Atlassian's Submission to the ACCC in relation to the Discussion Paper for Interim Report No. 5 of the Digital Platform Services Inquiry

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We appreciate this opportunity to provide feedback to the ACCC on the potential regulatory framework to address competition and consumer issues in relation to digital platform services, as set out in the Discussion Paper of February 2022 (the **Discussion Paper**).

At Atlassian, we build enterprise software products to help teams collaborate, including for software development, project management and content management. Although Atlassian is not a large digital platform as described in the Discussion Paper, as one of Australia's most successful home-grown technology companies — and one that provides products and services to customers around the world — we believe that we are in a unique position to comment on the underlying framework aspects of the Discussion Paper.

We know the critical role of data and information in powering the operations of our customers, and the digital economy more broadly. This means that we understand the importance of regulatory frameworks that take account of, and are tailored for, our evolving global digital economy, and can anticipate what our digital future will mean for Australian organisations and individuals.

We believe that the forthcoming Interim Report presents an ideal opportunity for the ACCC, in detailed consultation with stakeholders, to carefully assess how competition and consumer issues can and should fit within an overarching digital regulatory framework that is able to respond to these issues in a clear, considered and holistic manner.

Our approach and proposed framework

In late 2020, Atlassian published eight Principles for Sound Tech Policy,[1] which are attached to this submission. These Principles are intended to not only guide Atlassian's own engagement on important matters of public policy, but to set forth guiding principles for what we believe sound technology-related public policy should look like more broadly.

Atlassian has also been proud to participate in the ANU Tech Policy Design Centre's process to develop a Tech Policy Design Kit, in collaboration with the Tech Council of Australia (of which Atlassian is a founding member) and the Digital Technology Taskforce in the Department of Prime Minister and Cabinet.[2] The Tech Policy Design Kit is intended to establish a baseline for 'best practice' development of regulatory frameworks and policies for our digital economy.

[1] These Principles are also available for download at https://www.atlassian.com/blog/technology/regulating-technology.

[2] See https://www.anu.edu.au/news/all-news/new-kit-to-deliver-better-tech-policy-0.

In line with these Principles and processes, we appreciate the detailed consideration of, and consultation on, the proposed new regulatory tools in relation to digital platform services in Chapter 7 of the Discussion Paper. This submission considers the matters raised in Chapter 7 of the Discussion Paper through the lens of these principles and our perspective on and approach to technology-related policy, without prejudice to our broader views on any competition and consumer harms that may arise from digital platform services (including the specific issues and proposed measures set forth elsewhere in the Discussion Paper).

In this context, we believe that any new regulatory tools should be situated within an overarching, coordinated digital regulatory framework that is:

- governed by **core principles**, which may be enshrined in legislation and would set expectations for all stakeholders as to how proposed measures and tools under this framework will be formulated and implemented, in line with Atlassian's first principle [*Define the playing field*] and fifth principle [*Let the light in*];
- operationalised through one or more central '**clearinghouses**', which allows government to build expertise (as to how technology operates, the opportunities and challenges it creates and how best to respond) and connections with industry, in a manner that can be accessed by a range of government agencies and regulators with responsibility across various sectors and areas of law, in line with Atlassian's second principle [*Engage with the issue*] and fourth principle [*Consult early, consult openly*]; and
- supported by targeted and objective **regulatory measures and tools**, which respond clearly to identified issues in a manner that aligns to and has the benefit of the overarching principles and institutional expertise, in line with Atlassian's third principle [*Treat the ailment, don't kill the patient*] and sixth principle [*Address behaviour, don't punish success*].

In our view, this proposed model is best able to balance the needs of certainty and flexibility identified in the Discussion Paper, and best able to ensure that the chosen regulatory tools can respond appropriately to the multi-dimensional nature of many of the issues involved.

A model for a central framework

In our view, a central framework, principles and governance model will provide clear benefits to the individual regulatory measures and tools that will be implemented under it.

As the Discussion Paper makes clear, the harms under consideration may arise only in certain contexts (for example, with respect to specific services or business models) or across our digital economy, they may intersect closely with other regulatory or legal issues or societal harms, and they are likely to have global dimensions and impacts.

