

2 May 2022

Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601  
**By email:** digitalmonitoring@accc.gov.au

To Whom It May concern,

**RE: Digital Platform Services Inquiry, Interim Report No.5: Updating competition and consumer law for digital platform services ( Discussion Paper )**

Thank you for the opportunity to make a submission in response to the Discussion Paper.

Please find attached, the submission from the Association for Data-driven Marketing and Advertising (**ADMA**). We thank you for providing the extension to submit.

ADMA has no objection to the publication of this submission.

If you have any questions in relation to this submission, please do not hesitate to contact me [REDACTED] and/or Sarla Fernando [REDACTED]

Regards,

Andrea Martens  
Chief Executive Officer  
**ADMA**



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

Australian Competition and Consumer Commission

1 May 2022

The Association for Data-driven Marketing and Advertising  
Level 27  
100 Barangaroo Road  
Sydney NSW 2000  
ABN: 53 156 305 487

This page intentionally left blank

## Introduction

The Association for Data-driven Marketing and Advertising (**ADMA**) welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (**ACCC**) in relation to the Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services (**Discussion Paper**).

Digital platform services drive the data-driven marketing and advertising industry. Two measures of sustainable success for the data-driven marketing and advertising sector are: the extent of effective competition throughout the supply chain for digital advertising services; and the extent to which processes and practices for collection and handling of data relating to consumers and internet users are fair, transparent and appropriately privacy preserving.

Along with many consumer benefits, powerful digital platform businesses have presented consumer and competition harms that create challenges for regulators around the world. In response, these regulators have often looked to their traditional tools and existing legislation to curtail anti-competitive activity and protect consumer rights. This has had varying levels of success, partly due to limitations of tools available to regulators.

In Australia, the Competition and Consumer Act (**CCA**), including the Australian Consumer Law (**ACL**), has been the primary regulatory tool to hold the larger digital platforms accountable. Use, and potential use, has driven some change. The ACCC's Digital Platform Services inquiry provides the government and industry with an opportunity to consider whether there is a need for additional protections to reduce risk of consumer and competition harms, and whether those protections ought to be built into the ACL and CCA.

It is ADMA's opinion that there is a need for reform to strengthen the protections for Australian consumers and the competitive local economy, but that regulatory reforms should be closely aligned with those implemented in comparable leading overseas jurisdictions.

## KEY RECOMMENDATIONS

In its submission, ADMA advocates:

- **that regulatory reform is needed** to better address consumer and competition harms associated with digital platform services in Australia. In this reform, the CCA, including the ACL, must be measured for 'fit for purpose' and will be strengthened if done alongside other economy-wide reforms
- **introducing prohibitions and obligations into legislation** where doing so provides clarity to service providers and consumers as to what is considered acceptable conduct in the digital economy

- **considering the suitability of creating a new authority** with oversight of the unique challenges in digital competition. The workforce tasked with oversight will need to have a diverse set of skills that mirror the industry's changing composition and landscape. This should also consider parallel issues such as privacy and eSafety. An analogous regulatory model is the UK Centre for Data Ethics and Innovation.
- **Australia applying learnings from UK's Competitions and Market Authority (CMA) approach** to defining frameworks for digital platforms that extract better data out of digital advertising and recognise penalties must be relative to the size and scale of the digital platform
- **Australia taking a global viewpoint in regulatory reform**, increasing interoperability and efficiency with other comparable jurisdictions. Any opportunities to improve upon overseas models should also be considered to allow for world-leading consumer protection
- **that regulatory reform avoid burdening Australian digital platform services** that do not enjoy substantial market power
- **a sensible tailored approach to addressing issues brought about by digital platform solutions.** While solutions preventing harms may sometimes be applied broadly, this must not be the assumption for all issues
- **that a fit for purpose competitions and consumer regime must be both structured and flexible and must be considered with a national security lens** due to the risk of exploitation of large scale digital platforms by bad actors and the rapid pace at which the digital economy changes
- **the ACCC needs sufficient resources and appropriate powers** to improve its responsiveness to emerging harms arising from the digital economy.

