



Australian
Privacy
Foundation

<http://www.privacy.org.au>

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Submission re: Google LLC acquisition of Fitbit Inc

This submission is made by Asst Professor Dr Bruce Baer Arnold (Canberra Law School) on behalf of the Australian Privacy Foundation.

The submission responds to the invitation by the Australian Competition & Consumer Commission to comment on the proposed acquisition of Fitbit, Inc. (Fitbit) by Google LLC (Google).

In summary, the Foundation regards the proposed acquisition as both contrary to the *Competition and Consumer Act 2010* (Cth) s 50 and at odds with recommendations in the ACCC's *Digital Platforms* report.

The attached statement offers background about the Foundation (the nation's premier civil society organisation concerned with privacy), contextualises the Foundation's cautions regarding the proposed acquisition and addresses specific questions identified in the ACCC's invitation.

The Foundation recognises that the ACCC has no scope to prevent the takeover of corporations that are based overseas in jurisdictions where the takeover & acquisitions framework is very permissive. The Foundation however considers that there is scope for the ACCC and competition watchdogs in Europe, the United Kingdom, Canada, Japan, South Africa and New Zealand to express concern about the anticompetitive nature of the acquisition. International cooperation offsets regulatory arbitrage.

At the national level there is scope for the Australian Government to restrict misuse of health data by Google and partners, including insurers and health service providers. Drawing on the *Digital Platforms* report and work by our members regarding health data/services the Foundation urges the ACCC to look forward and proactively articulate a framework that addresses population-scale health data as the most valuable commodity in the global information economy.

The Foundation is happy to discuss any matters in detail. Please contact Dr Arnold in the first instance.

David Vaile
Chair
Australian Privacy Foundation

1. The Australian Privacy Foundation

The Australian Privacy Foundation is the nation's premier civil society body concerned with privacy. It is politically unaligned and independent of any particular funding source. Its members include information technology and engineering experts, legal practitioners, academics, marketing specialists and a range of other expertise. It has actively and effectively contributed to informed public policy development over the past three decades, including Dr Arnold's participation in OECD working parties on collection, processing and sharing of health data.

Information about the Foundation is available at its website, www.privacy.org.au, which features copies of past submissions to the ACCC, law reform commissions and parliamentary committees.

2. Contextualisation

Population-scale data about health (including genomic predisposition to acute/chronic illness and the interaction of lifestyle choices with conditions that are not cured through a vaccination or other medication) will be the most valuable commodity in the coming age of 'precision medicine', resistance to antibiotics and an ageing population. It encompasses data about how people live their lives – for example choices regarding diet and exercise, sleep patterns, occupation and education – rather than merely age, gender, ethnicity and hospitalisation. Part of its value derives from scale, in other words readily processable data about millions of people rather than individuals or potentially unrepresentative cohorts. Part of its value derives from scope for potentially seamless integration with other data sources. That value sits alongside opportunities for data collectors to engage in targeted promotion of goods and services.

Unsurprisingly, most of the leading digital platforms have expressed interest in colonising the health 'space', that is applications and enterprises that deal with health information. Some of that interest has lacked substance, with no follow-through because the platform operator lacked capacity or the expression was essentially just an opportunity to boost share prices among investors who think 'health is hot' and recognise the difficulty of platforms building a major presence in financial services because the finance sector is significantly more consolidated and regulated than health.

Some of that interest has involved both alliance-building (for example with pharmaceutical companies, health maintenance services and insurers) and/or investment in initiatives that range from digital 'vaults' marketed to hospitals through to exploration of diagnostic services based on online searches by consumers. The model used by Silicon Valley and its emulators outside the United States has been acquisition – buying start-ups that appear to have potential or bring with them innovators with expertise – rather than inhouse development. There is disagreement across the scholarly literature about the extent to which that model is anticompetitive. The Foundation notes the ACCC's recognition in the *Digital Platforms* report of concerns about the model. We consider that such concerns are substantive and should be addressed.

Alphabet Inc, the parent of Google, has a strong but under-publicised history of acquisitions in health and other sectors, typically involving small enterprises rather than well-established brands (profitable or otherwise) that have name recognition among consumers and regulators in the major jurisdictions. The proposed acquisition of Fitbit forms part of Alphabet's evolving strategy and should be contextualised.

