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DYNAMIC DIGITAL INNOVATION AND REGULATION:

REFLECTIONS FROM A COMPETITION LENS ON THE CHALLENGES IN OPTIMISING OUTCOMES IN DIGITAL MARKETS FOR ALL AUSTRALIANS

Address to the 31st Credit Law Conference 2021

By Andrew Low, Gilbert + Tobin

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By Andrew Low, Gilbert + Tobin[1]

Thank you Informa for the kind invitation as a first timer speaker at today's annual Credit Law Conference, it's a great privilege to be here and to be able to share a competition lawyer's perspective on the challenges of regulation of dynamic markets.

Before we start, I'd like to acknowledge the traditional custodians of the land upon which we meet, the Gadigal people of the Eora Nation, and pay my respects to the Elders both past and present.

The views expressed today are my own.

Innovation has always been at the heart of the philosophy of free markets. Adam Smith in the 1700s, who is often regarded as the founding father of economics, had always seen invention and technological change as important factors in creating the 'wealth of nations'.[2] In his book *Capitalism, Socialism and Democracy*, Joseph Schumpeter wrote that:

> The process of industrial mutation … that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. **This process of Creative Destruction is the essential fact of capitalism**.[3] [emphasis added]

There's no doubt in my mind that the way free markets have been structured have created the conditions for amazing technological innovation. In 2016, the then obsolete iPhone 6 was apparently capable of performing the functions of the best Apollo era computers at a rate of 120 million times faster![4]

GPS technology, for example, has been used in the most innovative ways for the betterment of society. Kenya is a country with one of the highest infant and maternal mortality rates in the world.[5] This problem is exacerbated in pastoral communities where women must seasonally travel with cattle. GPS trackers supplied by national hospitals to pregnant women in pastoral communities have enabled healthcare workers to monitor, locate, and deliver pregnancies.[6] Between February 2018 and July 2019, critical treatment was provided to 268 women.[7]

Let's bring this closer to home. In the Northern Territory, Darwin Harbour is a body of water that contains five times more water than Sydney Harbour. It has heavy tides that swell more than seven metres before retracting.[8] The harbour is teeming with apex predators:

1 Andrew Low is a Special Counsel in Gilbert + Tobin's Competition & Regulation practice. This address was given at the 31st Annual Credit Law Conference held 9 December 2021. The author would like to thank his colleague, Lucy Goodlad of Gilbert + Tobin for her assistance with the address. The views expressed are the authors alone.

2 See generally Adam Smith, *The Wealth of Nations* (W. Strahan and T. Cadell, 1st ed, 1776).

3 Joseph A Schumpeter, *Capitalism, Socialism, and Democracy* (Harper & Brothers New York, 3rd ed, 1942), 83.

4 See Tibi Puiu, 'Your smartphone is millions of times more powerful than the Apollo 11 guidance computers' *ZME Science* (Web Page, 13 May 2021) <https://www.zmescience.com/science/news-science/smartphone-power-compared-to-apollo-432/>.

5 See 'Infant Mortality Rate by Country 2021', *World Population Review* (Web Page, 2021) <https://worldpopulationreview.com/country-rankings/infant-mortality-rate-by-country>.

6 'How I save babies' lives using GPS trackers' *BBC* (online, 31 July 2019) <https://www.bbc.com/news/av/world-africa-49120067>.

7 Ibid.

8 See 'Fishy Business: Putting AI to work in Australia's Darwin Harbour', *Microsoft* (Web Page) <https://news.microsoft.com/en-au/features/fishy-business-putting-ai-to-

saltwater crocodiles, and tiger, bull and hammerhead sharks. There, the Department of Primary Industry and Resources for the Northern Territory Government goes about ensuring fisheries' resources are sustainably managed and developed for future generations. To do so, a team of scientists are tasked with the necessary job of 'counting' fish in these waters, which involves dropping cameras into the harbour and subsequently wading through hours and hours of underwater footage. Amidst a debate about the potential impacts of artificial intelligence ('AI') on society, a collaboration between scientists and Microsoft engineers became an opportunity to test out the powers of AI as a force for good. They are now using AI facial recognition technology to recognise and count fish![9] This allows scientists to focus on more critical tasks.

However, the same technology and data that saves lives has also brought forth a very different reality. In 2018, a Canadian data consultant who previously worked at Cambridge Analytica released a cache of documents that gave rise to the Cambridge Analytica data scandal. In June 2019, many would have seen footage and photos of the Hong Kong protests; a feature of these images of protestors was the wearing masks.[10] The masks had a practical reason, being the protection against tear gas used against protestors. However, it also had a more important reason, as Forbes reported: Hong Kong protestors were also destroying facial recognition towers in protest at a surveillance state and the masks helped maintain anonymity.[11] The same technology used to count fish in the NT was also enabling a form of surveillance.

The point is, technology, incorporating big data and AI, is neither good nor bad, it is about use and misuse.

To me, this, in essence, reflects the "frenemy relationship" between competition regulation and innovation in debates about the digital market. Much has been said about the dominance and market power of large platforms, which often results in the delivering of significant benefits as well as significant harms. Competition policy is grappling with how to regulate this: how do we ensure that it maintains the conditions for innovation while ensuring that "permissionless innovation" isn't, in the long run, destroying the potential for innovation?

