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Submission to the ACCC
**Digital Platform Services Inquiry -
Discussion Paper for Interim Report No. 5:
Updating competition and consumer law for
digital platform services**

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About

About CHOICE

CHOICE is the leading consumer advocacy group in Australia. CHOICE is independent, not-for-profit and member-funded. Our mission is simple: we work for fair, just and safe markets that meet the needs of Australian consumers. We do that through our independent testing, advocacy and journalism.

Introduction

The benefits and harms of digital platform services have been thoroughly documented in Australia and internationally. The question now is not whether to regulate but rather which regulations will be most effective in addressing the power imbalances and consumer protection issues that have arisen as a result of these platforms being left unchecked.

CHOICE welcomes the opportunity to contribute to the Australian Competition and Consumer Commission's (**ACCC**) Digital Platform Inquiry (**DPI**) on updating competition and consumer law for digital platform services.

As Australia's largest consumer advocacy group, CHOICE supports measures that protect and strengthen the rights of consumers both offline and online. As more people use the internet to access essential services and make consumer transactions, it is crucial that regulatory measures are fit for purpose and work to protect the interests of consumers in the digital space.

The current Australian Consumer Law (**ACL**) framework must be strengthened to address consumer harms arising from digital platform services in Australia. Urgent regulatory reform is necessary. CHOICE strongly supports the introduction of a prohibition on unfair trading practices to strengthen the ACL. This prohibition would address certain practices that are arguably oppressive, exploitative or contrary to consumer expectations of fairness in the market. From a regulatory perspective, the introduction of an unfair practices prohibition would remove or avoid the need for sector specific regulation, and can be broadly applied to the market.

In addition, CHOICE supports the introduction of obligations or principles-based duties on digital platform services to provide a baseline level of protection for consumers and set reasonable standards of what a consumer can expect when interacting with these platforms. Such obligations should also be expanded to other actors in the digital economy. CHOICE supports the introduction of a best interest duty to businesses that collect, use or disclose data. This would allow for a cultural change in which businesses consider first and foremost the user of the product or service and assess potential risks from that perspective.

The Discussion Paper has highlighted a number of regulatory tools being considered or employed in overseas jurisdictions to address harms arising from digital platform services. The Australian Government must adopt regulatory options that bring the most benefit to Australian consumers. CHOICE supports alignment with other jurisdictions where it promotes increased consumer protection and confidence, and where consumers in Australia can access the same level of protection that consumers in other jurisdictions enjoy. However, where protections are lacking or could be strengthened using Australia's consumer law framework, CHOICE supports divergence from these international models.

The Australian Government has the opportunity to be a world leader in terms of addressing the harms that arise from digital platform services, and within the digital economy generally. CHOICE strongly supports any proposed regulatory framework that combines best practice (as tested in overseas jurisdictions), is principles based, and works to improve outcomes for Australian consumers that participate in the digital economy.

Recommendations

Recommendation 1: That the Australian Government urgently introduce regulatory mechanisms to address the consumer and competition harms associated with digital platform services in Australia.

Recommendation 2: That the Australian Government introduce a prohibition on unfair trading practices, supported by proportionate penalties, to strengthen consumer protections under the ACL.

Recommendation 3: That the Australian Government introduce principles-based obligations, such as a best interest duty on digital platforms and other data holders in the digital economy. This will ensure that businesses consider first and foremost the user of the product or service and assess potential risks arising from data collection or use from that perspective.

Recommendation 4: That any adoption of overseas models or tools for regulating digital platform services in Australia works to strengthen protections for Australian consumers. Any opportunities to improve upon overseas models should also be considered to allow for world-leading consumer protection.

Recommendation 5: That the ACCC is provided with sufficient resources and appropriate powers, including conferral of rule-making powers, to be responsive to emerging harms arising from the digital economy.

Responses to key questions

1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

Both the benefits and harms to consumers that arise from digital platform services have been well documented throughout the DPI. Consumers increasingly rely on the key products and services offered by digital platforms, such as Apple, Google and Meta, in their daily lives.

