14 April 2023

Law Council
OF AUSTRALIA
Business Law Section

Digital Platforms Branch
Australian Competition & Consumer Commission
Level 17
2 Lonsdale St
MELBOURNE VIC 3000

By email: digitalmonitoring@accc.gov.au

Dear Sir/Madam,

Submission to the Digital Platform Services Inquiry—September 2023 Report on the expanding ecosystems of digital platform service providers

1. This submission concerning the Australian Competition and Consumer Commission's (**ACCC**) *Digital Platform Services Inquiry—September 2023 Report on the expanding ecosystems of digital platform service providers—Issues Paper* (**Issues Paper**) is made by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

Key Points

2. The key matters the Committee wishes to bring to the ACCC's attention are:

    a) The foundational concept of an "ecosystem" should be carefully considered and precisely defined by reference to established concepts in order to ensure legal certainty, avoid the erosion of investment and innovation, and protect the benefits that interrelated services provide to consumers.

    b) Existing competition and consumer laws may be adequate to deal with conduct of concern and the potential harms addressed by the Issues Paper, and these legal options should be examined in further detail.

    c) It is critical that there be a concerted effort to avoid fragmentation in the various Australian reform processes which are currently underway to minimise uncertainty and unintended consequences for entities who may be subject to multiple regulatory frameworks.

Interpreting the concept of an "ecosystem"

3. The legal issues raised in the Issues Paper focus on the concept of an "ecosystem".

4. As the Committee has previously submitted, precise consideration of foundational terms is essential so that there is legal certainty and that any proposed regulatory approach is consistent with other frameworks. Ensuring clarity in foundational concepts assists in both the workability of any future reforms and guarantees they do not inadvertently impede innovation or erode investment.[1]

[1] Law Council of Australia, Submission to Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Discussion Paper for Interim Report No.5* (2 May 2022) [17]–[18] (**DPSI 5 Submission)**.

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5. "Ecosystem" is not a term of art. The Issues Paper acknowledges that there are "*various ways to define an ecosystem*". The Issues Paper uses the term to describe "*the wide range of interrelated products and services—whether interrelated through technical interoperability or by commercial practices such as bundling—offered by a single or related group of companies*."[2]

6. Overseas regulators have defined "ecosystem" in a number of varying ways. For example:

   - The Competition and Markets Authority in the UK (**CMA**) has previously defined an ecosystem to mean "*a number of firms—competitors and complementors—that work together to create a new market and produce goods and services of value to customers*".[3]

   - The CMA states that there is a spectrum of ecosystems ranging from completely closed to completely open and that the different degrees of openness of ecosystems are not only reflected in the characteristics of these systems but may also arise from different business models and system design.[4]

   - The European Commission's draft Market Definition Notice published for consultation in November 2022 proposes that an ecosystem "*can in certain circumstances be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance by technological links or interoperability.*"[5]

   - In Greece, the Hellenic Competition Commission has sought to define ecosystem to mean either "*a web of interconnected and largely interdependent economic activities carried out by different undertakings with the intention of supplying products, services or a nexus of products and/or services that impact the same set of users*" or "*a platform of economic activities carried out by different undertakings with the intention of supplying products, services or nexuses of products and/or services that impact the same users or different categories of users*".[6]

   - The German Federal Cartel Office (or Bundeskartellamt) has described digital ecosystems as describing "*a particular strategy in which the service provider combines various products for its customers in a portfolio-like manner so that they can perform as many activities as possible on its platform or within its ecosystem*".[7]

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[2] Australian Competition and Consumer Commission, *Digital Platform Services Inquiry—September 2021—Report on the expanding ecosystems of digital platform service providers (Issues Paper)* (March 2023), 2 (**Issues Paper**).

[3] Competition & Markets Authority, *The economics of open and closed systems* (16 December 2014) see here [2.2].

[4] Ibid [2.27].

[5] European Commission, *Communication from the Commission: Commission Notice on the definition of the relevant market for the purposes of Union competition law* (8 November 2022) see here [103].

