Law Council
OF AUSTRALIA

Business Law Section

21 August 2023

Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: digitalmonitoring@accc.gov.au

Dear Sir/Madam,

Digital Platform Services Inquiry 8, March 2024 report on data brokers, Issues Paper

A. INTRODUCTION

1. The Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to comment on the Australian Competition and Consumer Commission (**ACCC**) Digital Platform Services Inquiry (**DPSI8**), March 2024 issues paper on data brokers, dated 10 July 2023 (the **Issues Paper**).

2. We note that section 4 of the Ministerial Direction for the Inquiry defines "data broker" as "*a supplier who collects personal or other information on persons, and sells this information to, or shares this information with, others."* We understand that the ACCC takes the view that, given this definition refers to "other information on persons", it is therefore broader than any concept of 'personal information' for the purposes of section 6(1) of the *Privacy Act 1988* (Cth).

3. We appreciate that the Issues Paper is seeking factual responses in relation to many of the questions in the Issues paper. The Committee will leave factual responses to industry participants and will instead focus on legal and competition policy issues raised by the Issues Paper.

B. EXECUTIVE SUMMARY

4. The Committee makes the following summary points:

   (a) While the ACCC has said in the Issues Paper that it is not looking at privacy matters, it appears from the Issues Paper that it is indeed considering privacy issues through an Australian Consumer Law lens: for example, by looking at whether there is any misleading or deceptive conduct.

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(b) A clearer understanding of what is meant by data broking services is required, so that industry can understand what the ACCC is looking at as part of DPSI8 The ACCC defines these services in the Issues Paper as services that collect, process and analyse "personal or other information on persons". However, where that information is not collected directly from the relevant individuals by the broker, this concept seems to be very broad, and the services that the ACCC is looking at, as listed in the Issues Paper, include quite a few where publicly available information is used, including where individuals cannot be identified in any way from the final product or service and/or which may use only anonymised data. There appears to us to be a significant risk that the conflation of these different types of data with data that is truly "personal information" may mischaracterise the competition and consumer law issues that arise from the collection, storage, supply, processing and analysis of such data, unnecessarily raising concerns on the part of the public.

(c) There are several statements, both in the ACCC media release that accompanied the Issues Paper and in the Issues Paper itself, to the effect that consumers are not aware of what data brokers collect or are unhappy with the processes of data brokers. However, this does not seem to be supported by substantive evidence put forward by the ACCC in the Issues Paper, but rather is drawn primarily from an academic paper produced in Milan. That paper appears to combine, within the concept of data broking, both "first-party" data (that is, data that is collected directly from the relevant individual) and "third-party" data (that is, data that is not collected directly) and combines both personal and other types of information relating to individuals. Other research that is used as support for these concerns relates to personal information and again appears not to distinguish between first-party data and third-party data.

(d) While the ACCC is directing this report to third-party data brokers in order to provide what we anticipate is advice to Government as to the nature and scope of such services, we believe the ACCC is adopting what may be a false dichotomy both in terms of data collection and use as between first- and third-party brokers. The legal principles of disclosure of data collection, transparency as to use, and meaningful and real consent should apply both to companies directly collecting data, such as digital platforms, and to third-party data brokers who collect information indirectly, including through publicly available sources. There is a danger in treating these practices differently, as to do so may create regulatory barriers to competition in a similar way that it is widely argued that General Data Protection Regulation (**GDPR**) has unintentionally created in Europe. This is because larger organisations may be better equipped to manage any increased regulatory burden ultimately imposed in response to the ACCC's report from this inquiry.

(e) In light of the above, we believe that the ACCC needs to consider very carefully what types of practices, if any, are problematic, given that several of the services that the ACCC argues are data broking have significant benefits to businesses allowing them to be more competitive (which provides positive outcomes for consumers) and in many cases are based on the sharing and use of anonymised and aggregated data. It would be problematic if the ACCC issued a negative report

based on what seems to be a concern that personal information is being sold to third-party data brokers for targeted advertising in light of the pro-competitive benefits of many data broking services and the fact that many of those services do not use personal information.

