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A NEW DIGITAL COMPETITION REGIME

Submission to the Treasury

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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Recommendations

The Federal Government should:

1. Establish *ex ante* competition regulations by legislating a digital competition regime that applies to designated digital platforms;
2. Legislate the list of digital platform services proposed in the paper to be regulated under the regime, with possible additional consideration given to:
 - a. Third-party data brokers; and
 - b. Digital content distributors (e.g. video-on-demand, digital game stores etc.);
3. Prioritise investigations into app marketplaces, advertising technology platforms, and social media services;
4. Ensure that legislation on a digital competition regime includes explicit objectives to promote a broad range of consumer benefits, not just limited to prices;
5. Require the Australian Competition & Consumer Commission (“**ACCC**”) to publish a non-confidential summary of its investigation, regardless of the outcome of their investigation or whether it leads to designation;
6. Ensure the ACCC is adequately resourced to initiate its own investigations as well as undertaking those initiated by the relevant minister;
7. Consider extending the length of designation beyond five years and/or allow the ACCC to expedite the redesignation of digital platforms that still require additional obligations under the regime;
8. Provide clarity on the next priority focus areas for designation with a clear timeframe;
9. Establish broad and service-specific obligations on designated digital platforms;
10. Extend service-specific obligations to related services owned or operated by the same company that are not covered by the priority areas of digital platform services under investigation;
11. Empower the ACCC to make enforceable undertakings on digital platforms on specific practices related to their service-specific obligations;
12. Allow the ACCC to make exemptions to obligations as long as there are:
 - a. Countervailing benefits for consumers;
 - b. Clear and limited criteria for when exemptions can occur; and
 - c. Other relevant regulators are consulted prior to exemptions being provided;
13. Establish robust compliance and enforcement measures under the digital competition regime;
14. Empower the ACCC with information gathering powers;
15. Require digital platforms to produce and retain records relevant to the regime;

16. Establish a robust penalty regime for dealing with non-compliance by designated digital platforms, ranging from infringement notices to enforcement action with penalties linked to worldwide revenue;
17. Establish civil penalties on senior managers that fail to comply with information requests;
18. Consider imposing structural remedies on designated platforms if structural remedies have been imposed on the platform in other countries;
19. Not allow merit reviews of designated digital platforms under the regime;
20. Establish cost recovery mechanisms to resource the operation of the digital competition regime, and to fund civil society and consumer representatives to engage in relevant consultations;
21. Ensure the list of digital platform services is flexible and can be updated as needed;
22. Ensure there is an ability to update service-specific obligations in response to changes to technology and/or practices by designated platforms;
23. Amend the Australian Consumer Law (“**ACL**”) to establish a prohibition on unfair trading practices;
24. Amend the ACL to establish a general safety provision;
25. Amend the Privacy Act to establish a fair and reasonable use test; and
26. Legislate economy-wide mandatory guardrails on the use of AI in high-risk settings.

Introduction

CHOICE welcomes the opportunity to provide comments on the risks that anti-competitive practices from digital platforms pose to consumers, and the mechanisms the Federal Government can adopt to mitigate these risks.

Digital platforms have considerable influence on the Australian economy and the lives of Australian consumers. The digital technology sector generated 8.5% of Australia’s gross domestic product in 2021, and was Australia’s third largest industry.¹ ACCC Chair Gina Cass-Gottlieb has noted that Australian consumers have downloaded 790 million apps from Google and Apple’s app marketplaces, spending over \$3.4 billion in 2022, while Australian businesses spent \$14.2 billion in online advertising in the following financial year.²

However, the extraordinary market power of a handful of large technology firms is causing harm to consumers. Consumer organisations have been vocal on threats to consumer privacy from mass data collection, the prevalence of “dark patterns” across online retail, and the emerging

¹ Economics References Committee (2023), “Influence of international digital platforms”, *Australian Senate*, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000119/toc_pdf/Influenceofinternationaldigitalplatforms.pdf, p. 3.

