Nationwide News) considered a legislative prohibition on criticising the now-Industrial Relations Commission and its members¹⁴²; later *Lange v Australian Broadcasting Corporation (Lange)* considered whether the common law defamation defence of ‘qualified privilege’ – as contemplated by the *Defamation Act 1974* (NSW) – unduly restricted speech¹⁴³; and *McCloy v NSW* assessed the validity of legislative restrictions on political donations.¹⁴⁴

In this series of decisions, the Court was clear that there is no personal right to free speech – that is, the Constitution does not confer upon citizens a right to free speech which can be enforced against any actor (private or public).¹⁴⁵ However, the Court did find that legislation restricting speech can be invalidated on the understanding that ‘freedom of communication, on matters of government and politics, is an *indispensable incident*’ to the form of ‘representative and responsible government’ contemplated by sections 7, 24, 64 and 128 of the Constitution.¹⁴⁶ The Court found political communication is ‘necessary’¹⁴⁷ to, and therefore a ‘requirement’¹⁴⁸ of, a system of government that is ‘chosen by the people’.¹⁴⁹ It found, citizens cannot make a ‘true choice’¹⁵⁰ about the candidates and policies they prefer

¹⁴² *Nationwide News* (n 2).

¹⁴³ *Lange* (n 16).

¹⁴⁴ *McCloy* (n 140). This is not an exhaustive list of cases, only those initially significant to the development of the current doctrine.

¹⁴⁵ *Lange* (n 16) 567 (plurality).

¹⁴⁶ *Ibid* 559.

¹⁴⁷ *Ibid* 561.

¹⁴⁸ *Ibid* 566-567; *McCloy* (n 140) 201.

¹⁴⁹ *The Constitution* (n 17) ss 7 and 24.

¹⁵⁰ *Lange* (n 16) 560 (plurality).

without having the ‘opportunity’¹⁵¹ to communicate politically ‘to gain an appreciation of the available alternatives,’¹⁵² and otherwise be ‘informed on the facts and arguments relevant to the making of [these] decisions.’¹⁵³ The Court held that this communication is required between electors, their candidates, and their representatives; as well as between electors themselves.¹⁵⁴

As such, the Court found the availability of political communication to be ‘a legal incident...essential to the effective maintenance of [representative and responsible government].’¹⁵⁵ Consequently, the freedom does not operate as a personal right but as ‘a limitation on Commonwealth legislative [and executive] power.’¹⁵⁶ This is because the ‘powers conferred on the Parliament...are “subject to” the structures and limits prescribed in the Constitution’¹⁵⁷ (political communication being one such structure).¹⁵⁸ Consequently, Acts of Parliament and actions of the Executive that unduly curtail political communication may be invalidated.¹⁵⁹ This is notably different from the American First Amendment’s

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ *Attorney-General v Times Newspapers* (n 2) 315 (Lord Simon of Glaisdale) cited in *Nationwide News* (n 2) 31 (Mason CJ), 49 (Brennan J), 103 (McHugh J) and in *ACTV* (n 134) 139 (Mason CJ), 212 (Gaudron J), 231 (McHugh J).

¹⁵⁴ *Lange* (n 16) 560 (plurality).

¹⁵⁵ Ibid 559.

¹⁵⁶ *Lange* (n 16) 561 (plurality); *Unions NSW v New South Wales* (2013) 252 CLR 530 (*‘Unions No.1’*), 554 [36]-[38]. The implied freedom also limits executive power. While its operation on legislative power has been more frequently litigated, Justice Gageler clarified in *Palmer v Western Australia* (2021) 272 CLR 505, 546-547, that where ‘executive action which takes [its] legal force...from legislation’ the inquiry ‘is whether *the statute* complies with the constitutional guarantee’ (*emphasis added*) not the Executive action itself, that is assessed against implied freedom. However, where Executive action occurs by way of ‘exercise of a discretionary power’ it is the Executive’s action that is assessed against the implied freedom.

¹⁵⁷ *ACTV* (n 134) 187 (Dawson J), 217 (Gaudron J), 226 (McHugh J); see also *Lange* (n 16) 559-562.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

understanding of free speech as a right attaching to the person.¹⁶⁰ In Australia, the protection of speech *is only justified by, and consequently is limited to*, what is ‘necessary’¹⁶¹ for the functioning of the system of representative and responsible government as understood by the ‘text and structure’¹⁶² of the Constitution.¹⁶³

There are two consequences of the fact that the freedom is limited only ‘to what is necessary for the effective operation of’ representative and responsible government.¹⁶⁴ Firstly, the freedom protects only the sub-set of ‘speech’ that is ‘political communication’ and does so on the understanding that *it is only this particular category of ‘speech’* that is required for the ‘efficacy of representative and responsible government’.¹⁶⁵ While the Court has not substantiated the breadth of what constitutes ‘political communication’ Meagher observes that in the caselaw, communication is only be protected where there is a ‘nexus between [the] communication and federal voting choices’, and that such a nexus will interpreted generously to cover a broad range of topics and mediums of communication (including non-verbal communication¹⁶⁶).¹⁶⁷

The second consequence of this limitation is that the freedom is ‘not absolute’ – meaning that it will not invalidate all legislation that restricts political communication, as the

¹⁶⁰ U.S. CONST. amend. I.

¹⁶¹ *Lange* (n 16) 566 (plurality).

¹⁶² *Ibid* 567.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid* 561.

¹⁶⁵ *Ibid* 559-562; *ACTV* (n 134) 139 (Mason CJ).

¹⁶⁶ *Levy v Victoria* (1997)189 CLR 579, 595 (Brennan CJ).

¹⁶⁷ Dan Meagher ‘What is ‘political communication’? The rationale and scope of the implied freedom of political communication’ (2004) 28/2 Melbourne University Law Review 438, 450.

doctrine recognises that there are circumstances in which legislation restricting political communication has a competing purpose which itself is also ‘compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’ and therefore important to society.¹⁶⁸ The Court is the arm of Government constitutionally devised to assess the bounds of legislative power.¹⁶⁹ As the doctrine operates to limit *legislative and executive power*, the Court has determined itself as the appropriate arbiter.¹⁷⁰

Following *McCloy* and *Brown v Tasmania (Brown)*¹⁷¹ the Court, in its assessment of whether Parliament has unjustifiably infringed the freedom of political communication, will firstly consider whether the law ‘burdens the freedom’ in its ‘terms, operation or effect’.¹⁷² If this question is answered affirmatively, the Court will then consider whether ‘*the purpose* of the law is legitimate in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’¹⁷³ (‘compatibility testing’); and following this, whether the legislation pursuing this purpose is ‘reasonably appropriate and adapted to advance that legitimate object in a manner...compatible with...representative and responsible government’¹⁷⁴ (‘proportionality testing’).¹⁷⁵ In engaging with the proportionality analysis, a narrow (yet repeated) judicial

¹⁶⁸ *Lange* (n 16) 562 (plurality).

¹⁶⁹ *The Constitution* (n 17) ss71, 73, 75, 76.

¹⁷⁰ *ACTV* (n 134) 214-215 (Gaudron J), 230 (McHugh J); *Lange* (n 16) 561.

¹⁷¹ *Brown v Tasmania* (2017) 261 CLR 328 (‘*Brown*’).

¹⁷² *Ibid* 353 (Kiefel CJ, Bell and Keane JJ); *McCloy* (n 140) 194.

¹⁷³ *Brown* (n 171) 364.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*.

majority have supported a ‘structured proportionality’ test, which approaches this final stage of judicial analysis by considering whether the impugned law is ‘suitable, necessary, and adequate in its balance’.¹⁷⁶ The first two criteria are an assessment of the *means* of the provision – the ‘suitability’ requirement demands ‘that there be a rational connection between the purpose of the statute in question and the measures adopted by it to achieve that purpose’¹⁷⁷; and the ‘necessary’ assessment requires there to be ‘no obvious and compelling alternative’ that would be a ‘reasonably practical means of achieving the same purpose...[though with] a less burdensome effect on the implied freedom’.¹⁷⁸ The ‘adequate in balance’ criterion goes to the content of the law and ‘requires a judgement...as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.’¹⁷⁹

This test has a narrow, though ‘repeated’ majority in the High Court.¹⁸⁰ It should be noted, however, that Justices Gageler and Gordon (who presently reside on the Court¹⁸¹) have repeatedly opposed the ‘structured proportionality’ test.¹⁸² As Stone discusses¹⁸³, Justice Gordon suggests, among other reasons, that the adjudication of proportionality lacks

¹⁷⁶ *McCloy* (n 140) 194 (French CJ, Kiefel, Bell and Keane JJ).

¹⁷⁷ *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18 at [76].

¹⁷⁸ *Clubb v Edwards; Preston v Avery* (2019) 267 CLR 171 (*‘Clubb’*), 186 (Kiefel CJ, Bell and Keane JJ).

¹⁷⁹ *McCloy* (n 140) 195 (French CJ, Kiefel, Bell and Keane JJ).

¹⁸⁰ *Farm Transparency International Ltd v State of New South Wales* (2022) 96 ALJR 655 (*Farm Transparency*) 73 [250] (Edelman J).

¹⁸¹ As of submission.

¹⁸² See for example: *Brown* (n 171) 375-398 (Gageler J), 426-479 (Gordon J); and *Comcare v Banerji* (2019) 267 CLR 373, 407-425 (Gageler J), 425-440 (Gordon J).

¹⁸³ Adrienne Stone ‘Proportionality and Its Alternatives’ (2020) 48/1 *Federal Law Review* 123, 128-131; see also Kieran Pender ‘Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations’ (2022) 44/1 *Sydney Law Review* 1, 16-17.

qualification – her Honour finds that it too closely examines the actions of Parliament and the Executive, particularly in prescribing that a court must invalidate a law if there is a ‘reasonably practicable’ and ‘obvious and compelling alternative.’¹⁸⁴ Her Honour further presents that this lack of leniency and trust in Parliament’s decisions ultimately sees the Court exercise ‘a wider power of judicial review than that...reflected in *the Australian Constitution*.’¹⁸⁵ Justice Gageler is similarly critical, preferring his own ‘calibrated scrutiny’ approach.¹⁸⁶ Specifically, Justice Gageler is critical of the blanket application of the structured proportionality test across subject matters; and further finds that the test is not sufficiently anchored to ‘the reasons for the constitutional implication.’¹⁸⁷

A further challenge to the doctrine arose, in the recent *LibertyWorks Inc v Commonwealth of Australia (LibertyWorks)* decision, where Justice Steward questioned its existence *altogether* – citing the ‘continued division...about the application of the doctrine of structured proportionality’ as his Honour’s reason for this.¹⁸⁸ Regardless of these judicial differences, the existence of the doctrine is understood as ‘settled’ by the Court.¹⁸⁹ The doctrine has invalidated some legislation including restrictions on political advertising

¹⁸⁴ Ibid 128, citing *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 122-123 (Gordon J).

¹⁸⁵ Ibid 129 citing *Roach v Electoral Commissioner* (2007) 233 CLR 162, 289 (Gleeson CJ) as affirmed by Gordon J in *McCloy* (n 140) 289.

¹⁸⁶ Justice Gageler has proposed an alternative ‘calibrated scrutiny test’ which varies the level of scrutiny based on the ‘risk’ to representative and responsible government and the ‘importance’ of the competing purpose. See *Clubb* (n 178), 484 at [162] (Gageler J).

¹⁸⁷ *McCloy* (n 140) 236 (Gageler CJ); and Stone’s analysis, *Stone* (n 183) 128-129.

¹⁸⁸ *LibertyWorks* (n 177) 95 [249].

¹⁸⁹ Ibid 14 [44] (Kiefel CJ Keane and Gleeson JJ).

(*ACTV*)¹⁹⁰; political donations (*Unions NSW v New South Wales (No 1) and (No 2)*)¹⁹¹; protests (*Brown*)¹⁹²; criticism and defamation of public officers (see *Nationwide News*)¹⁹³; and some communication among citizens (*Monis v the Queen*).¹⁹⁴ Equally, the Court has upheld the validity of laws on these same topics on a proportionality analysis (see *Lange*, *Levy v Victoria* ('Levy'), *Coleman v Power*, *McCloy*, *Clubb v Edwards*, *LibertyWorks*).¹⁹⁵

3 What does the established doctrine suggest as to whether exposure to a plurality of political communication is a structural feature of Australia's democracy, as contained in the Australian Constitution?

The immediate question is, what does this established doctrine (and the relationship between 'speech' and 'democracy' that it expounds) suggest as to whether exposing citizens to a plurality of speech is a structural feature of Australian democracy, such that private corporations like search and social platforms are prevented from engaging in such restriction. The scope of this question should, however, be reduced to consider only whether citizen exposure to a plurality of *political communication* is a structural feature of Australia's democracy as the Court has clarified that only 'political communication' not 'speech' (generally) can be a requirement of 'representative and responsible government'.¹⁹⁶

¹⁹⁰ *ACTV* (n 134).

¹⁹¹ *Unions NSW v New South Wales* (2013) 252 CLR 530 (*Unions No.1*); *Unions NSW v New South Wales* (2019) 264 CLR 595 (*Unions No.2*).

¹⁹² *Brown* (n 171).

¹⁹³ *Nationwide News* (n 2).

¹⁹⁴ *Monis v the Queen* (2013) 249 CLR 92.

¹⁹⁵ *Lange* (n 16); *Levy* (n 166); *Coleman v Power* (2004) 220 CLR 1; *McCloy* (n 140); *Clubb* (n 178); *LibertyWorks* (n 177).

¹⁹⁶ *Lange* (n 16) 560 (plurality).

3.1 To what degree does the current doctrine protect not only ‘political communication’ but the *exposure of citizens to a plurality* of ‘political communication’.

Much of the legal *justification* for the implied freedom of political communication doctrine is predicated on an understanding that representative and responsible government requires that citizens have a plurality of political communication available to them, such that they can choose to expose themselves and others to it.¹⁹⁷ Similarly, much of its *application* protects this. Each will be discussed in turn.

3.1.1 *Justification.*

The primary justification provided by the Court for the existence of the doctrine is that Parliament can only be said to have been ‘chosen by the people’ if citizens had the opportunity to make a ‘true choice’;¹⁹⁸ and such a choice itself in turn, can only be said to have been made where citizens had ‘an “opportunity to gain an appreciation of the available alternatives”’.¹⁹⁹ Consequently, the Court found that ‘legislative power [could not] support an absolute denial of access’ to political communication.²⁰⁰ In this language of ‘available alternatives’ there is clear suggestion that it is important for citizens to have the *opportunity* to expose themselves (and others)²⁰¹ to a *plurality* of political communication – as without the ‘availability’ of viewpoint ‘alternatives’ a ‘true choice’ cannot be made. As such, the

¹⁹⁷ There are perhaps issues around the bounds of what an individual can ‘expose others’ to a plurality of political communication – particularly if violence is involved or for example in *Clubb* where Parliament suggested handing out anti-abortion flyers was prohibited in some circumstances. This thesis does not propose to discuss these.

