

Asia Internet Coalition (AIC) Comments on Australian Competition and Consumer Commission (ACCC) Digital Platform Services Inquiry 2020-2025

19 April 2022

Australian Competition and Consumer Commission (ACCC)
23 Marcus Clarke Street,
Canberra ACT 2601

Subject: Asia Internet Coalition (AIC) Comments on Australian Competition and Consumer Commission (ACCC) Digital Platform Services Inquiry 2020-2025 – Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services

The [Asia Internet Coalition \(AIC\)](#) and its members wishes to express our sincere gratitude to the Australian Competition and Consumer Commission (ACCC) for the opportunity to submit comments on the [new discussion paper under](#) Australian Competition and Consumer Commission (ACCC) Digital Platform Services Inquiry 2020-2025, which is the fifth in a series of reports produced under the ACCC's Digital Platform Services Inquiry, a five-year program that kicked off in 2020.

The AIC is an industry association of leading Internet and technology companies. AIC seeks to promote the understanding and resolution of Internet and ICT policy issues in the Asia Pacific region. Our member companies would like to assure the ACCC that they will continue to actively contribute to the security of digital platforms, products and services in support of the digital economy goals of Australia. For your information, the AIC has submitted several policy positions to the ACCC in the recent year including the Digital Advertising Services Inquiry and the Media Bargaining Code.

As such, please find appended to this letter with [detailed comments](#) which we would respectfully request ACCC [to consider](#). We are also grateful to the ACCC for upholding a transparent, multi-stakeholder approach in developing future recommendations. We further welcome the opportunity to offer our inputs and insights, directly through meetings and participating in official consultations.

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact me directly at [REDACTED] or [REDACTED]. Thank you for your time and consideration.

Sincerely,



Jeff Paine

**Managing Director
Asia Internet Coalition (AIC)**

Detailed Comments and Recommendations

Background

The Australian Competition and Consumer Commission (ACCC) is seeking feedback on a [new discussion paper](#) looking at legislative reforms, rules, codes of conduct and access regimes that could directly address the market dominance of digital platform giants.

The latest discussion paper is the fifth in a series of reports produced under the ACCC's Digital Platform Services Inquiry, a five-year program that kicked off in 2020.

Salient Points

Digital Platform Services Inquiry Interim Report No 5 offers up numerous options for how to address harms to consumers, businesses and competition identified as areas dominated by the digital platform players across social media to adtech, search, online retail and app marketplaces. The ACCC said these potential measures are being put up for review as part of a new regulatory framework aimed at promoting better competition and growth in the digital services space and an investigation of whether Australia's current competition and consumer laws, including merger laws, are up to the job.

Suggestions include measures to address anti-competitive conduct; barriers to entry, such as access to consumer data; bargaining imbalances; addressing data advantages; and insufficient consumer and business user protections such as effective dispute resolution process.

On the consumer side, the paper also looks at ways to improve consumer protection such as obligations on platforms to better deal with online scams, restrictions on conduct that can harm consumers. As well as the original and subsequent Digital Services Platform Inquiry, ACCC said suggestions had been informed by the Digital Advertising Services Inquiry.

Overall the discussion paper seeks to answer two questions:

1. Whether there is a need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services.
2. If reform is needed, options for regulatory reform. The discussion paper includes a list of specific questions for stakeholders about these options (see pg. 9-11 in the discussion paper for consultation questions)

Key considerations toward platform regulation in Australia

1. Digital platforms provide Australian consumers and businesses with significant benefits.
2. Introducing new regulation for platforms needs to take into account wider potential implications for businesses and consumers that use platforms, especially given the dynamic and innovative nature of digital markets.
3. We encourage the ACCC to:

- thoroughly assess whether the benefits of any proposed *ex ante* regime outweigh its potential negative impact
- consider whether existing enforcement frameworks (including competition, consumer and privacy) provide a more proportionate means of achieving desired outcomes.
- clarify the expected outcomes of a proposed framework
- leverage evidence and past experience to focus the proposed framework on types of conduct that are recognised to be particularly harmful, rather than seeking to address theoretical or speculative harm - this risks overregulation to the detriment of innovation
- acknowledge that economy-wide harms (such as online scams or opaque data practices) are better addressed by economy-wide reforms, rather than platform-specific regulation
- embrace a balanced approach toward data limitation and access, that takes into account consumer benefits, business confidentiality and security aspects

Principles for an *ex ante* regime for digital platforms in Australia

When designing any proposed *ex ante* regime, we recommend the ACCC and policy-makers to adopt the following six principles:

1. The ultimate objective is to promote competition and innovation
2. The overarching framework aims to prevent competitive harm and permits evidence-based justifications
3. The rules on conduct are necessary and proportionate to the seriousness of anticipated harm and the likelihood of it occurring
4. The integrity of a new regime is secured by suitable procedural protections and review mechanisms. In particular, full merits review by a Court should be available for decisions that have legal consequences for affected companies
5. Evidence and consultation to justify changes to the rules, while preventing unfettered regulatory discretion
6. The rules are consistent with other regulatory regimes in Australia and overlapping obligations are avoided.

Suggested approaches and recommendation

1. Mandating platforms to share data with third parties / granting third parties access to data

- These types of proposals would reduce incentives to compete and innovate: the prospect of having to share assets with rivals discourages innovation – both by the asset owner who knows it has to share the benefits, and by the rivals, who can sit back knowing that if someone else develops a successful asset, they get to access to it, so they don't have to invest in creating their own.

