



Australian Competition and Consumer Commission, *Digital Platform Services Inquiry Discussion Paper for Interim Report No 5: Updating competition and consumer law for digital platform services*

Submission in response by the ARC Centre of Excellence for Automated Decision-Making and Society, 8 April 2022

Who we are

The ARC Centre of Excellence for Automated Decision-Making and Society (ADM+S) is a cross-disciplinary, national research centre which commenced operations in mid 2020. ADM+S has been established and supported by the Australian Research Council to create the knowledge and strategies necessary for responsible, ethical, and inclusive automated decision-making. Focus areas for ADM+S research include news and media, as well as social services, health and transport. ADM+S brings together leading researchers in the humanities, social and technological sciences, together with an international network of partners and collaborators across industry, research institutions and civil society.

Summary

We welcome this opportunity to comment on the *Digital Platform Services Inquiry Discussion Paper for Interim Report No 5: Updating competition and consumer law for digital platform services*. In this submission:

1. We argue, consistent with research in ADM+S across a range of our projects, that the increasing presence of the digital platforms in Australian economic and social life means that platform business models and market structures may give rise not only to a narrow set of consumer welfare and competition concerns, but also to a broader range of personal and social harms. These broader harms are likely to be increasingly relevant to the ACCC's activities. Responding to these emerging risks will require greater co-ordination with other regulators, together with a strong consumer voice in the digital platforms space.
2. We discuss challenges arising for the Centre's research and public understanding of the impacts of platform activities from both a lack of access to data and activities by platforms that frustrate legitimate research activity. We support the need for reforms to improve transparency, and we propose public research infrastructure that will support the work of researchers, regulators, policy- makers and enhance public understanding.

We also suggest further discussions with the ACCC and other interested regulators, in which we will be able to share expertise within the Centre, and discuss further insights from research undertaken but not necessarily published. We would be very happy to continue the conversation; please contact ADM+S (adms@rmit.edu.au) for further discussions on this submission or any points raised within it.

Harms to competition and consumers arising from digital platform services

Consultation Question 1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

The digital platforms are a major site for ADM+S research. The production and circulation of research and information, and the platforms, technologies and algorithms that deliver them, are key research interests.

Social media services, like other technologies, are used both for harmful and empowering ends. Digital platforms mediate communications impacting daily life for billions of people worldwide, and they make billions of decisions each month that directly influence how individuals and businesses communicate and transact. In order to operate at this scale, platforms employ complex automated and human systems, relying on outsourced labour and machine learning that is constantly learning and changing. Individuals and businesses are deeply impacted by the decisions that platforms make to allow or prohibit certain forms of behaviour, to prioritise or derank different information, to determine the visibility of messages from businesses and individuals, and to personalise the content that is delivered to individuals.¹

Research projects across the Centre's program of work are investigating how the automated systems of the Digital Platforms work to shape the information Australians see and the services they use. ADM+S charts the impacts of those systems on people, using a range of cutting edge empirical methods. An outline of the ADM+S research program and its specific research projects is available on our website.² It includes projects investigating content moderation and political disinformation and bias,³ personalisation by search engines and advertisers,⁴ and empirically establishing a wide range of harms that occur through data collection and misuse. We would be happy to connect ACCC staff with researchers working on any projects of interest.

The Discussion Paper largely focuses on consumer welfare as the relevant harm for the ACCC's inquiry and regulatory action, to be addressed through pro-competitive reforms and some consumer protection reforms, such as a prohibition on unfair trading practices. The ACCC's approach to regulating the digital platform services markets has direct implications for a broad range of harms to people, groups and society. Platform practices and policies create or amplify gendered and other discriminatory online harms and create challenges in content moderation and have impacts on the public sphere and public discourse.

