



Submission to the ACCC's *Digital Platform Services Inquiry* Discussion Paper

Centre for AI and Digital Ethics and Melbourne Law School

2 April 2022

Link to the ACCC's full report: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2022-interim-report>

### The Discussion Paper

In this report, the ACCC is concerned about the rapidly growing influence of digital platform services. Specifically, the ACCC foregrounds the potential harms to competition and consumers engendered by the massive market power and social reach possessed by major tech firms. Framing its discussion around the already existent Australian Consumer Law (ACL) and Competition and Consumer Act (CCA), the ACCC considers the measures necessary to protect consumers and ensure that the tech industry remains competitive and a source of innovation. Specifically, the ACCC is interested in:

- Whether there is a need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services.
- If reform is needed, the options for regulatory reform. The discussion paper includes a list of specific questions for stakeholders about these options.

### CAIDE Response

Our response focuses on the consumer protection aspects of the discussion paper, rather than competition law, although we begin with a few observations at the outset.

### Chapter 5: Harms to competition and consumers arising from digital platform services

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

##### *Market based issues*

Digital platforms services offer a wealth of benefits to Australian consumers, and in many cases are offered at little to cost. The benefits are particularly acute with respect to core communications technologies such as social messaging, marketplaces, content delivery and hosting, and information retrieval. However, markets for several services are consolidated among a limited number of players. While the risks inherent in consolidation are in many cases specific to a given market, the following are emerging risks of particular importance to digital platforms:

1. Self-preferencing: this is when a company that spans multiple lines of business uses its dominance in one line to steer customers towards its other lines-the behaviour at the centre of much recent debate. For example, using its dominance in the mobile device market, Apple may set Safari as a default and give it unique access to system functionality within iOS. Such behaviour by Apple likely drives traffic away from competitors such as Firefox and towards Apple's own offering, reducing market competition.<sup>1</sup>
2. Killer acquisitions: Australia is fortunate to be home to a growing start-up scene that promotes job-growth and domestic innovation. When Australian firms compete with large tech firms, there is a growing body of evidence that suggests the larger firm may engage in a 'killer acquisition' -<sup>2</sup> an acquisition of the smaller firm in which the larger firm discontinues the smaller product.
3. Network-effects and Switching Costs: A large body of academic and non-academic literature highlights the potential for network-effects on certain digital platforms to create switching costs that impair competition. Most commonly, these studies examine social networks and the challenges faced by new market entrants.
4. Regulatory Avoidance: Large multinational tech firms often evade consumer regulation by employing a strategy of paying monetary costs of regulatory non-compliance while simultaneously acting to supplant incumbent services that are compliant. This is apparent in the regulatory approaches of firms such as Uber and Airbnb - both of whom pursued unusually aggressive regulatory strategies. Alternately, firms may also evade regulation by retaliating against consumers when threatened by regulation, as did Facebook in the face of recent legislation requiring that they bargain with Australian news media. This presents a strategic risk to the Australian regulatory landscape by limiting the ability of our regulators and legislators to address misbehaviour and market abuse by large tech platforms. Further, it puts compliant firms at an unfair disadvantage and reduces their competitiveness in the market.
5. Predatory Pricing: Digital platform services with large capital reserves can undercut local competition by reducing prices below competitive levels. This drives the competition (often smaller domestic businesses) out of the market and in the long run may result in higher prices paid by the consumer. In the local market, Uber is an exemplar of this behaviour - accused of using capital from VCs to charge below the marginal cost for transport services, impairing the ability of taxi services to compete.

A comprehensive approach to digital platform regulation in Australia should carefully evaluate the impact of *each* of these risk factors and weigh them against the benefits from lighter-touch regulatory approaches.

## **Chapter 6: Competition and consumer protection law enforcement in Australia**

### ***2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?***

Digital platform services raise new challenges for consumers, including relating to data collection and use, and the new personalised forms of marketing and advertising. The importance of effective regulation in this context cannot be overstated. Consumer cannot just walk away from social media, as it provides a central means of communication about work, leisure and social networks. This essential

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<sup>1</sup> See, eg, F Marty, "Competition and regulatory challenges in digital markets: How to tackle the issue of self-preferencing?" (Groupe de REcherche en Droit, Economie, Gestion (GREDEG CNRS), Université Côte d'Azur, France)

<sup>2</sup> See, eg, Cunningham et al., 'Killer Acquisitions', 2021, Vol. 129 No. 3, *Journal of Political Economy*, 649

character of social media through digital platforms should be met by proportionate statutory safeguards for consumers' rights and interests.

