Digital Platforms: Government consultation on ACCC's regulatory reform recommendations

Submission by

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1. The ACCC proposes tools that can address consumer harms potentially arising from exclusionary or exploitative conduct in digital platform service markets.

In its Digital Platform Services Inquiry, Interim Report No. 5, the ACCC highlights several competition-related consumer harms that may arise in digital platform markets. These include a degradation in service quality or innovation, price increases, and a loss of privacy from excessive data collection. The ACCC also enumerates several types of conduct that may lead to such consumer harms, including self-preferencing, tying, and creating barriers to multi-homing.

Existing competition provisions in Part IV of the *Competition and Consumer Act 2010* (CCA) apply a 'consumer welfare' standard to establish most violations. The consumer welfare standard has provided a coherent foundation for competition enforcement that is attuned to economic realities, including the economic insight that no conduct is intrinsically harmful. Competition enforcement based on the consumer welfare standard aims for analytical rigour by relying on evidence about the likely effects of conduct in most cases. It focuses the decision-maker on understanding the benefits of competition for achieving good outcomes for consumers, which includes avoiding the kinds of potential harms that the ACCC has identified in digital platform markets.

But as the ACCC correctly points out, enforcement on the basis of the consumer welfare standard may not prevent the above types of harm in digital markets. The Interim Report canvasses certain shortcomings of the traditional enforcement approach, which we would group into two categories:

(i) There is uncertainty as to whether regulators or courts should intervene in a digital platform market in the first place. The Interim Report acknowledges that the complexity and dynamism of digital markets complicates the predictive exercise needed to linking current evidence to future effects on consumer welfare. Further, as firms in digital markets increasingly compete on non-price dimensions (e.g., innovation, product development, and possibly also data protection), established analytical tools (e.g., diversion and critical loss ratios) lose their power to identify harmful conduct. It therefore becomes extremely difficult to establish on the basis of evidence of *current* observable conduct that 'novel and prospective' forms of

consumer harm are sufficiently likely to result in digital platform markets in sufficient magnitude to be of concern.

(ii) Current enforcement instruments do not allow the ACCC (or courts) to impose their preferred regulatory outcome to prevent competition harms, even if such harms have been clearly identified.[1] This is because:

a. Court proceedings against digital platforms are likely to be protracted (while the ACCC is yet to bring a case against any digital platform on a competition issue, overseas experience as well as the Google-Fitbit merger clearance underscore this concern).
b. Regulatory interventions cannot keep pace with fast-moving evolution in digital markets. As a result, harmful conduct with *potentially* significant impacts on competition (such as platform entrenchment) may continue.
c. There are doubts about remedial efficacy. Even assuming a violation has been established, the ACCC and courts face difficulties in designing and implementing a remedy that sufficiently addresses the broad, systemic and ever-evolving conduct that it targets.

2. The ACCC's recommended response is the development of mandatory codes with targeted obligations for 'designated' digital platforms.

To address the identified shortcomings of traditional competition law enforcement in digital platform service markets, the ACCC makes two relevant Recommendations (3 and 4).

Recommendation 3 proposes a new power to introduce mandatory, service-specific codes for designated digital platforms as a form of *ex ante* conduct regulation. These codes would have the following features:

(i) Codes would be developed by the relevant regulator, in consultation with appropriate policy agencies and stakeholders.
(ii) The digital platform services that could be designated would be set out in enabling legislation, with the regulator, or a government Minister, empowered to designate a platform service if it meets specified criteria.
(iii) New codes could be developed in response to competition concerns that emerge over time.

Recommendation 4 complements Recommendation 3 by proposing that the mandatory service-specific codes support targeted obligations to address potentially harmful conduct (e.g., self-preferencing, tying). Such obligations would be developed in consultation with industry and other relevant stakeholders, with compliance assessed against objective criteria.

The practice of subjecting designated platforms or services to mandatory *ex ante* regulations and obligations appears to mirror recent overseas regulatory developments. For example, the European Union's *Digital Markets Act* prohibits designated 'gatekeeper' platforms from

[1] The limits of hierarchical regulatory enforcement have been recognized in the literature. See generally, John Braithwaite, 'The Regulatory State?' in Sarah A. Binder, R.A.W. Rhodes and Bert A. Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008), 231.

engaging in specific conduct, including self-preferencing and tying. The proposed *American Innovation and Choice Online Act* in the United States similarly prohibits 'covered platforms' from self-preferencing.

