

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

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# 1. About this submission

This is the Business Council of Australia's submission in response to the Treasury's consultation on the government's response to the ACCC's Digital Platforms Services Inquiry Report No. 5.

The BCA agrees it is worthwhile examining whether existing legislative and regulatory frameworks are suitable as technology evolves. Key to this is ensuring that we can continue to access the benefits these technologies provide. They exist and are widely used because they empower consumers, and deliver what Australians want.

If Australia is going to maintain our high standard of living, and be a high wage, high productivity economy, government regulation must ensure any new measures are proportionate and appropriately targeted. Any measures that fail this test should not proceed.

This consultation is contemplating new consumer and competition measures.

The BCA supports additional effort to ensure Australian's have high quality consumer protection measures. This effort needs to be done in collaboration with businesses, who all remain strongly committed to addressing scams and preventing consumer harms. This is an area where substantial investments are already being made by businesses across the economy, and new measures should build on these investments.

However, the creation of a new *ex ante* framework for competition matters should be approached with caution. If badly formulated, it will stifle innovation, investment, and growth, while also likely inadvertently capturing operators or industries that are not of concern.

Australia is in the fortunate position of being able to observe how similar frameworks will work in overseas jurisdictions, to understand whether this type of regime is effective and delivers on the outcomes intended. Government must take this opportunity to learn from the overseas experience, to properly assess whether the framework are successful.

## 2. Key recommendations

1. The government's code on scams for digital platforms be prioritised in the government's response to the ACCC's report and include mechanisms to ensure all relevant parts of industry (such as banks, retailers, and telcos) can work toward a shared outcome.
2. Given many of the proposals are still only broadly defined, government undertake further extensive consultation with industry before moving ahead with any specific measures.
3. Any consumer protection measures be developed according to the following principles:
  - a. Deliver benefits greater than the costs to consumers and businesses.
  - b. Properly targeted and focused on specific and identified harms.
  - c. Not conflict with or duplicate other regulatory efforts (e.g. on privacy reforms, Online Safety codes of conduct, etc).
4. Not proceeding with the notice-and-action mechanism.
5. Instead of requiring the verification of financial services advertising requirements, government should make appropriate investments in developing a framework and system for businesses to determine whether a prospective advertiser genuinely holds an appropriate licence from the Australian Securities and Investments Commission (ASIC) and similar registers.
6. Before proceeding with a new *ex ante* framework:
  - a. Identify whether there are specific harms to consumers and businesses.

- b. Undertake a thorough assessment process to determine whether the overall economic benefits of a new framework will outweigh the costs.
  - c. Consider whether existing regulatory tools are sufficient.
  - d. Only continue with possible new powers after the Treasury has had an opportunity to understand whether similar regimes overseas have been successful.
7. If the government does wish to proceed with a new designation process, it must include:
- a. Clear checks and balances, including scope for judicial review.
  - b. Only be put into place where it can be demonstrated the benefits of designation outweigh the costs.
  - c. Provide clear guidance on scope and thresholds before being brought into force.
  - d. Be appropriately resourced and transparent.

### 3. Overview

Advances in technology and connectivity in recent decades have created new opportunities and economic growth and provided new services that better meet consumer desires. This has brought substantial benefit – both economic and social – but has also created new challenges.

The BCA agrees it is worthwhile meeting these challenges, but in doing so we must not cut ourselves off from the positives.

The fundamental question to be answered is whether the benefits of the proposals will outweigh the costs. Poorly designed regulations or policy approaches come at a cost.

Australia needs to reshape the economy into a high wage, high productivity one. Moving more businesses to the frontier will require Australia to adopt and embrace new services, technologies, and ways of doing business. If we do not – and instead hobble ourselves with measures intended to protect incumbents and outdated business models – not only do we undercut our international competitiveness, but we deprive Australians of the goods and services they want.

The growth of ‘digital platforms’ has been because they have met consumer needs – be that access to the world’s information, easy ways to connect with their friends and family, or to enable quick delivery of products.

All Australian businesses will need to follow this: consumers are more empowered than at any stage in history. Becoming a successful business in Australia will mean adopting aspects of what has made digital platforms successful, such as reducing consumer friction, or using data to better tailor services to consumer preferences.

This would be facilitated by an internationally and domestically coordinated and coherent regulatory regime. If the government fails to provide such a regulatory environment, they will be resigning Australian businesses to wither away as competitors or new business models outperform them. Inconsistent and unpredictable regulation is a major barrier to innovation, reducing investment in new ideas. If this occurs across the economy, it will be catastrophic in an era of increasing global competitiveness. Not every business can, or needs to, build its own digital platform but all can take advantage of the opportunities offered by them.

