

03 March 2023

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

## **Re: Digital Platforms: Government consultation on ACCC's regulatory reform recommendations**

### **About the Tech Council of Australia**

The Tech Council of Australia (TCA) is Australia's peak industry body for the tech sector. We represent around 160 companies from a diverse cross-section of Australia's tech sector, including companies working in business enterprise software, consumer software, telecommunications, fintech, venture capital and digital platform services.

The tech sector is a key pillar of the Australian economy, contributing \$167 billion per annum to GDP and employing over 860,000 people. Together, the tech sector is equivalent to Australia's third largest industry, after mining and banking, and Australia's seventh largest employing sector.

### **Introduction**

The TCA welcomes the opportunity to participate in the Treasury's consultation on the ACCC's fifth interim report for its Digital Platform Services Inquiry.

The TCA's membership encompasses a wide breadth of the digital platforms ecosystem – including a selection of major multinational digital platform service providers, Australian platform companies and consumers of platform services. As such, we approach this consultation seeking the best outcomes for the Australian tech ecosystem, consumers and the broader economy.

The ACCC's fifth interim report has examined a number of important issues about how to enable a competitive and consumer-centric market for the growing digital economy. This is a shared objective of the Tech Council and fundamental to the effective functioning of our economy.

As Treasury notes in its paper, providers of digital platform services play a central role in facilitating efficient interactions between consumers and businesses. This highlights the need for thoughtful, evidence-based and well-designed reform.

Most businesses and consumers in Australia now rely on multiple digital platform services. This not only includes the digital platform services of large multinational tech companies, but may also include the services of Australian platform success stories such as Canva, SEEK, REA Group, Carsales, and Xero. While the focus of the ACCC's work has been on the competition and consumer risks, it's important not to overlook the pro-competition and pro-consumer benefits platforms have provided. These benefits range from lowering barriers to entry for e-commerce, to opening up greater consumer choice, improving access to information and driving improved service delivery.

Given the diversity of digital platform services delivered by different companies – from internet search engines and social media to private messaging, electronic marketplaces and cloud services – one of the most important design principles for any future regulatory reform agenda is to not treat digital platform services or companies as homogenous, nor to take a one-size-fits-all approach.

Placing “digital platform services” into a single reform basket is analogous to embarking on reform to something as broad as “primary industries”. No Australian jurisdiction would regulate the mining, agriculture and forestry sectors as if they were a single homogenous sector with identical market dynamics and conditions.

If we look just at three large digital platforms within the Tech Council membership – Google, Microsoft and AWS – there are considerable differences in the services, purposes, customer bases and business models they use. Google Search and Google Maps, for example, serve an entirely different purpose and market compared to the Microsoft 365 suite or the AWS cloud. These services are vastly different again compared to social media or electronic marketplaces. This is a key point recognised by the ACCC in its inquiry report.

In addition to this important observation, there are a range of other principles the Tech Council espouses for best practice regulation of the digital economy, including digital platform services. These include that regulation is:

- Informed and coordinated – underpinned by rigorous analysis and industry engagement, with thoughtful consideration of the interrelationships with other policies and regulation;
- Proportionate – taking a risk-based approach targeted at addressing a clearly defined problem and avoiding unintended consequences such as increasing barriers to entry or inadvertently capturing other parts of the tech sector;
- Timely – to ensure Australia maintains a competitive place in the global market;
- Consistent and interoperable – including with global and domestic regulation to improve the ease of doing business and maintain Australia's investment attractiveness; and

- Has a bias to innovation and growth – including by avoiding prescriptive technical requirements that may become quickly outdated or inhibit innovation.

The tech sector also has growing concerns about governance frameworks for digital economy policy and regulation. Regulators are increasingly playing a role in designing and developing digital economy policy and regulation, beyond their traditional role of compliance and enforcement. This can result in insufficient oversight by the Parliament or the Government, who are better placed to consider the broader economic and social trade-offs of these decisions. It also means there isn't an appropriate division of policy and regulatory responsibilities. On a more positive note, we are pleased to see increased coordination and collaboration between regulators to address cross-cutting digital platform regulatory issues through the Digital Platform Regulators Forum. This coordination approach could be expanded to encompass digital economy policy more broadly.

We suggest that any reform should be developed with these underlying principles in mind. Our submission offers an Australian tech sector perspective on the important role digital platforms are playing in our economy and provides considered feedback on the proposals from the ACCC.

