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LEGAL AND REGULATORY ADVISORS

Digital platforms – an Australian regulatory approach

The Australian Competition and Consumer Commission (ACCC) has been conducting significant inquiries into digital platforms and the digital economy for the better part of a decade. The terms of reference for the digital platforms inquiry were issued in December 2017 with the final report issued in July 2019. The digital platforms services inquiry commenced in 2020. To date, 8 interim reports have been released. The ninth interim report should be published imminently, with the final report due in March 2025.

As the ACCC inquiries have progressed, so have a series of regulatory initiatives, with governments of both persuasions expressing a desire to further regulate digital platforms.

With the final report of the digital platforms services inquiry due in March, it seems likely that the Australian government will commit to further regulation of digital platforms, building upon the ACCC's recommendations over many years.

In the fifth interim digital platforms services inquiry report, the ACCC recommend that legally binding codes of conduct be applied service-by-service to designated digital platforms. The codes of conduct would address issues including anti-competitive self-preferencing, tying and exclusive pre-installation agreements. In addition, the ACCC said the codes "could also aim to improve consumer switching, information transparency and interoperability between different services, and to better protect business users of digital platform services."

Digital platform regulation to date

1. The eSafety Commissioner was established in 2015 (originally as the *Children's* eSafety Commissioner). Its powers were expanded under the Online Safety Act 2021, which is currently under review.
2. The News Media Bargaining Code was introduced in 2021 to address a perceived imbalance between the value digital platforms received from linking to news articles on their platforms and the value flowing to news companies.
3. Unfair contract terms legislation was strengthened in 2023, a move which had been recommended by the ACCC in the fifth interim report of the digital platforms services inquiry.
4. Addressing scams on digital platforms has been a recent focus, first through a voluntary code in July, and then last month through proposed legislation that would establish a Scams Prevention Framework as a new Part XIF of the Competition and Consumer Act 2010, under which general principles would apply to regulated entities and sector-specific codes could be created.
5. Also last month, the Australian government announced legislation to be introduced by the end of 2024 to establish a minimum age for children to access social media.

This would mark somewhat of a shift in focus. Regulation to date has mostly focused on consumer protection issues (see the box, "Digital platform regulation to date"). The next major regulatory developments will move into the trickier area of economic regulation — the ACCC has likened the

potential changes to the groundbreaking Hilmer reforms of competition law in the 1990s. The ACCC said:

> *"Although digital platforms don't have the physical characteristics of 'essential facilities' described by the Hilmer Report, there are similarities in their strategic positions, the extent to which firms in other areas of the economy depend on their services and products, and the small number of digital platforms that have substantial market power."*

The Government has already provided in-principle support for development of an ex ante digital competition regime, under which "some digital platforms could be designated to service-specific codes, which could include imposing targeted obligations and prohibitions relating to specific types of anti-competitive conduct." The significance of this task should not be understated. As the Government warned in its response to the ACCC inquiry:

> *"The introduction of any new ex ante regime would be a significant undertaking and it would be critical to develop a framework that ensures Australians continue to enjoy the benefits of the best technology in the world."*

One part of retaining the benefits of the best technology in the world is to align with other jurisdictions so that Australia doesn't find itself a digital island (as well as a physical one). The Government stated that it "is closely monitoring international developments and will work with our international counterparts to ensure any Australian framework is consistent and cohesive with overseas approaches."

With that said, a consistent and cohesive regime should not mean an identical regime. Existing Australian regulatory theory and legal frameworks reflect Australia's particular position in the international landscape and local conditions. Nor should we too readily adopt some of the farthest-reaching interventions adopted overseas. For example, self-preferencing poses well established risks to competition. But an absolute blanket ban on any form of self-preferencing under the EU's Digital Markets Act is already depriving or delaying European consumers from accessing innovations and may carry a disproportionate risk of regulatory failure that chills innovation.

Similarly, the one Australian regulatory foray into digital competition regulation — the News Media Bargaining Code — doesn't seem to be going so well. Meta's decision to not renew deals with Australian media companies and to not prioritise news on its platforms has highlighted shortcomings of that legislation. Meta's first new platform since the News Media Bargaining Code and similar interventions in other countries has been Threads, which eschews news content by design. Even if Meta is forced to the bargaining table, that outcome would seem inconsistent with the original rationale of requiring digital platforms to pay for value they are deriving from news organisations (clearly not so much value that Meta feels compelled to carry it at a price underpinned by regulatory intervention). This is a powerful recent example of the difficulties of regulating dynamic digital platforms and the need to get the fundamentals right.

