SUBMISSION TO THE ACCC DISCUSSION PAPER

UPDATING COMPETITION AND CONSUMER LAW FOR DIGITAL PLATFORM SERVICES

INTRODUCTION

This submission responds to the *Discussion Paper for Interim Report No. 5 of the Digital Platform Services Inquiry* ('Discussion Paper'), published by the ACCC in February 2022, which asks whether Australia's current competition and consumer laws are sufficient to address harms that may arise from digital platform services.

Overall, we welcome the Discussion Paper and the ACCC's willingness to focus on technology firms whose market power and ability to act as 'gatekeepers' over large swathes of economic and social activity are particularly problematic. The Discussion Paper goes some way towards acknowledging and addressing gaps in the current regulatory approach, such as the risks arising from the 'data advantage' of dominant firms. This submission extends those advances, drawing on our interdisciplinary expertise in technology, law, and policy.

An outstanding gap in the Discussion Paper, with implications for its various proposals, is the lack of clarity regarding the goals of competition and consumer law with respect to digital platform services, as a necessary pre-requisite to articulating the potential harms and suitable responses. In particular, and as acknowledged in the preceding ACCC *Digital Platforms Inquiry*, privacy and personal information regulation are central to the effective operation of digital markets. However, privacy and personal information regulation have not been considered holistically as part of the Discussion Paper, nor as express and integrated goals for competition and consumer law. Parallel federal reforms in the areas of privacy and data sharing only enhance the need for this integration. This submission demonstrates how privacy and personal information regulation can be more directly engaged in reform and why this is essential in a digital context.

RECOMMENDATIONS

In response to **questions 1 and 2** on the harms and benefits of digital platform services, and the sufficiency of the existing regulatory framework, we have two recommendations:

1. Harms arising from digital platform services must be broadly conceived in order to address novel features of these services, such as their availability at zero-monetary cost to consumers. In such markets, exploitation of privacy and personal information is a business model by which firms compete. If competition and consumer law are blind to this exploitation, harm is increased. Similarly, harm is increased if aggregation and exploitation of personal information occurs in ways that grossly undermine consumers' expectations, impacting trust in the market and effective consumer choice.

2. The full range of harms that can arise through a 'data advantage' held by incumbents must be acknowledged in order to prevent an over-emphasis on the short-term efficiency gains of acquisitions, and an under-accounting for the harms of concentrated market power.

Regarding **question 4** and the potential use of different regulatory tools from legislation to codes of practice to third-party access regimes, we recommend:

3. Specific duties and obligations of fairness should be explored for major digital platforms, to promote a fairer distribution of benefits in digital markets.

4. It would be productive for the ACCC to complement its focus on regulatory tools with leadership and reform proposals to ensure that regulatory authorities have adequate resources and coordination to ensure effective enforcement.

Regarding **questions 8-10**, which consider increasing or limiting data access to incumbents and competitors, we recommend:

5. 'Data' is too diffuse to serve as a meaningful regulatory target. Considerable contextual considerations apply to information, especially information about people.

6. We are confident that simply adopting a regulatory stance of *increasing* data access to more parties will not respond to the harms identified in the Inquiry. Instead, it gravely risks compounding harms to consumers and individuals and communities more broadly.

7. The Discussion Paper's sensitivity to data *limitation* measures reinforces the necessity of accounting for privacy and personal information regulation within the goals of competition and consumer law, rather than as distinct and isolated concerns.

Question 16 asks about increased transparency, though focuses exclusively on transparency to consumers. We recommend:

8. Where transparency is used to place a further burden on consumers to understand and take responsibility for how their information is used, then it is a tool that potentially increases harm. Instead, transparency should be geared to addressing the information asymmetry between technology firms and regulatory authorities, allowing the ACCC to have more information to take actions that contribute to fairer outcomes for competitors, consumers, and society as a whole.