This is a big topic and there's no human way to cover it in one session. What I propose to do today is:

1. Tell the story of how competition law has been grappling with the issues of the digital economy in Australia. I will try and distil an otherwise complex maze of developments into a simple overview.
2. In doing so, the story prompts some interesting observations. I will share two of them with you, being:
    a. Observations about the merits and challenges of having the competition regulator, the Australian Competition and Consumer Commission ('ACCC'), lead the charge to solve for issues in the digital economy.
    b. Observations about how we regulate in a world of uncertainty.
3. I'll then close with some personal thoughts on the various developments in technology regulation.

COMPETITION LAW AND DIGITAL MARKETS

It's useful to start at the beginning in Australia. On 4 December 2017 the then Treasurer directed the ACCC to conduct an 18-month long public inquiry into the impact of digital platforms on the state of competition in media and advertising services markets – becoming known as the Digital Platforms Inquiry ('DPI').[12] These Directions enliven certain investigatory powers of the ACCC to inquire into markets and report back on the Terms of Reference ('ToR').[13] This Inquiry was part of a commitment by the Government as a condition of the then Senator, Nick Xenophon's support for significant legislative changes to media control and ownership laws under the *Broadcasting Services Act 1992* (Cth). This occurred in the wake of growing international interest from competition regulators in digital platforms and their conduct in the use and misuse of data and advertising practices, including the Cambridge Analytica data scandal.

work-in-australias-darwin-harbour/>.

9 Ibid.

10 Jen Kirby, 'The Hong Kong government tired to ban face masks. Protestors are already defying it' *Vox* (online, 4 October 2019) <https://www.vox.com/world/2019/10/4/20898568/hong-kong-protests-face-masks-ban-carrie-lam>.

11 Zak Doffman, 'Hong Kong exposes both sides of China's relentless facial recognition machine' *Forbes* (online, 26 August 2019) <https://www.forbes.com/sites/zakdoffman/2019/08/26/hong-kong-exposes-both-sides-of-chinas-relentless-facial-recognition-machine/?sh=4c4d4e3d42b7>.

12 *Competition and Consumer Act 2010* (Cth) s 95H(1).

13 See generally Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Terms of Reference, 4 December 2017).

Back then, the DPI was touted as a 'world's first' Inquiry into Digital Platforms that goes to 'the heart of their business models'.[14] The ToR were arguably sufficiently broad to cover a wholesale review of digital platforms' business practices; however, it is apparent and unsurprising that the ToR primarily focused on digital platforms' impact on competition in media and advertising markets.

In short, the DPI focussed on the interaction between significant platforms which were, through their superior data practices and vast share of user attention, supposedly pulling advertising dollars away from news media. There were also a range of issues associated with the inability to commercially deal or bargain with these large platforms, lack of transparency in ad markets, privacy and consumer vulnerability online.

After 18 months, on 26 July 2019, the ACCC's Final Report was released and outlined 23 specific recommendations for reform, five of which were competition-specific.[15] They included recommendations for:

+ Broader merger laws under section 50 of the *Competition and Consumer Act 2010* (Cth) ('CCA') to factor in, amongst other things, potential lessening of competition caused by mergers that removed 'potential competition' (as opposed to actual competition) and data aggregation as a consequence of mergers. The concern here is that large digital platforms have established their dominance in no small part due to the number of acquisitions made and this was by killing off potential competitors or hoarding data. The ACCC has suggested that the large number of acquisitions undertaken by digital platforms has helped establish their dominance and may have had the effect of removing potential competitors;[16]
+ Choice of default search engine and internet browsers on Android phones. Interestingly the Inquiry was silent on Apple and its 58% share of mobile devices, as the DPI was focussed on digital platforms that did impacted news media;
+ A new branch within the ACCC to monitor digital platforms and an ongoing 5-year monitoring inquiry to allow it to do so; and
+ A new prohibition on 'unfair trading practices', prompted by a sense that the current 'unconscionable conduct' standard in the *Australian Consumer Law* was too high a threshold to deal with unfair practices online.

There were also a suite of media-specific recommendations, notably the *News Media Bargaining Code*. Most of the recommendations were supported by the Government,[17] and the *News Media Bargaining Code* came into effect on 3 March 2021. The ACCC Digital Platforms Branch was established in late 2019. In early 2020, a further digital platforms monitoring inquiry ('DPSI') was directed until 2025, and a separate inquiry into digital advertising services was directed subsequently released on 28 September 2021.[18]

In essence, the answer given in response to the problem posed was to consider broader laws, higher penalties for 'unfair practices', and more monitoring.

The DPI really shaped the direction for competition law regulation of the digital economy in the subsequent years.

