



Level 24  
1 York Street  
Sydney, NSW 2000  
paypal.com

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## Submission in response to the Digital Platforms Inquiry Consultation Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services

### Introduction

PayPal is committed to democratising financial services and empowering people and businesses to join and thrive in the global economy. Our goal is to enable consumers and merchants to manage and move their money anywhere in the world, anytime, on any platform and using any device. PayPal facilitates consumers engaging in domestic and cross-border shopping and merchants extending their global reach, while reducing the complexity and friction involved in enabling e-commerce and cross-border trade.

PayPal has remained at the forefront of the digital payment revolution for more than 20 years. By leveraging technology and strategic partnerships to make financial services and commerce more convenient, affordable, and secure, the PayPal platform is empowering more than 425 million consumers and merchants in more than 200 markets.

PayPal Australia has been operating in Australia since 2005, enabling transactions, online and offline, for Australian businesses, from sole proprietors to established large merchants, whilst protecting the personal financial information of our over 9.3 million active user accounts. PayPal is passionate about innovation in payments and is excited about the myriad of benefits that such innovation can bring to the economy.

As a payment services provider, PayPal's network builds on the existing financial infrastructure of bank accounts and credit cards to deliver innovative and secure digital payment solutions worldwide. Over time, PayPal has expanded its digital wallet proposition and payments offering more generally and has identified and brought to market new ideas to provide benefits to consumers, SMEs and large enterprise customers.

PayPal's products are device- and network-agnostic. Further, PayPal's open APIs have enabled many third parties to incorporate PayPal transaction data as well as its online and/or offline capabilities into their own solutions. Through partnerships, and our device-, network- and platform-agnostic approach, we are enabling digital payments around the world. By combining the best of our assets with the best of our partner's assets, we strive to provide the best experiences for all our customers.

PayPal welcomes the opportunity to respond to the Australian Competition and Consumer Commission (ACCC)'s Digital Platform Services Inquiry (DPSI). As a long-standing participant in the digital economy, PayPal is pleased to provide comments, and participate in future consultation, on the need and options for reform to competition and consumer law in Australia as discussed in the ACCC's DPSI Discussion Paper for Interim Report No. 5.<sup>1</sup>

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<sup>1</sup> DPSI Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022 (**Discussion Paper**).

## A new regulatory framework

The ACCC considers in the Discussion Paper whether a new regulatory framework is needed to support existing regulation in Australia in light of the challenges of using existing competition and consumer law to address the breadth of concerns arising with respect to digital platform services, and if so, the digital platforms to which the new framework should apply.<sup>2</sup>

PayPal notes that the Discussion Paper outlines a number of possible legislative and regulatory tools that could be used to address competition and consumer harms arising from the supply of digital platform services. These include, but are not limited to:

- obligations and prohibitions contained in legislation;
- the development of code(s) of practice;
- the conferral of rule-making powers on a regulatory authority;
- the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm; and
- the introduction of a third-party access regime.

All of these options merit consideration. As a key principle, the effectiveness of reforms is likely to be maximised if it focuses on the core mission of protecting competition against practices that unambiguously diminish it, through the use of clear rules, swift determinations, and the development of staff with expertise in both competition and digital markets.

The chief advantages of dedicated, enforceable regulatory rules (whether they are contained in legislation or form part of a third-party access regime) or code(s) of practice is to ensure that outcomes can be realised sufficiently quickly to preserve competition and avoid markets tipping irreparably to a particular player. At the same time, the effectiveness of the potential to introduce new legislation, including ex ante regulation, is best served by focusing on the core task of preserving competition that might otherwise be harmed by platforms that have the power to determine the conditions of competition in the markets where they operate. In this context, we note the importance of a clear scope for any new framework to avoid expanding new regulation to firms without “market power”, a “strategic position” or “gatekeeper” status (as discussed further below).

Should the Australian Government decide new regulatory tools are required to address the issues identified in the Discussion Paper, we submit that the scope and definitions of any future reforms need to be carefully designed and articulated, and the methodology and criteria proposed to apply those factors to entities and conduct needs to be the subject of consultation with stakeholders at the earliest possible stage. In order to be successful and achieve the policy objectives of the DPSI, any potential legislative or regulatory solutions would need to be carefully defined and progressed through consultation.

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<sup>2</sup> Discussion Paper, p. 72.

In this regard, we note the various legislative and regulatory reforms recently implemented and/or subject to consultation, which have been focused on addressing new and emerging risks online and in the digital economy in recent years. These include the *Online Safety Act*, the Security of Critical Infrastructure regime and anticipated reforms to the Australian payments system regulatory framework, all of which contain definitions and regulatory concepts which would ideally be taken into account in the development of any competition and consumer reforms designed to address digital platforms' market power and "gatekeeper" role.