(f) The report should also be cognisant of the advances in AI and in particular generative AI, which has the ability to scrape vast databases and crawl the Internet. Some data barriers of the past may very quickly cease to exist due to these technological advances (naturally, depending on the nature of the particular data sets involved). Advancements in AI may also change the nature of the services provided by data brokers as AI, as deployed by large digital platform firms, may well be able to provide the deep analytical services currently undertaken by data brokers. We are not, of course, advocating any relaxation of protections for personal information, but are simply drawing attention to the vast potential for non-personal information to be collected, processed, and utilised.

(g) With regards to relevant economic considerations for the ACCC's analysis, the Committee makes the following points.

(i) **Data as a barrier to entry**: there should not be a general presumption that data is likely to constitute a barrier to entry for services provided by data brokers. Whether data constitutes a barrier to entry for the services provided by particular data brokers depends on the precise nature of the data relied on, the extent to which other data brokers can collect the same data, the extent to which the suppliers of the data can supply their data to alternative data brokers in the event that they are dissatisfied with their counterparties, and the interaction between data and data analytics as discussed below.

(ii) **The importance of data relative to data analytics:** data brokers may compete more on their data analytics capabilities rather than their access to data and this may have important implications for assessing data as a barrier to entry, the market power of particular data brokers and likely competitive outcomes. The importance of data analytics relative to raw data may diminish the importance of data as a barrier to entry. On the other hand, data and data analytics may interact (such as when data is used to train machine learning algorithms) so that more data can improve a data broker's analytics performance.

(iii) **The scope for competition to address consumer harms:** competition can generally be expected to lead to better consumer outcomes for both price and non-price dimensions of competition. The extent to which competition is likely to address potential consumer harms in the data broking industry is likely to depend both on the extent of competition between the different data broker providers and also the extent to which a particular price or non-price factor is valued by customers.

C. DETAILED COMMENTS

Characterisation of personal information and other data

5. The ACCC has said that it is not considering privacy in this inquiry. We agree that this is properly the responsibility of the Office of the Australian Information Commissioner, which has the expertise about (and enforces) the Privacy Act. Nonetheless, it appears from the Issues Paper that, as with other ACCC Digital Platform Services Inquiry reports, the ACCC is continuing to considering privacy issues through an Australian Consumer Law lens, for example, by considering whether there is any misleading or deceptive conduct.

6. In this context, there needs to be a clearer understanding of what is meant by data broking services and what the ACCC is considering. Although the ACCC defines these services in the Issues Paper as services that collect, process and analyse "personal or other information on persons" where that information is not collected directly from the relevant individuals by the broker, this seems to be taken very broadly. The services that the ACCC is considering, as listed in the Issues Paper, include quite a few where publicly available information is used, where individuals cannot be identified in any way from the final product or service, and/or which may use only anonymised or de-identified data. That is plainly not personal information but may be viewed as information ''on persons". For example:

   (a) Property data analytics products and services are included. While property analytics may be more sophisticated in the current era, property data used has always been publicly available through searches of property registers that are maintained in relation to property transactions throughout Australia.

   (b) In the case of retail data analysis, it would seem very likely that this is analysed in an aggregated/anonymised way and in all probability much of the data that is provided by retailers to data brokers is already anonymised—it would seem unreasonable that a retailer cannot provide aggregated anonymised data about purchases to a data analytics services provider to, for example, assess trends that will help the retailer to develop its business and compete more effectively.

   (c) Nielson data is included, despite the fact that Neilson does not make available data that can directly identify individuals. At least in terms of its broadcast TV analysis, Nielson also obtains express consent from individuals to monitor viewing habits and share that data.

