
Submission

15 February 2023

Market Conduct Division
Treasury
Langton Cres
Parkes ACT 2600

Re: Digital Platforms: Government consultation on ACCC's regulatory reform recommendations Consultation Paper

The Australian Communications Consumer Action Network (ACCAN) thanks The Treasury for the opportunity to provide feedback to the *Digital Platforms: Government consultation on ACCC's regulatory reform recommendations Consultation Paper* (the Consultation Paper).

ACCAN is the peak body that represents consumers on communications issues including telecommunications, broadband, and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

The increased convergence of digital technologies with telecommunications and media can provide significant benefits for both individuals and the broader community when the appropriate competition and consumer protections are in place. For example, communications platforms have played an invaluable role in allowing people to work and stay connected during the global Covid 19 pandemic. We are supportive of competitive and efficient digital platform markets that provide consumers with effective choice and confidence.

The consultation paper explores a range of questions related to the Australian Competition and Consumer Commission's (ACCC) recommendations for regulatory reform of digital platforms. We have restricted our comments to those questions that touch upon matters directly relevant to consumers. In this submission we reiterate our support for the ACCC's recommendations to introduce:

- economy-wide consumer measures, including a prohibition against unfair trading practices and unfair contract terms.
- digital platform specific policies to ameliorate consumer harms by placing obligations on digital platforms to prevent and remove scams, harmful apps and fake reviews.
- external dispute resolution through a digital platforms ombudsman
- measures to offer consumers greater choice and encourage competition in digital platform markets such as greater interoperability and easier switching.

We also urge for the provision of funding for consumer representation to participate in the ongoing discussions regarding digital platform services and consumer protections and safeguards. At present there is no consumer body funded to represent digital platform consumers, representing an imbalance of perspective on policies issues.

Further details on our response to the consultation paper's questions are set out in the remainder of this submission.

The need for consumer representation

Digital platforms are a popular means for Australians to communicate with each other.¹ However Australians are faced with numerous harms including scams, harmful apps and fake reviews. In previous submissions to the ACCC Digital Platform Services Inquiry² ACCAN has raised concerns that there is no dedicated Australian consumer organisation representing the interests of consumers in the ever-expanding digital platform environment.

We believe that a properly resourced consumer voice is needed to ensure that all Australian consumers can use digital platforms confidently and safely. As the consultation paper notes, the effectiveness of different regulatory schemes on digital platforms is unknown and will require ongoing consumer engagement and representation.

ACCAN recommends that consumer representation be adequately funded to properly engage with emerging issues facing Australian consumers on digital platforms.

Responses to select questions

1) Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

We agree with the ACCC's conclusion that existing regulatory frameworks do not adequately protect Australian consumers and small businesses from adverse outcomes.

Relying on existing regulatory frameworks risks continued harm to consumers of digital platforms. The consumer harms present in the digital platforms space have a significant financial impact on the lives of digital platforms consumers. For example, The ACCC reports that losses from social networking and mobile app scams almost doubled between 2020 (\$49 million) and 2021 (\$92

¹ We Are Social 2022. *DIGITAL 2022 AUSTRALIA: ONLINE LIKE NEVER BEFORE*. Available at: <https://wearesocial.com/au/blog/2022/02/digital-2022-australia-online-like-never-before/>

² ACCAN 2021a, *Submission to ACCC Digital Platforms Inquiry Report on market dynamics and consumer choice screens in search services and web browsers*, available: <https://accan.org.au/accans-work/submissions/1847-acc-consumer-choice-screens>

ACCAN 2022, p.6. *Digital Platform Services Inquiry – March 2023 Report on Social Media Services*. Available at: <https://accan.org.au/accans-work/submissions/2018-acc-report-on-social-media-services-issues-paper>

million).³ The ACCC estimates that only 13 per cent of victims report their scam and the actual sum of money lost to scams is likely much higher.