² Cass-Gottlieb, G (2024), “Digital giants harm consumers and competition”, *Australian Financial Review*, <https://www.afr.com/technology/digital-giants-harm-consumers-and-competition-20240226-p5f7gq>.

risks on consumers from artificial intelligence systems.³ Critics have noted the prevalence of online scams on digital platforms and the spread of mis- and disinformation on social media.⁴ In these circumstances, government intervention is required to protect consumers.

CHOICE supports introducing a new digital competition regime for key digital platforms, and the majority of the framework put forward by the Federal Government for the regime. Specifically, the process of designation, the broad and service-specific nature of obligations, and the enforcement and compliance framework are important elements to promote fair competition in the digital market. CHOICE also believes that the alignment of these measures to existing or proposed frameworks abroad will help the Australian digital competition regime implement learnings from other jurisdictions.

However, CHOICE also recommends a number of amendments to improve the effectiveness and strength of this regime and to protect consumers. A key characteristic of these recommendations is ensuring the regime is as broad, flexible, and enforceable as possible to effectively regulate large technology firms. CHOICE also urges the Federal Government to ensure consumer outcomes are the focus of the digital competition regime, centring consumer needs in the objectives of the regime.

Additionally, CHOICE believes that further economy-wide reforms are needed to protect consumers from harms caused by digital platforms. A digital competition regime alone is not sufficient to protect consumers from data breaches, invasions of privacy, dark patterns, unsafe goods and services, or unfair outcomes from artificial intelligence systems. Urgent action is needed to modernise our laws with a fair and reasonable use test in the *Privacy Act*, prohibitions on unfair trading practices and a general safety provision in the ACL, and mandatory guardrails on the use of artificial intelligence in high-risk settings.

An *ex ante* competition framework can protect consumers

Implementing *ex ante* regulatory mechanisms in the new digital competition regime can protect consumers. CHOICE agrees with the proposal paper's position that *ex ante* laws are best

³ CHOICE (2023), "Submission to the Privacy Act Review", <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2023/march/submission-to-the-privacy-act-review>; Consumer Policy Research Centre (2022), *Duped by design – Manipulative online design: Dark patterns in Australia*, <https://cprc.org.au/report/duped-by-design-manipulative-online-design-dark-patterns-in-australia>; CHOICE (2023), "Submission to the DISR: Safe and responsible AI in Australia", <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2023/august/safe-and-responsible-ai>.

⁴ Kollmorgen, A (2024), "Social media scam losses go from bad to worse", CHOICE, <https://www.choice.com.au/electronics-and-technology/internet/using-online-services/articles/social-media-scams-on-the-rise-nasc-report>; Trijsburg, I (2025), "Disinformation in 2024 was rife, and it's likely to bring more risks in 2025", *Pursuit – University of Melbourne*, <https://pursuit.unimelb.edu.au/articles/disinformation-in-2024-was-rife,-and-its-likely-to-bring-more-risks-in-2025>.

placed to rectify anti-competitive practices amongst digital platforms. This aligns with CHOICE’s policy recommendations in other consultations on digital markets, such as support for impact assessments for prohibited and restricted practices in the *Privacy Act* and mandatory guardrails on the development and deployment of artificial intelligence technologies.⁵

Question 2: Is the proposed scope of digital platform services targeted appropriately? Are there any digital platform services that should be added or removed?

CHOICE supports the proposed scope of the regime, but suggests the following digital services should also be included:

- Third-party data brokers: Entities that collect, analyse, share, or trade consumer data have significant effects on competition by mediating – and potentially denying – access to critical information about consumers and markets. Data brokers that engage in anti-competitive practices that negatively impact consumers, as explored in the ACCC’s eight interim report in the Digital Platform Services Inquiry,⁶ should be brought within the scope of the regime;
- Digital content distributors: The Federal Government and the ACCC should consider whether content platforms such as video-on-demand streaming (e.g. Netflix, Stan) and gaming distribution platforms (e.g. Steam, Playstation Store) would be appropriate focus areas for the digital competition regime. Competition issues have been raised about both industries – for instance, streaming services sometimes have arrangements with television manufacturers for button placements on remotes, while Valve has been subject to court proceedings over the dominance of Steam and its impact on developers and consumers.⁷

Question 3: Do you agree with the proposal that app marketplaces, ad tech services and social media services should be prioritised as the first services to be investigated for designation under the framework?

