



interactive games & entertainment association

# **Submission to the Treasury on the Digital Platforms Inquiry**

**September 2019**

**Interactive Games & Entertainment Association**

## Introduction

The Interactive Games & Entertainment Association (IGEA) is the peak industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. Our members develop, publish, market and distribute interactive games and entertainment content and related hardware.

We appreciate the opportunity to provide a submission to the Government's consultation on the final report of the Australian Competition and Consumer Commission's (ACCC) Digital Platforms Inquiry (the Inquiry). While IGEA did not make any submissions during the Inquiry itself, given the limited overlap between the scope of the Inquiry and the video games industry, we closely monitored its progress and have considered that it would now be appropriate and beneficial to provide a short submission.

This submission provides background on the video games industry and how it fits into the digital landscape from a competition policy perspective. It also provides our high level perspective on a small number of relevant recommendations to assist the Government to plan out its response to the Inquiry. Most importantly, this submission signals our intention to become more closely involved in upcoming policy processes and our desire to be brought closer into ongoing and future consultations related to the implementation of any relevant recommendations.

We note that many of the ACCC's recommendations are significant and substantial in their scope. The Government is facing a challenging task in both identifying whether and how they should be implemented, while implementation itself is likely to be a lengthy process. Our key priority for these consultations is to ensure that policy and regulatory reforms are evidence-based, are able to be implemented practically by industry and do not inadvertently have an unintended negative impact on consumers.

We would be happy to discuss or provide additional information on any of the points raised in this submission and look forward to our participation in further consultations on what recommendations from the Inquiry are proposed to be implemented, how they will be implemented and under what timeframes. While we have focussed on providing our high level views in this submission and have not chosen to address each recommendation specifically, we are likely to have more comprehensive views on these and other recommendations as further details around the Government's response are made clearer over the coming months.

## Video games in the digital landscape

Before addressing any specific recommendations, we would like to provide some broader background and context around video games and the games industry. We hope this information is helpful for informing the Government about how our industry fits and, just as importantly, does not fit into the broader digital eco-system and the scope of the recommendations.

### The video games market and industry

The video games market is one of the largest creative and media markets in the world, worth around \$200 billion annually and played by over 2 billion people. In Australia, the video games market was worth \$4 billion in 2018, an increase of 25 per cent since 2017, or more than the film, music, and streaming sectors combined. According to our [Digital Australia 2020 research](#), two thirds of the Australian population play games. In contrast to some dated stereotypes about gamers, the average age of an Australian game player is 34 and less than a quarter of Australian players are under the age of 18.

Video games businesses in Australia can broadly be placed into four categories: consoles owners, publishers, distributors and developers. As their name suggests, console owners create and sell consoles specifically designed for playing video games and operate the digital storefronts for these consoles. These businesses also include the manufacturers of smartphones and personal computers (PCs) that are also used to play video games. Publishers generally market and distribute games that they or other parts of their broader organisation develop. Distributors market and distribute third party games, after having acquired the legal rights to sell those games in Australia. Developers create their own games which they publish themselves or through a publisher and include some of the most exciting and innovative digital businesses operating in Australia today.

### A diverse and competitive eco-system

Given how digitalised many video games businesses are, many could be considered to be 'digital platforms' in one form or another. However, the video games industry has not experienced the supposed competition issues that were discussed by the Inquiry. The global and Australian video games eco-systems have always been diverse and highly competitive and is likely to become even more so over time as the industry continues to expand through new major digital competitors entering the market and a plethora of new game studios bringing an even greater range of products to consumers.

First, the reality is that there are tens of thousands of video game businesses in the world, including hundreds or thousands of companies in Australia chiefly or partially involved in making, selling or otherwise supporting the video

games sector. This includes the hundreds of studios and individuals creatively designing and developing Australian video games, including the makers of some of Australia's most successful digital exports of the past decade. Further, the business models for video games are diverse and ever-evolving, and include purchase costs, advertising revenue, subscription fees and in-game purchases. This ensures that game businesses have significant flexibility and freedom in how they operate with the market and compete with each other.