¹⁹⁸ Ibid, quoting *ACTV* (n 134) 187 (Dawson J).

¹⁹⁹ Ibid.

²⁰⁰ Ibid 560.

²⁰¹ See (n 197).

primary justification for the doctrine is predicated on some understanding that representative and responsible government requires there be a plurality of political communication *available* to citizens, such that they have the opportunity to expose themselves (and others) to it. Notably, ‘exposure’ itself is not required, only the ‘availability’ of an opportunity of exposure is.

Chief Justice French and Justices Kiefel, Bell and Keane suggested in *McCloy* that the ‘constitutional basis’ for the justification of the implied freedom is ‘well settled.’²⁰² While the *primary* justification is arguably well settled, the completeness of their Honours assertion is, with respect, challenged in this section. Some Judges have provided differing satellite justifications as to why political communication is important for representative and responsible government alongside the primary one. These include (1) that only ‘by freedom [of political communication]...and of association, can people build and assert political power’²⁰³; (2) political communication was required to promote accountability of government²⁰⁴; and (3) that representative and responsible government requires citizens to be able to represent their opinions both to their representatives and to each other – something that can only be achieved by political communication.²⁰⁵ Indeed, Justice Nettle in *McCloy* suggested that elected representatives should be exposed to the preferences of ‘all those they govern’ and ‘not just the few who have the means of buying political influence;’²⁰⁶ and Justice McHugh suggested in *Levy* that it was important that ‘people of different backgrounds

²⁰² *McCloy* (n 140) 200 [23].

²⁰³ *ACTV* (n 134) 139 (Mason CJ); *Unions No.1* (n 191) 551 [29] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

²⁰⁴ *McCloy* (n 140) 230 [123] (Gageler J); nb. this could perhaps fall within the primary justification.

²⁰⁵ *McCloy* (n 140) 257 [217] (Nettle J); *Levy* (n 166) 662 (McHugh J).

²⁰⁶ *Ibid* [217] (Nettle J).

or with different perspectives or information’ were not ‘prevented from exchanging views’ with one another.²⁰⁷ Each of these justifications seemingly suggests it is important that a plurality of political communication is available for citizens to expose themselves to, or otherwise expose others to – such that they can choose how and where to build political power; are able to hold elected members to account; and be understood by their representatives and each other.

It is interesting to observe that in neither the primary nor satellite justifications, does the Court suggest that exposure to a plurality of political communication is important to build social cohesion, or because citizens must consider the needs of others, or because democracy is about ‘fact-finding’ and getting to an objective standard of truth.²⁰⁸ This observation is important given these two arguments are so routinely made in scholarship (see *Chapter One*). Rather, the Australian understanding is that citizens need to have the opportunity to gain ‘an “appreciation of the available alternatives”²⁰⁹ from which citizens can *make their own judgement* as to their political opinion and as to what is ‘fact’ (in the course of arriving at that political opinion), and that their judgement should be respected. Consequently, the existing doctrine is, at least in-part, justified on an understanding that having plurality of political communication available for citizens to expose themselves to, is indispensable to the functioning of representative and responsible government.

3.1.2 Application

²⁰⁷ *Levy* (n 166) 662 (McHugh J).

²⁰⁸ ‘Fact-finding’ was mentioned in *ACTV*, *Nationwide News* and in *Unions No.1*, however it was suggested that this was a process individuals engaged in to form their own political opinions, as opposed to being required for the pursuit of ‘objective truth’.

²⁰⁹ *Lange* (n 16) 560 (plurality).

Similarly, the application of the existing doctrine largely protects the availability of a plurality of political communication. There are two types of legislation that may be invalidated by the doctrine – legislation that imposes a ‘blanket ban’²¹⁰ on an entire topics or arguments involving political communication; and that which prohibits the dissemination of entire topics or arguments involving political communication *in certain circumstances*.

Firstly, to consider the former, although there are few examples in caselaw where Parliament has imposed a ‘blanket’ prohibition on an entire area of political communication, this did arguably occur in *Nationwide News* and to a lesser extent in *Coleman*.²¹¹ In *Nationwide News*, the impugned legislation prohibited ‘by writing or speech’ the bringing of ‘a member of the [Industrial Relations] Commission or the Commission [generally] into disrepute’ – that is, legislation imposed a ‘blanket ban’²¹² on the ‘entire species of communication’ that was unfavourable comments about the Commission. The majority of the Judges who discussed the implied freedom found a ‘banket ban’ was not ‘reasonably appropriate and adapted.’²¹³ In *Coleman* section 7(1)(c) of the *Vagrants Gaming and Other Offences Act 1931* (QLD) prohibited ‘profane, indecent [and] obscene language’ and section 7(1)(d) prohibited ‘threatening, abusive [and] insulting words’ in ‘any public place’.²¹⁴ The former section was invalidated by the Queensland Supreme Court²¹⁵, and the latter was held to be valid by a slim majority of the High Court, on a narrow reading that interpreted the

²¹⁰ *ACTV* (n 134) 206 (Gaudron J), 238 (McHugh J).

²¹¹ *Nationwide News* (n 2) cautiously relied upon as it was decided pre-*Lange*; *Coleman* (n 195).

²¹² *Nationwide News* (n 2) 24.

²¹³ *Coleman* (n 195) 3-8.

²¹⁴ *Ibid*.

²¹⁵ *Coleman v Power* [2002] 2 Qd R 620.

provision as only having application where violence was likely or sought in the use of such language.²¹⁶ On a narrow majority, the case arguably stands as a weak proposition supporting a similar sentiment – legislation prohibiting the species of communication that is ‘insulting words’²¹⁷ and ‘uncivil communication’ is likely to be invalid if it has blanket application. The legislation was only valid because it was read narrowly to apply only to certain situations (here situations, where violence was likely or sought²¹⁸). However, the freedom is ‘not absolute’²¹⁹ – and as such, ‘blanket bans’ may still be valid if they are compatible and otherwise proportionate. The ‘structured proportionality’ test arguably presents a high bar which a blanket ban is likely to struggle to overcome, as the test assesses ‘the importance of [this] purpose... [against] the extent of the restriction [it] imposes on the implied freedom’²²⁰ (which is arguably *considerable* where entire species of content is prohibited).

The doctrine similarly can invalidate legislation restricting the dissemination of political communication *in certain circumstances*. Arguably, in doing this the doctrine similarly serves to protect the availability of a plurality of political communication. The first question of the *McCloy* test considers whether the impugned law ‘effectively burden[s] [the] freedom of communication about government or political matters either in its terms, operation or effect.’²²¹ The caselaw demonstrates that legislation restricting the dissemination of political communication can satisfy this ‘effective burden’ test – examples of where this was found

²¹⁶ *Coleman* (n 195) (Gummow, Hayne JJ and Kirby J) (McHugh J also in majority, though providing separate reasons).

²¹⁷ *Ibid* 66.

²¹⁸ *Ibid* 64-102.

²¹⁹ *Lange* (n 16) 560 (plurality).

²²⁰ Adrienne Stone and Simon Evans ‘Australia: Freedom of speech and insult in the High Court of Australia’ (2006) 4/4 *International Journal of Constitutional Law* 677, 686; see also *McCloy* (n 140) 194 (French CJ, Kiefel, Bell and Keane JJ).

²²¹ *McCloy* (n 140) 194 (French CJ, Kiefel, Bell and Keane JJ).

include restrictions on protesting at a duck shooting range during certain hours in *Levy*²²²; provisions restricting the dissemination of content by limiting electoral donations in *Unions (No 1 and 2)*²²³; the prohibition on the distribution of anti-abortion flyers around related medical clinics in *Clubb*²²⁴; and anti-logging protest restrictions in *Brown*.²²⁵ Not all of these restrictions were ultimately invalidated (the burden on political communication was held in *Levy* and *Clubb* to be proportionate and compatible with representative and responsible government, while the provisions in *Unions (No 1 and 2)* and *Brown* were invalidated). However, each case exemplifies how stage one of the test operates to largely protect the *availability* of a plurality of political communication, as it considers a burden on dissemination to be a burden on political communication generally.

There was early judicial discussion that the existing doctrine should more readily strike down ‘restrictions which target ideas or information’ (the content of political communication) than those which either ‘incidentally’ restricted the freedom or otherwise restricted only the ‘mode of communication’ and not the content itself.²²⁶ The suggestion was that restrictions on the former were valid only if there was a ‘compelling justification’ and were (in substance) ‘no more than is reasonably necessary to achieve...the competing public interest.’²²⁷ The latter restrictions would only be invalidated if they were ‘*disproportionate to*

²²² *Levy* (n 166).

²²³ *Unions No.1* (n 191); *Unions No.2* (n 191).

²²⁴ *Clubb* (n 178).

²²⁵ *Brown* (n 171).

²²⁶ *ACTV* (n 134) 142-143 (Mason CJ); *Levy* (n 166) 619 (Gaudron J) and 645 (Kirby J); nb. Deane and Toohey JJ in *Nationwide News* (n 2) 76-77 and Toohey and Gummow JJ in *Levy* (n 166) 614 discussed a different two-pronged test (not discussed).

²²⁷ *Ibid.*

the attainment of the competing public interest’, which is notably a lower threshold.²²⁸ This suggestion, however has not been pursued in the latest structured proportionality test. Indeed, at the ‘necessary’ stage, it seemingly applies a version of the higher bar – that there to be ‘no obvious and compelling alternative’ – to both types of restrictions.²²⁹ However, the sentiment behind some of their Honours’ reasoning in the earlier cases might hold in the ‘adequate in balance’ assessment – as restricting an entire species of political content may be more likely to weigh more unfavourably against validity, than restrictions on dissemination only in certain circumstances, given the ‘extent of the restriction [the former] imposes’²³⁰ is greater.

Nonetheless, the application of the doctrine largely protects the existence and *availability* of a plurality of political communication – albeit qualified by the structured proportionality test. Notably, again the existing doctrine does not demand citizens be exposed to a plurality of political communication, it simply requires that it be available.

3.2 Limitations of the existing doctrine and bounds of the Constitution – understanding not only that there is no Constitutional requirement that citizens be exposed to a plurality of political communication in the existing doctrine; but that no such requirement can exist in the Constitution, generally.

Although the analysis above finds that the implied freedom largely protects the availability of a plurality of political communication, there are two clear limitations that qualify the degree to which political communication can be said to be a structural feature of Australian democracy. These are that the protection operates *only* to (1) *invalidate* the acts of (2) the

²²⁸ Ibid.

²²⁹ *McCloy* (n 140) 195 (French CJ, Kiefel, Bell and Keane JJ).

²³⁰ Ibid.

Parliament and Executive Government.²³¹ An exploration of these two limitations explains not only that there is no existing obligation on search and social platforms, and no *positive* requirement on the legislature, to ensure citizens are exposed to a plurality of political communication, respectively; but it also demonstrates *why no such requirement can or does exist in the Constitution, generally*.

The first limitation pertains to the fact that the existing doctrine has application only to the *actions of Parliament and Executive Government* – that is, the doctrine does not have any application to the unregulated acts of private companies (such as, search and social platforms) which may be restricting or otherwise controlling citizens’ exposure to a plurality of political communication. The absence of a stronger protection for political communication and the availability of a plurality of it – either as an enforceable protection against the actions of private companies, or as a requirement for Parliament to facilitate the availability of such a plurality – initially appears to contradict the Court’s assertion that political communication is a structural feature ‘*necessary* for the effective operation of...representative government’.²³² However, for many years, the fact that the implied freedom did not apply to private companies was largely unproblematic. Invalidating acts of Parliament was likely to provide substantial protection to the ‘free flow of political communication’²³³ as for the better part of history, only governments had the ability to limit political communication across the country. If a private company that disseminated speech (for example a media company) were to prohibit content or a method of its dissemination, the consequence would not be as impactful – citizens could turn to alternate companies for news.

²³¹ These could be considered one limitation; however this thesis makes a distinction for reasons apparent below.

²³² *Lange* (n 16) 567 (plurality).

²³³ *McCloy* (n 140) 257.

Search and social platforms, coupled with Australians' increasing reliance, use and arguable dependence on them, are perhaps challenging this. Chief Justice Mason acknowledged in *ACTV* that some 'modes of communication' have a 'striking impact' in their dissemination of political communication.²³⁴ Television was held to have such an impact, and this was a factor which influenced his Honour's finding that the Parliament's restrictions on political advertising through this medium was invalid.²³⁵ A similar conclusion was reached by the majority in *Unions (No 1 and No 2)* in relation to political donations as a method of funding the dissemination of content.²³⁶ Although *ACTV* was decided pre-*Lange/McCloy* and therefore must be treated cautiously, arguably this 'striking impact' sentiment would weigh similarly in the 'adequate in balance' inquiry of the current structured proportionality assessment. The impugned legislation must 'balance...the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom' (which is arguably greater where a medium has a striking impact).²³⁷ Today, search and social platforms could be said to have a similar 'striking impact' on political communication and citizens' formation of political opinions – given the percentage of Australians who use Google and Meta daily is around 70% and 58%, respectively.²³⁸ Arguably because of the high levels of concentration in search and social platform markets (Google has a 93-95% market share of the search industry; and Meta a 60% share),²³⁹ the leading platforms arguably

²³⁴ *ACTV* (n 134) 146 (Mason CJ).

²³⁵ *Ibid.*

²³⁶ *Unions No.1* (n 191); *Unions No.2* (n 191). Though the specific term 'striking impact' was not used in either *Unions* decisions.

²³⁷ *McCloy* (n 140) 179.

²³⁸ *ACCC 2019 Final Report* (n 1) 44.

²³⁹ Measured by percentage of consumer use. *ACCC 2019 Final Report* (n 1) 58; *ACCC Interim Report 6* (n 22) 11-12; see also *Bennett* (n 6).

have similar levels of control over dissemination of political communication across the platform industry, as that Parliament attempted to have over the television industry in *ACTV*. However, the existing doctrine does not have any application to private companies and the determinations they make about the plurality of political communication citizens are exposed to as Constitution was drafted only to establish and confer power upon the branches of government. Private corporations are contemplated, though only in section 51(xx) where Parliament is empowered to make laws for their regulation.²⁴⁰ This is not to suggest that that a modern Australian constitution should be drafted or interpreted to include a direction towards curtailing private companies in this regard. Rather, this reflection is simply made as an observation of the fact that in the modern era, technology has enabled private corporations to wield a level of control over public debate that previously only Parliament had the capability to exercise. Regardless, the implied freedom has no application to search and social platforms.

