COMMUNICATIONS
ALLIANCE LTD

Communications Alliance Submission

to the Treasury
in response to the

Digital Platforms: Government consultation on ACCC's regulatory reform recommendations
Consultation Paper

23 February 2023

Contents

Communications Alliance

Communications Alliance is the primary communications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, platform providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to be the most influential association in Australian communications, co-operatively initiating programs that promote sustainable industry development, innovation and growth, while generating positive outcomes for customers and society.

The prime mission of Communications Alliance is to create a co-operative stakeholder environment that allows the industry to take the lead on initiatives which grow the Australian communications industry, enhance the connectivity of all Australians and foster the highest standards of business behaviour.

For more details about Communications Alliance, see http://www.commsalliance.com.au.

1. Introduction

Communications Alliance welcomes the opportunity to make a submission to the Treasury in response to the *Digital Platforms: Government consultation on ACCC's regulatory reform recommendation* Consultation Paper (Consultation Paper).

Our members, which include digital platforms (also those directly targeted by some of the measures proposed by the ACCC in its fifth interim report for the Digital Platform Services Inquiry released in November 2022) are competing in the Australian (and international) market, supporting the Australian economy and promoting consumer welfare with innovative and high-quality products and services.

Our members not only comply with relevant national and international laws and regulations but regularly assume additional burdens to promote and enable compliance by their business partners and to assist regulators.

Communications Alliance has not made submissions to the ACCC's Digital Platforms Services Inquiry interim reports. However, members have provided individual submissions in response to those reports.

In this submission, we will not provide commentary in response to ACCC assumptions and statements about the status of individual markets and/or market participants put forward in its fifth interim report (Report). However, we highlight a need for those to be rigorously and independently explored and analysed.

Instead, we will share some high-level thoughts on the key themes of the Consultation Paper, seeking to address some of the overarching questions raised by Treasury. The views are based on the 25 years' experience that Communications Alliance (including in its previous role as the Australian Communications Industry Forum) has from its position at the heart of communications industry regulation.

Members may make individual submissions in response to the Treasury's Consultation Paper.

2. The need for reform

International context

2.1. When considering whether to import a new regulatory framework into Australian law (which is what is proposed here), Government should take a cautious approach and conduct an upfront cost/benefit assessment to determine whether a new regulatory framework, on balance, is needed and – most importantly – is appropriate to the Australian context.

2.2. This is particularly the case where there is no consensus around the world as to what the right approach to digital regulation should be. To date, only one country has actually passed a wholly new regulatory regime specific to 'digital platforms' and it is still experimental, expected to be tested and is understood to involve some very significant costs.

2.3. As Treasury correctly observed, the question is whether Australia acts quickly or waits and learns from overseas experience. In our view, the costs of acting precipitously far outweigh the benefits.

Existing regime and powers

2.4. The Discussion Paper to the Report asserts that market-wide issues exist that warrant, or rather necessitate, the introduction of new laws.[1] However, in our view, the ACCC has done little to demonstrate that this is actually the case.

2.5. New laws would only be required if the existing laws were demonstrably unable to effectively and efficiently regulate (through deterrence and/or enforcement action brought by the regulator) the behaviour – to the extent that regulation is required – of the participants in each respective market.

2.6. For the 'digital platforms market' – noting the definitional and delineation difficulties that are attached to this terminology, and if there is such a market at all – we suggest that the ACCC first make use (in relation to digital platforms) of its existing powers under the recently extended section 46 of the *Competition and Consumer Act 2010* (CCA) which prohibits a firm with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

2.7. Against this background we note that the ACCC has to date not brought any proceedings against digital platforms for contraventions of competition prohibitions of the CCA. It has, however, used its merger review powers on a number of occasions in the past decade, including in respect of large platforms targeted in the Report, without indication of inadequacy of legislation or powers, and it has not opposed any mergers of digital platforms.

2.8. Importantly, following the passage of the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*, which significantly reforms the unfair contract terms (UCT) provisions of the CCA, the ACCC now has substantially more power to enforce UCT laws, once they come into effect in November 2023. It would be advisable to allow the amended legislation to take effect and for businesses to introduce measures enabling them to comply with the new UCT provisions. Should any issues remain following a reasonable amount of time to observe the implementation of the amendments to the CCA, it would be appropriate to consider how any outstanding issues could be resolved.

2.9. The Discussion Paper also indicated that the Government will consult on an unfair practices prohibition. If that proposed prohibition is passed into law, that would be a further substantial reform which should be given time to take effect before further new laws are proposed.

Activity-specific (economy-wide) vs sector-specific measures

2.10. Many of the issues raised in the Report and Discussion Paper, including in relation to data access, portability and privacy, transparency in consumer contracts and UCTs, are not digital platform-specific but rather apply on an economy-wide basis or at least to a number of large sectors.

2.11. It is unclear why specific digital platforms are being singled out as the target of regulation/legislation given the conduct referred to is often engaged in by participants across an industry, especially noting the lack of use of existing/newly established powers discussed above.