The market-defining power of these companies however comes at a cost to consumers. In such a heavily data driven economy, consumers have no choice but to exchange their data to use a platform's services, becoming the product in turn.

Digital platforms have created ecosystems in which consumer data flows freely with no oversight, transparency or meaningful choice given to consumers. Such a model is fundamentally unequal and exploitative. The Discussion Paper highlighted key privacy risks, including reduced data security, as well as risks to consumers such as increased profiling, discrimination and exclusion.

The monopolistic nature of these companies also denies consumers the ability to disengage from these ecosystems. Consumers can become trapped in the digital platforms' ecosystems, as these platforms employ tactics to create barriers to using another provider's products/services. This further entrenches the platforms' market power and leaves the consumer with reduced choice and quality of service.

2. Do you consider that the Competition and Consumer Act (CCA) and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

Regulatory reform is required. The ACL needs to be strengthened to address competition and consumer harms arising from digital platform services and more generally, in the economy.

CHOICE notes that the digital economy does not exist as a separate entity to the traditional economy - they are intertwined. They should therefore be regulated in the same way with guiding principles and obligations on participants to uphold standards of behaviour.

The global pandemic has accelerated the adoption by businesses in moving to online modes of selling, targeting customers and offering digital products and services.¹ For this reason, CHOICE supports the introduction of an unfair trading practices prohibition, which will not only address harms arising from digital platform services but those occurring across the economy generally.

Another shortcoming of the ACL is that consumers are unable to access their consumer guarantees when it comes to the provision of digital services. In particular with digital platform services, consumers face significant barriers in seeking remedies when the service provider did not take all necessary steps to avoid loss and damage, when the service was not fit for purpose or did not give the results that the business had agreed to. The lack of redress available to

¹Prime Minister and Cabinet, *Digital Economy Strategy 2030*, accessed on 1 April 2022, <https://digiteconomy.pmc.gov.au/strategy/australia/changing-how-we-do-business>, p. 13

consumers indicates that the ACL as it stands is not sufficient when applied to these large digital platforms.

3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?

A broader framework should be adopted to address multiple potential harms across different digital platform services. A patchwork of law reform addressing different harms at different times could have detrimental outcomes for consumers. Instead, a principles based approach that sets minimum standards of conduct should be applied to address existing and emerging consumer harms.

4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?

a) Prohibitions and obligations contained in legislation

Introducing prohibitions and obligations into legislation will clarify expectations to service providers and consumers of what is considered acceptable conduct in the digital economy. Such legislative provisions can provide certainty for consumers, thereby increasing consumer confidence.

b) The development of code(s) of practice

CHOICE does not support the development of codes of practice to address the nature and extent of consumer harm that has arisen in the digital context. Digital platforms such as Apple, Google and Meta do not represent a nascent industry. These platforms are well established and have willfully engaged in practices that do not meet community expectations both in Australia and overseas.

Codes of practice are useful regulatory tools in certain sector specific contexts. However, such codes could easily be developed by industry in a way that would likely favour the needs and practices of the platforms, leading to distorted outcomes for consumers.

c) The conferral of rule-making powers on a regulatory authority

Consumers need well-resourced regulators with appropriate powers to ensure consumer rights and protections are safeguarded in a digital environment. CHOICE supports the conferral of rule-making powers on a regulatory authority as this will increase its responsiveness to emerging harms. The DPI has described how delays in taking an enforcement action against digital platforms can result in increased consumer harm, as the platform's practices continue while the regulator gathers intelligence and brings the case forward to a court.² Consumers need stronger powers for regulators to quickly and proactively respond to potential harms.

² ACCC 2021, *Digital Advertising Services Inquiry Final Report*, accessed on 1 April 2022, <https://www.accc.gov.au/publications/digital-advertising-services-inquiry-final-report>, p. 133.

d) The introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm

The introduction of pro-consumer measures following the finding of consumer harm could be a useful regulatory tool in combination with other approaches. However, CHOICE advises against a piecemeal approach that directs a regulator's efforts to address single practices made by one actor in a market. Instead, pro-consumer measures could be set out in an economy-wide obligation.

