



Digital Platform Services Inquiry

Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services

Submission by the Australian Communications Consumer Action Network (ACCAN) to the Australian Competition and Consumer Commission (ACCC)

1 April 2022

About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards communications services that are trusted, inclusive and available for all.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

Contact

PO Box A1158

Sydney South NSW 1235

Email: info@accan.org.au

Phone: (02) 9288 4000

Fax: (02) 9288 4019

Contact us through the [National Relay Service](#)

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1. Introduction

ACCAN thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to provide feedback to the Discussion Paper for *Interim Report No. 5: Updating competition and consumer law for digital platform services*.

ACCAN is following the scope of the ACCC's Digital Platforms activities to better understand the potential positive and negative implications for consumers. As the peak body for communications consumers, ACCAN closely observes the evolving communications landscape. The increased convergence of digital technologies can provide significant benefits for both individuals and the broader community when the appropriate competition and consumer protections are in place. ACCAN is supportive of competitive and efficient markets that provide consumers choice and confidence.

Given that the discussion paper provides a range of possible approaches and regulatory tools, ACCAN has restricted its comments to those questions that touch upon matters directly relevant to ACCAN's work. We look forward to providing more in-depth feedback in response to a more formal, progressed consultation in the future.

In this submission, ACCAN:

1. Argues that a funded consumer voice is needed in the digital platforms space
2. Supports reforms to the *Competition and Consumer Act 2010 (Cth)* (CCA) and Australian Consumer Law (ACL)
3. Supports consumer choice through obligations on digital platforms to foster meaningful interoperability and data portability
4. Supports the regulation and oversight of dark patterns
5. Supports obligations on platforms to prevent scams and malicious apps
6. Supports the application of fair-trading obligations to digital platforms
7. Supports the introduction of a prohibition on unfair trading into Australian Consumer Law
8. Supports obligations for Internal Dispute Resolution (IDR) schemes and the establishment of an external review body
9. Supports measures to increase transparency of digital platforms

The following pages respond to select questions in the discussion paper and elaborate on these points.

1.1 List of recommendations

Recommendation 1: ACCAN recommends that consumer representation be adequately funded to ensure that the consumer voice is appropriately resourced to participate in the ongoing discussions regarding digital platform services and consumer protections and safeguards.

Recommendation 2: ACCAN broadly supports reforms to both the CCA and ACL that can best protect the interests of Australian digital platform users. While it is important that Australian regulation of digital platforms aligns with overseas jurisdictions to be most effective, reform processes will require broad consultation with the Australian community to ensure that the distinctive voice of Australian users is heard.

Recommendation 3: ACCAN supports measures to impose obligations on large digital platforms to provide meaningful tools that facilitate interoperability and data portability. These measures would empower users to switch services and have more control of their data.

Recommendation 4: ACCAN supports the ACCC recommendations that large digital platforms be required to ensure that interfaces and menus give consumers every opportunity to navigate services in their best interests, free from blatant and unreasonable design. This obligation should be overseen by a well-resourced and capable regulator, for example the ACCC or the ACMA.

Recommendation 5: ACCAN supports the different mechanisms suggested by the ACCC to reduce the harms to consumers from scams and malicious apps. ACCAN agrees that operators should be required to implement systems and processes to protect their users. This requirement needs to be supervised by a well-resourced and capable regulator. There also needs to be effective consumer education materials made widely available, including on the platforms themselves.

Recommendation 6: Fair-trading obligations as outlined under the Australian Consumer Law should be extended to all digital platforms which conduct business in Australia.

Recommendation 7: ACCAN supports the development of Internal Dispute Resolution standards and the establishment of an independent ombudsman scheme.

Recommendation 8: The ACCC should introduce a prohibition on unfair trading into the Australian Consumer Law.

Recommendation 9: ACCAN is supportive of measures that increase the transparency of digital platform decisions to consumers in effective and accessible ways.

2. Responses to select questions

2.1 Harms and Benefits of Digital Platform Services in Australia

Responding to question:

1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

As ACCAN has outlined in previous submissions to the ACCC, digital platforms provide a range of benefits to Australian consumers.