The second (and related) limitation of the doctrine is that it protects political communication only by way of *invalidating* the acts of Parliament and actions of the Executive Government. That is, the protection is afforded by way of a ‘freedom’²⁴¹ and does not impose a positive obligation on Parliament, citizens, or any other actor to ensure that political communication exists. Initially, there appears to be a disjunct here. Intuitively, framing the doctrine as a ‘freedom’ suggests political communication is something that may freely occur, but is not strictly required. Yet, the Court has suggested political communication is a structural feature ‘*necessary* for the effective operation

²⁴⁰ In qualified circumstances. s51(xx) *the Constitution* (n 17).

²⁴¹ *Brown* (n 171) 430.

of...representative government’ (emphasis added).²⁴² This raises the question as to *whether* or *how* this can be so. Arguably the Court and the Constitution alike *do* understand political communication to be structural feature required by representative and responsible government, however they make the assumption that it *naturally exists* in society and that citizens will organise to sufficiently expose themselves to it. As such, there is no need to impose a positive obligation on any actor to facilitate it. All that is required is a ‘freedom’ from it being ‘infringed’. Indeed, the Constitution ‘denotes that sovereign power resides in the people’²⁴³, and arguably it is a natural extension of this to assume the competence of the people to engage in activities of ‘political organisation’²⁴⁴ and to create institutions like the press, in order to ‘gain an appreciation of available alternatives’.²⁴⁵ That is, it is assumed that citizens will naturally organise to place themselves in a position such that their electoral choice is a reflection of a ‘true choice’.²⁴⁶ This assumption explains the absence of any express requirement in the Constitution for there to be a press or other form of public political communication; despite the suggestion by the Court (for example by, Justices Brennan, McHugh and Keane) that the ‘public press’ is a ‘principal instrument’ of democracy.²⁴⁷ Consequently, the limitations of the existing doctrine explain not only that there is no requirement in the existing doctrine that either (i) citizens be exposed to a plurality of political communication or (ii) that Parliament otherwise make available a plurality of

²⁴² *Lange* (n 16) 567 (plurality).

²⁴³ *ACTV* (n 134) 137; *McCloy* (n 140) 284 [318].

²⁴⁴ *Lange* (n 16) 560 (plurality).

²⁴⁵ *Ibid*,

²⁴⁶ *Ibid*.

²⁴⁷ *Nationwide News* (n 2) 48 (Brennan J); *ACTV* (n 134) 103 (McHugh J); *Unions No.1* (n 191) 580-581 [145].

political communication to citizens; but that no such legal requirement can exist in the Constitution generally.

Arguably too exposure to a plurality of political communication can never be forced; and neither exposure to it, nor its availability can ever be perfect – meaning, it is impossible to expose citizens to, or make available to them, the entire plurality of political communication that exists in Australian society. Further, any action by Parliament facilitating the availability or exposure of citizens to a plurality of political communication would regularly conflict with other competing interests of government. Value judgements would need to be made as to the extent to which this should be pursued in light of these competing interests. As such, if there *were* a positive obligation on the Parliament, arguably the Court would be unable to adjudicate this. The Court can adjudicate the current doctrine because it is adjudicating whether Parliament has acted *outside of its power*. However, given that it is both impossible for Parliament to discharge any such positive obligation perfectly, and that doing so would require the making of value judgements about the extent to which it should be discharged, the Court in assessing whether Parliament had discharged a positive obligation, would be *making an assessment as to whether Parliament had made a ‘good decision’ as to the extent to which it exposed citizens to a plurality of speech*. This strays into Legislative power. As such, *the Constitution* neither creates such a positive obligation on the Parliament, nor is it justiciable.

However, the *availability of* a plurality of political communication is clearly something Australia’s system of representative and responsible government *values* – it a structural feature of representative and responsible government that is assumed to exist. Scholars often hesitate in suggesting that the Australian Constitution substantively contains values because

of its ‘prosaic’²⁴⁸ purpose, and the fact that operatively the document simply establishes the institutions of power.²⁴⁹ This thesis, however, aligns itself with the work of Adrienne Stone and Elisa Arcioni in this regard.²⁵⁰ Stone suggests that while some constitutions are undoubtedly more tailored towards substantive value commitments, the ‘structural...elements of the [Australian] Constitution’ nonetheless ‘reveal some deep substantive commitments.’²⁵¹ Arguably, making available a plurality of political communication to citizens is one such substantive commitment of representative and responsible government, as revealed by the existing doctrine. This thesis does not pursue the idea that exposing citizens to a plurality of political communication is a substantive commitment of the Constitution – it is clear, that the Constitution assumes the competence of the people to sufficiently organise and expose themselves to ‘alternatives’²⁵² to an appropriate degree. Rather, simply it suggests *the availability of a plurality of political communication* is the substantive ‘values’ commitment tethered to the doctrine of representative and responsible government.

Although there is no obligation on the Parliament to further this value, the Parliament arguably can nonetheless *recognise* that this is a value and act to further it if they so choose. The Constitution assumes people will organise to facilitate an environment in which they can ‘gain an appreciation of available alternatives.’²⁵³ Arguably, the Parliament is a tool the people can use to do this. As such, the absence of a constitutional requirement to make a

²⁴⁸ *Stone and Arcioni* (n 121) 63.

²⁴⁹ See for example George Williams; Mark McKenna; Amelia Simpson’s reflections in ‘First words: the preamble to the Australian Constitution’ (2001) 24/2 *University of New South Wales Law Journal* 382-400.

²⁵⁰ *Stone and Arcioni* (n 121) 60-61.

²⁵¹ *Ibid* 60-61.

²⁵² *Lange* (n 16) 567 (plurality).

²⁵³ *Ibid* 560.

plurality of political communication available to citizens is not conclusive in determining whether this structural feature exists in Australia's democracy. It is important to determine whether Parliament has legislated to further it.

4 Is the value of having an availability of a plurality of political communication, accepted by Parliament as a structural requirement of Australian democracy?

This Chapter has sought to determine whether the availability of a plurality of political communication is a structural feature of Australian democracy. It has done this with the view to later inquiring whether search and social platforms compromise this standard, should this Chapter find it exists. This Chapter has thus far established that no such requirement exists in the Constitution, however, Parliament may have legislated to establish it. As such, this section will now consider whether Parliament has previously suggested that the availability of a plurality of political communication is a structural requirement of Australian democracy. If it has, this thesis is led to conclude that this structure is arguably something Parliament should extend to have similar application *across society, including to search and social platforms*.²⁵⁴

²⁵⁴ As legislation that would be regulating political communication it naturally would need to avoid mistakenly infringing the implied freedom (per *McCloy and Brown*). This legislation is unlikely to be invalid if appropriately drafted. It is unlikely that the legislation would be considered to 'burden' political communication as it is designed to enhance it. However, it would be important for legislation to not mistakenly impose such a burden when making value judgements about how, and the extent to which, such plural political communication was to be made available. One example of a misstep may be where legislation, with the purpose of facilitating the availability of plural political communication, demands corporations make certain content available (or otherwise prioritise it) at the cost of circulation of other content. If the legislation was to 'burden' political communication, it would need to satisfy both 'compatibility' and 'proportionality' testing (see *McCloy and Brown*). Naturally, its purpose would be compatible with representative and responsible government. As such, drafters must simply ensure the legislation is 'suitable, necessary, and adequate in its balance'. This cannot be determined without assessing the legislative text. However, such legislation is unlikely to be disproportionate given it is seeking to facilitate the further availability of political communication. Separately, note that Parliament would be empowered to regulate the dissemination of political communication on search and social platform corporations by way of sections 51(v) and 51(xx) of the Constitution.

Unsurprisingly, the Legislature has not expressly legislated to facilitate the availability of a plurality of political communication on the understanding that it is a structural feature of Australian democracy. The Australian Parliament generally avoids codifying ideals, rights, values and principles expressly. As such, any suggestion by the Parliament of this will be more subtly expressed through its regulation of a particular industry or aspect of society. Arguably, Parliament has done this in legislating to regulate the traditional media industry; and in enacting defamation²⁵⁵ and copyright law.

4.1 Areas of social regulation in which Parliamentary debate on this question has ensued.

4.1.1 Defamation and copyright law in Australia.

Until recently, Australia was routinely referred to as the ‘defamation capital of the world’ for the ease with which individuals (and journalists in particular) could be sued for defaming others.²⁵⁶ At general law, a publication is considered ‘defamatory’ where it: injures the reputation of an identifiable person in the estimation of others;²⁵⁷ including by encouraging society to shun or exclude them;²⁵⁸ or otherwise by exposing them to ‘ridicule’²⁵⁹ or ‘contempt’.²⁶⁰ By December 2022 the Australian State and Territory Parliaments (with

²⁵⁵ Defamation law is governed by general and state law. However, the federal Attorney-General and state and territory Attorney-Generals have collaborated to create a uniform law, see (n 261).

²⁵⁶ Louise Lim ‘How Australia Became the Defamation Capital of the World’ (online, New York Times, March 5 2019) <<https://www.nytimes.com/2019/03/05/opinion/australia-defamation-laws.html>> accessed 15 May 2023.

²⁵⁷ *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466 [4], see also [1]-[9].

²⁵⁸ *Ibid* [3].

²⁵⁹ *Ibid* [4].

²⁶⁰ *Ibid* [4].

support from the federal Attorney-General)²⁶¹ suggested the common law qualified privileged defence²⁶² cannot ‘adequately protect public interest journalism’ and as such places ‘unreasonable limits on freedom of expression, particularly about matters of public interest’.²⁶³ They introduced a ‘dedicated public interest defence to protect the ability of journalists and media organisations to publish matters of public concern without fear of defamation litigation’.²⁶⁴ This offers journalists (and others) a defence where (i) their publication concerned an issue of public interest; and (ii) the individual ‘reasonably believed the publication to be in the public interest.’²⁶⁵ Arguably, in providing greater defence to journalists and raising the standard for a cause of action, the new reforms work to protect the free flow of political (and other) communication.

Parliament has made a similar assessment in relation to copyright. While copyright protections are relatively easy to acquire, the *Copyright Act 1968* (Cth) contains ‘fair dealing’ provisions which provide exceptions to the reproduction of work for news reporting, criticism and research (in some circumstances), again encouraging the free flow of political communication.²⁶⁶

4.1.2 *Traditional media regulation/laws.*

²⁶¹ Council of Attorney-Generals, Communiqué July 2022, 4-5 <<https://www.ag.gov.au/about-us/publications/standing-council-attorneys-general-communications>> accessed 28 May 2023; reflecting changes from 2020-2022.

²⁶² The common law qualified privilege protects a person who made the defamatory statement where that person has a duty to make it, and the recipient has corresponding obligation to receive it. It is a defence unless the statement was malicious. See *Wraydeh v Fairfax Media Publications Pty Limited & Ors* [2021] NSWCA 153.

²⁶³ New South Wales, *Parliamentary Debates First Reading Defamation Amendment Bill*, Legislative Assembly, 29 July 2020, 2865 and 2870, the Hon. Mark Speakman (Attorney-General); see also *Council of Attorney-Generals, Communiqué* (n 261).

²⁶⁴ Ibid 2870.

²⁶⁵ Enacted across all states and territories, see for example: s29A(1) *Defamation Act 2005 No 77* (NSW).

²⁶⁶ ss40-42, 103A-103C *Copyright Act 1968* (Cth).

The Australian media industry has been criticised internally and externally as being ‘among the most concentrated in the developed world.’²⁶⁷ It is dominated by two major commercial players – News Corp and Nine Entertainment owning 59% and 23% of national and metropolitan newspapers, respectively.²⁶⁸ There are seven primary television broadcasters in Australia.²⁶⁹ Four of these, Channels Seven, Nine, Ten and the ABC dominate the television market, while a handful of others (like News Corp’s SkyNews) have some influence in the market.²⁷⁰ Digital news platforms are increasingly replacing print media.²⁷¹ Across print, online and television Nine Entertainment reaches 13.3 million Australians per month²⁷², while News Corp has a reach of 12.1 million.²⁷³ The publicly owned Australian National Broadcaster (ABC) follows with an 11.4 million reach.²⁷⁴ Many new smaller digital news players like ‘Crikey’, ‘TheDailyAus’ and the Guardian Australia have emerged in the online

²⁶⁷ Report to the Minister for Broadband, Communications and the Digital Economy by the Hon R Finkelstein QC (assisted by Matthew Ricketson), *The Independent Inquiry Into The Media And Media Regulation* (2012) 59.

²⁶⁸ Getup! *Who Controls our Media*’ (report, 2021), 4 <[https://cdn.getup.org.au/2810-GetUp - Who Controls Our Media .pdf](https://cdn.getup.org.au/2810-GetUp_-_Who_Controls_Our_Media_.pdf)> accessed 26 May 2023.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Data from one year sample 2020. RMIT ABC Fact Check, Nielsen Digital Content Planning supplied data 01/12/2020-31/12/2020 <<https://www.abc.net.au/news/2021-04-14/fact-file-rupert-murdoch-media-reach-in-australia/100056660#digital>> accessed 25 May 2023.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

environment.²⁷⁵ Additionally, approximately 10% of Australians live in regional areas which are serviced by television networks such as WIN, the ABC and online services.²⁷⁶

Since the 2017 passage of the *Broadcasting Legislation Amendment (Broadcasting Reform) Act*²⁷⁷, this market has been regulated by little more than economy-wide competition law. As a body of law, competition law operates to maintain rivalry between firms in the marketplace.²⁷⁸ The operative provisions of the economy-wide competition laws are the ‘restrictive trade practices’ provisions contained in Part IV of the *Competition and Consumer Act 2010 (Cth) (CCA)*.²⁷⁹ These provisions are designed to maintain competition by ensuring that conduct of any firm does not (i) substantially lessen existing levels of competition; or (ii) create ‘barriers to entry’ for new firms looking to establish themselves in the market.²⁸⁰ The provisions do this by prohibiting cartel conduct (‘horizontal arrangements’ between firms that detract from competition by arranging price fixing, restricting outputs, market allocation or bid rigging);²⁸¹ and prohibiting mergers (by way of retrospective court action, or otherwise on direct application to the ACCC)²⁸² and any actions by firms that ‘would have the effect, or

²⁷⁵ Ibid.

²⁷⁶ Derek Wilding, and Tim Koskie ‘Australia Media concentration and deteriorating conditions for investigative journalism’ in Josef Trappel and Tales Tomaz (ed) *The Media for Democracy Monitor 2021: How Leading News Media Survive Digital Transformation (Vol. 1)* (Nordicom University of Gothenburg 2021), 67.

²⁷⁷ *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017 (Cth)*.