⁵ CHOICE (2023), “Submission to the Privacy Act Review”, <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2023/march/submission-to-the-privacy-act-review>; CHOICE (2024), “Choice submission on mandatory guardrails for AI in high-risk settings”, *Department of Industry, Science and Resources*, <https://consult.industry.gov.au/ai-mandatory-guardrails/submission/view/145>.

⁶ ACCC (2024), *Digital platform services inquiry - March 2024 interim report*, <https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-25-reports/digital-platform-services-inquiry-interim-report-march-2024>.

⁷ Lobato, R, Scarlata, A & Schivinski, B (2023), “Netflix and other streaming giants pay to get branded buttons on your remote control. Local TV services can’t afford to keep up”, *The Conversation*, <https://theconversation.com/netflix-and-other-streaming-giants-pay-to-get-branded-buttons-on-your-remote-control-local-tv-services-cant-afford-to-keep-up-203927>; Scarcella, M (2024), “Video game giant Valve hit with consumer class action over pricing”, *Reuters*, <https://www.reuters.com/legal/transactional/video-game-giant-valve-hit-with-consumer-class-action-over-pricing-2024-08-12>.

CHOICE also supports the proposed initial priority areas for investigation. Social media services should be included as a priority target in the initial stages of the regime. The practices of social media services can have a significant effect on competition in other areas, including advertising, and social media companies such as Meta have developed considerable market power as noted by the ACCC in their sixth interim report in the Digital Platform Services Inquiry.⁸

However, it is also important that this regulatory framework and its powers are aimed at the protection of consumers. Market competition is only fair when consumers are also empowered to make informed choices free from coercive business practices. The legislation should ensure the ACCC considers outcomes for consumers in its decisions on designation, obligations, and enforcement in the regime. This should include a wide range of consumer outcomes – not just price and choice. For example, data privacy and security, the quality of goods and services, and fair trading practices should all be relevant considerations. CHOICE, the Consumers' Federation of Australia, and the Australian Communications Consumer Action Network have previously called for National Competition Principles to be led by an overarching goal to improve consumer outcomes in markets.⁹

Recommendations

The Federal Government should:

1. Establish *ex ante* competition regulations by legislating a digital competition regime that applies to designated digital platforms;
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 - a. Third-party data brokers; and
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3. Prioritise investigations into app marketplaces, advertising technology platforms, and social media services;
4. Ensure that legislation on a digital competition regime includes explicit objectives to promote a broad range of consumer benefits, not just limited to prices.

Designation is an important tool to regulate digital platforms

CHOICE supports the establishment of a designation mechanism to target digital platforms that require obligations under the digital competition regime. Designation can allow for specific and

⁸ ACCC (2023), *Digital platform services inquiry - March 2023 interim report*, <https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-25-reports/digital-platform-services-inquiry-march-2023-interim-report>, pp. 11-13.

⁹ CHOICE (2024), "Submission to Productivity Commission on analysis of competition policy reforms", <https://www.choice.com.au/consumer-advocacy/policy/policy-submissions/2024/september/competition-policy-consult>

effective regulation of digital platforms that undermine fair competition and fair consumer outcomes, and can act as an incentive for digital platforms to act appropriately in the market. As noted in the proposals paper, designation will also align Australia's digital competition regime to analogous jurisdictions in other countries.

Question 8: The proposed framework provides the relevant minister the ability to direct the ACCC to conduct designation investigations and the ACCC to also self-initiate designation investigations. On what basis should the ACCC be able to self-initiate investigations?

Question 9: Should the ACCC be required to publish a non-confidential summary of its designation investigation findings?

