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Reference Digital Platforms: Government Consultation on
ACCC's Regulatory Reform Recommendations

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Internet Australia appreciates the opportunity to comment on the paper: Digital Platforms: Government Consultation on ACCC's Regulatory Reform Recommendations, (**Consultation Paper**) referencing The ACCC's Digital Services Interim Report No 5 - Regulatory reform (**Interim Report**).

The Consultation Paper asks 27 questions covering a range of proposed reforms to address issues raised by digital platforms. Our response will focus only on handling mechanisms for digital platforms and general questions relating to competition regulation of platforms.

IA Response to Questions

Complaint Handling

Questions 10: Is a new independent external ombuds scheme to resolve consumer disputes with platforms warranted: Can any or all of the functions proposed for the new body be performed by an existing body and, if so, which one would be most appropriate.

This question should include recommendations for BOTH an accessible and effective internal complaints handling system AND an accessible and effective external system. Both of those recommendations were made in the ACCC's 2019 Final Report on Digital Platforms (Final Report).¹

¹ ACCC, *Digital Platforms Inquiry Final Report 2019* Recommendations 22 and 23. Recommendation 22 called for digital platforms to comply with internal dispute resolution requirements and Recommendation 23 called for the establishment to resolve complaints



Assuming requirements are imposed on digital platforms for providing accessible and effective internal complaint handling processes, the establishment of an external ombudsman scheme for platforms is equally important for consumer protection.

The Centre for Media Transition released a research study on this issue². The study identified the various existing external complaint handling regimes and the jurisdictional restrictions on each to deal with the wide variety of issues raised by platforms. Expanding the jurisdiction of any of them - without providing blanket coverage of all platform complaints - could only add to the existing user confusion on where to take a complaint. One possible solution proposed by the study was to expand the jurisdiction of the TIO over some matters while establishing a clearing house for other escalated complaints about platforms. As the Study suggested:

The clearing house would act as a referral and tracking service to help users identify the right home for their complaint, while also monitoring the volume of complaints and some aspects of industry performance.³

The Interim Report echoed the study's concerns, coming to much the same conclusion:

While the ACCC recognises that a 'one stop shop' for digital platform complaints would significantly improve accessibility for users, a 'no wrong door' policy should be sufficient to ensure that consumers are able to be directed to the appropriate agency.⁴

The existing agencies handling issues raised by platforms include the Office of the Australian Information Commissioner, the eSafety Commissioner and the Telecommunications Industry Ombudsman. All of them have an important role in platform regulation and could work together to establish a 'clearing house' mechanism such that platform complaints not resolved by the relevant platform are referred to an organisation best suited to deal with that complaint.

Internet Australia supports a requirement on all platforms to establish and/or maintain an internal accessible, effective complaints handling regime, with regular reporting requirements to a regulator.

and disputes with digital platform providers. P 37-8. See also Interim Report Para 4.2 for similar recommendation on the provision of internal complaints handling mechanisms

² <https://www.uts.edu.au/node/247996/projects-and-research/digital-platform-complaint-handling>

³ See <https://www.uts.edu.au/node/247996/projects-and-research/digital-platform-complaint-handling>

⁴ Interim Report No 5, September 2022



Internet Australia does not support the establishment of a separate external body for handling platform complaints. Instead, Internet Australia supports the establishment of a 'clearing house' mechanism that refers complainants to the appropriate complaint handling organisation, while monitoring and reporting on the volume and topics of platform complaints.

Competition Regulation

Question 2: Can existing regulatory frameworks be improved or better utilised.

Question 3: Are there alternative regulatory or non-regulatory options that may be better suited.

Question 15: Do you agree with the proposed principles for designating platforms for the regime.

Question 16: Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4. Should any issues be removed or added.

Question 17.1: Should Codes be targeted at individual companies, a specific service or all digital platforms.

Question 18: Should Codes be mandatory or voluntary.

Question 19:/20 Who should be responsible for the design of the proposed codes of conduct and obligations and who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements.

Perhaps the most significant change recommended by the Interim Report is for *ex ante* regulation. In addition to existing competition restrictions, rules are imposed on the larger platforms - 'Designated Digital Platforms' (**Designated Platforms**) - that prohibit anti-competitive behaviour by such platforms without having to prove that such behaviour has caused harm. As suggested in the Interim Report:

...establish up-front obligations about acceptable and unacceptable conduct,,,
new measures can seek to avoid harm from occurring in the first place.⁵

The sorts of potentially anti-competitive practices that should be addressed in the proposed new regime are set out in Recommendation 4 of the Consultation Paper.⁶

⁵ Interim Report 110

⁶ The Treasury, Consultation on ACCC's Regulatory Reform Recommendations: Consultation Paper, December 2022 (**Consultation Paper**) 10. For a further discussion on the types of harm caused by anti-competitive conduct of large platforms, see the Interim



Specifically, the first five elements listed in Recommendation 4 are practices platforms can use to either retain customers or discourage them from moving to another platform. Internet Australia strongly supports obligations that prevent such practices and supports the interoperability of platform services for users. Our concern, however, is that the security and privacy of messaging platforms are not compromised by such obligations. Any interoperability measures developed under these recommendations must be rejected if the security and end-to-encryption is compromised.

The Interim Report raised other platform practices that can become barriers to entry into the market and could be included in competition obligations imposed on such Designated Platforms.⁷ Those practices could be further refined during a consultation period to reflect anti-competitive practices of platforms based on Australian experience.

The Consultation Paper raises two issues: the development and structure of the competition regulation applying to Designated Platforms and what platforms should be covered by that regulation.