[6] Michael G Jacobides and Ioannis Lianos, "Ecosystems and competition law in theory and practice" *Industrial and Corporate Change* (2021) see here 1220.

[7] Bundeskartellamt, Determination of the status as addressee of Section 19a(1) GWB (Meta Platforms and Facebook Germany) (2 May 2022) see here [302].

7. As is apparent from the variety of approaches, some of which are outlined above, there are numerous ways that the concept of an ecosystem can be defined and framed. The Committee submits that this foundational concept should considered carefully and defined with precision to focus on potential harms within the Australian legal framework and avoid raising concerns about business structures and conduct that deliver benefits to consumers and competition.

8. For example, the offer of interrelated products and services is central to the description of "ecosystem" in the Issues Paper. However, as the Issues Paper acknowledges, the offer of interrelated products and services "*can provide important benefits to consumers by creating a more seamless experience*".[8] The Productivity Commission's recent reports have highlighted that with digital technology, such as the Internet of Things, which is used to describe the universe of Internet-connected devices, there is a wider range of product choices for consumers which can provide more tailored offerings to better suit the needs of individual consumers.[9]

9. Similarly, the key behaviours identified in the Issues Paper (such as bundling, tying, self-preferencing, pre-installation arrangements and default settings) are not inherently anti-competitive. As noted in the Issues Paper, "*these practices do not always harm competition and can sometimes be pro-competitive. For example, where self-preferencing leads to greater competition between ecosystems by improving a platform for consumers*."[10]

10. The Committee submits that the ACCC should identify the features of the offer of interrelated products and services that could conceivably give rise to harm to consumers and competition by reference to established concepts under Australian competition and consumer law and policy, such as leveraging market power or full line and third line forcing. Those concepts are outlined in the discussion of existing provisions of Australian law set out below.

11. In particular, the Committee submits that the ACCC's consideration of potential competition harms in its Report should acknowledge and take into account the distinction between its proposed definition of "digital platform ecosystem" (encompassing the offerings of a single or related group of companies) and the concept of a relevant "market" under Australian competition laws.

12. Additionally, the Committee considers that the ACCC should identify whether there are features of digital platform ecosystems that do not exist in other ecosystems (for example, it appears that a conglomerate firm in any industry could fall within the ACCC's proposed definition), and whether such features give rise to a need to adopt a different approach to assessing digital platforms' activities.

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[8] Issues Paper, 6.

[9] Australian Government, Productivity Commission, *5-Year Productivity Inquiry: Australia's data and digital dividend—Inquiry Report Volume 4* (7 February 2023) see here iv, 6.

[10] Issues Paper, 6.

In a similar vein, the CMA has noted that ecosystems are complex and multisided, and that "*economic literature shows that it does not necessarily hold true that openness is always good for competition and welfare, while being 'closed' is bad*." See: Competition & Markets Authority, *The economics of open and closed systems* (16 December 2014) here [1.3]–[1.4].

Addressing harms raised in the DPSI 7 Issues Paper

13. The Committee does not seek to comment on whether, and to what extent, the expanding ecosystems of digital platform services have caused (or have the potential to cause) harm to consumers and businesses.

14. Rather, the following paragraphs outline existing provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA)** that the Committee observes may apply to certain conduct and harms identified in the Issues Paper. The Committee does not seek to comment on the adequacy of these provisions and simply recommends that the ACCC take them into account in any recommendations resulting from its inquiry. As has been previously submitted by the Committee, as a general principle, where there is evidence of harm, a threshold consideration is whether there is a clear legislative gap such that harm to consumers and businesses cannot be addressed by current legislation.[11]

15. As noted above, the Committee also notes that Treasury recently completed its consultation on the ACCC's *Digital Platform Services Inquiry—September 2022 Interim Report—Regulatory Reform* (**DPSI 5 Report**), which recommended a range of measures to address apparent harms from digital platforms to Australian consumers, small businesses and competition. The ACCC's recommendations (**DPSI 5 Recommendations**) include:

    - Economy-wide consumer measures, including a prohibition against unfair trading practices and unfair contract terms.

