COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW ON THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION'S PRELIMINARY REPORT ON DIGITAL PLATFORMS

February 15, 2019

The views stated in this submission are presented on behalf of the Section of Antitrust Law; they have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

The American Bar Association Section of Antitrust (the Section) commends the Australian Competition and Consumer Commission (ACCC) for providing the opportunity to comment on the ACCC's Preliminary Report on Digital Platforms (the Report).[1] Market studies can serve an important purpose in informing sound policy and enforcement by increasing a government agency's understanding of competitive dynamics and how technology and other factors may affect the evolution of competition. We accordingly applaud the ACCC's initiative in studying the markets in which digital platforms operate. As a general matter, however, the Section advises against the adoption of special rules, standards or presumptions for either a specific industry or, certainly, for specific companies, because doing so can end up unnecessarily and perversely stifling competition and innovation, particularly in dynamic internet-based industries.

This comment reflects the expertise and experience of the Section's members with competition law and economics.

EXECUTIVE SUMMARY

For the reasons set forth in detail below, the Section respectfully recommends that the ACCC:

1. Reconsider reliance on the notion of combined substantial market power.
2. Reconsider initial recommendations to adopt broad policy changes based on concerns about conduct by certain specific market participants.
3. Reconsider initial recommendations to impose requirements that would apply only to specific industry players (e.g., requiring "large digital platforms" to provide advance notice of the acquisition of any business with activities in Australia).
4. Ensure that any proposed regulations are premised on findings of specified market failures and survive a rigorous cost-benefit analysis that includes consideration of relevant economic factors such as price, output, innovation, quality and service levels.
5. Consider clarifying that conduct involving digital platforms or media will generally be subject to the same competition and consumer protection law analysis as is applied to other sectors.
6. Consider clarifying that merger review involving "big data" will be subject to the same analysis as applied to any other assets or inputs.

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[1] AUSTL. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: PRELIMINARY REPORT (Dec. 2019) [hereinafter REPORT], *available at* https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf.

7. Tether any "unfairness" principles to general competition law principles, including requiring a showing of harm to the competitive process and consumers.

8. Consider clarifying that any restrictions on data practices will balance the harms and benefits to competition and consumer protection based on applicable studies and research.

SPECIFIC RECOMMENDATIONS

Overall, the Section believes that the Report includes a number of preliminary factual and legal conclusions, as well as recommendations to impose behavioral and other remedies, that may be premature, given the dynamic innovation in these markets and the evidentiary findings to date. For example, the Report concludes that specific companies—either alone or in combination—have durable market power and are engaged in harmful conduct. However, the Report reaches these conclusions without including a fact-specific analysis. In addition, rather than focus on digital platforms in general or on particular relevant markets, the Report appears to focus primarily on specific companies. The Section respectfully recommends that the ACCC reconsider its initial recommendations to develop broad policy based on a limited examination of a small number of specific companies and recommend that the ACCC instead focus on determining whether there are widespread or systematic market failures. Such a determination is a necessary but not sufficient condition for the enactment of new economic regulation.[2] If the ACCC deems it necessary to reach conclusions about specific companies, we recommend it conduct case-by-case, fact-specific analyses in a manner that provides the parties with due process of law and full transparency so that the public can review and understand the ACCC's analysis.

I. Substantial Market Power

Based largely upon market shares, the Report concludes that specific companies, either alone or combined, possess substantial market power in a number of markets. The Section respectfully points out that reliance on market shares alone (even within properly defined markets) is likely to invite errors when attempting to identify substantial market power. In the United States, there has been a movement away from focusing upon market definition and market shares to analyze actual competitive effects. For example, the 2010 *Horizontal Merger Guidelines* make clear that the agencies no longer rely solely on market shares to predict whether a firm possesses durable market power or is likely to be able to sustain significant non-transitory price increases. This shift in antitrust analysis is consistent with modern economics.[3] Relatedly, the lines between markets may not be clearly delineated in sectors reliant on innovative and rapidly evolving technology (such as in the markets in which online platforms compete).

