7 August 2023

Ms. Gina Cass-Gottlieb
Chair
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

RE: Comments of ACT | The App Association on the Australian Competition and Consumer Commission's Request for Comments on *Digital Platform Services Inquiry – March 2024 report on data brokers (Issues Paper)*

Dear Chair Cass-Gottlieb:

ACT | The App Association (the App Association) appreciates the opportunity to provide input to the Australian Competition and Consumer Commission (ACCC) in response to its request for comments on competition and consumer issues in relation to data collection, storage, supply, processing and analysis services supplied by data brokers in Australia.[1]

I. Statement of Interest & General Comments on Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information

In general, the App Association supports the ACCC's efforts to better understand new business models that sell consumer data to exercise enforcement, supervision, regulatory, and other authorities. Consumer data essentially powers the internet, which has brought about both significant innovation as well as risks to those consumers. While the data that consumers generate about themselves through their online activities is valuable and should be accessible and portable to them, many harms consumers face also stem from the pervasive collection of data that they may unknowingly have generated. Many beneficial use cases of personalization and targeted advertising exist, but at the same time, they also give rise to abuse and privacy threats that can result in real-world damage.

The App Association is a global trade association for small and medium-sized technology companies. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the value of the ecosystem the App Association represents—which we call the app economy—is approximately AUD 2.3 trillion and is responsible for hundreds of thousands of Australian jobs.[2] As the world has quickly embraced mobile technology, our member companies have been creating innovative

[1] https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25/march-2024-interim-report.

[2] https://www.progressivepolicy.org/wp-content/uploads/2021/03/PPI_AustralianAppEconomy2021.pdf.

solutions that power the growth of the internet of things (IoT) across modalities and segments of the economy.

The App Association's members include many innovators who develop mobile technology products in both established and emerging markets, and they work to handle personal data with the appropriate care. Our members take privacy and consumer complaints seriously, and they care about how data is used and shared because it affects how their products function and how consumers engage with those products and services. Our members handle and work with data daily, so they are directly affected by consumer trust issues that abuse by data brokers may cause. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition. Strong data privacy protections that meet evolving consumer expectations are a key component of developing consumer trust in tech-driven products and services. The App Association helps shape and promote privacy best practices in a variety of contexts, including for apps directed to children and digital health tools, making us well-positioned to respond to this ACCC request for comment.

We believe the current lack of understanding and transparency of data broker practices makes users only more vulnerable to risks and makes it harder for policymakers to address the issue. Additionally, the lack of federal privacy legislation has allowed the data broker industry to profile millions of Australians in a legal grey zone. We, therefore, welcome the ACCC gathering information on data brokers and their business practices.

The App Association offers comments here that build on our extensive views already provided to ACCC in the course of its digital platforms inquiry,[3] which we urge for consideration of in the context of this request for comment.

II. App Association Views on Data Brokers and Competition

With respect to digital platforms and data brokers, an appropriately scoped market definition should precede determinations of market power and whether a market feature has an adverse effect on competition, including with regard to the impact on small businesses. While ACCC's market definitions that address digital platforms and/or data brokers should consider antitrust foundations such as the existence of substitutes, such an analysis must be fact-specific and traditional antitrust analysis is not easily applied to platforms that often are multi-sided markets.

Multi-sided platforms differ from traditional markets in important ways because the platform creator's practices and pricing on one side of the market affect the other side. For example, investments that increase participation or quality on one side of the market create the value that is sought by the other side. The value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A platform firm must, therefore, be concerned not only with its own quality and advertising, but also that of the vendors who operate over its network.[4]

Traditionally, antitrust analyses on two-sided markets (e.g., newspapers) have focused on only one side of the market because of the limited impact of network effects. Where platforms experience more indirect network effects with linked demands and pricing—such as in the case of software app distribution

[3] [link to our complete ACCC platform comments]

[4] Mark Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Persp. 125, 136 (2009).

platforms—including both sides in the relevant antitrust market is appropriate. Digital platform markets likely require consideration of at least three distinct markets (possibly four if one considers wireless carriers) to perform one transaction. But even where multi-sided platforms have demonstrable competition on both sides of a transaction, using traditional constructs such as the "small but significant non-transitory increase in price test" (SSNIP) on one side of the transaction would lead to the misapplication of antitrust law. ACCC is encouraged to provide flexibility for case-by-case market definitions, and to appropriately apply antitrust law to multi-sided digital platforms. Further, as the App Association has already recommended to ACCC, the high amount of diversity and competition in the digital economy (and positive effects from these dynamics such as improved platform features and reduced prices for end users) should be acknowledged by ACCC across its reports developed for the Treasury under the digital platforms inquiry.[5]

And although developers can choose from multiple platforms, there is no such thing as a perfect software distribution platform. Some, but not all, app developers pay a fee to platforms for developer services, and they expect those services to meet their needs. Just as online companies must clearly communicate their data practices to consumers, so must platforms clearly define the requirements and details of their terms of service to developers. For example, when platforms change their developer guidelines, they must communicate clearly and ensure developers understand what the changes mean for them and their customer relationships. The App Association continuously fights for improvements in these areas on behalf of its small business developer community.