    - Consumer measures specific to digital platforms, including mandating internal and external dispute resolution processes and obligations on platforms to prevent and remove scams, harmful apps and fake reviews.

    - A new competition framework, which would subject 'designated' digital platforms to mandatory codes applying to the services they provide.

    - Targeted competition obligations for designated digital platforms to be included in the proposed new framework and codes, to address harms such as anti-competitive self-preferencing.

16. Even if harms are evidenced, and a gap in the existing framework is identified, the Committee notes that the ACCC made its DPSI 5 Recommendations in response to potential harms of the kind referred to in the Issues Paper—such as anti-competitive self-preferencing, anti-competitive tying, exclusive pre-installation and default agreements that hinder competition, impediments to consumer switching, impediments to interoperability, data-related barriers to entry and expansion, lack of transparency, unfair dealings with business users (which would include use of dark patterns), and exclusivity and price parity clauses in contracts with business users.[12]

17. The Government is expected to announce its position on the DPSI 5 Recommendations this year.

[11] DPSI 5 Submission, [5].

[12] Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Interim Report No.5* (September 2022) 16-17 (**ACCC DPSI 5 Report**).

Existing provisions of Australian law

18. The Committee observes that there are currently general and specific provisions which seek to provide mechanisms to protect businesses and consumers, including those outlined below.

19. Chapters 2 and 3 of the Australian Consumer Law provide various general and specific protections to consumers and small businesses. These include:

    - Section 18 of the Australian Consumer Law which prevents companies from engaging in misleading or deceptive conduct. Additionally, sections 29, 33, 34, 35, and 36 prohibit companies from engaging in various forms of false, misleading, or deceptive conduct.

    - Sections 20 and 21 of the Australian Consumer Law which prohibit companies from engaging in unconscionable conduct when dealing with other businesses or their customers. Unconscionable conduct means conduct that is so harsh it goes against good conscience.

    - Section 23 of the Australian Consumer Law provides that a term of a consumer contract or small business contract is void and, since 2021, is prohibited if the term is unfair and the contract is a standard form contract. Recent amendments to the unfair contract terms regime (discussed below) will make the use of unfair contract terms illegal and introduce significant penalties for breach of these provisions.

20. The CCA prohibits a range of conduct that broadly has the purpose, effect, or likely effect of substantially lessening competition in a market. For example:

    a) Section 46 of the CCA prohibits a corporation with a substantial degree of market power from engaging in "conduct" that has the purpose, effect, or likely effect of substantially lessening competition in *that market* or *any other market* in which the corporation, *or its related bodies corporate*, supply (*or are likely to* supply) goods or services, or acquire (*or are likely to* acquire) goods or services.

    b) Section 47 prohibits a range of exclusive dealing and tying practices including full line and third line forcing where these practices have the purpose, effect or likely effect of substantially lessening competition. . The mandating of proprietary standards, and/or an inappropriate degree of influence over the development of 'public' standards, may be used to camouflage such conduct or to inhibit innovation-led competition.

    c) Section 50 of the CCA prohibits acquisitions of shares or assets that are likely to substantially lessen competition in a market in Australia. The ACCC's Merger Guidelines (November 2008) outline the application of section 50 to, relevantly:

        (i) vertical mergers ("combining firms that operate at different stages of a single vertical supply chain—that is, a merger between an 'upstream' firm and a 'downstream' firm"); and

        (ii) conglomerate mergers (involving "firms that interact across several separate markets and supply products that are typically in some way related to each other").

        The guidelines outline how such mergers may raise competition concerns, whilst also noting, at para 5.19, "[i]t is often the case that vertical mergers will promote efficiency by combining complementary assets/services which may benefit consumers"; and at para 5.20, "[o]ften, conglomerate mergers will allow

firms to achieve efficiencies and result in better integration, increased convenience and reduced transaction costs".

Furthermore, the acquisition of assets, such as intellectual property rights and licences, is often overlooked in terms of the reach of s. 50.