Additionally, the economic literature cautions against antitrust enforcement actions applied to platforms based solely on their relative size and user base. Network effects, innate in platforms, have been an important consideration when analyzing potential market power.[4] Recent academic work, however, suggests that network effects are not always a guarantor of substantial market power, as had been initially feared by antitrust authorities.[5] First, the literature suggests that, due

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[2] *See, e.g.*, Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 1-22 (1969); Dave D. Haddock, *Irrelevant Externality Angst*, 19 J. INTERDISC. ECON. 3 (2007); Thomas W. Hazlett & Joshua D. Wright, *The Law and Economics of Network Neutrality*, 45 IND. L. REV. 767, 798 (2012).

[3] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), *available at* https://www.justice.gov/atr/file/810276/download.

[4] David S. Evans & Richard Schmalensee, *Network Effects: March to the Evidence, Not to the Slogans*, CPI ANTITRUST CHRONICLE (Aug. 2017), *available at* https://www.competitionpolicyinternational.com/wp-content/uploads/2017/09/CPI-Evans-Schmalensee.pdf; Catherine Tucker, N*etwork Effects and Market Power: What Have We Learned in the Last Decade?*, 32(2) ANTITRUST 77 (2018).

[5] Tucker, *supra* note 4, at 73-78.

to the rapid changes in technology, and the fact that platform businesses may be completely viral without relying on any one type of hardware, users may have low switching costs in a given case.[6] Moreover, the instability of network effects may lead users to choose multiple platforms instead of sticking to a single platform. For example, it is common for riders and drivers to use both Uber and Lyft. Such "multihoming" increases competitive pressures on platforms.[7] Finally, platform congestion may lead users to switch to other less congested platforms, where available and feasible, thereby potentially providing an opportunity for new entry.[8]

With respect to the Report's conclusion that certain companies *combined* possess substantial market power, we recommend against the adoption or reliance on collective market power theories. One concern is that regulation based on theories of combined substantial market power may harm as opposed to promote competition. At the very least, we recommend that these portions of the report be revised to require concerted action as a joint monopoly, which is the approach generally required by the European Commission.

II. Anticompetitive Conduct

The Report includes conclusions that certain conduct has resulted in harm to the competitive process and consumers. For example, the Report appears to conclude that certain vertically-integrated platforms are harming competition by, among other things, the use of differential (or discriminatory) pricing. As a general principle, flexibility in pricing is crucial to competition in any market-based economy. Differential pricing does not necessarily reflect a lack of competition or anticompetitive conduct and is generally output-enhancing.[9] Therefore, the existence (or instances) of differential pricing in a market may be an indication of robust competition. In particular, price differentiation based on consumer demand is often beneficial for competition and consumers. It is widely accepted under competition law principles that distinct supply and demand conditions may result in the existence of separate geographic markets in which different prices are to be expected. Differing prices may be a response not only to different costs but also to other market conditions such as different supply or demand levels, consumer demographics, culture, local competition, regulatory risk or requirements, and distribution structures.[10] Allowing companies to set different prices taking into account the diversity of conditions in different countries or geographic markets is generally procompetitive.[11]

The U.S. experience with the Robinson-Patman Act, which prohibits certain forms of price discrimination, shows that regulation of price discrimination "has had the unintended effect of limiting the extent of discounting generally."[12] Indeed, the Antitrust Modernization Commission, which recommended repeal of this U.S. law, asserted that it inhibits entry and "requires price rigidity that imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence."[13]

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6 *Id.*

7 *Id.*

8 *Id.*

9 *See, e.g.,*OECD, *Personalised Pricing in the Digital Era–Note by the United States*, DAF/COMP/WD(2018)140 (Nov. 21, 2018), *available at* https://one.oecd.org/document/DAF/COMP/WD(2018)140/en/pdf.

10 *See , Cross-Border Price Regulation: Anti-Competition Policy?: Report of the C.D. Howe Institute Competition Policy Council*, THE VERDICT (C.D. Howe Inst.), May 8, 2014, at 3, *available at* https://www.cdhowe.org/sites/default/files/attachments/other-research/pdf//Verdict_CPC_May_2014.pdf.

11 James C. Cooper, Luke Froeb, Daniel P. O'Brien & Steven Tschantz, *Does Price Discrimination Intensify Competition? Implications for Antitrust*, 72 ANTITRUST L.J. 327, 341 (2005).

