BCA

Business Council of Australia

Digital Platforms Services Inquiry - Interim Report

Submission on the Discussion Paper for Interim Report No. 5

April 2022

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1. About this submission

This is the Business Council of Australia's submission to the Australian Competition and Consumer Commission (ACCC) on the Discussion Paper for Interim Report No. 5 of the ongoing Digital Platforms Services Inquiry.

The Business Council represents businesses across a range of sectors, including manufacturing, infrastructure, information technology, mining, retail, financial services and banking, energy, professional services, transport, and telecommunications.

2. Key recommendations

The Business Council recommends:

1. The government should develop a wider set of principles and priorities for the regulation of the digital economy, potentially through the current work being undertaken by the Department of the Prime Minister and Cabinet, so that all regulatory agencies' actions and advice are informed by government's policy direction to the benefit of all Australians.
2. The ACCC adopts the well-established principles in defining and articulating the markets and sectors it is seeking to regulate, including identifying the specific issue or harm it is concerned about and then precisely outlining the proposed solution. This will provide certainty for all businesses and consumers and will ensure all relevant participants are included and avoid the unintended capture of third parties.
3. The ACCC articulates why a "new" regulatory framework is needed for each relevant activity and the specifics of new proposed regulations, and then re-consults on the detail of any new proposal before including them in a final report.
4. Not proceeding with any changes to mergers and acquisitions regimes for digital platforms or more broadly across the economy.

3. Key points

The ACCC is consulting on a wide-ranging Discussion Paper on whether Australia's current consumer and competition laws are sufficient to address competition or consumer harms relating to digital platform services. The ACCC suggests that it has growing concerns that enforcement under existing competition and consumer legislation is insufficient to address the concerns relating to 'rapidly changing digital platform services'.

It is quite clear the ACCC is focused on a small number of large businesses with significant domestic and international reach – namely Apple, Alphabet and Meta. The Business Council agrees that it is worthwhile government considering whether new technology or business models are creating new policy problems. We do not, however, agree that it is appropriate for any regulator to specifically design regulatory measures toward a single business. Any regulatory responses should be appropriately targeted and proportionate to address specific concerns or problems. Creating a new *ex ante* framework will stifle innovation, investment, and growth, while also likely to inadvertently capture operators or industries that are not of concern. Moreover, we encourage regulators to first consider whether their existing powers are sufficient to address any real problems that have been identified, and to ensure any new regulations reflect a least cost approach.

Regulation should not respond to populist impulses, but instead to sound economic analysis. We are not suggesting that no regulation is needed: instead, the ACCC should ensure the benefits of the proposals being brought forward are not outweighed by the costs. Regulation that drives off investment or new service offerings from digital platforms risks cutting off or reducing the benefits Australians and Australian businesses get. Australians save time and money from the easy access to services these platforms provide. These platforms help

them connect with their friends and family – even through a global pandemic that shuts down borders and cities. It helps businesses – large and small – connect with new customers and markets, to grow their businesses, and employ more Australians. The economic benefits each of these platforms bring to Australia are in the tens of billions.

Poorly crafted regulation will also only make Australia less competitive and less attractive as a destination for international capital. This is not only through the direct costs of bad regulation, but also by disincentivising existing businesses from modernising their business models – either through new explicit regulatory barriers, or from the signal sector poor specific regulation sends about government's attitude towards what the Discussion Paper calls 'digital' activities. This would be a very poor outcome: Australia's future prosperity relies on businesses modernising and taking up new technologies and ways of doing business. Without this, we will be left behind.

Ultimately, we support the ACCC striving to enhance the welfare of Australians through the promotion of competition. Underpinning the arguments advanced by the ACCC (and other regulators) is a belief that consumer welfare issues are being undermined by a small group of businesses which are 'too big' or have entrenched market power. It is not clear that the ACCC's concerns about some areas are genuinely competition-related issues (as opposed to other areas of public policy), or if there are valid concerns why the solution is greater regulation from both the ACCC and other portfolios rather than the enforcement of existing rules. Every new regulatory cost for businesses operating in the 'digital' economy is another hurdle that any new market entrants will have to meet.

The ACCC should consider whether the sum of the high regulatory costs being imposed by existing regulatory frameworks and through the proposals put forward through this inquiry are running counter to the objectives of the *Competition and Consumer Act 2010*. Rather than promoting competition, poorly designed regulation can perversely undermine these objectives by creating or increasing barriers to entry or distorting competitive forces.