The ACCC should be required to publish a non-confidential summary of its designation findings soon after the investigation is finalised, regardless of the outcome, and regardless of whether or not it leads to designation. Transparency on the reasons leading to designation (or not) will help consumers make informed choices in digital markets, and provide greater public accountability from consumer representatives on the practices of designated platforms. It will also improve transparency of the decision making process, and will be an important accountability measure on the final decisions made by the Minister on designation.

However, CHOICE also holds the following concerns about the proposals. Under the Federal Government's proposal, either the Minister or the ACCC can initiate an investigation into a digital platform for designation. CHOICE urges the Federal Government to ensure that the overlap between Ministerial and regulatory powers does not implicitly restrict the ACCC's willingness to initiate investigations without Ministerial direction. To help reduce the risk of confusion or challenges with this model, the funding arrangements should be designed so the ACCC will not be put in the position of having to choose between prioritising investigations it initiates itself or those initiated by the Minister. The ACCC has significant expertise in this area, and should be trusted to prioritise its investigations.

Question 10: The digital competition regime proposes designation to last for up to 5 years. Is this time period appropriate?

CHOICE is also concerned about the proposed length of the designation period. Designation for five years may be too short to firmly change the practices of large digital platforms that have benefited, in many cases, from decades of anti-competitive behaviour. If five years is considered appropriate for designation, the Federal Government should allow expedited redesignation processes where the ACCC can choose to continue designation without initiating another detailed investigation. This would ensure continuity of obligations and place the onus on digital platforms to demonstrate they have mitigated competition issues if they believe the ACCC was incorrect in their redesignation. CHOICE also supports proposals that place obligations on

designated platforms while reviews or applications are underway in order to prevent litigious entities from delaying their obligations.

Additionally, CHOICE has concerns about the staged nature of the implementation of the competition regime that initially prioritises app marketplaces, advertising technology, and social media platforms. While CHOICE supports these three areas as key focuses for the ACCC, the Federal Government should clarify what future areas of investigation will be, and in what timeframe. This would ensure that digital platforms that fall outside these areas but nonetheless hold significant and imbalanced market power will be investigated in a timely manner.

CHOICE supports the Federal Government's proposal to include quantitative and qualitative thresholds for designation. This would ensure that the ACCC can focus on platforms with critical importance to or impact on the Australian economy and consumers. However, CHOICE recommends that designation can be based on a number of quantitative metrics, such as domestic revenue, worldwide revenue, and number of users. This would ensure that the unavailability or unsuitability of one dataset does not preclude further qualitative assessments.

Recommendations

The Federal Government should:

5. Require the ACCC to publish a non-confidential summary of its investigation, regardless of the outcome of their investigation or whether it leads to designation;
6. Ensure the ACCC is adequately resourced to initiate its own investigations as well as undertaking those initiated by the relevant minister;
7. Consider extending the length of designation beyond five years and/or allow the ACCC to expedite the redesignation of digital platforms that still require additional obligations under the regime;
8. Provide clarity on the next priority focus areas for designation with a clear timeframe.

Consumers must benefit from obligations on platforms

CHOICE supports broad and service-specific obligations on digital platforms that have been designated for anti-competitiveness. Certain anti-competitive practices are common across digital platforms, and broad mandatory principles can mitigate these practices. Meanwhile, service-specific obligations are needed to target the mechanisms in which anti-competitive practices are executed in particular services. CHOICE supports the list of obligations proposed by the Federal Government.

CHOICE supports extending service-specific obligations in one area to related services owned or operated by the same company. One complexity in the regime – as noted in the paper – is on the interactions between services e.g. harms in the supply of app marketplaces as a result of the same platform’s control of a mobile operating system. This problem requires further attention in the development of the digital competition regime, as this issue is likely to occur frequently as large digital platforms providers operate interacting services and “ecosystems”. For example, the European Commission has filed charges against Microsoft of anti-competitive behaviour by bundling Teams into its Office 365 and Microsoft 365 services, while Germany’s Bundeskartellamt (Federal Cartel Office) is investigating Microsoft for leveraging its market power in cloud computing into dominance in other fields, including artificial intelligence.¹⁰

Empowering the ACCC with the ability to impose enforceable undertakings on designated platforms would allow for more precise obligations based on the nature of the digital platforms. For instance, the two largest app marketplaces – Apple’s App Store and Google’s Play Store – have significant operational differences that may require different rules.¹¹ This would allow the ACCC, within scope of subordinate legislation, to create specific rules on digital platforms to mitigate competition concerns.

