



Gumtree Australia welcomes the opportunity to provide a submission to the ACCC's Digital Platform Services Inquiry (DPSI) in response to the *February 2022 Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*.

A. ABOUT GUMTREE

Launched in 2007, Gumtree Australia is an online classifieds marketplace connecting 7 million Australian buyers and sellers each month, with 2.8 million live listings across hundreds of categories. We provide a local online trading environment in which Australians can buy, sell, swap and give-away to other members of their local community.

Gumtree supports a range of selling categories including cars and vehicles, parts and accessories, home and garden, sport and fitness, electronics and computers, clothing and jewellery, business services, real estate, jobs, and more. We equip users with platform functionality to facilitate safe and successful trading, from posting policies to profile user ratings and PayPal account integration capabilities. However, Gumtree does not hold, advertise, or sell products itself.

Besides offering a horizontal or generalist platform where there is a wide variety of trade in different goods and services categories, when we refer to Gumtree Australia herein, it also includes our operations in respect of:

- Autotrader, a vertical or specialist online automotive marketplace which facilitates and supports the buying and selling of motor vehicles both privately and through dealers; and
- CarsGuide, which is a comprehensive source of motor vehicle related guides, reviews, news, tips, and advice, as well as an automotive classifieds website

Gumtree is owned by Adevinta, a European-based global online classifieds specialist that operates digital marketplaces in 15 countries. With trusted brands that enjoy leading market positions, Adevinta operates a resilient business model at the centre of the second-hand economy at the time when consumers are seeking more sustainable and cost-efficient ways to buying products.

B. GUMTREE WORKING WITH REGULATORS

Gumtree works closely with the ACCC, state-based consumer protection agencies and other regulators and law enforcement authorities to help enable safe and responsible trading. We prevent, detect, and cooperate with relevant authorities to take down counterfeit, unlawful and non-compliant listings. Our terms of use prohibit listings from violating any Australian laws, in particular, we clearly call out certain prohibited items (e.g., recalled and banned products, products that do not meet mandatory product safety standards).

Gumtree has clear user posting policies; a dedicated customer service team; a range of user education and support, including in relation to safe and prudent practices; direct reporting channels with regulators, authorities, and intellectual property rights owners; and detailed complaints policies for managing reported listings and user violations.

C. KEY TAKEAWAYS - SCOPE OF REGULATION AND CONCERNS

Gumtree strongly supports the ACCC's important work through the DPSI, including its focus in areas like retail marketplaces, online search, and app marketplaces. Gumtree fully appreciates and understands the urgent need for regulatory intervention and why the ACCC is seeking to prioritise its focus on largest digital gatekeeper platforms - platforms that enjoy an unprecedented and powerful gatekeeper position in and across markets, with their critical mass only growing. Besides the common themes that are already addressed by the ACCC in the request for submission, we take this opportunity to highlight some additional harmful behaviours from gatekeepers.

Overall, Gumtree supports a strong and enforceable regulatory framework as this is critical to ensure fair and contestable digital markets, stimulating innovation and consumer choice, and protecting new market entrants, businesses and consumers from unfair gatekeeper practices. We encourage any ex-ante regulation that seeks to identify, pre-empt, and prevent gatekeeper behaviours that preclude third parties from being able to compete on a level playing field with a strong enforcement mechanism and penalty regime for breaches of the rules. While generally competition law is an important tool, it can be too slow to prevent serious (and often irreparable) harm. In addition, antitrust remedies are limited to the specific case at hand and cannot address practices that are manifestly unfair, but not necessarily anti-competitive (yet), or practices that are unfair *because of* the position those platforms have. The very recently adopted EU Digital Markets Act (DMA) in Europe - where there are similar challenges with gatekeepers - is a great example of ex ante regulation targeting unfair practices by gatekeepers.

The framework needs to capture gatekeeper integrations between their core platform services with other services (such as marketplaces, app stores, and payment systems) and also C2C/B2C customers that use these services (e.g., advertising products). Accordingly, the scope needs to be capable of addressing the following harmful behaviours by gatekeepers that were not yet (sufficiently) covered in the ACCC's request for submission:

1. combining and tying of services;
2. leveraging data between services;
3. use of competitor data; and
4. self-preferencing and exclusionary practices.

In the next sections we will discuss these harmful behaviours in more detail.

The negative impact of harmful behaviours is significant. When a gatekeeper engages in one or more of the practices described below, it may prevent other players from competing on the merits or even exclude them from the market. Harmful behaviours create obstacles to innovation, investment and growth, for example by interfering with product development, marketing strategies and entry into new markets or directly impacting business users' ability to attract and retain consumers and generate sales.