2.12. It would be better practice to target any new approaches at specific anti-competitive activities or behaviours **economy wide** that are detrimental to consumer welfare – irrespective of whether that activity/behaviour has occurred online, offline or through some hybrid approach – where specific actual harms have been identified.

[1] p. 64, ACCC, Digital Platform Services Inquiry, Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services, February 2022

Coordination with other Government policies and processes

2.13. In addition and following on from some of the above, it is important that some key processes currently already being undertaken – either by Government and/or though industry initiatives – are being given sufficient time to conclude and be implemented, prior to embarking on a project that would entail a significant step-change away from established doctrines of the Australian competition and consumer law.

2.14. These processes include:

- the Digital Platform Services Inquiry itself;
- reforms to address unfair trading practices if they are indeed deemed necessary on an economy-wide basis (which have the potential to impact on many of the actual or perceived issues raised by the ACCC);
- the review of the Privacy Act 1988;
- the Age Verification Roadmap;
- Digital Identity Legislation;
- the National Data Security Action Plan;
- the National Cyber Security Strategy 2023;
- the Consumer Data Right (banking, energy, telecommunications);
- the establishment of the National Anti-Scam Centre and other industry anti-scam initiatives; and
- consultations on reforms to the national payments system.

3. Consumer Recommendations

Scams

3.1. Scams, fake reviews and harmful apps raise very complex problems which ought to be addressed in a coordinated, cross-sectoral approach. Sectoral efforts to combat scams, while useful, have the tendency to drive the criminal activity into areas with fewer controls, thereby starting (or continuing) a game of 'whack a mole'.

3.2. Moreover, scams constitute one of the most technically dynamic activities combined with the exploitation of human bias, vulnerability and social trends.

3.3. Therefore, Communications Alliance does not believe that scam activity on digital platforms (or facilitated using telecommunication services, for that matter) can be meaningfully addressed through legislation or regulator-imposed codes or standards. Key to limiting the harm caused by scams will be industry cooperation (to the extent permitted by legislation), possibly through self-regulatory codes that can flexibly be amended to keep pace with the evolving nature of scams and digital platforms.

3.4. It should be noted that Communications Alliance was very successful with the development of its industry code C661:2022 Reducing Scam Calls and Scam Sms to combat scam voice calls and texts, with so far more than 955 million scam calls (an estimated 50% of scam calls) blocked since the code's inception in December 2020 and 90 million scam texts blocked since July 2022 (the code was extended to also cover sms in July 2022).

3.5. The recently established National Anti-Scam Centre, hosted within the ACCC, will also play an important role, together with the already existing Scamwatch. It would be useful to get a clearer understanding of the functions and roles of those two centres in

the future, also with respect to disseminating high-quality, timely information and industry's role in assisting the identification of trends and/or tracking/tracing.

3.6. Digital platforms and telecommunications providers invest substantial resources and efforts in combatting scams and other types of fraud and criminal behaviour, including through close cooperation with law enforcement agencies, and will continue to do so.

3.7. Communications Alliance members, including digital platforms, also participate in a cross-sectoral, multi-stakeholder anti-fraud/scam working group which focuses on operational aspects of individual scams and general improvements to authentication measures. Stakeholder groups include all major banks, telecommunications carriers, platforms, crypto currency operators, Toll Group, Service NSW, Australia Post etc., state and federal police, Border Force, AFCX, etc.

3.8. It is through these types of cross-sectoral efforts, formalised or informal, that sit alongside efforts of individual companies that we believe scams can be combatted most effectively, and we believe further work can deliver good results in limiting consumer harm through scams. The reason being that the ecosystem of digital platforms is far less 'closed' than that of telecommunications networks where at least some technical means may exist to identify, trace and block the delivery of the scam message (call, sms) which may not be the case on digital platforms or over-the-top services.

External dispute resolution scheme

3.9. Complaints and subsequent disputes that can arise in a digital platform context are diverse and require a nuanced approach. For example, disputes in relation to (end-user) content removal, which is subject to other legislation and/or regulation requires a careful and detailed assessment of the facts and context. This type of issue appears to be difficult to resolve through prescriptive mandatory rules without material industry input to provide the context and nuance required so that unintended harmful consequences are avoided.

3.10. Similarly – and noting the definitional difficulties around the term 'digital platforms' – digital platforms differ substantially in the products and services they offer, their business models, and the extent to which they compete with participants that also provide similar products and services offline or through a hybrid approach.

3.11. Noting the complexities that arise in respect of the very different digital services supplied and that there are often, in fact, a number of participants that supply those services (not just the so called 'digital platforms') a phased approach would better serve Australia. Industry self-regulatory solutions should be allowed to develop to resolve issues.

3.12. This would allow the complexities referred to be above to be resolved by reference to the particular service and issue, and will lead to a broader resolution for consumers. If those codes do not resolve the concern, then the Government could consider intervening.

3.13. As highlighted above, we also caution against treating all digital platforms with a 'one size fits all' approach. For example, platforms operating in the retail space and, hence, competing with the offline and hybrid world may require a different approach and need to consider existing avenues to dispute resolution prior to exploring a new sector-specific path.