A new access regime for digital platforms?

If we are to move forward with new digital competition regulation, as seems likely, there is a lot of ground to cover between the headline concept of service-specific codes and a workable regulatory regime. One measured and flexible starting point could be the established access regimes in the *Competition and Consumer Act* (the CCA). The general access regime in Part IIIA of the CCA and the telecommunications access regime in Part XIC of the CCA offer some useful precedents for a future "digital platform services access regime".

The ACCC is thinking about access regimes in adjacent areas. In its submission to Treasury's consultation on Revitalising National Competition Policy, the ACCC said that an access regime is "capable of being applied to any type of significant infrastructure with natural monopoly characteristics", such as digital infrastructure. The ACCC was careful to note that it was talking about digital *infrastructure* and not necessarily digital *platforms*. But in our view, it's relevant that the ACCC acknowledges that existing economic regulatory principles can be applied to digital/non-physical entities.

International comparisons & contrasts

EU: Under the *Digital Markets Act*, "gatekeepers" are large digital platforms providing "core platform services" (which includes search, app stores, and messenger services) which:

- have a significant impact on the "internal market" of the European Economic Area
- provide a core platform service with a strong intermediation position (connecting business users and end users)
- have an entrenched and durable position in the market

Gatekeepers are prohibited from undertaking legislated activities in respect of their core platform service.

UK: Under the *Digital Markets, Competition and Consumers Act*, the Competition and Markets Authority may designate a company as having "Strategic Market Status" if it:

- engages in a digital activity which has a link to the UK and has a global turnover in excess of GBP 25 billion or UK turnover in excess of GBP 1 billion in the previous 12-month period
- has substantial and entrenched market power
- is in a position of strategic significance

Such firms may be subject to bespoke enforceable codes of conduct setting out conduct requirements, may be subject to targeted "pro-competitive interventions", and are subject to a strict merger reporting regime.

We anticipate Australian regulation will be more like the UK than the European approach, allowing the ACCC to determine regulations on a service-by-service basis.

A fit for purpose digital *platforms* access regime, in our view, will need to be responsive to the rapid evolution of technology and the ultra-dynamic markets in which digital platforms operate. We explore this as a hypothetical new "Part XIG" of the CCA.

Key features of a new Part XIG might include the following.

- The ACCC as the most appropriate regulator, drawing on its digital platform inquiries since 2017 and its experience administering Parts IIIA and XIC of the CCA.
- In line with Part XIC of the CCA, the ultimate aim of promoting the long-term interest of end users, including by promoting innovation.

- Ex-ante rules in the form of access regulation, providing access to digital infrastructure bottlenecks on a wholesale basis to those who would not otherwise be in a position to negotiate access with digital gatekeepers.
- Service-specific codes which would only apply to specific gatekeepers, for specific digital platforms and in relation to specific platform services — all three elements are critically important:
    - Codes should apply asymmetrically — to gatekeepers only — not to all providers of a particular type of platform: to be pro-competitive, digital platform access should be provided to aspects of Meta's Facebook platform for example, not to a small competitor with a start-up social network.
    - Codes should apply only to the particular platform that is a bottleneck on downstream investment, adversely impacting certainty and innovation: for example, it might apply to Facebook, but not to Threads, which has grown rapidly from launch but not yet established an entrenched market position.
    - Codes should apply to specific services that are (or should be) offered by the particular platform being regulated, where there is a demonstrated case for regulatory intervention to support downstream markets despite the known risks that flow from the regulation affecting a digital platform that is itself generating significant consumer benefits: for example, by providing access to the Facebook APIs required by competitors allowing businesses to manage advertisements across platforms, without automatically providing access to all private APIs of Facebook.

    ### Example service-specific access code

    A service-specific access code might require Apple, as the provider of the integrated iPhone/iOS platform, to provide wholesale access to businesses to allow use of the NFC chip for services including payment services or other NFC-based services that have not yet been invented.

    It's easy to imagine banks using access to the NFC chip to enable digital credit cards that live outside the Apple Wallet. We can even stretch our imaginations to transport agencies enabling stored value cards for public transport payments. Or loyalty cards that live in your shopping apps and can be used across digital and physical locations easily. But the very benefit of access regulation will be use-cases that we can't yet imagine, because the platform for innovation is not currently available from the gatekeepers of the new digital economy.