The first issue is the development and implementation of the regulation itself. The two ministries most relevant to the proposed competition regulatory changes are the Communications Ministry for its oversight of digital platforms, and Treasury for its role in competition regulation. The Internet Society has developed an Internet Assessment Tool Kit used to determine the impact of regulations on the 'open, globally connected, secure and trustworthy Internet'. The tool, and examples of its use are available on the Internet Society's website.⁸

For addressing competition issues, the most appropriate code framework would be the development of Codes under Part IV of *the Competition and Consumer Act 2010* (CCA). The CCA provides the framework for development of Codes, which can be either mandatory or voluntary, and are overseen by the competition regulator, the ACCC.

An alternative framework is the development of service provider rules or standards under Part 6 of the Telecommunications Act 1997 (TA). Most platforms are content service providers; they provide a content service which can be any online information,

Report, 40ff, and the ACCC, Digital Platforms Final Report, (**Final Report**) 2019, Chapter 3. See also the EU, *Digital Markets Act* Explanatory Memorandum 1-3

⁷ Interim Report 5, 33. See also DMA, Para 3 Results of Stakeholder Consultations and Impact Assessments 5ff

⁸ <https://www.internetsociety.org/resources/internet-impact-briefs/>



entertainment or other online service⁹ and they use a 'listed carriage service'¹⁰ to provide the platform service - thus fitting the definition of a service provider.¹¹

The ACMA can determine service provider rules in relation to the supply of content service providers, and service providers are required to comply with those rules.¹² The ACMA's process for making service provider rules only requires consultation with the ACCC¹³ However, the ACMA could follow a more open processes required for Code development under Part 6 of the TA.

The clear first steps for the development of additions to the current regulatory framework should include open discussion and debate on the elements of the new regime, including the basic principles that underpin the anti-competitive conduct the subject of the *ex ante* regulation, and the legislative framework for the development of a code or codes to provide more detailed rules on prohibited behaviour by Designated Platforms. That could be done either through the relevant departments - Treasury or Communications - or by the regulators: the ACCC and/or the ACMA. Both regulators already have processes place to develop and monitor the implementation of codes.

The Consultation Paper asks if the codes developed under the proposed regime should be mandatory. The clear reason for the introduction of an *ex ante* regulatory regime is to prevent anti-competitive behaviour by such platforms BEFORE such conduct damages or destroys the platform's competitors. Allowing voluntary compliance by such platforms would admit of non-compliance and defeat the whole purpose of the *ex ante* regime. Codes made under these regulatory reforms must be mandatory.

Question 17.1 above asked whether the codes should be targeted at individual companies, specific services or all platforms. The EU's *Digital Marketing Act* takes a different approach. It first lists the general practices on 'Gatekeepers' that 'limit contestability or are unfair'. In the next article it lists 'Obligations for Gatekeepers susceptible of being further specified'.¹⁴ The advantage of this approach is to identify - and prohibit - anti-competitive behaviour that can apply across different types of

⁹⁹ TA s. 15

¹⁰ TA s. 16

¹¹ TA s. 97.

¹² TA ss 99 and 101.

¹³ TA s. 99(3)

¹⁴ *Digital Markets Act 2020*, Chapter III Articles 5 and 6



platforms (Article 5), while allowing the regulator to develop more specific rules targeting specific types of platforms or specific behaviours (Article 6).

The next issue is the identification of platforms that should, for the purposes of the new *ex ante* regulation, be held to be Designated Platforms and subject to additional *ex ante* regulation. The Consultation Paper suggests that the new framework should only apply to such platforms that hold a critical position in the Australian economy and that have the ability and incentive to harm competition.¹⁵ The Interim Report suggests that the types of criteria for identifying those Designated Platforms could be:

- Quantitative criteria that sets 'minimum criteria using metrics such as annual revenue, number of users etc
- Qualitative criteria such as whether the platform holds an important intermediary position or has substantial market power in operating multiple platform services
- A combination of both.¹⁶

The Interim Report suggests that while quantitative criteria would be 'effective and efficient' as the primary method for determining 'Designated Platform' status, there may be situations where there is insufficient quantitative data, and other metrics must be used.¹⁷ Clearly, the tests for Designated Platform status must be developed only after consultation with all relevant parties, including users, and should reference Australian AND global metrics in determining whether a platform has sufficient market power to be considered as 'Designated'- reflecting their stronger position from their additional revenue and user numbers to competitors with only a local presence. The criteria used should be sufficiently clear to determine both whether a platform should or should not be Designated and to provide a basis for appeals by platforms to challenge their Designated status. Clearly, there must also be an appeal process for platforms to allow that challenge.

Conclusion

Internet Australia supports a requirement on all digital platforms to provide an accessible, effective internal complaints handling mechanism. While it does not support the establishment of a new digital ombudsman scheme, it does support the

¹⁵ Consultation Paper 9.

¹⁶ Interim Report 114

¹⁷ Interim Report 116



development of a 'clearing house' consumers can use to find the appropriate complaint handling body to address their complaints.

Internet Australia also agrees that there is a need to establish a new competition and consumer protection regime in Australia, targeting larger digital Platforms. The proposed new *ex ante* regulation on Designated Platforms can be overseen by the ACMA or the ACCC and develop mandatory codes of conduct for those platforms meeting criteria to be held as Designated Platforms.

About Internet Australia

Internet Australia is the not-for-profit organisation representing all users of the Internet. Our mission - "Helping Shape Our Internet Future" - is to promote Internet developments for the benefit of the whole community, including business, educational, government and private Internet users. Our leaders and members are experts who hold significant roles in Internet-related organisations and enable us to provide education and high-level policy and technical information to Internet user groups, governments and regulatory authorities. We are the Australian chapter of the global Internet Society, where we contribute to the development of international Internet policy, governance, regulation and technical development for the global benefit.

Yours Sincerely

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