In adopting overseas templates, the ACCC's proposal also aligns with established Australian practice of using mandatory codes to achieve regulatory outcomes. For example, the ACCC has previously adopted mandatory codes to regulate the dairy and franchising sectors.[2]

As we will argue further below, the recommendations may address some of the concerns with existing competition law identified by the ACCC. However, we urge some caution about the proposed solutions for at least two reasons.

First, the recommendations appear to be based on recent overseas regulatory templates (albeit through Australian mechanisms), despite there being limited or no evidence about the efficacy of such templates.

Second, the recommendations follow a well-trodden path for the elaboration of Australian competition law, whereby targeted provisions and instruments are added to the existing law. The aim seems to be to make the law ever-more specific and detailed about the kinds of conduct that it proscribes. This approach has had several unintended consequences:

(i) Adding new rules or regulatory tools to deal with specific problems – while maintaining existing ones – adds to legal complexity, which itself undermines the certainty and efficacy of competition law and its interaction with other regulatory regimes. This approach to competition law reform has led to accretion of detail and specificity in the CCA and has contributed to its "legislative opacity and unwieldiness".[3]

(ii) We would argue that precisely such prescriptive statutory detail has made it difficult for the ACCC to enforce Part IV effectively. Most decided cases focus on textual arguments, distracting from the needed focus on substantive understanding of the theory of harm and possible ways to remedy such harm. This problem is particularly acute in fast-moving sectors of the economy, such as digital services, where the link between current evidence and future harm is extremely difficult to establish in a judicial process. Once again the current recommendations propose new and more specific tools precisely because the literal detailed terms of existing CCA provisions do not capture novel conduct. But the same problem will only recur with the new set of specific provisions to be developed under the recommended codes.

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[2] See A Terry, 'The Unusual Place of Industry Codes of Conduct in the Regulatory Framework' (2022) 45(2) *University of New South Wales Law Journal* 649.

[3] *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59 at [70] per Kirby J who went onto make comments relevant to the CCA more broadly: "The language of the provisions of the [then] TPA applicable to this case is obscure. Indeed, it represents a significant challenge for interpretation. It is in need of redrafting by reference to concepts and purposes. It requires the negotiation of too many cross-references, qualifications and statutory interrelationships. This imposes an unreasonable burden on the corporations and their officers subject to the TPA, the ACCC enforcing the Act and courts with the responsibility of assigning meaning to, and applying, its provisions."

3. An alternative enforcement template is provided by experimentalist competition law that has already been used and demonstrated as efficacious.

As discussed above, the ACCC has identified constraints on competition enforcement in digital markets, which we have grouped as (i) uncertainty about harm from novel conduct and how to remedy it; (ii) inability to intervene in a timely and effective fashion through legal enforcement.

One regulatory response to the above two conditions (uncertainty and difficulty of coercive legal enforcement) is to adopt an experimentalist architecture for competition law. This model of enforcement is aimed at negotiated participative problem-solving and recursive remedial adaptation, as opposed to establishing legal violations subject to penalties and narrowly-tailored remedies.

Compared to the new overseas regulatory templates that have inspired the ACCC's recommendations, one advantage of experimentalist competition law enforcement is that it has a track record of efficacy overseas.[4] Moreover, certain CCA instruments and the ACCC's current practice reflect, at least in part, an experimentalist approach to enforcement.[5]

An experimentalist competition law enforcement regime is implemented through five functional steps to deal with the problems of uncertainty and the difficulty of legal enforcement:

(i) The first step is to identify the goals pursued by the regulatory regime (in this specific case, the goal would be avoiding the types of consumer harm that the ACCC canvasses as being of potential concern in digital service markets).
(ii) The second step is to identify (through market screening and stakeholder input) instances of conduct that could give rise to such harm. Instead of establishing a violation (given the uncertainty about the existence and extent of harm as it may arise from specific conduct), the enforcement authority proceeds to negotiate – together with the concerned target corporation – business conduct modifications that could address concerns or protocols for monitoring the extent of harm. Such an approach recognises that the identification of harmful conduct cannot be done through enforcing existing rules or through purely expert modelling of fast-evolving markets.
(iii) In light of the limits of both rules and expert knowledge, the third step is to subject a proposed remedy developed in step (ii) to peer review – from market stakeholders and even other competition or regulatory authorities in Australia and beyond.[6]
(iv) The fourth step is to monitor the implementation of the remedy, including through input from market stakeholders affected by the impugned conduct and remedy, and by mandating regular reports about the effects of the implemented remedy.
(v) The fifth step is to adjust the remedy in light of experience with its implementation. In other words, based on monitoring and review of remedial effects, the ACCC may identify the need to modify the remedy. Such monitoring and review can highlight that a remedy is unnecessary or ineffective, or it may also lead the ACCC and relevant