Research by ACCAN found that 79% of Australians believe more needs to be done to protect users' safety and privacy online.⁴ Only 27% of respondents believe the government is doing enough to make sure digital platforms do the right thing.⁵

ACCAN considers that new digital platform specific regulation is required to ameliorate consumer harms and foster trust in the digital economy. This should include mandating internal and external dispute resolution processes and obligations on platforms to prevent and remove scams, harmful apps and fake reviews. New pro-competition measures are required to encourage competition in digital platform markets and offer customers greater choice through greater interoperability and easier switching.

2) Can existing regulatory frameworks be improved or better utilised?

See answer above.

3) Are there alternative regulatory or non-regulatory options that may be better suited?

No, the proposed regulatory instruments are a sufficient starting point to address the specified consumer harms and competition risks in the near term.

7) Do you agree with the evidence presented by the ACCC regarding the prevalence and nature of harms to consumers resulting from the conduct of digital platforms?

We agree with the evidence presented by the ACCC. We note that evidence presented by the ACCC likely understates the extent of the harm, noting the current lack of reporting frameworks, difficulties in reporting harm and disincentives for consumers to report harm.

8) Do you agree with the ACCC recommendation to introduce targeted measures on digital platforms to prevent and remove scams, harmful apps and fake reviews? Are there any

³ ACCC 2022, p.9. *Digital platform services inquiry: Interim report No. 5 – regulatory reform*. Available at: www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform

⁴ ACCAN 2021. *New research finds nearly three-quarters of Australians want better complaints handling from digital platforms*. Available at: <https://accan.org.au/media-centre/media-releases/1942-new-research-finds-nearly-three-quarters-of-australians-want-better-complaints-handling-from-digital-platforms>

⁵ ACCAN 2021. *New research finds nearly three-quarters of Australians want better complaints handling from digital platforms*. Available at: <https://accan.org.au/media-centre/media-releases/1942-new-research-finds-nearly-three-quarters-of-australians-want-better-complaints-handling-from-digital-platforms>

other harms that should be covered by targeted consumer measures, for example, consumer harms related to the online ticket reselling market for live events?

8.1) Is the notice and action mechanism proposed by the ACCC for these consumer measures appropriate? Are there any alternative or additional mechanisms that should be considered?

We agree with the ACCC's recommendation that targeted regulatory reform is needed to promptly address issues around scams, harmful apps and fake reviews.

To reduce the harm from scams and harmful apps on digital platforms, the ACCC suggests that digital platform services provide:

- a notice-and-action mechanism allowing users to report a scam or harmful app, and requiring the platform receiving this report to act in response, communicate its actions, share information with relevant agencies, and offer redress, as appropriate.
- verification of certain business users, including advertisers, app developers and merchants, to minimise scams and harmful apps, and additional verification of advertisers of financial services and products.
- public reporting on mitigation efforts.

To reduce the harms from fake reviews, the ACCC recommends that digital platform services:

- provide an accessible avenue for consumers to report fake reviews and respond to such reports.
- publish information on their review verification processes, including where no verification is undertaken.
- report on their mitigation efforts.

We support these targeted measures as a small part in reducing consumer harms from malicious actors on digital platforms. These measures are a vital first step in fostering greater consumer trust in digital platforms.

9) What digital platform services should be captured in the ACCC's recommendation?

We agree with the ACCC that these measures to reduce consumer harms, outlined in question 8, should apply to all digital platforms.

10) Is a new independent external ombuds scheme to resolve consumer disputes with platforms warranted? Can any or all of the functions proposed for the new body be performed by an existing body and, if so, which one would be most appropriate?