12 ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 311 (Apr. 2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

13 *Id.* at 320.

III. Behavioral Remedies

The Report recommends the imposition of a number of behavioral remedies exclusively on digital platform companies. These include requiring "large" digital platforms to provide the ACCC with advance notice of acquisitions of any business with activities in Australia.[14] We respectfully recommend against the imposition of behavioral remedies in the absence of specific investigations. Such remedies are more appropriate in the context of an investigation after the ACCC has made specific findings and the investigated party has had an opportunity to provide a defense.

IV. Regulatory Recommendations

The Report recommends a number of new regulations to monitor and provide oversight for digital platforms. As an initial matter, the Section cautions that *ex-ante* regulation may jeopardize efficiencies and other procompetitive benefits of platforms by imposing burdens and regulations that may lack the flexibility and predictability of existing competition and consumer protection laws. *Ex ante* regulation, in general, carries a greater likelihood of error costs and, for this reason, is generally associated with lower levels of innovation than an *ex post* enforcement policy.

The basis for economic regulation rests on the need to correct an inefficient allocation of resources in a particular industry. Thus, before any regulation or oversight authority is created, a careful study should be done to identify specific market failures or misallocations. Moreover, even if a market imperfection is identified, careful attention needs to be given as to whether a proposed regulatory solution sufficiently corrects it and has an overall positive effect as determined by a rigorous economic cost-benefit analysis, including consideration of potential unintended consequences.[15] In addition, we note that numerous companies are already working on private ordering solutions to address perceived concerns. For example, Airbnb self-regulates by limiting hosts to a "one host, one home" policy in various places such as New York City and San Francisco, a policy that is designed to mitigate the problems of landlords creating housing shortages by using homes as *de facto* hotels. A number of digital-education companies, including Google and Apple, signed a student privacy pledge organized by a trade association.[16] Google, Facebook, Twitter, and Microsoft joined together to create the Data Transfer Project, which has created a data portability platform to improve the ability for consumers to easily move between digital providers.[17] Google recently stopped its First Click Free policy in response to publisher concerns.[18] Twitter, Google, and Facebook all made voluntary changes to their policies to increase transparency around political ads.

In addition, it is important to keep in mind that online intermediation services connect businesses and consumers and must balance the needs of these disparate groups. In other words, it is important to consider the demand interdependencies of the two sides of a platform (i.e., "indirect network effects") when analyzing the effects of contemplated regulation. These network effects may act as a safeguard against harmful activities of a platform in relation to either side of that platform. Network effects inherent to platforms imply that actions that would harm one side of a platform, such as price increases, can also reduce platform attractiveness to the other side of the

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[14] *See* REPORT, *supra* note 1, at 10 (Preliminary Recommendations 1-2).

[15] *See* Joshua D. Wright, Fed. Trade Comm'n, Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC, Remarks at the Big Ideas about Information Lecture 9 (Apr. 2, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf. *See also* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 1-22 (1969).

[16] STUDENT PRIVACY PLEDGE, https://studentprivacypledge.org/.

[17] DATA TRANSFER PROJECT, https://datatransferproject.dev/.

[18] Greg Sterling, *Google: First Click Free is Over, Being Replaced by Flexible Sampling*, SEARCH ENGINE LAND (Oct. 2, 2017), https://searchengineland.com/google-first-click-free-replaced-flexible-sampling-283667.

platform if the actions cause participation on the harmed side of the platform to drop. Similarly, regulatory changes on one side of a platform will impact market participants on the other side of a platform, and thus the "net" effect on all groups engaging with the platform should be considered. For example, compliance with new regulations would result in increased costs for online platforms, some of which will be passed on to businesses and consumers using these services. This may in turn result in fewer consumers and businesses using these platforms.