This means that it is critical to ensure that:

- ***The context of the problem or harm to be addressed is well-understood***. As the Discussion Paper points out, the question of which entities will be subject to a new framework is not a straightforward one. In large part, this is because there are multiple ways to understand "digital platforms" and indeed the broader technology sector. This sector is not always capable of one-to-one comparisons with other, traditional 'vertical' sectors (such as energy, telecommunications and financial services) for a variety of reasons, including that the technology sector:
    - in many cases operates as a horizontal rather than a vertical sector, in that the products and services that it provides underpin and enable the activities of participants in most other sectors of our economy; and
    - is not homogenous, and captures a wide variety of types of businesses that operate at different layers of the technology ecosystem, from providers of physical infrastructure like data centres to social media platforms, to platforms that help to

reimagine ‘real-world’ products like transportation and accommodation, with associated significant differences in service delivery and business models.

Finally, in today’s digital economy, it is common to hear that ‘every company is a tech company’, such that relevant issues and harms may need to be addressed across the economy (for example, market participants in various industries across Australia are engaged in the development and deployment of artificial intelligence and machine learning in their businesses). It is therefore critical to be able to understand where and how the problem or harm under consideration arises, and its relationship to the relevant technology products or services and those who provide or implement them.

- ***The proposed measure is targeted and proportionate to the problem or harm***. It follows from the context outlined above that the specific measures required to address identified problems and harms will need to clearly respond to that problem in a manner that is appropriately tailored and proportionate, as noted in the Discussion Paper. We set out some further considerations in this respect below.
- ***Both the problem, and the proposed measure, are properly situated within the broader (domestic and international) framework***. The Discussion Paper already identifies and seeks to place its proposals within the context of international developments in this area. However, it is also clear that many of the problems that could be addressed through a new framework are multi-dimensional and could implicate many aspects of digital regulation (for example, where competition law concerns may intersect with valid privacy or security concerns). A deeper understanding of these intersections and interrelationships, bolstered by appropriate technical expertise, will help to minimise unintended consequences and increase the likelihood of achieving domestic and international regulatory coherence. This kind of framework would also empower Australian regulators and policymakers to support and drive the development of interoperable regulatory regimes in and through multilateral fora like the OECD.

We believe that a central framework and governance model will help to achieve these aims.

We appreciate that the ACCC, Australian Communications and Media Authority, Office of the Australian Information Commissioner, and Office of the eSafety Commissioner have recently formed the Digital Platform Regulators Forum to increase cooperation and information sharing across their work. We welcome and encourage this Forum and its important work.

However, we believe that the proposed ‘clearinghouse’ governance model outlined above could add significant further weight to models like this Forum, by establishing a body that can act as an ‘internal regulatory consultancy’ to government agencies and regulators alike. This body could monitor for issues and harms, assess their impact, and understand how these issues apply to and translate across our economy — from the entirety of the digital economy down to more homogenous sub-categories of digital platforms.

Options for regulatory tools and measures under that framework

We appreciate the detailed consideration of various options for implementing new regulatory tools set out in Chapter 7 of the Discussion Paper, recognising that these could be used individually or in combination with one another depending on the circumstances.

In an initial assessment of those options by reference to the framework and objectives outlined above, we believe it is likely that some combination of well-designed and well-targeted codes of practice and pro-competitive or pro-consumer interventions are likely to be more appropriate measures in respect of digital platform services.

This assessment will always be subject to a more detailed consideration of how that framework and objectives may apply to the specific circumstances of each case, but at a high level, and having regard to the examples and analogies provided in the Discussion Paper:

- ***Codes of practice*** *may be appropriate where well-designed, targeted towards a clearly defined and relatively homogenous group, and subject to clear overarching governance and procedural requirements*. As the Discussion Paper notes, codes of practice can be flexible, clear in their application and more easily adaptable to an evolving landscape. However, when they are applied in the technology sector, it will be critical to have regard to the sectoral context and participants that should be subject to the code. A code that vaguely or broadly defines which entities should be subject to the code, or that seeks to conflate compliance across multiple types of technology platforms and differing business models, is likely to introduce significant confusion and unintended consequences in practice. Similarly, codes that introduce discretionary powers or overly subjective enforcement mechanisms can add confusion and increase overall operational risk for technology platforms.