Question 15: What are the benefits and risks of various international approaches to exemptions (such as the EU’s Digital Markets Act and the UK’s Digital Markets, Competition and Consumers Act)?

Question 16: For the grounds for exemption, would a broad ‘countervailing benefits’ exemptions mechanism with a high threshold be appropriate? What measures should there be to reduce the risk of vexatious applications?

CHOICE understands that exemptions from obligations may be required at times, and that this would be aligned with internationally analogous regimes. CHOICE supports the use of a “countervailing benefits” test above a “net public benefit” test, and generally supports alignment with the conditions for this test required by the UK’s *Digital Markets, Competition and Consumers Act*. However, the primary assessment of countervailing benefits should be based on a broad assessment of benefits and detriments for consumers in general, rather than solely the users or expected users of the platform. This would ensure that users of other platforms are not unfairly disadvantaged by the practices of the designated platform, and that a more systemic view of public benefit in the market is considered. This would also align with CHOICE’s

¹⁰ Chee, FY (2024), “Microsoft hit with EU antitrust charge over Teams app, risks hefty fine”, *Reuters*, <https://www.reuters.com/technology/eu-charges-microsoft-with-abusive-bundling-teams-with-office-2024-06-25/>; Bundeskartellamt (2024), “Microsoft also subject to extended abuse control pursuant to Section 19a GWB – Bundeskartellamt determines paramount significance across markets”, www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/30_09_2024_Microsoft_19a.html.

¹¹ Abbott, A (2024), “A tale of two app stores”, *Forbes*, <https://www.forbes.com/sites/aldenabbott/2024/10/10/a-tale-of-two-app-stores>.

recommendation to legislate a consumer benefit objective in the regime. An exhaustive set of criteria that can lead to exemptions should also be included in the regime to ensure that exemptions are only provided in necessary and limited circumstances.

The exemption process could be further strengthened by ensuring that other regulators are consulted in the process. The ACCC should be required to inform and seek advice from other regulators that may have considerations on how the decision could affect consumer outcomes in their market domain e.g. the OAIC's consideration if there are effects on personal data privacy, ASIC's consideration if payment providers are involved, or ACMA's consideration if there is an effect on content distribution. This would also create a greater onus on designated platforms to demonstrate the countervailing benefit of their practice across the economy.

Recommendations

The Federal Government should:

9. Establish broad and service-specific obligations on designated digital platforms;
10. Extend service-specific obligations to related services owned or operated by the same company that are not covered by the priority areas of digital platform services under investigation;
11. Empower the ACCC to make enforceable undertakings on digital platforms on specific practices related to their service-specific obligations;
12. Allow the ACCC to make exemptions to obligations as long as there are:
 - a. Countervailing benefits for consumers;
 - b. Clear and limited criteria for when exemptions can occur; and
 - c. Other relevant regulators are consulted prior to exemptions being provided.

Robust enforcement is needed to rein in businesses

The digital platforms with sufficient market power to justify designation will often be major companies that require significant incentivisation to comply with the regime. CHOICE supports empowering the ACCC with strong enforcement and compliance mechanisms to guarantee the efficacy of an *ex ante* regime across the economy.

Question 19: The proposed framework could include record keeping requirements for designated digital platforms to record and keep certain information in a standardised format. How could these requirements be scoped to limit regulatory burden? Would there be any public benefit of publishing some of these records?

A key foundation of this compliance and enforcement framework is transparency and information gathering. CHOICE supports the inclusion of information gathering powers in the

Competition and Consumer Act 2010 (Cth) to support the digital competition regime, including proposed amendments as part of the merger reforms. CHOICE also supports obligations on digital platforms for record keeping on relevant information, such as domestic and worldwide revenue, number of users, and number of complaints. Relevant records should be publicly available to provide consumers and their representatives with transparency on the practices of digital platforms, to improve the power balance between consumers and digital platforms in the market, and to facilitate public input into the decisions of the ACCC, especially with regards to exemption decisions made on the basis of countervailing benefits.