The use of *ex-ante* cross-sector regulation can be particularly problematic in the context of technology markets. In light of the wide variety of operators and products involved across platforms, there is significant difficulty in attempting to designate particular practices as "unfair" or "anticompetitive" by definition, as the wholesale condemnation of broad categories of conduct does not adequately account for the "circumstances, details, and logic of a restraint."[19]

As a general matter, the activities of online platforms are often not situated differently from other avenues to market—such as traditional media, retailers or wholesalers—merely because they involve software and internet content. As such, online platforms remain equally subject to the well-established competition laws. Indeed, if anything, the online nature of the service increases transparency into some aspects of platform operators' practices which, in turn, increases the ability of market participants and competition authorities to detect anticompetitive behavior in a timely manner. In a competitive market, we should expect that successful online intermediation services would offer a competitive mix of prices and terms to each group of participants. The fact that some providers may offer less generous terms of access than others does not necessarily imply a market failure. Instead, it could be part of a competitive dynamic in which providers compete by offering differentiated services to each group of platform participants.

The contemplated regulations would limit the ways in which online intermediation services can lawfully compete with each other and with more traditional competitors. The "rules" of a platform, whether related to an internal complaint-handling system, provisions for dispute resolution, or even access to data, are means of competition. Regulatory intervention that applies only to certain types of competitors limits dimensions of competition and runs the risk of adversely affecting emerging business models that deliver attractive offerings to consumers. This harm would be felt not only by online intermediation services but also by businesses that will not reap the benefits of this innovation. At the same time, firms employing other business models will face less competitive pressure from online intermediation services, potentially dampening their own competitive vigor.

Lastly, we note the risk that regulation will advantage large incumbents at the expense of smaller competitors and potential new entrants. For example, increased costs and complexity in managing online platforms will tend to increase entry barriers and entrench incumbents. Large incumbents can often absorb regulatory compliance costs more effectively than new entrants. Regulation that protects incumbents will tend to decrease competition. As former Federal Trade Commission Commissioner Julie Brill noted, "competition law frowns on activities that make entry in a market more difficult."[20]

V. "Unfairness"

Preliminary Recommendation 11 (and its accompanying Box 5.25) contemplates prohibiting "unfair contract terms."[21] The Section respectfully recommends that any prohibitions

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[19] California Dental Ass'n v. F.T.C., 526 US 756, 781 (1999).

[20] Julie Brill, *Competition and Consumer Protection: Strange Bedfellows or Best Friends?*, ANTITRUST SOURCE, Dec. 2010, at 4, *available at* https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Brill12_21f.authcheckdam.pdf.

[21] *See* REPORT, *supra* note 1, at 237-39.

on unfairness be tethered to traditional competition law principles, namely, requiring an effects-based analysis and a showing of harm to the competitive process, as opposed to merely harm to rivals.

VI. Merger Review Involving "Big Data"

The value consumers place on privacy varies both across the population and with context. For example, some people feel no intrusions from collection of their online browsing habits (some prefer it because they prefer targeted ads that better match their interests), while others do. The same people who care little about online tracking, however, may derive great value from keeping details about their health conditions, real time location, or children private.[22]

There is an inherent tradeoff when regulating data flows. While such regulations increase consumer privacy protections, they also inhibit firms' ability to collect and use data, potentially reducing consumer welfare. In light of the recent explosion of the "Internet of Things" and big data, restrictions on the collection and use of data can deprive society of benefits outside of the commercial context, such as discovering more effective medical treatments, policing strategies, or farming techniques, and therefore making it crucial that any regulation in this area should be based on sound economics. Specifically, regulators could consider whether increased privacy protection benefits to consumers outweigh the attendant costs, including any reduction in consumer welfare due to chilled innovation. This type of an approach seeks to both minimize the risk of regulators relying on subjective notions of privacy and provide more legal certainty, while avoiding policies that, although facially appealing, could be detrimental to both consumers and competition.[23]

The Section urges against the use of competition law to address pure privacy issues and submit that consumer protection or privacy laws are the appropriate tools. Yet, competition in data markets and over privacy protections should not be ignored. In the context of investigations of privacy-related issues, regulators should be cautious about relying on survey data ("stated preference") rather than the actual tradeoffs made by consumers ("revealed preference").[24] For example, while survey data show that consumers care about privacy, revealed preferences suggest their stated concerns are not always consistent with their actual practice.[25] Consumers increasingly participate in online activities that reveal personal data to known and unknown third parties—the percentage of online adults engaging in social media rose from eight percent in 2005 to seventy-two percent in 2013, and the health tracking market has exploded in recent years.[26] Although marketplace options exist for those who are privacy-sensitive, to date there appears to be minimal use of these tools; few people opt-out of online tracking or adopt privacy-protecting technology, like the TOR browser or searching via Duck, Duck, Go!.[27] Another factor to consider is whether there is competition among providers (e.g., browsers or search engines) with respect to privacy terms (and if not, why not), and/or whether consumer behavior changes in relation to varying levels