7. As noted above there are several statements both in the media release and in the Issues Paper to the effect that consumers are not aware of what data brokers collect or are unhappy with the processes of data brokers. However, this does not seem to be supported by any substantive **empirical** evidence. For example, on page 10 of the Issues Paper the ACCC states that "*consumers are generally unaware of data brokers and their business practices*" but evidence cited for this statement is an article published in Internet Policy Review which was written by an Italian academic based in Milan, Italy. That paper does not cite any Australian consumer survey information. Further, on a review of that academic's paper, it is clear from page 4 that the analysis relates to first-party data collected by what is described as "big tech" with Google and Facebook expressly referenced. It is accordingly unclear from that paper whether the criticisms that are made are confined to third-party data brokers as is suggested in the ACCC Issues Paper. That

academic paper also appears to conflate personal information with other types of data relating to people in different ways.

8. Other references that the ACCC cites for statements about consumer views are old research undertaken by the ACCC for its work on loyalty programs (which raise other issues that the ACCC has separately investigated) and a 1000-person survey undertaken by the Consumer Policy Research Centre. The latter survey does not distinguish between different types of personal information collection and use (for example, no questions seem to be asked as to whether it is acceptable for anonymised data to be used) and seems to have asked questions on the assumption that personal information is being sold for online advertising. The limited sample of individuals surveyed, and the lack of information as to demographics of those surveyed, not only makes it difficult to determine how representative the sample is, but also call into question the reliability of such surveys.

9. Finally, several references in the Issues Paper to concerns by consumers do not derive from third-party data but from practices involved in data compilation by first-party data collectors.

Competition and general economic concerns

10. By ignoring the practices of first-party data brokers, there is a risk that the positive benefits to businesses that are not big tech companies (and which therefore do not benefit from first-party data **access**) are not considered. In other words, the use by other businesses that do not have access to a sufficient volume of first-party data or data sourced from third-party brokers may well be a good competitive constraint on the cost of services and data obtained from first-party data brokers.

11. While the ACCC is directing this report to third-party data brokers, we believe the ACCC is adopting what may be a false dichotomy both in terms of data collection and use. That is, the legal principles of disclosure of data collection, transparency as to use, and meaningful and real consent, should apply both to entities collecting first-party data, such as platforms, and to third-party data brokers. There is a danger that treating these practices differently will create regulatory barriers to entry and expansion which it has been argued that GDPR has created. In other words, there is a real risk that the market position of the larger platforms that collect first-party data will obtain a benefit by being more lightly regulated than third-party data brokers, notwithstanding that the collection and use of data by the two types of businesses is essentially of the same nature.

12. The ACCC should consider very carefully what types of practices, if any, are problematic given that quite a few of the services that the ACCC argues are data broking have significant benefits to businesses allowing them to be more competitive and in many cases are based on the sharing and use of anonymised and aggregated data rather than personal information. More competitive businesses provide benefits for consumers. It would be problematic if the ACCC issued a negative report based on what seems to be a concern that personal information is being sold for targeted advertising in light of the pro-competitive benefits of many data broking services arising from the use of data that is not personal information.

13. The report may also be outdated very quickly given that advances in AI and, in particular, generative AI, which has the ability to scrape vast databases and crawl the Internet. These

advances are likely to mean that some data barriers of the past may disappear due to technological advances, naturally depending on the nature of the datasets.

14. Three key relevant economic considerations are relevant to the ACCC's report on data brokers. First, the Issues Paper suggests that data acts as a barrier to entry in many markets where access to large volumes of high-quality personal information is essential for businesses to compete, and where businesses have unique access to such data.[1] Whether data is likely to constitute a barrier to entry for data brokers, and thereby influence whether they have market power and affect competitive outcomes, is likely to depend on a number of context-specific factors that are likely to be different for different data broking services. In particular, the following considerations are likely to be relevant in assessing whether data is likely to constitute a barrier to entry for a particular data broking service:

    (a) **The type of data being collected**
    The Issues Paper outlines a wide range of different data that data brokers are likely to collect. This includes data from digital platforms (including social media services), web pages (through web scraping), website cookies, app developers, other businesses (such as banks, retailers and telecommunications companies), open data projects, government sources (such as the electoral roll, ASIC databases, and land titles offices), customer loyalty schemes, and other data brokers.[2] The extent to which data is likely to constitute a barrier to entry (including due to whether data brokers may acquire the same data or data suppliers can switch to a different broker as discussed below) is likely to depend on the particular data being collected and the context in which it is being used.