[4] Y Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart 2020) ("Svetiev, *Experimentalist Competition Law*"); Y Svetiev "Antitrust Governance: The New Wave of Antitrust" (2007) 38 *Loy. Univ. Chicago Law Journal* 593.
[5] J Sinn, "Managing Nascent Digital Competition: An Assessment of Australian Merger Law Under Conditions of Radical Uncertainty" (2021) 44 *University of New South Wales Law Journal* 919.
[6] Consulting other competition authorities may be useful both as a form of review by knowledgeable peers, but also to address any problems of remedial inconsistency and regulatory arbitrage across jurisdictions given the highly interconnected nature of digital markets. Svetiev, *Experimentalist Competition Law*, 34-35, 52.

stakeholders to modify their overall understanding of the objectives of competition law in the specific platform.

Within the regulatory architecture described above, negotiated remedies are provisional and adjusted on the basis of real-time information about their effects (in the same way that corporate actors develop strategy through prototyping and adjustment on the basis of real-time information). Moreover, experimentalist remedies can be differentiated across different actors (such as different platforms) on a principled basis, such as the different type, magnitude and likelihood of harm.

4. Undertakings can be repurposed as an experimentalist remedial device with limited statutory intervention that captures the benefits of the codes and avoids their pitfalls.

We argue that experimentalist enforcement is desirable in implementing competition law in digital markets in Australia because it addresses the key concerns in the ACCC's Interim Report. It is also feasible for at least two reasons. First, experimentalist solutions have already been implemented in other jurisdictions with greater evidence of efficacy. Secondly, to proceed in an experimentalist manner, the ACCC can get the benefits of dynamic flexibility of the proposed codes of conduct by using the existing remedial tool of undertakings pursuant to CCA, s 87B.

The ACCC has already identified undertakings as an efficient and flexible tool for quicker and less costly case resolution[7] with negotiated remedies as a form of settlement for a relatively clear CCA breach.[8] But the settlement conception of undertakings for clear violations is unsuitable when we face uncertainty about harm arising from conduct as discussed above.

An alternative "innovative" use of undertakings[9] is as a flexible and dynamic tool for learning about potential harm and remedy under conditions of uncertainty.[10] When undertakings are used as a learning device, the remedy is collaboratively developed between enforcer and the target corporation, with input from market stakeholders. Such remedies are designed not to address an established infringement, but to understand the extent of harm and to identify conduct modifications that could address that harm. Any remedy is provisional, in that it can be adjusted over time.[11]

It seems that no significant statutory amendment to s. 87B CCA would be required to give effect to the use of undertakings as experimentalist remedies based on the five steps discussed above:

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[7] ACCC, Making Markets Work – Directions and Priorities, 1999, at 7.
[8] ACCC, Section 87B of the Competition and Consumer Act, 2014, at 4.
[9] ACCC, Making Markets Work – Directions and Priorities, 1999, at 7.
[10] Y Svetiev, "Settling or Learning? Commitment Decisions as a Competition Enforcement Paradigm", (2014) 33 *Yearbook of European Law* 466; Svetiev, *Experimentalist Competition Law* (Ch. 2 specifically in the context of digital platforms).
[11] For similar logic in the review of mergers under uncertainty, see J Sinn, "Managing Nascent Digital Competition: An Assessment of Australian Merger Law Under Conditions of Radical Uncertainty" (2021) 44 *University of New South Wales Law Journal* 919; M Jennejohn, "Innovation and the Institutional Design of Merger Control" (2015) 41 *Journal of Corporation Law* 167.