However, digital platforms also require safeguards and protections to reduce the risk of consumer harms. In the following submission ACCAN outlines some points in response to the ACCC's questions about digital platform services. ACCAN agrees that there needs to be proactive and consultative regulatory reform. Obligations need to be placed on platforms to ensure data interoperability and portability. Consumers require more protections from blatant manipulation of interfaces, malicious apps and scams. There needs to be far more scrutiny of privacy practices and data security mechanisms. More regulation is needed to prevent deceptive and misleading conduct that especially impacts on vulnerable consumers. Platform providers must be obliged to provide meaningful and fair dispute resolution mechanisms and there should be a broadly empowered external body to review those disputes as required. Consumers require more transparency to better understand how digital platforms use their data. Given the broad and preliminary nature of this discussion paper, these points are just a few examples from the broad range of activity in which digital platforms participate and improvement is needed.

In previous submissions to the ACCC Digital Platform Services Inquiry¹ and Media Reform Green Paper,² ACCAN has raised concerns that there is no dedicated Australian consumer organisation representing the interests of consumers in the ever-expanding digital platform environment. ACCAN believes that a properly resourced consumer voice is needed to ensure that all Australian consumers can use digital platforms confidently and safely. This consumer body should be funded by government and industry to properly engage with the plethora of emerging issues facing Australian consumers on digital platforms.

Recommendation 1: ACCAN recommends that consumer representation be adequately funded to ensure that the consumer voice is appropriately resourced to participate in the ongoing discussions regarding digital platform services and consumer protections and safeguards.

¹ ACCAN 2021a, *Submission to ACCC Digital Platforms Inquiry Report on market dynamics and consumer choice screens in search services and web browsers*, available: <https://accan.org.au/accans-work/submissions/1847-acc-consumer-choice-screens>

² ACCAN 2021b, *Submission to Media Reform Green Paper: Modernising television regulation in Australia*, available: <https://accan.org.au/our-work/submissions/1854-media-reform-green-paper>

2.2 Regulation reforms

Responding to questions:

2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?

4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the following regulatory tools to competition and consumer harms from digital platform services in Australia?

a) prohibitions and obligations contained in legislation

b) the development of code(s) of practice

c) the conferral of rule-making powers on a regulatory authority

d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm

e) the introduction of a third-party access regime, and

f) any other approaches not mentioned in chapter 7.

5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?

6. Noting 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 also general search services, what are the benefits and risks of implementing some form of regulation to prevent anti-competitive conduct in the supply of the following digital platform services examined by this Inquiry, including:

a) social media services

b) online private messaging services (including text messaging, audio messaging, and visual messaging)

c) electronic marketplace services (such as app marketplaces), and

d) other digital platform services?

7. Which platforms should such regulation apply to?

Broadly, these questions refer to a mixture of approaches and regulatory tools. ACCAN understands that the discussion paper is seeking general views on a range of possible approaches and potential frameworks. Given the broadness of the inquiry ACCAN can only articulate its concerns on some specific consumer harms and voice a more general concern on broader areas of regulatory reform and competition law. ACCAN looks forward to providing feedback to more specific proposals as the inquiry progresses.

ACCAN supports reform to the CCA and ACL to protect Australian consumers in the digital platforms space but does not have specific prescription from the range of possible approaches and regulatory tools referenced in the discussion paper. Regardless of the type of reform, ACCAN asserts that there needs to be a community voice present during considerations of legislation, designations, codes or frameworks that are applied to a mix of platforms and aligned with other overseas jurisdictions. We consider this consumer voice to be vitally important to ensure that the distinct voice of Australian consumers is heard while ensuring that Australian digital platform regulation works effectively with overseas jurisdictions.

Regarding competition in digital platform markets, ACCAN has previously submitted its views to the ACCC's Digital Platforms Inquiry (DPI) final report.³ In 2019, ACCAN wrote that we support reform of merger law:

ACCAN is supportive of competitive and efficient markets. Thus, the Competition and Consumer Act 2010 (Cth) should be drafted to promote innovation and competition to the strongest extent possible. ACCAN concurs with the ACCC that the current drafting of s. 50 of the Competition and Consumer Act 2010 (Cth) fails to adequately account for the potential of innovative technologies to be a source of competitive tension. We agree that excessive acquisition and consolidation may undermine potential competition.

ACCAN does not foresee that there are any material barriers to progressing the recommendations made by the ACCC with respect to the revision of s. 50 of the Competition and Consumer Act 2010 (Cth), noting that an appropriate consultation process should be undertaken to examine the appropriate drafting of these changes.

ACCAN supports the recommendation from the ACCC DPI Final Report that reform is needed to ensure Australian consumers have access to competitive digital platform markets.