The ACCC is actively monitoring the digital economy. In the DPSI, the ACCC is examining specific sectors across the digital economy and reporting every 6 months over 5 years. The interim reports focus on search engines, social media, online private messaging, digital content aggregation, media referral services and electronic marketplaces. To date, three reports have been produced:

+ The first, on online private messaging, focuses on power imbalances leading to unfair contract terms, data collection, tracking and privacy in relation to services offered by providers of online messaging platforms;[19]
+ The second examines app marketplaces, noting the significant market power owned by Apple and Google through their respective App Stores, and flagging revisiting these concerns in a later report;[20] and

14 See Elizabeth Avery, Andrew Low and Anna Belgiorno-Nettis, 'Digital Platforms the Focus of a "World First" Inquiry' *Gilbert + Tobin* (Blog Post, 12 December 2017) <https://www.gtlaw.com.au/insights/digital-platforms-focus-world-first-inquiry>.

15 See generally Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019).

16 Eg ibid 79.

17 See Gilbert + Tobin, *Government's Response to the DPI – A Roadmap for Reform in the Digital Age* (12 December 2019) <https://cdn.brandfolder.io/3RTTK3BV/as/q2dysv-k64fk-syokf/Government_response_to_the_DPI_-_A_Roadmap_for_reform_in_the_digital_age.pdf>.

18 See Elizabeth Avery and Andrew Low, 'The ACCC begins 2020 with a bang, announcing two new inquiries into digital platforms and advertising', *Gilbert + Tobin* (Insight, 18 February 2020) <https://www.gtlaw.com.au/insights/accc-begins-2020-bang-announcing-two-new-inquiries-digital-platforms-advertising>.

19 See Elizabeth Avery et al, 'ACCC releases Digital Platforms Services Inquiry Interim Report on Online Private Messaging', *Gilbert + Tobin* (Insight, 23 October 2020) <https://www.gtlaw.com.au/insights/accc-releases-digital-platforms-services-inquiry-interim-report-online-private-messaging>.

20 See Gina Cass-Gottlieb, 'Digital Platforms Services Inquiry: ACCC releases App Marketplaces Interim Report', *Gilbert + Tobin* (Insight, 10 May 2021) <https://www.gtlaw.

+ The latest report, published in September 2021, focused on web browser and search engine choices for consumers with particular emphasis on the entrenched market power of Google Search on mobile devices.[21]

The ACCC is also actively enforcing in the digital economy. Following the publication of the DPI in July 2019, the ACCC has taken a number of enforcement actions in digital markets, including:

+ Commencing proceedings against Google over Android's data collection and retention practices;[22]
+ Commencing proceedings against HealthEngine for misleading and deceptive data practices;[23] and
+ Commencing proceedings against Google, alleging it had misled consumers about the use of personal data since June 2016;[24]
+ Commencing proceedings against Facebook over its promotion of its Onavo Protect data protection app;[25] and
+ Investigating into Google's acquisition of Fitbit.[26]

What we are seeing is that concerns about regulation of dynamic markets are being led by the ACCC. This isn't unique to Australia, as competition regulators across the world lead the charge in addressing what I would coin as the issue of 'permissionless innovation' leading to 'significant economic dominance and therefore political power'. In part, this may be a tribute to the degree of trust and confidence in the ACCC as a regulator. There is also some logic that the market regulator is the appropriate institution to address market conduct of businesses.

Some interesting questions arise from these developments.

SHOULD A REGULATOR-SPECIFIC LED POLICY DESIGN BE ASSUMED TO BE A GOOD THING?

While the ACCC is heavily engaging in regulation of big tech, the first question is whether a regulator-specific led policy design should be assumed to be a good thing? There are a few observations I would share with you on this question:

First, the policy objective of competition could potentially override others.

Competition law is not the panacea for all things digital. Competition laws play a critical supporting role in a free market economy. Traditionally, it rests on the premise that a well-functioning free market economy delivers greatest consumer welfare through the delivery of productive, allocative and dynamic efficiency, or at least better than a government regulated one. Competition laws in that framework had a fairly straightforward objective: *ensuring that private parties did not create market power other than as a result of superior ingenuity and individual endeavours.*

These objectives are not necessarily consistent with other policy objectives. For example, the over protection of privacy can come at the cost of innovation and increased competition.

On 26 April 2021, Apple iOS 14.5 released its 'app tracking transparency' (ATT) framework.[27] Effectively, it shut off a stream of data that app developers, measurement companies, and advertisers used to link user behaviour across apps and mobile websites. Many publishers such as news outlets and e-commerce operations relied on this data to reach customers more efficiently.[28] At the same time

com.au/insights/digital-platforms-services-inquiry-accc-releases-app-marketplaces-interim-report>.

21 See Elizabeth Avery, Louise Klamka and Asha Keaney, 'ACCC Digital Platforms Services Inquiry Third Interim Report: web browsers and search services', *Gilbert + Tobin* (Insight, 11 November 2021) <https://www.gtlaw.com.au/knowledge/accc-digital-platforms-services-inquiry-third-interim-report-web-browsers-search-services>.

22 *Australian Competition and Consumer Commission v Google LLC* [2021] FCA 971.

23 *Australian Competition and Consumer Commission v HealthEngine Pty Ltd* [2020] FCA 1203.

24 *Australian Competition and Consumer Commission v Google LLC* [2021] FCA 1172.