(i) Section 87B grants a broad power to accept undertakings "in connection with a matter in relation to which the Commission has a power or function under this Act … or the consumer data rules". As such, the statute does not appear to require an undertakings remedy to be rooted in an existing infringement.[12]
(ii) Section 87B allows for dynamic adjustment of remedies, given that any undertakings may be withdrawn or varied with the consent of the Commission (s. 87B(2)). However, for dynamic adjustment to be responsive to the observed effects of the remedy, it would be necessary to strengthen the mechanisms for monitoring and stakeholder input about remedial effects. This can be done through ACCC practice or guidance and without statutory amendment.
(iii) Experimentalist remedies, to be effective, may require a hierarchical penalty default. This is an enforcement alternative operating as a background default, so as to incentivise both the target corporation and the enforcer towards the collaborative remedial route. In some jurisdictions, the threat of enforcing general competition law against the target entity before the courts operates as a sufficient penalty default.[13] This is because litigation is a less desirable pathway for both authority and defendant because they lose control of the outcome and the remedy. In the Australian context, however, this may not be the case because there is no margin of judicial deference to the ACCC as an expert authority and the detailed prescriptiveness of the statutory provisions means that the target entity has much greater likelihood of prevailing in court. As such, statutory or regulatory amendments may be necessary to provide an appropriate penalty default to incentivise experimentalist remedies.[14]

5. Concluding remarks.

In this submission we have argued that the ACCC has appropriately identified the shortcomings of using the CCA to address concerns about harm in digital platform services markets. We have argued that these shortcomings can be grouped under two categories: (i) uncertainty about linking conduct and harm and devising appropriate remedies that address such harm; (ii) the limits of legal enforcement of competition law in fast-paced markets even if we resolve the uncertainty problem.

We have also argued that, whereas the ACCC's recommendations draw on new and untested regulatory templates from overseas, experimentalist competition enforcement may be a more promising route with more existing evidence-base.

In fact, the ACCC's recommendation of mandatory industry codes carries an experimentalist intuition. It is intended to be more flexible, to accommodate faster evolution and development

[12] It is the ACCC's (non-binding) s. 87B Guidelines that state that the provision is generally only used in "situations where there is evidence of a breach, or a potential breach, of the CCA that might otherwise justify litigation and that the ACCC will not accept an undertaking that contains a "a denial that the conduct breached the CCA". No such requirements exists in the CCA or in the use of the similar resolution tool in the European Union.
[13] In the EU, for example, the courts are generally supportive of the Commission's enforcement against digital platforms, but have engaged in a more searching review of the remedy in case of violation findings compared to negotiated remedies.
[14] The current CCA, s 80AC and s 81A incorporate a penalty default for a defendant failing to cooperate in resolution. The News Media Bargaining Code and the ACCC's role in arbitrating access disputes for telecommunications facilities also reflect a penalty default logic that could stimulate experimentalist collaborative solutions. See generally, Svetiev, *Experimentalist Competition Law*, at 70, 78-79, 136. The ACCC's proposed codes could also be framed as penalty default rules for failing to collaborate in remedial problem-solving.

of new codes to address novel concerns as they arise, and to do so through stakeholder participation.

However, the codes route focuses on developing ever more *ex ante* specific rules that will add to the complexity and unwieldiness of Australia's competition law regime. Such an approach assumes that *ex ante* obligations can be devised for designated services, based on practices perceived to be 'high-risk' to competition, and not become quickly outdated. While the ACCC intends such codes to be open to revision and flexibility, there are no protocols for real-time learning and peer review proposed to be embedded within the codes for their revision. Finally, the recommendations do not address the burning problem of effective and timely enforcement and implementation of workable remedies, particularly in a relatively small jurisdiction facing global multinational actors.

By contrast, the experimentalist route requires little or no statutory amendment. As our work shows, it involves the reuse of existing tools through a novel frame. Experimentalist enforcement begins from remedial design for flexible real-time problem-solving, without seeking to assign liability for violations *ex ante*. As such, it avoids the problem of law reform by accretion that has hobbled the efficacy of the CCA and other Australian market regulatory statutes.[15]

Finally, experimentalism reflects the intuition that regulation needs to be dynamically responsive to outcomes, but not by moving from lenient to punitive enforcement (as in the influential responsive regulation paradigm,[16] which assumes away the problem of uncertainty), but by moving from less towards more interventionist remedies based on effects observed in real-time.

[15] For example, the Australian Law Reform Commission has described the *Corporations Act 2001* (Cth) as a "lengthy maze of provisions". It argues that it suffers from law reform by accretion, with over 100 legislative instruments notionally amending the *Corporations Act*. See Australian Law Reform Commission, *Financial Services Legislation: Interim Report A*, Report No 137 (2021) [3.51]-[3.52].

[16] I Ayers and J Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (Oxford, Oxford University Press, 1992); Svetiev, *Experimentalist Competition Law*, at 63-68.