Regarding advance notice of acquisitions, in 2019 ACCAN expressed our support for advanced notice of acquisitions by large digital platforms:³

ACCAN does not foresee any immediate barriers for the formalisation of advance notification processes for acquisitions by large digital platforms. Only a handful of platforms fall within this category and similar arrangements exist in comparable jurisdictions, meaning that the creation

³ ACCAN 2019, *Submission to ACCC Digital Platforms Inquiry Final Report*, available: <https://accan.org.au/our-work/submissions/1672-treasury-consultation-acc-dpi-final-report>

of the proposed mechanism is feasible in a relatively short period. In the event that notice arrangements cannot be negotiated within a time-frame of 12 months, ACCAN considers that regulation should be introduced.

ACCAN maintains that if large digital platforms do not voluntarily agree to a merger notification protocol, then regulation should be introduced to ensure that the ACCC has advance notice to consider possible consumer harms of proposed merger transactions.

Recommendation 2: ACCAN broadly supports reforms to both the CCA and ACL that can best protect the interests of Australian digital platform users. While it is important that Australian regulation of digital platforms aligns with overseas jurisdictions to be most effective, reform processes will require broad consultation with the Australian community to ensure that the distinctive voice of Australian users is heard.

2.3 Data access, portability and interoperability

Responding to questions:

8. A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access. In relation to each of these potential options:

- a) What are the benefits and risks of each measure?
- b) Which data access measure is most appropriate for each of the key digital platform services identified in question 6 (i.e. which would be the most effective in increasing competition for each of these services)?
- c) What types of data (for example, click-and-query data, pricing data, consumer usage data) should be subject to these measures?
- d) What types of safeguards would be required to ensure that these measures do not compromise consumers' privacy?

9. Data limitation measures would limit data use in the supply of digital platform services in Australia:

- a) What are the benefits and risks of introducing such measures?
- b) Which digital platform services, out of those identified in question 6, would benefit (in terms of increased competition or reduced consumer harm) from the introduction of data limitation measures and in what circumstances?
- c) Which types of data should be subject to a data limitation measure?

10. In what circumstances might increasing data access be appropriate and in what circumstances might limiting data use be appropriate? What are the relative benefits and risks of these two approaches?

ACCAN supports measures that give consumers security, control over, and benefit from their data. Secure interoperability and data portability should be prioritised in order to give consumers meaningful choice of which digital platforms they choose to use.

Interoperability

Interoperability is an important measure to foster competition and innovation in digital platforms. Telecommunications, the internet and the web were built on open standards that continue to underpin fundamental communications like email today. However, as the ACCC identifies, digital platforms benefit from single side network effects that lock consumers into services in order to maintain access to their social networks.

For example, online private messaging services remain far less interoperable than they should be. There have been some recent developments in interoperability, such as between Meta owned apps⁴ and between Google's message app and Apple's iMessage.⁵ However, the limited nature of these recent developments illustrates the inadequate interoperability offered to consumers. The lack of established standards and interoperability between popular messaging apps including Facebook Messenger, WhatsApp, Telegram or Snapchat forces users to choose which platforms they use based on their broader social networks instead of each app's merits.

Platforms often cite privacy and security as excuses for the lack of initiative in interoperability, but their lack of progress in finalising standards leads some critics to find this argument unconvincing.⁶ For example, the open-source Signal protocol already underpins many messaging apps and could serve as a preliminary cryptographic standard.⁷

The lack of messaging interoperability risks making communications worse for Australian consumers. SMS is a fundamental means of communication for many Australians. As Australians expect more from their messaging services, such as multimedia and reactions, standards will need to evolve to meet those expectations. However, Apple's iMessage, one of the most popular apps for SMS and messaging, limits interoperability with other apps.⁸ According to court documents, the lack of interoperability may be intentional to protect Apple's market share.⁹ Critics have pointed out that

⁴ TechCrunch 2020, *Facebook introduces cross-app communication between Messenger and Instagram, plus other features*, available: <https://techcrunch.com/2020/09/30/facebook-introduces-cross-app-communication-between-messenger-and-instagram-plus-other-features/>

⁵ TechCrunch 2022, *Google's Messages app can now handle iMessage reactions, challenges Apple with new features*, available: <https://techcrunch.com/2022/03/10/googles-message-app-can-now-handle-imessage-reactions-challenges-apple-with-new-features/>

⁶ Electronic Frontier Foundation 2018, *Facing Facebook: Data Portability and Interoperability Are Anti-Monopoly Medicine*, available: <https://www.eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine>

⁷ For further information, see: https://en.wikipedia.org/wiki/Signal_Protocol

⁸ Android Police 2022, *Google's RCS drama with Apple, explained: More than bubble envy, less than noble*, available: <https://www.androidpolice.com/googles-rcs-drama-with-apple-explained/>