²⁷⁸ S G Corones *Competition Law in Australia* (Thompson Reuters, 5th edition, 2010) 10-175.

²⁷⁹ *Competition and Consumer Act 2010 (Cth)*.

²⁸⁰ Russell Miller *Miller’s Australian Competition and Consumer Law Annotated* (35th edition, Thompson Reuters, 2013) 449-634.

²⁸¹ ss45AA-45AU *CCA* (n 279).

²⁸² Ibid s50.

be likely to have the effect, of substantially lessening competition in any market'.²⁸³ The latter prohibition is more readily applicable where the conduct of the firm constitutes a 'misuse of market power'.²⁸⁴ Competition law is justified (as the 'object' of the *CCA* states²⁸⁵) in its endeavour to 'enhance the welfare of Australians'.²⁸⁶ Traditionally, 'welfare' was conceptualised as 'economic welfare'. As Attorney-General Snedden articulated in his second reading speech that introduced the *CCA*²⁸⁷ there is a general economic understanding that where firms are forced to compete consumers and society generally will benefit.²⁸⁸ Competition encourages firms to trade quality goods at low prices; pursue innovation to better their products; and to productively use their resources – leading to the efficient allocation of resources in society generally.²⁸⁹ It is rationally assumed that both the individual and society will benefit from these high-quality low cost goods, where technological innovation thrives, and when resources are allocated more efficiently.²⁹⁰

The earliest conscious articulation of the federated Australian Parliament suggesting 'market competition' would be an appropriate means of regulating the media industry, came from the Hammond Royal Commission on Wireless (radio) in 1927.²⁹¹ The Commission

²⁸³ Ibid s45. The *CCA* restrictive trade practice provisions also prohibit some vertical arrangements, however these have little relevance to media corporations.

²⁸⁴ Ibid s46.

²⁸⁵ Ibid s2.

²⁸⁶ Ibid s2; *Second Reading Speech Trade Practices Act (Snedden)* (n 18) 1655-1656.

²⁸⁷ Then, the *Trade Practices Act 1965* (Cth).

²⁸⁸ *Second Reading Speech Trade Practices Act (Snedden)* (n 18) 1655-1656.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Report of the Royal Commission on wireless, together with appendices, led by JH Hammond, *Parliamentary Paper*, no. 121. (1927) <<https://catalogue.nla.gov.au/Record/4397279>> ('*Hammond Royal Commission*').

considered ‘desirable policy and practises’²⁹² on radio. It suggested concentration of ownership should not be vested wholly in the Government, fearing propaganda and biased reporting would result. The same concern about bias similarly relates to any single *commercial* entity having that same level of control. From this, Australian media policy became characterised by an understanding that source diversity leads to content diversity and as such, a competition system acted as a convenient proxy for ensuring media pluralism.²⁹³ Economy-wide competition law was introduced with the passage of the *Trade Practices Act* when it was recognised that markets did not naturally always facilitate competition; as was an industry-specific requirement that individual and corporations could own a maximum of two television stations.²⁹⁴

This competition law approach remained until the late 1980s when the Hawke-Keating government assessed that it *did not* on its own provide a sufficient plurality of ownership and consequently communication.²⁹⁵ Cross-media ownership prohibitions were then introduced; they prevented the owners of print media from also owning a television station in the same geographic market.²⁹⁶ Keating idiomatically summarised the change by stating media organisations could be ‘queen of the screen or prince of the press but not both’.²⁹⁷ These

²⁹² Ibid v.

²⁹³ Commonwealth Parliament, *Parliamentary Debates Second Reading Speech Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017*, House of Representatives, 15 June 2017, the Hon. Paul Fletcher (Minister), 2746-2749; see Ariel Ezrachi ‘Sponge’ (2017) 5/1 *Journal of Antitrust Enforcement* 49-75 generally discussing competition law as a ‘proxy’ for social objectives.

²⁹⁴ *Trade Practices Act* (n 287); s92(1)(a) *Broadcasting Act 1942* (Cth).

²⁹⁵ Commonwealth Parliament, *Parliamentary Debates Second Reading Speech, Broadcasting (Ownership and Control) Act*, House of Representatives, 29 April 1987, the Hon. Michael Duffy (Minister for Communications), 2192.

²⁹⁶ *Broadcasting (Ownership and Control) Act 1987* (Cth).

²⁹⁷ Paul Keating cited by Paul Chadwick in ‘Hawke cabinet’s media changes paved the way for News Corporation’ *The Guardian Australia* (1 January 2014) <<https://www.theguardian.com/world/2014/jan/01/hawke-cabinets-media-changes-paved-the-way-for-news-corporation>> accessed 29 April 2023.

reforms abolished the two station rule, with the requirement that no individual or corporation could reach more than 75% of the television viewing audience'.²⁹⁸ The then-Minister for Communications, suggested these laws were enacted 'in order to facilitate better access by the public to diverse sources of news and information.'²⁹⁹ However, as Harding-Smith reflects, 'it was also widely believed that the government wished to reward its friends in the media and punish its enemies...[as] the changes suited [Kerry] Packer and [Rupert] Murdoch and inconvenienced Fairfax and the Herald and Weekly Times [which] had been critical of the Hawke government.'³⁰⁰ This criticism was raised by Members of Parliament in subsequent debates.³⁰¹ Indeed, Treasurer Keating is understood to have visited Rupert Murdoch to inform him of the 'changes' prior to their introduction; and soon-after approved the sale of the Herald and Weekly Times to Murdoch's then-News Ltd.³⁰² This action is understood to have consolidated Murdoch's market power as it resulted in him owning print monopolies in four capital cities and controlling 60% of Australian print media generally.³⁰³

These media-specific laws were repealed by the Liberal Government in 2006 and 2017 and the Australian media regulation largely reverted to economy-wide competition law.³⁰⁴

²⁹⁸ The then-s92(1)(a) *Broadcasting Act 1942 (Cth)* repealed by the *Broadcasting (Ownership and Control) Act 1987 (Cth)*.

²⁹⁹ *Second Reading Speech Broadcasting (Ownership and Control) Act* (Duffy) (n 295), 2193.

³⁰⁰ Rob Harding-Smith, 'Media Ownership and Regulation in Australia' (August 2011) *Centre for Policy Development Issue Brief* <https://cpd.org.au/wp-content/uploads/2011/11/Centre_for_Policy_Development_Issue_Brief.pdf> 4.

³⁰¹ See Commonwealth Parliament, *Parliamentary Debates Second Reading Speeches, Broadcasting (Ownership and Control) Act 1987*, House of Representatives <[https://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;adv=yes;orderBy=customrank;page=0;query=Title%3A%22BROADCASTING%20\(OWNERSHIP%20AND%20CONTROL\)%20BILL%201987%22;resCount=Default](https://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;adv=yes;orderBy=customrank;page=0;query=Title%3A%22BROADCASTING%20(OWNERSHIP%20AND%20CONTROL)%20BILL%201987%22;resCount=Default)>; see for example 2 June 1987, Senator David Vior 3374.

³⁰² *Chadwick* (n 297).

³⁰³ Julianne Schultz *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge University Press 1998) 70-83.

³⁰⁴ *Broadcasting Services Amendment (Media Ownership) Act 2006 (Cth)*; *Broadcasting Legislation Amendment (Broadcasting Reform) Act 2017 (Cth)*.

The primary reason provided by the Ministers for the repeal was that cross-media ownership laws unnecessarily restricted ‘commercial flexibility’ given the advent of digital media.³⁰⁵ Both Ministers maintained that ‘the need to ensure the diversity of media ownership’ and ‘access’ to it was ‘fundamental’ to Australian democracy.³⁰⁶ They suggested these reforms did not compromise media pluralism³⁰⁷ as the advent of digital media was ‘providing Australians with an unprecedented level of choice and control in their media usage’.³⁰⁸ Under economy-wide competition law, the ACCC approved the merger of two Australian media giants Fairfax media Ltd and Nine Entertainment Co Holdings Ltd in 2018, further consolidating the industry.³⁰⁹

The industry is also subject to *Broadcasting Services Act 1992* (Cth) (BSA) which states in its objectives that it is designed to ‘ensure...where possible, the development of diversity, including public, community and indigenous broadcasting’³¹⁰, ‘encourage diversity in control of the more influential broadcasting service’³¹¹ and encourage commercial broadcasters to deliver ‘fair and accurate coverage of matters of public interest’.³¹² The BSA (1) restricts the number of television and radio licenses that an individual can own to one license, and those a

³⁰⁵ Commonwealth Parliament, *Parliamentary Debates Second Reading Speech Broadcasting Services Amendment (Media Ownership) Act 2006*, Senate, 14 September 2006, the Hon. Sandy MacDonald, 11; *Second Reading Speech Broadcasting Reform) Act 2017* (n 293) 2746-2749.

³⁰⁶ Ibid.

³⁰⁷ *Second Reading Speech Broadcasting Reform Act 2017* (n 293), 2746-2749; *Second Reading Speech Media Ownership Act 2006* (n 305) 10-11.

³⁰⁸ Ibid.

³⁰⁹ ACCC Media Release (8 November 2018) <<https://www.accc.gov.au/media-release/accc-will-not-oppose-nine-fairfax-merger>> accessed 7 June 2023.

³¹⁰ s3(n) *Broadcasting Services Act 1992* (Cth) (‘BSA’).

³¹¹ Ibid s3(c).

³¹² Ibid s3(g).

corporation can own to two licenses³¹³; (2) prescribes local content requirements in some circumstances (particularly in regional areas)³¹⁴; (3) encourages commercial broadcasters work with the Australian Communications and Media Authority (ACMA) to develop non-binding ‘codes of practice’ including in relation to editorial standards and fairness in the representation and presentation of news (this does not apply to the print industry which is entirely self-regulated, namely by the Australian Press Council)³¹⁵; and (4) prohibits what the *BSA* deems ‘an unacceptable media diversity situation’ – which is defined as a situation in which the number of print, radio, online or television media organisations drops below five in a metropolitan area, and four in a regional area.³¹⁶ Mergers that would create an ‘unacceptable speech situation’ are prohibited; and the ACMA may issue remedial direction (for example a direction requiring the disposal of shares) if such a situation arises.³¹⁷ The market rarely drops below an ‘unacceptable speech situation’, and as such the provision is understood as a minimal protection of the plurality of political communication.

Additionally, the industry is affected by the *Australian Broadcasting Corporation Act* and the *Special Broadcasting Service Act*.³¹⁸ The former establishes the Australian Broadcasting Corporation (ABC) as ‘an independent national broadcasting service’ broadcasting programming for ‘national, commercial and community sectors’ and providing ‘a balance

³¹³ Ibid ss53, 54.

³¹⁴ Ibid s121H.

³¹⁵ Ibid ss123-129.

³¹⁶ Ibid ss61AB, 61AG, 61AH, 61AJ, 61AN, 61AP, 61AS.

³¹⁷ Ibid ss61AB, 61AG, 61AH, 61AJ, 61AN.

³¹⁸ *Australian Broadcasting Corporation Act 1983* (Cth) (*‘ABC Act’*); *Special Broadcasting Service Act 1991* (Cth) (*‘SBS Act’*).

between broadcasting programs of wide appeal and specialized broadcasting programs’.³¹⁹

The latter is tasked with meeting ‘the communications needs of Australia’s multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities’ by disseminating news and programming for (and in the language) of different cultural community groups within Australia.³²⁰

Finally, in 2021 the Federal Government passed landmark legislation (*News Media and Digital Platforms Mandatory Bargaining Code Act 2021 (the Code)*) requiring search and social platforms to pay traditional media organisations for the content that was shared and viewed on their platform.³²¹ The legislation was enacted to protect news media organisations who were under financial strain caused by platform policies which, for example, made demands on news media organisations that they allow a certain number of free articles per user. In creating paid protections of content, the Code acted to maintain the current plurality of news media organisations.³²²

Australian media policy has throughout this time been criticised by the public, independent commissions and members of minority parties for the level of ownership concentration it allows (see for example the government-initiated 2012 ‘Finkelstein Review’).³²³ Indeed, in December 2021 the Environment and Communications References Parliamentary Committee handed down a report that suggested it was unlikely the current regulatory framework was ‘fit-for-purpose’, and recommended that ‘the Commonwealth

³¹⁹ ss6(1)(a), 6(2)(a)(iii) *ABC Act* (n 318).

³²⁰ s6(2)(a) *SBS Act* (n 318).

³²¹ *News Media and Digital Platforms Mandatory Bargaining Code Act 2021* (Cth).

³²² *ACCC 2019 Final Report* (n 1) 279-372.

³²³ *Finkelstein Review* (n 267).

initiate a judicial inquiry with the powers of a royal commission to...investigate the concentration of media ownership in Australia.’³²⁴ The current government and opposition have not, however, expressed any recent interest in acting on this recommendation; as such, the current policy of primarily economy-wide competition law regulation has bi-partisan support.

4.2 Value judgement one – ‘availability of’ a plurality of political communication, for ‘choice’ in degree of exposure.

When analysing these areas of social regulation, it is clear that Parliament has previously determined that it should facilitate the availability of a plurality of political communication. Although there has been protracted controversy within the Parliament about traditional media regulation, this debate has *not* related to whether a plurality of political communication should be made available to Australians through traditional media, but rather *to what extent* it should be – and specifically, whether economy-wide competition law facilitates a sufficient diversity of political communication; or unduly prioritises corporate financial interests over a sufficient level of diversity. As such, both sides of politics have maintained that the ‘access to a diverse range of media’ is ‘fundamental’ to Australian democracy.³²⁵ Indeed, both the 2006

³²⁴ The Senate Environment and Communications References Committee, *Media Diversity in Australia* (2021), xv (Recommendation 1).

³²⁵ Ibid 7-28.

and 2017 Bills that repealed the cross-media ownership laws were justified by the Ministers on the understanding that they caused substantively ‘little’ or ‘no’ diminution of diversity.³²⁶

Competition law regulation of the traditional media industry is designed to maintain a plurality of firms in the marketplace. On Parliament’s understanding that diversity of ownership leads to diversity of opinions, competition law should similarly maintain the availability of a plurality of opinions. The recent defamation law reform laws accord with this – as in providing greater protection for journalists (the ‘public interest’ defence), the availability of political communication is further protected. Current copyright law further accords with this principle insofar as it provides exemptions on exclusive rights to political communication for the circulation of news and academic discursive purposes.

Earlier, this thesis noted that should Parliament choose to pursue a structural requirement of facilitating citizens’ exposure to a plurality of political communication, it would need to make value judgements as to whether this was so, and the extent to which this feature should be furthered. This thesis will label Parliament’s decision to facilitate a plurality of political communication as ‘value judgement one’. Issacharoff and Pildes, accurately suggest that there are two ways by which a state can ‘positively’ further a feature of democracy – (1) by preventing the feature from being infringed upon by third parties through command-and-control legislation (‘first-order’ regulation and would perhaps see Parliament impose a requirement on private companies for a standard of media plurality); or

³²⁶ *Second Reading Speech Broadcasting Reform Act 2017* (n 293), 2746; *Second Reading Speech Media Ownership Act 2006* (n 305) 10-12.