25 *Australian Competition and Consumer Commission v Facebook, Inc* [2021] FCA 244.

26 See 'Google LLC proposed acquisition of Fitbit Inc', *ACCC* (Public Informal merger review portfolio) < https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc>.

27 See more Alison DeNisco Rayome, 'This iPhone setting can stop ads from following you across the web', *CNet* (web page, 9 November 2021) <https://www.cnet.com/tech/services-and-software/iphone-privacy-setting-stop-ads-tracking-you/>.

28 Kate O'Flaherty, 'Facebook adjusts ad measurement as Apple's privacy features hit', *Forbes* (online, 30 October 2021) < https://www.forbes.com/sites/

Apple to pushed adoption of its own target advertising solution (SKAdNetwork or SKAN). What do you think about this situation? Is this Apple seeking to position itself as a leader in privacy protection? Or is it opportunistically stifling innovation and competition from third parties in favour of its own ecosystem under the guise of privacy?

These inconsistencies in policy objectives are not new. We expect our existing legislative regimes to make trade-offs between these rights based on a value judgment arrived at through a democratic process. Does overreliance on our competition-regulator put consideration of broader value trade-offs for Australia at risk? Do we risk over-expansion of one set of laws without an eye to other social values?

The way competition laws address the issue of data aggregation is another example that illustrates this issue. Competition regulators globally are concerned with the aggregation of data in one party. The fear is that too much control or access to data by one party will, in turn, result in entrenching a party's dominance (as smaller competitors who are not as large are unable to replicate the data sets and leverage data to the same degree – and in the long run not given an opportunity to displace the dominant provider). This is reflected in the ACCC's Statement of Issues in its review of Google's acquisition of Fitbit:

> The ACCC is concerned about the potential for the acquisition to reduce the (limited) competitive constraint on Google arising from the threat of expansion or new entry… This is underpinned by the considerable data advantage it holds over its rivals.[29]

This focus on the potential harms of aggregating data through mergers is reflected in the legislative 'ask' of the ACCC, which is to consider if the transaction substantially lessens competition. It is not being asked to consider if the transaction improves competition or innovation. That is a different test.

Contrast this fear of aggregation of data with the views of the transaction expressed by the Founder of Fitbit, James Park:

> 'Google is an ideal partner to advance our mission. With Google's resources and global platform, Fitbit will be able to accelerate innovation in the wearables category, scale faster, and make health even more accessible to everyone.'[30]

This view of data aggregation may be confusing to those who are fintechs and innovators. It would be perfectly valid if you found it strange that we would prevent data aggregation in circumstances where arguably the vast aggregation of data and the ability to interpret that data is in part responsible for the amazing innovations we see and enjoy today. As the Organisation for Economic Cooperation and Development ('OECD') notes:

> 'Data-driven innovation forms a key pillar in 21st century sources of growth. The confluence of several trends, including the increasing migration of socio-economic activities to the internet and the decline in the cost of data collection, storage and processing, are leading to the generation and use of huge volumes of data… These large data sets are becoming a core asset in the economy, fostering new industries, processes and products and creating significant competitive advantage.'[31]

The application of competition laws to conceptualise data within a traditional economic framework of an 'asset' that – like shares – can substantially lessen competition results in a framework where competition laws (as they are enforced against specific corporations on a case by case basis) are making judgments on who should and who should not have data – and how it should be used. Basically, we like data when it leads to innovation, but we don't want that innovation to be led by people who are too big. This is an uncomfortable proposition if competition policy is intended to encourage innovation.

My second observation is about the potential crowding out effects of a strong regulator.

We should all take comfort in the additional resources dedicated to the ACCC to monitor and investigate the digital economy, and to

kateoflahertyuk/2021/10/30/apples-stunning-new-strike-to-facebook-is-a-mind-blowing-success/?sh=6f1242e6ff93>.

29 ACCC, *Google LLC – proposed acquisition of Fitbit Inc* (Statement of Issues, 18 June 2020) 3-4.

30 'Fitbit to be acquired by Google', *Fitbit* (Press Release, 1 November 2019) <https://investor.fitbit.com/press-releases/press-release-details/2019/Fitbit-to-Be-Acquired-by-Google/default.aspx>.

31 Organisation for Economic Cooperation and Development, 'Data-driven innovation for growth and well-being', *OECD* (Insight) <https://www.oecd.org/science/data-driven-innovation.htm>.

take the lead on privacy and media reforms. This is of significant importance. But is our growing expectation of the ACCC to solve these issues creating a crowding out effect on other regulators?

I was watching the streaming of the recent Parliamentary Joint Committee Inquiry on Mobile Payment and Digital Wallet Financial Services ('PJC Inquiry') over three days.[32] One of the topics of debate was Apple Pay's dominance in mobile wallet payments, which is of particular significance given the rapid shift in consumer preferences from 'traditional' banknote transactions in favour of effecting in-person and online transactions via digital wallets.[33]

Evidence was given by the ACCC, the Reserve Bank of Australia ('RBA'), the Australian Prudential Regulation Authority ('APRA') and the Australia Securities and Investments Commission ('ASIC'). The hearings brought to light the difficulties of regulator crowding out effects. The ACCC expressed concern over Apple's emerging gatekeeper role, derived from its control over a gateway to offer services to customers. The ACCC and the Treasury considered that Apple's exclusive NFC access raises significant competition concerns that could culminate in the foreclosure of rivals. The RBA expressed similar sentiments, explaining the potential for Apple to develop a stronger negotiating position that could make it difficult for smaller firms to compete.