Second, there are a number of significant and popular video game platforms, including the Nintendo Switch, Microsoft Xbox and Sony PlayStation, handheld devices including Android, iOS and Windows smartphones, and a variety of storefronts operating on PCs. These platforms need content from game developers just as much as game developers need these platforms, leading to a continued and strengthening competitive tension throughout the video games industry. Just as game developers have a wide range of choice of platforms for distributing their games (and selling their games concurrently on multiple platforms is often the norm), consumers likewise have a wide range of choice of devices and platforms for finding and playing the games that they love. This diversity and competition are likely to intensify as innovative new video game streaming services are launched over the coming months and years and they hungrily compete for content and audiences.

Third, companies in the sector have, since the birth of the industry, often spanned more than one category of video game business and have contributed to multiple segments of the value chains. This is normal, and it has helped to grow the industry and market. For example, video game console owners have invested in game development studios to ensure more and better games are brought to their platforms. Most major publishers are also game developers and may support their own ecosystem of studios who compete with each other in addition to the wider industry. Even many smaller independent Australian developers in recent years have expanded to games publishing services to diversify their revenues and to support fellow Australian and overseas game developers. We have also seen some major game publishers and developers expand into their own digital platforms and storefronts, competing directly with console owners and providing an increasing number of storefronts for developers and gamers to find each other.

Rather than reducing competition, we would argue that these industry trends have enriched the industry and fuelled the industry's growth by inhibiting monopolistic behaviour, increasing distribution channels, rapidly expanding the number of video game studios and increasing the commercial options available to individual video game businesses to succeed. It has also put

pressure on the profit margins of platforms and storefronts as they face fierce competition to secure good gaming content and audiences. This has benefited consumers by significantly expanding the choice of video game options available to game players. There has never been a time where video games have been more plentiful than now, and tens if not hundreds of thousands of new games are finding audiences every year.

The diversity and competition in the video games sector has also helped to lower the cost of video games, with an almost unlimited number of free games currently available in the market. In fact, some of the most popular games in the world right now are free to play. Even with paid games, there has been a universal trend of continually falling purchase prices for even the most expensively-produced 'AAA' video games - certainly adjusted for inflation, if not in outright purchase costs. At the same time, despite this increased competition the video games industry continues to grow in terms of investment dollars, number of businesses and workers all around the world.

### Comments on specific Inquiry recommendations

In this part of the submission we would like to address some of the ACCC's specific recommendations. However, other recommendations that we have not addressed are still relevant to our industry (eg. copyright, consumer law and contractual policy issues) and as we previously discussed, we will be monitoring the progress of the Government's consideration of all of the recommendations and look forward to further consultations as the Government's next steps become clearer.

#### Recommendation 1. Merger cases are to consider data issues and whether potential rivals would be removed from the market

*Section 50(3) of the Competition and Consumer Act 2010 (CCA) be amended to incorporate the following additional merger factors:*

*(j) the likelihood that the acquisition would result in the removal from the market of a potential competitor;*

*(k) the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.*

While this recommendation, if implemented, would be unlikely to have a significant impact on the video games industry, we would like to highlight the point that it is not unusual for video game console owners and platforms, including some operated by what the Government might consider digital platforms, to acquire other video game businesses. Often these acquisitions are of video game developers in order to obtain or ensure the continuation of successful video game titles that can be distributed on their platform. Rather

than being uncompetitive, these kinds of acquisitions have helped to increase the size of the industry and the variety of games available to consumers.

Video game development is a challenging business, with some games requiring thousands of workers and costing hundreds of millions of dollars to develop, let alone market. The investment by video game console owners into studios has led to investments worth hundreds of millions of dollars or more into game development annually and some of the most creative and successful titles in the world have been developed by studios backed by console owners. Foreign investment by video game companies has been vital to the growth and progress of Australia's homegrown game development industry and it is no coincidence that Australia's three largest game studios by headcount are all overseas-owned. In our view, none of this investment, overseas or at home, has had any impact on the competitiveness of the games industry, which remains diverse and vibrant.