Neither the Foundation nor regulators are privy to the plans of Alphabet and Google. Those plans should not determine national health, privacy, innovation, taxation or other policy. They

can be influenced by regulators. In considering the proposed acquisition of Fitbit the Foundation infers that Google on a strategic basis is not particularly interested in the marketing of wrist or other devices. Margins for the manufacture of those devices will decline and Fitbit faces competition from the next generation of smart phones, for example marketed by Apple and manufactured by entities such as Foxconn. We envisage that Google in acquiring Fitbit does not intend to directly engage in marketing.

The Foundation instead infers that Google is interested in Fitbit for two reasons, both of which require a competition and privacy analysis.

The first is that Google will acquire a large pool of data from consumers across all developed economies. That data would otherwise be expensive to collect *de novo*. In essence, it is easier to buy an existing pool than build a pool, especially as both consumers and privacy watchdogs might express concern about new collection mechanisms given growing consumer sophistication in the wake of incidents such as Cambridge Analytica and Australia's Medicare data breach.

The second is that Google will gain a brand and a base from which it can persuade consumers in future to provide data on an ongoing basis (a matter of valuable temporal depth rather than just population size) and which can be used in alliance building with insurers. The Foundation notes that Australian entities such as NIB have on occasion sought to gain/retain customers through offers of 'wellness' devices and services, including problematical direct-to-consumer genomic testing.

From a competition perspective there are potential concerns regarding expansion of the Alphabet 'family', considered in relation to specific acquisitions and an ongoing practice of buying established/start-up enterprises. The Foundation considers that Alphabet should be construed by the ACCC as an 'information' group that requires scrutiny because of the significance of information in the emerging global digital economy. Its existence – along with other platforms such as Facebook that embody a failure of self-regulation – is predicated on global collection, processing and dissemination of information. Along with the other platforms it has been dismissive of regulation at the national and international level, in some instances while claiming to be a champion of privacy and free speech. Its rubric of 'do no evil' coexists with a corporate structure that seeks to 'pay no tax'.

The Foundation accordingly considers that claims by Alphabet, Google and Fitbit should not be taken at face value. They are offshore commercial enterprises that seek to maximise value for their executives and shareholders. Ongoing expansion is undesirable unless their activity as data enterprises is adequately shaped through rules that embody community expectations regarding matters such as informed consent, transparency in data processing and sharing, correction and revocation of consent. The legitimacy of such rules is a foundation of European Union jurisprudence regarding privacy and the EU General Data Protection Regulation (which like the new Californian privacy regime) offers a benchmark for the overdue updating of Australia's unsystematic privacy regime.

The following paragraphs discuss those matters.

The Foundation recognises that the ACCC is not able to unilaterally block Google's acquisition of Fitbit per se or its licensing/purchase *en bloc* of data collected by Fitbit. The ACCC can however seek to influence policymakers in the United States through collaborative expressions of concerns with other competition watchdogs. Just as importantly to can inform policy development within Australia regarding personal data. A fit-for-purpose regime regarding Alphabet as the salient Big Data enterprise involves a comprehensive review of Australian privacy law (noting gross variation across the Australian statutes), enshrinement of a justiciable right to privacy (aka the privacy tort, otherwise known as a cause of action for

egregious disregard of privacy), fundamental invigoration of Australia's national privacy watchdogs and initiative on the part of the ACCC as the entity that has proven more effective than the Office of the Australian Information Commission and the Health Privacy Commissioner.

3. Specific Issues

This part of the Foundation's response addresses specific queries by the ACCC.

a) the impact of the proposed acquisition on prices and features of wearables including the wearable operating system

The Foundation is not privy to details of Fitbit's financials and does not purport to provide a detailed competitive analysis. The Foundation considers that the prices of wrist and other wearables are in essence a matter of what consumers will pay, something that is ultimately a matter of perception and that might be strongly influenced by Google promoting specific products. The Foundation's sense is that the technology for current wearable is not particularly sophisticated or original. Once COVID 19 has abated we will see competitors manufacturing/marketing products that have the same or similar capabilities and that are not restricted by patent law. Fitbit's competitive advantage is in essence its large user base rather than an especially innovative and difficult to reproduce product protected under patent/trade secret law. It is conceivable that the market for wearables will be reshaped by entities such as Apple through coming generations of smart phones.