On the other hand, consumers need to have certainty, safety, and security in their interactions through digital channels. Australians are already well-protected by general protection laws that apply to all goods and services, both digital and physical, and there is substantial work underway in other areas such as privacy, online safety and ‘unfair practices’.<sup>1</sup> We agree appropriate measures to address real consumer harms are vital to ensuring

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<sup>1</sup> This includes the long-running review of the Privacy Act, separate consultations on unfair trading practices, the ongoing development of codes for online safety, and investigations by a range of bodies into role of large technology businesses in Australia. These sit on top of myriad other changes to competition, privacy and online safety already made by government.

Australians' can have confidence in a new and fundamental domain through which they interact with each other, with businesses, and with government.

But onerous and excessive consumer protection measures raise the barriers for market entry. New small startups and large prospective players might all decide against being part of the market if the barriers are unnecessarily high. This ultimately undercuts competition and reduces choice for Australian consumers.

The choices are not always clear cut. Seemingly pro-competition or pro-consumer measures (like mandating data sharing) have substantial anti-privacy outcomes. Similarly, ostensibly pro-consumer measures (like mandatory takedowns of reported content) involve subjective judgments over unclear facts and impact on individual users' rights to freedom of speech and expression.

This is why getting digital regulation right is so important. If poorly designed, bad regulation stops Australian businesses from using new technologies, services, or investing in new ways of doing business. It also has a chilling effect across the economy, as it sends a poor signal about the government's attitude towards the use of new technologies.

And ultimately, poor quality regulation reduces the desire of all businesses to invest in new technologies or ways of meeting consumer expectations. This undercuts Australia's productivity and international competitiveness.

## 4. Key points

### 4.1 Consumer recommendations

The consultation paper asks whether additional consumer protection measures are needed. The ACCC's report suggested there were consumer harms attributed to digital platforms and more generally, particularly in relation to unfair trading and unfair contracts, as well as inadequate processes for dealing with scams, disputes, and complaints.

Treasury is seeking views on the ACCC's recommendations, including mandatory measures such as a notice-and-action mechanism, verification of certain business users, verification of advertisers of financial services and products, mandatory internal dispute resolution standards, and an independent external ombuds scheme, among others.

Businesses remain strongly committed to addressing scams and preventing consumer harms. This is an area where substantial investments are already being made by businesses across the economy. It is not in the interest of businesses to be a haven for, for example, scams – it harms consumers and businesses alike.

But adversarial actors (like scammers) and social problems are not simple or straightforward to manage. A collaborative and adaptable approach is the only way to address consumer issues identified by the ACCC, particularly scams. Regulatory solutions should be designed taking into account the common interests of businesses and governments to address and mitigate these constantly evolving threats.

We recommend the government's code on scams for digital platforms be prioritised in the government's response to the ACCC's report. Given scams do not take place on a single platform but involve multiple industry players, we also recommend the code include mechanisms to ensure all relevant parts of industry (such as banks, retailers, and telcos) are able to work toward a shared outcome and note the positive initiatives already taken in this direction.

This type of approach – drawing in a range of sectors to act against scams – will provide a valuable opportunity for government to understand how to address, develop and target more complex codes in future. This understanding will be particularly important given the challenge of managing the wide range of business models in this space (discussed further below).

We support government working closely with business on these problems. To ensure the success of these efforts, we also recommend any interventions must:

- Deliver benefits greater than the costs to consumers and businesses.
- Be properly targeted and focused on specific and identified harms.
- Not conflict with or duplicate other regulatory efforts (e.g. on privacy reforms, Online Safety codes of conduct, etc).

However, several of the proposed schemes are likely to have unintended consequences or not deliver benefits to consumer greater than the expected costs. We recommend government not proceed with the notice-and-action mechanism or the verification of financial services advertising requirements, and instead focus on collaborating with industry to address these ongoing and changing challenges.

#### 4.1.1 Notice-and-action mechanism

The ACCC has proposed platforms be required to provide “user-friendly processes for reporting scams, harmful apps, and fake reviews, and to respond to such reports”. This would require platforms to allow “users to report a scam or harmful app, and requiring the platform receiving this report to act in response, communicate its actions, share information with relevant agencies, and offer redress, as appropriate”.