    But regulated access is not without trade-offs. Security and privacy — already hot-button issues for us all — will come under even greater pressure if access to NFC is provided to a potentially wide variety of access seekers. Read on for our thinking about how access might need to be constrained through legitimate terms of access and limits on access obligations.
- There should be limitations on gatekeepers' obligations to provide access. Under the existing telecommunications access regime, network operators can deny access to a regulated wholesale service if the access provider is not creditworthy. In the digital platform space, we

expect gatekeepers may be able to deny access if they can show to an objective standard that a particular access seeker poses a special security risk. Assessing such matters will require gatekeepers to dedicate resources, for which it may be reasonable to charge fees. Disputes about gatekeepers' determinations on access may need to be adjudicated efficiently. The ACCC may want the ability to set up-front rules on limitations or have some specified in legislation.

- There will need to be some form of equivalence obligation, allowing companies that obtain access to a gatekeeper's regulated digital platform service to obtain that access on an equivalent basis to that which the gatekeeper itself enjoys. This must allow the gatekeeper to continue evolving the service and innovating. The design of access regulation should not be recklessly indifferent to its impacts on the gatekeepers' own innovation. Both the regulatory design and its enforcement will need to balance the desirability of allowing some of the most dynamic and innovative global firms to continue creating massive consumer benefits while ensuring that the process of platform evolution minimises disruptions to downstream access seekers who are dependent on the stability of the digital platforms on which they innovate.

Regulatory design for maximum innovation

Meta, Google, Amazon, Apple and others have all unleashed incredible technology and value and continue to do so. They remain subject to competitive pressures — just look at the impact of Amazon's product search, OpenAI's ChatGPT knowledge search and Apple's App Store search as competitive constraints on Google's general web search business. Access regulation should focus on ensuring that downstream innovation can also occur — that makers of smart watches and wireless headphones can compete with the ubiquitous AirPods and Apple Watches. It should not recklessly inhibit or divert the innovation of iOS, blocking the addition of personal AI features that rely on data already stored within iOS merely because this is a form of self-preferencing.

Consumer protection issues would continue to be regulated under existing consumer protection legislation, such as the Australian

Consumer protection in a digital age

In a future article, we will look at upcoming reforms of consumer protection in the digital age. One example identified by the ACCC is dark patterns on digital platforms. Dark patterns seek to manipulate or trick users into taking actions that they might not otherwise choose to take. For example, by dissuading a consumer from unsubscribing from a digital service by hiding the option to do so or requiring a confusing set of actions.

While regulators are understandably concerned about these practices, consistent standards and enforcement should be adopted across the economy. For example, consumers can easily subscribe online to many traditional services like newspapers or Pay TV, but if they wish to unsubscribe, they must phone the company during limited opening hours and are met long wait times and aggressive retention offers.

Ironically, some of the best consumer experiences are offered by digital platforms like Apple's iOS, which collates all subscriptions in one place and allows easy (and easy to understand) cancellation of subscriptions. The full spectrum of customer experiences should be taken into account by any new regulation or regulatory enforcement action.

Consumer Law, the *Online Safety Act* and the *Privacy Act*. They would not be directly addressed through the new Part XIG access regime.

How would a new digital platform service access regime work in practice?

We take some inspiration from the existing access regimes in Parts IIIA and Part XIC of the CCA to illustrate a potential process for digital platform service access regulation:

1

Gatekeeper / Platform Designation

ACCC designates a gatekeeper and specific digital platform with substantial market power within a defined digital market.

As set out in the fifth interim report to digital platform services inquiry, such a designation "should aim to identify the digital platform services that hold a critical position in the Australian economy and that have the ability and incentive to harm competition."

In the report, the ACCC discusses both quantitative and qualitative criteria. Quantitative criteria might include the numbers of monthly active Australian users of a platform's service(s) and the platform's Australian and/or global revenue. Qualitative criteria might include "whether the digital platform holds an important intermediary position, whether it has substantial market power in the provision of a digital platform service, and/or whether it operates multiple digital platform services."