    (b) **Whether data brokers can acquire the same data**
    Data is non-rivalrous and its use by one entity does not preclude its use by another entity.[3] Where data is obtained from public or non-exclusive sources (such as from web pages through web scraping or from government sources) data is less likely to constitute a barrier to entry as different data brokers would be able to collect the same data.

    (c) **Whether data suppliers could easily switch to another data broker if not satisfied with their services**
    Sometimes data brokers rely on a particular supplier of data, such as a supermarket that chooses to share its customer loyalty data with a particular data broker. In this scenario, even if only one data broker has access to the data, the retailer may be in a position to share its data with another data broker (or multiple data brokers) in the event that it is not satisfied with the services provided by its selected data broker.

15. A second key consideration for whether data is likely to constitute a barrier to entry is the relative importance of access to data and data analytics in the products provided by data brokers, and whether lack of data can be compensated for with better analytics. The Issues Paper suggests that data analytics is likely to be of key importance for data

[1] Issues Paper, p 2.
[2] Issues Paper, p 8.
[3] See, for example, Daniel L. Rubinfeld and Michal S. Gal, 'Access barriers to big data' (2017) 59 Arizona Law Review 339.

brokers.[4] This is likely to diminish the importance of raw data itself as a barrier to entry. Having said that, to the extent that data brokers rely on machine learning to improve their data analytics, there can be important interdependencies between data and data analytics as raw data can be used to train and improve the performance of machine learning algorithms.[5]

16. Finally, the Issues Paper outlines a wide range of possible consumer harms from data broking practices, including from direct marketing practices (customer profiling, personalised pricing or pre-quoting, and **potentially** harmful targeted advertising), use of information in ways that discriminates against a consumer, the misuse of personal information obtained by malicious actors, and misleading terms and conditions or inadequate disclosure about how information is shared with brokers.[6] While some of these harms may be expected to be addressed by areas of law other than competition law, the extent to which we would expect competition to address some of these harms (such as loss of privacy) will depend on how customers value these non-price factors relative to other price and non-price factors.[7] More competition may not always lead to more privacy, for example, as customers may not value privacy more than lower prices or other non-price features. In any event these issues are likely to be more readily and appropriately addressed by requirements as to transparency of data collection and use, and real and meaningful choice in relation to consent.

17. As an aside, the Committee observes that section 50 of the *Competition and Consumer Act 2010* (Cth) may have relevance where data acquisition arrangements have anti-competitive potential, and the data can be regarded as an asset.

Conclusion and further contact

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

19. Please contact the chair of the Committee Lisa Huett at Lisa.Huett@au.kwm.com, if you would like to do so.

Yours faithfully



Philip Argy
Chairman
Business Law Section

[4] The Issues Paper states at page 4 that *"[t]hird-party data brokers typically add value to the data they collect by applying sophisticated and proprietary analysis to it, which is then used to develop data products and services sold or licensed to businesses that might not otherwise have the in-house capacity or resources to undertake this themselves"*.
[5] See, for example, Yuji Roh, Geon Heo and Steven Euijong Whang, 'A survey on data collection for machine learning: a big data – AI integration perspective', 12 August 2019, available at https://arxiv.org/pdf/1811.03402.pdf.
[6] Issues paper, p 10.
[7] See, for example, Alex Marthews and Catherine Tucker, 'Privacy policy and competition', Brookings, December 2019, pp 5-8.