**Recommendation 1:** Avoid taking a one-size-fits-all approach to the digital platforms regulatory reform agenda – recognising the vast differences between digital platform companies, services and business models – and ensure regulation is informed by the following best practice principles for regulating the digital economy:

- Informed and coordinated
- Proportionate
- Timely
- Consistent and interoperable
- Bias to innovation and growth

**Recommendation 2:** Continue to support the existing Digital Platform Regulators Forum as a means to improve coordination between relevant regulators on cross-cutting digital platform regulatory issues and risks, and examine how to further improve cross-government coordination on digital economy policy (such as through the tech policy coordination model proposed by the ANU Tech Policy Design Centre).

## **Role of digital platforms in Australia's tech ecosystem and broader economy**

Australia's tech sector's foundations were laid by commercial tech companies, including IBM which first began its Australian operations in the 1930s and Microsoft which arrived in the 1980s. The next wave came in the mid-1990s with the emergence of local dotcom boom companies such as SEEK, realestate.com.au and carsales.com.au. The 2000s marked the growth of the local software sector, which has accelerated rapidly from 2010. It also saw continued investment by global firms, with

Google opening its second only office outside the US in Australia in 2002, and AWS entering Australia in 2012.

One of the features driving the rapid growth of the Australian software sector over the last two decades have been the foundational investments in cloud infrastructure by global tech companies such as Microsoft, Google and AWS. While these companies bring significant economic contributions of their own, their global hyperscale cloud capabilities have enabled the emergence of Australian-based SaaS platforms by supporting Australian software companies to scale globally and reducing barriers to entry. This is important because tech companies are born with the intention of becoming global – operating in multiple regions and nations, having a diversified workforce and tapping into a global market of customers. Our research shows that SaaS is now one of the most successful segments of Australia's tech sector and the most successful new industry in Australia in the last decade.<sup>1</sup>

The adoption of SaaS platforms has democratised access to productivity-enhancing software by a range of businesses, especially small-medium sized enterprises, who would have been previously unable to afford and resource large enterprise systems. Moreover, the subscription services provided by these technology companies (such as Xero, Deputy and Employment Hero) works to enhance flexibility in the operating models of smaller enterprises because they tend to have lower up-front costs and lower switching costs, enabling them to be more agile in an ever evolving and dynamic market. A 2019 study by Deloitte Access Economics found that the cumulative productivity benefit of the adoption of cloud services by Australian businesses was estimated to be in the order of \$9.4 billion over the preceding 5 years.

Previous Tech Council research highlights that both Australian starts-ups and scales-ups, and large global tech companies, will play an important role in helping grow the economic contribution of the tech sector to meet the targets of delivering \$250 billion per annum to Australia's GDP, and meeting our joint commitment with the Government to 1.2 million people in tech jobs by 2030, as shown in Exhibit 1 below.

Large tech firms also play an important role in enabling jobs, economic growth and productivity in the broader economy:

- A 2022 study by Alpha Beta estimated that Google's products provide \$19.5 billion in annual economic value to Australian consumers and \$47.1 billion to Australian businesses, as well as supporting over 133,000 jobs and a further 186,000 across business supply chains. Google's products enable businesses to increase revenues and expand their reach domestically and internationally, while capturing efficiency gains.
- A 2023 AWS Economic Impact Study shows that that its \$6.8 billion investment into the new Asia Pacific (Melbourne) cloud region will add an estimated \$15.9