Consideration of conduct and harms raised in the DPSI 7 Issues Paper

21. The ACCC discusses a number of types of potentially harmful conduct and potential competition and consumer harms in the Issues Paper, as follows:

    a) expansion strategies including strategic acquisitions or replicating rivals' innovative features and use of data across services to enhance offerings;

    b) leveraging market power across services, including via bundling, tying, self-preferencing and pre-installation arrangements and default settings;

    c) consumer lock-in and reduced choice, including from information asymmetries and lack of transparency that makes comparison of products difficult, or dark patterns that discourage switching such as making it difficult to cancel subscriptions;

    d) problematic data practices and excessive or undisclosed data collection, and undesirable terms of use that may be provided on a 'take-it-or-leave-it' basis; and

    e) other dark patterns such as hidden recurring charges.

22. The examples of conduct and harms raised in the Issues Paper appear to reflect those raised in the ACCC's previous DPSI Interim Reports, including relevantly the DPSI 5 Interim Report on which the DPSI 5 Recommendations are based. The Committee agrees with the ACCC's observations that some of the practices referenced in the Issues Paper "do not always harm competition and can sometimes be pro-competitive".

23. The Committee considers that the ACCC should consider whether existing laws may be adequate to deal with any conduct of concern and harms identified as part of the ACCC's inquiry, and whether its DPSI 5 Recommendations (if adopted by the Government) would be capable of dealing with any residual conduct or harms to consumers or competition.

24. For example:

    a) Leveraging of market power by a digital platform across services or behaviour that results in consumer lock-in could be challenged under section 46 of the CCA.[13] The Committee submits that sections 46 and 47 have the capacity to target conduct like bundling, tying and self-preferencing in the context of digital platforms, as demonstrated by section 46 cases which have addressed these kinds of behaviours in other markets.[14]

    b) Standard form terms of use or privacy policies that enable problematic data practices or excessive data collection could be challenged under the unfair contract terms regime (as amended).

[13] DPSI 5 Submission, [22].

[14] See for example, *ACCC v Baxter Healthcare Pty Ltd* (2006) 153 FCR 574.

c) The Committee has previously observed that existing prohibitions on misleading and deceptive conduct may apply to the issues arising from a lack of transparency or "dark patterns" that may impede consumers from making effective and informed decisions.[15] To some extent this may be evidenced by the success which the ACCC has had in both the Trivago[16] and Viagogo[17] cases, which arguably involved the use of dark patterns.

d) Strategic acquisitions by digital platforms to expand into new markets could be challenged under section 50 of the CCA, including by relying on established theories of harm that apply to vertical and conglomerate mergers.

25. The Committee supports the ACCC continuing to use its existing powers and considering the extent to which such provisions have, in practice, been effective at preventing such problematic conduct having regard to the practical challenges, if any.

Extrapolating findings from case studies

26. Finally, the Committee notes that the objective as set out in the Issues Paper is to "examine the expanding ecosystems of providers of digital platform services" and "closely examine the extensive web of interconnected products and services of digital platform service providers and the extent to which this may have increased the risk of competition issues and consumer harms in Australia" by reference to case studies (smart home devices and consumer cloud storage).

27. The Committee notes that providers of digital platform services have different business models and offer different products and services such that caution should be exercised before extrapolating findings based on its two case studies to broader offerings of these firms.

Coordination with other Government policies and processes

28. To the extent that the ACCC considers it necessary to recommend, or reinforce previous recommendations for, regulatory reforms to address issues arising from the expanding ecosystems of digital platform services, the Committee notes that any reforms should be mindful of the existing and emerging regulatory landscape to ensure consistency and avoid duplication or fragmentation of regulation.

29. In the last 18 months, the Committee has seen multiple concurrent law reform initiatives which touch on the same, or closely-related, subjects. For example:

a) **Privacy law reform**: On 16 February 2023, the Attorney-General's Department released a report setting out 116 reform proposals (**Privacy Act Report**).[18] The proposals, if adopted, will introduce significant economy-wide changes, many of which are directly relevant to the operation of digital platforms and the rights of their respective individual users. These include expanding the scope of privacy regulation to types of de-identified data, the introduction of more prescriptive privacy rules and new rights such as the right to 'fair and reasonable' collection,

[15] DPSI 5 Submission, [26].