⁹ Wall Street Journal 2022, *Why Apple's iMessage Is Winning: Teens Dread the Green Text Bubble*, available: <https://www.wsj.com/articles/why-apples-imessage-is-winning-teens-dread-the-green-text-bubble-11641618009>

newer standards like Rich Communication Services (RCS) are more secure than SMS and support encryption.¹⁰

Messaging provides a clear example that despite the threats to interoperability, the principles of fostering open, secure standards should be applied across the digital platform sector. Experts at MIT in the US note that “tech platforms have solved engineering challenges a hundred times harder” than becoming more interoperable.¹¹ Organisations such as the Electronic Frontiers Federation have argued for years that greater effort is required to facilitate interoperability between different social media services.¹² ACCAN urges the ACCC to consider instruments that foster greater interoperability across and within digital platforms and offer consumers meaningful choice about the services they use.

Data portability

An issue related to interoperability is data portability. Data portability recognises that consumers own their data, and they should reasonably be able to transfer it between comparable services as they choose. Data portability can contribute to a more competitive digital platform market by allowing users to switch services more easily. For example, consumers could keep their music playlist data when switching between music streaming services or move their photos between different photo apps.

The large digital platforms are aware that consumers want greater choice with the services they use and desire the removal of barriers to switching services or leaving a platform. As Google wrote recently, people “want the freedom to be able to use different online services without worrying about losing their photos, contacts, emails and other data if they close an account or switch to a new company”.¹³ Meta also recently outlined its attempts to give “people more control and choice over their data”.¹⁴ These observations were both accompanied by announcements of further efforts to foster data portability between digital platforms. Both organisations have participated in efforts such as the Data Transfer Project (DTP) for several years.¹⁵

However, progress with data portability to date has been slow. Although some of the most valuable and technologically advanced companies in the world are members of the Data Transfer Project, the product is “still in development”.¹⁶ In its recent post on data portability, Meta argues that “the ecosystem we are building to support data portability will not come to fruition without regulation

¹⁰ Android Police 2022, Google's RCS drama with Apple, explained: More than bubble envy, less than noble, available: <https://www.androidpolice.com/googles-rcs-drama-with-apple-explained/>

¹¹ Fast Company 2021, *How interoperability could end Facebook's death grip on social media*, available: <https://www.fastcompany.com/90609208/social-networking-interoperability-facebook-antitrust>

¹² EFF 2018, *Facing Facebook: Data Portability and Interoperability Are Anti-Monopoly Medicine*, available: <https://www.eff.org/deeplinks/2018/07/facing-facebook-data-portability-and-interoperability-are-anti-monopoly-medicine>

¹³ Google 2022, *Building data portability to help consumers choose*, available: <https://blog.google/outreach-initiatives/public-policy/building-data-portability-help-consumers-choose/>

¹⁴ Meta 2021, *Transfer Your Facebook Posts and Notes With Our Expanded Data Portability Tool*, available: <https://about.fb.com/news/2021/04/transfer-your-facebook-posts-and-notes-with-our-expanded-data-portability-tool/>

¹⁵ For further information, see: <https://datatransferproject.dev/>

¹⁶ For further information, see: <https://datatransferproject.dev/documentation>

that clarifies which data should be made portable and who is responsible for protecting data once it has been transferred”.¹⁷

ACCAN supports regulatory efforts to encourage the prompt development and implementation of data portability regimes that are fit for purpose. The discussion paper mentions the Consumer Data Right (CDR) as a potential tool to facilitate greater data portability. ACCAN supports the consideration of CDR in the digital platforms sector and particularly the focus on users as owning their own data, and digital platforms acting as data holders. ACCAN supports penalties for digital platform services that fail to deliver effective data portability instruments and restrict consumer’s choice and autonomy over their data. While the CDR regime provides one avenue for reform it may take some years to implement. ACCAN encourages stakeholders to act now to implement fit for purpose data portability measures to give users control over their data as soon as possible. ACCAN urges the ACCC to develop obligations for digital platforms to offer their users accessible and easy to use data portability tools.

Recommendation 3: ACCAN supports measures to impose obligations on large digital platforms to provide meaningful tools that facilitate interoperability and data portability. These measures would empower users to switch services and have more control of their data.