- Forced data sharing poses risks to user privacy: Australian users would have less control over their data if digital platforms are mandated to share their data with third parties. Even though the Discussion Paper contemplates ensuring that such proposals come with controls to protect privacy, ensuring any such controls are robust and cannot be reverse engineered by determined parties is an ongoing challenge.
- There is the risk of disclosing businesses' confidential information and facilitating collusion.
- Forced data sharing could enable even more dramatic harms, such as widespread disinformation and manipulation.
- We understand that mandated data sharing is a competition issue and should be prescribed in instances where the ACCC has demonstrated market power.

Recommendation:

Data portability can help drive innovation and competition by enabling consumers to securely switch among services from different providers, empowering them to try new services, and allowing them to choose the offering that best suits their needs. Measures to promote common frameworks and open systems for consumers to move data between services could have similar benefits as for data portability, provided that the actual data sharing would be at consumers' request. It is important to note that the data portability could be best dealt as part of the review of the Privacy Act

2. Mandating platforms to share data with third parties / granting third parties access to data (e.g. click-and-query search data)

Limiting the ability of platforms to share user data internally (e.g. by way of an outright ban on such sharing)

- Rigid rules to limit or ban cross-service use of data could prevent users from enjoying the benefits that such data use brings. For example:
 - enabling sharing of data across products allows for information to be accessed or controlled centrally across multiple products, rather than needing to separately manage this for each service;
 - cross-device or product data sharing is also used for security measures and fraud detection.
- Introducing such measures entail a risk of severely impact the value that digital platforms offer to the Australian market and in particular to consumers.

Recommendation:

Encourage data portability and interoperability to increase 'market contestability' issues such as barriers to entry and expansion, multi-homing, and switching, to help keep markets open to entry and expansion.

3. A platform-specific merger regime (e.g. with a lower threshold to establish anticompetitive harm)

- Mergers and acquisitions play an important and positive role in the economy, including as a driver of innovation and investment. So while it is critical to guard against transactions that are likely to have a negative impact on competition, it is imperative that Australia's merger regime does not prevent mergers that are pro-competitive (depriving users of benefits) or competitively benign (depriving sellers of the opportunity to maximise the recovery of their investments and the return on their innovation).
- Australia's informal merger regime is working well, and able to effectively review and prevent anti-competitive acquisitions. There is no evidence that the ACCC is missing anticompetitive acquisitions in the digital sector.
- With respect to a digital platform specific merger test, the risks of such proposals have been recognised internationally, including by the Furman Review and the European Commission's Special Advisor's Report:
 - Digital platform mergers are often pro-competitive
 - Acquisitions can provide an important exit option for innovators as well as an important route to market for their technologies
 - Evidence of anti-competitive acquisitions by digital platforms (including "killer acquisitions") is weak
 - Proposals to lower the standard of proof for digital mergers are disproportionate and could have the same effect as an outright ban on acquisitions.
- The ACCC is also pushing for economy wide merger law reform. Best practice regulation would first design the economy-wide reforms to the merger control regime (if there is evidence the current regime is not working) and then determine if the facts support any features in addition to the economy-wide regime for mergers involving digital platforms.

Recommendation:

A digital platform specific merger notification regime and legal test should not be adopted. If the ACCC and Government wish to pursue broader merger reform this should be subject to proper consultation, done on an economy-wide basis first, before then considering if there are any gaps needing to be specifically addressed by digital platform specific rules.

4. Rigid *ex ante* rules (e.g. without scope for justifications / defences)

- Due to the potential significant economic impacts of *ex ante* regulation, it is crucial the Government plays an active role in engaging with relevant stakeholders and market players development of any *ex ante* regime.
- Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation.

- New regulation should only be introduced after a comprehensive analysis of the costs and benefits. This should involve an assessment of whether existing tools, such as use of existing competition, consumer and privacy laws are sufficient or there are gaps.
- To ensure the cost of any new regime does not outweigh its benefits, any regime should allow scope for justification of conduct where it is clearly pro-competitive or competitively benign; it should allow defenses for legitimate protections such as user safety, security, quality, functionality. Without such appropriate safeguards an ex ante regime may outlaw legitimate and pro-competitive forms of conduct, to the detriment of consumers and businesses that use platforms.

Recommendation:

As a starting position the ACCC should use its existing powers to address concerns.

The Government should only introduce new regulation after a comprehensive cost / benefit analysis. Part of that analysis should consider whether existing competition, consumer, and privacy laws, properly enforced, are capable of addressing potential concerns and might be a more proportionate means to achieve these outcomes.

If the Government thinks the case has been made for ex ante regulation, it should develop this regime with careful oversight and consultation.

5. Digital platforms should have the opportunity to comment on specific *ex ante* rules before the ACCC recommends them to Government

- The Discussion Paper is a useful starting point for the debate on ex ante regulation in Australia.
- The Paper canvasses a wide range of topics with competition concerns; consumer law concerns; and merger law reform proposals. While an open approach to consultation allows for genuine debate on the issues, the ACCC's Final Report is due to the Government in September 2022 (only 6 months from now).
- This is a short time for the ACCC to consider all third party views and start to consolidate its position in light of these submissions; and seek proper and detailed feedback on its preferred form of ex ante regulation.
- A thorough dialogue would be necessary to identify issues leveraging perspective from market players and other stakeholders.

Recommendation:

Given the significant potential consequences of the introduction of an ex ante regime, we encourage the ACCC to extensively consult with relevant stakeholders. We expect that the Government will ensure there is a sufficient consultation process on the ACCC's recommendations, especially in areas that the regulation can have significant economic impact.