ACCAN remains strongly supportive for an independent digital platforms ombudsman scheme as proposed in the DPI Final Report in 2019.⁶ This ombudsman would review decisions made by large

⁶ ACCC 2019, p.27. *Digital Platforms Inquiry Final Report*. Available at <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

digital platforms and ensure that consumers receive fair treatment. The ACCC’s recent interim report recommended the establishment of a new body to act as a digital platforms ombudsman.⁷

Recent research by the Centre for Media Transition at University of Technology Sydney found that rather than setting up an entirely new body for digital platforms, existing bodies such as the Telecommunications Industry Ombudsman (TIO) could be expanded to take on parts of the role. The researchers noted that because “the TIO currently administers a resolution scheme based on consumer complaints about telecommunications service providers” therefore “complaints about digital platforms are a natural fit for an expanded TIO”.⁸ The researchers concluded that “that the TIO is the only existing body that merits serious consideration as the platform ombudsman”.⁹

A digital platforms ombudsman is needed as soon as possible, irrespective of whether the government chooses to establish a new body or further expand an existing body. It has been three years since the ACCC’s recommendation and no decision has been made. Every year of delay risks unnecessary harms from delays to consumers seeking redress on digital platforms.

We urge the government to develop a strategy for the establishment of a digital platforms ombuds scheme before the end of 2023.

11) The ACCC recommends these requirements to apply to all digital platforms, do you support this? If not, which requirements should apply to all platforms, and which should be targeted to certain entities?

We support measures to reduce harms from scams, harmful apps and fake reviews on all digital platforms. With consideration to the types of services offered, these harms could occur regardless of the size of the platform and the ACCC’s proposed requirements should apply to all digital platforms. These measures should be considered a minimum standard for all digital platforms.

12) If the above processes are introduced, is the Australian Consumer Law the appropriate legislation to be used and what should the penalty for non-compliance be?

ACCAN agrees with the ACCC that the new measures should be included within the existing Australian Consumer Law (ACL) at Schedule 2 to the *Competition and Consumer Act 2010* (CCA).

We agree that new measures to protect would benefit from being established in primary legislation to provide digital platforms “certainty and clarity about acceptable and unacceptable practices”.¹⁰

⁷ ACCC 2022, p.9. *Digital platform services inquiry: Interim report No. 5 – regulatory reform*. Available at: www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform

⁸ Raiche, H, Wilding, D, Lee, K & Stuhmcke, A 2022, p.5. *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme*. Available at: <https://www.uts.edu.au/sites/default/files/2022-08/CMT%20DPCH%20Report%20-%20electronic%20version.pdf>

⁹ Raiche, H, Wilding, D, Lee, K & Stuhmcke, A 2022, p.42. *Digital Platform Complaint Handling: Options for an External Dispute Resolution Scheme*. Available at: <https://www.uts.edu.au/sites/default/files/2022-08/CMT%20DPCH%20Report%20-%20electronic%20version.pdf>

¹⁰ ACCC 2022, p.104. *Digital platform services inquiry: Interim report No. 5 – regulatory reform*. Available at: www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform

We support significant financial penalties to encourage lawful conduct and protect consumers. Given the size of some of the digital platforms, we recommend that the new regulatory regime should provide for penalties equivalent to the largest penalties already available in the CCA.

13) Do you agree with the designation and code of conduct model proposed by the ACCC for the new competition regime? What would be the main implementation challenges for such a regime?

We support the ACCC’s recommendation of targeted ex-ante regulation in order to promote competition in digital platform markets. Designating large digital platforms to conform with pro-competition mandatory codes is a start to addressing competition risks in Australia’s digital platform markets.

14) Do you agree with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes?

ACCAN agrees with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes, in order to provide flexibility.

15) Do you agree with the proposed principles for designating platforms for the regime?

The ACCC recommends quantitative criteria should be the primary means of designating a platform for mandatory competition codes. The ACCC notes that qualitative criteria could be useful to supplement quantitative criteria.