  In this way, we note the illustrative contrast between several of the legislative codes applicable to digital platforms outlined in the Discussion Paper and other existing codes under the CCA. For example, both the online safety and (proposed) online privacy codes would apply to a broad range of industry participants, which are in many cases not clearly defined and highly variable in terms of their products, services and business models (and motivations), and whose conduct could give rise to problems that accordingly differ significantly in nature, extent and scale. By contrast, a code like the Dairy Industry Code identifies and regulates the dealings between, and conduct of, clear categories of participants and sets forth clear obligations to specifically address identified issues.

  Clearer targeting of codes of practice may also have the benefit of streamlining industry participation, when industry participants are more naturally aligned in the activities and conduct that are sought to be regulated. This will also have consequential benefits for the further consultation with broader stakeholder communities, which we agree remains critical to the success of such codes (as noted in the Discussion Paper).

- ***Pro-competitive or pro-consumer interventions*** *could present a novel way to quickly address specific harms, if supported by clear governance and procedural requirements*. Although the Discussion Paper notes the parallels between Part XIB of the CCA and this option, this UK-inspired model would constitute a new regime in Australia and would require further consideration, including to ensure that the ACCC exercises its discretion to pursue such interventions in a manner that is predictable and subject to clear procedural guardrails. However, in light of the unique context and nature of the technology sector, these interventions could present a more tailored and surgical way to address specific harms or conduct, and to quickly obtain appropriately tailored remedies.

  As the Discussion Paper notes, this option may be best used in combination with other measures, such that the learnings obtained over time from these interventions can inform the consideration and assessment of any potentially necessary broader measures.

- *Other measures (including* ***rule-making powers and access regimes****) are likely to give rise to significant issues in their application, which would only be exacerbated by the unique nature of the tech sector*. The Discussion Paper describes the options for rule-making powers and access regimes by reference to parallels with the energy and telecommunications sectors respectively. In addition to noting the significant differences between these two traditional 'vertical' sectors and the technology sector (as outlined above), these examples also help to illustrate some of the significant concerns and potential pitfalls that these options could give rise to. In particular, the detail-driven and iterative nature of rules made under rule-making powers can be a detriment as well as a benefit. For example, the National Electricity Rules have been subject to criticism due to their increasing complexity over time (including due to their length, frequency of changes and use of interrelated definitions), leading to associated uncertainty. In the case of

access regimes, in practice these regimes are often slow-moving (in respect of both the making of declarations and determining access terms, as well as dispute resolution) and inflexible.

Although there may be ways to target these rules and access powers in a similar manner to codes of practice (as described above), the complexities involved in both options are likely to make them significantly less attractive as a regulatory tool in the circumstances.

In each of these cases, any measures should be carefully considered and formulated as part of the overarching framework set out in this submission and outlined above in order to best ensure their success.

Atlassian would be pleased to discuss these comments with the ACCC, and looks forward to the consideration of these matters in the context of Interim Report No. 5.

Yours sincerely,

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Atlassian Principles for Sound Tech Policy

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Atlassian Principles for Sound Tech Policy

Preamble

We at Atlassian are strong believers that the future of human endeavour and economic prosperity will increasingly flow from innovation and technology. And as 2020 has shown us, ever-greater digitisation is not only tomorrow's trend, but also today's urgent requirement.

But the pace of technology development means that all of us – individuals, private industry and government – must together develop policy frameworks that unleash the positive potential of technology for society while reducing any negative effects.

We know that developing a sound policy framework requires carefully considering the interests and rights of all vested stakeholders, as well as the potential impacts on them. This complex undertaking requires dedicated planning and process--as well as guardrails for the ultimate result. It is not surprising then that sometimes such policy efforts come up short of their intended aims.