Question 22: Are increased monetary penalties and/or new specific non-monetary penalties required in the new digital competition regime? If so, why?

CHOICE also supports the construction of a penalty regime to hold businesses accountable. CHOICE generally supports the proposed penalty being the greatest of \$50 million, three times the value of the benefit obtained, or 30% of adjusted turnover during the breach period. This is consistent with penalties currently actionable under the ACL and the recently amended *Privacy Act*. However, this may be inadequate to penalise multinational technology companies with annual revenue in the many billions of dollars. The Federal Government should consider whether percentages of worldwide turnover would be more effective to enforce compliance, as seen in the EU's, Germany's, and the UK's digital competition regimes, and in India's draft bill.

CHOICE supports other measures to enforce compliance. CHOICE notes that infringement notices have been an effective tool for the ACCC to penalise misbehaving businesses in other market domains, and inversely, the inefficiency of regimes without similar powers. For example, before 2022 the OAIC could only impose financial penalties for breaches of the *Privacy Act* via court action. Recognised as a shortcoming of the regime, this was addressed via recent changes expanding the OAIC's powers to issue infringement notices.¹² CHOICE would also support the inclusion of civil penalties on senior managers for non-compliance with information requests, as provided for in the UK's *Digital Markets, Competition and Consumers Act*. Information gathering powers are critical for the functioning of the digital competition regime, and enforcing this through enforceable obligations on senior managers would encourage improved governance of digital platforms. The Federal Government should also consider penalties on senior managers for other forms of non-compliance with the digital competition regime.

Question 23: Should the new digital competition regime provide for structural remedies similar to those available in overseas regimes? Alternatively, should the regime include a mechanism for the ACCC to require that, where a platform has implemented a structural

¹² OAIC (2024), "OAIC welcomes first step in privacy reforms", <https://www.oaic.gov.au/news/media-centre/oaic-welcomes-first-step-in-privacy-reforms>.

remedy overseas under an equivalent international regime, the platform roll out that same remedy in Australia?

CHOICE also encourages the Federal Government to consider structural remedies in the digital competition regime, like those in other jurisdictions. Currently, the digital competition regimes in the EU and the UK allow for structural remedies, while antitrust laws in the US allow for court-ordered structural remedies. The digital competition regime risks leaving Australian consumers less protected than consumers in other countries if future structural remedies are not translated into the Australian market – for example, if the US Department of Justice succeeds in forcing Google to sell their Chrome web browser, or if the European Commission had forced Google to sell its advertising exchange.¹³

Recommendations

The Federal Government should:

13. Establish robust compliance and enforcement measures under the digital competition regime;
14. Empower the ACCC with information gathering powers;
15. Require digital platforms to produce and retain records relevant to the regime;
16. Establish a robust penalty regime for dealing with non-compliance by designated digital platforms, ranging from infringement notices to enforcement action with penalties linked to worldwide revenue;
17. Establish civil penalties on senior managers that fail to comply with information requests;
18. Consider imposing structural remedies on designated platforms if structural remedies have been imposed on the platform in other countries.

Other means for improving the digital competition regime

Question 25: Should merits review be available for certain administrative decisions under this regime (such as exemption decisions)? What would be the associated risks, and can these risks be mitigated?

CHOICE holds concerns about the implementation of a merits review process as part of the digital competition regime. It is unclear how a merits review process would add relevant and significant information following a rigorous investigation process; conversely, a merits review process could interrupt or delay important regulatory actions and force the ACCC to use

¹³ McCabe, D & Grant, N (2024), "What's Next for Google's Search Monopoly", *The New York Times*, <https://www.nytimes.com/2024/12/03/technology/google-search-antitrust-judge.html>; Chee, FY (2024), "Exclusive: EU break-up order to Google unlikely for now, sources say", *Reuters*, <https://www.reuters.com/technology/eu-break-up-order-google-unlikely-now-sources-say-2024-09-13>.

significant resources to defend its decisions. CHOICE believes that judicial reviews are sufficient to ensure the legality of decisions made in the regime.