## **DISCUSSION**

### **Digital platform services: identifying the benefits and harms**

Digital platform services underpin the digital economy and open up opportunities for organisations to improve their efficiency and effectiveness. Digital platform services also provide innovative and cost-effective ways for any organisation to reach, engage and do business with their customers in ways and at times that are convenient to them. Digital platform services are essential for the automation and ubiquitous delivery of services that Australian organisations and consumers have come to rely on and in some instances (when funded by advertising) allow free access to information and other services. They also play a key role in connecting Australians with their family, friends and community networks locally and internationally – in real time.

Digital platform services enable data-driven marketers and advertisers to truly put the customer at the centre of their strategy. There are a multitude of benefits that digital platform services offer they now play an important role in stimulating the economy.

However, left unchecked, they can present significant competition and consumer risks. ADMA agrees with the comprehensive and wide-ranging analysis of competition and consumer harms outlined by the ACCC in the discussion paper and agrees that these harms have become more prevalent as reliance on digital platform services grow. The rise in the use of connected devices (in addition to conventional computers, tablets and smartphones) will also aggravate the likelihood of harm as these offer digital platform service providers access to unprecedented volumes of personalised (and intimate) data and insights, giving them an unbalanced market power as data collectors, channel owners and in some instances, the provider of advertising services.

There are innate network-effects as digital platforms gain users, coupled with the economies of scale enjoyed in the operations of these businesses. If society is to continue to be able to rely on digital platform services in the future, these issues must be addressed in a way that ensures that a dynamic and competitive industry is maintained, that it fosters innovation, drives economic prosperity for Australia and that consumer rights and safety are protected.

### **Regulatory reform is needed**

Technological innovation has changed the landscape being regulated significantly, and these changes have developed organically (albeit at a rapid pace).

The ACCC's review of competition and consumer law as it applies to digital platform services is both timely and necessary. While some may think that regulatory reform is somewhat overdue, the review at this more mature stage of the industry lifecycle provides an opportunity to consider the impact digital platforms have had on industry through a lens where business, regulators and the community have a better idea and understanding of issues that need to be addressed, the harms they are trying to avoid and the competition protections they need to preserve.

Australia's CCA, including ACL, continues to play a vital role in addressing competition and consumer harms arising from digital platform services. There is existing strength in the provisions of section 18 and 29 that prohibit misleading and deceptive conduct and false or misleading representations.

However, regulatory reform is required. The ACL needs to be strengthened to address anti-competitive behaviour that is not currently captured or where investigation occurs only after harm has been inflicted. Further, given the volume of advertising on these platforms, much of which is placed using automated tools, it's a reasonable question whether compliance is (or can be) adequately policed.

ADMA notes that the digital economy does not stand apart from the traditional economy. Both should be regulated in the same way with guiding principles and obligations on participants to uphold standards of behaviour.

ADMA also notes that a current shortcoming of the ACL is that consumers face significant barriers seeking remedies when a digital platform services provider fails to meet a standard of service (or product) that is expected to be upheld by traditional businesses locally. The lack of redress available to consumers indicates that the ACL, as it stands, is not sufficient when applied to digital platform services and is an even greater issue when Australians deal with a global entity.

In addition to the CCA, including ACL being made 'fit for purpose', ADMA supports wider reforms that would strengthen the protection of competition and consumers against harm. Some of these include:

- the introduction of an unfair trading prohibition
- introducing a general safety provision (drafted with a national security lens)
- a strengthening of unfair contract terms provisions
- an overhaul of the Privacy Act to better protect against consumer harm related to the collection, use, disclosure and management of personal information. ADMA recommends that this Inquiry be considered in conjunction with the Privacy Review that is currently underway.

### **Introducing prohibitions and obligations into legislation**

ADMA advocates for the introduction of principles-based prohibitions and obligations into legislation to the extent that doing so:

- helps set the standards for what is considered acceptable conduct in the digital economy; and
- that the introduction of such further clarifies these expectations to service providers and consumers.

ADMA cautions against any reform that has the potential of creating confusion as this will have the adverse effect of reducing compliance.

