Law Council OF AUSTRALIA

Business Law Section

3 March 2023

Director, Digital Competition Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: digitalcompetition@treasury.gov.au

Dear Director

DIGITAL PLATFORMS—CONSULTATION ON REGULATORY REFORM

1. This submission concerning the Government's consultation on the Australian Competition and Consumer Commission's (**ACCC**) Digital Platforms regulatory reform recommendations is made by the following Committees of the Business Law Section (the **Section**) of the Law Council of Australia:

- Competition and Consumer Committee;
- Digital Commerce Committee;
- Intellectual Property Committee;
- Media and Communications Committee;
- Privacy Law Committee; and
- SME Business Law Committee (**SME Committee**).

Key Points

2. The key matters the Section wishes to bring to Treasury's attention are as follows:

   (a) The introduction of any industry-specific legislation should not be duplicative and the principles of regulatory best practice developed by the Council of Australian Governments (**COAG**) should be applied in the development of any digital platform regulation.

   (b) In order to reduce uncertainty and unintended consequences, the Section submits that it is critical to consider the sequencing and consistency of law reform proposals that impact the digital economy. Any digital platforms law reform proposals should be developed in light of, and in a consistent manner with, current law reform proposals in relation to the digital economy—including efforts in relation to privacy law reform, eSafety law reform, misinformation and disinformation reform, unfair contract law reform, the implementation of the National Anti-Scams Centre, initiatives in relation to Digital Identity, and copyright enforcement reform. Additionally, the differing information and cyber security standards that may emerge between suppliers in supply chains that may include critical infrastructure (bound by the *Security of Critical Infrastructure Act 2018* (Cth) (**SOCI Act**) and rules, including data storage and processing sectors, research sectors and communications sectors). The Section observes

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the risk of unintentionally reducing competition in the digital economy where 'digital' is the common denominator but the ability to meet higher regulatory standards is inequitable.

(c) With respect to governance the Section notes that:

(i) there should be a separation of roles and responsibilities for the designation of digital platform services, the design and review of a regulatory code; and the enforcement of any regulatory regime for digital platforms.

(ii) In any proposed regulatory regime, digital platforms and other affected stakeholders should have the right to apply for merits review of designation decisions.

(iii) Any code or legislation that is implemented should be the subject of consultation, and once implemented, subject to regular review to ensure continuing efficacy.

(d) The Section recommends that Treasury have regard to the regulatory approaches to digital platforms taken in other jurisdictions.

Principles for the development of good governance

3. Treasury's Consultation Paper invites interested parties to provide their views on whether specific digital regulation is warranted. Outlined below are the principles that the Section considers should apply.

4. The Section particularly refers to the principles of best practice which the COAG (now replaced by the National Federation Reform Council, National Cabinet) has agreed in respect of the development of regulation.[1] Specifically, it states that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

(a) establishing a case for action before addressing a problem.

(b) considering a range of feasible policy options, including self-regulatory, coregulatory and non-regulatory approaches, and their benefits and costs assessed.

(c) in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:

(i) the benefits of the restrictions to the community outweigh the costs; and

(ii) the objectives of the regulation can only be achieved by restricting competition,

(d) providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;

[1] Department of the Prime Minister and Cabinet, *Principles of best practice regulation* (2021) <https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>.

(e) ensuring that regulation remains relevant and effective over time;

(f) consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and

(g) ensuring that any government action is effective and proportional to the issue being addressed.

5. Accordingly, the Section submits that industry-specific legislation should only follow where there is evidence that existing laws and regulations are insufficient to address the concerns raised by the ACCC in its Digital Platform Services inquiry *Interim Report No 5—Regulatory Reform* (**Interim Report No 5**).[2] The Section encourages the Treasury to undertake a gap analysis to identify areas where existing laws are inadequate.

6. The Section submits that the introduction of any industry-specific legislation should not be duplicative. Consumer protection provisions and prohibitions against anti-competitive conduct under the *Competition and Consumer Act 2010 (Cth)* (**CCA**) already apply broadly. While the Section accepts that industry-specific legislation or regulation may be appropriate in some circumstances where evidence of harm exists and there are current examples, careful consideration should be given to any unintended consequences that may arise from having industry-specific legislation that overlaps with the CCA and the existing enforcement powers and resources of the ACCC. In this regard, the Section welcomes the Treasury's consultation on 'the extent to which some or all of the benefits of the proposed new measures could be achieved through existing general consumer and competition regulatory protections', and '[m]ore broadly, all policy alternatives need to be assessed, including voluntary or self-regulatory approaches'.