2.4 Dark patterns, scams and malicious apps

Responding to questions:

11. What additional measures are necessary or desirable to adequately protect consumers against:
- a) the use of dark patterns online
 - b) scams, harmful content, or malicious and exploitative apps?
12. Which digital platforms should any new consumer protection measures apply to?
13. Should digital platforms that operate app marketplaces be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps? If so, what types of additional obligations?

Broadly, these questions are asking about protections and oversight of specific risks for users of digital platforms. ACCAN supports measures that allow consumers to safely and confidently use digital platforms and participate in the digital economy.

Dark patterns

¹⁷ Meta 2021, Transfer Your Facebook Posts and Notes With Our Expanded Data Portability Tool, available: <https://about.fb.com/news/2021/04/transfer-your-facebook-posts-and-notes-with-our-expanded-data-portability-tool/>

Regarding dark patterns, ACCAN supports measures that require large digital platforms to ensure that their user interfaces and choice architecture are designed fairly and do not undermine consumer choice or nudge consumers towards a certain outcome that benefits the platform. ACCAN is aware that many consumers are time poor or may lack digital literacy skills to change defaults in the digital services that they use. Consumers should be given every opportunity to make purchases in their best interests and should be protected from blatant or unreasonable design of menus and interfaces.

ACCAN supports the empowerment of a regulatory body to scrutinise the prevalence and characteristics of dark patterns. This body should be resourced to conduct regular investigations using different means of research including data science and qualitative research. This regulatory body could oversee the ACCC's suggestions that large digital platforms should be required to:

- Provide equal prominence between options to change default settings.
- Respect user choices of their settings and only use notifications reasonably.
- Make services as simple as possible to cancel.

ACCAN supports regulatory scrutiny and oversight of dark patterns. Voluntary standards should not be used in place of regulatory oversight. Additionally, voluntary standards should only extend consumer protections beyond existing Australian consumer protection laws.

Scams and malicious apps

ACCAN's view is that there needs to be more proactive monitoring of scams and malicious apps by large digital platforms. Furthermore, there must be more proactive reporting to, and independent investigation by, relevant regulators, alongside the standardisation of terms and conditions and provision of effective consumer education. Scams are of major concern to ACCAN and our members. As the ACCC reports, Australians are losing record breaking amounts to scammers.¹⁸ Fighting scams requires both preventative measures and more effective consumer education.

In 2021 ACCAN outlined our view on online marketplaces:¹⁹

ACCAN continues to have concerns about the potential misuse of consumer information – data collection, data security and privacy, made possible from this increased uptake of online retail marketplaces. ACCAN is aware of research indicating that many consumers find terms and conditions, warranty and complaints mechanisms complicated and difficult to understand. This inability to understand the possible implications of data harvesting, price discrimination or on-selling of consumer information leaves many consumers vulnerable to harm. Clear and unambiguous terms and conditions as well as clear information about consumer data information is needed to ensure that consumers can use these online marketplaces safely and confidently. As such, ACCAN recommends that there be effective consumer education available and that there be a standardised

¹⁸ ACCC 2021, *Scammers capitalise on pandemic as Australians lose record \$851 million to scams*, available: <https://www.accc.gov.au/media-release/scammers-capitalise-on-pandemic-as-australians-lose-record-851-million-to-scams>

¹⁹ ACCAN 2021, *ACCC Online Retail Marketplaces 2021*, available: <https://accan.org.au/accans-work/submissions/1907-acc-online-retail-marketplaces-2021>

set of Terms and Conditions in plain English made available on all online marketplaces.

In addition to the ACCC's recommendation for an economy-wide prohibition on certain unfair trading practices, ACCAN supports the ACCC's suggestion that large digital platforms should be required to:

- improve their existing processes to more effectively monitor, block and remove online scams and malicious apps from being displayed to their users and to manage the harms associated with the prevalence of fake online reviews on their platforms
- notify and/or provide redress to their users who have been exposed to harmful content identified on their platforms
- implement systems and processes that proactively prevent the distribution of online scams and malicious apps to their users, such verification requirements for advertisers and labelling that clearly distinguishes the advertisements of unverified advertisers, and
- report regularly to relevant regulators and law enforcement agencies.²⁰

In addition to these measures, large digital platforms should offer a standardised set of Terms and Conditions online. These terms and conditions must be written in plain English and comply with the latest Web Content Accessibility Guidelines.

As discussed in relation to dark patterns, ACCAN supports the empowerment of a well-resourced body that can meaningfully investigate websites or apps to identify malicious apps and scams.