### **Supporting legislative reform: considering the appropriateness (and skillset) of a new authority**

To be effective in maintaining consumer and competition protections, the governing framework needs to be supported by regular surveillance and enforcement by the regulator. It should also be aligned (in a practical sense) to the industry it is being applied to. ADMA supports the ACCC investigating whether it makes sense for Parliament to create a new authority with both oversight of the unique challenges in digital competition, while working alongside parallel issues such as privacy and eSafety. An analogous regulatory model is the UK Centre for Data Ethics and Innovation.

The digital economy requires regulators take a more sophisticated approach to identifying harm. The current approach of relying on reports that identify harms after they take place is no longer feasible.

Furthermore, the monitoring and surveillance by regulators in the complex digital environment requires a diverse workforce that understands the implications of the law along with the technical architecture on which these models are built and the various ways in which these digital platform services are being used to serve a consumer.

Experts such as data scientists, data-driven marketers and advertisers, artificial intelligence engineers, data analytics professionals, information security analysts and other technology professionals will need to be included in the teams supporting upstream regulation in the digital economy. This will mitigate risk and protect consumers and competition, potentially before widespread harm occurs.

ADMA provides education services to the data-driven marketing and advertising industry. It is ADMA's experience that helping organisations and individuals tailor their education in compliance so that it applies to the environment they operate in has a positive effect of improving compliance and best practice – especially when there is regulatory change. ADMA looks forward to working with the regulator to educate the industry as required.

### **The advantage of being able to apply learnings from the CMA**

ADMA acknowledges that the ACCC has already formed a view on the need for specific rules to prevent anti-competitive conduct in the supply of ad-tech services and general search services. In identifying and implementing any such rules and recommendations that the ACCC make from this inquiry, ADMA advocates an approach that follows the substantial work already done by the UK's Competitions Market Authority (CMA) in this space.

Many of the issues being considered and addressed in the CMA's detailed, enhanced regulation of digital platforms are aligned to those identified in Australia. The CMA's approach was to define frameworks for digital platforms that extract better data out of digital advertising in a way that will benefit (and protect) both the consumer and a competitive digital economy and recognise that penalties must be relative to the size and scale of the digital platform.



### **Taking a global approach to regulatory reform**

ADMA believes it makes sense for Australia to take a global approach to regulatory reform related to digital platform services. The pace of innovation and the global nature of digital platforms means examining the issues with an Australian-only lens risks being myopic and ignorant of the realities of cross-border commerce. A failure to address these gaps will only empower global incumbents looking to use their market power to improve their own commercial interests at the expense (and sometimes disregard) of a genuine interest in protecting Australian consumers or society from harm.

Australia should, where appropriate, align its regulatory framework with other comparable jurisdictions and support interoperability and international consistency as it applies to global governance of digital platforms. This will help manage situations where recalcitrant digital platforms may threaten Australian-domestic market withdrawal rather than abiding by regulatory requirements. Harmonising international regimes (to the extent that is appropriate to Australia) will also reduce the regulatory burden (and therefore cost) often cited by global platforms as for a reason to withdraw operations and/or services and make compliance by global operators more efficient and effective.

### **Reform must not inadvertently prejudice Australian local digital platform services**

ADMA advocates for a tailored approach to regulatory reform that addresses specific harms, as well as addressing broader systematic issues. Furthermore, ADMA supports an approach that is measured, appropriate and likely to capture in governance the intended cohort.

Australia needs to be careful that it does not inadvertently prejudice the local digital platform services that may fall within a regulated category by definition only, but do not enjoy substantial market power. Such prejudice would lead to regulatory burdens on local market operators that are not shared by their multinational counterparts and could have the effect of stifling competitiveness and/or innovation to the disadvantage of all Australians and the economy.

### **A sensible tailored approach to addressing issues brought about by digital platform services**

As the use of data analytics increases there has been a reduced level of transparency to that data by the consumer.

ADMA understands the need to protect the use of that data to minimise potential consumer harms. However, while transparency is important, ADMA believes it is equally important to improve the effectiveness of current disclosure and consent models.