Certain types of harmful behaviour have become systemic across platforms, affecting many business users in an ever-larger number of sectors, including travel, dating, publishing, communication, online marketplaces etc.

D. HARMFUL GATEKEEPER BEHAVIOURS

1. Combining and tying of services

Gatekeepers often gain and maintain unfair market advantage by tying other (ancillary) services with their core platforms, nudging users to access and use the broader service offering within their ecosystem which have the effect of discriminating against or excluding competing solutions against the service owned by the platform. Examples are adjacent services (like a marketplace, a payment solution or distribution service) that are pre-installed, tied, embedded and/or integrated with their core platform service. Users are exposed to these services regardless of whether they choose to or not, thereby locking-in users while foreclosing competitors.

Gatekeepers should be prevented from automatically making other services available to users by way of functional, technical, or economic integration with their core platform services (e.g., via structural remedies).

2. Leveraging data between services

Currently, gatekeepers have access to and process vast troves of user and other data across the different services they offer and leverage that unprecedented access to data for anti-competitive purposes (e.g., entering an adjacent market). When a gatekeeper has multiple businesses in different markets, they can link and combine those businesses through user data creating vast amounts of powerful datasets – datasets that are difficult if not impossible to match by new entrants or competing players normally present in only one market. This makes them indispensable for both consumers and businesses to use which will only further cement their gatekeeper position.

Any regulatory framework would need to include strong and enforceable data restrictions on gatekeepers to limit their ability to leverage data across their services and to prevent this data asymmetry. User consents should not be able to be used to justify broad data collection and the combining of data - this instead, should be prohibited.

3. Use of competitor data

The regulatory framework should include an absolute prohibition on gatekeepers to leverage the (commercially sensitive) data from competitors/business users using the gatekeeper's services to launch or advance their own products and services (at little incremental cost) to the detriment of current and future competitors. As mentioned above, gatekeepers are indispensable for both consumers and businesses to use and therefore they will have to make available (commercially) sensitive data. Such a strong position could allow gatekeepers to refuse appropriate data protections against data being used for anti-competitive purposes (e.g., offer or improve a service that directly competes with the service that the business user offers on the core platform).

4. Self-Preferencing and Exclusionary Practices

Regulatory intervention is needed to tackle situations where gatekeepers give preferential treatment of their own (adjacent) products and services resulting in discriminating or shielding off competitors. In essence it means providing technical, economic, or other business benefits for products and services owned or controlled by the gatekeeper, where these benefits are not based on its own qualities and have not been made available to competing companies, thereby discriminating against those companies.

It is vital that the regulatory framework addresses and prohibits self-preferencing and exclusionary practices by gatekeepers which use their broad market power across their tied and integrated services, supported by their unrestricted leveraging of data, in ways that prevent current and future competitors from competing on the merits.

The imposition by gatekeepers of unfair and discriminatory *access conditions on third parties* (than applied to their own services) is another harmful behaviour that more broadly needs regulatory intervention. Such provisions are especially necessary to enable competition in the wide range of future value-adding services (e.g., internet of things, smart networked devices, artificial intelligence) and should apply across all gatekeepers' core platform services (including app stores). They should ensure that gatekeepers cannot use technical reasons to lock-out competitors; impose unjustified restrictive requirements; or charge excessive commissions.

To enable this outcome, gatekeepers should be required to provide fair, reasonable, and non-discriminatory general conditions of access for business users that are no less favourable than those that they apply to their own services.

CONCLUSION

Gumtree recognises a gap in regulation that requires a timely strategy to address some of the harmful behaviours of gatekeeper platforms to ultimately prevent them from using their unprecedented market power in ways that make it impossible for new entrants and competitors to compete fairly. In establishing the regulatory framework, the ACCC is encouraged to take advantage and learnings from regimes that are being put in place in other jurisdictions around the world. In particular, it is important that any regime is principles-based, future-proof, and able to take strong and effective action in a timely and proactive manner.

The regulation needs to be both enforceable and strongly penalized by both fines and structural remedies where appropriate to prevent gatekeepers from taking 'regulatory fines' as part of "the cost of doing business".

Gumtree Australia appreciates the opportunity to make this submission and would be pleased to provide any further details that would be helpful for the ACCC Digital Platforms team.

Sincerely,

Gumtree Australia

1 April 2022