While we support consumers being able to report scams and similar content (and most platforms already have these in place), a mandated mechanism of this nature is unlikely to lead to strong pro-consumer outcomes. Existing reports from consumers via scam reporting schemes run by government do not always contain appropriate detail to enable effective action on the part of a platform. In addition, the variety of issues encompassed in ‘scams, harmful apps, and fake reviews’ are both broad and nuanced – unlikely to be able to be addressed by a single mandatory notice-and-action mechanism.

Similarly, if a platform is required to take down even *suspected* scams or review manipulation (as suggested in the ACCC’s report), this type of mechanism will be quickly weaponised by malicious actors against genuine businesses or advertisers.

Similar mechanisms are being imposed under the EU’s Digital Services Act, which is newly in force but not yet implemented. If government thinks there is merit in this approach, it would be worthwhile understanding how effective this type of approach is in the EU context and what lessons Australia can learn from how they work in practice.

Proactive efforts are never going to be perfect, but a collaborative approach – rather than punitive – will ensure best results. Ultimately government and business must work together to ensure the scammer or malicious actor is held accountable.

#### 4.1.2 Verification of business users and financial advertisers

The ACCC has proposed platforms be “required to take steps to verify the identity of certain business users, including advertisers, app developers and merchants”, and for financial services, “take additional steps to verify the legitimacy of the advertiser and the product or service.”

Preventing the misuse of likenesses of businesses and prominent Australians is important, and will protect the integrity of the wider Australian business community.

However, the practical implementation of this recommendation raises some concerns.

For financial services, there currently is not a clear, practical way for businesses to verify whether a prospective advertiser genuinely holds an appropriate licence from the ASIC, or if they are included within any of the various exemption categories.

We support platforms acting against the misuse of likenesses of businesses and prominent Australians. But it needs to be done in a way that is realistic and implementable.

If the government wishes to proceed with the spirit of this recommendation, a necessary first step is that existing financial licencing systems be upgraded to provide a means for businesses to definitively verify whether a prospective advertiser genuinely holds an appropriate licence from ASIC.

Any other categories of business users to be subject to similar verification requirements must also be clearly defined, along with any additional steps required to verify that group of users.

## 4.2 Competition recommendations

The ACCC has suggested there are unique competition concerns in a range of digital platform services and has suggested the introduction of new mandatory codes for designated platforms.

The ACCC has suggested a wide range of conduct it would seek to address through these codes, from anti-competitive self-preferencing, to impediments to consumer switching, to unfair dealings with business users, among myriad others. However, with the possible exception of 'unfair dealings', the ACCC's report does not make clear whether the ACCC considers the conduct listed would be caught under the current competition provisions of the CCA.

*It doesn't make sense to talk about 'digital platforms' as a market...*

The proposed measure suggests that the businesses targeted will be the "providers of digital platform services which play a central role in facilitating the interactions between consumers and businesses". It remains unclear – as we have pointed out numerous times – how the specific businesses or sectors will be defined.

'Digital platforms' are the ways of delivering a service or product, not a market in and of themselves. Even the organisations the ACCC has been most focused on – Meta, Alphabet and Apple – have substantially different business models, operate in diverse sets of markets, and have varying consumer interactions.

*... and even if it does, competition is strong, and platforms don't exist in a vacuum*

Competition is vigorous and diverse for many of the services that can be supplied by 'digital platforms', with, for example, the emergence of competitors like TikTok and WeChat, enduring platforms like Discord, and fierce competition among streaming platforms. Similarly, there has recently been intense focus on generative AI and the implications this will have on both digital platforms and all businesses, which has highlighted the intense competition between players in the digital space. The claim existing 'digital platform' businesses have an enduring and immovable market position is questionable.

'Digital platforms' do not operate in a vacuum. The 'digital' or online tools some businesses use are often only one of many ways to compete in 'markets' as Australians see them – with online marketplaces competing with brick-and-mortar stores or digital video services competing against other forms of broadcasting, for example. Any interventions targeted at just the digital component will distort competitive dynamics more broadly.

*This means government needs to be precise in its actions*

In the context of the ACCC's report, several BCA members have raised concerns about poorly targeted regulation, such as regulation to manage online content including B2B providers, who are not well placed to manage these issues.

Precision in any regulation is needed. It will be critical to have a clear definition of both the problem and the markets. The proposed approach will see a single new regulatory framework established for disparate businesses connected only tenuously by a sense of being 'digital'. Regulation should be focused on the market involved, not the way a good or service is provided.