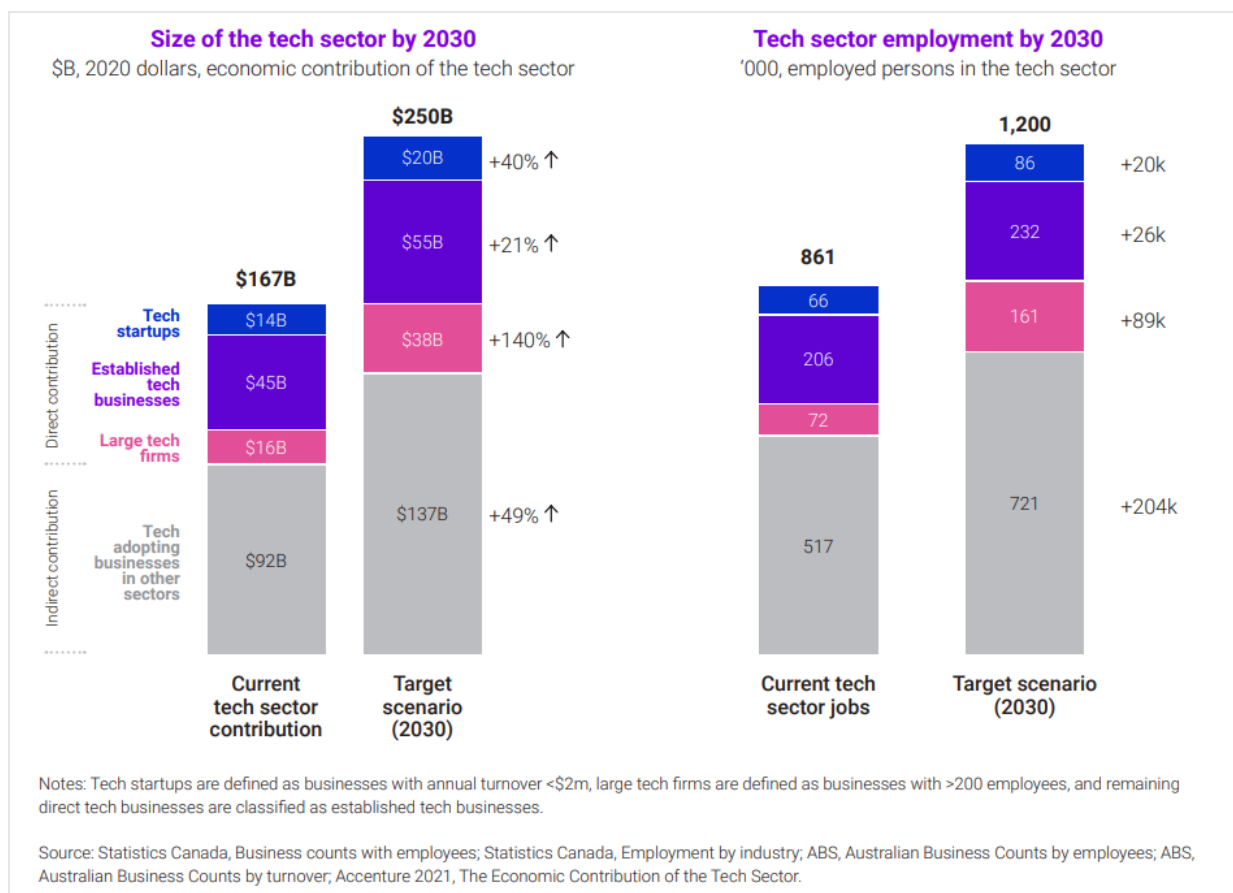
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<sup>1</sup> Tech Council of Australia 2022, Turning Australia into a Regional Tech Hub

billion to Australian GDP by 2037, and annual average of over 2,500 full-time jobs at external businesses.

- Microsoft's Australian business includes over 9,000 partners of which almost 70% are small businesses. These partners have a presence in every Australian state and territory and in 2020 invested \$17.2 billion in their Microsoft related businesses.
- The ACCC's fifth interim report in the digital platform services inquiry highlights that these services are major drivers of productivity growth – from widening and improving access to information, services and products for consumers, to enabling businesses (particularly SMEs) to reach new markets, innovate and reduce the costs of trade.
- A 2019 study by CSIRO and Data61 forecasts that AI and other digital technologies will add AU\$315 billion to the Australian economy by 2028.

**Exhibit 1. Current and forecast economic and jobs contributions to Australia's tech sector**



As the Government considers its digital platforms regulatory reform agenda, it is important to consider how Australia can continue to enable these important economic contributions and competition and consumer benefits.

## **ACCC consumer protection recommendations**

The TCA recognises one important role the ACCC plays is to protect Australian consumers from unfair business practices. This is a fundamental role that helps contribute to our country's identity as a place that is fair and rule-abiding.

### Economy-wide consumer measures

We support in-principle the ACCC's push to ensure there are strong economy wide consumer protection measures and believe this should be the primary approach for addressing consumer protection concerns (while also acknowledging that some digital platform specific measures may be required to address specific harms to consumers).

We specifically supported the Government legislating a prohibition on unfair contract terms. We also note the work being led by Consumer Ministers on a potential prohibition against unfair business practices. It is important this work provides clarity around the legal gaps this reform would address, the obligations it would impose on businesses, and how it would interact with the existing consumer protection regime, including the Australian Consumer Law.