However, despite agreement on the issues, there appeared to be a difference in opinion as to who was responsible. Over the public hearings, the RBA told the committee:

> **While the case for regulatory attention on digital wallets appears to be growing, it is unclear that the Bank currently has regulatory powers in this area. Accordingly, it is likely that the ACCC would take the lead**, with cooperation from the Bank, should competition issues warrant regulatory scrutiny. For example, the limits to the Bank's powers in this area could affect the Bank's ability to seek relevant data or other information from wallet providers. [emphasis added]

The ACCC's evidence was:

> Regulation of the financial sector is not our responsibility. That's probably a question better directed at Treasury and the Reserve Bank.

The PJC Recommendation 10 was to suggest it be the ACCC's job to investigate.

These issues straddle the line between competition and payments regulation. Who should own this? The RBA is responsible for promoting the safety and efficiency of the payments system and through the *Payment Systems (Regulation) Act 1998* (Cth); and the ACCC is responsible for enforcing the *CCA*.

That the ACCC has been recommended to take the lead in assessing the issue is a testament to the confidence and efficacy of the regulator but will it produce an outcome with too much of a competition-focussed lens? That is, will it mean our assessment is focussed on a substantial lessening of competition ('SLC') test only as opposed to conceptualising whether this presents a systemic risk of disintermediation of the payment system by one large tech platform (in turn impacting competition)? Have we inadvertently crowded out our payments regulator?

These are moving issues. Just yesterday there were media releases that new laws would be proposed by Treasury to expand the RBA's powers early next year.[34]

Let's contrast these developments with Europe. While these issues have been explored since 2015 and culminated in the proposed

32 See Parliamentary Joint Committee on Corporations and Financial Services, *Mobile Payment and Digital Wallet Financial Services* (Report, October 2021) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024736/toc_pdf/MobilePaymentandDigitalWalletFinancialServices.pdf;fileType=application%2Fpdf>.

33 Philip Lowe, 'Payments: The Future? (Speech, Address to the Australian Payments Network Summit 2021, 9 December 2021).

34 See James Eyers, Patrick Durkin and John Kehoe, 'Afterpay fees may be passed on to shoppers', *Australian Financial Review* (online, 8 December 2021) <https://www.afr.com/companies/financial-services/afterpay-fees-could-be-passed-on-to-consumers-20211208-p59fve>. See also Jessica Sier and James Eyers, 'Who will win the buy now, pay later battle?', *Australian Financial Review* (online, 16 July 2021) <https://www.afr.com/technology/who-will-win-the-buy-now-pay-later-battle-20210715-p58a3p>.

legislation in the *Digital Markets Act*,[35] and Germany's *Lex Apple Pay*.[36] It's not certain which approach is right or wrong, but it is certain that Australia is well-behind global thinking on this issue.

My third observation is whether regulation policy led by a competition regulator will inevitably reflect that regulator's institutional character or specific capability in the policy solutions it proposes?

For competition regulators, that capability is couched primarily in enforcement capability, that is, to investigate and seek significant penalties for conduct that is considered a contravention. In this way the ACCC is an effective competition and consumer enforcement agency, and from the DPI, three significant proceedings have been commenced by the ACCC.

The ACCC's primary mode of engagement therefore is to identify problems and propose solutions for those specific problems; a 'problem-solution' lens. This is useful in enforcement but necessarily a narrow lens for considering the complexity of digital markets. For example, while the DPI was touted as the comprehensive examination of digital platform behaviour in Australia it is important to note that (1) Google and Facebook aren't the 'digital economy' (and seems to have missed important players such as Apple), and (2) media and advertising industries were not the only industries 'disrupted' by digital platforms.

I want to take moment to contrast the DPI recommendations with the review undertaken for the UK Government – around the same time as the DPI – by a specially constituted panel of experts lead by the former Chief Economist to President Obama, Prof Jason Furman.[37] The Furman Report has much in common with the ACCC's DPI Report, but there are subtle and important differences in approach to the challenges of the digital economy. The Furman Report emphasised ex ante co-regulatory approach to identifying permitted and non-permitted behaviour:

> The approach should combine participation and consultation with the scope for regulatory enforcement… it should only intervene where doing so is effective and proportionate to achieve competitive aims. Where this is the case, the Panel wants to introduce a system where industry has greater clarity and confidence over what constitutes acceptable practice and the rules that apply. The best way of achieving these outcomes is through introduction of a digital platform code of conduct… developed collaboratively… with platforms and other affected parties. This will provide the opportunity to clarify what constitutes unfair or unacceptable conduct.[38]

In 2020, the UK Government expressed its intention to implement most of the recommendations from the Furman Report.

