Law Council
OF AUSTRALIA

Business Law Section

14 February 2025

Director, Digital Competition Unit
Market Conduct and Digital Division
Treasury

By email: digitalcompetition@treasury.gov.au

Dear Treasury

Response to Treasury Proposal Paper: A new digital competition regime

This submission concerning the proposed new digital competition regime is made by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**).

The Committee would be pleased to discuss any aspect of this submission.

Please contact the chair of the Committee Peta Stevenson [redacted], if you would like to do so.

Yours faithfully

Pamela Hanrahan
Chair
Business Law Section

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The Treasury

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Executive Summary

1. The Committee welcomes the opportunity to respond to the Treasury's December 2024 **Consultation Paper**, titled *A new digital competition regime*.

2. In responding to the Consultation Paper, the Committee recognises the policy position which has been taken that a new digital competition regime is required. Accordingly, this submission does not take issue with that position. The focus of this submission is on the structure and operation of the proposed regime as set out in the Consultation Paper.

3. Australian competition laws were initially underpinned by broad principles-based obligations with more specific and detailed obligations introduced over time, including sector-specific rules. With sector-specific legislation contemplated under the proposed competition regime, it would be desirable for these provisions to follow, where possible, the broad architecture of existing Australian competition law.

4. The proposed digital competition provisions contemplate the introduction of broad obligations on digital platforms. In the Committee's view it would be highly desirable for such obligations to reinforce rather than disrupt the existing, fundamental legal and economic architecture of the *Competition and Consumer Act 2010* (**CCA**).

5. In terms of thresholds for designation decisions, care should be taken with imported concepts that have historically had no significance under Australian laws (i.e., "dominant position" or "substantial and entrenched market power"). If such imported concepts are to underpin designation thresholds, then such qualitative thresholds should, at the least, be secondary to objective quantitative thresholds. Preferably, the conditions for designation should instead be based on quantitative thresholds with a view to capturing only those digital platforms that hold a critical position in the Australian economy and have the ability and incentive to harm competition.

6. On the proposed countervailing benefits test, absent a compelling reason to impose a more stringent test than the existing "net public benefits" test, it is not appropriate to depart from the existing and already high threshold for exemptions for authorisations.

7. Penalties applicable under the proposed regime should be proportionate and consistent with the existing penalty regime within the CCA. If, as suggested in the Consultation Paper, the ACCC is given the power to issue infringement notices as an alternative to applying to the court for pecuniary penalties, such penalties should be specifically formulated and limited to less serious breaches (i.e., breaches of record keeping and other procedural or administrative obligations).

8. Structural remedies have traditionally been part of the Australian competition regime in limited circumstances only, consistent with the severity of such remedies and Australia's unique constitutional and institutional context. If structural remedies were to become available under the proposed regime, they ought to be used only in the last resort, where no other form of remedy can address the identified harm or benefit.

9. Finally, the proposed regime ought to be clear and transparent. If broad obligations are imposed on digital platforms, they should be defined in a way that is applicable to all digital platform services, and capable of objective understanding and compliance. The findings of the ACCC relevant to designation decisions should also be published to ensure transparency and accountability.

Section 2: Proposed framework and legislative approach

10. Traditionally, competition policy and its underpinning law have been designed by reference to a broad set of principles-based obligations with economy-wide application. Over time, more specific and detailed provisions have been introduced and, increasingly, sector-specific rules imposed. Recognising the need for sector-specific legislation in this instance, it would nonetheless be desirable for these provisions to follow, where possible, the broad architecture of existing Australian competition law.

11. In contemplating the introduction of broad obligations under the proposed digital competition provisions of the CCA, in the Committee's view it would be highly desirable for any such obligations to reinforce rather than disrupt the existing, fundamental legal and economic architecture of the CCA.

12. The Committee recognises the position of the Federal Government with the proposed framework involving a combination of broad and specific obligations. From a "principle" perspective, the Committee's view is that obligations under the proposed regime should be confined to broad obligations that complement—rather than redefine—those already in place. Nonetheless, if the Federal Government's policy position is that specific obligations are necessary, then specific obligations alone are likely to be more workable than a combination.

Section 3: Designation

Two-step process for designation

13. Recognising the significant implications that flow from designation, it should be confined to digital platform services that hold a critical position in the Australian economy and have the ability and incentive to harm competition.

14. It is important in a legislative regime of this type that the conditions for designation are clear and transparent. In this regard, quantitative factors have the benefit of clarity and transparency. The Committee supports the use of quantitative thresholds for the primary criteria and recommends that, consistent with the EU position, designation should only occur when initial threshold quantitative criteria are met. If those quantitative thresholds are met, then qualitative factors can be considered to determine whether designation is appropriate.