Coordination with other Government policies and processes

Do you see any conflicts between any of the recommendations and existing Government policy? 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?

7. The growth of the digital economy and changes to the way in which businesses engage with their supply chain and end users in the digital economy is driving regulators in several specialist areas to consider the effectiveness of their regulatory frameworks.

8. It is important that as reforms to the digital economy move forward, these reform processes remain cognisant of both the existing and emerging regulatory landscape, keeping an eye on overlapping schemes, recognising the pre-existing regulatory burdens that have already been placed on certain sectors and seeking out opportunities for alignment and removal of duplication where possible. It is also critical that a harmonised approach is taken across regulators to ensure consistency and avoid duplication or fragmentation. In this regard, the Section welcomes the Treasury's observation that 'recommendations of the Inquiry need to be examined within a broader context of Government policy affecting digital platforms'.

[2] Australian Competition and Consumer Commission, 'Digital Platforms Services inquiry - Interim Report No 5 - Regulatory Reform' (September 2022) <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

9. The Section is encouraged to hear that the ACCC, the Australian Communications and Media Authority (**ACMA**), the Office of the Australian Information Commissioner and the Office of the eSafety Commissioner have recently come together to form the Digital Platform Regulators Forum to facilitate cooperation between digital platform regulators, including approaches to regulation.

10. As acknowledged in the Consultation Paper, several competition and consumer policy reforms have been introduced recently, including the passing of legislation prohibiting unfair contract terms, the Consumer Data Right, regulation of security of critical infrastructure, and funding for the development of a National Anti-Scam Centre. In the last 12 months, the Section has seen multiple concurrent law reform initiatives which touch on the same, or closely related, subjects. This includes the Statutory Review of the Consumer Data Right on 29 September 2022 (leading to 16 recommendations to further develop the CDR regime) as well as several other significant law reform proposals.[3] Many of these initiatives are in the process of being implemented and are expected to have a significant impact on the regulatory landscape for the digital sector. For example:

    (a) **Privacy law reform:** On 16 February 2023, the Attorney-General's Department released a report setting out 116 reform proposals (**Privacy Act Report**).[4] The proposals, if adopted, will introduce significant economy-wide changes, many of which are directly relevant to the operation of digital platforms and the rights of their respective individual users. These include expanding the scope of privacy regulation to types of de-identified data, the introduction of more prescriptive privacy rules and new rights such as the right to 'fair and reasonable' collection, use and disclosure,[5] greater alignment with European Union (**EU**) data protection laws, a specific focus on online services, and the empowerment of regulators to play a more active enforcement role.

    The Attorney-General's Department is seeking submissions in response to the Report by 31 March 2023. Given the complexity and potential major economic impact of the proposals, the Privacy Act Report indicates that a number of the more significant or technical proposals made should be subject to additional consultation (for example, in relation to removal of, or adjustments to, the exemptions for small businesses and employee records, and on the significant changes to rules on direct marketing and targeting). Following that consultation, draft legislation will need to be prepared to give effect to the proposals.

    (b) **eSafety law reform:** On 23 January 2022, the *Online Safety Act 2021* (Cth) (**OSA**) came into effect. In addition to the introduction of a new legislative framework, the OSA also provides for industry bodies or associations to develop new codes to regulate certain types of harmful online material, and for the eSafety Commissioner to register the codes, if they meet the statutory requirements and provide appropriate community safeguards.

    On 11 April 2022, the eSafety Commissioner issued notices to six industry associations formally requesting the development of eight mandatory, enforceable codes to apply to social media platforms, electronic messaging services, online games and other relevant electronic services, websites and

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[3] Australian Government, *Statutory Review of the Consumer Data Right Report* (September 2022) <https://treasury.gov.au/sites/default/files/2022-09/p2022-314513-report.pdf>.
[4] Attorney-General's Department, *Privacy Act Review Report* (16 February 2022) <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>.
[5] Ibid Proposal 12.2.

other designated internet service, search engines, app distribution services, internet service providers, hosting service providers and manufacturers and suppliers of equipment used to access online services and people who install and maintain equipment.