The Foundation thus considers that the proposed acquisition will have a neutral effect on prices, with wearables not becoming cheaper and available to hitherto unserved markets or becoming more expensive.

As indicated above, the Foundation considers that the acquisition is a mechanism for Alphabet to cheaply buy large amounts of data rather than about gaining a dominant multifunction device equivalent to the iPhone or smart watch.

b) the ability to foreclose or otherwise frustrate the ability of other businesses to compete

Given Google's dominance in the Search space, noted in the *Digital Platforms* report and independent studies, and its presence in other spaces such as advertising in its blog platform, the Foundation considers that Google will have the ability to reduce competition by discriminating in advertising.

That ability can and should be addressed under Australian competition law through restrictions on privileged promotion by members of the Alphabet group of goods/services from members of the group.

c) the impact that Google's increased access to data will have on markets which rely on the collection of data, e.g. advertising markets

The Foundation considers that there are two issues in relation to this question.

The first is the deepening and broadening of the Google/Alphabet pool of data, with scope to provide advertisers with more granular targeted identification of consumers.

The second is the scope for expansion into new markets, ie beyond advertisers to for example insurers and commercial health service providers. Global digital platforms have partnered with or serviced a range of entities, often justifying sharing of large data sets (or abstracts derived from large data sets) on the basis that individuals were deidentified. There is general

acknowledgement within the information technology and privacy communities that much deidentification is both ineffective and greatly overrated by data custodians.

In responding to the question the Foundation accordingly considers that there must be significantly increased transparency at the national and international levels about –

- the entities that are receiving raw/abstracted data from Google/Alphabet
- what data is being provided
- how the data is being used
- whether the data is being provided to third parties

To adapt a traditional legal principle, sunlight is the best disinfectant for both fears and anticompetitive activity. Transparency is the appropriate price paid by global information enterprises for their social licence. It provides a basis for informed policymaking and determination by watchdogs such as the ACCC regarding anticompetitive outcomes.

d) the impact of Google extending its “ecosystem” of products.

The Foundation is supportive of measures that result in market diversity and innovation in the delivery of goods and services, in particular information goods. One response to the business model noted above (ie ongoing expansion through acquisition of start-ups and established enterprises in related sectors) is that leading corporations have often chosen poorly and large-scale acquisition has been ineffective rather than adding long term value or reducing competition. Examples are Microsoft, Time-Warner and News Corporation.

The Foundation however suggests that in considering the Fitbit acquisition and future acquisitions by Google/Alphabet the ACCC should look beyond specific hardware/software and instead construe Alphabet as seeking to maintain and extend its dominance as a data giant. Alphabet needs to be understood as a data group first and foremost – one that operates across borders and sectors – rather than in terms of discrete activity such as provision of search services, a repository of kitten videos and other content on YouTube, a drone-based deliverer of coffee and donuts to residents of Canberra, and devices that tell you how many steps you did yesterday.

e) consumer preferences in the supply of wearables, when answering you may wish to comment on smartwatches versus fitness wearables, relative prices, functionality and data use.

The Foundation has not undertaken a survey of wearable prices and characteristics. Overall the Foundation considers that consumer preferences are shaped by –

- Fashion
- Ease of use
- Perceived value-add for consumers in relation to information provided by Fitbit and its competitors

The proposed acquisition may provide Google with an advantage by facilitating a deepening of information provided to users of Fitbit wearables.

The Foundation notes the paucity of publicly-accessible authoritative information about consumer attributes.

If the proposed acquisition proceeds, would it alter the competitive dynamic for the acquisition of, or access to consumer data?

The Foundation notes the significant lack of transparency about Fitbit's relationships with partners (unavailable to consumers apart from statements that data may be shared) and about how data is processed.

The Foundation expresses deep concern about the proposed acquisition as a manifestation of ongoing deepening and broadening of the pool of data accumulated by members of the Alphabet group in an environment of low transparency and low accountability.

Would the proposed acquisition provide Google with the ability and/or incentive to restrict access or otherwise impact access by third party wearable manufacturers to: Google's Wear OS, Google Play Store, or any other Google service including Google search advertising? What impact could such behaviour have on competition to supply fitness wearables and smartwatches?