15. This two-step process has the advantage of only catching organisations of a threshold size, but then involving an appropriate qualitative assessment to determine whether a qualifying organisation may engage in conduct of concern.

16. A single step focussed only on financial criteria risks being overly inclusive, and a single step based on qualitative factors alone risks being opaque and uncertain.

17. In the EU, the Digital Markets Act sets out rebuttable presumptions for each of the designation criteria in the form of quantitative thresholds. While the designation criteria can also be met by qualitative elements, the inclusion of rebuttable presumptions helps to provide greater certainty for market participants and a measure by which they can determine whether they could potentially be impacted by the digital competition regime (and similarly whether they are unlikely to be impacted).

18. In setting both the quantitative and the qualitative criteria, consideration should be given to Australia-specific market conditions, and an evidence-based approach should be used to test potential thresholds. This testing should consider whether these potential thresholds capture the types of businesses and services intended to be regulated and do not result in over-capture of businesses and services not intended to be regulated.

Quantitative thresholds

19. A platform's financial strength (derived from revenue) and a platform's reach (the number of its users) are relevant quantitative criteria which could be used to meet the first step test in the designation process.

20. At whatever levels the quantitative thresholds are set, they need to be clear and understandable to provide certainty to market participants.

21. The Committee supports the publication of guidance from the ACCC on the application of any quantitative criteria, given the potential for differences in digital platforms' business models and/or approaches to reporting revenues. In its Interim Report No 5, The ACCC gave the following examples of guidance that may be required:

    (a) the appropriate measure of revenue, including providing details on how this should be calculated by each individual digital platform; and

    (b) how to calculate "monthly active users" of a digital platform service in Australia and over what period.

Qualitative thresholds

22. The qualitative factors to be used as the second stage of the test need to be clear and readily capable of being tested.

23. Whilst concepts such as a substantial degree of market power are used elsewhere in competition law, what constitutes a substantial degree of market power is often hotly contested. The Committee is concerned that the inclusion of 'the degree of market power held by the digital platform in the relevant service' as a relevant qualitative factor has yet greater potential to lead to disputes over designation decisions.

24. Reliance on new, imported concepts, such as the 'substantial and entrenched market power' and 'dominant position' designation criteria in the UK and Germany, respectively, also has yet greater potential to lead to disputes over designation decisions. This arises from the inherent difficulties with assessing market power, which can be particularly challenging when dealing with digital services and related markets in combination with adjectival modifications of the essential concept for which there is no relevant Australian jurisprudence. The designation criteria in the UK and Germany can be contrasted with the approach adopted in the EU, which does not contain any specific criteria related to market power, although the quantitative thresholds and many of the qualitative elements included in the designation criteria are indicia of market power.

25. For these reasons the Committee submits that specifying the relevant indicia of market power as independent qualitative factors relevant to a second step in the designation decision (similar to the approach adopted in the EU) would be a preferred approach.

26. Qualitative factors could also include:

    (a) whether a digital platform occupies an important intermediary position; and

    (b) whether a digital platform operates multiple digital platform services.[1]

27. The Committee supports the publication of guidance material from the ACCC about how qualitative criteria will be interpreted to provide clarity to industry participants.

Designation decision

28. The ACCC should be required to publish a non-confidential document setting out the evidence and reasons for its designation investigation findings. Consistent with principles of Australian administrative law, the publication of reasons is important to promote transparency and accountability in administrative decision-making and provide stakeholders with a greater understanding of the designation process.

29. The publication of reasons is also critical to the review of designation decisions as they provide a foundation for understanding what aspects of a decision might be reviewed.

30. Entities proposed to be designated should also be provided with a confidential version of this document that includes at least their own confidential information.

Designation period

31. The Committee considers a designation period of 5 years to be generally appropriate. Given the dynamic nature of the industry, a shorter timeframe for designations may be appropriate on a case-by-case basis depending on the facts.

Section 4: Potential obligations

Challenges implementing a combination of broad and specific obligations

32. The proposed framework of requiring compliance with a combination of both broad and service-specific obligations is likely to create challenges for compliance and certainty.

33. While it is intended that any service-specific obligations imposed would “clarify the requirements of the broad obligations for each service” (p.18), the proposal is that designated entities would be required to comply with both sets of obligations in any event. This undermines the putative clarificatory purpose of the service-specific obligations, as compliance with those “clarified” obligations would not exclude the possibility of an entity being found not to comply with some, less clear, aspect of the associated broad obligation.