WHO WE ARE – UWA MINDEROO TECH & POLICY LAB

The UWA Minderoo Tech & Policy Lab is an independent, interdisciplinary research institute based at The University of Western Australia Law School. The Lab has expertise in technology law and governance, biomechanics and bioengineering, data analytics and machine learning, and augmented/virtual/extended reality technologies. This submission was led by Research Fellow Dr Hannah Smith, Lab Directors Associate Professors Julia Powles and Jacqueline Alderson, and Research Associate Noelle Martin.

The Lab is a core node in an international tech impact network focused on tackling lawlessness in the technology ecosystem, with partners including the Minderoo Centre for Technology and Democracy at the University of Cambridge, the Center for Critical Internet Inquiry at the

University of California Los Angeles, and the AI Now Institute, which is currently advising the US Federal Trade Commission on competition and consumer law. One of the defining features of the Lab, as well as the broader network, is that we critically interrogate aspects of the technological and regulatory landscape that have a 'taken-for-granted' status, resisting the twin lures of tech-determinism and tech-optimism to ensure pro-public futures that work for everyone.

The Lab is supported by diverse funding, including a gift from Australian charity Minderoo Foundation. We maintain the highest standards of academic integrity and are committed to the autonomy and independence of our researchers to pursue work free of external influence.

Q1-2: BENEFITS, HARMS & REGULATORY GAPS

Recommendation 1: Competition and consumer law must account for harms arising from privacy and personal information exploitation

Harms to privacy and personal information rights are a central consequence of the current digital economy, impacting markets for digital platform services and the interests of consumers in two key ways. First, where the business models of digital platform services are predicated on personal information extraction (active, passive, and inferred) and subsequent aggregation, without limit or consequence, this deprives privacy and personal information protection from becoming a basis of competition between firms. This is squarely a competition and consumer law concern. Second, where personal information is extracted, aggregated, and used in ways that undermine consumers' expectations, this comes at considerable cost to trust in the market and effective consumer choice.

The popularity of services such as DuckDuckGo, Signal, and Telegram demonstrate consumer interest in protecting privacy, and that firms can compete and differentiate on the basis of how consumer information is treated. Reducing this competition would reduce the quality of goods and services in the market.[1] This should be within the ACCC's purview, given its own findings in the *Digital Platforms Inquiry* that 36% of consumers incorrectly assume that the mere existence of a privacy policy prevents personal information being shared with third-parties.

The implication of many digital platform services being provided at zero-monetary cost to consumers is also squarely relevant to the ACCC, with substantial research demonstrating consumers' difficulties in assessing the true costs of such services, creating an imperative to be attentive to, and address harms arising from, aspects of consumer welfare not based upon price.

Recommendation 2: In acquisitions, don't overlook the long-term harms of a 'data advantage'

The current regulatory approach to acquisitions places too much emphasis on the short-term efficiency gains that can arise from increased data access, at the expense of the long-term implications for competition and consumer interests.[2] This is facilitated through the inappropriate bundling of many different types of information, from many different contexts, into the single

[1] O Lynskey, Considering Data Protection in Merger Control Proceedings (OECD Submission, 2018).
[2] See generally J Kwoka, Squaring the Deal (2017); UK Digital Competition Expert Panel, Unlocking Digital Competition (2019).

framing of 'data', which is then treated as a purely commercial asset, rather than as something that may be representative of who we are as individuals and communities in ways that are deeply consequential.[3] Our recommendation 5 makes the argument that 'data' is too diffuse to serve as a meaningful regulatory target. Instead, we recommend focusing contextually on what information is involved,[4] and then adopting an approach that assesses the benefits and harms to consumers that arise from aggregating that specific information (including whether current privacy regimes even permit it), as well as the wider impacts that entrenching a data advantage has on the market.

