FOREWORD

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Increasingly, Australians are spending a greater proportion of their time in the digital world as online services and products prove invaluable for people and businesses alike.

Digital markets are highly concentrated, often featuring only one or two dominant firms with significant market power. In search and adtech, this is Google; in app marketplaces, this is Apple and Google; in social media, this is Facebook (through both the Facebook and the Facebook-owned Instagram services).

Australians spend almost 40% of their online time on services operated by Google and Facebook alone.[1] In 2020, Google's share of the market for general search was 95%,[2] while over 70% of time spent by Australians on selected social media platforms was on Facebook.[3]

The digital platforms ('DPs') are great examples of how innovation can change our lives, much of it for the better. The COVID-19 pandemic only reinforced their importance and value, particularly in the way we communicate with each other, whether at home or work, sometimes both at the same time. Even the courts are increasingly reliant on the services of the digital platforms as they, too, have adapted to working remotely.

The popularity and usefulness of the digital platforms have transformed them into growing economic powerhouses capable of quickly dominating adjacent markets they enter. The subject range of the articles in this Issue of the *University of New South Wales Law Journal* ('*Journal*') indicates how their rapid growth is challenging current laws across diverse areas such as privacy, copyright and regulatory processes, as well as in competition and consumer law.

The Australian Competition and Consumer Commission ('ACCC') has conducted a number of inquiries into the business practices of digital platforms, starting with our 2019 Digital Platforms Inquiry ('DPI') which examined the impact of search engines, social media platforms and other digital content aggregation platforms on competition in media and advertising services markets.

Our inquiries have revealed how vague, long and complex data and privacy policies contribute to the substantial disconnect between how consumers think their data should be treated and how it is actually treated. Transparency and inadequate

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1 Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry' (Interim Report, September 2020) 17.

2 Ibid B2.

3 Ibid B7.

disclosures involving digital platforms and consumer data are an ongoing focus of the ACCC's work.

In this Issue of the *Journal*, the importance of consumer consent is looked at from the point of view of children's rights and their susceptibility in the article 'Adtech and Children's Data Rights' by Ms Lisa Archbold, Dr Damian Clifford, Professor Moira Paterson, Professor Megan Richardson and Associate Professor Normann Witzleb.[4] They call for more transparency and for a 'binding privacy code' covering children, drawing on the European Union's *General Data Protection Regulation*,[5] the United States *Children's Online Privacy Protection Act*,[6] and a recommendation from the DPI's Final Report.[7]

The platforms that dominate digital markets have very successful business models. Facebook and Google offer services for 'free' to consumers and generate revenue through extensive data collection and advertising. Apple and Google both make use of their control of a broader ecosystem of software and hardware products (each controlling around 50% of the mobile phone and mobile operating system markets in Australia) to draw in and 'lock in' consumers, thereby growing, defending and extending their market positions.

All of the leading digital platform firms are frequent acquirers of successful, smaller businesses and technology. In the last decade to 2019, Google, Facebook, Microsoft, Amazon and Apple together made an estimated 431 acquisitions worth a combined USD155.7 billion.

These expanded services can deliver benefits to consumers, but the impacts on competition and consumer choice need to be closely monitored and considered.

General competition law is inadequate to address the significant competitive concerns associated with the large multinational digital platforms. In particular, the length of time taken to investigate and enforce competition or antitrust law may not always provide effective remedies given the fast-moving nature of these businesses which can quickly entrench market power. This has led to growing international recognition of the need to also consider some form of regulation of digital platforms to prevent anti-competitive conduct before it arises.

In some cases, the acquired companies may have provided much-needed competition as rivals to the dominant platforms. Arguably, limitations in the application of existing merger rules around the world have made it difficult for competition authorities to effectively scrutinise and, if required, block such acquisitions.

A significant challenge in assessing these acquisitions is forecasting the changing digital habits of consumers and the likelihood that smaller start-ups and

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4 Archbold et al, 'Adtech and Children's Data Rights' (2021) 44(3) *University of New South Wales Law Journal* 857.

5 *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1.

6 *Children's Online Privacy Protection Act of 1998*, 15 USC §§ 6501–6.

7 Australian Competition and Consumer Commission, 'Digital Platforms Inquiry' (Final Report, June 2019).

nascent firms will grow and develop to match those changing habits in the absence of the proposed acquisition.[8]

Australia's current merger threshold prevents acquisitions that 'would have the effect, or be likely to have the effect of, substantially lessening competition in any market'.[9] This test makes it difficult to address acquisitions with a low probability of causing anti-competitive harm, but which would have a very significant impact if this harm did occur. The ACCC is advocating for changes to Australian merger laws.

These are complex issues, but they matter enormously and, in different ways, they are being considered all over the world. It is good to see that debate continued in this Issue of the *Journal*.

