

1 April 2022

Manager
Digital Platform Services Inquiry
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Submitted via Email: digitalmonitoring@accg.gov.au

Dear Sir/Madam,

Updating competition and consumer law for digital platform services

The Australian Investment Council welcomes the opportunity to contribute to the Australian Competition and Consumer Commission's (ACCC) *Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*. We also refer to our [submission](#) to the APP Marketplaces phase of this inquiry on 8 October 2020.

Private capital investment has played a central role in the growth and expansion of thousands of businesses and represents a multi-billion-dollar contribution to the Australian economy each year. Our members are the standard-bearers of professional investment and include private equity (PE), venture capital (VC) and private credit (PC) funds, alongside family offices and institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers. Our members include both Australian domestic and offshore-based firms.

Private capital fund managers invest billions of dollars into Australian companies every year. Australian-based PE and VC funds under management reached \$37 billion in 2020, which represents a growth in available capital to support investment into businesses across every industry sector of the economy. The industry now has a combined total of around \$14 billion in equity capital available to be invested in the short-term.

Investments made by private capital firms into Australian businesses directly result in the creation of new jobs and support growth in economic output across all sectors of the market. These investments represent 2.6 per cent of Australia's GDP output each year and are responsible for creating around 1 in 9 new Australian jobs according to independent analysis by Deloitte Access Economics.¹

As the industry association for private capital, the Council is supportive of policy initiatives and reforms that help ensure our economy is competitive, innovative and able to support Australia now and into the future. In particular, the Council encourages initiatives that help expand entrepreneurship, increase productivity and foster investment – initiatives that drive the development of skills and talent, productive capacity and innovation through technology.

Many of the Council's members invest into businesses that use digital platforms to promote and sell their products and services to their target markets or build digital applications that facilitate end-user experiences.

Our Submission

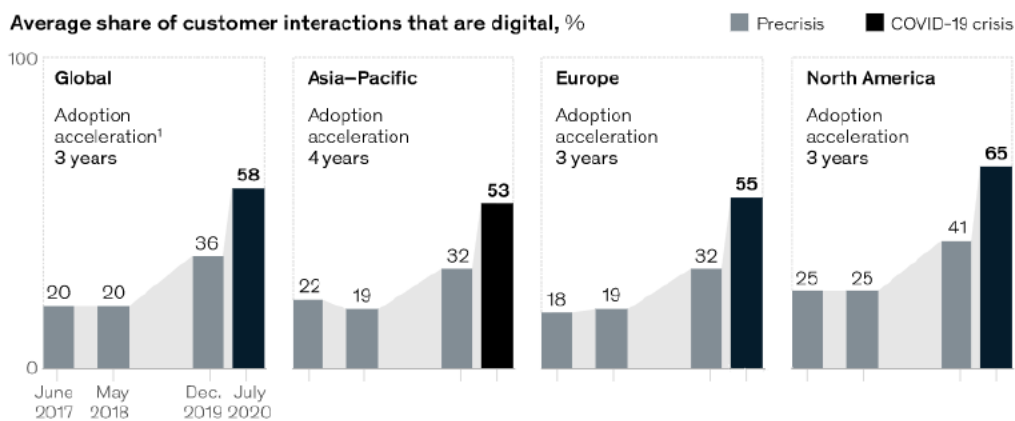
Lockdowns and border closures during the COVID pandemic have had a profound effect on businesses and individuals with the majority of the population working from home and needing to transform their work environments, schools and universities fast-tracking online learning capabilities, online transactions booming, and social isolation escalating the need for communication through digital means for social and leisure activities.

A survey by McKinsey & Company in October 2020 shows that the Covid pandemic led to a significantly increase in the adoption of digital technologies by consumers "accelerating digitisation of customer interactions by several



years.”¹ This is illustrated in **Figure 1** which shows an average acceleration of 3 years in the adoption of digital interactions by consumers.

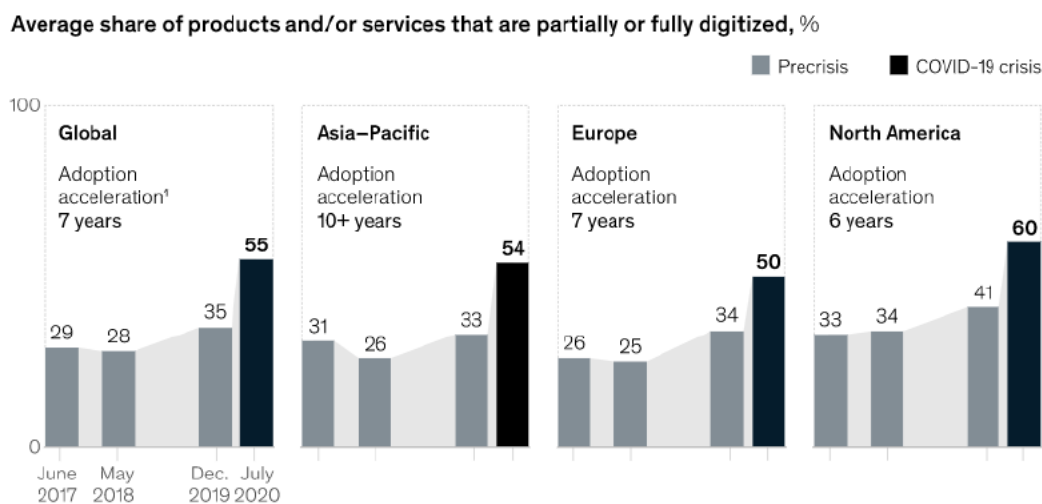
Figure 1²



¹Years ahead of the average rate of adoption from 2017 to 2019.