(2) by facilitating access to it and creating an environment in which in which the feature can flourish³²⁷ ('second-order' regulation).³²⁸ Parliament has, in making this value judgement, adjudicated that the second is the appropriate mechanism here. Importantly, (and in accordance with what this thesis has suggested is understood by the Constitution) the Parliament has not suggested citizens must be exposed to a plurality of political communication, rather that it should simply be available, and citizens can determine the degree to which (if any) they expose themselves (and others)³²⁹ to it.

While the Parliament has not suggested that it derived this value judgement from an understanding that this was a value contained in the Constitution, they have justified it on the understanding that this is 'fundamental' to democracy – arguably, a similar (although not expressly articulated) sentiment.

4.3 Value judgement two: tempering the degree of choice and availability of a plurality of political communication with business interests – at both the level of the market; and the firm.

It is important, however, to analyse the nuances qualifying value judgement one. That is, it is important to consider the value judgements Parliament has made around *how and to what extent* they should facilitate the availability of a plurality of political communication – specifically on the understanding that the advancement of this may necessarily conflict with

³²⁷ Samuel Issacharoff and Richard Pildes 'Politics As Markets: Partisan Lockups of the Democratic Process' (1998) 50/3 Stanford Law Review 643-717, 648. See also: Henry Shue *Basic Rights* (Princeton University Press, 40th anniversary edition, 2020); and Tarunabh Khaitan 'Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism' (2021) 7 Canadian Journal of Comparative and Contemporary Law (University of Melbourne Legal Studies Research Papers (No. 941) 30-36, 62-67.

³²⁸ Ibid.

³²⁹ See (n 197).

other societal interests and making entire breadth of plural political communication available to citizens, is impractical.

4.3.1 Value judgements two (a) and two (b): (a) a minimum standard of ‘five voices’ in the market; and (b) beyond this number plurality minimally facilitated by acting on the market.

The proceeding section concluded that Parliament has suggested it should facilitate the availability of a plurality of political communication. Parliament has, however, provided guidance about the degree to which this should be pursued.

Firstly, Parliament has suggested that there needs to be at least five media ‘voices’ in metropolitan areas, and at least four in regional areas. This standard is contained in the BSA and is therefore separate to economy-wide competition provisions. This standard acts directly on businesses to prevent mergers that would result in an ‘unacceptable media diversity situation’³³⁰ or order the disposal of shares or restraint in the exercise of rights, where a merger has occurred.³³¹ Parliament understands that ownership diversity leads to content diversity (this assumption has bipartisan support³³² and consequently – while it could be contested – on an understanding that those controlling media organisations typically come from similar gender, race and socio-economic backgrounds – this thesis will adopt this assumption for the purposes of analysis). This threshold of diverse ownership was referred to by the Minister as the ‘diversity floor’.³³³ As such, where the availability of a plurality of

³³⁰ ss61AH-61AJ *BSA* (n 304).

³³¹ *Ibid* ss61AB, 61AG, 61AH, 61AJ, 61AN(1).

³³² This foundational assumption that ‘ownership diversity leads to content diversity’ has not been challenged by any major party – instead, controversy typically relates to whether there is *sufficient ownership* diversity in media.

³³³ *Second Reading Speech Broadcasting Reform Act 2017* (n 293), 2747.

political communication is compromised below the diversity floor, the Parliament has made the assessment that democracy is at an ‘unacceptable’ risk, and that as such it should act directly on firms to maintain the availability of this requisite plurality of political communication.³³⁴

Beyond this minimum level of plurality, economy-wide competition law (in the CCA) regulates diversity of media ownership, and consequently the diversity of the political communication available in the public media realm. It is important to understand what level of ‘availability’ of a plurality of political communication economy-wide competition law protects, as this reveals *to what extent* Parliament understands that a plurality of political communication should be made available to citizens.

The CCA operates to maintain rivalry between firms in a marketplace to ‘enhance the welfare of Australians.’³³⁵ ‘Welfare’ has traditionally been conceptualised by competition law in economic terms – indeed, the CCA is clear in its understanding of the Australian ‘consumer’ as having interest in only economic ‘productive efficiency, higher output and fair and reasonable prices’ for quality goods.³³⁶ For example, in considering whether a merger or other conduct ‘substantially’ lessens competition, the Court is directed to consider (among other market considerations), factors which affect ‘consumers’ like the ‘likelihood [of]... increase[d] prices or profit margins...and effect on innovation’.³³⁷ The legislation is clearly

³³⁴ s61AB BSA (n 310).

³³⁵ s2 CCA (n 279).

³³⁶ *Second Reading Speech Trade Practices Act* (Snedden) (n 18) 1655, 1656.

³³⁷ s50(3)(e) CCA (n 279).

framed to consider market needs, and economic needs of the Australian consumer but not their welfare in other capacities.

Although this body of law was traditionally conceptualised to provide economic protection to Australians, Ezrachi and Lamadrid de Pablo suggests competition law is ‘sponge like’ – that it is ‘[susceptible] to national peculiarities.’³³⁸ They suggest the design of competition law is influenced by values and standards a state has and expects for its people (for example values of consumer choice and financial protection).³³⁹ As such, Ezrachi and Lamadrid de Pablo suggest such values are shared with, and are ‘permeable to’, other non-economic aspects of society.³⁴⁰ Consequently, competition law could readily be a ‘convenient proxy’ for non-economic aims. Arguably, this is what Parliament identified following the Hammond Commission Report recommendations in 1927³⁴¹ – if ownership diversity leads to content diversity, then competition law (being designed to maintain a plurality of firms in the marketplace) could be a convenient proxy for Australia’s democratic needs in this regard. Australia is perhaps increasingly doing this more consciously. The Code is a good example – although partially implemented to protect the financial viability of Australian media organisations, it was also designed to protect the existence of a plurality of opinions for the Australian consumer citizen.³⁴²

³³⁸ *Ezrachi* (n 293) 49; Alfonso Lamadrid de Pablo ‘Competition Law as Fairness’ (2017) 8/3 *Journal of European Competition Law & Practice* 147, 147.

³³⁹ *Ezrachi* (n 293) 61.

³⁴⁰ *Lamadrid de Pablo* (n 338) 147; see also *Ezrachi* (n 293) 61.

³⁴¹ *Hammond Commission Report* (n 291) 1-20.

³⁴² Commonwealth Parliament, *Parliamentary Debates Second Reading Speech Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, House of Representatives, 9 December 2020, Hon. Josh Frydenberg (Treasurer), 11013-11015.

However, competition law is not solely designed for the protection of consumers. As the Minister suggested in the introduction of the first iteration of the *CCA*, competition law is designed to protect consumers without ‘unnecessary interference into business’.³⁴³ Indeed, Australian liberal society acknowledges the importance of allowing an individual the freedom to own and profit from his or her labour and property in a manner that is largely unfettered, as this has significant ramifications for individual dignity, and economically benefits both individuals and the country.³⁴⁴ As Attorney-General Snedden articulated in his second reading speech introducing the earliest iterations of Australia’s competition law, competition law seeks to balance the needs of individuals against the interests of business – and seemingly has assessed that the balance that should be struck is that consumers should be protected, though as minimally as possible (that is, without ‘unnecessary interference into business’).³⁴⁵ The Minister’s 2016 second reading speech (that reverted the traditional media industry to economy-wide competition law) suggests this was a major consideration of the Parliament in devising this legislation. Indeed, at points one of the Minister’s justifications for the legislation appeared to be that the reforms would protect the financial interests of media companies – suggesting that the Parliament was committed to ‘implementing the necessary change’ to assist media organisations dealing with competition and financial pressures from the digitalisation of the industry.³⁴⁶ He then suggested that such reforms came at ‘little’ cost to existing levels of media diversity.³⁴⁷ Indeed, while economy-wide competition law protects consumers, it regularly uses qualifying language in its thresholds and tests for misconduct

³⁴³ *Second Reading Speech Trade Practices Act* (Snedden) (n 18) 1655-1656.

³⁴⁴ *Ibid.*

³⁴⁵ *Second Reading Speech Trade Practices Act* (Snedden) (n 18) 1655-1656.

³⁴⁶ *Second Reading Speech Broadcasting Reform Act 2017* (n 293), 2748.

³⁴⁷ *Ibid* 6604.

which provides corporations with leeway to pursue their financial interests and harm consumers in doing so. For example, the *CCA* qualifies the threshold for prohibited and merger conduct such the requirement is that the merger or conduct cannot ‘*substantially*’ lessen competition (as opposed to simply ‘lessen’ competition in any way that is harmful to consumers).³⁴⁸

There has been some criticism from Parliamentarians over time that this reversion to competition law does not facilitate a sufficient availability of a plurality of political communication, and was done to gain favor (and favorable coverage) from media organisations.³⁴⁹ Regardless, the current legislation has bipartisan support.³⁵⁰ As such, arguably Parliament in selecting competition law to regulate the traditional media industry has made the value judgement that the ‘availability’ of a plurality of political communication should be facilitated as part of a structural feature of Australian democracy (value judgement one). However, the degree of availability, at the level of the market, should be the existence of at least five metropolitan, and four regional ‘voices’ (value judgement two (a)), and beyond this should be tempered by business interests and financial priorities – that is, (to use the phrase of the Attorney-General Snedden) occur ‘without unnecessary interference into business’.³⁵¹ Parliament does not consider the use of economy-wide competition law as ‘unnecessary interference into business’ – as this legislation has already negotiated the balance between

³⁴⁸ ss45, 46 and 50 *CCA* (n 279).

³⁴⁹ Commonwealth Parliament, *Parliamentary Debates Broadcasting Services Amendment (Media Ownership) Act 2006*, Senate, 14-September-16 October 2006
<<https://www.aph.gov.au/Parliamentary%20Business/Bills%20Legislation/Bills%20Search%20Results/Result/Second%20Reading%20Speeches?BillId=s527&Page=1>>; see for example 11 October 2006, Senator Lyn Allison MP, 3.

³⁵⁰ Independent Zoe Daniels MP presented a motion for further inquiry into media diversity (Commonwealth Parliament, House of Representatives Private Members Business ‘Media Diversity’ motion Member for Goldstein). However, this was not pursued by either of the major parties.

³⁵¹ *Second Reading Speech Trade Practices Act* (Snedden) (n 18) 1655-1656.

protecting individuals as consumers, and protecting business interests. It has refrained, however, from other types of legislation that may directly act on firms, and curtail their business autonomy, to make available a plurality of political communication in the market (for example, by directing quotas of different types of content in the market).³⁵²

Additionally, it should also be noted that in creating and introducing the ABC and SBS to the market – with their respective mandates to ‘balance...programs of wide appeal and more specialised programs’³⁵³ and ‘promote understanding and acceptance of the...diversity of the Australian people’³⁵⁴ – Parliament has consciously sought to facilitate an increased availability of a plurality of political communication. Notably here, and arguably in keeping with value judgement two (b), Parliament is acting on the market generally to introduce new players to encourage competition, and not directly on firms. Albeit this is an industry-specific competition measure, and not an economy-wide competition measure – this suggests, both are permitted and not considered as ‘unnecessary interferences into business’.

4.3.2 Value-judgement two (c): minimal, market-facilitated ‘editorial standards’ at the level of the firm.

Secondly, arguably Parliament has sought to facilitate the availability of a plurality of political communication, at the level of each media firm. Notably however, it has chosen *not* to do this by introducing editorial standards that would directly act on firms to demand content diversity, but rather to act on the market in such a way that *incentivizes* firms to have

³⁵² An exception to this is Parliament has some Australian-content quotas and ‘local content’ quotas in regional areas.

³⁵³ ss6(1)(a), 6(2)(a)(iii) *ABC Act* (n 318).

³⁵⁴ s6(2)(c) *SBS Act* (n 318).

some (albeit minimal) standard of plurality in the content that it disseminates (value judgement two (c)).

Parliament has not imposed editorial standards on the traditional media industry. The print industry is entirely self-regulated – the Government did look to formally introduce such standards in the 1970s, however this process was terminated following protest by the industry.³⁵⁵ In broadcasting, s123 of the BSA requests that commercial television stations work with ACMA to develop ‘codes of practice’ including in relation to ‘fairness’ of representation and presentation of news.³⁵⁶ However, these codes are voluntary.³⁵⁷ This suggests the Parliament’s hesitancy to compromise business interests in its regulation of traditional media. However, arguably Parliament has nonetheless sought to facilitate the availability of a plurality of political communication at the level of the market-player indirectly. Parliament, in introducing the ABC and SBS into the market, not only made available a greater level of plural content in the market, but also introduced a mechanism of accountability of individual commercial firms. If commercial channels do not engage in a sufficient plurality of speech, the ABC and SBS can challenge the accuracy or legitimacy of narratives they present, and in turn their reputation and profits. Although this is far from a guaranteed mechanism of accountability, it provides some market-incentivised editorial standard of plurality for commercial firms. Again using Issacharoff & Pildes’ framework, it is clear that Parliament has refrained from firmly or directly impacting commercial interest – it has not introduced first order ‘command-and-control’³⁵⁸ regulation, but rather attempted to

³⁵⁵ Julianne Schultz *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge University Press, 1998) 114.

³⁵⁶ s123(2)(d) BSA (n 304).

³⁵⁷ Ibid s123(1).

³⁵⁸ Issacharoff and Pildes (n 327) 647.

create an environment in which firms are encouraged to provide citizens access to a plurality of political communication.³⁵⁹ In this choice, it is clear that value judgement one – being the need for an availability of a plurality of political communication – is tempered by business interests and financial priorities and therefore at the level of the individual firm, will only be incentivised and not coerced (value judgement two (c)).

4.4 Summary of value judgements.

As such, Parliament in (1) selecting competition law to regulate the traditional media industry, (2) creating ‘fair dealing’ provisions that largely exempt news from copyright infringement, and (3) its recent reforms to defamation law, has made the value judgements that while the ‘availability’ of a plurality of political communication should be facilitated as part of a structural feature of Australian democracy (value judgement one), it is tempered by business interests and financial priorities (that is, this should only occur if it is possible without ‘unnecessary interference’³⁶⁰ into business) (value judgement two).

It is challenging to fully ascertain from what minimal legislative guidance there is, what constitutes ‘unnecessary interference’ into business. However, what is clear is that – specifically, beyond ensuring the availability of at least ‘five voices’ at the level of the market³⁶¹ (value judgement two (a)); such availability at the level of the market should only be facilitated through economy-wide, and occasionally sector-specific, competition law to ensure that there is not unnecessary interference into business (value judgement two (b)). At

³⁵⁹ Ibid.