HOW DOES OUR SITUATION LOOK COMPARED TO OTHER GLOBAL DEVELOPMENTS?

It's useful to contrast the ongoing Inquiry-report-monitor phase Australia is going through today as compared to other developed economies on these issues.

In Europe, the Digital Single Market strategy undertook a wholesale review of the digital markets from 6 May 2015.[39] It considered whether EU's single market was fit for the digital age including – shaping the digital single market to open up opportunities for people and businesses and enhance Europe's position as a world leader in the digital economy, boosting EU's digital industry (eg, ensuring SMEs and non-tech industries benefit from digital innovations), building a EU data economy, improving connectivity and access, investing in network technologies, creating digital society and supporting trust and security.

The Digital Single Market Strategy triggered the introduction of the *Digital Markets Act*, which was proposed on 15 December 2020. The DMA is broad ranging focused on all aspects of the digital economy. It did not propose over-regulation of all players, and where it had specific concerns, it sought to designate company-specific obligations (in the same way Australia does for the telecommunications

35 See European Commission, 'The Digital Markets Act: ensuring fair and open digital markets', *European Commission* (Web page) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>.

36 Dr Susan Grohé, 'Lex Apply Pay – Take Two', *Pay Tech Law* (Web Page, 17 May 2021) <https://paytechlaw.com/en/lex-apple-pay-take-two-zag/>.

37 *Unlocking Digital Competition – Report of the Digital Competition Expert Panel* (Report, March 2019) ('Furman Report').

38 Ibid 55—58.

39 What is the Digital Single Market About', *Eurostat* (Web Page) < https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html>.

industry). It doesn't presume that all suppliers in the digital economy are a large digital platform.

In the US, following the Stigler Report,[40] there were a series of House of Representative hearings. These resulted in five legislative bills being debated in the legislature which specifically focus on killer acquisitions, self-preferencing, data interoperability, data portability and monopolisation.[41]

In the APAC region, governments are considering *ex-ante* regulation to address data collection and retention practices by digital platforms. On 17 February 2021, the Japan Fair Trade Commission ('JFTC') released its Final Report Regarding Digital Advertising.[42] The report in effect provided a series of ex ante guidance to businesses around the regulator's expectations of how business would conduct themselves with respect to digital advertising online, including when the JFTC would consider a lack of clarity of privacy policy or use of information would be problematic (i.e., lack of availability of audience data to publishers).

My observation is not that these forms of regulation are necessarily correct, but they have inherently led to, over the four years since the DPI was commenced, a stark contrast to where we are at in Australia.

While regulators need to and are expected to be active on these issues, we should not be quick to assume that a regulator-specific led policy agenda, or over-focus and over-reliance on competition regulators to determine the appropriate means for regulating the economy, necessarily lead to overall positive outcomes. Policy needs to have a broad perspective and engage with broader value trade-offs beyond one policy design.

ANOTHER INTERESTING OBSERVATION ARISING FROM OUR DEVELOPMENTS IS HOW WE GRAPPLE WITH REGULATION OF UNCERTAIN ENVIRONMENTS.

In competition law, one of the key issues that regulators are grappling with is the highly dynamic nature of digital markets, and the difficulties of predicting how small actions today could have significant impacts on competition in the future. This is specifically relevant for merger control.

Under section 50 of the *CCA*, mergers are prohibited if they have the effect or likely effect of substantially lessening competition. It is a forward-looking analysis. It is also challenged by the fact that there are strong incentives to intervene before mergers are consummated:

+ Mergers, once consummated, are difficult to unwind.
+ Under the CCA, unilateral conduct engaged in once a merger is consummated is not prohibited unless that party has a substantial degree of market power and engaged in conduct that has the purpose, effect or likely effect of SLC in that market or another market in which it supplies or acquires goods. These misuse of market power prohibitions are incredibly difficult to prosecute and don't capture the range of purely legal economic activity that could lessen competition.

Accordingly, the opportunity for the regulator to prohibit a party gaining dominance (and therefore structurally distorting competition in markets) is at the time of merger.

This sentiment is shared by competition regulators worldwide, including the ACCC who on 27 August 2021 outline the need for merger control reform.[43] For those of you who are unfamiliar, mergers in Australia are prohibited if they have the effect or likely effect of substantially lessening competition, such potential assessed against a counterfactual in the future with or without the merger having regard to *'a real chance not remote and grounded in commercial reality'*. In his speech heralding the need for merger law reform, ACCC Chair, Mr Rod Sims, stated that:

40 Stigler Centre, *Stigler Committee on Digital Platforms* (Final Report, 16 September 2019).

41 See 'House antitrust subcommittee unveils five big tech antitrust bills' *Reuters* (Web page, 15 June 2021) https://www.reuters.com/legal/legalindustry/house-antitrust-subcommittee-unveils-five-big-tech-antitrust-bills-2021-06-14/>.

42 See 'Final Report Regarding Digital Advertising' (Press Release, February 2021) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html>.