4. Governance

4.1. The Discussion Paper and Report recommend the development of a new sector-specific framework that would consolidate rule making powers (through mandatory

industry codes and/or designation) and enforcement of legislation and newly created rules in the hands of, as we understand it, the same regulator, i.e. the ACCC.

4.2. Noting our objection to the creation of a new legislative/regulatory framework highlighted above, we are additionally concerned with any approach that would place rule-making powers with far-reaching economic implications for Australia as well as consumer welfare in the hands of a single agency.

4.3. Treasury has asked whether single or multiple agencies should be responsible for any new regulatory frameworks. It is clear that the agency that designates a firm (making it subject to certain regulatory rules) should not also be tasked with enforcing those rules. The ACCC is resourced and funded to enforce our competition and consumer laws, whereas the regulatory framework proposed involves a material administrative component and that should be undertaken by a specialist body with the technical required skills to understand the sector.

4.4. We note that existing processes originally designed to analyse and potentially mitigate concerns around the impact of regulation through independent processes often fail to provide the required level of independence and rigour: in the time from March 2021 to today, 42 pieces of regulation/legislation that required a form of analysis were dealt with through either a Certified Independent Review (which can be undertaken in lieu of an Impact Analysis), a Post Implementation Review (i.e. ex-post, after legislation/regulation has been passed) or received a Prime Minister's exemption. (116 were analysed through an Impact Analysis.) Against the background of the issue of governance and independence, it is important to note that a Certified Independent Assessment can be "Internal departmental or agency reviews or reports or briefs"[2], In addition, in most (if not all) cases where a Certified Independent Review is being undertaken in lieu of an Impact Analysis, the Office of Impact Analysis does also not assess the quality of the analysis but only the relevance of the recommended option(s)[3].

4.5. In any case, any rule-making powers ought to follow principles of procedural fairness. Those include, importantly, a limited remit and scope for setting rules to ensure no unfettered rule-making powers are granted. In addition, a requirement for genuine, broad consultation, periodic reviews (again subject to consultation) and the inclusion of effective appeals and merit review mechanisms are key. Where appropriate, regulatory instruments created by the regulator ought to be disallowable by Parliament.

4.6. Finally, it is worth noting that the European Commission, which is responsible for administering the Digital Markets Act (DMA), has observed that the timelines for its introduction are very challenging, and that it is proving costly both in terms of funding and staffing. These are material factors that require careful consideration by Government before proceeding down a path to introduce a new regime in Australia.

5. Conclusion

Communications Alliance and our members look forward to continued engagement with Treasury and other relevant stakeholders on ensuring that consumers welfare, competition and innovation continue to prosper in the Australian markets.

We welcome any debate around meaningful changes that may be required to address specific issues that arise from actual harm caused by activities undertaken by digital platforms. However, we disagree with wide-sweeping sector-specific reforms in the absence of clear evidence that those are indeed required, and with very limited consideration given

[2] p.1, Department of the Prime Minister and Cabinet, Office of Best Practice Regulation, Independent Reviews, RIS-like processes and the Regulation Impact Statement requirements, March 2020, as accessed at https://oia.pmc.gov.au/resources/guidance-oia-procedures/independent-reviews on 16 Feb 2023
[3] p.2 ibid

to the following: (1) whether there truly is a gap in our existing competition and consumer laws; (2) the impact of existing reforms and the future reforms already proposed; (3) the absence of any cost/benefit assessment; and (4) the potential negative consequences that could arise from such reforms for Australian consumers at a time when the economy faces many challenges.

Taking into account the factors discussed above, and given that the benefits of the DMA are yet to be proven and can only be fairly evaluated in some years, we believe it would be prudent to adopt a wait-and-see approach before considering similar reform. This caution is justified given the concerns raised by across industry, by academics[4] and others about the DMA-style regulatory reforms including in relation to the administrative burden and cost of a highly prescriptive regime.[5]

For any questions relating to this submission please contact Christiane Gillespie-Jones on 02 9959 9118 or at c.gillespiejones@commsalliance.com.au.

[4] Herbert Hovenkamp, Gatekeeper Competition Policy, (8 Feb 2023), University of Pennsylvania Carey Law School; University of Pennsylvania - The Wharton School. Available at SSRN: https://ssrn.com/abstract=4347768. See also Lazar Radic, "Final DMA: Now We Know Where We're Going, but We Still Don't Know Why" (25 March 2022). See https://truthonthemarket.com/2022/03/25/final-dma-now-we-know-where-were-going-but-we-still-dont-know-why/.

[5] See Schwab, "EU Commission lacks numbers, talent to enforce gatekeeper law" (22 June 2022). See https://www.bruegel.org/blog-post/insights-successful-enforcement-europes-digital-markets-act.

Published by:
COMMUNICATIONS
ALLIANCE LTD

Level 12
75 Miller Street
North Sydney
NSW 2060 Australia

Correspondence
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
E
info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507