This is why we think it is time for a reset on the conversation around tech regulation--one that fully encompasses the positive contributions of the tech sector to society, the legitimate regulatory requirements of government and protection of individual rights, as well as the need for a consistent and reliable environment for shared economic prosperity.

To contribute to this renewed conversation, Atlassian offers the following set of guiding principles to help government, industry, and the public converge on the essential qualities of sound regulation in the technology sector. If implemented, we believe that these guiding principles will result in targeted and proportionate policies, informed by a collaborative process, that ultimately unleash the positive potential of technology while fully addressing individual and societal interests – a true "win win" outcome for all of our communities.

Lastly, as these Principles make clear, we believe that collaboration is key to sound tech policy. As part of our drafting process, we engaged with numerous members of the tech sector, industry associations, and civic organizations who share our common vision. But to ensure that collaboration and improvement can continue even after publication, we are licensing these Principles under a **Creative Commons** license, so that others can adopt, modify and build upon these ideas as the dialogue continues.

Atlassian Principles for **Sound Tech Policy**

I. Define the playing field

Sound tech policy should have clear objectives. This means that everyone should be able to understand the specific problems that regulation seeks to solve, or the interests it seeks to support. More importantly, the regulatory solution should be clearly targeted at that identified problem. Unclear intent breeds distrust and concern.

II. Engage with the issue, don't dumb it down

Sound tech policy should be developed with a clear understanding of the relevant technology. Lawmakers and regulators may not all be technical experts, but if they engage with these experts and other stakeholders to understand the relevant technology and business models, they will be better positioned to respond to them through regulatory means. This can assist in identifying which regulatory means can be used effectively, and which ones are impractical or overly burdensome.

III. Treat the ailment, don't kill the patient

Sound tech policy should be proportionate, and should always seek to minimise unintended consequences. If regulatory responses are not properly considered and tested, they can overreach or lead to unintended and undesirable consequences. These consequences can be just as devastating to companies and their users as failing to act at all. Regulations should be surgical; government should not use a regulatory hammer where a scalpel is appropriate for its goals.

IV. Consult early, consult openly

Sound tech policy should be developed through open, consultative processes. When all relevant stakeholders are engaged early in regulatory processes, potential risks and unintended consequences can be identified and addressed before decisions are made. Open engagement also fosters greater trust in regulatory processes and creates space for both sides to clearly state their objectives or concerns. Early and extensive consultation is an obvious way to try to mitigate against a lack of understanding of the relevant technology or the business model of companies, and the consumer use cases. It also helps governments to ensure that regulations are as effective as possible.

V. Let the light in

Nothing is more uncertain than "black box" exercise of government discretion outside of the public eye. Sound tech policy should provide for transparency in government decision-making and set forth fair procedures that allow meaningful challenge of and detailed inquiry into those decisions.

VI. Address behaviour, don't punish success

Sound tech policy should seek to mold and target behaviours across a sector or drive outcomes on a systemic basis. It should not target specific individuals or companies. An approach that singles out individual organisations does not take into account the diversity and dynamism of the tech sector. More importantly, such an approach is not a sound long term approach addressing future challenges. This does not stop laws from ultimately being enforced in relation to identified individuals or entities, but regulations should not be made out against them specifically in the first place.

VII. Tech (and trust) is global

Sound tech policy should be coherent and consistent, mindful of global standards and able to enhance global interoperability. Local conditions must of course be considered, ensuring that any regulation forms part of a coherent local landscape. However, if competing regulatory frameworks are not also considered, there is a high risk that technology regulation will develop in a piecemeal manner that increases the burden on innovation, business, and consumers alike.

VIII. Build the foundation for shared success

Sound tech policy should provide a consistent and reliable framework for business and investment. We fully appreciate and support governments' legitimate interest in meeting regulatory goals and protecting consumers and the public, and the responsibility that all businesses share to ensure that this is achieved. It is equally important that the legislative process and outcome should be measured, fair, and reliable, in a manner that provides business stakeholders with the confidence to grow and invest in jobs, infrastructure, and improved products and services for their customers.