The Google-DoubleClick acquisition demonstrates the deficiencies of the current approach. In clearing the acquisition, the US Federal Trade Commission only attended to the benefits of increased data access for internet publishers and advertisers. Consumers and new entrants were not considered. This meant that the benefits and harms of more targeted and personalised ads and services (including by potentially facilitating discrimination and exclusion), the entrenched dominance of the merged entity, and the significant barriers to entry that followed the acquisition, were not addressed. Another contemporary example is the Google-Fitbit acquisition, where the benefits that Google may potentially realise through mining Fitbit users' health information are contingent on ignoring the diverse privacy and personal information expectations of each consumer and on rewarding Google's data advantage with the opportunity to further that advantage in a new market where it has no efficacy, validity, or safety record.

Ultimately, the approach of furthering a data advantage through allowing incumbents to purchase competitors, nascent competitors, potential future competitors, and companies in adjacent markets, tends to encourage incremental improvements by the incumbent, rather than truly 'disruptive' innovation,[5] with negative implications for both competition and consumers. As noted by leading US technology law scholar Professor Frank Pasquale, inappropriate data access can lead to harms ranging from cascading disadvantages to 'disturbing' data uses.[6]

We agree with the ACCC that merger frameworks should be updated to assess the impact of acquiring competitors and the economies of scope generated by pooling data sets. As outlined above, we recommend that this should be accompanied by a sophisticated and granular approach to what 'data' is actually involved in any potential acquisition, as well as a consideration of the 'consumer' that encompasses both present and future consumers.[7]

Q4: REGULATORY TOOLS

Recommendation 3: Duties and obligations of fairness for dominant digital platforms

Digital platforms can have tremendous influence over individuals' lives and the nation's vital interests in a way that falls wholly outside the scope of 'protecting consumers'.[8] To address this,

[3] R Binns & E Bietti, Dissolving Privacy, One Merger at a Time: Competition, Data, and Third Party Tracking (2020).
[4] H Nissenbaum, *Privacy in Context* (Stanford University Press, 2009).
[5] SK Kamepalli, RG Rajan, and L Zingales, Kill Zone (2020).
[6] F Pasquale, The Generative Potential of Rights to Information Access in an Era of Digitized Judgment (2022).
[7] F Pasquale & M Cederblom, The New Antitrust: Realizing the Promise of Methodological Pluralism (2022).
[8] K Sabeel Rahman, *Democracy Against Domination* (Oxford University Press, 2017); Lowry Institute, Threats to Australia's Vital Interests (2021).

various jurisdictions, such as the EU with 'gatekeepers' in the Digital Markets Act and the UK with 'strategic market status' firms, have been advancing reforms to place obligations and duties on digital platforms. In Australia, we recommend developing obligations and duties of fairness specifically for major digital platforms, addressed to proactively demonstrating that the appropriateness of their practices before they are permitted to operate,[9] in order to promote a more fair distribution of benefits in digital markets. This could build on the News Media Bargaining Code, which allows the Treasurer to designate entities under the Code and address bargaining power imbalances.[10] Further duties and obligations could align well with the ACCC's desire to more proactively prevent potential harms. Further, experience with the Code suggests that the threat of designation might alone be enough to encourage compliance with the rules, without necessarily increasing the ACCC's workload.

A review of approaches in other fields suggest various ways forward to promote fairness, including: greater clarity regarding the collection or use of inferred or passively collected information; greater transparency regarding the algorithms used to target customers and set prices; the concept of 'unfair terms' within contract law to respond to power imbalances; the rules regarding product safety whereby a firm would have to demonstrate the 'safety' of their commercial activities; and the governance of 'buy now pay later firms', which may exploit consumer biases.

A promising approach is the use of proactive requirements on major digital platforms to demonstrate the appropriateness of their practices before they can operate in Australian markets.