Industry associations submitted draft codes to the eSafety Commissioner for registration on 18 November 2022 and the eSafety Commissioner is continuing to provide feedback and to work closely with the online industry in relation to the development of these codes.

The development of these codes reflects the first phase of the development of eSafety Codes, and the eSafety Commissioner has indicated that this will be followed by a second phase involving the development of additional eSafety codes.

(c) **Misinformation and disinformation:** On 20 January 2023, the Federal Government announced that it intends to legislate to provide ACMA with new powers to hold digital platforms to account and improve efforts to combat harmful misinformation and disinformation in Australia. This will involve:

(i) giving ACMA new information-gathering and record-keeping powers to create transparency around efforts by digital platforms to respond to misinformation and disinformation on their services, while balancing the right to freedom of expression so fundamental to democracy; and

(ii) providing ACMA with new powers to register an enforceable industry code and to make a standard, to address the threat posed by misinformation and disinformation.

The Government has announced that the legislation will include measures to protect Australians, such as stronger tools to empower users to identify and report relevant cases.

The Government has also announced that it intends to undertake public consultation on the powers through the release of an exposure draft Bill in the first half of 2023 and introduce legislation into Parliament later this year following consultation.

(d) **Unfair contract law reforms:** On 10 November 2022, the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) came into force. Following a 12-month grace period, on 10 November 2023, the following amendments will take effect:

(i) prohibition against proposing, applying or rely on unfair contract terms in standard form consumer or small business contracts;

(ii) expansion of the application of the unfair terms provisions to a broader range of small business contracts;

(iii) the regime will apply to businesses with less than 100 employees or an annual turnover of up to $10 million; and

(iv) there will no longer be a monetary ceiling for the value of contracts subject to the Australian Consumer Law regime, while the threshold in the

Australian Securities and Investments Commission Act 2001 (Cth) will be raised from $300,000 to $5 million.

These reforms followed a significant period of consultation with Australian Government and the ACCC.

(e) **Cyber security and security of critical infrastructure reforms**: Two sets of amendments to the SOCI Act received Royal Assent in December 2021 and April 2022 respectively.[6] The reforms expand the number of critical infrastructure assets regulated under the SOCI regime. Unlike in Singapore, currently the media and digital platforms are not directly identified as a critical infrastructure sectors under the SOCI Act. However, many digital platforms are regulated directly under SOCI as critical data storage or processing assets,[7] or as part of a supply chain or of a new regulated sector of the economy.

It should be noted that to the extent there is overlap between sectors or a supply-chain dependency, there is a risk of non-compliance as well as a risk of promoting commercial relationships with partners from 'high-standard' jurisdictions at the expense of local suppliers.

Additionally, the regime relies on a broad set of rules, many of which are yet to be made and are likely to overlap and traverse matters to be addressed as part of this inquiry noting the overlap of security controls and the privacy of users and their experiences when interacting with digital platforms.[8]

11. In addition, the Australian Government is continuing to explore multiple law reform proposals and other initiatives that have overlapping implications and relevance to the digital economy, including a broader consultation on the implementation of an economy-wide prohibitions against unfair business practices, the payments system reform and Government initiatives in relation to Digital Identity. The Australian Government has also allocated substantial resources towards the development of National Anti-Scams Centre. This centre is in the process of being established by the ACCC, in collaboration with other agencies.[9]

12. Further, the Attorney-General's Department has recently commenced the Copyright Enforcement Review, which includes within its scope the role of digital platform services in relation to licensing agreements, notice and take-down measures and liability for infringement. In that context policy settings specific to intellectual property matters are to be considered. It would accordingly be undesirable for the present proposals (for example by way of generalised or specific unfair dealing norms) to inadvertently affect existing intellectual property rights, in particular in a manner which may cut across those settings.

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[6] See *Security Legislation Amendment (Critical Infrastructure) Act 2021* (Cth); and *Security Legislation Amendment (Critical Infrastructure Protection) Act 2022* (Cth).

[7] See section 12F, Security of Critical Infrastructure Act 2018

[8] Australian Competition and Consumer Commission, 'Digital Platforms Services inquiry - Interim Report No 5 - Regulatory Reform' (September 2022) [6.5.3] <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf>.

[9] Australian Competition and Consumer Commission, 'ACCC receives additional responsibilities in budget' (Media Release, 26 October 2022) <https://www.accc.gov.au/media-release/accc-receives-additional-responsibilities-in-budget>.

