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**Australian Competition and Consumer Commission**
**Submission to Digital platform services inquiry 2020-2025**

As part of its Digital Platform Services Inquiry, the Australian Competition and Consumer Commission is "considering whether Australia's current competition and consumer protection laws, including merger laws, are sufficient to address the competition and consumer harms identified in relation to digital platform services or whether change is needed". Further, it is "considering whether additional tools may be needed to address conduct that cannot be effectively dealt with under existing laws, as well as to help prevent harmful conduct before it occurs."[1]

Understanding existing shortcomings

In any effort to consider the addition of new intervention tools, it is important to begin by considering what are the short-comings of existing tools so as not to reproduce these short-comings after reform. Adding new rules or regulatory tools to deal with specific problems or situations – while maintaining existing ones – adds to legal complexity, which itself undermines the certainty and predictability of competition law and its interaction with other regulatory regimes (beyond the remit of the Digital Services Inquiry). Historically, such an approach to law reform has led to accretion of detail and specificity in the Competition and Consumer Act 2010 (Cth) (CCA). It has contributed to its "legislative opacity and unwieldiness" compared to other jurisdictions.[2] Arguably, the prescriptiveness and unwieldiness makes it difficult for the ACCC to enforce the Act particularly in fast-moving sectors of the digital economy, associated with uncertainty in the characterization of both anticompetitive conduct and harm.

Coping with uncertainty

To illustrate the constraint of uncertainty, the Discussion Paper identifies a number of novel types of harm that may stem from market power of digital platforms. However, it is less clear whether the enumerated harms are regarded as merely potential or empirically established. It is also less clear whether these harms are attributable to specific types of conduct and to the exercise of traditional market power or a new manifestation of market power arising from the gate-keeping function of digital platforms.

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[1] ACCC, Digital platform services inquiry – September 2022 report – Discussion paper, 28 February 2022.
[2] *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003 HCA 59 at [70 per Kirby J who went onto make comments which may be relevant to the CCA more broadly: "The language of the provisions of the [then TPA applicable to this case is obscure. Indeed, it represents a significant challenge for interpretation. It is in need of redrafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and courts with the responsibility of assigning meaning to, and applying, its provisions."

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The Discussion Paper recognises that the power of digital platforms may not be the classical market power that antitrust tools were refined to address. But defining the features of this new market power is more elusive. For example, the new source of market power may arise because the digital production environment is deeply collaborative through intimate data sharing across organizational boundaries, with corporations operating at multiple levels of the market.[3] As a result, producer and consumer harm are more difficult to disentangle. In such an environment, some authors have suggested that the concept of network failure – not classic market failure – can be useful to competition enforcers.[4]

The current prescriptive provisions in the CCA are unlikely to be well-targeted to digital market power and conduct. At the same time, as the ACCC has recognised, purely structural solutions advocated among some US policy-makers are not a panacea, even if workable. This is because the gatekeeping function of the digital platforms itself results due to benefits to users from concentration in data-related services. Digital platforms also allow for more decentralized production downstream. As a result, a gatekeeping digital platform is also a convenient regulatory actor through which to implement regulatory solutions, as opposed to an enforcer (such as the ACCC) monitoring a "galaxy of downstream firms".[5]

Selecting regulatory instruments

Apart from the uncertainty about harm linking it to conduct and market power, there is also uncertainty about selecting regulatory mechanisms to achieve the CCA's public interest objectives within the ACCC's mandate. While the Discussion Paper canvasses a number of alternative tools that could be added to its armament, a key question is whether there is any unifying characteristic of these new tools and how they improve on existing ones.

A key constraint on current CCA enforcement, particularly in digital markets, in addition to uncertainty, is the inherent limitation of coercive legal enforcement. It arises not only because of inability to define rules that appropriately target harmful conduct, but also because of the costliness and the time it takes to establish infringements and craft effective remedies.[6] If these two constraints limit the enforcement of competition law (which is based on broad but flexible standards to react to identified problems), they present an even greater challenge for developing a comprehensive ex ante regulatory regime for digital platforms. These challenges are more significant if different digital actors engage in different types of conduct, which in turn leads to different forms of harm.

Experimentalist enforcement of competition law

One regulatory response to the above two conditions (uncertainty and difficulty of coercive enforcement) is the adopt an experimentalist architecture through five functional steps:

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[3] Y Svetiev "Antitrust Governance: The New Wave of Antitrust" (2007) 38 Loy. Univ. Chicago Law Journal 593.
[4] A Schrank and J Whitford , ' The Anatomy of Network Failure ' (2011) 29 Sociological Theory 151.
[5] John Braithwaite, 'The Regulatory State?' in Sarah A. Binder, R.A.W. Rhodes and Bert A. Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008), 231.
[6] Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart 2020) ("Svetiev, *Experimentalist Competition Law*").