We would like to be consulted on this recommendation should the Government pursue its implementation in one form or another. In particular, the merger factor relating to "the nature and significance of assets, including data and technology" is currently vague and unclear in its scope and focus. Like many other kinds of software companies, the assets of video game companies will often include innovative new technologies and collections of data, including the data that it has collected from users to ensure their video games run properly, safely and in a well-designed way. We believe none of this has had an effect on competition.

#### Recommendation 6. Progress with a process to implement a harmonised media regulatory framework

*A new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms. This would create a level playing field that promotes competition in Australian media and advertising markets.*

*The framework should reflect the evolving media landscape and be underpinned by a sound policy rationale based on the functions or impact of the regulated entities. The framework should include the following matters:*

- *Underlying principles: clear platform-neutral guiding principles that are applicable across media formats and platforms, and adaptable to new services, platforms and technologies*
- *Extent of regulation: determination of the appropriate extent of regulation and determining appropriate roles for self-regulation and co-regulation.*
- *Content rules: a nationally-uniform classification scheme to classify or restrict access to content consistently across different delivery formats.*
- *Advertising restrictions: a consistent system of advertising restrictions across all delivery platforms, including online and offline channels.*
- *Enforcement: appropriate monitoring and enforcement mechanisms accompanied by meaningful sanctions.*

*- Given the significance of this reform, the ACCC recommends it be approached in stages to ensure that regulatory disparities of immediate concern are promptly addressed.*

It is clear from the ACCC’s final report that the video games sector was not an industry of interest when the agency conducted the Inquiry. However, the scope of this recommendation and its discussion around content protection arguably includes video games. While we note that this recommendation likely seeks to address perceived differences in how online and broadcast linear screen content (ie. movies and programs) are regulated, its implementation would likely also have an impact on video games. In particular, we note that this recommendation advocates a nationally-uniform classification scheme to deal with content consistently across different delivery formats.

We support and continue to advocate for reform of the National Classification Scheme so that it is efficient, effective and deals with video games both offline and online fairly. Video games have historically – as well as currently - been treated more harshly than other forms of screen content like film and TV content. Video games for adults were not even legally allowed to be sold in Australia until the introduction of a R18+ classification for video games in 2012, achieved only after an almost ten-year campaign by IGEA, the industry and Australian game players. The current Classification Guidelines also include unreasonable rules around content in video games that do not similarly exist for film and TV and do not reflect contemporary Australian standards. While the Government has announced a review into these Guidelines, this review has not yet commenced.

We supported the Australian Law Reform Commission’s 2012 final report into Content Regulation and Convergent Media, which provided a model for reform of the National Classification Scheme. However, no Australian Government has responded to this report, let alone given thought to its implementation. Earlier this decade when video games increasingly moved online, the global video games industry developed the International Age Rating Coalition (IARC) tool for classifying online and mobile games, collaborating closely with the Australian Government which implemented it and contributes to its governance. However, broader reform to modernise the National Classification Scheme, which remains elusive, is still strongly needed.

Finally, we believe any consideration of this recommendation must also take into account the fact that if there is currently an unlevel playing field between ‘digital’ and ‘traditional’ content production and delivery entities, in at least some aspects we believe it favours the latter. For example, the commercial, public and subscription television broadcasters currently have the ability to self-classify all of their programs and movies and even design their own classification codes (subject to some minimum requirements). On the other hand, our members and other video game publishers continue to pay

hundreds of thousands of dollars each year in fees to have physical (boxed) and some digital games classified by the Classification Board, in addition to the significant investment that has been needed to build and maintain the IARC classification tool. The Australian film and TV industries are also supported by tens of millions of dollars in Screen Australia funding annually and much more in additional tax incentives and offsets, while Australian video game developers remain completely unsupported at the federal level.

Recommendations 12. Improve digital media literacy in the community

*A Government program be established to fund and certify non-government organisations for the delivery of digital media literacy resources and training based on frameworks currently used by the Online Safety Grants Program and Be Connected program administered by the Office of the eSafety Commissioner. The resources and training should be broadly delivered through community centres, libraries, schools and seniors centres for the benefit of all Australians.*

Our industry is one that takes its responsibility for online safety seriously and we are proud to sit on the eSafety Commissioner’s Online Safety Consultative Working Group. Video game businesses take a multi-pronged approach to online safety, including through a multitude of parental and family controls at both the console and game level in addition to providing information and guidance. We support ongoing and strengthened efforts to improve and teach digital media literacy in Australia in order to bridge the digital divide in the community and to ensure that Australian children and their parents and guardians are well equipped to navigate an increasingly digital social and economic landscape.