43 See more Elizabeth Avery et al, 'ACCC heralds its proposal to reform the Australian merger control regime', *Gilbert + Tobin* (Insight, 31 August 2021) <https://www.gtlaw.com.au/knowledge/accc-heralds-its-proposal-reform-australian-merger-control-regime>.

> The key challenge for merger control is to distinguish between acquisitions that substantially lessen competition and those that do not, and are benign. It is a forward-looking exercise that involves inherent uncertainty.
>
> However, uncertainty should not make clearance the default, which is where we are today. This is a crucial point.
>
> …
>
> Our current merger law does not capture acquisitions by digital platforms where there is a relatively low probability of a lessening of competition but, if it occurs, the impact is likely to be very substantial and long-lasting. It also does not adequately capture acquisitions that may enable a platform to leverage its existing dominance or control of data into market power in related markets.
>
> …
>
> While this shortcoming is not limited to acquisitions in digital markets, it certainly has been amplified by the growth of digital platforms where a strategy of acquiring nascent rivals can, and likely is, being used to protect positions of very substantial and long-lasting market power.
>
> …
>
> Regardless, it is beyond debate that acquisitions have taken place that have contributed significantly to the substantial market power of the digital platforms. With the benefit of hindsight, they should not have been allowed to proceed.[44]

The ACCC recognised that there is difficulty in predicting the future, in a rapidly changing market and there are challenges to intervening early in these markets when there are unknowns.

However, it's not easy to prove as a matter of fact whether a merger will or will not substantially lessen competition with or without the benefit of hindsight. In 2019, a study produced by competition economics consultancy, Lear, for the CMA examined ex-post mergers in digital markets and found that there was no definitive way to conclude, 10 years later, that mergers were problematic even in retrospect.[45] Lear concluded that:

> "[t]he decisions taken in Facebook/Instagram and Google/Waze may have represented missed opportunities for the emergence of challengers to the market incumbents but have also likely resulted in efficiencies."

The current debate is whether our merger laws are not fit for purpose because in the face of dynamic uncertainty, they are geared towards permitting mergers to occur rather than opposing them.

However, mergers in the digital economy should not be presumed to be bad. They can in fact play an important role in incentivising investment and innovation by providing a viable and desirable exit path for innovators. Furthermore, they can be a reorganisation of economic entities that can lead to significant synergies – reducing costs and enhancing complementarities. Yes, this can be the case even when the big one buys the little one!

It seems to me that most mergers are benign for competition, and our real concerns relate to fringe cases. Most digital transactions appear to be capable of assessment based on the facts available at the time. For example, in the last year the ACCC has:

+ Reviewed Meta's acquisition of CRM supplier Kustomer (not opposed);
+ Salesforce acquisition of Slack Technologies (not opposed);
+ Microsoft Corporation's acquisition of Nuance (not opposed); and
+ Is currently reviewing Amazon's acquisition of MGM Studios.

In each of these cases, the existing analytical framework for competition assessment served the ACCC well – the assessment of what we refer to as vertical, horizontal and conglomerate effects irrespective of market definition was sufficient to satisfy no competition

44 Rod Sims, 'Protecting and promoting competition in Australia' (Speech, Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021) <https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia>.

45 Lear Consultancy, *Ex-post assessment of merger control decisions in digital markets* (Final Report, 9 May 2019)

concerns would arise post transaction.

So, what is the fringe case? In my view, this is the Google's acquisition of Fitbit, which had the following features:

+ Google, a well-known technology company, offered a range of technology services including search and social media. It did not have a wearable device or 'smart watch' offering. Fitbit is a US based smartwatch manufacturer. There was no competitive overlap between the two parties.
+ Fitbit experienced a significant decline in sales and revenue caused by vigorous competition from Apple's Apple Watch and other more advanced smartwatches. Apple was by far the largest smartwatch manufacturer globally.
+ Google's acquisition of Fitbit would allow Fitbit to accelerate its innovation in the wearables category, scale faster, and make its health products more accessible. This was based on Google's resources and global platform. For Google, the combination of Fitbit's technology, product expertise and health and wellness innovation with Google's AI, software and hardware would drive more competition in wearables and make the next generation of devices better and more affordable.

The transaction was reviewed globally, including in Australia, the US and by the European Commission. The fear was that Google would access, through Fitbit, significant consumer health data – expanding its existing data set – and entrench its dominant position in advertising. It may also limit entry into data-dependent health markets (not yet formed) where Fitbit's data would be an important resource for third parties innovating new services in the market. This is because third parties would not be able to access Fitbit's data under Google's ownership. There was also a concern that there could be foreclosure of third-party wearable manufacturers by refusing them access to Google Maps, Wear OS, Google Play and Android OS.

The merger had clear benefits from the commercial parties' and consumers perspectives. However, the fear of regulators was the potential for harm resulting from too much aggregation of data in one party; nascent markets; and foreclosure of access to essential technology points. Could there be a potential that, though small, there would be significant risk in the future of allowing this merger to proceed? The reviews took around one year to assess.