The ADM+S considers that a future regulatory framework - which we agree will be needed to supplement the CCA and ACL with respect to digital platform services - will inevitably need to recognise the broader set of individual, societal, cultural and political harms that may arise from the platforms' businesses and practices, and consider how Australia's specialist regulators can work together more effectively to take coherent and integrated action to address those harms. We note

¹ Nicolas P Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* (Cambridge University Press, 2019).

² <https://www.admscentre.org.au/research/#research-filter>

³ <https://www.admscentre.org.au/automated-content-regulation/>

⁴ <https://www.admscentre.org.au/personalisation-search-results/>; <https://www.admscentre.org.au/dark-ads-transparency-project/>

the ACCC has already gone some way to recognising harms in relation to privacy⁵ and impacts on public discourse and news via the *News Media Bargaining Code* that may be mitigated through use of ACCC powers. Competition and consumer authorities globally have gone further in identifying individual, social and discourse harms as matters for concern and action.⁶

We note the establishment of the Digital Platform Regulators Forum in March 2022 and welcome this initiative, designed to increase cooperation and information sharing between digital platform regulators across Australia, including approaches to regulation.⁷ ADM+S recognises that better regulatory outcomes could occur by way of a more richly developed network of regulators, as anticipated in the Digital Platform Regulators Forum: developing partnerships among the regulators that couple domain expertise with the necessary enforcement powers and resources. Further, we believe the inclusion of strong, broadly based consumer voices actively contributing to the consideration of regulatory reforms related to the full range of issues in the digital platforms space will be important in building public confidence in the platforms and their effective regulation.

It is beyond the scope of this submission to offer a model for a future regulatory network and the disposition of powers in which domain, or how the ACCC's market regulation may help reduce harms in broader social spheres. The ADM+S however would be well-equipped to assist the ACCC as it develops proposals for a new regulatory framework. We have particular expertise in regulatory approaches to current issues and challenges, with leading scholars such as Christine Parker, Frank Pasquale, Nic Suzor, Kimberlee Weatherall, and Karen Yeung spearheading our work as chief investigators and partner investigators on a range of projects. We have junior researchers and postdoctoral researchers deeply engaged in understanding and articulating particular impacts of platforms on Australians. We would also welcome the opportunity to meet with members of the Digital Platform Regulators Forum, and to share further insights from our current research.

Increased transparency

Consultation question

16. In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?

⁵ We note here *Australian Competition and Consumer Commission v Google LLC (No 2)* (2021) 151 ACSR 355; as well as ACCC actions against Google alleging misleading or deceptive conduct involving Google's collection and combination of consumer personal data and internet activity, and its action against Meta/Facebook for misleading consumers as to use of their personal activity data in the Onavo VPN app.

⁶ Consider, for example, the US Federal Trade Commission which is engaging generally around issues of privacy and data security (see

https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf), but also considering broader harms. The FTC for example in late 2020 issued investigative orders to nine social media and video streaming companies, requiring them to provide data on how they collect, use, and present personal information, their advertising and user engagement practices, *and how their practices affect children and teens*. The UK's Competition and Markets Authority Report, *Online platforms and digital advertising market study final report* (1 July 2020) also recognised broader social and cultural harms, especially to public discourse caused by digital platforms.

⁷ <https://www.accc.gov.au/media-release/agencies-form-digital-platform-regulators-forum>

- a. What additional information do consumers need?
- b. What additional information do business users need?
- c. What information might be required to monitor and enforce compliance with any new regulatory framework?

There is a pressing need for greater public access to data about how digital platforms impact society.

