BCA
Business Council of Australia

Submission to the Digital Platform Services Inquiry – March 2025 – Final report Issues Paper

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1. Overview

This is the Business Council of Australia's submission in response to the Australian Competition and Consumer Commission's (ACCC) Issues Paper supporting the Digital Platforms Services Inquiry's March 2025 Final Report.

The BCA wants high-quality regulatory measures that enhance competition and protect consumers. As technology evolves, we must reassess legislative and regulatory frameworks and ensure they are fit for purpose. This purpose is to minimise harms and maximise benefits.

To meet this purpose, the government must ensure Australia's technology regulation is proportionate, targeted and coordinated across many already overlapping regulators, agencies, Departments, and policies.[1] This will grow Australia's competitiveness, productivity and investment desirability, and maintain our position as a science and tech power.

Particularly concerning competition-related legislative developments internationally, Australia is in a fortunate position of being able to observe how effectively these regimes are functioning and whether they are delivering the outcomes intended. The government must take this opportunity to learn from overseas experience to avoid unintended outcomes and properly assess whether the frameworks are successful.

The BCA respectfully recommends caution and further analysis before new regulation of digital markets in Australia is implemented, particularly in nascent and highly dynamic emerging areas such as generative artificial intelligence (AI) technologies.

2. Key recommendations

1. The government should wait and observe how international examples of new ex-ante regulatory experimentation unfold.
2. Before proceeding with any new ex-ante framework, the government should demonstrate why existing tools are insufficient before considering new ones.
    a. As part of this analysis, the government should undertake a robust, evidenced-based approach to whether existing law and regulatory tools such as the existing prohibitions under the *Competition and Consumer Act* – along with other areas of policy reform – may otherwise address demonstrated harms before considering further regulation.
3. The government should undertake a thorough assessment on whether the overall economic benefits of a new framework will outweigh the costs.
    a. Any consideration of new tools should also assess the risk of increased regulatory capture and rent seeking, which could be through joint work by the Productivity Commission (PC) and the ACCC.
4. Any eventual regulatory response taken by the government should be carefully targeted towards actual harms to competition or consumers.
5. Before seeking to regulate generative AI, the government should first build on the PC's report *Making the most of the AI opportunity*[2] to identify how Australia can best use generative AI to boost productivity and growth across the economy.
    a. In particular, the government should provide a new referral to the PC to update its work and provide formal recommendations to the government on how to maximise the benefits of AI across the economy and where the most appropriate regulatory interventions are warranted.
    b. The government has also released its *Proposals Paper for introducing mandatory guardrails for AI in high-risk settings*, along with the *Voluntary AI Safety Standard*, which will significantly reshape ex-ante regulation of AI. The government should wait until the current consultation is resolved before taking a position on regulating AI.

[1] *Tech Policy Design Centre*, Cultivating Coordination, 21 February 2023
[2] https://www.pc.gov.au/research/completed/making-the-most-of-the-ai-opportunity

3. Key issues

3.1 International regulatory developments

Some countries are experimenting with new regulatory frameworks to address the shifting technology landscape while others are carefully monitoring these developments. Some of these experiments are already producing sub-optimal outcomes and unintended consequences.

The EU's Digital Market Act (DMA) has only been in the compliance stage for about 6 months. This is too early to make definite conclusions about its effectiveness, or lack thereof, particularly given the numerous enforcement investigations currently underway. However, there are signs of negative impacts.

- **Rigid and prescriptive ex-ante regulations like the DMA may lower innovation and increase unwanted standardisation** by forcing the same approach to 'gatekeeping' across diverse, differentiated services.[3] This could result in all platforms being the same, only differentiated by size, leading to outcomes that harm consumers and competition.
- **The DMA is legally ambiguous**. Due to this uncertainty, the launch of several new cutting-edge services has been delayed in the EU, which means delayed access to these services by European businesses and consumers, which may weaken competitiveness compared to other markets. Another legal ambiguity is the potential risk of double punishment under the existing competition law enforcement framework and the new ex ante regulatory framework.
- **The DMA's prohibition on gatekeepers privileging their own products means there is less opportunity for gatekeepers to innovate** within their ecosystems and grow new, valuable functionality.[4] The DMA's data-related restrictions – such as restrictions on data combination or cross-use of user data – may also slow down innovation, while also decreasing safety and integrity.
- **The DMA is also reducing convenience and value for consumers.**
  - The DMA restricts useful information and functionality. Article 6(5) of the DMA prohibits 'self-preferencing'. For example, Google search results cannot be linked directly to Google Maps results.
  - However, the DMA also mandates irrelevant information. The DMA's requirement for "fair" search means that Google search in Europe is now overloaded with extraneous results, meaning more steps to get the search results users want.
  - Such friction has made the consumer experience worse and could cause more searching costs to European businesses and consumers.
  - DMA related changes have led to a decrease in web-traffic to hotel sites[5] and negative consequences for consumers, such as additional pop-ups, cybersecurity risks and reduced functionality.[6]
  - Indeed, the DMA framework does all this because it is designed to protect contestability of markets without regard to product design and user preferences. Australia should be seeking a more balanced approach.