Further, to ensure confidence in any new proposal, it will be essential to have clarity and transparency around the governance and structure of any reforms proposed by the ACCC as a result of its inquiry, as well as enforcement decisions, including the possibility of appeal to an independent party or the Courts. When designing an effective governance structure, and considering the need, content and form of the regulatory solutions themselves, the ACCC should work closely both with businesses that would be subject to potential reforms as well as those benefiting from the protections of the reforms.

The Discussion Paper indicates that the ACCC is informed by overseas developments and suggests that the ACCC would seek to align its recommended approach to other jurisdictions to promote regulatory certainty and reduce regulatory burden for affected digital platforms.<sup>3</sup> PayPal generally agrees with this approach especially given the cross-border nature, operation and impact of digital platform services.

### **Firms to which potential reforms should apply**

The Discussion Paper asks which digital platforms the potential reforms should apply to in order to prevent anti-competitive conduct.<sup>4</sup> With respect to reforms addressing the consequences of market power, the Discussion Paper notes that these would only apply to a *"few large digital platforms, identified by objective criteria or an assessment linked to market power and/or a strategic position, such as occupying a gatekeeper position."*<sup>5</sup>

An assessment of whether a platform is captured by any potential reforms ought to evaluate concepts such as "market power", "strategic position", and "gatekeeper position" as part of an overall assessment rather than interpreting them as distinct, individual criteria. Each of these terms conveys the notion of a platform operator that has the ability to determine the competitive conditions under which business users of the platform are able to compete for consumers. To a large extent, these terms overlap: for example, a platform with "market power" would also likely have a "strategic position" or a "gatekeeper position". Accordingly, interpreting them as distinct criteria could lead to disputes about where the boundaries between them lie, and frustrate the process of assessing whether a platform is subject to a particular rule or regulation.

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<sup>3</sup> Discussion Paper, pp. 6, 72.

<sup>4</sup> Discussion Paper, Question 7.

<sup>5</sup> Discussion Paper, p. 72.

In assessing whether a particular platform has market power, or a strategic position (such as a position as a gatekeeper), a wide range of evidence could be taken into account, just as it is in assessments of dominance (e.g., market shares, user loyalty, degree of customer lock-in, availability and viability of alternative channels). Two considerations appear particularly important to the potential for anti-competitive conduct and consumers harm: the existence of conflicts of interest, and the presence of market power.

- **Conflicts of interest.** Operators that both manage and sell services through the platform may have conflicts of interest; specifically, they have an incentive to tilt competition in favour of their own services against those of third-party business users where able. The existence of conflicts of interest should therefore be taken into account in the assessment of whether a platform is captured.
- **Market power.** There is a risk that platform operators without market power can be punished through market mechanisms: unfair or imbalanced platform rules may lead business users to switch to different platforms instead. However, business users will not have an “exit option” to the same extent where the relevant platform has market power (e.g., if there are few realistic alternatives or if business users or consumers are “locked in”). Accordingly, the assessment of ‘strategic market status’ or position and whether a platform is captured should entail a market power threshold.

In PayPal’s view, any definition of concepts such as “market power” or “strategic position” should be capable of being applied to the full range of business models that form gatekeeper platforms but should not be defined so broadly that it encompasses business models that do not present gatekeeper characteristics.

In PayPal’s experience, e-commerce platforms and app stores may control merchants’ or app developers’ access to consumers and, depending on the market position, could operate as gatekeepers. As such, they should be subject to rules that foster competition and innovation by not allowing them to restrict availability or functionality of third-party merchants or service providers on their platforms.

The Discussion Paper also notes that it may be appropriate for measures to apply to a broad range of digital platforms (even all digital platforms) if the aim of such measures is “to address systemic, wide-spread harms.”<sup>6</sup> It recognises that “different measures might apply to different digital platforms or services depending on what issues those measures are seeking to address.”<sup>7</sup> As stated above, the effectiveness of any potential reforms is best served by focusing on the core task of preserving competition that might otherwise be harmed by platforms that have the power to determine the conditions of competition in the markets where they operate. Applying such reforms to digital platforms without

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<sup>6</sup> Discussion Paper, p. 72.

<sup>7</sup> Discussion Paper, p. 72.

“market power” or a “strategic position” would detract from that core objective and creates a greater risk of false positives (since firms without such a strong degree of market power are, by definition, less able to tip competition in their own favour) and unintentionally reducing choice.

## Conclusion

A new regulatory framework offers significant opportunities to foster the conditions for continued competition in the digital sector. However, any such framework must be thoroughly considered in terms of its scope, application, enforceability and inter-operability with existing regulatory regimes and frameworks to allow the flexibility to enable the conditions to foster both competition and innovation in a fast-moving environment without the regulation becoming overly burdensome.

As a long-standing device-, network- and platform-agnostic participant in, and enabler of, the digital economy with both local and global operations, PayPal welcomes the opportunity to participate in future consultations with the ACCC on this important issue.