15 February 2023

Director, Digital Competition Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

digitalcompetition@treasury.gov.au

Dear Director,

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

I fully accept the ACCC's analysis of potential harms and the need to address them. I believe however that a different approach is needed not only to address the harms but also facilitate innovation to take advantage of the digital revolution.

The attached draft working paper makes the case in more detail. It argues that an approach that creates truly free markets should be resolutely principles based, avoiding prescriptive regulations – even industry codes. It should rather give much greater attention to enforcement. The legal principles necessary to address commercial harms and facilitate free market design have been developed over centuries. It is failure to enforce them in a timely manner that has left space for harms to develop.

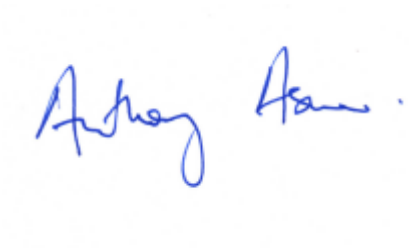
Taking advantage of the digital revolution requires collaboration as much as competition. It seems to me that competition regulators have not absorbed recent empirical economic research that has identified the need for redesigning of markets to ensure transparency and prevent fragmentation. The extensive competition reviews published internationally in the last few years make no apparent use of the work of a dozen Nobel Memorial Economics winners whose work is directly relevant to market design.

My submission is based on over forty years of experience in the financial industry, divided between practice and academia, and between South Africa and Australia. I have been involved in policy formulation for thirty of those years, mainly through the professional actuarial bodies but also four years at APRA in the policy division. I have read widely and attempt to integrate insights from economics, management, marketing, psychology and philosophy both to inform these submissions and for my lectures to senior actuarial students. My central concern has been to contribute to

focussing the actuarial profession on its social and ethical role in meeting the needs of customers of the financial sector.

I have answered some of the questions in the consultation paper in the next few pages, and attach my draft working paper, an adapted version of which is intended to be presented to the International Actuarial Congress in May 2023.

Yours sincerely,



Anthony Asher
Associate Professor
School of Risk and Actuarial Studies
UNSW Business School Building
UNSW SYDNEY NSW 2052 AUSTRALIA
T: +61 424 003 257
E: a.asher@unsw.edu.au

Responses to Questions

1. *Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?*

I agree that enforcement is inadequate, but not that the legal framework needs extension in the way envisaged.

Seen from the perspective of market design, the problem is that producers have been admitted to markets without adequate enforcement of market norms, which include the standard commercial legal principles. The Australian experience with financial services (particularly advice) provides an example where poor industry practice has not changed despite a huge increase in the level of prescription. This was the observation of the Hayne commission.

I think John Braithwaite[1] has the outline of an answer with his responsive regulation that carries a big stick that must be used when organizations are harming others – but that the clear objective is to encourage the best in people. Also see Elinor Ostrom[2] . My suggestion in the paper is that a representative body of all market participants would provide a first line of enforcement by identifying unacceptable practice. The intention would be to give a voice to customers and competitors who suffer from abuse of market power.

3. Are there alternative regulatory or non-regulatory options that may be better suited?

As above, I believe that the voice of those market participants who are suffering harm needs to be strengthened and their grievances taken up by enforcement regulators and the courts.

11. The ACCC recommends these requirements to apply to all digital platforms, do you support this? If not, which requirements should apply to all platforms, and which should be targeted to certain entities?

I think the distinction made by the EU report[3] between competition for the market and competition in the market is helpful. Each market on the platforms needs separate consideration and the participants need to be empowered against the platforms, which are making markets. Currently competition law effectively prevents them from collaborating to ensure market integrity.

12. If the above processes are introduced, is the Australian Consumer Law the appropriate legislation to be used and what should the penalty for non-compliance be?
The penalty should be to compensate those who have been disadvantaged. To the extent that bad faith is demonstrated, the any doubt about the extent of damages

[1] Braithwaite, J. (1998). Institutionalizing distrust, enculturating trust. Ch 14 in Trust and Governance, ed V. Braithwaite and M Levi. Russel Sage Foundation, NY. 343-375.

[2] Ostrom, E. (2010). Beyond Markets and States: Polycentric governance of complex economic systems. *American Economic Review*, 100(3), 641-72.

[3] Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T. M., & Van Alstyne, M. W. (2021). The EU digital markets act: A report from a panel of economic experts. Publications Office of the European Union, Luxembourg.

should err on the side of disadvantaged. Directors should not be exempt from proportionate personal penalties.

16. Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4? Should any issues be removed or added.

I agree that these issues are all relevant, and suggest that they all fall within the overall principle of collateral abuse of power. There would be advantages in making the principle entirely clear in legislation – and as suggested by Judge Hayne – using these as examples rather than as definitions.

17. What services should be prioritised when developing a code? What harms should they be targeted on preventing? Should codes be targeted at individual companies, a specific service, or all digital platform services?

Codes may be helpful at a sufficiently high level, but there are dangers that they will create as many loopholes as barries to harms.

19. Who should be responsible for the design of the proposed codes of conduct and obligations?

I think that peak bodies of providers should be required to subject their codes to other market participants – consumer bodies, consultants, independent experts and regulators. This is the core proposal of my paper: a Parliament of Peaks and Dissidents.

21 to 24. Enforcement issues

See answer to question 1 above.

25. Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate?

My impression is that most regulators are captured by a paradigm that puts too much weight on competition and undervalues possibilities of collaboration.