

EDITORIAL

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‘Big technology’ companies exert extraordinary power over so many facets of our lives. In many ways, their impact has been both ‘positive [and] transformative’,¹ and it is evident that they play a central role in providing access to online commerce and communications:² Facebook facilitates communication with others from all over the world; Google Search provides an extensive database right at our fingertips; and Amazon, as the most visited e-commerce marketplace in the world,³ provides a convenient and centralised shopping platform for consumers.⁴

However, such an immense concentration of market and economic power raises concerns for consumers, businesses and policymakers. Lina M Khan argues that the dominance of large technology companies can be attributed to several factors, including their role as gatekeepers of digital markets and their ability to leverage their existing platform dominance to create competitive advantages in adjacent or separate markets.⁵ Their power is further entrenched by their exploitation of data as a strategic asset.⁶

Competition regulators in many jurisdictions are grappling with the complexities of regulating digital platforms. The Australian Competition and Consumer Commission (‘ACCC’) has commenced multiple inquiries into the market power of digital platforms.⁷ There have also been numerous antitrust investigations and regulatory proposals in the United States⁸ and in the European

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1 Caron Beaton-Wells, ‘Foreword’ in Katharine Kemp, *Misuse of Market Power: Rationale and Reform* (Cambridge University Press, 2018) xi, xi.

2 Lina M Khan, ‘The Separation of Platforms and Commerce’ (2019) 119(4) *Columbia Law Review* 973, 982.

3 Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, United States House of Representatives, ‘Investigation of Competition in Digital Markets’ (Report, 2020) 256 <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519>.

4 See also Katharine Kemp, *Misuse of Market Power: Rationale and Reform* (Cambridge University Press, 2018) 1–2.

5 Lina M Khan, ‘Sources of Tech Platform Power’ (2018) 2(2) *Georgetown Law Technology Review* 325, 326–8.

6 *Ibid* 329–30.

7 See, eg, Australian Competition and Consumer Commission, ‘Digital Platforms Inquiry’ (Final Report, June 2019); Australian Competition and Consumer Commission, ‘Digital Platform Services Inquiry’ (Interim Report No 2, March 2021); Australian Competition and Consumer Commission, ‘Digital Advertising Services Inquiry’ (Interim Report, December 2020).

8 See, eg, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, ‘Investigation of Competition in Digital Markets’ (n 3).

Union.⁹ Additionally, the power of ‘Big Tech’ is not merely over ‘commerce, but [also extends to] ... politics, the news and our private information’.¹⁰

The articles in the thematic component of this Issue build on topical academic discourse on the regulation of digital platforms and technology in commercial and political contexts. They explore a diverse range of issues, including: the inadequacy of existing merger law in addressing nascent digital competition concerns; the protection of children’s best interests in the context of adtech and data practices; disseminative competition as a key functional dimension of copyright markets; the capacity of the *United Nations Convention on Contracts for the International Sale of Goods*¹¹ to regulate international trade in non-software data; the changing nature of political participation and the regulation of contemporary digital politics; and the challenges of and potential reforms for regulating disinformation and deepfakes.

Issue 44(3) also features an exceptional selection of six general component articles, which discuss: the challenges associated with the use of automation in administrative decision-making; an improved model for Australia’s enhanced fintech sandbox; the subversion of the rule of law to avoid the granting of permanent protection to refugees; an analysis of environmental, social and governance resolutions in the context of the legal framework for shareholder resolutions; proposed reforms for regulating police body worn cameras; and the potential in an affirmational republic with an extra-constitutional Declaration that reflects Australia’s history and values, including the nation’s Indigenous inheritance and British heritage.

There are a great number of people who have contributed to the publication of this Issue. Firstly, I would like to thank the authors for entrusting the *Journal* with their work. It has been a privilege and an absolute pleasure to see such exceptional articles through to publication, and I have really enjoyed working with each of you throughout the editorial process. I am greatly indebted to the anonymous peer reviewers, whose feedback and expertise were vital to selecting and refining articles and ensuring that the *Journal* continues to contribute to contemporary legal debate.

I am deeply grateful to Rod Sims, Chair of the ACCC, for agreeing to write the foreword and deliver the keynote speech. The *Journal* is honoured to have Mr Sims providing his insightful comments on these topical issues.

It would not have been possible to produce this Issue without the incredible work and sharp eyes of the Editorial Board. To every Board member who painstakingly proofread each article and meticulously checked every footnote and pinpoint reference, I am immensely grateful for your patience and commitment, and the effort and countless hours you have dedicated to these edits. I greatly appreciate your hard work and enthusiasm for editing, and I have been very fortunate to work

9 See, eg, European Commission, ‘The Digital Services Act Package’ (Web Page, 2 September 2021) <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>>; Kate Beioley and Javier Espinoza, ‘UK Competition Watchdog Warns Big Tech of Coming Antitrust Probes’, *Financial Times* (online, 22 February 2021) <<https://www.ft.com/content/da5c30a8-6fab-4131-b6bd-f8f05dcf5a46>>.

10 Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018) 15.

11 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988).

with you. I would also like to sincerely thank the *Journal* alumni who generously volunteered their time to assist with edits.

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