13. Given the active, and ongoing, development of a range of new regulatory frameworks in the digital sector it is important that there be a concerted effort to avoid fragmentation in the various Australian reform processes, and that the sequencing of law reform proposals and developments is carefully considered. This will be critical to reduce uncertainty and unintended consequences for those subject to multiple regulatory frameworks. The Section is of the view that a complementary and holistic approach is important for improving transparency for consumers and small businesses as well as for regulatory consistency.

Governance

Who should be responsible for the design of the proposed codes, designating platforms, and enforcement?

14. The regulatory reform proposals in Interim Report No 5 broadly involve a three-stage process of administrative decision-making:

    (a) the decision to designate specific digital platform services as 'Designated Digital Platforms';

    (b) decisions concerning the design of a regulatory code, including the scope of the code's application, and the content of the obligations therein; and

    (c) the enforcement of the regulatory regime (being taking enforcement action against Designated Digital Platforms that do not comply with code obligations that apply to them).

15. The Section submits that the designation of Designated Digital Platforms and decisions concerning the formulation of a regulatory code should be undertaken by independent entities with appropriate expertise. The Section further submits that enforcement of the regime should be the responsibility of a separate entity, most likely the ACCC.

16. The separation of administrative powers in a multi-faceted decision-making process provides a necessary and important layer of oversight within the process, promotes confidence in the independence of administrative decision-making, and prevents the apprehension of bias on the part of decision makers.[10]

17. For example, if the ACCC (or another independent agency) was vested with responsibility for all three decision-making processes, this could create the real risk of perceived bias, as the ACCC's independence could be jeopardised if it were responsible for determining to whom regulatory obligations should apply; the content of those obligations; and assessing compliance. The risk of perceived bias is arguably acute given the ACCC's role throughout the Digital Platform Services Inquiry and the views it has already expressed about participants in the digital platform service industry throughout that inquiry.

[10] Business Law Section, Law Council of Australia, Submission to the Treasury, *Timeliness of processes under the National Access Regime* (19 April 2021) [38] <https://www.lawcouncil.asn.au/resources/submissions/timeliness-of-processes-under-the-national-access-regime>.

18. This separation of roles and responsibilities is consistent with other comparable regimes in the CCA as observed by the Treasury in its Consultation Paper,[11] such as:

    (a) the *News Media and Digital Platforms Bargaining Code*, where the Treasurer is responsible for the designation of digital platform services (that is, determining who will be subject to the Code), while the ACCC has the relevant enforcement powers; and

    (b) the National Access Regime in Part IIIA of the CCA, where the National Competition Council reviews applications for the declaration of nationally significant infrastructure services and then provides a recommendation to the designated Minister (who then decides whether to declare the relevant service). Once a service is declared, the ACCC then has the power to arbitrate any disputes as to the terms and conditions of access.

19. The Section submits that the decision to designate specific digital platform services should not be made by the ACCC but, consistently with these comparable regimes, should be made by the Treasurer.

20. As noted by the Treasury in its Consultation Paper,[12] the ACCC has recommended that the appropriate regulator be responsible for developing codes in consultation with the policy agency and that this regulator would also be responsible for enforcement. The Section submits that it would be more appropriate to maintain separation between those roles. That is, the content of any codes that a Designated Platform is required to comply with should be developed, drafted and implemented by executive government and parliament, just as industry codes are developed, drafted and implemented under Part IVB of the CCA. The ACCC should be consulted in that process, but if the ACCC is also to enforce compliance, it is more appropriate that it is not also the body that sets the rules which it will then enforce.

21. If it is shown there is a need to grant rule-making powers to the ACCC or another administrative body that enables that body to impose prohibitions and obligations without the need for legislative approval, such powers should be subject to appropriate checks and balances.

22. The clear demarcation of these roles and responsibilities promotes the independence of, and confidence in, these administrative decision-making processes and assists in ensuring that administrative decision-making as part of the regulatory regime is rigorous and well-reasoned.

What checks and balances should be placed on decision makers and across the various stages of the policy?

23. The Section believes that any regulatory proposal for digital platforms should include:

    (a) the capacity for Designated Digital Platforms or those who interact with the platforms to apply for review of designation decisions;

    (b) scope for consultation on content of any code or regulation, including regulatory impact assessment; and

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[11] The Treasury, *Digital Platforms: Government consultation on ACCC's regulatory reform recommendations* (Consultation Paper, December 2022) 11.