### Scams

We support in-principle the ACCC's push for further action against scams. The increasing number and sophistication of scams, particularly via messaging services or on social media, is concerning and could impact our efforts to become a world leader in cyber security and the digital economy.

The TCA believes the Government's initiative to create a National Anti-Scam Centre presents an opportunity to make significant headway on this issue, and help refine Australia's approach on key issues such as how to balance the onus of responsibility for scams across different sectors of the economy.

While we note the ACCC has recommended a compliance-based regulatory approach to this matter, we consider there is merit in a collaborative partnership approach through the National Anti-Scam Centre. This would build on the significant action already being taken by telecommunications companies, digital platforms and the tech sector more broadly, who have a shared interest in reducing scam activity on their services. For example:

- SEEK has initiated a community of practice with other online marketplaces (such as carsales.com.au and others) to share and collaborate on approaches to addressing scams and fraud;

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- Microsoft has been piloting an [Advertiser Identity Verification program](#) in Australia, which requires some advertisers to verify their legal identity before placing an ad;
- Mobile and fixed network operators have written and adopted an industry code to encourage the blocking of scam calls and messaging, and to help coordinate the tracing of scams to their origins. Telecommunications companies block hundreds of millions of phone calls, SMS and emails annually;

The objective of this partnership approach could be to both prevent scams and to provide community education and support.

For example, there is a strong opportunity for a more joined-up approach between industry and government on consumer education. It will never be possible to stamp out scams entirely, and therefore building awareness among consumers of how to spot scams and protect themselves is critical.

We also acknowledge the growing sophistication of criminal operations means education alone is not enough, and further work needs to be done to better prevent, remove and stop the spread of scams.

Scams often proliferate across different sectors, including telecommunications (services used by scammers) and the retail sector (for example gift card scams). This means the issue goes well beyond digital platform services, and ideally intelligence and actions would be shared across industries and business models.

An appropriate first step here is to strengthen engagement between government and industry to understand existing industry anti-scam processes and identify gaps where further action (including technology solutions and assurance processes) can be taken. Enhancing transparency and understanding of existing activities can also be a powerful tool to drive improvements across industry.

There is also an opportunity for greater collaboration between government and industry, and within industry itself, to improve the effectiveness of identifying scams, handling complaints and taking-down or blocking harmful content. This could include considering how complaints received through Government and Members of Parliament (who are often the last port of call for Australians seeking a remedy) can be dealt with.

Finally, the TCA notes there are a number of complex issues to unpick when it comes to the onus of responsibility for scams across the digital supply chain, such as the responsibility that lies with digital platform services versus other services that may be affected (such as financial services). This is an issue that warrants further attention and more considered discussion as the Anti-Scam Centre is designed. This is another reason why this initiative is such a positive one that the tech industry wants to ensure is successful.

## Dispute resolution

Given the central role digital platforms now play in our economy, for both consumers and businesses, the Tech Council agrees it is essential that effective dispute resolution processes are in place.

We are not opposed in-principle to the potential introduction of well-designed internal standards to ensure a minimum level of accessibility, timeliness, accountability and transparency. However, it is important to note that digital platform service providers are already investing considerable resources in dispute resolution efforts and many often have well established processes in place that meet consumer needs.

Further, the development of such standards could be a complex undertaking, given the diversity of digital platform services and operators, as noted in our introduction, as well as the vast variety and subjectivity of disputes resolved on digital platforms.

As such, if the Government wishes to proceed down this path, it is critical that it ensures any standards are:

- Developed in close collaboration with industry and informed by a clear understanding of existing best practices across providers and consistent with comparable obligations in overseas jurisdictions (such as those under the EU's Digital Services Act);
- Outcomes focused and tailored, given a prescriptive approach would not work for the diversity of platform providers and services on offer;
- Risk-based and targeted at platform services where there is clear evidence of wide-scale consumer harm, noting there is always a risk that these sorts of regulatory interventions inadvertently capture a broad swathe of the tech sector providing lower-risk services;
- Proportionate with clear boundaries, with respect to expected effort and cost, noting many services provided by platforms are offered at zero financial cost to the consumer (in contrast to services like telecommunications).

**Recommendation 3:** Proceed with existing processes to enhance economy-wide consumer protection measures, including consultation by Consumer Ministers on a potential prohibition on unfair trading practices (noting the Parliament has already-passed laws prohibiting unfair contract terms).