In sum, the DMA seems to be making digital platforms less secure, less affordable, and less useful.[7] Along with poorer consumer outcomes, DMA implementation and enforcement are not moving any more speedily or with less complexity than ex-post regimes, which was a key reason given (including by the ACCC) for needing an ex-ante regime.

The UK's Digital Markets, Competition and Consumers Act (DMCC Act) is even newer, having only passed in late May 2024 and not yet implemented. It vests broad powers to the regulator, with little constraint on how they may be used, and with limited appeal rights. The result could be platforms having to ask government for authorisation to innovate.

Australia's ongoing review of other regulatory approaches should include a thorough examination of their specific legal, economic and political contexts as they are quite different to Australia's. The government should critically assess the portability of these frameworks.

[3] https://digital-markets-act.ec.europa.eu/gatekeepers_en
[4] https://www.esade.edu/ecpol/en/publications/potential-risks-and-unintended-effects-of-the-new-eu-digital-markets-act/
[5] https://web.swipeinsight.app/posts/dma-implementation-leads-to-30-drop-in-google-hotel-ads-clicks-and-bookings-5656
[6] https://www.americanactionforum.org/insight/dma-goes-into-effect-what-happens-now/
[7] https://truthonthemarket.com/2024/03/12/the-broken-promises-of-europes-digital-regulation/

We therefore are firmly of the view that Australia should watch and learn. We can then adopt the effective elements of these overseas regulatory frameworks and disregard those unfit for purpose.

3.2 Review existing legislative tools and conduct cost/benefit analysis

In addition, the government already has a range of legislative tools to address competition concerns including Part IV of the Competition and Consumer Act and proposed reforms to merger notification and review which are intended to provide strong oversight of transactions with the potential to impact competition in markets. Further measures may add to regulatory and legislative uncertainty.

If the government was to seek additional regulator or legislative powers, it is vital that it should demonstrate why existing tools are insufficient before considering new ones. Any consideration of new tools should also assess the risk of increased regulatory capture and rent-seeking.

Conventionally, ex-ante regulation is justified only by clear and well-evidenced market failure, and by the absence of other proportionate and effective measures. Even in market failure situations, poorly executed ex-ante frameworks for competition matters may stifle innovation, investment, and growth. Ex-ante regimes can also remove checks and balances on the regulator. Australia has a thoughtful, robust judicial system that already reviews breaches of the Competition and Consumer Act effectively.

The BCA also encourages the government to consider the potential security consequences of ex-ante competition codes. Mandating greater openness by third parties provides a channel for bad actors and other vulnerabilities to affect the security and privacy of consumers' systems.

More broadly, the BCA is mindful of the recent, current and upcoming areas of policy reforms that could affect digital platforms and the sector. Policymakers will also have to be mindful of all of these and their complex interactions before proposing additional regulatory measures. These include:

- Privacy Act Reform
- Digital ID consultation and implementation
- Safe and Responsible AI
- Consumer Data Right and Screen Scraping
- Cyber Security Strategy and associated Cyber Legislative Reforms
- Data and Digital government Strategy
- Response to Gender-Based Violence – Deepfakes
- Online Safety Act Review
- News Media and Digital Platforms Mandatory Bargaining Code
- Social Media Review implementation
- Copyright Reform
- Future Made in Australia
- Merger reform
- Unfair trading practices
- National Competition Policy Review, including the recently released *Revitalising National Competition Policy* which considers data and digital technology
- Scams Prevention Framework
- Combatting Misinformation and Disinformation

3.3 Major developments in digital platform markets

As the ACCC's Issues Paper notes, "The ACCC observed a wide range of online private messaging services available to Australian users, which were often highly differentiated, offering different features and functionalities, and used by consumers for a number of different purposes."

The ACCC's September 2020 analysis of private messaging was a point in time analysis.[8] It was overly narrow in focus and avoided addressing the range of competitive options and the dynamic nature of the competition. The challenges of a COVID environment may have contributed to this limited scope.

However, since 2020, there continues to be vigorous competition in the supply of private messaging services:

- iMessage benefits from pre-installation across all Apple devices and the planned rich communication services (RCS) roll-out means it competes even more closely with Meta's messaging services.
- SMS and voice services are the incumbent communication services in Australia.[9]
- Other messaging services have seen significant growth:
  - TikTok has become the fifth largest social media platform worldwide and continues to innovate its direct messaging functionality.[10]
  - Snapchat has doubled its Australian user base since 2021.[11]

While important to consider the developments, the ACCC has not yet identified any player with disproportionate market power or any harm to competition or consumers.

