# Response to Treasury Consultation Paper on Digital Platform Services Inquiry Reform Recommendations

Date: 17 February 2023

To: Digital Competition Team, Australian Federal Treasury

From: Hannah Marshall and Danielle Kroon, Marque Lawyers

---

**Introduction**

*Our interest in the Digital Platforms Inquiry*

Marque Lawyers is a Sydney based law firm. We have a particular interest in the Digital Platform Services Inquiry on account of our competition law practice, and more broadly where major digital platforms are necessary trading partners for many of our clients. The role of digital platforms in business and the community is increasingly fraught as they cement their dominance and expand their ecosystems. This in turns lays bare the challenges and shortcomings in our current competition law regime.

This submission responds to the Treasury's Paper 'Digital Platforms: Government consultation on ACCC's regulatory reform recommendations' dated December 2022 (**Treasury Paper**). It considers reform proposals outlined in the Digital Platforms Services Inquiry Interim Report No. 5 dated September 2022 (**ACCC Reform Report**).

We previously provided a submission (**2022 Submission**) in response to the Discussion Paper for Interim Report No. 5 dated February 2022.

*What this submission covers*

We list below the topics that this submission covers, with reference to the questions posed on the Treasury Paper. Broadly, we address the form and rationale for targeted competition obligations for digital platforms.

| | **Submission** | **Relevant questions in the Treasury Paper** |
|---|---|---|
| **1.** | We endorse the ACCC's rationale for proposing sector-specific regulation. | Question 1 |
| **2.** | What sector-specific competition obligations should comprise. | Question 16 |
| **3.** | There may be opportunities to leverage existing frameworks to achieve similar, sector-specific ends. | Question 2 |

| | Submission | Relevant questions in the Treasury Paper |
|---|---|---|
| **4.** | Sector-specific obligations will only work if they are capable of enforcement. The ACCC (or other regulator) will need stronger information gathering powers for this to happen. | Question 24 |
| **5.** | There is a clear logic to international alignment and the EU DMA is a suitable reference point. | Question 25, 26, 27 |

## 1. We endorse the ACCC's rationale for proposing sector-specific regulation

1.1 The start point for this submission is that we generally endorse the ACCC's rationale for proposing sector-specific competition obligations for digital platforms in part 2.1 of the ACCC Reform Report.

(a) The existing competition law regime in Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is relevantly premised around two central legal tests; whether a business has a substantial degree of market power, and whether conduct has the purpose or likely effect of substantially lessening competition.

(b) Each of these tests carries a degree of uncertainty and nuance in application, particularly insofar as they hinge on the question of market definition. The success or failure of a prosecution may turn on this point. Yet market definition is an inherently ambiguous concept.

(c) Digital platforms arguably hold a kind of power which transcends traditional concepts of distinct 'markets'. Their power comes from their dynamic capabilities in constantly expanding ecosystems. This means that they are not well-suited to regulation within the traditional concepts of market analysis. In particular:

(i) they operate across multiple industries;

(ii) they compete with other platforms, other participants in their supply chains (e.g. Google competing across the adtech supply chain, Amazon competing both as a platform and also a seller), and readily enter and take control of new or different industries leveraging their size, resource and data advantage; and

(iii) they typically have the power to control downstream competition among their customers by operating as gatekeepers – regardless of whether they compete downstream themselves (such as Apple via the app store);

(d) The challenge in applying market definition principles to digital platforms was evident in the process of developing the *News Media and Digital Platforms Bargaining Code*. There, it

was clear that digital platforms held a critical position in respect of the digital news supply chain, but their relationship with news agencies was arguably not one of supply in a traditional economic market. The ACCC tacitly recognised this, finding that the digital platforms held 'substantial bargaining power' rather than 'substantial market power'. This ultimately led to designation criteria under the Code also being framed around an imbalance in bargaining power[1].