Recommendation 4: The ACCC should advocate for sufficient resources and coordination for effective enforcement

Recognising the significant power and information asymmetries in digital markets, and the significant complexity and opacity surrounding the exploitation of privacy and personal information by digital platform services, regulatory authorities have an obligation to relieve consumers of the burden of navigating markets and take the lead in promoting the best outcomes. This can be done by ensuring that digital platforms are operating in an accountable manner,[11] overcoming subsequent challenges occasioned by the sharing of distorted or partial information.[12] Improvements in accountability could also help respond to the ACCC's concerns of false-positives that create culture of 'default clearances' to the detriment of consumers.

A more joined-up approach between regulators, as has been modelled elsewhere,[13] could be part of the role played by the recently developed Australian Digital Platform Regulators Forum (DP-REG).[14] In its current form, DP-REG facilitates the sharing of information and expertise but does not alter members' regulatory powers, legislative functions, or responsibilities. We recommend strengthening regulators' capacity to respond to relevant harms, including perhaps through duties to consult and duties to cooperate, as are being explored in the UK. The ACCC has a long and fruitful history of collaboration and the ongoing utilisation of these relationships would be

[9] F Pasquale & G Malgieri, 'From Transparency to Justification: Toward Ex Ante Accountability for AI' (2022).
[10] Australian Communications and Media Authority, News Media and Digital Platforms Bargaining Code (2021).
[11] Pasquale & Maglieri, above.
[12] ACCC, Ex Post Review of ACCC Merger Decisions (2022).
[13] See, for example, the Digital Clearing House in Europe and the UK's Digital Regulation Cooperation Forum.
[14] Office of the Australian Information Commissioner, Addressing Online Harms Central to Digital Platform Regulators Forum (2022).

highly beneficial. Whichever approach is taken, we strongly recommend a proactive response to hold platforms to account for harms that are reasonably foreseeable and, through the use of broad, cross-cutting principles, to future-proof the regulatory framework.

In order to support a proactive and effective regulatory response, it will be absolutely essential to have adequate resources, including time, finances, and personnel to investigate, monitor, and act. The ACCC has been hampered in its efforts to address the harms arising from acquisitions in digital markets by difficulties in accessing information both proactively, and in terms of reviewing subsequent promised efficiencies. This leads to our recommendation 8, regarding gearing transparency to regulators, rather than to consumers.

Q8-10: 'DATA ADVANTAGE'

Recommendation 5: The ACCC must be more cognisant of the contextual considerations that apply to information (aka: 'data' is not the frame)

We are unconvinced that some of the measures proposed in the Discussion Paper can be described as pro-competition or pro-consumer responses to the identified harms. It remains unclear, for example, how increasing data access can be described as a pro-consumer remedy when it undermines consumers' expectations towards the collection, use, and sharing of their information. Further, the more that information is shared between different entities, the greater the risk that the information will be lost, hacked, or otherwise misused. When consumers are already concerned about their lack of control, it appears irrational to propose a measure that will further undermine consumers' abilities to choose how their information is used and shared.

We believe that one of the reasons for these measures appearing in a Discussion Paper that is otherwise sensitive to power imbalances and consumer harms is that the word 'data' is a distraction that deprives us from a contextual consideration of the underlying information that is involved. There is all the difference in the world between widening access to one's medical results, search queries, or (wisely) unsent emails, as opposed to environmental sensing data, the length of a field, or the depth of the ocean.

Recommendation 6: Increasing data access as a remedy will not respond the identified harms

The Discussion Paper raises the need to 'recalibrate' the interpretation and enforcement of competition law and consumer protection law. In this vein, some of the points concerning the risks of over- and under-enforcement apply to the risks relating to increasing data access. The harms arising from the finding of false-negatives in merger enforcement indicate that the costs of allowing too much data access justify a cautious regulatory approach.

We strongly disagree with the Discussion Paper's proposal of increasing data access as a potential remedy for addressing the data advantage held by incumbents. This approach is based on the flawed and unproven premise that it is only the lack of data held by competitors that produces poorly-functioning markets. Doing so overlooks the relevance of manifold other factors.

