

AUSTRALIA'S COMPETITION WATCHDOG FLOATS SWEEPING REFORM FOR DIGITAL MARKETS

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Legal Briefings - By **Stephanie Panayi, Patrick Clark, Philip Aitken and Tomas Kemmery**

ACCC consults on more robust approach to digital players as regulators square up to tech giants

The ACCC has formally opened consultations on whether Australia's competition and consumer law regime (including merger laws) needs digital platform-specific rules. The rules the ACCC is considering are significant and, if enacted, will impact a range of digital markets, including search, social media, ad tech and apps.

SUMMARY

- The ACCC's approach to this issue is very mindful of the developments in other jurisdictions, particularly the European Union and the United Kingdom.
- One aspect of the reform proposals involves considering regulating digital platforms by drawing upon economic regulatory concepts that feature in frameworks applying to more traditional infrastructure assets.
- Some reform proposals are targeted at the largest digital platforms, but there are a range of proposals that will have broader impacts.
- Some reform proposals reflect the ACCC's wider reform agenda relating to merger rules and strengthening consumer laws.

BACKGROUND

On 28 February 2022, the ACCC released its Discussion Paper for Updating Competition and Consumer Law for Digital Platform Services (**Discussion Paper**). The Discussion Paper marks the halfway point in the ACCC's ongoing Digital Platforms Services Inquiry and comes nearly five years into its examination of competition and consumer issues in digital markets.

The Discussion Paper builds on and reflects the ACCC's previous work in digital markets including its Digital Platforms Inquiry, Ad Tech Inquiry and several Interim Reports of its Digital Platform Services Inquiry.

Below are our key takeaways.

A RANGE OF REGULATORY APPROACHES IDENTIFIED, INCLUDING THOSE DRAWING UPON INFRASTRUCTURE AND REGULATED ENTITY REGIMES

The Discussion Paper sets out different approaches to an overarching regulatory framework. The ACCC is considering the need for new regulation because of the perceived ineffectiveness of the *Competition and Consumer Act (CCA)* in dealing with harms to consumers and competition arising from the market power of digital platforms (enforcement cases tend to have a narrow focus, are lengthy and remedies may be insufficient).

Several of the approaches set out by the ACCC draw upon economic regulatory concepts used in CCA regimes applying to physical infrastructure assets and regulated entities. Other approaches draw upon reforms proposed in other jurisdictions, with the ACCC noting the benefits of international regulatory coherence for digital markets.

Each of the approaches is set out below:

- **Prohibitions and obligations contained in legislation.** This could be similar to the EU's proposed *Digital Markets Act*, which sets out a list of do's and don'ts, such as prohibitions on self-preferencing or requiring users to be allowed to uninstall pre-installed apps.
- **Codes of practice.** This could be similar to the UK's proposed pro-competition regime, which, once a digital platform is designated as having Strategic Market Status, is subject to one or more enforceable codes of conduct. Australia has various codes in place that deal with specific issues, including industry codes under the CCA.
- **Rule-making powers.** This approach would allow the ACCC to develop and implement

rules to achieve certain overarching objectives and principles. Such an approach exists in electricity and natural gas markets where the Australian Energy Market Commission can make rules that, for example, regulate the operation of the spot market, spot price determination and market information.

- **Pro-competitive interventions.** This approach would allow the ACCC to impose a specific measure on a platform or set of platforms following a finding of a consumer harm. Aspects of this approach exist in the CCA under Part IXB, which allows the ACCC to issue notices to telecommunication companies where they are believed to have been, or currently be, engaging in anti-competitive conduct.
- **Access for third parties.** This could be similar to the ACCC's power under Part XIC of the CCA wherein it may declare a service in the telecommunications sector, following which the ACCC can make binding rules of conduct and access determinations that set terms and conditions of access.

Measures that could be included as part of these approaches are aimed at addressing, among other issues, exclusionary anti-competitive conduct, discrimination, foreclosure, refusal to deal, promoting interoperability of data and services and improving transparency, including about the performance of algorithms.