Question 26: Would it be appropriate for government to recover the costs of administering the regime from industry?

Question 27: Are any additional measures required to ensure that the framework remains fit-for-purpose to address harms in fast moving and dynamic digital platform markets?

CHOICE additionally supports the following proposals in the paper:

- Cost recovery mechanisms to resource the operation of the digital competition regime;
- A flexible list of digital platform services that can be updated if needed;
- An ability to develop additional obligations for specific services; and
- An ability to update service-specific obligations in response to changes to technology and/or practices by designated platforms, as suggested earlier in the submission.

These measures can safeguard the sustainability of the regime, while also guaranteeing that the regime can continue to be fit-for-purpose as new harms are discovered or emerge.

The efficacy of this regime is not just contingent on a well-resourced regulator, but also on a well-resourced civil society. Consumer advocacy organisations and other civil society stakeholders play a key role in representing the interests of consumers, providing advice to regulators and governments, educating the public, and shaping policies and priorities. Therefore it is important for representation to be funded. CHOICE would support proposals to fund representation in the form of a levy on designated platforms.

Recommendations

The Federal Government should:

19. Not allow merit reviews of designated digital platforms under the regime;
20. Establish cost recovery mechanisms to resource the operation of the digital competition regime, and to fund civil society and consumer representatives to engage in relevant consultations;
21. Ensure the list of digital platform services is flexible and can be updated as needed;
22. Ensure there is an ability to update service-specific obligations in response to changes to technology and/or practices by designated platforms.

Economy-wide reforms are still needed to protect consumers

A robust and effective digital competition regime is critical to protect consumers and businesses from anti-competitive practices by dominant digital platforms. However, fair competition alone will not protect consumers from digital harm. It is conceivable that digital platforms can engage with rival entities in good faith, while degrading the rights and interests of consumers. It is also conceivable that pro-competitive practices can exacerbate harms – for instance, a digital platform sharing collected user data to new entrants could help boost competition in the market, but would also undermine the individual privacy rights of their users. The European Consumer Organisation has made similar arguments about the limits of the ability of *ex ante* European competition rules alone to protect consumers from invasive data practices, unfair trade practices, and unfair contract terms.¹⁴

As such, it is vital that laws that protect consumers are enhanced alongside advancements in competition law to ensure baseline protections. CHOICE and other consumer organisations have advocated for a number of economy-wide reforms that would shift the onus of responsibility for consumer protection onto the businesses that a) are better informed about the risks and harms of their practices than consumers and regulators; b) are better able to mitigate the risks and harms in their practices; and c) are better resourced to change their practices. The key economy-wide reforms recently proposed include:

- Amending the ACL to establish a prohibition on unfair trading practices;
- Amending the ACL to establish a general safety provision;
- Amending the Privacy Act to establish a fair and reasonable use test; and
- Legislating economy-wide mandatory guardrails on the use of AI in high-risk settings.

Establishing these baseline and mandatory economy-wide standards on businesses can assist in the enforcement of broad and service-specific obligations (e.g. enhanced privacy rights can support obligations on data portability or interoperability). These proposals have been made through government consultation processes, and CHOICE encourages the relevant departments to coordinate the implementation of these reforms to establish a comprehensive regulatory regime on the practices of digital platforms.

Recommendations

The Federal Government should:

23. Amend the ACL to establish a prohibition on unfair trading practices;

¹⁴ European Consumer Organisation (2021), “Ex-Ante Regulation and Competition in Digital Markets – Note by BEUC”, OECD, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)66/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)66/en/pdf), p. 6.

24. Amend the ACL to establish a general safety provision;
25. Amend the Privacy Act to establish a fair and reasonable use test; and
26. Legislate economy-wide mandatory guardrails on the use of AI in high-risk settings.