The prohibition on misleading conduct has been successfully used by the ACCC to prompt greater transparency in data collection practices and use,<sup>3</sup> and in potentially greater responsibility by digital platforms for misleading advertising.<sup>4</sup> But the prohibition is limited to precluding misleading conduct, rather than promoting best practice (for example in communication strategies and transparency) or even ruling out unfair or manipulative practices. This may mean the prohibition has difficulty targeting the underlying harms, which are confusing, nudging and manipulating consumer choice, and that actions must generally be formulated in specific terms, relating to specific breaches. Accordingly, we consider there is a case for measures designed to better respond to information asymmetries, consumer inexperience and platform manipulative conduct, especially by virtue of the use of choice architecture.

We support, as set out further below, specific regulatory initiatives designed to address consumer confusion or manipulation in respect to privacy and other significant policies in interacting with online platforms. Use of standard disclosure practice, symbols and interfaces would go some way to better empowering consumers.

We further suggest there is scope for a positive independent obligation of transparency in communicating with consumers, not merely as an element in the unfair terms law, as found in the UK.<sup>5</sup> Such a provision would support specific disclosure measures in response to the use of choice architecture and dark patterns – which fall foul of the core obligation of transparency. We note that a robust interpretation of transparency means it should be scaled to the forum in which information is being presented. Therefore online transparency demands different communication strategies from firms than communication in print.<sup>6</sup>

Measures aimed at greater transparency in this field are useful. But should not distract attention from the fundamental information asymmetries and the lack of time or capacity on the part of consumers to scrutinise all online interactions for the 'fairness' of the deal. The hurdles for consumers doing this are significant.<sup>7</sup>

Accordingly, we also support substantive measures to require platforms to take responsibility for their dealings with consumers, and promote fair and honest practices. These include robust enforcement of

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<sup>3</sup> Paterson, Jeannie Marie, and Bant, Elise, et al. "Australian Competition and Consumer Commission v Google: Detering misleading conduct in digital privacy policies". *Communications Law - Journal of Computer, Media and Telecommunications Law*, vol.26,no.3, 2021, pp. 136-148; Paterson, Jeannie, and Bant, Elise 2021. "Privacy erosion by design: why the Federal Court should throw the book at Google over location data tracking."

<sup>4</sup> Liam Harding, Jeannie Paterson, and Elise Bant, 'ACCC v Big Tech: Round 10 and Counting' *Pursuit*, 25 March 2022: <https://pursuit.unimelb.edu.au/articles/accc-vs-big-tech-round-10-and-counting>

<sup>5</sup> Consumer Rights Act: 68 Requirement for transparency

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

<sup>6</sup> Paterson, Jeannie 2011. "Consumer Contracting in the Age of the Digital Natives." *Journal of Contract Law* 27, no. 2: 152-170.

<sup>7</sup> Paterson, JM, Chang, S, Cheong, M, Culnane, C, Dreyfus, S, and McKay, D 2021. "The Hidden Harms of Targeted Advertising by Algorithm and Interventions from the Consumer Protection Toolkit." *International Journal on Consumer Law and Practice* 9 1-24.

the unfair contract terms provisions in the ACL as applied to the context of platform services. In particular, we support a prohibition on unfair trading to act as a 'safety net' catching other forms of unfair conduct.<sup>8</sup>

#### **Chapter 7: Regulatory tools to implement potential reform**

***4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?***

- a) prohibitions and obligations contained in legislation*
- b) the development of code(s) of practice*
- c) the conferral of rule-making powers on a regulatory authority*
- d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm*
- e) the introduction of a third-party access regime, and*
- f) any other approaches not mentioned in chapter 7.*

Key legal principles and rules should be contained in legislation. There is sometimes a case for more specific requirements to be found in regulation. Codes can be useful in articulating the expectations of particular industries. Overall the use of multiple overlapping legislative instruments can create confusion, duplication and reduce the overall coherence and therefore impact of the law.

***5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?***

It is highly desirable to reduce compliance costs and increase the potential of coordinated cross jurisdictional regulatory action for new law in this area where possible to be consistent with that developed overseas.

#### **Chapter 8: Potential New Rules and Measures**

##### ***Improved consumer protection***

***6. What additional measures are necessary or desirable to adequately protect consumers against:***

- a) the use of dark patterns online*
- b) scams, harmful content, or malicious and exploitative apps?*

##### ***Dark Patterns***

See also our comments above. While we support the maintenance of the commitment in the ACL to principle-based prohibitions applying generally, we recognise a case for specific regulation targeting

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<sup>8</sup> Paterson, JM, and Bant, E 2020. "Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online." *JOURNAL OF CONSUMER POLICY* 44, no. 1: 1-19. doi:10.1007/s10603-020-09467-9

dark patterns in online contexts. Models might include regulations under California Consumer Privacy Act, designed to target dark patterns (and from 2023 more extensive regulation under the California Privacy Rights Act). These specific reforms might include bans on common dark pattern techniques:

- confusing language, such as double negatives
- requiring users to click-through unnecessary information before cancelling a service
- and overreaching and confusing privacy policies

as well as promoting standardised templates and interfaces.