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[22] *See* James C. Cooper, Douglas H. Ginsburg, Bruce H. Kobayashi, Koren W. Wong-Ervin & Joshua D. Wright, *Problems with the European Commission's Platform Survey and Lessons Learned from the Economics of Multi-Sided Platforms and Privacy*, CPI EUR. COLUMN (Jan. 2015), *available at* www.competitionpolicyinternational.com/wp-content/uploads/2016/01/Europe-Column-January-Full1.pdf.

[23] *Id.* at 4.

[24] *Id.*

[25] Mary Madden & Lee Rainie, *Americans' Attitudes About Privacy, Security and Surveillance*, PEW RESEARCH CTR. (May 20, 2015), *available at* www.pewinternet.org/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/ (sixty-five percent of respondents say that "controlling *what* information is collected about [you]" is "very important.").

[26] Joanna Brenner & Aaron Smith, *72% of Online Adults are Social Networking Site Users*, PEW RESEARCH CTR. (Aug. 5, 2013), *available at* www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/; Susannah Fox, *The Self-Tracking Data Explosion*, PEW RESEARCH CTR. (June 4, 2013), *available at* www.pewinternet.org/2013/06/04/the-self-tracking-data-explosion/.

[27] *See* Allen P. Grunes & Maurice E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, ANTITRUST SOURCE, Apr. 2015, at 8-9, *available at* www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr15_grunes_4_22f.authcheckdam.pdf.

of privacy protection. Indeed, a recent survey of the privacy literature concludes that the adoption of privacy enhancing technologies has lagged substantially behind the use of information sharing technologies.[28]

With respect to competition analysis, the Section submits that data is an asset that should not be treated any differently from any other asset that may be analyzed as part of the review of any merger, except perhaps for a greater likelihood that the industry in which the asset is used will be characterized by dynamic competition. In reviewing the Facebook/WhatsApp transaction, the European Commission (EC) analyzed whether the merger would "materially strengthen Facebook's position in the provision of online advertising services as a result of the increased amount of data which will come under Facebook's control," including whether "post-Transaction Facebook would integrate its social networking platform and consumer communications app with WhatsApp."[29] The EC acknowledged Facebook's potential ability to do so but considered whether Facebook's collection of user data from WhatsApp for Facebook would "prompt some users to switch to different consumer communications apps that they perceive as less intrusive."[30] The EC also acknowledged that there would unlikely be harm to competition because "there are currently a significant number of market participants that collect user data alongside Facebook" and "regardless of whether the merged entity will start using WhatsApp user data to improve targeted advertising on Facebook's social network, there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control."[31]

CONCLUSION

We appreciate the opportunity to comment and welcome the opportunity to discuss with the ACCC any comments or questions it may have.

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[28] Alessandro Acquisti, Curtis R. Taylor & Liad Wagman, *The Economics of Privacy*, 54 J. ECON. LITERATURE 442 (2016). Researchers who have attempted to measure revealed preferences tend to find that consumers would be willing to accept small discounts and purchase recommendations in exchange for personal data, and that they exhibit little willingness to pay to for protection from telemarketers. *See* Dan Cvrecek, Marek Kumpost, Vashek Matyas & George Danezis, A Study on the Value of Location Privacy, Proceedings of the 5th ACM Workshop on Privacy in the Electronic Society (2006); Hal R.Varian, Fredrik Wallenburg & Glenn Woroch, Who Signed Up for the Do Not Call List? (June 15, 2004) (unpublished manuscript), http://eml.berkeley.edu/~woroch/do-not-call.pdf (2004); Ivan P. L. Png, On the Value of Privacy from Telemarketing: Evidence from the "Do Not Call' Registry (June 2007) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000533.

[29] Case COMP/M.7217—Facebook/WhatsApp, Comm'n Decision, ¶ 184 (Oct. 3, 2014), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

[30] *Id*. ¶ 186.

[31] *Id*. ¶¶ 188-89.