[1] This was identified by the ACCC in Interim Report No 5.

34. If broad obligations are to be imposed, they would need to be defined clearly in a way that is applicable in respect of all of the digital platform services that would be regulated under the regime, and capable of being objectively understood and complied with:

    (a) The examples set out in Table 1 (pp.21–22) suggest this may be challenging. To take the fourth row in the table as an example, it is not clear what the boundaries of the proposed broad obligation in respect of "impediments to consumer switching" would be. For example, a consumer may be required to verify their login or identity details before being able to transfer their data to switch to a different messaging platform. This might constitute an "impediment" but could not conceivably be the type of impediment that the regulation is intended to prohibit. Moreover, a "clarificatory" service-specific obligation tailored to the particular circumstances of messaging platforms would not, under the present proposal, release the platform operator from liability in respect of the vague, broad obligation which would remain.

    (b) More generally, the list of targets of broad obligations on p.19 suggests that some conduct would only be prohibited if it is anti-competitive ("anti-competitive preferencing" and "anti-competitive tying"), whereas other types of conduct may be prohibited outright regardless of whether the conduct is anti-competitive ("impediments to consumer switching", "restrictions on interoperability that limit effective competition", "unfair treatment of business users", and "lack of transparency"). This would be problematic if it were the intention, as the same conduct could be pro- or anti-competitive depending on the circumstances, and the regulation should not prohibit pro-competitive conduct. Each obligation should be subject to an assessment of whether the relevant conduct is anti-competitive. Given such an assessment (which would include consideration of any efficiencies) may be detailed, fact-intensive, and potentially time-consuming if it is linked to a broadly-defined obligation, it may be more efficient for the regime to have tailored service-specific obligations rather than broad obligations which could take longer to assess.

    (c) It may also not be clear how the proposed broad obligations would apply in respect of each and every different specified regulated digital platform service. Different types of obligations may also have different levels of relevance or importance depending on the service involved: for example, tying may be more relevant than transparency for certain services, while the position may be reversed for others.

35. Additionally, the potential scope of service-specific obligations is currently unclear. As these are proposed to be implemented in subordinate legislation, the breadth of the power to make service-specific obligations should be defined clearly in the primary legislation.

36. At the very least, every obligation should be linked to a well-evidenced and well-defined theory of harm. By way of example, it is suggested on p.21 that an app marketplace using commercially sensitive data to develop its own apps is an example of self-preferencing that could be captured through a service-specific obligation for app marketplaces. However, it is not immediately obvious why the use of another firm's sensitive data is an example of self-preferencing. This illustrates the challenge of relying on broad prohibitions, and why only service-specific obligations should be relied on once clearly defined.

37. The suggestion that service-specific obligations "could extend to conduct occurring in the supply of other related services" (p.19) suggests that the potential scope of these obligations could extend widely. An appropriate boundary will need to be specified; for example, it would not be appropriate for service-specific obligations on an entity designated in respect of one particular service to be imposed to address alleged harms in respect of a different service.

38. It is notable that no digital platform regime in force in any other major jurisdiction takes the proposed 'hybrid' approach where compliance with both broad and narrow obligations is required.

Alternative options

39. Alternative options to the proposed combination of broad and service-specific obligations could include:

    (a) Similar to the UK DMCCA, setting tailored obligations for each service, potentially in respect of specific designated entities. The scope of such potential obligations would need to be clearly defined in primary legislation, so that there are appropriate boundaries on the potential tailored obligations that could be set. There would be no separate 'broad obligations'.

    (b) Similar to the EU DMA, setting out obligations in primary legislation which automatically apply to all designated entities.

    (c) A hybrid type of scheme could be workable if it involves obligations in primary legislation which apply to designated entities, but with an option to impose service-specific obligations (with appropriate scope/boundaries set in primary legislation) and, if such service-specific obligations are in force, a requirement to comply only with those obligations (or deemed compliance with the broad obligations in primary legislation).

40. The proposal paper notes that "consideration will be given as to whether the ACCC should be given a limited power to develop rules to further specify the technical requirements for obligations" (p.23). The scope of such a proposed power is not clear. It would be preferable for rule-making functions to be separated from the enforcement function. As the body responsible for enforcement, it may not reflect best practice for the ACCC also to have a rule-making power, particularly in the present circumstances where the proposed regime contemplates wide-ranging and onerous obligations.