5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?

Australia should adopt overseas regulatory models or tools where it is evident that consumer protections are stronger. This will ensure that consumers in Australia are afforded similar protections to those in other jurisdictions when using the same digital platform services. CHOICE supports alignment where it benefits Australian consumers. We also encourage the Australian Government to go further where gaps in consumer protection are identified.

8. A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access. In relation to each of these potential options:

d) What types of safeguards would be required to ensure that these measures do not compromise consumers' privacy?

Consumer privacy should be upheld regardless of which measures are employed to increase data access in the supply of digital platform services. CHOICE would like to see the introduction of an obligation for businesses to act in the interests of people whose data they hold and use. This could take the form of a best interest duty, as is being explored by some jurisdictions in the United States, or a broader obligation to act in the collective interests of a large group, similar to obligations that apply to superannuation fund trustees. This would allow for a norm shift in which businesses consider first and foremost the user of the product and service and assess potential risks from that perspective.

11. What additional measures are necessary or desirable to adequately protect consumers against:

- a) the use of dark patterns online; and**
- b) scams, harmful content, or malicious and exploitative apps?**

A prohibition on unfair trading practices would cover the use of deceptive (also known as dark) patterns online. This prohibition would address certain practices that are arguably oppressive, exploitative or contrary to consumer expectations of fairness in the market. From a regulatory

perspective, the introduction of an unfair trading practices prohibition would remove or avoid the need for industry or sector specific regulation, and can be broadly applied to the market.

12. Which digital platforms should any new consumer protection measures apply to?

Platforms of strategic market status must be covered by any new consumer protection measures; these include Apple, Google and Meta.

13. Should digital platforms that operate app marketplaces be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps? If so, what types of additional obligations?

Digital platforms that operate app marketplaces should be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps. CHOICE believes that if these platforms don't have the mechanisms to monitor their marketplaces and swiftly remove potential harms, then they should not be providing the service.

14. What types of fair-trading obligations might be required for digital platform services in Australia? What are the benefits and risks of such obligations? Which digital platforms should any such fair-trading obligations apply to?

The Australian Government should introduce a prohibition on unfair trading practices, supported by proportionate penalties, to strengthen consumer protections under the ACL.

Unfair trading practices prohibitions exist in comparable jurisdictions, including the United States, European Union (EU), United Kingdom, Canada and Singapore. The rise of e-commerce and the increased digitisation of services has resulted in emergent practices that considerably weaken the bargaining power of consumers in these transactions. Existing prohibitions such as 'misleading or deceptive conduct' and 'false and misleading representations' are too specific to respond to new forms of exploitative trading.

CHOICE supports an unfair trading practices prohibition that is flexible, proactive and considers a mix of moral and economic factors in determining whether a business practice is unfair. The EU prohibition is a good model for this, where an unfair practice is contrary to the requirements of professional diligence and materially distorts the economic behaviour of consumers by impairing their ability to make an informed decision. This definition includes both a moral element that refers to community expectations, and an objective impact on consumers. The unfair trading practices prohibition would provide a baseline safeguard for consumers using digital platform services, and more generally in the market.

15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?

Yes, there should be a specific requirement imposed on digital platforms to improve aspects of their processes for resolving disputes with consumers. In particular, CHOICE supports the ACCC's recommendations for minimum internal dispute resolution standards and the implementation of an independent ombudsman scheme, such as a digital ombudsman that addresses complaints arising from digital harms.

CHOICE also supports pro-consumer measures that prohibit restrictive dispute resolution clauses in terms of use policies, such as requirements for claims to be made in jurisdictions outside of Australia and limitations on class actions.

16. In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?

Digital platforms must ensure that their algorithms and policies are explainable, transparent, lawful and have human oversight at key decision points.

CHOICE supports the introduction of measures to improve transparency of digital platform services such as requiring the provision of certain types of information or data regarding the operation or outcomes of key algorithms for regulators, researchers and stakeholders (including consumer groups). Further, we support the requirement on digital platforms to provide information regarding how they use data to provide their services.