In particular, we consider that the Office of the eSafety Commissioner continues to have a lead role in community outreach and education, being one of its foundational responsibilities, but are worried that this outreach has suffered from an increasing focus and diversion of resources towards regulation and enforcement. For example, we note that large portions of the eSafety website, one of the Office’s most important tools for reaching communities, have not been updated for some time and are out of date to the point of irrelevancy. Furthermore, the status of the Office’s certified training providers program is currently unclear, following the cessation of funding in mid-2018.

Recommendation 13. Teach digital media literacy in schools

*The Terms of Reference for the review of the Australian Curriculum scheduled for 2020 should include consideration of the approach to digital media literacy education in Australian schools.*

We support a stronger focus on digital media literacy education in Australian schools and would like to highlight the opportunities that video games can provide. Many of our members, particularly those involved in gamification or

serious games, have worked with schools and education departments all around Australia to develop games for education. In fact, our [Digital Australia 2020](#) research told us that 52 per cent of Australian children had used games in school as part of their curriculum and classroom learning, that 23 per cent had used video games for co-curricular or after-school activities, and 26 per cent had developed video games in their school. We would be happy to discuss these results and opportunities further.

#### Recommendations 16 - 19. Various recommendations relating to privacy

*We note that the ACCC has made a number of recommendations in relation to privacy, including:*

- *Strengthening protections in the Privacy Act (recommendation 16),*
- *Broader reform of Australian privacy law (recommendation 17),*
- *An OAIC privacy code for digital platforms (recommendation 18) and*
- *A statutory tort for serious invasions of privacy (recommendation 19).*

Our primary response to these recommendations is that any reforms of privacy laws that are ultimately pursued need to be practical, evidence-based and carefully calibrated against benefit to the community and impact on industry, particularly for small to medium sized Australian businesses. Poorly designed reform proposals or reforms that are not fully informed of the current and future digital landscape run the risk of making changes that do not provide benefits to consumers while also severely impacting the businesses that provide goods and services to them. Given that the privacy-related recommendations are among the most significant recommendations from the Inquiry, we would expect considerably greater consultation in the future.

Like most other businesses that have Australian customers, in both digital and traditional industries, video game companies collect data in compliance with strict data protection and privacy policies for uses that are essential to how they operate. These include to:

- Help the business identify and address software bugs and to protect the business's network security, particularly around customer data
- Monitor user activity within games and communication channels to help protect game players from inappropriate behavior including harassment and discriminatory language
- Comply with government regulations at home and abroad, such as certain criminal and online safety laws
- Enforce corrective and disciplinary action against individual game players (such as suspensions and bans)
- Monitor and implement a variety of parental and family controls on gaming platforms and in games

- Monitor and implement integrity measures within games to combat cheating and to ensure fairness within gameplay is protected
- Implement various technological protection measures to help combat piracy and copyright infringement
- Improve a player's experience by dynamically adjusting game difficulty settings and, in multiplayer games, to match the player with other players of a similar difficulty level
- Allow game businesses to better understand how players interact with a game, which will help them to fix faults, make improvements and design even better games in the future (in fact, it is a universal expectation of game players that their data is used by the developer to improve the balance or 'meta' of gameplay)
- Encourage and facilitate the creation and sharing of user-generated game content by players.

We would urge caution around the consideration of any legal changes or policy reforms to privacy laws that may disadvantage the ability of video game businesses to use data to better protect players and their data or to continually improve the quality of the products and services that they provide to players. While we fully appreciate and support the desire for ensuring clear and understandable consent is given, a requirement for significant increased and more onerous consent requests could cause consent fatigue that could paradoxically lead to a worse outcome for consumers. Broader reforms of privacy laws should also, to the extent possible, be consistent with successful, effective and supported reforms that have been tried and tested overseas in order to facilitate timely and efficient implementation.