With regards to when a consumer wishes to exercise specific privacy and other related consumer rights on digital platforms, Australia should encode a presumption that logging into a service constitutes sufficient proof of a user's identity. An exception should be available for measures reasonably necessary to ensure the security of the platform and in suspected cases of account theft. This measure is needed to mitigate the risks posed by current platform policies in which platforms unnecessarily request and store sensitive information and documents - which inevitably leak.<sup>9</sup>

### *Scams*

In relation to scams we note with interest the new action by the ACCC to hold Meta responsible for scam advisements and promotions appearing on its Facebook platform.<sup>10</sup>

### *Fairer dealings with business users*

***15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?***

We support an industry ombudsman model for consumer (and small business) dispute resolution. Ombudsman schemes are an accessible and effective way of supporting individuals to assert their rights and protect their interests in respect to personal data in circumstances where they are unlikely to have the resources to pursue a matter in court. A good model for such a service would be the Australian Financial Complaints Authority.<sup>11</sup> Ombudsman services typically offer both mediation and an inquisitorial model in resolving disputes which addresses the stark inequality of resources and experience as between individual complainants and firms.

An industry funded ombudsman tasked with resolving individual complaints against digital platforms would leave the ACCC/OAIC to focus on disciplining the market and privacy policy respectively. The work of the ombudsman would complement that of the OAIC, particularly if that ombudsman was subject to an obligation to report systematic contraventions of the ACL/Privacy Act.<sup>12</sup>

### *Increased transparency*

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<sup>9</sup> See Martino et al, Personal Information Leakage by Abusing the GDPR Right of Access, and also see James Pavur and Casey Knerr. *G DPArrrrr: Using Privacy Laws to Steal Identities*. Black Hat USA 2019).

<sup>10</sup> Liam Harding, Jeannie Paterson, and Elise Bant, 'ACCC v Big Tech: Round 10 and Counting' *Pursuit*, 25 March 2022: <https://pursuit.unimelb.edu.au/articles/accc-vs-big-tech-round-10-and-counting>.

<sup>11</sup> See, eg, discussion of the Australian Financial Complaints Authority in Bolitho, H., Howell, N. and Paterson, J 2020. Duggan & Lanyon's Consumer Credit Law, 2 edn, LexisNexis Butterworths, ch 22.

<sup>12</sup> As is the case with AFCA.

**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?**

- 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?

Transparency is important in any digital service, but particular those relying on the use of what is sometimes called ‘AI’, embracing uses of software, algorithms, data analytics or machine learning to make decisions, predictions or recommendations. Transparency in relation to AI products is not merely a matter of disclosing the detail of the algorithms providing the service, although at times this may be useful. Algorithmic transparency may be viewed at a more general level, in terms of the technology being used, its efficacy in performing its allocated tasks, and the steps that should be taken by those relying on the system to ensure its efficacy and to safeguard the interests of those using it. Transparency in this sense is closely associated with initiatives in explainable AI. The possibility of explainable AI has received considerable attention in literature on AI ethics and in technical strategies for embodying these ethical demands.<sup>13</sup> Again, explanations in this sense do not lie in the details of code or algorithms. Rather AI explanations should be tailored towards the information needs of the recipient.

Transparency initiatives may work at a number of levels. They may assist in discouraging consumers from unwarranted reliance on untrustworthy applications. Transparency also provide a stronger basis for regulators, litigators, and consumer advocates to more effectively monitor the outputs from AI systems in consumer markets. The demands of transparency may even prompt better governance and oversight by developers and firms in their use and promotion of such technologies.<sup>14</sup>

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<sup>13</sup> Often linked to transparency: see Select Committee on Artificial Intelligence, *AI in the UK: Ready, Willing and Able?* (House of Lords, Sessions 2017–2019) 40. See also discussion of the relationship between explainability and transparency in Australian Human Rights Commission, *Human Rights and Technology* (Discussion Paper, December 2019) 75.

<sup>14</sup> See further Jeannie Paterson ‘Misleading AI’ (forthcoming) Loyola University Chicago School of Law Consumer Law Review.