DEVELOPERS ALLIANCE

Founded in 2012, the Developers Alliance is a global advocate for software developers and the companies that depend on them.

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# The Developer Community's Views on ACCC's Regulatory Reform Recommendations

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## Introduction

On behalf of our membership of more than 70,000 software developers, app publishers, and stakeholders in the mobile ecosystem, the Developers Alliance[1] is pleased to submit comments to the Australian Competition & Consumer Commission on the software developer community's views on the recommendations put forth by Digital Platform Services Inquiry Interim Report No. 5. The Developers Alliance appreciates the Commission's examination of potential competition and consumer issues related to the mobile ecosystem and urges the Commission to continue to recognize the vital role of software developers in ensuring the creation of effective policy in this area.

## About the Developers Alliance

The Developers Alliance (the "Alliance"), founded in January 2012, is an industry association operating in Australia, the United States and the European Union that supports software developers as entrepreneurs, innovators, and creators. The Alliance supports developers and the app ecosystem by (i) promoting innovation and growth through collaboration, networking and education; (ii) delivering resources and support that enable developers to advance in their areas of expertise; and (iii) advocating for policies that promote developers' interests, including in the areas of data privacy and security, intellectual property, competition, and innovation.

Developers were strongly opposed to similar comprehensive regulatory regimes in other jurisdictions (namely the European Union's Digital Markets Act[2] and Data Act[3]). In general, developers believe that only anti-competitive behavior should be reviewed and note that many of the behaviors the ACCC addresses can be strongly pro-competitive. We have made substantial submissions on the risks and challenges of many of these recommendations. We strongly favor voluntary codes, free market mechanisms, enhanced transparency, uniform treatment of online and offline competitors, support for data and marketing tools, and support the idea of an ombudsman or independent expert to assist in disputes.

[1] https://developersalliance.org/

[2] https://developersalliance.org/developers-alliances-position-paper-on-the-digital-markets-act-dma/

[3] https://developersalliance.org/developers-alliances-position-paper-on-the-digital-markets-act-dma/

## Questions

1. *Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?*

Thriving markets create immense consumer benefits. The ACCC's conclusion is problematic industrial policy that is not justified. There is no evidence that suggests the ACCC's recommendations will create a more favorable outcome for developers or consumers in Australia. Changes to regulatory structures will create many unintended consequences and adverse outcomes.

2. *Can existing regulatory frameworks be improved or better utilised?*

Market failures can best be addressed by existing regulatory frameworks. Multi-sided markets have many complexities and additional empirical evidence is needed before any actions are taken. Platform competition has never been more robust, suggesting a healthy ecosystem that spurs innovation and job growth. It is true however, that all ecosystems –not just the app ecosystem –should be transparent for consumers and regulators.

3. *Are there alternative regulatory or non-regulatory options that may be better suited?*

Voluntary standards and codes of conduct should be explored before any new regulatory regime is put in place. Consumer trust is paramount for developers and the firms that employ them. Both understand that absent that trust, their businesses will dry up. Bad actors do exist, but the lion's share of developers are good actors acting the best interest of their users. These good actors can be trusted to work toward reasonable standards and codes of conduct.

4. *Do you see any conflicts between the recommendations?*

The app ecosystem is vast and changing by the hour. The ecosystem is creating innovative products and services, generating economic growth, and creating untold jobs across Australia. Heavy-handed measures will disrupt this growth. Steps should be taken to protect small- and medium-sized firms from onerous compliance requirements.

Recommendation 1 should be applied to both online and offline business practices. For example, it should be applied to telecommunications companies, cable companies, and newspapers. Data is a valuable tool for innovation and consumers should be free to share as they wish.

Recommendation 2 does not consider how difficult the proposed requirements would be for small- and medium-sized firms –who often lack in-house counsel, time, and finances –to comply with. This recommendation could also force platforms to act as content gatekeepers. Misinformation and disinformation can be difficult to define and are certainly beyond a platform's capabilities.

Recommendation 3 should target market failures and not be driven by a desire to institute new industrial policy. In addition, mandatory codes of conduct are onerous and will create burdens for small- and medium-sized firms to comply with in a timely manner. Recommendation 3 also assumes competition imbalances in the marketplace. In our experiences, these concerns are overblown. Platforms of all sizes are able to compete, grow, and flourish thanks to free market principles.

Recommendation 4 should be applied to both online and offline markets. Regulators should make allowances for pro-competitive impacts. Developers strongly oppose the DMA and the Data Act as destructive policy. We disagree with many of these recommendations and their underlying analysis.

> *5. Do you see any conflicts between any of the recommendations and existing Government policy?*

It is imperative that the Australian government pursue a light-touch approach to ensure continued growth in the industry. The free market only flourishes if innovators can take risks and generate growth. A heavy-handed, industry-wide approach that does not differentiate between good and bad actors, as well as small and large firms will have severe consequences for the Australian economy. Those small firms following the rules and acting in the best interests of their users will suffer greatly, harming innovation across Australia.