## 4.2.1 A new regulatory framework

We remain concerned with the creation of a new *ex ante* framework. It will stifle innovation, investment, and growth, while also likely inadvertently capturing operators or industries that are not of concern.

Government already has regulatory tools to address competition concerns, including those concerns identified by the ACCC in its report. Many have been introduced but not been used. Further measures will only add to regulatory uncertainty. Before weighing down the regulatory toolkit further, we recommend government first demonstrate why the existing regulatory tools are insufficient.

*Precision is needed about who will be captured, and it has not been provided*

The ACCC has not provided sufficient detail about the types of services which could be subject to a code, except to suggest that it be subject to 'appropriate public and industry consultation', and subject to a mix of qualitative (such as whether it has an intermediary position in the market) and quantitative criteria (such as number of Australian users). This is not appropriate. If the ACCC is unable to identify specific services or businesses of concern after a wide-ranging and years-long series of inquiries, it is unclear how new wide-ranging powers to designate specific services or businesses can be justified.

This is partly a function of the types of services the ACCC was asked to consider through the ongoing Inquiry, which captured a wide and disparate set of services. But it remains challenging to see how a widely-scoped designation process could sensibly be used to manage competition issues across services that have little in common with each other – there is little commonality between search, social networks, and video streaming services, for example. Creating a new regulatory hammer will make every issue into a nail.

Moreover, the ACCC has been ambiguous about whether some types of conduct it wishes to regulate are problematic. For example, the ACCC has only suggested that self-preferencing 'may' have anti-competitive impacts, and that there are instances where it might lead to greater consumer welfare or pro-competitive outcomes (such as through greater competition at an ecosystem level or through greater security).

*The proposed approach will have errors and unintended consequences*

That ambiguity indicates a more basic problem of *ex ante* rules relying on 'anti-competitive' as an element of the definition of prohibited conduct. Unless a new concept of 'anti-competitive' is proposed, under Australian competition law that would mean the conduct has the purpose, effect or likely effect of substantially lessening competition in a market. For *ex ante* regulation, the critical limb is 'likely effect'. In another area that relies on a similar predictive assessment – merger law – the ACCC argues it is so difficult to establish that the standard of probability should be lowered to a mere 'possibility that is not remote' and the onus of proof reversed. Future assessment of *conduct* in highly dynamic markets would be even more challenging than the structural assessment used in merger analysis and it raises serious concerns about the inherent likelihood of error in defining prohibiting conduct.

While intervention may be appropriate if harm has been found, the proposed approach would set a bad precedent for government to have wide-ranging powers to intervene in an arbitrary set of businesses, based only on speculation of potential harm.

*There is a chance to learn from international experience*

It is not clear that there is a broad consensus both within Australia or more widely internationally about the need to regulate through *ex ante* regulations, nor is there consensus about how a best practice approach to this should work. As the consultation paper notes, there are a range of approaches being trialled in other jurisdictions, including the United Kingdom, the European Union, South Korea, and Japan, among others. Australia is in the fortunate position of being able to watch natural experiments in action, to understand whether this type of regime is effective and delivers on the outcomes intended.

Given the potential pitfalls with establishing this type of regime, and the substantial disincentives it may create to all business investment in Australia, it would be prudent to not rush into providing new powers. As noted earlier



in this submission, any new regulation must have benefits greater than the costs, be appropriately targeted, and not overlap with other regulatory efforts. To this end, we recommend proceeding with the creation of new powers to make mandatory codes for designated platforms only after the Treasury has had an opportunity to understand how to circumvent the pitfalls of overseas regimes.

## 4.2.2 Designation and codes

However, if the government wishes to proceed with the creation of a new regime allowing the designation and creation of codes, it must be based on several key design principles. To this end, we recommend that any designation process include:

- Identify whether there are specific harms to consumers and businesses.
- Only be put into place where it can be demonstrated the benefits of designation outweigh the costs.
- Provide clear guidance on scope and thresholds before being brought into force.
- Be appropriately resourced and transparent through the development process.
- Clear checks and balances, including scope for judicial review.

Poorly scoped codes – such as those under the Online Safety Act – have resulted in the capture of a wide range of services that would not have been captured under a risk-based and proportionate approach. This includes the capture of services with little to no capacity to appropriately deal with issues of concern. The development of these codes is likely to have been a more streamlined process if it was commenced with a better understanding of the sector and the specific problem being targeted. This highlights the importance of properly understanding digital platform business models and precisely targeting the specific and identified harms.

BUSINESS COUNCIL OF AUSTRALIA

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