³⁶⁰ *Second Reading Speech Trade Practices Act* (Snedden) (n 18) 1655-1656.

³⁶¹ Parliament did permit four voices in regional areas. However, this distinction is not relevant in online environments where internet access provides the same availability of political communication. As such, this thesis will proceed only with the higher metropolitan standard of five voices in its subsequent analysis.

the level of the market player, the dissemination of a plurality of political communication should only ever be incentivised by nudging (not coercing) each individual, again (usefully) through competition law (value judgement two (c)).

This Chapter has established that Parliament has *previously suggested* that the availability of a plurality of political communication is a structural requirement of Australia's democracy.

CHAPTER THREE: DO SEARCH AND SOCIAL PLATFORMS MAKE AVAILABLE A SUFFICIENT PLURALITY OF POLITICAL COMMUNICATION, AS MEASURED BY THE STANDARDS THAT AUSTRALIANS (THROUGH THE PARLIAMENT) HAVE PREVIOUSLY SET FOR THEMSELVES?

At its outset, this thesis explained that it sought to understand (i) whether the availability of a plurality of political communication is a structural feature of Australian democracy; and if so, (ii) whether search and social platforms make available a sufficient plurality of political communication to meet these standards. If the former is found in the affirmative and the latter in the negative, then this thesis would be led to conclude that platforms, in their current form, are harming Australian democracy.

This thesis has subsequently resolved (i) – finding that although there is no constitutional requirement that citizens be exposed to a plurality of political communication, that Australians (through the Parliament) have recognised that having a plurality of political communication *available* for citizens to choose to consume is a value of Australia's constitutional system. Parliament has made a number of value judgements as to the extent to which it should be legislatively facilitated to be a structural feature of Australian democracy.

The purpose of this chapter is to resolve (ii) – and determine whether search and social platforms make available a sufficient plurality of political communication, *as measured by the standards* (the value judgements) *that Australians have previously (legislatively) set for themselves*.

(i) *Methodology and structure.*

This thesis explained in both its *Introduction* and in *Chapter One* how this methodology – of measuring ‘harm to democracy’ by *qualitative* standards, as opposed to attempting to *quantifiably* determine ‘sufficient’ levels of plural political communication availability – avoids the challenges encountered by existing scholarship. Namely, its struggles to obtain (i) consistent quantitative data; and (ii) develop uniform quantitative standards as to what constitutes a ‘sufficient’ level of available plural political communication. The use of quantitative standards removes these ‘roadblocks’ for Australia in determining whether regulation is required.

This methodology, however, has two limitations. Firstly, (i) there is a question as to whether value judgements identified in *Chapter Two* can have application to social platforms in particular – as these platforms blur the public-private distinction in ways that earlier mediums of political communication (those from which Parliament’s previous value judgement standards were derived) have not. Secondly, (ii) the value judgements made by Parliament have been limitedly substantiated – in the context of only the traditional media industry, copyright and defamation law. This Chapter opens by addressing and resolving (i) as a threshold question on which further analysis is conditional. It then proceeds to apply each of the existing value judgements to search and social platform markets, products and regulatory frameworks. It navigates (ii) in this process by explicitly stating where any ‘grey-

areas' of application arise, or where a complete assessment cannot be adjudicated. This Chapter assesses that the nature of the product disseminated by search and social platform markets – typically a single feed of content personalised *for, not by* the citizen – and the low levels of market concentration fall foul of value judgements two (a) and (b), though not (c). As such, on the findings pertaining to value judgements two (a) and (b), this thesis suggests Australian democratic standards require platforms to facilitate a greater availability of plural political communication; and consequently, that regulation is warranted. This paper more generally, concludes by briefly recommending areas of law which may successfully regulate this aspect of platforms, for further research.

1 Can Parliament's prior value judgements have application to social platforms which straddle the public-private divide?

Parliament's value judgements, as identified by *Chapter Two* of this thesis, were made in relation to the regulation of traditional media, defamation and copyright law. These laws regulate areas of society that involve the dissemination of political communication *from the public sphere to the individual*. Social platforms facilitate this public sphere-to-private person connection, and yet also facilitate connections between friends, family, acquaintances, online-only acquaintances and colleagues. That is, they also *connect private individuals with each other*.³⁶² It is possible to suggest there is a question as to whether these value judgements can have application to this new form of the dissemination of political communication that straddles the public-private divide.

³⁶² Social platforms also generate political communication in different formats to traditional media (ie. short-form videos). This thesis does not analyse this distinction on the understanding that both are political communication.

However, this thesis suggests that that framing Parliament's prior value judgements as made in relation to only public-to-private communications, is misguided. Arguably, these value judgements were not made about the 'public' dissemination of content specifically. They were made about the dissemination of content, which previously could only occur in the public realm. As such they can – and should – be applied to all aspects of search and social platforms, save for direct one-on-one communications (which have been excluded from this thesis).³⁶³ However, even if this framing is adopted, the value judgements still have application as social platforms *arguably have the function of bringing communications from private sphere into the public realm*. Firstly, and on a minor point, features on platforms routinely allow private individuals to share to other private connections, communications that are available in the public realm – for example, X's ('tweets') from media organisations and politicians. Such a feature brings aspects of the public realm into what once would have been a private conversation. However, and more substantively, *even if* an individual wholly authors their own content without sharing publicly available material, a public company intervenes in that communication. Algorithms, programmed by private companies, dictate to an individual *which* private communications from their friends and family will be shown to them. The platform not only provides some degree of public amplification of content even within an individual's personal circle, but it too mediates and makes decision as to *whose communication* within that individual's private circle will reach them. As such, a private corporation operating in the public sphere is gatekeeping and involving itself in connections between private individuals – meaning these connections are not occurring wholly in the individual's private realm. As such, the value judgements identified in *Chapter Two* can and should be applied to the search and social platform industry.

³⁶³ See *Introduction – (i) Definitions and Scope*.

2 Do search and social platform markets, products and regulatory frameworks adequately reflect Parliament’s previous value judgements as to the level of plural political communication that should be available to Australian citizens?

2.1 An assessment of value judgements one and two (a): the requirement that ‘five voices’ be available at the level of the market:

In its assessment of value judgement two (a) this section will firstly discuss the state of platform markets and regulation, before proceeding to analysis.

2.1.1 The state of search and social platform markets and regulation.

Akin to the traditional media industry, the primary mechanism regulating search and social platform markets is economy-wide competition law. The operative provisions again being the restrictive trade practice sections in Part IV.³⁶⁴ Although these provisions are designed to maintain competition among firms, ACCC has suggested the market is extremely concentrated comparative to that of other industries. The search market houses five players in Australia – Google (which also owns YouTube), Yahoo!, Bing, ChatGPT and DuckDuckGo³⁶⁵; while the social market houses six main players in Australia, albeit to varying degrees of consumer uptake (represented as a percentage of average monthly Australian users in the list that follows) – (i) Meta (owning Facebook (84%), Instagram (39%) and Threads (Threads data is not yet available as the product launched in July of this

³⁶⁴ CCA (n 279) Part IV; see *Chapter 2, Section 4.2.2(ii)*.

³⁶⁵ Other search platforms exist but are not widely used or known about in Australia.

year)³⁶⁶; (ii) Twitter – 11.5%³⁶⁷; (iii) TikTok – 39%³⁶⁸; (iv) LinkedIn – 19.6%³⁶⁹; (v) SnapChat. – 23.2%³⁷⁰; and (vi) Reddit – 7.3%.³⁷¹ The ACCC have also suggested Google and Meta have market power in their respective spheres³⁷² – Google has a 93-95% share of the market³⁷³ (measured by consumer use) and Meta has a 60% share of the social market – ‘double’ that of its next closest competitor TikTok (30%).³⁷⁴ However, ChatGPT may be beginning to rival Google (and is certainly dominant among search firms providing software that generate original outputs, though data on this platform is not yet available given its recent release in November 2022). The ACCC has observed that it is rare for a new entrant in the market to be successful. The most notable exception is TikTok and its success is attributed to its differentiation of content format (short-form videos).³⁷⁵

The ACCC has not yet challenged any platform for breach of the CCA. The extent to which Australia would be able to enforce the CCA is unclear given that platforms are typically registered in foreign jurisdictions.

³⁶⁶ *ACCC Interim Report 6* (n 22) 36, 40.

³⁶⁷ *Ibid* 46.

³⁶⁸ *Ibid* 43.

³⁶⁹ *Ibid* 55.

³⁷⁰ *Ibid* 49.

³⁷¹ *Ibid* 61. This thesis excludes BeReal and Pinterest. Pinterest is typically used for ‘recipes, home and style inspiration’ (not political communication); see Pinterest’s ‘About’ page ‘All about Pinterest’ <<https://help.pinterest.com/en-gb/guide/all-about-pinterest>> accessed 24 July 2023). BeReal is a private photo-sharing platform. While users can ‘discover’ the images of other users nearby the platform is rarely used for political communication. Other search platforms exist but do not have wide/any uptake in Australia, and as such are excluded.

³⁷² *ACCC 2019 Report* (n 1) 8-10.

³⁷³ *ACCC 2019 Final Report* (n 1) 58.

³⁷⁴ *ACCC Interim Report 6* (n 22) 11-12.

³⁷⁵ *Ibid* 113.

Outside of economy-wide competition law, search and social platforms are almost wholly self-regulated at a market level. One industry code exists (for misinformation); and one industry-specific competition law applies – the aforementioned News Media Bargaining Code.³⁷⁶ Search and social platforms (as foreign entities) may also be subject to the *Privacy Act 1988 (Cth) (Privacy Act)* if they (i) are found to ‘[carry] on business in Australia’ and (ii) collect or store personal information.³⁷⁷ Meta is currently challenging this.³⁷⁸ If applicable, the *Privacy Act* would prohibit platforms from collecting personal information unless the individual has consented³⁷⁹, or if the information is ‘reasonably necessary for...one or more of the entity’s functions or activities’.³⁸⁰ It would also prevent platforms from using that data for anything other than the primary purpose for which it was collected, unless the individual has consented or would reasonably expect it to be used for a secondary purpose.³⁸¹ Finally, search and social platforms are also subject to aspects of Australian Consumer Law – notably, section 18(1) which prohibits trading entities from engaging in misleading and deceptive conduct.³⁸² The ACCC has litigated this to both successful and unsuccessful result.³⁸³

³⁷⁶ *The Australian Code of Practise on Disinformation and Misinformation* (last updated 22 December 2023, Digi Group) (not considered further – see *Introduction – (i) Definitions and Scope*; *the Code* (n 321)).

³⁷⁷ ss5B(1A), 5B(3)(ii), 6, 6A, 14, 15 *Privacy Act 1988 (Cth)* (*‘Privacy Act’*).

³⁷⁸ Facebook has appealed *Facebook Inc v Australian Information Commissioner* [2022] FCAFC 9.

³⁷⁹ Schedule 1, Part 2, Principle 3.3, *Privacy Act* (n 377).

³⁸⁰ *Ibid* Principle 3.1.

³⁸¹ *Ibid* Principle 6.1(a), 6.2(a) and 6.3.

³⁸² s18(1) *CCA* (n 279).

³⁸³ See for example: *ACCC v Google LLC (No 2)* [2022] FCA 942 (ACCC successful); *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 (ACCC unsuccessful).

2.1.2 Assessment.

Both market concentration and dominance as phenomena of the search and social platform industry do not necessary contradict Parliament's prior value judgements. Parliament has notably allowed market concentration and dominance in traditional media ownership. The standard against which market concentration should be measured is, that there should an availability of a plurality of political communication as a structural feature of Australian democracy (value judgement one), but that this should occur without unnecessary interference into business (value judgement two) – and specifically, here that Parliament should ensure the availability of at least 'five voices' at the level of the market (value judgement two (a)). Chapter Two established that facilitating this minimum standard of 'five voices' is not subject to the requirement that this only be done if it is possible *to achieve without* unnecessary interference into business.

Prima facie, both the search and social platform markets meet value judgement two (a). The search market has five firms that are readily available to Australians (Google, ChatGPT, Yahoo!, Bing and DuckDuckGo); and the social market has at least six (Meta, TikTok, X, Snapchat, Reddit and LinkedIn). However, as frequently acknowledged in scholarship, a distinction can be made between a legal 'rule' and a 'principle' that sits behind it.³⁸⁴ As Dworkin suggests, legal rules are standards that 'dictate[s] [a] result, come what may'.³⁸⁵ A legal principle on the other hand 'states a reason that argues in one direction, but

³⁸⁴ Ronald Dworkin 'The Model of Rules' (1967) 35/1 The University of Chicago Law Review 14-46. This thesis acknowledges that this distinction is debated in scholarship. Length constraints prevent this thesis from reviewing this literature, it instead adopts Dworkin's view.

³⁸⁵ Save where it is overridden by a superior rule. Ibid 36.

does not necessitate a particular decision'.³⁸⁶ 'Principles' generally motivate the articulation of 'rules'; though rules, are often narrow and 'incomplete' articulations of the principles behind them as oftentimes there are 'exceptions' that the rule would not support, but the principle would.³⁸⁷ The 'five voices' requirement acts as a 'rule' and, arguably, there are two principles sitting behind it.

- (i) *The first principle behind the 'five voices' requirement: the availability of a minimum plurality of independent editorial minds.*

The first principle underpinning value judgement two (a) is arguably that Australian citizens must have access to five *editorial minds that are operating independently of each other*. Notably, this value judgement represented a minimum threshold of political communication plurality, and was not found in *Chapter Two* to be subject to the qualification that this should only be facilitated if it was possible to do so through competition law (that is, without 'unnecessary interference into business').

As established in *Chapter Two*, when Parliament regulated the traditional media industry they did so on the assumption that 'ownership and source diversity leads to content diversity'.³⁸⁸ As such, in establishing the requirement that citizens have access to 'five voices' – Parliament was suggesting that citizens have access to five different sources of content, each owned, edited and operated by independent entities. As such, underpinning the

³⁸⁶ Ibid 26.

³⁸⁷ Ibid 25-26.

³⁸⁸ *Second Reading Speech Broadcasting Reform Act 2017* (n 293) 2746-2749.

‘five voices’ rules, is a principle about citizens needing access to a minimum plurality (of five) independent editorial minds.

Search and social platforms (DuckDuckGo excepted) do not act as independent editorial minds. As established in *Chapter One Section One* these platforms routinely personalise content based on a user’s web browser history, location and demographic etc. using tracking mechanisms such as cookies. Therefore, and as scholars like Englehardt and Narayanan demonstrate, different search and social platforms are each using part of the same data to create an individual’s feed.³⁸⁹ As such, if each platform’s algorithm is considered as the equivalent of the ‘editorial mind’ of traditional media outlets, then it cannot be said each algorithm’s ‘editorial mind’ is independent as they are influenced by almost identical data.