> *6. What is the best way to ensure coherence between Government policies relating to digital platforms? Are any of the recommendations better addressed through other Government reforms or processes?*

Ensuring coherence should begin with dialogues among the government and industry. Communication between the two entities will help both better understand goals, risks, agendas, etc. Only after this communication takes place and an understanding between the parties is achieved, can government policies be effective.

> *7. Do you agree with the evidence presented by the ACCC regarding the prevalence and nature of harms to consumers resulting from the conduct of digital platforms?*

The evidence put forth by the ACCC suggests that all large platforms are harmful to consumers. While there may be cases where some platforms create some harm for consumers, generally speaking, these large platforms are good actors creating immense opportunity for Australians. These platforms help students and teachers communicate during the COVID pandemic, provide consumers with increased choices in the marketplace, and even increase the distribution of real news at a time when disinformation and misinformation are on the rise, to name just a few examples. Platforms benefit consumers and developers alike. Like any industry, there may be a bad actor. An industry-wide regime goes too far as it punishes the good actors, too.

*8. Do you agree with the ACCC recommendation to introduce targeted measures on digital platforms to prevent and remove scams, harmful apps and fake reviews? Are there any other harms that should be covered by targeted consumer measures, for example, consumer harms related to the online ticket reselling market for live events?*

Any recommendation must take into account the resources small- and medium-sized enterprises have at their disposal. The recommendations put forth by the ACCC may be easily achievable for large firms; that may not be the case for other smaller firms.

*8.1 Is the notice and action mechanism proposed by the ACCC for these consumer measures appropriate? Are there any alternative or additional mechanisms that should be considered?*

We strongly support robust content moderation but recommend leaving platforms the flexibility to manage their own content policies. User feedback is a critical component, but users don't always agree on what is appropriate or not. We support appropriate appeal mechanisms and protections for free speech.

*9. What digital platform services should be captured in the ACCC's recommendation?*

If the Australian government decides to pursue a new regulatory regime policymakers should be aware that defining what digital platforms services are captured will be difficult. In today's ecosystem many platforms straddle multiple verticals, and it is nearly impossible to pinpoint what each digital platform's primary service is. For example, a platform may be a search engine to some, a media player for others, and a news aggregator for some. How would this digital platform be defined and captured?

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

We support alternatives to litigation, including an industry ombudsman.

*11. The ACCC recommends these requirements to apply to all digital platforms, do you support this? If not, which requirements should apply to all platforms, and which should be targeted to certain entities?*

We generally support applying similar protections online and off, and believe transparency is a key component. We are concerned that some of the behaviors identified are common throughout online and offline marketing schemes and should only be addressed where they are anti-competitive. Rules should apply to all economic actors, not just platforms. Consumers should remain free to contract for free services based on data sharing and advertising.

*12. If the above processes are introduced, is the Australian Consumer Law the appropriate legislation to be used and what should the penalty for non-compliance be?*

There is a growing trend among governments to use global revenues to calculate penalties. This decision results in very large penalties for what may be small, local or regional issue. This should not be the model Australia employs. We are strong opponents of extraterritorial fines and disproportionate penalties. Fines should be proportionate to economic harm.

*13. Do you agree with the designation and code of conduct model proposed by the ACCC for the new competition regime? What would be the main implementation challenges for such a regime?*

We disagree that the code of conduct model be mandatory. Voluntary codes of conduct are preferable, chiefly to give developers and their employers flexibility to comply with them. The implementation challenges are vast. For example:

- How will it define platforms?
- What platforms will be covered?
- How is it meeting the needs of small- and medium-sized firms?
- What is the timeline for which the regime will be implemented?
    - Will there be flexibility in the timeline?
- How will the government work with the international community to ensure it is not erecting harmful barriers to entry?
- How will the government ensure small firms can continue to grow under the new regime?
- How and when will the government hold multi-stakeholder dialogues? How will it identify an ombudsperson with the necessary experiences in the app ecosystem?

*14. Do you agree with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes?*

Any code of conduct should be voluntary.

*15. Do you agree with the proposed principles for designating platforms for the regime?*

Regulators should not create overly tailored principles that only target foreign companies.

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

Recommendation 4 is especially troubling. Chief among our concerns is the notion that platforms should be prohibited from taking steps which might restrict interoperability. The Developers Alliance strongly supports robust end-to-end encryption to protect data to give users peace of mind. Any disruption in this security will only empower bad actors to compromise user data. We adamantly oppose any efforts to increase interoperability. Increased interoperability will create an

unnecessary access point for bad actors. Australian policymakers should be *encouraging*, not *discouraging*, increased security.

In addition, limiting pre-installation will again weaken security. Pre-installed apps are vetted and often more secure than apps users download on their own. Security begins to be compromised when users install their own, unvetted apps. Just a fraction of all apps are pre-installed, not nearly enough to warrant additional regulation. Many pre-installed apps serve as foundational capabilities (email, browser, search, maps, media players, etc.). Consumers have come to expect these foundational apps on their devices.

