

Digital Platform Services Inquiry – March 2022 Interim Report

Tara Taylor, McCullough Robertson, comments on the ACCC's March 2022 interim report into digital platform services.

As part of its broader inquiry into digital platforms, in late April 2022 the Australian Competition and Consumer Commission (ACCC) released its fourth Interim Report (**Interim Report**) which examines potential competition and consumer issues in Australian general online retail markets. With the COVID pandemic leading to an increase of almost 31% in online spending in 2020-2021 compared to 2019-2020¹, it's not surprising that the ACCC has focused its inquiry on online markets that facilitate transactions between third-party sellers and consumers through a common platform (such as Amazon, eBay, Catch and Kogan) (**online marketplaces**).

In contrast to other jurisdictions which have claimed that Amazon dominates online marketplaces, the ACCC considers that no online marketplace currently possesses market dominance in Australia. However, due to their multi-sided nature and unique business operations, the ACCC has raised concerns that if an online marketplace attains substantial market power, it may adopt a gatekeeper position and in turn stifle competition in Australia. This article outlines the operations of online marketplaces in Australia, the key issues raised by the ACCC and its proposed solutions to protect consumers and ensure online marketplaces remain competitive.

Online marketplaces in Australia

Online marketplaces play an important role in connecting Australian consumers and businesses and fostering trust and confidence in the digital economy. Unlike the United Kingdom and United States, the ACCC considers that there is currently no dominant firm in the Australian online retail marketplace. However, the ACCC has noted that the Australian market is dynamic and that there is potential for the market to 'tip' in favour of a single dominant marketplace.

In the Interim Report, the ACCC identified the following features as being key to scrutiny and likely to cause the Australian market to 'tip':

- **(Cross side network effects)** the more sellers on an online retail marketplace, the more attractive it is to consumers and the more consumers, the more attractive the marketplace is to sellers;
- **(Same-side network effects)** the more consumers attracted to an online retail marketplace, the greater the ability of the platform to collect data regarding consumer preferences. The more this data can be used to improve the matching of consumer preferences to products, the more attractive the online retail marketplace becomes to other consumers; and
- **(Limited bargaining power of other sellers)** when moving away from an online marketplace, sellers may face various learning and implementation costs. If a seller

Key Takeaway

- The Interim Report aligns with the ACCC's broader approach to digital platform regulation. Unlike social media platforms or search engines (which have also to significant examination by the ACCC), the ACCC considers that no one online retail marketplace currently has substantial market power in Australia. However, to address competition concerns that may arise if the Australian market 'tips' and to more generally protect Australian consumers, the ACCC has proposed a series of reforms which if implemented will place increased obligations on online retail marketplaces operating in the Australian market.

seeks to create their own website or physical store, they will also face establishment costs. These costs mean that sellers have limited bargaining power when dealing with large online market places – including in relation to the fees paid to the online marketplace operator.

Achieving market power is not in itself a competition concern and may in fact be evidence of effective competition in a highly concentrated market. However, the ACCC has indicated that where 'tipping' leads to a dominant retail marketplace behaving anti-competitively or reducing the benefits that consumers and sellers might otherwise gain from competition, it will intervene.

Key issues raised by ACCC

Like other digital platform services, the growth of hybrid marketplaces presents a unique regulatory challenge due to the greater consumer choice these platforms afford and conversely the competition concerns they raise. For example, despite providing a low-cost way for sellers to enter the market and increasing consumer choice, where an online marketplace sells its own goods in competition with a third party, competing incentives may exist to prevent or inhibit third party sellers from competing on their merits. The ACCC has recognised such issues and considers that hybrid marketplaces should inform consumers and third-party sellers about the factors that influence how prominently products are displayed (e.g. when favourable treatment is being provided to the online marketplace's own products) especially where those reasons appear less relevant to a consumer.

In addition to the above, some other issues raised by the ACCC regarding online marketplaces include:

- **(Data control)** the data practices of online marketplaces are often misaligned with consumer preferences to limit the collection and use of their data; and

¹ Australia Post, Inside Australian Online Shopping – eCommerce Industry Report August 2021, 27 August 2021, p4.

- **(Lack of dispute resolution mechanisms)** consumers may have limited recourse to dispute resolution mechanisms outside of the policies of an online retail marketplace which in the event of a dispute, may act as the forum, adjudicator and fact-finding body.

Proposed solutions

To provide consumers with greater protections when purchasing products online and to ensure that smaller firms are able to effectively compete in online retail marketplaces, the ACCC has expressed its support for solutions identified in previous reports and also proposed new solutions to deal with the challenges posed by online retail marketplaces. The ACCC also noted, by way of example, the success of the Product Safety Pledge which has been entered into by some online marketplaces.

These solutions include:

- **(Introducing a prohibition on unfair trading practices)** the ACCC reiterated its support to introduce a prohibition on unfair trading practices to cover harmful conduct which falls outside of existing provisions. If introduced, this prohibition may address concerns regarding the data collection and use by online marketplaces and 'nudges' where a user is encouraged to take action that may not be in their best interests;
- **(Making unfair contract terms illegal and introducing civil pecuniary penalties)** the ACCC also continues to support making unfair contract terms illegal (as opposed to just voidable) and argues that this would act as an effective deterrent to online retail marketplaces when using any unfair contract terms in small business agreements;
- **(Internal dispute resolution mechanisms and ombudsman scheme)** the ACCC has supported its recommendation in the 2019 Digital Platforms Inquiry Final Report to introduce an ombudsman scheme and has suggested that this scheme be developed in a way that would also assist sellers resolve disputes with consumers and online market places. The ACCC proposes that this will assist address some of the consequences that arise from the limited bargaining power of sellers who operate on hybrid marketplaces; and
- **(Introducing a general safety provision)** the introduction of a general safety provision would require businesses to supply safe products to the Australian market. This proposal is being considered by the Australian Government's Department of the Treasury and the ACCC has indicated it should be carefully considered to ensure that any burden placed on online marketplaces is appropriately balanced.



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