Greater transparency is urgently needed to help people better understand how the platforms work and their impacts. Digital platforms play a crucial role in mediating the ordinary interactions of Australians. Currently, consumers and businesses are at a major disadvantage when trying to understand how platforms make these decisions. One of the primary services that platforms offer is curation of massive flows of information.⁸ As coordinators of multi-sided markets, platforms have access to information about producers and consumers that provides major competitive advantages, particularly in markets where they have vertically integrated operations.⁹ Platforms are notoriously secretive about the decisions they make to rank and prioritise content (their ‘secret sauce’) and the politically sensitive role they play in shaping public attention and debate. Individuals are generally not given sufficient information about how their news and search results are ranked, how their feeds are curated, how matches are made, or how their speech is constrained or amplified. The demand for this information has led users to develop and believe folk theories and myths based on individual experience, anecdotes and leaked information.¹⁰

Greater transparency is also required for the common good. Policy-makers around the world face significant challenges in responding to the harmful uses of digital platforms,¹¹ and arguably the most acute of these is the lack of robust and independently generated evidence. New regulations are being introduced, in Australia and elsewhere, on the responsibilities of platforms to deal with hate speech and extremist content; gender-based violence, bullying and harassment; the advertisements they carry and the licence fees they pay; their response to misinformation and propaganda; their discriminatory impacts; and more. Transparency will be required to make better policy, to monitor its impacts, to ensure public policy goals are met and unintended consequences avoided or mitigated.

ADM+S researchers have direct experience in the challenges of researching the activities, and impacts, of the digital platforms. Our researchers and many others worldwide are investigating how people use digital technologies and how platforms amplify, constrain, and curate their activities. Our scholars are leading research projects on topics such as:

- the role that platforms and automated systems are playing in the response to the COVID-19 pandemic, from symptom tracking to the dissemination of (mis-)information
- How automated systems identify and categorise sexual content, the challenges faced by NGOs providing sexual health information, and how sexual data is being collected, stored, shared, and sold
- How search results are personalised and the impacts of ‘recommendation’ engines
- ‘Dark ads’ – custom targeted ads that are visible only to those who receive them

⁸ Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press, 1st edition, 2018).

⁹ Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2016) 126 *Yale Law Journal* 710.

¹⁰ Sarah Myers West, ‘Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media Platforms’ (2018) 20(11) *New Media & Society* 4366.

¹¹ Terry Flew, *Regulating Platforms* (Polity Press, 2022).

- How users experience and understand harm and safety, and how platforms enable, amplify, and respond to harm on their networks
- What role platforms have in reproducing and combating systemic inequality in the peer economy and the visibility and participation of marginalised communities

In recent years, technology companies have begun publishing ‘Transparency Reports’ that provide aggregated information about how they moderate user content and disclose personal information. This information, however, is not sufficiently granular for researchers to understand either what platforms are doing or how their services are being used and misused.¹² At the same time it has become, in general, increasingly difficult to access data relating to the operations and impact of the platforms.

Two ADM+S projects which use novel methods to provide important insights into the platforms are the Australian Search Experience and the Australian Ad Observatory.¹³ The Search Experience project addresses potential concerns about differential targeting of search results to users based on information about their preferences and activities.¹⁴ The Ad Observatory responds to ongoing concerns about the role of targeted advertising in allowing discriminatory forms of commercial messaging and predatory advertising as well as in facilitating the spread of false information. Both projects rely on a “data donation” approach that allows people to contribute data to researchers in order to provide some level of observability for platform impacts and how platform systems work. We emphasise that these projects are conducted with the greatest care for user privacy, with formal ethical approval and consistent with the National Statement on Ethical Conduct in Human Research.

Our researchers involved in these projects face challenges in accessing information through increasingly restrictive Application Programming Interfaces (APIs),¹⁵ and some platforms have threatened researchers with legal action. For example, in October of 2020, Facebook (now Meta) sent a cease and desist notice to a group of researchers at New York University who were collecting and publicly displaying political ads that appeared on the social media platform.¹⁶ The NYU group has refused to accede to Facebook’s cease and desist order. The company de-platformed the researchers involved but has not taken further legal action against the project. However, it has taken technical action, as we discovered from our conversations with the NYU researchers, and from experience with our own similar tool.