1. The first step is to identify a set of goals of the regulatory regime (in this specific case it would be the avoidance of the types of harm that the Discussion Paper canvasses as potentially of concern).
2. The second step is to identify (through market screening and input) instances in which that type of harm may arise and to explore – together with the concerned target corporation – either possible business conduct modifications that could address concerns or protocols for monitoring the extent of harm. This is because the identification of harmful conduct cannot be done through enforcing existing rules or through purely expert input in fast-evolving markets.
3. The third step, given the limits of both rules and expert knowledge, is to subject a proposed remedy from step (2) to peer review – from market stakeholders and other competition or regulatory authorities in Australia and beyond.[7]
4. The fourth step is to monitor the implementation of the remedy through input from market stakeholders affected by the remedy.
5. The fifth step is dynamic adjustment. Namely, based on monitoring and review of effects, it may be necessary to modify the remedy if it proves either unnecessary or ineffective. Such monitoring and review may also lead us to modify the overall understanding of the rules and objectives of competition law in the specific platform.

Within the above experimentalist architecture, enforcement solutions can be differentiated across different actors on a principled basis. Enforcement is also dynamic and responsive, not by moving from lenient to punitive enforcement,[8] but by moving from less towards more interventionist remedies.

If the experimentalist conception of enforcing competition law in digital markets is attractive, the key question is whether existing or any new tools would allow the ACCC to proceed in the manner described above.

Re-purposing "undertakings" as a learning device

My key submission is that rather than any new rules or regulatory instruments, to proceed in an experimentalist manner, the ACCC can use an existing remedial tool of undertakings pursuant to CCA s. 87B. The ACCC's use of undertakings identifies them as an efficient and flexible tool for quicker and less costly resolution[9] through remedial settlement for a relatively clear CCA breach.[10] But the settlement conception is not suitable when we are faced with uncertainty about conduct and harm as discussed above.

[7] Consulting other competition authorities may be useful both as a form of review by knowledgeable peers, but also to address any problems of remedial inconsistency and regulatory arbitrage across jurisdictions given the highly interconnected nature of digital markets. Svetiev, Experimentalist Competition Law, 34-35, 52.
[8] I Ayers and J Braithwaite , Responsive Regulation: Transcending the Deregulation Debate (Oxford, Oxford University Press, 1992); Svetiev, Experimentalist Competition Law, at 63-68.
[9] ACCC, Making Markets Work – Directions and Priorities, 1999, at 7.
[10] ACCC, Section 87B of the CCA, 2014, at 4.

An alternative "innovative" use of undertakings[11] is as a flexible and dynamic tool for learning about harm and remedy under conditions of uncertainty.[12] When undertakings are a learning device, the remedy is collaboratively developed between enforcer and the target corporation, with input from market stakeholders. They are designed not to address an established infringement, but to study the extent of harm and conduct modifications that could address that harm and that may be adjusted over time.[13]

It seems that no statutory amendment to s87B CCA would be required to give effect to its use for experimentalist remedies by incorporating the five steps discussed above.

- The section grants a broad power to accept undertakings "in connection with a matter in relation to which the Commission has a power or function under this Act … or the consumer data rules".
- The section allows for dynamic adjustment, given that any undertaking may be withdrawn or varied with the consent of the Commission (87B(2)). To give effect to dynamic adjustment, it would be necessary to strengthen regular monitoring and stakeholder input into remedial effects, which can be done through ACCC practice or guidance and probably without statutory amendment.
- Experimentalist remedies also require a hierarchical penalty default, as an enforcement alternative operating in the background to incentivize both the target corporation and the enforcer towards the collaborative dynamic remedial route. In some jurisdictions, the threat of enforcing general competition law against the target entity before the courts, which is a less desirable path for both enforcer and defendant because of the loss of control of the outcome and remedy of the litigation, operates as a sufficient penalty default.[14] In the Australian context, however, this may not be the case because there is no margin of judicial deference to the ACCC as an expert authority and the prescriptiveness of the statutory provisions means that the target entity has more likelihood of prevailing in court. As such, statutory or regulatory amendment may be necessary to provide an appropriate penalty default to experimentalist enforcement.[15]

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[11] ACCC, Making Markets Work – Directions and Priorities, 1999, at 7.

[12] Y Svetiev, "Settling or Learning? Commitment Decisions as a Competition Enforcement Paradigm", (2014) 33 Yearbook of European Law 466; Svetiev, Experimentalist Competition Law (Ch. 2 specifically in the context of digital platforms).

[13] For similar logic in the review of mergers under uncertainty, see J Sinn, "Managing Nascent Digital Competition: An Assessment of Australian Merger Law Under Conditions of Radical Uncertainty" (2021) 44 UNSW Law Journal 919; M Jennejohn, "Innovation and the Institutional Design of Merger Control" (2015) 41 Journal of Corporation Law 167.

[14] In the EU, for example, the courts are generally supportive of the Commission's enforcement against digital platforms, but have engaged in a more searching review of the remedy in case of infringement.

[15] One penalty defualt would be daily penalties or penalty enhancements following prosecution in case of a digital platform's failure to collaborate in crafting a remedy. These are familiar to Australian practice from the telecommunications context, but they may be inappropriate based on the prior experience of their use stimulating legalism. The News Media Bargaining Code and the ACCC's role in access disputes for telecommunications facilities also incorporate a penalty default logic that could stimulate experimentalist solutions. See generally, Svetiev, *Experimentalist Competition Law*, at 70, 78-79, 136.