[12] Ibid 12.

(c) regular review of any code or regulation that is implemented.

Review of designation and enforcement decisions

24. The Administrative Review Council (**ARC**) has developed a well-established set of general principles to provide guidance to assist in the development of proposals or legislation that create administrative powers of decision. As the ARC states in those principles:

> *if a decision is likely to have an effect on the interests of any person, that decision should be open to be reviewed on the merits… If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by a decision, and a risk of losing the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.*[13]

25. Any decision to designate, or not to designate, whether by the Treasurer (as the Section recommends), or by the ACCC or some other body, will have an effect on the interests of the platform that is designated, and persons who interact with that platform and therefore should be reviewable on the merits.

26. Merits review enables a person aggrieved by the actions of an administrative decision maker to have that decision reviewed on its merits, or to challenge a finding of fact. In general, merits review is the process by which a person or body:

    (a) other than the primary decision maker;

    (b) reconsiders the facts, law and policy aspects of the original decision; and

    (c) determines what is the correct and preferable decision.[14]

27. On review, the reviewer or review body stands in the shoes of the original decision maker and exercises the powers and functions of that decision maker. The result of the review is the affirmation, variation or setting aside of the original decision. This ensures fair treatment of all persons affected by the decision, improves the quality and consistency of decisions and ensures that openness and accountability of decisions made by government are enhanced.[15]

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[13] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) [2.4]-[2.5] < https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.
[14] Ibid [1.1].
[15] Ibid [1.2], [1.4], [1.5].

The objectives of merits review (Administrative Review Council, 1999)[16]

The principal objective of merits review is to ensure that administrative decisions are:

- ***correct***—in the sense that they are made according to law; and
- ***preferable***—in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

This objective is directed to ensuring fair treatment of all persons affected by a decision.

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.

28. As the Section has previously observed,[17] merits review provides the only means to correct decisions made by an administrative decision maker on the basis of incorrect facts. Judicial review rarely allows for factual errors (other than jurisdictional errors) in decisions to be revisited or corrected. The court's concern in judicial review proceedings is limited to whether the legal framework for decision-making was observed, and whether the law was properly understood and applied by the decision-making in making the decision.[18] Particularly with respect to designation decisions, accurate understanding of factual matters will be critical to determining whether an entity ought to be designated under any new regulation or code; as such it is appropriate that there is an embedded ability to review factual accuracy within this regime.

29. The decision to designate a specific digital platform service will enliven substantial (and potentially onerous) obligations on service providers, as well as compliance costs, possible implications for intellectual property rights and the need to tailor global products in an Australia-specific manner to comply with the regulatory obligations envisaged by the ACCC. It is not a legislative decision of broad application (which is subject to the accountability safeguards that apply to legislative decisions), or a decision that automatically follows from the happening of a set of circumstances (which leaves no room for merits review to operate).[19] It is therefore not, by its nature, a decision that is unsuitable for review on the merits.

30. In addition to merits review, the Section strongly supports the availability of judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* (and related jurisdictions)[20] on questions of law arising from designation, and other decisions, taken under any proposed code.

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[16] Ibid [1.3]-[1.5].
[17] Business Law Section, Law Council of Australia, Submission to the Treasury, *Timeliness of processes under the National Access Regime* (19 April 2021) 10-18 <https://www.lawcouncil.asn.au/resources/submissions/timeliness-of-processes-under-the-national-access-regime>.
[18] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145, [5].
[19] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) [3.1] <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>.
[20] *Judiciary Act 1903* (Cth), s 39B.

31. The Section acknowledges the criticisms that have been made of the length of time it has taken for the outcome of merits review and appeals processes in the context of Part IIIA. The Section submits that these risks can be reduced by:

    (a) structuring any regime so that the process of designation can be instigated only by the Treasurer or the ACCC; and

    (b) including measures such as clear process and timing requirements that decision makers and interested parties must comply with.

Review of Code content

32. It would be preferable for any industry-specific digital regulation to be implemented by way of legislation or regulation rather than providing rule-making powers to the ACCC or another body.