Platforms have in some cases developed increasingly sophisticated technical measures to detect and prevent third parties from accessing information in the public domain at the scale that is required for systemic analysis. The Ad Observatory research tool, for example, relies on the ability to identify the ‘sponsored’ tag on all ads in the Facebook news feed. Facebook has repeatedly worked to disguise this tag, presumably to thwart research such as ours. The company has used multiple processes of obfuscation throughout the life of our project: initially by changing character opacity, then through the use of a tag ‘aria-labelledby’, and more recently through zero-sized elements. Facebook does not remove these obfuscation techniques as it develops new ones, and as a result,

¹² Nicolas P Suzor et al, ‘What Do We Mean When We Talk About Transparency? Toward Meaningful Transparency in Commercial Content Moderation’ (2019) 13 *International Journal of Communication* 1526.

¹³ These can be viewed at the following link addresses: <https://www.admscentre.org.au/searchexperience/> and <https://www.admscentre.org.au/adobservatory/>

¹⁴ Eli Pariser, *The filter bubble: What the Internet is hiding from you* (Penguin UK, 2011).

¹⁵ Axel Bruns, ‘After the “APIcalypse”: Social Media Platforms and Their Fight against Critical Scholarly Research’ (2019) 22(11) *Information, Communication & Society* 1544.

¹⁶ Grindell, Samantha (2020). Facebook is trying to prevent NYU from examining its political ad targeting. *Business Insider* (Oct 25): <https://www.businessinsider.com/facebook-stopping-nyu-researchers-examining-political-ad-targeting-2020-10>

the barrier to entry increases for those seeking to do legitimate research. Individuals seeking to understand their own Facebook feeds, or those engaged in research without funding are thereby put at a significant disadvantage.

While some platforms have introduced programs that enable hand-selected research teams to access data for very specific purposes, these programs are often slow, not sufficiently widespread, and leave the decisions about what research can be done, and by whom, to platforms and their representatives.

Governments around the world are beginning to introduce requirements for enhanced transparency into regulations covering digital platforms. Generally speaking, these are positive developments. The key difficulty facing regulators is that it is important to ensure that transparency requirements are sufficiently granular to be useful, but do not interfere with the privacy rights of individuals. Consumer-focused schemes, like the Consumer Data Right,¹⁷ may go some of the way to improving competition. They do not, however, go far enough to help address the pressing *social* questions about how platforms mediate information environments and how they could and should respond to harmful uses of their networks. The *Santa Clara Principles on Transparency and Accountability in Content Moderation* also provide some guidance that can assist consumers to understand how their content is treated and how their information is disclosed.¹⁸ But these measures do not sufficiently address the need for high quality, granular data that researchers need to investigate some of the most pressing issues of our digital environment.

In addition to consumer- and business-facing transparency and data portability, we therefore suggest that the ACCC (and government) consider ways to encourage greater data sharing for public interest research.¹⁹ Some approaches could include:

- Ensuring that platforms are committed to enabling public interest research and refrain from threatening researchers. DIGI's recently developed *Australian Code of Practice on Disinformation and Misinformation* provides an example of such a commitment;²⁰
- Law reform to clarify that researchers face no civil or criminal liability for accessing and using data that is ordinarily available;²¹
- Ensuring that consumers are not prevented from collecting and sharing their own data (including, for example, studies that rely on data donations from users or crowdsourced data collection); and
- Encouraging the development of industry partnerships that effectively support access to data for public interest research (without limiting the kinds of research that can be undertaken or the results that can be published);
- Requiring platforms to provide a complete library of ads they serve, with details of targeting and reach.

¹⁷ <https://www.cdr.gov.au/>

¹⁸ 'Santa Clara Principles on Transparency and Accountability in Content Moderation', *Santa Clara Principles* <https://santaclaraprinciples.org/images/santa-clara-OG.png>.

¹⁹ We acknowledge that public interest research must be conducted according to standards of good research practice and research integrity.