Further, once a market has been appropriately defined, we urge for ACCC's antitrust analysis to turn to a determination of market power and monopoly power to inform whether a market feature has an adverse effect on competition. Market power and monopoly power are related concepts but are not the same. Market power is the seller's ability to raise prices above those that would be charged in a competitive market, while monopoly power occurs when a firm has the power to control prices and exclude competition. ACCC should distinguish the two concepts as a matter of degree, monopoly power being higher. However, a firm's mere possession of either market power or monopoly power should not be enough to find competitive harm; ACCC should demonstrate that the firm unfairly values its products resulting in harm to consumers and competitors. Demonstration of such abuse is critical to properly determining whether antitrust remedies are appropriate, and if so, to what degree. The App Association urges for ACCC's analysis to be updated to clearly define and explore both market power and monopoly power.

Platforms play an important role across a variety of economic sectors, bundling sets of services together for sellers and connecting those sellers with specific categories of buyers. Japanese antitrust policy should reflect that market power assessments should be more holistic and rely on factors beyond market share alone, and that new digital platforms illustrate that the application of traditional antitrust fact patterns to complex software platforms is ill-advised. Over-reliance on basic market share (e.g., the relative size of a user base) breakdowns wrongly equates *share* with *power*, ignoring unique attributes of multi-sided platforms such as the ability to benefit from multiple services on the same platform, a low barrier to substitution, and ease of market entry by new competitors. Such characteristics minimize the lock-in effect on users. Further, a proper antitrust analysis should also demonstrate that the monopoly power at issue is not short-lived. Such a determination will, again, be highly fact-dependent and should be comprehensive, based on rigorous and objective economic analysis. Across its digital platforms inquiry, we strongly caution ACCC and others to avoid relying on unproven allegations made by outlier opportunist companies seeking to upend the harmonious app ecosystem simply for their own company's benefit, including in current ongoing litigation.

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III. App Association Views on Data Brokers and Privacy

App Association members include leading app developers who build transparency and privacy concepts into their innovations "by design" as a matter of principle and ethics. Our members condemn the unethical or illegal sharing of sensitive financial information with third parties, particularly when it is done without the knowledge and consent of an individual. If consumers access their and their family's data—some of which are likely sensitive—through a smartphone, users should have a clear understanding of the potential uses of that data by developers. Otherwise, most users will not be aware of who has access to their information, how and why they received it, and how it is being used. The downstream consequences of using data in this way may ultimately erode a user's privacy and willingness to disclose information to his or her financial services provider. The App Association believes that it is in the best interest of the consumer/user to understand how their data is being used.

At the same time, the small business developer community the App Association represents already practices responsible and efficient data usage to solve problems identified across consumer and enterprise use cases. Since the inception of the General Data Protection Regulation (GDPR) in Europe and the subsequent adoption of similar measures around the world, our members have responded to evolving consumer expectations and enhanced market competition by meeting and, in many cases, exceeding relevant legal requirements. These efforts include the utilization of cutting-edge privacy-by-design approaches from the earliest phases of product development and the most advanced tools and methodologies available, such as differential privacy techniques.[6] Complying with GDPR and CCPA has given some of our members a competitive advantage over competitors who are not compliant and typically creates new opportunities through a thorough review of organizational processes.

The App Association appreciates and shares the ACCC's interest in protecting user privacy through its consideration of data brokers. Consumers in Australia (and around the world) rely on our members' products and services, with the expectation that our members will keep their valuable data safe and secure. The Australian government should provide a framework outlining high-level data privacy and security guardrails that addresses individual access, data collection, uses and disclosures, consent and authorization, breach mitigation procedures and consumer notice, and security practices. Such requirements should be based on demonstrated risks to consumers, with technology-neutral measures, scaled to the levels of risk presented, as means for compliance. Such guardrails should ensure that consumers are oriented to the risks of sharing their data with third parties that are not financial institutions and better equip the Federal Trade Commission to hold third parties to sound privacy and security practices.

The App Association considers third-party collecting entities to be companies that collect personal data about an individual without attaining it directly from that individual, and whose principal source of revenue is derived from processing or transferring covered data that the covered entity did not collect directly from the individuals linked or linkable to the covered data. We urge ACCC to ensure that it excludes from its definition of a "data broker" first-party collectors and those that have a "principal source of revenue" other than processing or transferring personal data.

The App Association continues to support the creation and maintenance of public, searchable, and central registries of third-party collecting entities and the information they have submitted to the registry. Within the

[6] Differential Privacy, HARVARD UNIVERSITY PRIVACY TOOLS PROJECT. https://privacytools.seas.harvard.edu/differential-privacy (last visited 17 February 2023).

registry, consumers would be able to submit a "do not collect" request to all entities the registry includes. This mechanism would provide consumers with a one-stop-shop to opt out of third-party collection and request entities to delete all covered data held about them. However ACCC defines a "data broker," we urge regulators to focus on giving consumers some data rights including correction and deletion of covered data, in addition to any third-party collecting entity-specific proposals. When an individual requests correction or deletion, the covered entity should make a reasonable attempt to notify third parties and service providers to which the individual's data may have been transferred of this request. As provided in comprehensive privacy frameworks at the state level in the United States and in GDPR, entities with direct consumer relationships must generally devolve appropriate responsibilities to service providers and third-parties separately via contractual relationships. Such a framework appropriately apportions risks and responsibilities while allowing for flexible arrangements that meet shifting contexts and consumer expectations.

IV. Conclusion

We thank the ACCC in advance for its consideration of our views.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel

Leanna Wade
Regulatory Policy Associate