3.1 Alignment across government

There are also serious tensions within the proposals suggested by the ACCC (for example, the unfair contract terms reforms or an unfair practices reform), and also between these proposals and other government initiatives.

For example, as the Discussion Paper notes, the proposals relating to data portability will have privacy impacts. It is unclear how the ACCC sees any of the mooted approaches working within a wider definition of 'personal information' as is being considered in the concurrent review of the Privacy Act. The ACCC notes it is working with other government agencies to ensure alignment with other government initiatives (including on privacy, cyber security and online safety, among others). We support continued coordination and collaboration between and across government and business to ensure a consistent approach.

The paper also suggests acting against some types of conduct without having regard to how that conduct manifests. For example, the paper suggests actions to regulate 'dark patterns': deliberate design decisions taken to 'nudge' consumers to take a specific course of action. However, nudge techniques such as framing are common in all forms of marketing and communications. The techniques can be used to promote virtuous choices just as much as for any other purpose. Government itself has invested in exactly this kind of activity through the Behavioural Economics Team (BETA) in the Department of the Prime Minister and Cabinet.

3.2 Bringing it all together

More broadly, the ACCC canvasses establishing a new regulatory framework for digital platforms. We agree it is important to ask whether a particular regulatory framework should be updated and revised to reflect new ways of doing business. However, before looking at 'new' regulatory frameworks, the ACCC first needs to identify the harm, the activity causing the harm and why the existing framework does not work for each activity. This informs the question of whether a 'new' framework is needed.

For example, the ACCC asks what types of fair-trading obligations could be applied to digital platforms in Australia (questions 14 and 15). It is not clear from the Discussion Paper specifically what the ACCC is proposing. The ACCC has suggested this might include prohibition from allowing business users from directly contacting consumers or prohibiting offering different promotions or discounts than what consumers can access from outside the platform.

It is unclear what principles would drive this type of new obligation, or even what commonality there is between the two examples beyond them occurring on digital platforms. There are already statutory provisions that prohibit businesses, including digital platforms, from engaging in 'unfair practices', such as misleading and deceptive conduct, unconscionable conduct, and unfair contract terms.

We strongly recommend the ACCC more clearly define the content of many of the proposed regulatory measures (such as the proposed 'unfair trading practices') and demonstrate why existing statutory provisions are insufficient. This includes, for example, clearly articulating why a 'new' prohibition is needed. We also recommend the ACCC more clearly articulate the detailed content of the proposed approach to this (and other new potential regulatory measures), and re-consult on them before including in any final report.

We also contend that the digital sector presents a wider set of challenges and opportunities for government to consider. However, as noted above, while there is a wide range of regulatory activity underway responding to 'digital', not all of it is consistent. For this reason, rather than the ACCC independently considering the need for a new regulatory framework, we recommend government consider a wider set of principles and priorities to guide all regulators and ensure there is sufficient support for the growth of the 'digital economy', to ensure consumers can enjoy the benefits and businesses are not disincentivised from modernising. This will not only provide certainty for businesses but will ensure regulators are able to appropriately coordinate their activities to meet the interests of the community as expressed through the government. To this end, we welcome the additional funding provided to the Department of the Prime Minister and Cabinet to undertake deep dives into the regulation of the digital economy in Australia, to ensure the benefits and concerns are considered in a holistic manner.

3.3 Defining a 'digital platform'

The Discussion Paper notes concerns with 'digital platform service'. This is defined according to the Ministerial Direction for the purposes of the *Digital Platforms Services Inquiry*.[1] The list of sectors and services is wide ranging. The Direction does not, however, define what a 'digital platform service' is beyond this list. Any reforms would need to precisely define what a 'digital platform service' is, or 'digital activity' that raises the relevant ACCC concern. The Discussion Paper on occasion refers to certain specific conduct, but more often refers generally to 'digital platforms'.

Chapter Four of the report suggests some descriptive elements that are common to some of the platforms of concern identified by the ACCC. But these are not unique to the digital platforms the ACCC has concerns with: the use of data is not unique to Apple, Google or Facebook, nor are efforts to expand into related markets, nor is vertical integration. Retailers in Australia have been collecting and using a very significant volume of customer data for a very long time without this being concern. The position taken in the paper is at odds with government efforts to incentivise digitalisation in Australia. But it is also particularly peculiar in the context of the recently passed *Data Availability and Transparency Act 2022*, which establishes a new data sharing scheme to allow Commonwealth bodies to share and use data that identifies individual Australians between agencies and with state and federal governments and public Australian universities.