ACCAN agrees with the ACCC that while preventative measures should be the primary means of preventing consumer harm from malicious apps and scams, consumer education can also play an important role in helping consumers protect themselves. ACCAN recommends that the ACCC create effective consumer education materials and ensure that they are readily available to consumers, both from government websites and hosted on the platforms themselves. These education materials need to be provided in a range of accessible formats and diverse community languages.

Recommendation 4: ACCAN supports the ACCC's recommendations that large digital platforms be required to ensure that interfaces and menus give consumers every opportunity to navigate services in their best interests, free from blatant and unreasonable design. This obligation should be overseen by a well-resourced and capable regulator, for example the ACCC or the Australian Communications and Media Authority.

Recommendation 5: ACCAN supports the different mechanisms suggested by the ACCC to reduce the harms to consumers from scams and malicious apps. ACCAN agrees that operators should be required to implement systems and processes to protect their users. This requirement needs to be supervised by a

²⁰ ACCC 2022, *September 2022 interim report Discussion paper*, available: <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2022-interim-report>

well-resourced and capable regulator. There also needs to be effective consumer education materials made widely available, including on the platforms themselves.

2.5 Fair Trading Obligations

Responding to question:

14. What types of fair-trading obligations might be required for digital platform services in Australia? What are the benefits and risks of such obligations? Which digital platforms should any such fair-trading obligations apply to?

ACCAN supports the introduction of fair-trading obligations for digital platform services in Australia. Despite the introduction of legislation such as the ACL and *Australian Securities and Investments Commission Act 2001* (ASIC Act) over a decade ago, Australian consumers continue to experience misleading and deceptive conduct from a range of digital platform services,^{21 22} covering issues such as consumer guarantees²³ and rights to refunds.²⁴

Fair-trading obligations as outlined under the ACL should be extended to all digital platforms which conduct business in Australia, as established under *Valve Corporation v ACCC* [2017] FCAFC 224 (Valve Appeal Decision).²⁵ If only selected digital platforms are designated as having to comply with fair-trading obligations, Australian consumers would remain at risk of having negative experiences (such as sustaining financial losses) with those platforms outside of the designation.

Additionally, ACCAN supports recommendations²⁶ that the ACCC introduce a prohibition on unfair trading into the ACL. According to Paterson and Bant (2020), one benefit of a general prohibition on unfair trading would be that it may prompt “courts to move beyond a narrower notion of unconscionability in addressing exploitative or manipulative business systems that offend community standards.”²⁷ This is important as proving unconscionability in court can be a difficult task that does not always recognise the impact of the conduct on consumers.

Digital marketing practices, especially those employed through digital platforms such as Meta and Google, have become increasingly complex since the ACL was introduced in 2011. As a result,

²¹ ACCC 2021, *Google misled consumers about the collection and use of location data*, available: <https://www.accc.gov.au/media-release/google-misled-consumers-about-the-collection-and-use-of-location-data>

²² ACCC 2022, *ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook*, available: <https://www.accc.gov.au/media-release/accc-takes-action-over-alleged-misleading-conduct-by-meta-for-publishing-scam-celebrity-crypto-ads-on-facebook>

²³ ACCC 2017, *Full Federal Court confirms that Valve misled gamers*, available: <https://www.accc.gov.au/media-release/full-federal-court-confirms-that-valve-misled-gamers>

²⁴ ACCC 2021, *Booktopia in court for alleged false or misleading claims on refund rights*, available: <https://www.accc.gov.au/media-release/booktopia-in-court-for-alleged-false-or-misleading-claims-on-refund-rights>

²⁵ For further information, see: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2017/224.html>

²⁶ Consumers Federation of Australia 2022, *Consumer Policy Agenda 2022*, available: http://consumersfederation.org.au/wp-content/uploads/2020/08/20220223_CFA_Consumer-Policy-Agenda-2022.pdf

²⁷ Paterson, JM & Bant, E, 2020, ‘Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online’, *Journal of Consumer Policy*, vol. 44, no. 1, pp. 1–19

general prohibitions against unconscionable conduct may no longer adequately address the primary concerns over new digital marketing techniques.²⁸ ACCAN is concerned that the collection and use of data to microtarget consumers could lead to significant detriment for vulnerable consumers, who may be targeted with inappropriate products or services that they would not ordinarily seek out. These data collection activities could also result in vulnerable consumers being discriminated against or excluded from markets.²⁹

ACCAN supports calls from the Consumers' Federation of Australia (CFA)³⁰ for a prohibition on unfair trading that would focus on consumer outcomes of products, services and business practices, including:

- marketing that manipulates or restricts the freedom of choice of a consumer
- product design so that commercial returns to a firm arise predominantly from consumer outcomes that are consistent with the product's purpose
- ensuring consumers experiencing vulnerability do not experience worse outcomes than other consumers

ACCAN recognises that legislative reform has been proposed regarding unfair contract terms with the *Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022*. ACCAN has previously detailed³¹ our support for CHOICE's submission³² to Treasury's consultation on the draft Bill. Enclosed within CHOICE's submission are two case studies which examine potentially unfair contract terms within the digital platforms market. ACCAN is eager for the strengthened protections against unfair contract terms outlined in this draft legislation³³ to come into effect as soon as possible.