See above

What is the likelihood that absent the proposed acquisition:

- a) Google would enter the supply of wearables (fitness wearable and/or smartwatches) and compete with Fitbit and other wearables?

The Foundation considers that it is unlikely that Google will supply wearables, in essence low-tech data collection devices, in competition with Fitbit and its peers.

Google is more likely, in the coming decade, to invest in the market for personal diagnostic devices (sometimes characterised as the 'pathology lab on a chip') as that sector begins to mature.

- b) Another potential competitor would enter the supply of wearables?

The Foundation has insufficient information to address that question but considers Fitbit is likely to face increasing competition among some consumer demographics, especially at the bottom of the market.

In the absence of the proposed acquisition, how is Fitbit's own product line and wearable operating system likely to develop into the future?

See above.

Are wearable devices likely to become important complements to other devices in the future (such as smart speakers)? If so, would the proposed acquisition provide Google with the ability or incentive to deny competitors in complementary goods or services effective access to Fitbit devices?

In relation to denial of opportunities see above. The Foundation considers that market development will reflect a range of desired affordances, ie different demographics will emphasise different capabilities such as –

- Location tracking/finding of elders, employees and minors
- Realtime exchange of information with clinicians
- Danger alerts

- Pollution/allergen measurements

rather than just activity counts, the time, the temperature, weather forecasts, email or other capabilities currently found in wrist devices such as Fitbit, smart phones and the ubiquitous mobile phone.

From the Foundation's perspective the central issue is *not* the particular form of the device. It is instead whether consumers

- have readily informed consent
- can readily restrict dissemination of data to the partners of Fitbit and/or Google
- can revoke consent (eg on becoming aware that the data collector such as Fitbit or Facebook is misusing their trust)

and whether regulators will take timely effective action in response to concerns regarding corporate misbehaviour, something that has regrettably often not been the case in Australia,

In providing this submission we accordingly endorse the ACCC's willingness to take action and reaffirm the fundamental significance of systematic reform of the Australian privacy framework to provide a readily accessible statutory cause of action for all Australians regarding serious disregard of privacy. That underpins any consideration of competition policy, which is not something to be considered in isolation or an end in itself.

Would the proposed acquisition have any impact on competition in markets to supply products that are complementary to wearable devices?

See above.

16. If the proposed acquisition proceeds, would Google's ownership of Fitbit advantage Google in any of its business ventures related to the use of data? When answering this question please have consideration of:

See above.

Payment Systems

As per above, the Foundation does not envisage a significant reduction in competition in the supply of mobile contactless payment solutions.

Insurance and health markets

In a preceding paragraph the Foundation noted the practice by some insurers of offering wearables as an inducement for consumers.

In principle the Foundation is not opposed to insurers, health service providers, employers or other entities providing people with wearables or subsidising their use.

There are however several salient concerns in relation to privacy. Those concerns should be addressed through statute and actively enforced, as distinct from accepting promises of self-regulation (such as were made by Facebook prior to revelations about Cambridge Analytica)

- Consumers must be fully informed about the relationship between themselves, the insurer or other entity, and any third parties
- Consumers must be able to refuse consent without any disadvantage

- Consumers must be able to revoke consent to any provision of data to a third party, salient for example if it becomes apparent that the third party is not complying with law or reasonable expectations in data handling
- The insurer or other data collector must publicly disclose the relationship with third parties (inc accessible disclosure to regulators rather than just through fine print when a consumer enters into the relationship)

The latter requirement reflects comments above regarding transparency as a basis for effective regulation. It is an appropriate cost for the social licence enjoyed by insurers and other entities, and for example allows fact-based evaluation if there are claims that the provision by insurers has resulted in denial of service or other discrimination. The Hayne Royal Commission demonstrated that leading financial sector organisations have on occasion misplaced their sense of corporate responsibility and behaved in ways that attract criminal sanctions.

We state our concerns because comprehensive and accurate data is in essence the foundation for evaluating risk and thus the insurance industry. In an environment where Australia has an ageing population and there are restraints on the public health system it is conceivable that Alphabet – directly or in partnerships – will leverage its information stores through activity regarding health service delivery and insurance. It has the wealth needed for expansion and the requisite mindset for diversification. It is unlikely to receive significant resistance from United States regulators under an administration modelled on that of President Trump.