Increased data access fails to respond to the existing network effects that have accrued to incumbent digital platforms,[15] and overlooks lock-in and the need for consumers to be persuaded to change service providers or use different products. The reliance upon consumer action also places an unreasonable burden on consumers to remedy deficiencies in market functioning. This point is particularly salient given that increasing data access does nothing to improve consumers' understandings of how their information may be used, and instead renders it more difficult and more complex, at scale. Such a regulatory response may be in the interests of industry, but it lacks significant spill-over benefits for consumers.[16]

Where concern about incumbents' data advantage stems even partially from concerns that they have not respected consumers' privacy and personal information protection expectations, it is unclear how the most appropriate solution would be to increase data access for other companies. The stark disconnect between competition and consumer law and privacy interests fostered by this proposed response overlooks the prominent role that privacy and personal information regulation play in protecting consumers and promoting competition.

Recommendation 7: Use data limitation to appropriately account for privacy and personal information regulation within the ACCC's remit

The ACCC references the possibilities of data minimisation as a response to the regulating the activities of the digital platform services, directly and productively acknowledging the role of tools associated with protecting privacy and personal information rights as relevant to competition and consumer law. We support the inclusion of this consideration and recommend its wider consideration in other aspects of the *Digital Platform Services Inquiry* going forward.

In an environment where personal information is used in increasingly unexpected ways; where decisions are justified by reference to complex, 'black box' algorithms; and where the activities of other individuals (known and unknown) can be used to infer information about ourselves, the lines drawn between privacy and personal information regulation, on the one hand, and competition and consumer law, on the other, becomes increasingly illusory.

Including privacy and personal information regulation as a critical element of protecting consumers and promoting competition will ensure that the ACCC is able to fulfil its stated goals.

Q16: TRANSPARENCY

Recommendation 8: Use transparency to address existing information asymmetries – with a focus on regulators, rather than consumers

Digital platform services are characterised by a level of complexity and opacity that prevents consumers' abilities to make informed decisions and provide freely-given and informed consent. Increasing transparency, however, is not a silver bullet solution to the problems identified in the Discussion Paper. Rather than treating more information as an implicit good, more explicit

[15] ACCC, Digital Platforms Inquiry – Final Report (2019), 11.
[16] OECD, Economic and Social Benefits of Data Access and Sharing (2019).

attention should be given to the purpose of transparency, the issues that it responds to, the parties it addresses, and how transparency ameliorates those identified issues.

Increasing transparency is neither a pro-competition nor a pro-consumer response where it increases the burden on consumers, where consumers are faced with no real alternatives than to use a particular service or product, where it leads to non-negotiable terms of service, or where there is no minimum requirement on what is disclosed and the minimisation of harm.

Where transparency could play a vital role is in requiring platforms to provide more information to regulators, who can act on behalf of consumers and communities and initiate enforcement action. In closing, we look to what could be if there was more transparency and accountability to consumers as well as regulators. *Imagine if* … when you want to use a particular digital platform service, there are a set of alternatives and their pros and cons clearly and readily provided to you, as a requirement of competition and consumer law. *Imagine if* … this information allows you to make an assessment both of the considerations that apply to you as an individual consumer, but also as a citizen with a range of concerns about the role of digital platforms in a democratic society.

Imagine … how would a particular service stack up to a standardised, audited set of questions demanded proactively by a regulator? How would the service justify the reasonable necessity of every aspect of information that they collect – and how might that be challenged by an independent privacy commissioner? How would the service vs a not-for-profit representative group representing affected individuals address the increased risks potentially faced by children, individuals from different minorities, and those that identify as part of the LGBTQI+ community? How would a service make explicit the non-monetary costs paid by consumers in accessing digital platform services – and how might independent researchers challenge that account?

Australia has a distinct opportunity to lead the world in how it imagines – and builds – the future of competition and consumer law to realise the benefits and reduce the harms of digital platform services. We on the West Coast look forward to being a part of that exploration. /