1.2 A logical way of addressing these characteristics of digital platforms' competitive position is via sector-specific obligations. The regime proposed in part 5 of the ACCC Reform Paper essentially replaces traditional tests of 'market power' and 'substantial lessening of competition' with designation. Once designated, the focus then is on targeted forms of prohibited conduct. Questions around market definition and competition are no longer a consideration.

1.3 Further, we endorse the benefits of an ex ante approach, which provides greater clarity and arguably has wider and more immediate impact on business practices.

1.4 We note however the following points of caution or qualification.

(a) One on view, the issues raised in the ACCC Reform Report may not be limited to digital platforms. The need for sector-specific obligations may suggest a broader flaw in existing Part IV provisions. That is, that concepts of market definition and market power are too narrow to effectively regulate in the modern environment, in which digital and global economies increasingly prevail.

(b) Essentially, sector-specific obligations will operate as an alternative to a misuse of market power action in CCA section 46. They will necessarily have consequences for any other enforcement action under section 46, which should be carefully considered in the design phase. For example:

(i) To what extent does a designated platform remain liable to action under section 46?

(ii) Does designation create a presumption of market power?

(iii) Does a lack of designation suggest an absence of market power?

(iv) Can the fact of designation be referred to as evidence of market power?

**2. What sector-specific competition obligations should comprise**

2.1 In our view there are two broad categories of obligations to consider when framing targeted obligations for digital platforms.

(a) The first category would address behaviours which are connected, or consequent, to their position of dominance. These include the kinds of behaviours listed in Recommendation 4

[1] CCA section 52E.

in the ACCC Reform Report, such as self-preferencing, tying, impediments to switching services, etc.

(b) We also submit that there is a second, distinct category of obligation to consider, which is downstream access. In many cases, platforms operate as gatekeepers to downstream competition. The ACCC Reform Report identifies platforms as holding the position of gatekeeper or important intermediary for substantial volumes of online commerce, making them a 'must have' for a large number of businesses and consumers[2].

(i) The App Store is a prime example. This kind of dominance is arguably deserving of a specific access regime, to limit the platforms' ability to deny access. Apple's decision to refuse access to the App Store to Epic Games was a key trigger point to Epic's current litigation against Apple.

(ii) We also consider that access was a critical element of the relationships giving rise to the *News Media and Digital Platforms Mandatory Bargaining Code*. Mandating that designated platforms provide access to news links is, in our view, a missing piece in that regime. This problem crystallised when Meta switched off news content for Australian users for a period in early 2021.

2.2 Mandated access rules would ensure that businesses reliant on gatekeeper digital platform services cannot be refused access, and can gain access on fair and consistent terms.

2.3 To take account of the need for access, we submit that any sector-specific obligations should explicitly address access. We address the means of doing this in part 3 below.

## 3. There may be opportunities to leverage existing frameworks to achieve similar, sector-specific ends

3.1 Mandated access to specific digital platform services could be achieved by amending the access to services regime in Part IIIA of the CCA, or alternatively via a specific access regime established for digital platforms along the lines of the Telecommunications Access Regime in Part XIC of the CCA. Each of these systems provides a regime for mandating access, and access terms, for specific services.

3.2 Part IIIA is unlikely to be able to assist in mandating access to services supplied by digital platforms in its current form. This is on account of the definition of a 'service' which is capable of declaration in section 44B. The consequence of the definition is that only services supplied via 'facilities' are capable of declaration. 'Facility' is not defined, but the case law indicates that it applies to physical equipment, and may not readily capture digital supplies.

3.3 The most efficient means of addressing this may be an amendment to the definition of 'service' and/or an introduction of a legislative definition of 'facility' which expressly includes digital facilities. This approach may be more flexible than a specific digital platforms access regime,

[2] ACCC Reform Report at [1.6], p 40.

where the scope of the services for which access might be mandated is likely to continue to evolve over time.