The ACCC contends that each of the businesses have significant market power in the supply of different services in Australia. However, many of these claims are based off findings from the original 2019 *Digital*

[1] The Ministerial Direction suggests a definition that ranges from highly consumer-oriented social services (such as online private messaging services like text-based messaging) to services allowing businesses to sell goods and services (such as electronic marketplaces) through to non-consumer facing business to business products (such as data brokers).

Platforms Inquiry. This includes claims these businesses have entrenched market power due to innate characteristics or specific behaviours (eg through the acquisition of potential competitors or because of data advantages). This is not being borne out in reality: evidence presented in the Discussion Paper itself shows the rapid rise of competitors like TikTok. In fast moving markets like the ones being examined here, it is not appropriate to ground policy or regulatory changes in outdated evidence.

Each of the businesses identified by the ACCC operate substantially different services, all of which have different implications for consumers and competition. There is no cohesive 'through line' to explain why all these different services should be considered together, or why there is a need for measures that would apply to all digital platforms given the varied markets they operate in. The "one size fits all" approach seems most likely to result in unanticipated harms to innovation and consumers.

This lack of a clear definition is deeply problematic for any regulations that government may wish to explore. Having a clear understanding of the activity and harm that is to be regulated and appropriately communicating this will be fundamental to ensuring regulation can be well targeted and effective. Without this, broad sector wide reforms are not proportionate and will mean consumers, businesses, and competition within Australia will end up worse off.

The lack of clarity on what is considered a 'digital platform' for the purpose of the reforms can be seen throughout the paper. For example, the ACCC suggests at least one of these businesses (Apple) holds substantial market power. However, the services that raise concern for the ACCC are not included within the Ministerial Direction setting out the scope of the inquiry – neither mobile operating systems or mobile app distribution are included in the (already very wide) scope of the inquiry, nor is it clear why they have been added. Similarly, the term 'gatekeeper' is used throughout the Discussion Paper. But it is defined in only very general terms as platforms 'that serve as an important and necessary intermediary between two sets of users (for example, business users and consumers), and which benefit from an entrenched and durable position.'

There are very real risks to this kind of approach, not least that it creates uncertainty for all businesses in Australia, with the threat that a regulator may arbitrarily decide to include them in an ill-defined 'sector' of the economy. If there aren't clear and overlapping commonalities between the 'services' being regulated and the harms to be prevented, then a 'sector wide' approach is inappropriate. And if there isn't a clear understanding of *why* certain businesses are caught by sector wide reforms, then it will result in unintended consequences, with a much wider range of businesses being captured than intended or competitive distortions introduced because of different regulation of the same activity. It also creates undue compliance burdens for smaller and domestic-focused players seeking to compete with international businesses, thereby reducing business certainty and confidence in the absence of a broader policy problem to be resolved.

Businesses have already seen examples where poorly crafted definitions are resulting in the inadvertent capture of businesses across Australia. The draft Online Privacy Bill (and associated online privacy code) released by the Attorney-General's Department would have captured any organisation that provides online access to their services (banking, booking flights online, account information about electricity/gas/water usage etc) where they have more than 2.5 million customers. This was clearly well beyond the government's intentions. But it would have resulted in the imposition of an onerous set of requirements on businesses across the country where there was no clear policy problem to be solved.

Further, many of the sectors identified by the ACCC do not exist in isolation of the rest of the economy. As we noted in our previous submission to the ACCC on online retail marketplaces:

> *Online marketplaces do not exist in a vacuum. They sit within a wider retail ecosystem, with competition for market share taking place between physical retailers, hybrid operations which have both physical and online presence and online marketplaces. All are subject to existing Australian laws and regulations. As the ACCC takes this work forward, it will be critical to identify and clearly specify the exact market being examined, and clearly explain any gaps in competition or consumer protections that are specific to this market and are not comparable to non-online retailers.*

We stand by the principle behind this position. For example, online messaging services also compete with and work alongside other forms of communication, such as SMS text messaging and phone calls. Likewise, all retailers compete regardless of their channel. Having a clear sense of the market being regulated will be critical to the success of any reforms.