Recommendation 6: Fair-trading obligations as outlined under the Australian Consumer Law should be extended to all digital platforms which conduct business in Australia.

Recommendation 7: The ACCC should introduce a prohibition on unfair trading into the Australian Consumer Law. This prohibition would help prevent consumer harm from unfair dealings with digital platforms.

²⁸ Paterson, JM & Bant, E, 2020,, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online', *Journal of Consumer Policy*, vol. 44, no. 1, pp. 1–19

²⁹ CPRC 2021, *Unfair Trading Practices in Digital Markets*, available: <https://cprc.org.au/wp-content/uploads/2021/11/Unfair-Trading-Practices-in-Digital-Markets.pdf>

³⁰ Consumers Federation of Australia 2022, *Consumer Policy Agenda 2022*, available: http://consumersfederation.org.au/wp-content/uploads/2020/08/20220223_CFA_Consumer-Policy-Agenda-2022.pdf

³¹ ACCAN 2021, *Treasury Laws Amendment (Measures for a later sitting) Bill 2021*, available: <https://treasury.gov.au/sites/default/files/2022-02/c2021-201582-accan.pdf>

³² CHOICE 2021, *Strengthening Protections Against Unfair Contract Terms*, available: <https://treasury.gov.au/sites/default/files/2022-02/c2021-201582-choice.pdf>

³³ For further information, see: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6844

2.5 Internal Dispute Resolution and Independent Ombudsman Scheme

Responding to question:

15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?

ACCAN supports effective and easily accessible ways for consumers to resolve disputes with digital platforms. Having access to fair, effective, transparent, and impartial mechanisms for dispute resolution is a vital part of ensuring consumers are adequately protected in all markets,³⁴ including those related to digital platforms. ACCAN's recent research has found that almost three in four Australians agree that it needs to be easier to make a complaint and to get their issues resolved when dealing with digital platforms such as Facebook, WhatsApp, eBay, and Service NSW.³⁵ Additionally, ACCAN's research found that 78% of Australians think that it needs to be easier for people to get their issues resolved, and 60% feel like there's not much they can do when something goes wrong online. This research indicates that existing dispute resolution options present on digital platforms are not adequately serving consumers.

In our 2019 submission³⁶ to the ACCC's DPI Final Report, ACCAN stated that we:

support the recommendation that digital platforms must develop appropriate internal dispute resolution processes to facilitate the effective resolution of consumer complaints. In accordance with the position of the ACCC, this is can be readily achieved through the development of an ACMA industry standard.

...

In seeking to implement this recommendation, any IDR standard should be set to require compliance with the AS/NZS 10002: 2014 Customer Satisfaction – Guidelines for complaint handling in organisations standard.³⁷

One potential internal dispute resolution model that could be reviewed for its application in the Australian context is the European Online Dispute Resolution (ODR) platform.³⁸ Provided by the European Commission, the ODR aims to make online shopping safer and fairer through access to quality dispute resolution tools. Using this model, all online retailers and traders (including those on

³⁴ UNCTAD 2016, United Nations Guidelines for Consumer Protection, available: https://unctad.org/system/files/official-document/ditccplpmisc2016d1_en.pdf

³⁵ ACCAN 2021, *New research finds nearly three-quarters of Australians want better complaints handling from digital platforms*, available: <https://accan.org.au/media-centre/media-releases/1942-new-research-finds-nearly-three-quarters-of-australians-want-better-complaints-handling-from-digital-platforms?highlight=WyJ0cnVzdCIsInRydXNOJyJd>

³⁶ ACCAN 2019, *Treasury consultation on ACCC Digital Platforms Inquiry Final Report*, available: <https://accan.org.au/our-work/submissions/1672-treasury-consultation-acc-dpi-final-report>

³⁷ For further information, see: <https://www.saiglobal.com/pdftemp/previews/osh/as/as10000/10000/10002-2006.pdf>

³⁸ For further information, see: <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>

marketplaces such as eBay, Amazon, and Etsy etc), would be mandated to provide an easily accessible link to the ODR platform, as well as an e-mail address for the ODR to contact them in case of a consumer complaint. If these internal complaint handling mechanisms fail, consumers should be able to quickly and easily escalate their complaint to a dispute resolution body, such as a digital platforms ombudsman.