[16] See, *ACCC v Trivago N.V.* [2020] FCA 16 (20 January 2020) and subsequent appeal. On 22 April 2022, the Federal Court ordered Trivago to pay penalties of $44.7 million.

[17] See, *ACCC v Viagogo AG (No 3)* [2020] FCA 1423.

[18] Attorney-General's Department, Privacy Act Review Report (16 February 2022) https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report

use and disclosure,[19] greater alignment with European Union (EU) data protection laws, a specific focus on online services, and the empowerment of regulators to play a more active enforcement role.

i. The Attorney-General's Department sought submissions in response to the Report by 31 March 2023. Given the complexity and potential major economic impact of the proposals, the Privacy Act Report indicates that a number of the more significant or technical proposals made should be subject to additional consultation (for example, in relation to removal of, or adjustments to, the exemptions for small businesses and employee records, and on the significant changes to rules on direct marketing and targeting). Following that consultation, draft legislation will need to be prepared to give effect to the proposals.

ii. The proposed privacy law reforms appear likely to impact conduct such as problematic data practices, excessive or undisclosed data collection and use of data across services.

b) **Unfair contract law reform**. On 10 November 2022, the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) came into force. Following a 12-month grace period, on 10 November 2023, the following amendments will take effect:

i. prohibition against proposing, applying or relying on unfair contract terms in standard form consumer or small business contracts;

ii. expansion of the application of the unfair terms provisions to a broader range of small business contracts;

iii. the regime will apply to businesses with less than 100 employees or an annual turnover of up to $10 million; and

iv. there will no longer be a monetary ceiling for the value of contracts subject to the Australian Consumer Law regime, while the threshold in the *Australian Securities and Investments Commission Act 2001* (Cth) will be raised from $300,000 to $5 million.

c) The Government is continuing to explore multiple law reform proposals and other initiatives that have overlapping implications and relevance to the digital economy, including a broader consultation on the implementation of an economy-wide prohibition against unfair trading practices, the payments system reform and Government initiatives in relation to Digital Identity.

d) The ACCC has previously made recommendations to the Government on merger law reform, and the ACCC Chair outlined the ACCC's current proposed merger regime on 12 April 2023, in her address to the National Press Club.[20] The ACCC's proposed reforms take into account what it perceives as the challenges raised by strategic acquisitions by digital platforms.[21] The Committee understands that the

[19] Ibid, Proposal 12.2.

[20] Gina Cass-Gottlieb, "The role of the ACCC and competition in a transitioning economy address to the National Press Club 2023", 12 April 2023, available at: https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023

[21] The **ACCC DPSI 5 Report** provides, at page 7: *"While this report does not make specific recommendations for merger reform, the ACCC notes that any future economy-wide reforms to Australia's merger laws should*

ACCC is continuing to engage with the Government on the need for economy-wide reforms to Australia's merger laws, and we look forward to contributing to debate on this issue in due course.

30. It is critical that there be a concerted effort to avoid fragmentation in the various Australian reform processes to reduce uncertainty and unintended consequences for those subject to multiple regulatory frameworks. The Committee is of the view that a complementary and holistic approach is important for improving transparency for consumers and small businesses as well as for regulatory consistency.

Conclusion and further contact

31. The Committee would be pleased to discuss any aspect of this submission.

32. Please contact the chair of the Committee, Lisa Huett (lisa.huett@au.kwm.com) and Kirsten Webb (kwebb@claytonutz.com) if you would like to do so.

Yours faithfully

Philip Argy
Chairman
Business Law Section

consider the challenges involved in adequately addressing the competition effects of serial strategic acquisitions, including by digital platforms." See also Gina Cass-Gottlieb's address to the National Press Club 2023, referenced above, "…*This would also assist with addressing concerns about creeping acquisitions – the accretion of market power through a strategy of small serial acquisitions that may not amount to a substantial lessening of competition on their own. While this is an issue across the economy, this has been a particular concern in digital platform markets*."