**4. Sector-specific obligations will only work if they are capable of enforcement. The ACCC (or other regulator) will need stronger information gathering powers for this to happen.**

4.1 Sector-specific competition obligations of the kind proposed in recommendation 4 have greater prospects of enforcement that traditional Part IV actions, as they move past questions of market definition, market power and competitive effect, and arguably require only evidence of the prohibited conduct.

4.2 Historically there have been challenges in gaining evidence of conduct by dominant industry players. It is quite understandable that trading partners of a dominant player may be reticent to come forward and give evidence in a prosecution, for fear of retribution. Anecdotally we have come across this concern on multiple occasions in other industries during the course of our work.

4.3 There are examples of an ACCC prosecution of a dominant business failing for lack of evidence of specific conduct towards trading partners. One such example is the prosecution of Woolworths over its 'Mind the Gap' scheme with suppliers[3]. Although prosecuted as an unconscionable conduct case, there were many similarities with misuse of market power. The ACCC relied on documentary evidence obtained via its compulsory investigation powers. It did not call evidence from individual suppliers. This resulted in the court having insufficient evidence on which to assess whether Woolworths' conduct was unconscionable.

4.4 The logical counter to this problem is to ensure that the ACCC has sufficient investigative powers, explicitly framed to allow the use of section 155 powers:

(a) to collect information to support consideration of designation criteria;

(b) to assess compliance with targeted obligations; and

(c) to support the periodic review of designation decisions, designation criteria, and the specific obligations which follow designation.

4.5 By ensuring that there are clear compulsion powers tied directly to the ACCC's (or other regulator's) functions, a new regime will maximise its prospects for enforcement. Absent the conduct of enforcement actions, any new regime us unlikely to achieve its desired legal effect.

[3] *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 1472

## 5. There is a clear logic to international alignment and the EU DMA is a suitable reference point

5.1 Analysis of competition in digital markets consistently recognises that digital platforms compete at a global level. This is uncontroversial. And it logically favours international consistency in the regulation of digital platforms. The ACCC has stated:

> *Alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection*[4].

5.2 On this basis, we submit that there is benefit in contemplating international regimes in force or in development when formulating an Australian system. (We develop this notion in respect of merger review in our 2022 Submission).

5.3 Having considered the various international developments, we submit that the EU *Digital Markets Act* (**DMA**) provides the most suitable framework with which to seek consistency. In particular:

(a) the DMA model bears similarities to the ACCC's proposal in recommendation 4, adopting a system of designation for 'core platform services' which meet specified criteria, and then providing a list of targeted obligations that apply following designation; and

(b) EU regulation is sufficiently wide-reaching as to stimulate change at a global level. This has already occurred in the context of the *General Data Protection Regulation* privacy reforms.

5.4 The DMA also provides a framework which, in principle, addresses the two types of regulation for which we advocate in part 2 above; i.e. restrictions on self-preferencing and other anti-competitive behaviours, and also mandated access to gatekeeper services. That said, it should be noted that the manner of regulating access is lighter-touch than what we propose in parts 2 and 3 above.

(a) The DMA provides that designated gatekeepers must provide certain types of access on 'fair, reasonable and non-discriminatory terms'[5].

(b) Although we agree with the principle of obliging access, we consider that an explicit, ex-ante access regime will be more effective.

(c) The DMA's approach is less prescriptive and is likely to suffer the same challenges as existing post-ante regulation. That is, there is uncertainty in what is required, enforcement action may be lengthy, and any decision will be fact-specific.

---

[4] *Digital Platform Services Inquiry Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services*, 28 February 2022, pp 6-7.

[5] See for example DMA Article 6(11) and (12).

5.5 Regardless of potential differences in the detail, in our view the greatest gains in terms of consistency in international regulation will come from alignment on policy and principles across jurisdictions. In that regard, we consider that the DMA provides a useful reference point with which to align Australia's regulation.

We are grateful to the Treasury for the opportunity to provide this submission, and would be pleased to expand on any aspect or answer any questions.

Yours sincerely

**Hannah Marshall**
Partner

**Danielle Kroon**
Senior Associate