Countervailing benefits test

41. It is proposed that the threshold for a 'countervailing benefits' exemption would be higher than the current 'net public benefit' test for authorisations under section 90(7)(b) of the CCA. However, the net public benefit test under section 90(7)(b) is already a high threshold to meet, and it has the advantage of being the subject of both regulatory consideration and judicial scrutiny over many years in Australia. There does not appear to be any compelling reason to impose a more stringent test for countervailing benefits for exemptions under the proposed regime, and the threshold under section 90(7)(b) would be appropriate. A deviation from the approach in section 90(7)(b) risks inefficiency and harm to the welfare of Australians, because conduct that results in a net public benefit may not be authorised.

42. To the extent possible, the concepts used in these amendments should complement and not interfere with the principles underpinning the essential existing architecture of the CCA. An inherent risk in engaging new or materially different legal and economic concepts from those already embedded in the CCA is significant compromise to the effectiveness of the digital platforms regime in enhancing the welfare of Australians.

43. The suggestion to implement a higher threshold appears to be motivated by a potential concern regarding vexatious exemption applications. However, the proposal paper does not set out any specific basis for such a concern. In any event, any concern about vexatious applications should not be addressed by altering the threshold for exemption, as this could exclude genuine applications which involve a net public benefit.

Section 5: Enforcement and compliance

Penalties

44. The Committee considers that any penalties under the new regime should be proportionate and consistent with the CCA penalty regime more broadly.

45. The regime should clearly specify which provisions are penalty provisions (e.g., breach of the broad obligations proposed to be contained in the legislation). Non-monetary remedies should also be consistent with the non-monetary remedy regime more generally and available to be ordered by the Court in its discretion.

46. The Committee notes one alternative to applying to the court for pecuniary penalties is for the ACCC to have the power to issue an infringement notice for an alleged breach.

47. Specific penalties should be formulated for breach of record-keeping and other more procedural or administrative requirements.

Structural remedies

48. So-called structural remedies (i.e., involuntary mandated divestitures) are not currently a part of the general Australian competition regulatory environment, except in very limited circumstances (e.g., in theory an Australian court could order a divestiture to 'unscramble' a completed merger that had contravened section 50). There are many historic reasons for this, including Australia's unique constitutional and institutional context. However, in some overseas jurisdictions such remedies have evolved as part of the general competition regulatory environment, and that explains why, in relation to recent regulation of digital platforms, some of those jurisdictions have or could include such a remedy.

49. The Committee notes that any proposed Australian regulation of digital platforms should contain remedies consistent with our own regulatory, constitutional and institutional environment. Structural remedies are considered the most intrusive enforcement measure from a property rights perspective. Australia's constitutional approach to private property rights is very different, for example, to that of other jurisdictions.

50. If such a remedy were to be introduced in Australia, uniquely for the regulation of digital platforms, it should be appropriately qualified so that its use is very clearly a last resort. It should be noted that, even in those overseas jurisdictions that have long had such remedies, they are—and should be—used only where no other form of remedy can address the specific identified harm, and the benefits that are expected to flow

from the remedy would warrant its use. Indeed, their use is exceedingly rare. Structural remedies, for example, have rarely been adopted for abuse of dominance cases under EU competition law.

51. The Committee further notes that, in those overseas jurisdictions that have included the possibility of such a remedy as part of their regulation of digital platforms, there are specific limitations on their use. For example, under the EU DMA:

    (a) Only if a gatekeeper has been subject to several decisions of non-compliance, can the European Commission impose additional behavioural or structural remedies for this "systematic non-compliance" following a market investigation. Systematic non-compliance according to Article 18 requires that a designated gatekeeper has infringed one obligation several times or several of the obligations in Articles 5, 6, and 7.

    (b) To establish systematic non-compliance, two cumulative criteria—one formal and one substantive—must be met:

        (i) First, Article 18(1) stipulates that the market investigation must demonstrate that the gatekeeper has systematically infringed one or more obligations of Articles 5, 6, or 7 over the last eight years. This means at least three non-compliance decisions having been adopted in the previous eight years concerning any of the core platform services of the gatekeeper; and

        (ii) Second, the gatekeeper must have "maintained, strengthened, or extended its gatekeeper position", which relates to the gatekeeper having at least maintained the strong position required to be designated a gatekeeper in Article 3(1).