Mr Joshua Sinn's article, 'Managing Nascent Digital Competition: An Assessment of Australian Merger Law under Conditions of Radical Uncertainty', identifies problems with our current merger laws and the need for a rethink. As he points out, section 50 of the *Competition and Consumer Act 2010* (Cth), 'as currently interpreted by courts, poorly responds to the uncertainties created by the economic characteristics of digital markets, thereby inadequately promoting innovation in digital markets'.[10] Sinn closely examines the Australian jurisprudence concerning nascent competition issues, observing that merger analysis involving nascent digital competitors can be subject to significant ambiguity. He argues that the current laws respond poorly to the uncertainties inherent in digital markets, and advocates a more responsive and innovative approach to merger institutions.

If there is a common theme running through this Issue of the *Journal*, it is the need for the law to evolve to keep up with the rapidly shifting digital world. This is particularly evident when old legislation is no longer fit for purpose.

The starting point for Dr Benjamin Hayward's article, 'To Boldly Go, Part I: Developing a Specific Legal Framework for Assessing the Regulation of International Data Trade under the *CISG*' is that the future of commerce is digital.[11] Then he sets out to establish a legal framework for assessing the *United Nations Convention on Contracts for the International Sale of Goods*' ('*CISG*')[12] potential application to non-software data trade.

This old treaty, the *CISG*, was written with the physical goods trade in mind. While a body of scholarship has since addressed the *CISG*'s ability to govern electronic software, no-one has yet really considered how it now applies to the now-prevalent trade in other forms of digital products or data, such as media files, apps and 'raw data' (including personal data that forms the bedrock of many digital platforms' business models). This will become an increasingly relevant issue given the growing importance and commoditisation of data in the digital economy.

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8 Ibid 81.

9 *Competition and Consumer Act 2010* (Cth) s 50(1).

10 Joshua Sinn, 'Managing Nascent Digital Competition: An Assessment of Australian Merger Law under Conditions of Radical Uncertainty' (2021) 44(3) *University of New South Wales Law Journal* 919, 958.

11 Benjamin Hayward, 'To Boldly Go, Part I: Developing a Specific Legal Framework for Assessing the Regulation of International Data Trade under the *CISG*' (2021) 44(3) *University of New South Wales Law Journal* 878.

12 *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).

Dr Cheryl Foong's article on competition law reform, 'Reconceptualising Copyright Markets: Disseminative Competition as a Key Functional Dimension', points out that conceptual understandings of markets in the copyright context can benefit from competition law perspectives, and draws a number of interesting parallels between the two.[13] In particular, she notes that Australian competition law's purposive approach to identifying the relevant functional level of a market holds lessons for copyright law, including aiding in the understanding of competition that occurs in disseminative markets for copyright content. The article goes on to explore the potential application of a rule of reason analysis specifically tailored for copyright law.

The influence of the digital platforms goes beyond consumer and business issues. There are a number of larger societal impacts which are looked at from different angles in this Issue. The threat to the increasing automation of our regulatory and democratic processes is a common theme in a number of articles.

Professor Anika Gauja's article, 'Digital Democracy: Big Technology and the Regulation of Politics', focuses on how the digital platforms' profound effect on the way we communicate has altered and distorted political and regulatory processes.[14] Gauja reflects on the normative basis for the regulation of politics online, before surveying various models of regulatory governance in the context of digital politics. She saliently observes that whichever model of regulation is ultimately adopted, accountability and transparency will remain paramount to the legitimacy of regulatory decisions.

The issue of political deepfake videos created through artificial intelligence (a form of political disinformation) is the focus of the article by Mr Andrew Ray, 'Disinformation, Deepfakes and Democracies: The Need for Legislative Reform'.[15] He considers the threats to elections and representative democracies posed by this form of disinformation, noting that a global trend towards shareable content through platforms like Facebook can make it easier for such material to be widely distributed. He concludes that current legal protections are inadequate and proposes a number of specific legislative amendments to deal with this concerning issue.

The range of legal issues discussed in these articles underlines the significance of the challenges arising from digital platforms' growing role in our individual and collective lives, and the need for governments and us all to be proactive in anticipating the challenges and problems. Thoughtful legal frameworks have a role to play in harnessing the benefits of innovation while protecting society from its potential harms.

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13 Cheryl Foong, 'Reconceptualising Copyright Markets: Disseminative Competition as a Key Functional Dimension' (2021) 44(3) *University of New South Wales Law Journal* 1014.

14 Anika Gauja, 'Digital Democracy: Big Technology and the Regulation of Politics' (2021) 44(3) *University of New South Wales Law Journal* 959.

15 Andrew Ray, 'Disinformation, Deepfakes and Democracies: The Need for Legislative Reform' (2021) 44(3) *University of New South Wales Law Journal* 983.