This is evident in the ACCC's consideration of advertising in Australia: the ACCC suggests that Google and Meta have significant market power, citing, for example, the substantial portion of revenues for search advertising held by Google and the share for display advertising for Meta. But the ACCC presents these in isolation and does not consider them within the broader advertising market in Australia: all types of digital advertising (eg display or video advertising) made up less than forty percent of all advertising spending in 2021. This wider view helps inform not only determinations about relevant market power, but also the appropriate policy responses (regulatory or otherwise).

Conversely, key terms relating to both the concerns and the proposed reforms are used in broad ways without being defined, such as 'adjacent markets', 'fairly designed', or even 'unfair trading practices'. Without specificity about the kind of behaviour or activity that is of concern, businesses will not have certainty. This will create disincentives to invest in Australia, grow new business models, or spur growth in new markets. A clear understanding of the reasons and need for reforms are needed, otherwise any new changes will only add to the costs and barriers for Australians to access new services and products.

Finally, poorly targeted new regimes will not only create new unnecessary regulatory costs but will risk substantial industry distortions. While these distortions may not appear significant at present, they will be magnified as the digital economy continues to grow. As we have noted in previous submissions to the ACCC, the evolution of business models will be critical if Australian businesses are to remain internationally competitive and attractive to global capital, and if Australians are going to get access to new, and increasingly digitised, services and products that they value.

3.4 Merger reforms

In this Discussion Paper, the ACCC proposes a number of changes to ensure 'adequate scrutiny of acquisitions'. While the Discussion Paper suggests changes specific to digital platforms, it also re-canvasses economy-wide reforms to mergers and acquisitions.

For digital platforms, the reforms suggest changes to:

- notification requirements,
- amending the probability threshold (ie the assessment of whether there will be a substantial lessening of competition),
- a reversal of the onus of proof as to whether an acquisition will substantially lessen competition,
- changes to merger factors,
- the introduction of new deeming provisions,
- stricter prohibitions on certain categories of acquisitions (ie specifically preventing the acquisition by businesses in the same or adjacent markets, or that will extend, expand or entrench market power).

We do not agree with the proposals being put forward by the ACCC regarding either the economy-wide reforms or those specific to digital platforms. The policy case for these reforms has not been made.

There is insufficient evidence to demonstrate reforms to Australia's mergers regimes are necessary or beneficial. The costs of some of the proposals have not been quantified, nor have the expected benefits. If taken forward, we believe that the reforms would not only have a chilling effect on mergers and acquisitions activity in Australia, but also run counter to the objectives of the *Competition and Consumer Act 2010* (CCA): 'to enhance the welfare of Australians through the promotion of competition'.

Only a very small subset of mergers might give rise to competition concerns. As recently as August 2021, the former Chair of the ACCC publicly stated that under the current system, of the more than 300 acquisitions voluntarily notified to the ACCC each year, only 10 per cent might face public review. Of the acquisitions considered by the ACCC, only one to two per cent are likely to be contentious.[2] In this context, the proposed changes would be a highly disproportionate response to any perceived problems.

Further, there are already other checks and balances that allow the ACCC to assess acquisitions or mergers. For example, as part of the foreign investment review regime, there is a requirement for engagement with relevant federal government agencies, including the ACCC. Given the ACCC will be routinely engaged as part of the process, and a 'no objection' notification for a proposed transaction will not be issued until these agencies are satisfied, competition concerns are already being considered for a large share of the M&A activity in Australia.

Beyond being a disproportionate response where there is not a readily apparent problem, the proposed changes will also be to the detriment of Australia's overall prosperity. Business investment in Australia is at record lows. More investment is leaving the country than coming in. This means businesses in Australia are not investing enough in new machinery, processes or technologies that will create new, higher paying jobs.

In this context, it's important to consider Australia's global standing as an investment destination. We have already seen a substantial ratcheting up of the regulatory burden on businesses in Australia, including through the changes to Australia's foreign investment regime and the new critical infrastructure laws. Although the Business Council acknowledges the important national security safeguards behind these regulatory approaches, the regulatory burden and cost remains significant. As such, adding new regulatory layers or proposals without a clear public policy argument adds to a wider narrative that Australia isn't welcoming of investment. The changes proposed in this Discussion Paper add to this regulatory burden and will further dampen investment in Australia.