²⁰ DiGi, 'Australian Code of Practice on Disinformation and Misinformation' (11 October 2021) <https://digi.org.au/wp-content/uploads/2021/10/Australian-Code-of-Practice-on-Disinformation-and-Misinformation-FINAL-WORD-UPDATED-OCTOBER-11-2021.pdf>.

²¹ For proposed regulations similar aims, see Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, Article 31; Platform Accountability and Consumer Transparency Act (US), S.797, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/797/text>.

We would be happy to engage in more detail with the ACCC on the drafting of appropriate transparency provisions, based on the experiences of our researchers, our knowledge of overseas developments, and discussions among our network of international researchers who research platforms in jurisdictions that are taking their own steps to address transparency questions.

Proposed National Research Infrastructure - an Australian Social Data Observatory

Data collection and analysis in the public interest requires investment in the necessary research infrastructure for studying and analysing digital platforms and heterogeneous social data. Our proposal for an 'Australian Social Data Observatory'²² (ASDO) brings together the key elements required for better understanding of digital platforms including a governance hub, synthesis capability, modelling infrastructure and pilot projects. This proposal was highlighted as a landmark initiative in the recently released 2021 National Research Infrastructure Roadmap,²³ which would build in existing capabilities across the Humanities and Social Sciences and provide a step-change in the research capabilities required to support the next wave of digital transformation. The Roadmap noted that:

*"ASDO would provide tools and resources to deliberately gather and analyse online user experience data, dramatically extending access to social media data beyond the small group of specialists who currently work in the field...Such a capability would enable researchers across HASS and science, technology, engineering and mathematics (STEM), as well as government, industry and civil society to benefit from the insights derived from social data."*²⁴ (DESE 2022, p. 70)

ASDO will build on existing infrastructure investments and the expertise of ADM+S researchers in order to develop a broad-based facility capable of bringing together the data, tools and governance required to analyse large-scale online data on critical social, health and public policy issues. Given the constraints involved in accessing large-scale social media data through commercial platforms, ASDO would provide tools and guidelines for data donation, crowdsourcing and citizen science approaches, allowing researchers to access and analyse social data from multiple platforms.

ASDO will also provide the tools needed by agencies such as ACCC, ACMA, the e-Safety Commissioner, and the new Digital Platform Regulators Forum, or researchers working with them, to model the effects of different regulatory/governance settings. We would welcome the opportunity to discuss plans for the ASDO facility with the ACCC further as we develop the project plan and requirements over the next few months, to ensure we develop the tools required to address digital platform issues over the coming decade.

Conclusion and proposed ongoing discussion

We would welcome the opportunity to share further the research undertaken by the Centre with ACCC staff involved in this review. More generally, we would welcome the opportunity to meet with the Digital Platform Regulators Forum, individually or together with other experts in digital platform regulation (and regulation more broadly). We note the statement of the Digital Platform Regulators Forum that 'Regulators ... face many of the same challenges – addressing emerging consumer harms, encouraging innovation while balancing protections, and countering the market power of these large, complex and diverse multinational entities. A critical and overarching focus is considering how

²² ADM+S, *ASDO Concept Brief* (2021), ARC Centre of Excellence for Automated Decision-Making and Society, <https://www.admscentre.org.au/ausdo-concept-brief/>

²³ DESE, 2021 National Research Infrastructure Roadmap, (2022), <https://www.dese.gov.au/national-research-infrastructure/2021-national-research-infrastructure-roadmap>

²⁴ Ibid.

competition, consumer protection, privacy, online safety and data intersect in issues that the various regulators consider.²⁵ We believe that, due to our expertise and experience as an ARC Centre of Excellence focused on the questions being considered by the ACCC, and other members of the Digital Platform Regulators Forum, we are well placed to offer support in developing this focus.

²⁵ See Agencies Form Digital Platform Regulators Forum, Media Release, 11 March 2022, <https://www.accc.gov.au/media-release/agencies-form-digital-platform-regulators-forum>.