33. However, the Section considers that any grant of rule-making powers to the ACCC or another body that enables it to impose prohibitions and obligations without the need for legislative approval should be subject to rigorous and independent checks and balances—including the availability of a merits based right to appeal any decisions made by the ACCC or other responsible body to impose any Code or rules.

34. As the Section has previously observed,[21] an alternative to granting rule-making powers to the ACCC or another body may be to enable regulations to be created under the broad statutory prohibitions to address specific issues. These regulations would be made by the Australian Government on the recommendation of the ACCC or other body (as applicable) which would consequently have the benefit of having been appropriately reviewed and considered by the legislature before being implemented. These regulations would also be subject to the usual disallowance regime by either House of Parliament. The same scrutiny would also be a benefit of codes legislated under Part IVB of the CCA.

35. The Section refers to the principles of best practice agreed by the then COAG in respect of the development of regulation,[22] which states that all governments should ensure that regulatory processes in their jurisdiction are consistent with the following principles:

    (a) providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;

    (b) ensuring that regulation remains relevant and effective over time; and

    (c) consulting effectively with affected key stakeholders at all stages of the regulatory cycle.

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[21] Law Council of Australia, Submission to Australian Competition and Consumer Commission, *Digital Platforms Services Inquiry: Discussion Paper for Interim Report No.5* (2 May 2022) [65] <https://www.lawcouncil.asn.au/resources/submissions/discussion-paper-for-interim-report-no--5--updating-competition-and-consumer-law-for-digital-platform-services>.
[22] Department of the Prime Minister and Cabinet, *Principles of best practice regulation* (2021) <https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>.

36. Consistent with these principles, the Section believes that the implemented regulatory regime be subject to regular review and consultation by relevant stakeholders to ensure that it continues to achieve its objectives, and to consider whether amendments are required. The Section refers to the *Australian Government Guide to Better Regulation* which contains ten principles for Australian Government policymakers, one of which is that all regulation should be periodically reviewed to test its continuing relevance.[23]

37. This is common practice for comparable codes under the CCA—for example, the *News Media Bargaining and Digital Platforms Code* was reviewed after a year and the *Food and Grocery Code of Conduct* which was reviewed after 3 years.

What information gathering and investigatory powers should regulators have to adequately monitor multi-national companies?

38. The Section recognises that section 155 of the CCA provides the ACCC with a power of investigation that is fundamental to its ability to monitor for and enforce compliance with the CCA and related legislation. The *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022* (Cth), which took effect from December 2022, has extended the powers provided by section 155 to allow for issuance of notices to persons outside Australia.

39. The Consultation Paper notes that the ACCC in Interim Report No 5 raised concerns about the need for greater information-gathering and monitoring powers to allow the ACCC to obtain information from digital platforms,[24] including from parent companies and related bodies corporate in overseas jurisdictions. The Section considers that this concern has been adequately addressed by the amendments made to section 155 in late 2022.

40. To the extent a regulator other than the ACCC takes a role under the new regime including designation, that regulator should also have appropriate powers to gather accurate information from multinational companies to ascertain whether designation or enforcement is appropriate.

Priority and alignment with international developments

Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate? What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions? Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?

41. The Section agrees with the observations of the Treasury in the Consultation Paper that 'given the international nature of digital markets and the current global developments in regulating them, any Australian response to the recommendations in the ACCC's Interim Report No 5 will need to take careful account of international developments.'

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[23] Department of the Prime Minister and Cabinet, *The Australian Government Guide to Regulation* (2014) <https://apo.org.au/sites/default/files/resource-files/2014-03/apo-nid270966.pdf>.
[24] The Treasury, *Digital Platforms: Government consultation on ACCC's regulatory reform recommendations* (Consultation Paper, December 2022) 12.

42. If the Australian Government determines that the competition and consumer harms that the ACCC has identified justify sector-specific (and/or service-specific) regulatory reform, the Section agrees with the Treasury that any Australian response should carefully consider and leverage learnings from other jurisdictions. As the Treasury has observed, Australia is currently in a unique position in which it can 'leverage international regulatory approaches and industry undertakings overseas as they are developed, better aligning Australia with larger markets and benefiting from the rules implemented in other jurisdictions'.

43. The Section recognises that there are significant efficiency benefits to international alignment, both in the law reform and enforcement process. Compatibility with international regimes is also likely to facilitate cross border international trade, given the global nature of digital platform businesses. At the same time, the Section emphasises that any consideration of overseas reforms must take into account commercial and market realities, as well as existing regulatory frameworks, in Australia.