Accordingly, we do not consider that any aspect of the messaging market warrants regulatory intervention. To do so would require a more rigorous, evidence-based analysis of the competitive dynamics and landscape.

Regarding app marketplaces, although Android and Apple dominate in a virtual duopoly, this has not necessarily meant poorer outcomes. In fact, the intense competition between them has created innovation and efficiencies for consumers.[12]

3.4 Identifying potential or emerging issues

The ACCC's Issues Paper identifies three additional areas of gaming, cloud computing, and generative AI for further preliminary analysis.

The BCA's recommendation above regarding a measured regulatory response targeted towards actual harms to competition or consumers and a review of existing regulations applies equally, if not more so, to these highly competitive and rapidly changing sectors.

The cloud sector is already highly regulated in Australia, including through the Privacy Act, the Hosting Certification Framework (HCF) and Security of Critical Infrastructure (SOCI) legislation. Further, many cloud providers and hyperscalers need to comply with "over 100 different national, regional and industry-specific regulations worldwide".[13] New regulation could have unintended consequences, such as legal uncertainty and innovation obstruction.

In addition to being regulated, the IT sector in Australia is highly dynamic and competitive. There's healthy competition for cloud services, including between cloud service providers and on-premises IT solutions (as well as offsite data centres, co-location, software services, resellers, and various hybrid solutions), and the sector delivers immense benefits across the Australian economy, especially for small businesses. It is also worth noting that there is no evidence that the sector requires ex ante regime intervention, and such regulation risks significant loss of the many benefits to Australia's economy that cloud services deliver, such as growth to GDP, job creation, security, resilience, enabling innovation, access to emerging technology and more.

Our members observe that the generative AI market is very competitive, with rapid innovation and continuous releases of improved AI models from both existing players and new entrants.

The generative AI market is also differentiated across consumers and enterprise, with many competing products and services from large and small players. An unsophisticated and uninformed approach to contain larger AI players in the market could have anti-competitive effects. It could significantly stifle innovation and the potential productivity gains that could result from this new technology, ultimately to the detriment of consumers, particularly in a country the size of Australia.

[8] https://www.accc.gov.au/about-us/publications/serial-publications/digital-platform-services-inquiry-2020-25-reports/digital-platform-services-inquiry-september-2020-interim-report
[9] https://www.acma.gov.au/publications/2023-12/report/communications-and-media-australia-how-we-communicate
[10] https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/
[11] https://newsroom.snap.com/an-update-on-our-australian-community-8-million-and-growing
[12] https://www.cnet.com/tech/mobile/smartphone-showdown-15-years-of-android-vs-iphone/
[13] https://www.aph.gov.au/DocumentStore.ashx?id=36dd3c40-4e67-4e78-a73f-22b1ae08020f&sub d=736019

It is clear regulators want to avoid repeating their slow reactions to regulating many internet-based technologies like search, cloud and social media. But it would be a mistake to extrapolate, on a patchwork basis, internet regulation to generative AI without first understanding the generative AI value chain and a clear, evidenced basis for where existing regulatory tools would be insufficient to ensure competition and prevent harms to consumers.[14]

Rather than a rush to regulate, Australia should first get a better understanding of the generative AI value chain and of how generative AI functionalities have been introduced to increase competition between existing services, like online search and productivity tools.

The government could first build on the PC's report *Making the most of the AI opportunity* to identify how Australia can best use generative AI to boost productivity and growth across the economy. Amongst numerous helpful observations, the PC has cautioned against hasty regulatory 'fixes' without clear understanding of perceived or real harms:

> *As with any new technology, some consequences of AI use will only become apparent as the technology develops further and complementary technologies progress and are taken up. With general purpose technologies in particular, regulation based on 'predicted uses' or 'speculated harms' is likely to be overly broad and harm productivity.*
>
> *Many potential harms have been encountered with past technologies and adequately dealt with by existing regulatory frameworks in areas such as consumer protection, privacy, anti-discrimination, negligence and sector-specific and profession-specific requirements. AI is no different.*[15]

The generative AI market is in its infancy. We have a long way to go to understand the dynamics of competition in the generative AI market. Given that generative AI is a nascent technology, the competition landscape is vibrant and disruptive with lots of new market entrants and innovation. Understanding the market and identifying any regulatory gaps should be the first steps.

The PC is well positioned to provide detailed advice to the government on the wide-ranging economic issues relating to this nascent industry. The BCA therefore recommends that the government provide a formal referral to the PC to complete this work. Such a referral would enable all dimensions of generative AI to be considered including the wide-ranging benefits and opportunities it provides to the Australian economy as well as recommendations about where regulatory intervention may be warranted over and above existing regulatory frameworks.

[14] https://www.nytimes.com/2023/05/03/opinion/ai-lina-khan-ftc-technology.html
[15] Productivity Commission 2024, Making the most of the A opportunity: The challenges of regulating A , Research paper, no. 2, Canberra, p1.

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