Even if platforms only collected data on a user from interactions that user had on their platform (i.e. it did not use any third party data concerning that individual, that is also available to other platforms), each platform is likely to collect *very similar data* and therefore produce very similar feeds, because they are substantially collecting their data from the same source – the user. Users have the same likes, dislikes and interests regardless of what platform they use. Here, this thesis does not refer to a user ‘liking’ and ‘following’ the same individuals and organisations across platforms (citizens are permitted to choose who they follow and whose content they consume), but rather what interests, likes and ‘dislikes’ a platform infers a user to have from their interactions with various content (the time they spend viewing certain content, key words and images a user regularly likes to engage with) –

³⁸⁹ Arvind Narayanan and Steven Englehardt (2016) ‘Online Tracking: A 1-million-site Measurement and Analysis’ (CCS ’16: Proceedings of the 2016 ACM SIGSAC Conference on Computer and Communications Security) 1388–1401.

that is, data which is unbeknownst to the user, and used (opaquely) to rank and filter the political communication available to them on the platform. These interests are evident regardless of what platform the citizen is using. As such, each platform algorithm cannot be said to be ‘independent editorial minds’ from each other, as they are each being steered by the data, likes, dislikes and interests of the one individual. As such, the principle of ‘independent editorial minds’ that underpins value judgement two (a), is not met by search and social platform markets.

The immediate counter argument to this is that, as established in *Chapter One Section One*, platforms take other factors for algorithmic determination into account as decided by the individual business (for example Meta suggests they prioritise the content of ‘friends and family first’³⁹⁰) when ranking content.³⁹¹ As such, it could be argued that that each platform does have an ‘independent editorial mind’. Certainly, the opacity around platform algorithms renders it impossible to ascertain exactly what level of influence each factor plays in the ultimate output of content to the citizen. However, it remains that platforms use similar and (at times) often identical data to produce the citizen’s feed. Given, as *Chapter One Section One*, established, that platforms are oriented towards the same goal of profit,³⁹² and that personalisation is a key tool for retaining consumers and maximising profit,³⁹³ it is more likely than not, that platforms are not acting solely as ‘independent editorial minds’. As such, while platform markets may meet the numerical figure of ‘five’ firms, when applied to search

³⁹⁰ *Meta* (n 35) 64.

³⁹¹ See *Chapter One Section One*.

³⁹² See discussion of platform business model of cross-subsidisation in *Chapter One Section One*.

³⁹³ See discussion of personalisation and profit in *Chapter One Section One*.

and social platforms, this rule does not achieve the principle behind its original articulation – that principle being, that citizens should have access to a minimum number of five sources of political communication, each curated an independent editorial mind.

(ii) *The second principle behind the ‘five voices’ requirement: citizen choice.*

Arguably, there is a second principle behind the ‘five voices’ requirement of value judgement two (a) – it is a principle that protects *citizens’ choice* as to what political communication they consume, by substantiating that choice with a minimum number of editorial options. The search and social platform market, in not facilitating the existence of five independent editorial minds, also remove substantive citizen choice – an additional principle underpinning value judgement two of perhaps equal importance.

As such, the nature of search and social platform wholly prevents the principles underpinning value judgement two (a) from being able to be satisfied at the level of the market. However, arguably this value judgement could be satisfied if *at the level of the platform*, if citizens have choice to at least five independent editorial minds there. As such, it is important to modify this thesis’ articulation of this value judgement – away from its prescription that these ‘five voices’ must be present at the level of the market, to consider whether these principles are satisfied by the availability of plural political communication *at the level of the platform*.

2.1.3 *Are both principles upheld in the dissemination of political communication at the level of the individual platform?*

(i) *Principle one: do five independent editorial minds exist at the level of the platform?*

The current platform product model typically involves the production of a single ‘feed’ of content. If this ‘feed’ is understood as the platform equivalent of an ‘editorial mind’, then each platform falls well below housing the required ‘five voices’. The exception to this is platforms like X and Instagram, which in addition to the user’s personal feed, also make a ‘discover’ feed available for their consumption. X’s ‘discover page’, for example, allows users to view different feeds categorized as ‘trending’, ‘news’, ‘sport’ and ‘entertainment’ feeds etc. However, each feed provides only one ‘news’ or ‘sport’ alternative to the personalized feed, and as such even these platforms can only be said to be providing two feeds at best – again, falling well below the requirement of five independent editorial minds.

The immediate counter argument is to suggest that platforms do make ‘five voices’ available to citizens, for while they do not reflect five ‘independent editorial voices’, they do expose users to more than ‘five authorial voices’ of content. Platforms are host to a vast plurality of political communication, which well surpasses five authors of content. However, political communication – in both its content, and in the way it is internalised by the consumer – is affected by the editorial context in which it is presented. It is the culture in the traditional media industry, *to report broadly on a wide range of news events* of the day. This is driven by both normative standards and conventions in the industry, and commercial incentives to report on a broad spectrum of political communication, to appeal to a range of demographics within the citizenry in order to maximize the number viewers and readers – and consequently profits through advertising revenue. As such, when Parliament suggested citizens needed to have access to ‘five voices’ in traditional media markets, they were suggesting that citizens should have access to *five editorials* of content reporting broadly on a wide range of news events of the day. Platforms atomise content from different authors into one editorial. Parliament suggested citizens should have access to *five editorials*, not simply five authors opinions on different atomised pieces of political communication. As such, while

platforms make ‘five authors’ of content available, this does not satisfy the principle behind the ‘five voices’ rule previously made by Parliament which demands five independent editorial minds (reporting on the political communication of the day) are made available to citizens.

(ii) *Principle 2: is citizen ‘choice to’ these five independent editorial minds facilitated at the level of the individual platform?*

This thesis has just established that platforms do not provide citizens with at least five independent editorial voices of content. As such the requisite level of citizen choice (to this plurality of editorials) is also not substantiated at the level of the platform. It is important to clarify here that algorithms in and of themselves are not problematic in this assessment.

Algorithms are valuable tools that make available a remarkable opportunity to allow citizens access to a bank of plural political communication they otherwise could not have consumed. Similarly, a citizen’s consumption of political communication from only one source (whether an echo-chamber or not) in and of itself are not problematic – indeed, when assessed by the Parliament’s previous value judgements, citizens are allowed to place themselves in an echo-chamber or to otherwise only view news from a single source. The identifiable issue here, is that platforms do not enable citizens choice to another ‘voice’ of content (let alone the standard of five required by value judgement two (a)).

It is, however, possible to frame a citizen’s platform use from a different angle – and it is important to assess whether this principle of ‘choice’ is upheld in this light. As *Chapter One, Section One* demonstrated, platforms are open about the fact that they seek to anticipate the probability of what a user will enjoy engaging with (DuckDuckGo excepted). Examined from this perspective, algorithms act not only as ‘editorial minds’ (all be they not independent

ones) but as ‘the agent of the citizen’ – choosing what content the citizen would like to be shown from the bank of ‘all the news stories of the day’. However, here too citizen choice is *also largely removed* as platforms currently offer both only limited (or no) opportunity for citizens to (i) influence their algorithmic filtering (beyond the occasionally ‘see less/more of’ function and selecting which users/individuals/organisations they follow – however, they do not control whether they see all of the political communication from these users or not); or (ii) understand, modify or control what data and inferences the platform has made about what a citizen is interested in or ‘dislikes’. The conclusion here is not that the principle of choice underpinning value judgement two (a) necessarily requires citizens to be able to use a platform’s algorithm to select any publicly available news item. It is that given platforms do not make five editorials of content available to citizens, such choice – if available – might go some way towards fulfilling the second principle. If citizens could ‘program their own five editorials of content’ (by asking a platform *not* to consider certain data that it has on them; or otherwise provide them with different types of more ‘general news feeds’) value judgement two (a) would go some way to being satisfied. However, on the understanding that ownership diversity leads to content diversity, this would need to be complemented by diversity of such feeds at the level of the market too. In any event, platforms do not make available this level of choice to citizens, and as such this possibility to satisfy the second principle on ‘choice’ cannot be pursued further. As such, this section concludes that platforms do not provide citizens with at least five independent editorial voices, and as such the requisite level of citizen choice is also not substantiated *at the level of the platform*.

It could be argued that users could turn elsewhere online or in the media to source a plurality of political communication. However, as the Australian government has acknowledged, platforms are so pervasively used by Australians that they are an

‘unavoidable’ part of the media landscape³⁹⁴ and as such, highly influential in modern day political communication. Further, as discussed in *Chapter One, Section One* platforms use manipulative mechanisms to elicit addictive behaviour in consumers – including through ‘push notifications’, ‘ellipses’ and the ‘pull-to-refresh’ features.³⁹⁵ Logically, this creates an unprecedented and unparalleled level of use and reliance on search and social platforms. On the Government’s own assessment that platforms are an ‘unavoidable’³⁹⁶ and influential aspect of public communication, the value judgement should have direct application to the state of political communication on digital platforms. It is not sufficient to say citizens could turn elsewhere to find plural political communication.

As such, this section concludes that the current product model of search and social platforms fall well short of satisfying the minimum level of plurality (of ‘five voices’) that needs to be available for citizens to consume (value judgement two (a)). It finds this on the basis of value judgement two (a) Parliament needs to legislate to ensure (i) the existence of ‘five independent editorial minds’ and (ii) citizen access of choice to them. Regulatory reform facilitating greater levels of citizen choice – and to at least five independent editorials of content – is required.

2.2 An assessment of value judgement 2(b): beyond five voices, Parliament should facilitate the general availability plural political communication by ensuring

³⁹⁴ *Second Reading Speech ‘the Code’* (n 342) 11013-11015.

³⁹⁵ See *Chapter One, Section One*. Parliament has previously made assessment that products and services like alcohol and gambling should be regulated where they begin to manipulate individuals. Length restrictions prevent this thesis from considering whether similar assessment should be made regarding search and social platforms, however this thesis welcomes further research on this.

³⁹⁶ *Second Reading Speech ‘the Code’* (n 342) 11013-11015.

competition occurs *at the level of the market* (without unnecessary interference into business).

(i) *Is this value judgement still relevant?*

Parliament made value judgement two (b) on the understanding that ‘ownership diversity leads to content diversity’ and as such, the existence of a plurality of firms at the level of the market would act as a proxy for the availability of a plurality of political communication. In its analysis of value judgement two (a), this thesis found that this assumption does not hold in the search and social platform industry. Consequently, this thesis revised the articulation of that value judgement to apply *not at the level of the market, but at the level of the platform*. As such, it is important to address whether value judgement two (b) – also directed towards the level of the market – remains is relevant.

In the first instance, value judgement two (b) should, naturally, be similarly revised to have application to the level of the platform. This renders two (b) identical to that of two (c) (which will be addressed this in the next sub-section of this Chapter). In the second instance, a question remains as to whether general plurality at the level of the market, still has some value in making plural political communication available to citizens. That is, whether there is some merit in the assumption that ‘ownership diversity leads to content diversity’ in the platform industry? Although a plurality of ownership is not enough to facilitate a sufficient number of ‘independent editorial minds’ and citizen choice to them; there are differences of content *and of format of content* between platforms. As such, platform diversity at the level of the market is useful in promoting a plurality of political communication – even if it is not in and of itself, enough to fully satisfy value judgements two (a) and (b).

(ii) *Assessment.*

This thesis has illustrated that levels of competition in both search and social platforms are generally low.³⁹⁷ The ACCC have identified a number of characteristics ('barriers to entry and expansion') of these markets, which have led to this concentration.³⁹⁸ They suggest firstly, search and social platforms fall prey to 'same-side network effects on the user side of the platform'.³⁹⁹ This is a market phenomenon where 'an increase in the number of users of a platform...raises[s] the value of the platform to a given user' because more people are using the platform and able to be contacted or followed by the user.⁴⁰⁰ New market entrants struggle to compete with these established networks as platforms are not interoperable – meaning unlike, for example, cell phone providers which can connect users with individuals who use other providers, all users must use the same platform to be able to interact with each other (there are high switching costs for platform users).⁴⁰¹ Secondly, platform markets suffer from 'cross-side network effects and economies of scope'.⁴⁰² This is a phenomenon where larger platforms more readily attract advertisers' money which they can then invest in bettering their services⁴⁰³, while platform start-ups (typically being without these financial resources) struggle to compete.⁴⁰⁴ The ACCC then suggests, new entrants (that have limited

³⁹⁷ See the *preliminary assessment of value judgement two (a)*.

³⁹⁸ *ACCC Interim Report 6* (n 22) 112-120; *Interim Report 3 ACCC* (n 54); 16-20; Australian Competition and Consumer Commission (ACCC) Digital Platform Services Inquiry 2025, 'Interim Report 5: Regulatory Reform' (September 2022) 26-63.

³⁹⁹ *ACCC Interim Report 6* (n 22) 115, see also 92, 112, 116.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid* 115-120.

⁴⁰² *Ibid* 117-118.

⁴⁰³ *Interim Report 3 ACCC* (n 54); *Interim Report 5 ACCC* (n 398); *ACCC Interim Report 6* (n 22).

⁴⁰⁴ *ACCC Interim Report 6* (n 22) 117-118.

start-up capital) also confront a substantial ‘sunk costs’ risk as the upfront cost of ‘creating and maintaining’ a platform is sizeable, and profit margins are slow to develop.⁴⁰⁵

Additionally, major platforms (like Facebook and Instagram; and Google and YouTube) have merged overseas. Not only has this reduced competition, but the ACCC suggest this has ‘platform eco-systems’ and in turn ‘advantages of scope’ through data-sharing on users to ‘better’ their products.⁴⁰⁶ Finally, the ACCC also flags that platforms like Google have entered into agreements with other tech providers (for example, Apple) to make their product the default search engine on web browsers (like Safari), reducing competition.⁴⁰⁷ As such there are considerable barriers to market entry, and consequently a high level of concentration across both markets.

The fact that platform markets are highly concentrated is not necessarily contrary to value judgement two (b). Two (b) asks not whether the market is concentrated, but whether the Parliament could do more to facilitate competition (competition being a proxy for the availability of a plurality of political communication), without ‘unnecessarily interfering into business’. *Chapter Two* assessed that this latter requirement allows Parliament to pursue this value judgement through only economy-wide competition law, and some suitable industry-specific competition measures as required.

In making an assessment as to whether Parliament could do more to facilitate competition, this thesis relies on the analysis of the ACCC.⁴⁰⁸ The ACCC have recommended

⁴⁰⁵ Ibid 118-119.