44. At this stage, the Section does not advocate for the adoption of any specific overseas regime, but considers it appropriate that the Treasury have regard to the approaches taken in, for example, the UK's *Digital Markets, Competition and Consumer Bill,* the European Union's *Digital Markets Act* and *Digital Services Act*, and the bills currently under consideration in the United States Congress.

45. In considering the regulatory frameworks proposed and/or adopted overseas, the Australian Government must carefully consider the commercial and market realities in Australia, to ensure that any regulatory reform in Australia is fit for purpose in the domestic economy. To the extent that harms targeted by regulators and governments overseas have not arisen in Australia, adopting such approaches may result in unnecessary and excessive regulation. The ACCC itself has recognised that there are differences in market dynamics in Australia.[25]

46. The Australian Government should also be careful to ensure that any regulatory reform is consistent with existing regulatory frameworks in Australia. Other jurisdictions may have fundamentally different existing competition and consumer law regimes, with fundamentally different approaches to enforcement, decision-making and appeal rights, which may not be fit-for-purpose or immediately transferrable in an Australian context. In addition, the Australian Government should carefully consider whether the full scope of overseas reforms are necessary in Australia, noting the comprehensive coverage of our existing laws as well as current proposals. For example, a broad prohibition on unfair practices is unique to Australia and may address several of the potential harms identified in the ACCC's report.

47. Any delays in implementing regulation to learn from the experiences of other jurisdictions (positive and negative) should be balanced against such matters as the need to address the underlying policy mischief that has been identified by the ACCC and others in Australia. The appropriate balance and timing is a policy matter for the Australian Government in weighing the competing policy considerations.

[25] Ibid 14, 54- 56, 110-111, 186-7, 196 - 197.

Additional comments of the SME Committee

48. The SME Committee wishes to make the following supplementary comments;

49. The SME Committee agrees with the ACCC's description of the prevalence and nature of the harms to consumers and small businesses resulting from the conduct of digital platforms. Conduct such as self-preferencing, lack of transparency and unresponsive dispute resolution processes cause both consumers and small businesses considerable detriment. Both the ACCC and overseas regulators have found that similar practices are being engaged in by digital platforms in different jurisdictions.

50. The SME Committee agrees with the ACCC's recommendation to introduce targeted measures on digital platforms to prevent and remove scams, harmful apps and fake reviews. No discernible action has been taken by certain digital platforms to counter the proliferation of harmful scams and fake reviews which are causing consumers and small business considerable damage. The use by digital platforms of dark patterns is also well documented. For example, see the recent settlement between the Federal Trade Commission and Epic Games Inc (**Epic**), requiring Epic to pay a total of $US 520 million for privacy and dark pattern breaches.[26] Interestingly, the financial settlement for consumers in relation to dark pattern breaches was limited to US consumers despite the same practices being used in other jurisdictions including Australia.

51. The SME Committee supports the proposed notice and action mechanism recommended by the ACCC for consumer measures. This notice and action process is consistent with the approaches which have been proposed overseas in relation to similar issues.[27]

52. The SME Committee also supports the new independent external ombudsman scheme to resolve consumer and small business disputes. SME Committee members have first-hand experience in the problems experienced by small businesses in seeking to resolve disputes. The responses from digital platforms to small business complaints can be slow and generally unresponsive, relying heavily on AI generated pro forma responses. By way of example, in one case it took a small business more than 18 months to have its business listing restored after the listing was hijacked by a competitor who changed the relevant contact details on the site to show their own details and thus capture the small business's custom.

[26] Federal Trade Commission (US), 'Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars over FTC Allegations of Privacy Violations and Unwanted Charges' (Press Release, 19 December 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations>.

[27] See Australian Competition and Consumer Commission, 'Digital Platforms Services inquiry - Interim Report No 5 - Regulatory Reform' (September 2022), which identifies at [4.5.1] that '[n]otice-and-action mechanisms are also being considered for digital platforms in the UK and will soon be required in Europe'.

Contact

53. The Section would be pleased to discuss any aspect of this submission. Please contact Jessica Morrow, Section Administrator at Jessica.Morrow@lawcouncil.asn.au in the first instance if you would like to do so.

Yours faithfully

Philip Argy
Chairman
Business Law Section