For businesses in Australia, these changes will make investments slow and burdensome and disincentivise capital attraction. Given most cases do not raise any concerns, the single merger review channel will create costs and delays out of proportion to any perceived problems. It will also increase risks for sellers and buyers given market flex or other conditions in financing and capital raising arrangements.

The package of changes will also create specific challenges for Australian businesses looking to invest overseas. For example, in a competitive auction process, the new changes will reduce certainty for deal execution. Given the substantial time and money involved in a bids process for major projects or investments, potential partners may look more favourably on bidders where there is greater certainty and reduced timeframes for transactions (ie those with no exposure to Australia).

The changes proposed by the ACCC also dilute the current merger regime's correct focus on the competitive outcome of the proposed merger. The proposed reforms would allow transactions to be blocked based on speculative assessments and without a sufficient link to the competitive outcome. This is not in accordance with the objectives of the CCA.

3.4.1 Probability threshold

In a similar vein, the ACCC is also proposing lowering the probability of competitive harm (question 18(a)) from 'real commercial likelihood' to 'a possibility that is not remote'. This kind of change is deeply problematic. It will mean consideration of mere possibilities even if they are improbable, rather than focusing on realistic economic and consumer outcomes. This is likely to be to the detriment to the actual competitive process. Blocking potential mergers on mere speculation will increase transaction uncertainty and result in potential parties incurring higher costs, lessening the incentive to invest in Australia.

[2] https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia

3.4.2 Burden of proof

Moving the burden of proof from the ACCC to the merger parties is not sensible (question 18(b)). It assumes all mergers in digital sectors are likely to be a net negative – a position at odds with lived experience. In practical terms, it will also be challenging for merging parties to prove a negative, particularly as they will not be able to require third parties to provide the necessary relevant information, unlike the ACCC. The ACCC has suggested that third parties are likely to not wish to provide this kind of information.

3.4.3 Notification requirements

We do not support the ACCC's proposal to implement a mandatory notification regime, both generally and in relation to digital platforms (question 18(c)). This will substantially increase the costs and work for both businesses and the ACCC. There is no evidence to suggest the existing system is failing – as noted above the vast majority of matters already notified to the ACCC are not even facing public review, let alone proving contentious.

Imposing this notification requirement would see a dramatic uptick in unnecessary filings to the ACCC. This unnecessary increase in regulatory costs would deliver no tangible benefits to Australians, or to the ACCC.

3.4.4 Merger factors

As it has recommended previously, the ACCC is again suggesting the inclusion of further merger factors (as set out in section 50(3) of the CCA) to include the potential takeover of potential competitors or data sets in assessing whether an acquisition will substantially lessen competition (question 18(d)).

This is unnecessary. As the government noted in its response to the ACCC's original *Digital Platforms Inquiry*, 'courts may already consider these matters in merger cases'. Section 50(3) is already a non-exhaustive list of factors to be considered, so the concerns raised by the ACCC can already be factored in.

3.4.5 Deeming provisions

The ACCC is proposing to amend the CCA to include a deeming provision, for 'firms with substantial market power', or where this might be entrenched or extended because of an acquisition (question 18(e)).

We do not support this change. It is economically unsound, given it will likely result in transactions not going ahead regardless of whether they will have an actual and substantial effect on competition. This runs directly counter to the objective of the CCA, which is to promote competition for the benefit of Australians.

Moreover, it is unclear how the ACCC will determine or quantify what would constitute 'substantial market power', particularly where it is not clear what the 'market' being considered is.

3.4.6 Prohibition on acquisitions by large digital platforms

Though not included in the consultation questions, the ACCC has proposed specifically prohibiting acquisitions by 'large digital platforms' where they 'operate in the same or adjacent markets', or where it is likely to 'entrench, enhance or extend its market power'. We do not support this proposal.

It is not clear how the ACCC will determine what an 'adjacent' market is. As discussed above, such important concepts are not defined in the Discussion Paper. Without clarity, businesses will face substantial uncertainty, again reducing incentives to invest in Australia, and cutting Australians off from new, beneficial services that they value.

This will also disincentivise Australians from forming new start-ups: a legitimate ambition for many start-ups is not to become a new 'tech giant' in themselves, but rather to develop a product that is acquired by existing businesses. Cutting off this 'offramp' will not help Australians: it will only serve to drive those with ambition and ideas offshore.

BUSINESS COUNCIL OF AUSTRALIA

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