The development of digital offerings was even more pronounced with an average of seven years in acceleration in the rate companies are adopting digital or digitally enhanced products and services. (**Figure 2**)

Figure 2³



¹Years ahead of the average rate of adoption from 2017 to 2019.

¹ [How COVID-19 has pushed companies over the tipping point – and transformed business forever](#), McKinsey & Company, October 2020

² Ibid

³ Ibid



While the rapid uptake of technology across a range of digital platforms has provided efficiencies and new market opportunities, it has also placed the spotlight on the growth of larger market participants and their ability to exploit their size and market share to engage in anti-competitive behaviour through taking advantage of access to data and information on new or competitive products and services.

The Australian Investment Council noted an example in our submission of 8 October 2020 where there have been instances in the Australian in the app development ecosystem where removal of access to sensors has been applied to apps that have not been developed by Apple or Google. This has been done under the pretext of privacy and has resulted in limiting the quality of service the developer can provide, therefore giving consumers the impression that the product is inferior. One market participant who requested to remain anonymous stated:

In simple terms, the IP for which we have patents and a valuation of more than \$10 million is effectively reduced to \$0 in terms of value. We have had to retire this part of our business and pivot to a new domain.

Protecting from Harms to Competition

The Australian Investment Council is supportive of a regulatory framework that includes obligations and prohibition that would seek to address harms from digital platform services. While other jurisdictions have adopted a range of approaches to the regulatory oversight of digital market places, the Council's view is that this oversight should work within a framework that, in particular, protects smaller market participants from harmful competitive behaviour. This regulatory framework should identify specific harms that create anti-competitive practices for market participants and consumers.

Preventing Anti-Competitive Conduct

The Council supports regulation and oversight of digital marketplaces that facilitates the sector's continued growth and development and is conducive for new market entrants such as early-stage and fast-growth companies who are central to driving innovation and facilitating an open, competitive market.

The example cited above, provides a rationale for the need for rules and measures to prevent anti-competitive conduct which harms innovation and the third party supply of goods and services – and therefore reduces consumer choice - such as those provided through app marketplaces. Rules should be applied to market sectors where there is evidence of widespread anti-competitive conduct under the umbrella.

Codes and Practices

The Council supports a broader principles based approach to codes and practices for digital market places. Our view is that these do not need to be bespoke to each and every service within the digital marketplace, but rather, provide a comprehensive principles based approach for compliance across the entire sector.

Guidance may be beneficial where there are specific areas of contention, for example, where false or unsubstantiated claims are made on a businesses' social media sites.

Regulatory Oversight

To be effective, regulatory oversight will need to provide quick resolutions to certain issues taking into consideration:

- A) The ability of smaller market participants to move quickly and therefore requiring resolutions that are timely so as not to interfere with or stall the development of their businesses;
- B) Avoiding regulatory overreach that could result in stalling or making development of businesses uncertain when they are susceptible to losing market share, while balancing the need to ensure regulation protects



them from larger players which may be able to exploit data and market information due to their substantial market power

C) Effective, low-cost, accessible and efficient enforcement processes and procedures.

Without these processes working effectively, the system will not have the necessary power to enforce anti-competitive practices and participants may lose their critical first mover advantage.

The Council recommends any new legislation and/or regulations are reviewed 12 months after implementation.

Avenues for Redress

The avenues for redress should be set out clearly in the legislation so market participants can confidently address any issues without the potential for repercussions from or retaliation by the dominant (or other) market participants.

To this extent, the Council recommends the ACCC expands the capabilities of an existing resource, Whispli, to accommodate reporting from the digital economy participants to ensure anonymity and that they can register complaints on a confidential basis to avoid the possibility of potential retaliation from other market participants,

Other Areas of Concern

Ensuring consumers have choice across digital platform services is essential for improving competition and consumer outcomes.

In-App payment platforms is an area that requires closer scrutiny particularly where developers have limited or obstructed consumer access to competitors' apps and larger market players are using the justification of privacy protections for app users.

The Council has also heard from members that there have been instances of App led businesses – i.e. where the App is the main interface for the business with customers – are in fear of being critical of the payment platforms led by Apple and Google due to the potential for retaliation which may be as subtle as delaying approval processes for updates for many months which is enough time for a new provider to supersede the App led business or for the business to become no longer be commercially viable.

This has tremendous repercussions as we have seen evidence where the platform providers have taken advantage of access to the data of App developers as well as data garnered from the broader market place to develop their own products which have pushed others out of the market.

The Council would be pleased to provide further context on the points outlined in this submission and looks forward to participating in future discussions about the *Digital Platform Services Inquiry*. If you have any questions regarding this submission, please do not hesitate to contact the Australian Investment Council's policy team at

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Yours sincerely

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Yasser El-Ansary
Chief Executive