It is ADMA's view that this balance will be found in understanding the difference between consumer perceived risk vs actual consumer harm. Regulatory reform needs to address the harm without placing an unnecessary inconvenience, friction and burden on consumers when it comes to informing

consumers of their data rights. For context, an approach similar to how Australian Consumer Law discloses consent forms do not form part of every retail transaction but rather the weight of disclosure is applied to those who fail to adhere to the law (placing the emphasis and cost on bad actors, not that who act in good faith).

Overall, this means a 'one solution fits all option' may not always be the way to achieve the end goal. Take, for example, trying to address the issues surrounding dark patterns. While it would be tempting to assume this issue can be solved with 'notice' provisions, the nature of this activity may not be defused by just raising user awareness and providing notice – it may instead be an issue that is better addressed with a prohibition on unfair trading practices that can be broadly applied to the market.

Just as digital platform services have changed the form in which consumer data and personal information is collected, analysed, used and stored, the way in which it is regulated must be reflective of these (and future) changes. If it is not, then behaviours will be set by the 'loopholes' to compliance rather than being governed by the right way to do things.

### **Structure, flexibility and national security**

The digital economy has an unprecedented ability to influence and manipulate both consumers and the businesses that rely on digital platform services. This makes it more important that the regulatory framework be both structured enough to disincentivise undesirable behaviour but also flexible enough to apply to innovation over time without further empowering the incumbent powerhouses or putting an unreasonable burden of compliance on new entrants to the market. It is also critical to look at this through a national security lens, as the risk of exploitation of large-scale digital platforms by bad actors could undermine the integrity of critical institutions, public trust and be counter to the national interest.

### **Provision of resources, funding and appropriate powers**

ADMA advocates that the ACCC be provided with sufficient resources and funding as well as appropriate powers, including conferral of rule-making powers, to be able to improve its ability to be responsive to emerging consumer and competition harms that arise from the digital economy.

### **Conclusion**

Regardless of the path forward in this review, ADMA would encourage the ACCC to fully consider how compliance will be measured with any proposed reforms. We remain supportive of regulatory reform, but without adequate policing the good actors will bear the burden and the bad actors, who exploit consumer data and weaponise the digital ecosystem, will continue to go unpunished (and effectively operate unregulated).

ADMA looks forward to continuing to engage with the ACCC in the Digital Platform Services.

---

## ABOUT ADMA

ADMA represents the full 360 degrees of Australia's media, marketing and advertising ecosystem. ADMA itself is the principal industry body for data-driven marketing and advertising in Australia, representing over 350 organisations from a broad spectrum of Australian industries.

Together these organisations employ about 28,000 marketing professionals, many of whom are on the cutting edge of the data revolution. Members range in size from SMEs to multinational corporations. They include banks and telecommunication companies, global tech companies, advertising agencies, specialist suppliers of marketing services, statutory corporations, retailers, specialist industries such as travel, hospitality and automotive, charities (both large and small) and educational institutions.

ADMA, as the principal industry body for data-driven marketing and advertising, is committed to upholding good standards in data privacy. ADMA members are advocates of responsible marketing and as such recognise that a sustainable marketing and advertising sector requires fair and transparent business practices in the handling of consumer data (including personal information) and that such practices reflect a respect of consumers which in turn nurtures digital trust.

ADMA members take their privacy compliance responsibilities very seriously and support a regime that protects the personal information of the consumers understanding that responsible marketing practices stem from a compliance with data privacy law.

ADMA is keen to support all key stakeholders however it can to ensure that the review of the Australian Competition and Consumer regulatory regime is considered both through reform of the legislation itself and its application to industry. This will help ensure that Australia's competition and consumer framework will be fit-for-purpose and the regime will be future proof to the extent that it can be while executing its objective and purpose effectively.

ADMA acknowledges that our members may have an interest in individual questions raised in the Discussions Paper; however in this submission we focus on key issues as they pertain to the data-driven marketing and advertising industry.

Individual members of ADMA may provide separate submissions to the ACCC.