*17. What services should be prioritised when developing a code? What harms should they be targeted on preventing?*

Among the harms that should be prioritised are harms with identifiable victims. These harms include things such as revenge porn, child exploitation, etc. Generally, there are "bright line" crimes, but many others are unclear and ambiguous that are much more difficult to identify. It is also important to note that what may be considered a crime in Australia, may not be in another jurisdiction. Harm is often identified on a sliding scale.

*17.1. Should codes be targeted at individual companies, a specific service, or all digital platform services?*

Any voluntary code should be crafted to appeal industry-wide. Narrowly tailored codes that target specific companies or services can end up benefiting some companies while being especially punitive for others. This flies in the face of a free market economy.

*18. Should codes be mandatory or voluntary?*

Codes should be voluntary and developed in a multi-stakeholder approach. If done properly, voluntary codes are likely to enjoy widespread deployment and will benefit developers and consumers alike. Consumers will look to these codes as a seal of approval, while developers will earn consumer trust. Mandatory codes are heavy-handed and are not often created with an array of stakeholders.

*19. Who should be responsible for the design of the proposed codes of conduct and obligations?*

The multi-stakeholder approach should include developers from a variety of firms (small, medium, and large; firms dealing with differing data sets), consumer advocates, investors, elected officials, and regulators.

*20. Who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements?*

Platforms should self-report. A platform should notify the appropriate regulators if it meets the regulatory requirements. The criteria to meet these requirements should be clearly defined and objective. If platforms are unable to determine whether they meet the regulatory requirements the requirements likely need to be clarified.

*21. Who should enforce any potential codes and obligations?*

Who enforces potential codes and obligations is less important than regulators' expertise and industry knowledge. These regulators should have robust backgrounds in economics, business, and technology to name just a few areas. It is also critical that new regulators avoid overlapping responsibilities like the Department of Justice[4] and Federal Trade Commission[5] in the United States.

*22. What checks and balances should be in place on decision makers and across the various stages of the policy (e.g. code making, designation process, code enforcement)?*

First and foremost, decision-makers must be transparent. Transparency at all stages of the decision-making process is critical to ensure developers can continue to innovate and grow the industry. Additionally, it's important that developers and the firms that employ them have access to the court system to challenge agency decisions.

*23. What avenues of dispute or review should exist with regards to designation or decisions under any potential code? How can this best be implemented to ensure timely outcomes to allow for effective regulation in a fast-changing market?*

Access to specialist courts could be helpful. In the United States for instance, firms take their complaints to specialist courts such as the patent court[6] in Washington, D.C., or a business court[7] in Delaware depending on their complaints.

Bright lines that define what rules apply to whom would also be helpful. There should be complete clarity so that platforms can self-assess. The ombudsman role would likely play an integral role in helping determine how regulations are applied.

*24. Do information gathering powers for the relevant regulator need to be enhanced to better facilitate information gathering from multi-national companies? What balance should a potential regime strike between compliance costs, user privacy and the regulators information needs?*

The flow of information is increasing by the hour. Generally speaking, in order to stay up to date with the app ecosystem, regulators should enhance their information gathering. Enhancing information flow will only improve regulators' understanding of an ever-changing app ecosystem. However, regulators should keep in mind that enhanced information flow may be burdensome,

[4] https://www.justice.gov/atr

[5] https://www.ftc.gov/

[6] https://cafc.uscourts.gov/home/the-court/about-the-court/

[7] https://www.deb.uscourts.gov/

especially for small- and medium-sized firms, who may not have the wherewithal to comply in a timely or affordable manner. There may also be instances where firms are unable to comply with an enhanced request for information due to consumer privacy restraints.

> *25. Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate?*

Australia should align with an international regime. The internet, and by extension, the app ecosystem, are becoming increasingly balkanized thanks to overzealous policymakers at all levels of government. An international framework will benefit developers in Australia who are hoping to sell their products abroad. An ecosystem with few international hurdles will help generate job and economic growth in Australia.

Waiting to determine how the European Union decides to move forward with the Data Act and the Digital Markets Act would be wise. We anticipate both of those regulations to be profoundly disruptive.

> *26. What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions?*

Acting in advance could create confusion in the marketplace. If Australia's regime fails to align with subsequent regimes, developers will have to navigate a confusing patchwork of policies that will harm innovation and drive-up consumer costs. We urge Australia to work with its peers to create a single, clear framework.

> *27. Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?*

The ACCC should begin by establishing a transparent framework that clearly defines reporting obligations. This step should be the first step for each new regulatory agency.

## Conclusion

The modern application ecosystem is highly dynamic, competitive, and has been a global success story. One need only look at consumer uptake and the impact on our lives to see the tremendous value these products and services drive. Australian officials should do everything in their power to nurture this ecosystem. Heavy-handed regimes will disrupt the growth the ecosystem is generating and put job creation at risk. Any new policies in this arena should be created with a multi-stakeholder approach and voluntary. Indeed, bad actors may exist, but the clear majority of developers are working to improve the lives of users in their communities. We encourage you to pursue a light-touch regime.

The Developers Alliance appreciates the opportunity to weigh in on this critical matter and looks forward to future dialogues.