An example of an existing designation policy is the European Union’s (EU) Digital Markets Act (DMA). Three key criteria for a core platform service to be designated as a “gateway” and trigger specific competition measures in the DMA are:

- A size that impacts the internal market: when the company achieves a certain annual turnover in the European Economic Area (EEA) and it provides a core platform service in at least three EU Member States;
- The control of an important gateway for business users towards final consumers: when the company provides a core platform service to more than 45 million monthly active end users established or located in the EU and to more than 10,000 yearly active business users established in the EU;
- An entrenched and durable position: in the case the company met the second criterion during the last three years.¹¹

Given the similarities between the DMA’s obligations on “gatekeepers” and the ACCC’s proposed targeted obligations it would seem appropriate for Australia’s mandatory competition measures to adopt similar criteria, allowing for differences in our market.

¹¹ European Commission 2022. *Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6423

16) Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4? Should any issues be removed or added?

We support the ACCC’s suggested list of targeted obligations, including:

- anti-competitive self-preferencing.
- anti-competitive tying.
- exclusive pre-installation and default agreements that hinder competition.
- impediments to consumer switching.
- impediments to interoperability.
- data-related barriers to entry and expansion, where privacy impacts can be managed.
- a lack of transparency.
- unfair dealings with business users.
- exclusivity and price parity clauses in contracts with business users.

We agree with the ACCC that the list above should be considered a starting point and should be further developed in close consultation with stakeholders, including consumer advocates. The ACCC notes that future work may highlight other issues to be added to the list. We are particularly supportive of measures that offer consumers informed and effective choice through standardisation and interoperability.

17) What services should be prioritised when developing a code? What harms should they be targeted on preventing?

17.1 Should codes be targeted at individual companies, a specific service, or all digital platform services?

The ACCC recommends targeted obligation codes to be tailored to a service-specific level. For example, online search engines would likely have a mandatory code with services that are designated services (see question 15) needing to meet targeted obligations in that code.

Example service-types, used in the DMA, might include:

- a) online intermediation services
- b) online search engines
- c) online social networking services
- d) video-sharing platform services
- e) number-independent interpersonal communications services
- f) operating systems
- g) web browsers
- h) virtual assistants
- i) cloud computing services
- j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).

We agree that mandatory codes should be drafted at the service level to best encourage competition in each service type’s market. The priority of drafting and implementing a code for each service would be dependent on the initial list of codes to be drafted but should take the level of

market concentration or identified harms into account. For example, online search could be a priority given Google’s market share.¹²

The development of codes should take place within a firm period, after which the regulator will be empowered to finalise codes as it sees fit. This will prevent delays in the code making process that could result in competition harms.

18) Should codes be mandatory or voluntary?

Codes for targeted obligations in each service-type must be mandatory. *Ex ante* regulation, such as the proposed mandatory competition obligations, is effective when it provides tools to the ACCC to prevent anti-competitive behaviours in advance of the market. Allowing the codes to be voluntary risks rendering them ineffective to prevent anti-competitive behaviour.

19) Who should be responsible for the design of the proposed codes of conduct and obligations?

Given its experience in developing digital platform regulation, the ACCC should lead the consultation and design of the proposed codes of conduct and obligations. As noted in Section 2 of this submission, there is currently no consumer body funded to represent consumers on digital platforms issues. We note that resourcing will be required to ensure consumers are properly represented during code development.

20) Who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements?

We support the ACCC to be empowered to designate digital platforms and their relevant services. The ACCC should be given the necessary information-gathering powers to determine if the digital platforms meet the designation criteria. The ACCC would be well placed to designate platforms according to the defined criteria, especially where the designation decision takes into account qualitative criteria.

21) Who should enforce any potential codes and obligations?

In ACCAN’s view the ACCC should enforce the codes and obligations. The regulator is well placed to oversee the development of codes and the enforcement of those codes.

ACCAN considers that in order to support the effective enforcement of potential codes and regulatory obligations, it is critical that the ACCC is adequately resourced to perform this function. While we have confidence in the ability of the ACCC to enforce code provisions and regulatory obligations, the ACCC is called upon to regulate the broad economy and will likely require further resources to oversee new digital platforms regulation.