⁴⁰⁶ *ACCC 2019 Report* (n 1) 74-76, 80-81.

⁴⁰⁷ *Interim Report 3 ACCC* (n 54) 40-68.

⁴⁰⁸ *ACCC Interim Report 6* (n 22) 112-129; *Interim Report 3 ACCC* (n 54) 16-20; *Interim Report 5 ACCC* (n 398) 60-197.

the introduction of a number of industry-specific competition measures that would increase competition in platform markets to those typically seen in other industries.⁴⁰⁹ Specifically, the ACCC suggests these measures should consist of ‘service-specific competition codes’ – competition regulations that relate to each type of service platform provides (for example ‘search services’ and ‘video-sharing services’).⁴¹⁰ Depending on the service, these measures could include, firstly, regulation to ‘address data-related barriers to entry and expansion’.⁴¹¹ This may involve provisions requiring data portability between platforms – which would reduce barriers to consumers switching platforms (enabling competition between providers).⁴¹² These requirements may also include obligations on platforms not to aggregate data collected about users across different services or aspects of their platform.⁴¹³ The ACCC suggests that platforms with large pools of data have an ‘advantage’ over competitors, as they are better able to predict and personalise products.⁴¹⁴ An obligation not to aggregate data collected about users across different services or aspects of their platform would therefore increase competition.⁴¹⁵ Secondly, the ACCC suggest prohibitions on anti-competitive self-preferencing⁴¹⁶ – that is, where platforms like Google promote their own satellite services (like Gmail) over that of other providers (like Microsoft); and also prohibit exclusivity clauses – which require businesses to offer services only through certain platforms (for

⁴⁰⁹ Ibid.

⁴¹⁰ *Interim Report 5 ACCC* (n 398) 108, 112.

⁴¹¹ Ibid 165-174.

⁴¹² Ibid 170-171.

⁴¹³ Ibid 171-173.

⁴¹⁴ Ibid 171.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid 124-132.

example, only report news through Meta and not other platforms).⁴¹⁷ These generally facilitate competition between providers.

The ACCC has also suggested the introduction of interoperability requirements, which would prevent same-side network effects from occurring.⁴¹⁸ It has recommended the introduction of a ‘choice’ screen on new devices so consumers can choose which search engine will be their default – enabling new platforms to compete with incumbents.⁴¹⁹ This would require corresponding prohibitions on anti-competitive tying agreements which, for example, platforms to pay device-producers to pre-install their product as the ‘default’ device setting.⁴²⁰ Finally, the Commission has further suggested some codes could require search engines to share high-level data about search terms and user behaviour across the industry.⁴²¹ While this would promote competition by reducing the aforementioned ‘data advantage’, this thesis hesitates to endorse this particular recommendation as data-sharing across platforms may also further reduce the ‘independence’ of each platforms algorithmic ‘editorial mind’. This is the only recommendation that this thesis does not consider useful in advancing plurality of political communication through competition.

These measures are not economy-wide measures, but are specific to the search and social platform industry. Parliament assessed that such a plurality of political communication should only be pursued through economy-wide competition law, and at times also some

⁴¹⁷ Ibid 185-186.

⁴¹⁸ Ibid 156-165.

⁴¹⁹ Ibid 139-150; *Interim Report 3 ACCC* (n 54) 68-100.

⁴²⁰ *Interim Report 5 ACCC* (n 398) 132-150.

⁴²¹ Ibid 166.

suitable industry-specific competition measures as required (that is, without unnecessary interference into business). The question then becomes whether these measures are suitable industry-specific competition measures that do not unnecessarily interfere into business. There is a grey-area in the application of Parliament's prior value judgements here – for Parliament has only provided limited guidance as to what it considers the bounds of unnecessary intrusion on business to be. However, in its regulation of the traditional media industry, Parliament did introduce industry-specific competition measures, namely in the introduction of the ABC and SBS, to increase market competition. It deliberately refrained from introducing editorial standards – which target political communication plurality directly (not by proxy of competition law). Although the industry-specific measures presented by the ACCC are more substantial and invasive on business than the introduction of the ABC and SBS was on traditional media firms; they are nonetheless wholly designed to increase levels of competition in the market (as opposed to other types of industry-specific legislation like editorial standards, which seek to increase the availability of political communication through non-market mechanisms).

Consequently, this thesis assesses that search and social platforms fall short of value judgement two (b), and that regulation is required to facilitate greater levels of platform competition, as a proxy for facilitating greater levels of availability of plural political communication at the level of the market.

2.2 Assessment of value judgement two (c): the requirement that at the level of the firm, a general availability of plural political communication should be facilitated by Parliament beyond the minimum number of 'five voices', if this can be done without unnecessary interference into business.

In its discussion of value judgement two (a) this thesis established that levels of plural political communication on platforms are low, in so far as while they may make a plurality of authors available to citizens, the number of editorial voices is restricted to one or two (in what is typically a single feed of content). This section notes the applicability of this analysis again here.

Additionally, this thesis' finding of value judgement two (c) in *Chapter Two* was largely based on Parliament's attempt to ensure accountability, as to the plurality of content, that was disseminated at the level of the commercial firm in the traditional media industry. This thesis discussed how the introduction of publicly funded broadcasters into the market encouraged a plurality of political communication to be available, not only at the level of the market, but at the level of the individual broadcaster. These publicly funded firms – with their mandate of breadth – act to challenge the accuracy and legitimacy of the suite of content presented by commercial channels, where they do not disseminate a sufficient breadth of 'speech'. This in turn is likely to incentivise commercial firms to display some level of balance and plurality in the political communication they disseminate – albeit even if this effect is minimal and unguaranteed. There is no similar mechanism of accountability on search and social platforms as each users' feed is personalized to the individual and not publicly available for scrutiny by others. On this analysis, this thesis assesses individual platforms are not making available the level of plural political communication that has previously been seen (and facilitated by Parliament) in similar industries.

Parliament, however, will not have fallen short of value judgement two (c) unless these shortcomings can be rectified through general competition law by incentivising plurality through market mechanisms (that is, without unduly curtailing business autonomy and interests). As such, again editorial standards for algorithmic dissemination cannot be

justified. A introduction of additional competition measures or similar publicly funded players in the platform market would not rectify this issue in the search and social platform industry. These measures would not produce the same outcome of incentivized plurality as they do in traditional media markets, for the product model of platforms does not make a users' feed public, and therefore cannot be held publicly accountable by any other firm. This thesis welcomes further consideration of market mechanisms that may produce such incentives, however itself does not assess that these are obviously possible. As such, Parliament has not fallen short of value judgement two (c).

3 Recommendations for further research: areas of law and regulation which could be used to successfully implement Parliament's existing value judgements.

3.1 The outcomes regulatory reform must achieve and a suggestion of a hybrid competition and consumer law approach.

Section Two has established that Australian democratic standards require Parliament to facilitate a greater availability of plural political communication on platforms. The purpose of this thesis was to establish whether regulatory reform is required. In this finding, this thesis achieves its purpose. To conclude, this thesis makes high-level recommendations as to areas of law which, could be used to successfully implement Parliament's existing value judgements, for further research. Specifically, it suggests a hybrid consumer and competition law approach may usefully address this area. Length restrictions do not permit this MPhil to consider regulation in further detail. Further research analysing these recommendations is welcome.

It is important to deduce and articulate from *Section Two* what regulatory reform needs to achieve. The reforms need to achieve two outcomes. Firstly, Parliament should

facilitate the availability of choice for users of at least five independent editorial minds/voices from each individual platform (value judgement two (a)). Secondly, Parliament needs to do more to facilitate an availability of firms for the purposes of making plural speech available – without unnecessary interference into business (that is, by acting only to facilitate general levels of competition – value judgement two (b)). To achieve the latter, thesis endorses the competition law recommendations of the ACCC considered in *Section 2.2* above. It again recommends these and will not further consider areas of law that would satisfy value judgement two (b). *Section Two* found that Parliament had not fallen short of value judgement two (c) and as such no further regulation is required in pursuit of this. The analysis that follows, as such, only considers what areas of law would assist in achieving value judgement two (a).

3.2 Recommendations of areas of law address value judgement two (a) – ‘five voices’ at the level of the platform.

Value judgement two (a) requires Parliament to facilitate greater levels of availability of a plurality of political communication at the level of the platform, to make available at least five independent editorial minds. In legislating to achieve this requirement, Parliament does not have to consider ‘business interests’ and as such, is not limited to competition law. This is important *given the assessment of value judgement two (c)* demonstrated how competition law is unable to influence levels of plural political communication at the platform level.

Privacy law is regularly suggested as a useful means of platform regulation. The Government is currently considering recommendations from the Attorney-General’s

Department Review of the Privacy Act.⁴²² Its recommendations regarding platforms have largely been modelled off parts of the European *General Data Protection Regulation*⁴²³ and *Digital Services Act*.⁴²⁴ It includes recommendations of greater transparency requirements and a ‘fair and reasonable’ test that would govern the collection and use of consumer data.⁴²⁵ These reforms (and privacy law generally) are, however, preoccupied with an understanding that the protection of an individual is achieved where their personal information is kept sufficiently private. They do little to ensure citizens have choice to at least five feeds, each acting as independent editorial minds. As such, although privacy law and these reforms may tangentially assist the pursuit of value judgement two (a) (providing greater levels of citizen agency furthers the second principle of ‘citizen choice’ discussed as underpinning the broader value judgement) it ultimately will not alone satisfy two (a).

This thesis instead recommends that further research be done into a hybrid consumer and competition law approach, as a possible mechanism for advancing value judgement two (a). Australian Consumer Law (ACL) is contained in the CCA alongside competition law.⁴²⁶ As such, it too shares the CCA’s purpose of protecting the ‘welfare of Australians’.⁴²⁷ This thesis has established how the meaning of ‘welfare’ in competition law is typically understood to relate to Australians’ economic and financial needs. This is also the dominant understanding of the term in consumer law. However, consumer law has gradually extended this

⁴²² Privacy Act Review Report (n 15).

⁴²³ *General Data Protection Regulation* (Regulation (EU) 2016/679).

⁴²⁴ *Digital Services Act* (Regulation (EU) 2022/2065).

⁴²⁵ Privacy Act Review Report (n 15) 110-121.

⁴²⁶ Schedule 2 *CCA* (n 279).

⁴²⁷ s2 *CCA* (n 279).

understanding of ‘welfare’. ACL offers protection to Australians against corporations engaging in ‘misleading and deceptive conduct’ or representations⁴²⁸, contracting with ‘unfair terms’⁴²⁹, engaging in ‘unconscionable conduct’⁴³⁰, producing physically unsafe goods⁴³¹ and from the manufacturer financially injuring the consumer by trading faulty goods.⁴³² As such, consumer law extends this understanding of Australians’ ‘welfare’ to include freedom from physical harm and unique forms of personal harm (for example around privacy, as evident in the aforementioned finding against Google for misleading consumers about data collection and use).⁴³³

Arguably, this understanding of ‘welfare of Australians’ could be extended to include Australians welfare in their capacity *as citizens of its democratic society*. The exact content of these consumer law measures would require more detailed consideration than the length of this thesis permits. However, regulation could require platforms to produce a number of ‘alternative feeds’ that an individual could view from tabs on the search or social platform home page – only one of which was personalised. These ‘voices’ would, however, be from the same platform (and therefore the same ‘owner’). On the understanding that ‘ownership diversity is required for content diversity’, this would need to be complemented by competition of at least five firms at the level of market too and therefore the ACCC’s recommendations to increase competition (as discussed in *Section 2.2*). Alternatively, or in

⁴²⁸ s18(1) Ibid.

⁴²⁹ ss23-28 Ibid.

⁴³⁰ ss20-22A Ibid.

⁴³¹ ss104-150 Ibid.

⁴³² ss51-103 Ibid.

⁴³³ *ACCC v Google LLC (No 2)* (n 383).

addition, consumer law could demand that citizens have the ability to influence and direct platform algorithms – allowing them to program what factors an algorithm takes into consideration, *and whether their feed was personalised or not*. This model could, look similar to how individuals filter search results on websites when online shopping – for example ‘filter by brand’ and ‘by colour’ could be replaced with ‘filter by location result’, ‘filter by political leaning’ or ‘filter without personalisation’. Arguably, this method of disseminating political communication on platforms would enable citizens access to program five or more feeds that were *largely* editorially independent of each other. This too would perhaps facilitate unprecedented levels of citizen choice over their consumption of political communication – further advancing principle two (of citizen choice) that this thesis found to underpin value judgement two (a). However, again these feeds – although different from one another – would be generated by the same platform ‘owner’ and as such should also be complemented with increased market competition for the same reasons just discussed.

This thesis concludes with this recommendation that a hybrid of competition and consumer law approach – which expands the traditional economic understandings of what competition and consumer law should protect in its pursuit of safeguarding the ‘welfare of Australians’ – be considered for further research as a possible mechanism facilitating the sufficient levels of availability of plural political communication in Australia’s democracy.

CONCLUSION

The methodological challenges of determining whether search and social platforms are harming democracy in the way they algorithmically disseminate political communication has left the Australian Parliament unable to conclude whether regulation of this aspect of platforms is required. This thesis used doctrinal analysis to navigate this – firstly considering whether ‘exposure to speech pluralism’ is a structural requirement of Australia’s democracy as established by the Constitution. It found that although there is no constitutional requirement that citizens be exposed to a plurality of political communication, Parliament has recognised that having a plurality of political communication *available* for citizens to *choose* from is a value of Australia’s constitutional system of representative and responsible government. It found Parliament had previously sought to facilitate this legislatively by making a number value judgements as to the extent to which this should be furthered. These value judgements were that Parliament should facilitate citizen choice to a minimum number of five editorial voices (value judgements one and two (a)); and beyond this, it should only legislate to make a plurality of political communication available to citizens (both generally in the market and from individual platforms) by incentivising this to occur, by acting on the market generally using competition law, and not coercively dictating editorial-like (or similar) standards to firms (value judgements two (b) and (c)).

This thesis then applied these value judgements to search and social platform markets and products to assess whether these platforms were making available a sufficient plurality of political communication for citizens to choose from, as measured by these standards and structures that Parliament had previously assessed as necessary for Australian democracy. It found that concentrated market structure of search and social platforms, and feed of content

personalised *for (not by)* the citizen, fall short of value judgements two (a) and (b). As such, this thesis suggests Australian democratic standards require platform algorithms to facilitate a greater availability of plural political communication, and that regulation is needed – specifically, to provide at least five independent editorial minds, and greater levels of competition (as a proxy for greater levels of plural political communication) in the market. This thesis encourages further research into areas of law which may successfully regulate this aspect of platform algorithms – and specifically into a hybrid competition and consumer law approach.

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