



U.S. CHAMBER OF COMMERCE

February 14, 2019

Australia Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

Re: Response to Preliminary Report in the ACCC's Digital Platform Inquiry

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions. The Chamber's members have substantial trade and investment interests in Australia. In fact, American companies have invested more than \$630 billion in Australia, accounting for nearly one-quarter of all foreign direct investment, and far outpacing investors from any other country.

The Chamber is pleased to submit these comments to the Australian Competition and Consumer Commission ("ACCC") in response to its December 2018 Digital Platforms Inquiry Preliminary Report ("Preliminary Report"). The Chamber submits this response because it is interested in maintaining and encouraging innovations that benefit consumers. Most importantly, the Chamber believes that the role of antitrust plays an important role to the largest extent possible in ensuring market forces govern the economy in lieu of regulation. With these priorities in mind we offer these comments.

Competition Law Should Remain Focused on the Consumer Welfare Standard

We agree with ACCC Chairman Rod Simms when he recently stated that there has been a decades-long global consensus among the antitrust community that competition law should promote the consumer welfare standard.¹ Competition law

¹ ACCC, *Competition Law Should Remain Focused on Consumer Welfare* (29 Nov. 2018), <https://www.accc.gov.au/media-release/competition-law-should-remain-focused-on-consumer-welfare>, ("For the last few decades there has been a broad consensus among those in the antitrust community around the world that competition law should promote some concept of 'consumer welfare'; that competition law is primarily about making markets work for consumers."); see also Joaquín Almunia, *Competition and Consumers: The Future of EU Competition Policy*, Speech at European Competition Day, Madrid, 12 May 2010,

should not, as some have suggested, be used as a tool to address broader social policy issues (e.g., job creation, income disparity), or to promote the interests of competitors or other third-parties over consumers. According to Chairman Simms, “[I]t is inadvisable and counterproductive to import these [broader social policy] considerations into the core of competition analysis and enforcement. Competition law and policy should be first and foremost about protecting and promoting competition for the welfare of consumers.”²

However, our overarching concern with the Preliminary Report is that it makes many recommendations that extend beyond competition law and does so by borrowing concepts from competition law such as relevant markets and market power to justify actions that are more appropriately social policy considerations.³ The Preliminary Report correctly points out that “Australian law does not prohibit a firm from possessing a substantial degree of market power. Nor does it prohibit a firm with a substantial degree of market power from ‘out-competing’ its rivals by using superior skills and efficiency to win customers at the expense of firms that are less skillful or less efficient.”⁴ Further, the report appropriately recognizes that conduct is only anticompetitive if it “has the purpose or effect of substantially lessening competition.”⁵

These points are important from a competition perspective and are overshadowed as most of the Preliminary Report recommendations makes judgements about the “need for regulation” based on ill-defined markets and assumptions of market power. These recommendations have little connection to the consumer welfare standard or Australian competition law. While the Chamber understands the ACCC was asked by the government to conduct this investigation, we are troubled by the fact that the Preliminary Report has co-mingled competition-styled concepts with other social policy objectives in putting forward many of its recommendations. While many of the issues raised in the Preliminary Report are worthy of debate, a competition agency should, to the greatest extent possible, not be the catalyst for this debate. As a result, the Chamber would ask that the ACCC final report acknowledge the limited role competition enforcement plays in guiding social policy considerations. Further, we

http://ec.europa.eu/competition/speeches/index_speeches_by_the_commissioner.html (“Competition policy is a tool at the service of consumers. Consumer welfare is at the heart of our policy and its achievement drives our priorities and guides our decisions.”)

² *Id.*

³ See, e.g., Preliminary Report Recommendations 4 through 11.

⁴ Preliminary Report at 5.

⁵ ACCC, *Guidelines on Misuse of Market Power*, (Aug. 2018) at 3, available at <https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf>.

would also suggest the ACCC insert a note of caution about whatever regulatory action the government might take.

After all regulation often creates public-sector restraints on trade that generate anti-competitive effects that harm consumer welfare. They also can be subject to capture, cementing the role of dominant players in the market as significant regulatory compliance burdens can act as a barrier to entry. These concerns over regulatory approaches do align with the consumer welfare standard the ACCC is charged with safeguarding and the final report would be well-served if the ACCC inserted its competition advocacy voice to bring a bit of caution and balance to its non-competition recommendations.

The Preliminary Report Competition Related Recommendations

The first three recommendations the Preliminary Report makes are clearly related to the remit of the competition enforcement authority of the ACCC. Recommendation 1 suggests an update to Australia's merger law. Our reading of this recommendation is that it largely attempts to codify the current practices of the ACCC. However, the Chamber would recommend that if these changes are made in statute, the reference to consideration around the "amount and nature of data" must be clearly tethered to the consumer welfare standard as to prevent non-competition concerns around data from entering merger review analysis. The Preliminary report does not make this clear in its recommendation and we suggest that the final report correct for the open-ended nature in which this recommendation could otherwise be read.

Recommendation 2, which seeks to move Australia to establish a pre-merger notification regime, is consistent with many other jurisdictions, including the United States. The Chamber appreciates the recommendation identifies the need for an appropriate local nexus, however, the recommendation as drafted suggests such a regime would target specific companies and not be applied on a more objective basis. The Chamber suggest that the recommendation remove any discriminatory company specific bias.

Finally, Recommendation 3 speaks to competition remedies deployed in Europe in several high-profile cases. The Chamber is skeptical of these remedies, particularly when they are combined with large fines, as they fail to recognize preloaded offering can be a convenience for consumers and the anti-competitive harm faced from switching costs seems low in an increasingly sophisticated world that routinely downloads competing applications at the touch of a few clicks.

Conclusion

The Chamber appreciates the ACCC’s willingness to engage with stakeholders by publishing a Preliminary Report and seeking feedback before making final recommendations. We encourage the ACCC to carefully examine its preliminary recommendations and draw a bright line between its role in enforcing the consumer welfare standard and steering any debate over social policy objectives.

Sincerely,



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