¹² ACCC 2022. *Digital platform services inquiry: Interim report No. 5 – regulatory reform*. Available at: www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform

22) What checks and balances should be in place on decision makers and across the various stages of the policy (e.g. code making, designation process, code enforcement)?

ACCAN considers that existing legal frameworks provide an adequate checks and balances.

The ACCC will develop guidelines to describe how it would interpret the codes and obligations but the Australian courts are ultimately responsible for interpreting the legislation that underpins a regulatory scheme.

Delegated legislation can be disallowed by either House of Parliament.¹³ This provides oversight of the proposed measures.

23) What avenues of dispute or review should exist with regards to designation or decisions under any potential code? How can this best be implemented to ensure timely outcomes to allow for effective regulation in a fast-changing market?

In extenuating circumstances where obligations or mandatory code measures might have negative effects on competition or consumers, the primary legislation might consider an exemptions mechanism overseen by the ACCC to operate on a case-by-case basis. If it is implemented, the exemptions mechanism must require a significant evidence requirement to reflect the severity of harm that could result from the service not being required to comply with obligations or mandatory codes. While the ACCC is considering the exemption the service in question must continue to comply with relevant designated codes and obligations.

24) Do information gathering powers for the relevant regulator need to be enhanced to better facilitate information gathering from multi-national companies? What balance should a potential regime strike between compliance costs, user privacy and the regulators information needs?

Relevant regulators, including the proposed digital platforms ombudsman and the ACCC, must be empowered to collect information from digital platform firms domestically and in overseas jurisdictions. For the new regulation to work effectively, regulators must be able to compel digital platforms to provide them with information relating to compliance with the new competition and consumer obligations. Adequate information gathering powers will also be fundamental for designating platforms to comply with the proposed service level mandatory codes of conduct. Given the dynamic nature of digital platform markets, information gathering powers should be proportionate to allow regulators to monitor markets and investigate emerging issues so that regulation remains fit for purpose.

25) Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate?

Australia should seek to align with existing international regimes where their competition or consumer protections exceed those available in Australia. However, where international regimes

¹³ Australian Parliament House 2022. *Disallowance*. Available at: https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Brief_Guides_to_Senate_Procedure/No_19

offer lesser protections to consumers we consider that Australia should seek to set protections that align with the interests of Australian consumers.

The ACCC's recent interim report lists a number of recent digital platforms regulations from comparable jurisdictions including EU, the UK, Germany, Japan and the US.¹⁴ The mandatory competition codes for designated platforms and consumer protection measures proposed by the ACCC resemble existing or emerging regulations from these jurisdictions.

ACCAN supports competition and consumer protection measures that align, where possible, with existing legislation. For example, the EU's Digital Markets Act and Digital Services Act (DSA). The DMA introduces competition measures for large digital platforms, while the DSA provides further consumer protections, including bans on types of targeted ads and data transparency.¹⁵ Aligning with international laws, such as the DMA and DSA, may accelerate Australia's implementation, broaden enforcement capabilities and simplify compliance for digital platform services.

27) Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?

As stated in regard to question 10, The ACCC recommended the establishment of a digital platforms ombudsman scheme in 2019. Every year of delay adds to the number of consumers that might have otherwise been assisted by this scheme. We again urge the government to make a decision regarding the establishment of a digital platforms ombudsman before the end of 2023.

Conclusion

Thank you for the opportunity to provide feedback on the consultation paper. We look forward to further discussions as the as the implementation of the regulatory regime progresses. Should you wish to discuss this submission further, please do not hesitate to get in contact.

¹⁴ ACCC 2022, p.60-63. *Digital platform services inquiry: Interim report No. 5 – regulatory reform*. Available at: www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform

¹⁵ European Commission 2023. *The Digital Services Act package*. Available at: <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>