The ACCC states measures relating to market power would be targeted at certain digital platforms, based upon an objective criteria or an assessment linked to market power and/or strategic status. However, other measures, such as consumer protection measures, could apply more broadly to all digital platforms

PROPOSALS CONSISTENT WITH ACCC REFORM AGENDA

Many of the ACCC's proposed changes are consistent with its broader reform agenda, which includes changes to Australia's [merger review processes](#) and a [strengthening of consumer laws](#)

DIGITAL PLATFORM-SPECIFIC MERGER CONTROL

The Discussion Paper builds on merger law reform proposed by ACCC Chair Rod Sims in August 2021 and recommended in the Digital Platforms Inquiry Final Report. These additional measures include, for digital platforms that meet the relevant criteria:

- **A bespoke notification regime** requiring digital platforms to give the ACCC advanced notification of acquisitions before completion.
- **Applying a lower probability of competitive harm threshold**, which may allow the

ACCC to intervene in mergers where there is a low probability but high impact competition effects. The ACCC also identified, as an alternative, adopting a 'balance of harms' assessment (assessing whether, on balance, an acquisition is expected to be beneficial or harmful to competition).

- **Reversing the onus of proof** to require platforms to establish that an acquisition does not have the effect of substantially lessening competition. This is part of the economy-wide merger reform, but the ACCC notes if this reform is not implemented, it may be appropriate to have a digital-platform specific measure, which in the alternative could be implemented as a rebuttable presumption of competitive harm.
- **Changes to merger factors.** The ACCC points to previous recommendations in its proposed economy-wide reform and Digital Platforms Inquiry Final Report.
- **New deeming provisions.** For the economy-wide reform, the ACCC proposed that acquisitions by firms with substantial market power (such as large digital platforms) would be deemed to substantially lessen competition if they entrench, materially increase or extend that position of market power. The Discussion Paper proposes an enhanced deeming provision, which would be triggered if the acquisition raises barriers to entry or removes or weakens a future competitive constraint.

The ACCC also expressed an interest in hearing from stakeholders about the appropriateness of a **prohibition on acquisitions by relevant digital platforms of businesses in certain categories**, such as businesses that operate in the same or adjacent markets or businesses that may allow a digital platform to extend, expand or entrench its market power.

PROPOSALS TO STRENGTHEN CONSUMER LAWS

In addition to its competition law reform focus, the Discussion Paper also identifies a number of consumer harms. Though the ACCC identifies these harms as relating to digital platform services, some measures the ACCC puts forward have long been part of its consumer law reform agenda. In particular:

- Prohibiting unfair contract terms, for which the Federal Government has introduced a draft bill. The ACCC asserts such a prohibition would likely deter digital platforms from including unfair terms in their terms of use and privacy policies.
- Introducing an unfair trading prohibition, which the ACCC considers would promote fair trading between gatekeepers and business users by addressing the unbalanced bargaining power between the two.

The ACCC also identifies potential measures:

- requiring platforms to more quickly deal with online scams, malicious apps and fake reviews; and
- prohibiting platforms from using dark patterns, or user interfaces that deceive or manipulate a consumer into making a choice that are not in their best interests.

NEXT STEPS

Submissions on the Discussion Paper close 1 April 2022. The ACCC will meet with key stakeholders during this time, before presenting its views in its fifth Interim Report of the Digital Platform Services Inquiry, due September 2022.

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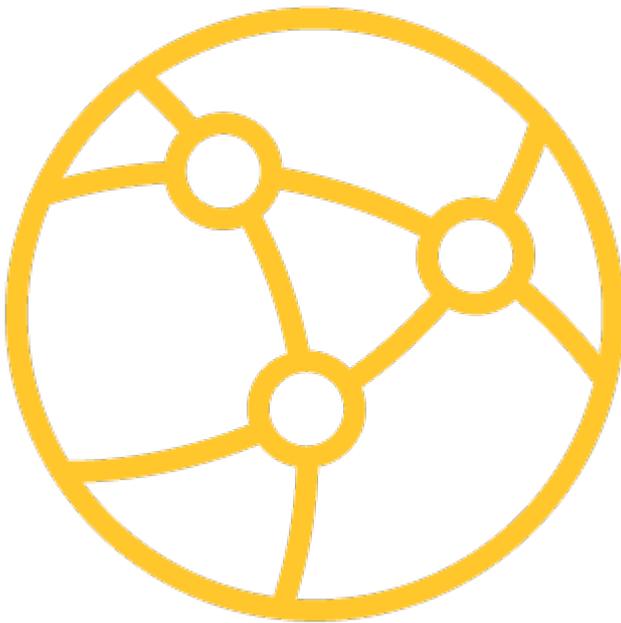
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