The designation of which digital platform services possess market power, and the process of defining the relevant market, will be a critical first step for any regulation. Any designation should first establish whether a digital platform has enduring market power. It may be unavoidable that this inquiry has a backward-looking aspect, but the ultimate answer must have a forward-looking focus, taking into account known and likely forces that may curtail the continued importance of a digital platform. Regulation can only operate over a medium-to-long term to shape innovation

The dynamism of digital markets should not be ignored

Despite a decade of inquiries, the ACCC's digital platform reports do not directly address one of the most transformative forces since the introduction of mobile phones — AI — because it was outside the ACCC's terms of reference. If AI proves to have the potential to disrupt existing digital platforms in the medium term, it may be the case that regulatory intervention into those existing platform businesses will skew markets and competition in a materially suboptimal way.

Even within a platform category, change can occur rapidly — on some counts, Threads has already acquired 200 million monthly users (in less than 18 months) to X's 500 million (acquired over 18 years...). Regulating X, at this point, seems like a more questionable proposition than it did just 18 months ago.

and markets. Technology and the digital economy evolve with astonishing speed. Unless a digital platform business will continue to be an important platform for innovation over a reasonable period of time, regulatory disruption may be a counterproductive force for innovation and the generation of consumer benefits.

The continuing appropriateness of a designation will also need to be regularly tested. The appropriate default and maximum lengths of designation will require careful consideration.

2

Service Declaration

ACCC or the gatekeeper declares a specific service (or services) that the designated gatekeeper has to offer through the designated digital platform.

Once the need for regulatory intervention is established, the form of regulation should be tailored — as recognised in the UK approach to digital platform regulation, where conduct requirements and targeted pro-competitive interventions are to be applied on a case-by-case basis to designated firms. For example, for iOS it may be appropriate to require access to an iPhone's NFC chip and proprietary Bluetooth extensions that allow optimal wireless earbud operations. But it may not be necessary to require AI search query interfaces which Apple seems to be prepared to offer on a "plug-in" basis commercially. The positions may be reversed for Google with Android (or Samsung with Galaxy phones).

After a gatekeeper and digital platform have been designated, the gatekeeper should be permitted to self-declare services on the platform. To take the iPhone example, Apple is likely in the best position to define the technical boundaries of a service to be provided on iOS. Only if it fails to do so should the ACCC seek to intervene — informed by experts including the gatekeeper, access seekers, international experience and the work of standards bodies. This would not prevent the ACCC from considering potential services as part of a gatekeeper / platform designation. Indeed, establishing the need for designation would necessarily require some inquiry into what services would be provided via the platform. But the technical work of defining service boundaries should not be finally pre-determined at the designation stage.

Declared services will need to be well defined. Functional aspects of a definition must not be so broad as to inadvertently capture unintended services or features. On the other hand, technical aspects of a declared service must not be so tightly defined that it fails to capture future versions or replacements of a service that are distinguished only by making small technical tweaks.

Declaring specific services separately also lays a solid foundation for the next steps in the regulatory framework.

3

Terms and Conditions determination

If needed, ACCC determines the terms and conditions for access to a declared digital platform service.

Once a gatekeeper is obliged to provide access to a declared digital platform service, there must still be terms on which access is to be provided: the price of access, remedies for failing to comply with access terms, liability allocation for security breaches, and many other matters need to be settled.

Following declaration of a service, should gatekeepers be permitted or required to publish standard terms of access available to all access seekers? Is this practical where access seekers may comprise a heterogenous set of businesses (with banks, transport providers, supermarkets and restaurants all wanting to access NFC functionality on a phone)?

Will it be possible for the ACCC to determine terms of access on its own motion, to set a benchmark or floor on access terms? Or should the ACCC play the role of the arbitrator in a negotiate-arbitrate model? Maybe there is a middle ground, with the ability for the ACCC to make model terms that set directional expectations, backed by an arbitration power to address access disputes.

This may be the area of greatest departure from traditional access regimes, where access seekers are generally a more homogenous group than potential access seekers of digital platform services.

Today, we see policy conviction that regulated access is needed to create new markets and opportunities for innovation and competition on the platforms of the 21st century. Along the way, we must be careful not to kill the geese laying a plethora of golden eggs. There must be a level of humility about the risk of regulatory failures, which can be just as damaging as market failures. As we embark on a journey of addressing these issues, productive engagement and careful and deliberate regulatory design is needed to ensure any new regulation truly is in the long-term interest of end users.

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