Interestingly, global regulators took different approaches:

+ Some regulators approved the transaction, such as the JFTC.[46]
+ The European Commission ('EC') allowed the transaction to proceed, but accepted undertakings to maintain structural separation of data of Fitbit from Google; and to ensure there would be continued third party access to Google's various services.[47]
+ The ACCC and DOJ did not arrive at any decision.[48] The last I am aware, these reviews remain ongoing, two years after public announcement in 2019.

In my view, no regulator failed to assess or appreciate the trade-offs they were being asked to make. They were being asked to assess whether:

1. Market forces brought two commercial parties together to see immediate value of a merger enhancing competition and commercial opportunities and therefore should not intervene; as opposed to
2. A merger that potentially risked entrenching a 'dominant' party and removing competition in markets not fully formed yet and should intervene.

The difference is in the value judgment regulators exercised around what should occur. Say "yes", say "no", say "yes, but" or "do nothing… for now"?

+ Saying "yes" may lead one to Type II error (approving when one should have rejected), but perhaps a risk weighting based on

46 See Japan Fair Trade Commission, 'The JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC' (Press Release, January 2021) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html>.

47 See European Commission, 'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions' (Press Release, 17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484>.

48 See ACCC, 'Google LLC proposed acquisition of Fitbit Inc', *ACCC* (Public Information merger reviews portfolio) <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc> and David McLaughlin, 'Google Closes Fitbit Deal Amid Ongoing U.S. DOJ Review', *Bloomberg* (Web Page, 15 January 2021) <https://www.bloomberg.com/news/articles/2021-01-14/google-closes-fitbit-deal-amid-ongoing-u-s-doj-review>.

existing evidence might lead one to believe that the risk of significant harm was small while the risk of opposing a transaction with significant benefits was high.

+ Saying "no" may lead one to Type I error, by rejecting something that could be net positive for consumers. The social cost of this is apparent.
+ Saying "yes, but" allowing for a more targeted and focussed approach to isolating the specific harms – while ensuring one gets the benefit of the merger.
+ "Do nothing… for now" is, in fact, an approach that suggests over time more data points will become clear that either show the merger is not or is anti-competitive. A 'wait and see' approach can be attractive, but it is undesirable as it gives commercial parties not certainty; and once the transaction completes in any event, it is very difficult to unwind. Furthermore, as the Lear Report shows, even after 10 years you may not be able to tell if the transaction was problematic…

I see this merger debate as one of the issues that goes to the heart of regulating dynamic innovation: if we don't move quick enough, we can miss the boat on any meaningful ability to regulate for harm. If we move too quickly, we may in fact stifle innovation.

One of the merger proposals contemplated is rebuttable presumptions for mergers by large digital platforms. That is, in the face of uncertainty, one opposes the transaction.

In my view, a world of 'absolutes' for regulation, being default 'yes' or default 'no', is likely to lead us into Type I or II errors and result in real and appreciable social losses. There is an opportunity to look at the EC approach and consider that perhaps a clearer expression of harm, and a more nuanced and targeted approach to regulation to address that harm, has merits. A clear, tractable, and transparent analytical framework for these issues will give parties the right signals and certainty on how to operate in a 'free market'.

CONCLUSIONS

In the competition space, the challenges of regulating the digital economy could be written in a tome and still be incomplete. I hope these observations have been interesting and thought provoking to the credit lawyers on the line.

I'd like to share some closing thoughts to sum up the state of affairs:

+ There is an overall disquiet and dissatisfaction with the current state of affairs in the digital economy. There is a sense that it is working for some, but not for many. The speed and uncertainty of innovation challenges traditional models of regulation, and commentators are left thinking that our regulatory tool set is out of date. Furthermore, like Apple Pay, things we didn't think were an issue at the outset over time could turn into significant existential issues for industries. The issues straddle a range of policy domains, from competition, to privacy and financial regulation amongst others.
+ We are observably moving quickly to address these issues and have the benefit of a strong competition regulator leading the charge to monitor and enforce in the digital economy. However, we shouldn't assume that a competition lens or a competition regulator-led policy approach is necessarily a good thing.
+ As a general proposition, we should not be afraid to regulate or take action, and to do so quickly. Taking no action, or too long to consider one's position, in circumstances where there are real questions to be asked in the digital economy is dangerous.
+ At the same time, as a general proposition, we need to avoid regulating quickly by polarising issues and opting for 'default' regulation. Not all regulation is bad regulation that will stifle innovation. Similarly, not all actions of large platforms are bad and should be opposed. Ultimately, we cannot say for certain in the future whether small actions now are going to have significant consequences – this is like trying to quantify the butterfly effect. Regulating in absolutes is dangerous.
+ In conclusion, regulation needs humility in the face of uncertainty (to know that there are some things we don't know) – but at the same time takes courage to grapple with the complex issues and apply a targeted mind to harms and delineation with benefits.

The challenges put to us in the digital economy is actually in some ways capture the essence of our aspirations for our ideal regulatory landscape, which is to:

+ Seek cross sector regulation where possible;
+ Maximise whole of economy benefits and harms; and
+ Manage competing interests across people, companies, government, human rights and private interests.

I look forward to hearing much more discussions on the issue and where we go in the next few years. Thank you for your time.


GILBERT
+TOBIN