In 2019, ACCAN wrote regarding creating of a digital platforms-focused ombudsman:³⁹

ACCAN supports the creation of an ombudsman scheme to resolve complaints and disputes with digital platform providers. Although the substantive reform component of the recommendation would require modifications to existing legal arrangements, an examination should be undertaken of the feasibility and appropriateness of the Telecommunications Industry Ombudsman assuming these responsibilities. As part of any consultation process ACCAN believes it is important that consideration be given to whether the existing investigative and enforcement powers of the TIO could be strengthened to support any expanded role.

...

In seeking to set up an ombudsman scheme ACCAN believes that there must be careful consideration of the minimum baseline resourcing required in order to ensure that the scheme is effective in resolving complaints. In addition, the scheme should provide for sufficient resourcing to allow for the identification and reporting on of any systemic issues that may emerge.

ACCAN maintains our support for an independent ombudsman scheme to review decisions made by large digital platforms and ensure that consumers receive fair treatment.

Recommendation 8: ACCAN supports the development of Internal Dispute Resolution standards and the establishment of an independent ombudsman scheme.

2.6 Transparency

Responding to question:

16. In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?

a) What additional information do consumers need?

³⁹ ACCAN 2019, Treasury consultation on ACCC Digital Platforms Inquiry Final Report, available: <https://accan.org.au/our-work/submissions/1672-treasury-consultation-acc-dpi-final-report>

b) What additional information do business users need?

c) What information might be required to monitor and enforce compliance with any new regulatory framework?

Due to the opaque nature of digital platforms operating models, there is a strong information asymmetry between users of the platforms (both consumers and businesses) and the digital platforms themselves. ACCAN recognises that the House of Representatives Select Committee on Social Media and Online Safety's recent report⁴⁰ has made a number of recommendations regarding establishing reviews of the use of algorithms in digital platforms and potential proposals for mandating platform transparency. ACCAN is supportive of measures that would increase transparency for both consumers and small businesses, as this would likely go some way in addressing issues with information asymmetry.

Key terms of service for digital platforms should outline the data that is being gathered about the user and should clearly explain how this data will be used.

Attention must also be paid to how information regarding complex topics such as contractual terms and privacy policies is presented to consumers. A recent analysis of 75 privacy policies across top e-commerce websites, banking apps and government service QR code check-in apps by CHOICE found that they average 4000 words and take 16 minutes to read.⁴¹ Of the privacy policies analysed, a third would require university-level reading skills to easily read and understand the information enclosed. This means that only 1.2% of Australians⁴² would have the literacy skills necessary to give informed consent when agreeing to the privacy policies of most digital platforms.

ACCAN recommends that all key documents relating to the use of digital platforms, such as terms of service and privacy policies, be made available in plain English and comply with the latest Web Content Accessibility Guidelines. Additionally, these documents can be made more legible by:

- Displaying key terms as frequently asked questions
- Using icons to illustrate key terms (noting these must have appropriate alt-text for accessibility)
- Showing users terms within a scrollable text box instead of requiring a click to view them
- Providing information in short chunks at the right time⁴³

⁴⁰ Commonwealth of Australia 2022, Social Media and Online Safety, available: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024877/toc_pdf/SocialMediaandOnlineSafety.pdf?fileType=application%2Fpdf

⁴¹ CHOICE 2022, *Privacy policy comparison reveals half have poor readability*, available: <https://www.choice.com.au/consumers-and-data/protecting-your-data/data-laws-and-regulation/articles/privacy-policy-comparison>

⁴² For further information, see: <https://www.stylemanual.gov.au/accessible-and-inclusive-content/literacy-and-access>

⁴³ UK Government 2019, *Improving consumer understanding of contractual terms and privacy policies: evidence-based actions for businesses*, available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831400/improving-consumer-understanding-contractual-terms-privacy-policies.pdf

Recommendation 9: ACCAN is supportive of measures that increase the transparency of digital platform decisions to consumers in effective and accessible ways.

3. Conclusion

Thank you for the opportunity to provide feedback on the discussion paper. ACCAN looks forward to further consultations as the investigation progresses. Should you wish to discuss this submission further, please do not hesitate to get in contact.