**Recommendation 4:** Develop a new collaborative public-private partnership with the tech sector on scams through the National Anti-Scam Centre, bringing together relevant large digital platform services and telecommunications companies with other important sectors of the economy, and focused on three key areas:

- A joined-up approach to consumer education, including to provide clearer pathways for support for victims of scams or fake reviews;



- Use of technology solutions to help prevent and respond to scams (including appropriate assurance or verification processes);
- Greater coordination and sharing between government and industry (and within industry) to improve the effectiveness and timeliness of scam identification, blocking, complaints handling and take-downs, and to lift best practices.

**Recommendation 5:** If the Government decides to proceed with new internal dispute resolution standards, ensure these are:

- Developed in close collaboration with industry and informed by a clear understanding of existing practices and consistent with comparable obligations in overseas jurisdictions;
- Outcomes focused and tailored, noting the diversity of different platform providers and the vastly different services they offer;
- Risk-based and targeted at platform services where there is clear evidence of wide-scale consumer harm;
- Proportionate with clear boundaries, noting many services provided by platforms are offered at zero financial cost to the consumer.

**Recommendation 6:** Do not proceed with an external ombudsman scheme at this time. Outcomes-focused internal dispute resolution standards would be a more appropriate first step if the Government is inclined to take action, and the effectiveness of these should be reviewed before introducing another regulatory regime. This includes consultation and engagement with industry who can work to be aligned on incentives and desired outcomes.

## **ACCC competition recommendations**

### Building on existing competition law

We agree with Treasury's assessment that the articulated objectives of the *Competition and Consumer Act 2010* to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection" are appropriate for governing the competition and consumer issues relating to digital services, including the questions the ACCC's inquiry tackles.

We also agree with Treasury's observation that developing, designing and implementing a tailored competition regime for digital platforms is not without a number of costs and implementation risks, including additional regulatory complexity and uncertainty.

Existing competition law is used to effectively regulate in a broad range of sectors across the economy – such as food and grocery, franchising, energy and telecommunications.

In many of these areas, there are concentrations and imbalances in market power.

The risks and issues associated with this market power have been mitigated by using the broad range of existing tools under the Competition and Consumer Act, such as voluntary and mandatory industry codes of conduct, enforceable undertakings, and compliance and enforcement action.

Given the precedent, complexity and risk of establishing a new competition framework for a specific suite of service providers in the economy (which are also vastly different from each other in their purpose and nature), our considered view is that there should be further exploration of how the existing tools under the competition framework can be applied, and whether the existing framework could be enhanced. This is especially important to consider in the context of highly dynamic digital markets, where business models are rapidly evolving and new entrants can quickly disrupt existing models by introducing new products/services and competition.<sup>2</sup>

It is also important to recognise how dynamic digital markets are and the capacity for new entrants to the market to disrupt existing models or introduce new services and competition. This is particularly true as new types of AI technologies are deployed, such as generative AI (e.g. ChatGPT).

### Potential new competition framework

We would also like to highlight specific concerns we have with the proposed competition framework put forward by the ACCC. If the Government and the Treasury were inclined to proceed with this sort of approach, it would need considerably more consultation and thought to develop a workable design that minimises regulatory uncertainty, complexity and risk.

Overall, we are concerned that the development of an entirely new competition framework (with broad powers to develop mandatory codes of conduct and designate specific digital platform businesses across a wide range of service areas) could create considerable regulatory uncertainty and complex, prescriptive and unworkable requirements.

Earlier versions of the News Media and Digital Platforms Mandatory Bargaining Code are a case in point. While the Treasury has found that the final version of the Code has been successful in achieving its objectives to date, the Code had considerable oversight by the Parliament and the Government which resulted in important amendments (e.g. to remove unworkable requirements around algorithms and the bargaining process) before it was eventually passed into law. Treasury also played a lead role in the development of the Code.

This demonstrates the importance of thinking through the oversight and governance arrangements for any new competition legislation, including who would be responsible

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<sup>2</sup> The widespread adoption of ChatGPT, which was estimated to have reached 100 million active users just two months after launching, is one particular example of this.

for the development and approval of any new codes of conduct. We reiterate our broader concerns, outlined above, that increasing powers are being handed to regulators in determining major policy decisions and trade-offs in the digital economy. Clear divisions of responsibilities are necessary.

Similarly, further thought is needed around how a designation process could be designed that provides sufficient regulatory certainty for digital platform services operating in the Australian market. This includes clear, objective criteria and thresholds that should be used to determine platforms that would fall within the scope of any regulation, while remaining flexible enough to accommodate dynamic digital markets. This includes a thoughtful and targeted designation process that is subject to robust and transparent review mechanisms, including judicial review of designation decisions.

At the principle-level, the TCA notes that government interventions should not always default to a mandatory code process as the only avenue to address competition issues or risks (noting the range of other mechanisms that can be used under existing competition law).

Any new regulatory framework would also need to be flexible, adaptable and outcomes-focused enough to allow for innovation in service delivery and evolutions in technology. Prescriptive approaches that don't account for differences across business models and platform services, and for how platforms can change over time, could dampen future economic benefits of digital platform services.

Consideration would also need to be given to coordinating any new regulatory measures in Australia with ongoing reforms overseas. The ACCC's inquiry is not taking place in an international policy vacuum. Many jurisdictions are tackling similar issues, and several of them are considerably more advanced than Australia's process – while we do not dismiss the argument that a middle-power country such as Australia can be a rule-maker rather than a follower, we are not a first-mover in this case. This provides an opportunity for lawmakers to observe the effectiveness of overseas reforms and their associated market outcomes jurisdictions before implementing additional or similar regulation in Australia.

**Recommendation 7:** Rather than introducing an entirely new competition framework for digital platform services (which would be a major departure from how competition is regulated in other major parts of the economy), we recommend more comprehensively exploring how digital platform competition issues can be addressed through existing competition law. This could include:

- Considering whether existing mechanisms under the Competition and Consumer Act to establish industry codes and enforceable undertakings could be better applied;
- Enhancing the capability of the ACCC digital platforms unit, drawing on learnings from similar units overseas such as the UK; and

- Examining whether amendments need to be made to the existing Competition and Consumer Act to address any identified gaps in oversight and enforcement powers for addressing any risks associated with digital platform services.

**Recommendation 8:** If the Government and the Treasury determine there is a need for a separate competition framework for digital platform services, there are a range of threshold issues that would need further consideration, including:

- Considering the level of appropriate oversight of the codes process by the Parliament and the Government, and ensuring there is structural separation between the agencies responsible for developing and enforcing the codes;
- Ensuring that any framework has a clear articulation of the harms the regime is designed to address;
- Ensuring there are clear and transparent mechanisms for review, including merits review, of designation decisions;
- Further considering whether all matters identified by the ACCC are appropriate to be dealt with through mandatory codes; and
- Ensuring the codes are flexible, adaptable and outcomes-focused to allow for innovation in technology, and are interoperable and consistent with global approaches.

## **Coordination with other Government policies and processes**

As a general statement of principle, digital economy policy and regulation development across government should be well coordinated to avoid overlapping, inconsistent and incoherent requirements that may increase regulatory burden and fail to achieve their objectives.

Given the inquiry has been running for several years and has straddled a change of government, it is unsurprising that the policy landscape has shifted over the course of the inquiry, and will continue to do so.

The TCA therefore supports Treasury's attempts to chart overlap between existing policy development processes to ensure any new regulatory reform agenda on digital platform services is cogent to wider Government policies.

The TCA sees a number of these policy developments as a positive that should be leveraged where possible, rather than adopting different methods for solving the same problems. Developments include:

- National Anti-Scam Centre establishment
- Privacy law reform (noting the review includes broad-ranging proposals to apply to online services' processing of consumer data, as well as other major changes that would apply more broadly to all APP entities)
- Roll-out of the trusted digital identity framework

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- Prohibition on unfair contract terms
- Consumer data right legislation reform
- Online safety industry codes and age verification roadmap
- Reforms to defamation law and copyright enforcement

These processes impact and interact with digital platform services, and coordination across these overlapping initiatives and any new regulatory reforms would be the best approach.

From a practical perspective, and noting Treasury only has carriage of a minority of the above initiatives, each process involves intensive consultation and discussion. This is very welcome, and the tech industry appreciates the collaborative approach being taken by the Australian Government – at the same time, there needs to be a balance struck to ensure reforms are undertaken in an orderly and considered way. We urge a whole-of-government lens be placed on reforms currently being considered across the digital economy to check against the risks of inconsistent or conflicting reforms.

**Recommendation 9:** Take a whole-of-government approach to the digital platforms regulatory reform agenda to avoid overlapping, inconsistent or incoherent requirements that may increase regulatory burden while failing to achieve their objectives.

Thank you again for the opportunity to contribute to this process. We look forward to further engagement with the Treasury on these important matters.

Yours sincerely,



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