    (c) When the market investigation concludes that these two requirements have been met, the Commission may adopt an implementing act imposing "any behavioural or structural remedies which are proportionate and necessary to ensure effective compliance with this Regulation". The principle of proportionality then applies as a further limitation on the potential use of a structural remedy. The main guideline derived from the proportionality principle is the obligation for the enforcer to choose the least onerous measure to achieve the objectives pursued by the legislation, and the disadvantages must not be disproportionate to these aims. The principle of proportionality leads to a preference for less intrusive remedies as a starting point if such are available.

52. Finally, the Committee notes that many of the likely targets for regulation are inherently multinational and supply services that are, by their nature, usually highly globalised that transcend territorial boundaries. As such, there are likely to be real and practical difficulties in imposing an involuntary mandated divestiture only within Australia's territorial and jurisdictional boundaries that does not apply outside Australia. While such issues are commonly encountered in global merger control, such issues of practicality are addressed in Australian mergers because the divestiture must be voluntarily offered by the party involved (ensuring the business can be structurally separated and divested within agreed timeframes) and, even then, is subject to intense scrutiny by the ACCC to ensure the divestiture is viable.

Compliance proposals regime

53. The inclusion of a mechanism that allows a designated entity to comply with its obligations under the regime by complying with an international compliance regime, so that regulation under Australia's proposed digital platform regulation is consistent with similar regulatory developments in other (comparable) countries, is sound policy.

54. To take advantage of comparable regulatory regimes, a mechanism for a designated entity to propose to the ACCC the same compliance regimes to which it is already subject overseas is recommended by the Committee. This could be similar to an entity proposing to give an undertaking to the ACCC under section 87B of the CCA. Some compliance proposals put by a designated entity may be detailed and granular. The process by which the ACCC would come to accept a compliance proposal is investigative, interactive and adaptive in nature.

55. If a compliance proposal is given to and accepted by the ACCC, the regulated entity will be considered to comply with the relevant obligations under the Australian regime. It follows that penalties for material breach of the accepted compliance proposal would be the same as for a breach of the Australian obligations that apply under the Australian regime in respect of the relevant service.

56. Regarding the proposed penalty regime for breaches of accepted compliance proposals, there is the potential (given unavoidable granularity in compliance proposals) for minor technical breaches of accepted compliance proposals to be treated as the same as a breach of the substantive obligations under the Australian regime. Therefore, some de minimis carve-out should be considered in this part of the Australian (statutory) regime. Alternatively, an explicit proportionality principle should be considered in this part of the Australian (statutory) regime, in relation to penalties for breaches of compliance proposals.

Section 6: Other implementation considerations

Relevant decisions

57. The proposed regime includes 5 categories of decisions:

    (a) Decision by Minister or ACCC to undertake a designation investigation.

    (b) Designation decision by Minister following ACCC investigation (instigated by Minister or ACCC) (to be made by way of subordinate legislation).

    (c) Decision to develop service-specific obligations in subordinate legislation (developed by government, in consultation with the ACCC).

    (d) Decision by ACCC to grant an exemption to permit conduct that may otherwise breach the new obligations.

    (e) Decision by ACCC to accept a compliance proposal.

Designation investigations

58. A Decision by the Minister or the ACCC to undertake a designation investigation should be subject to judicial review but in principle would not need to be subject to merits review given the nature of the process which it initiates, which does not of itself affect the interests of any person.

Designation decisions

59. A decision to designate is a critical decision in the framework of the proposal. It will involve quantitative and qualitative considerations. The qualitative considerations, in particular, appear to require the decision maker to exercise considerable judgment on complex issues of fact, law and economics. There are potentially very significant private property, investment and public interest and other consequences of designation decisions.

60. In principle, the decision to designate should be subject to merits review by the Australian Competition Tribunal (**Tribunal**). A decision to designate affects the interests of the designated entity and should be reviewable to ensure the right and preferable decision is made. As noted in the proposal paper, the right to review is an important safeguard and also promotes the integrity of the proposed framework. The current proposal does not seem to contemplate this as it does not seem to contemplate any step, such as the publication of the Minister's decision, before the subordinate legislation is passed (e.g., Minister publishes the Minister's decision).

61. The ability to seek a merits review of a designation decision and the review process itself should be balanced so that the review is a reconsideration of the designation decision, but the review occurs expeditiously. Mechanisms such as time limits and limits on material to be put before the Tribunal could be included, while also permitting new material that did not exist at the time of the decision to be put before the Tribunal, and allowing a party to respond to material before the decision maker. Some Tribunal discretion could also be included to ensure relevant material can be put before the Tribunal in a fast-moving sector. In principle, such limits and discretions would address concerns about the potential for protracted merits review processes to thwart the achievement of the objectives of the new regime while allowing proper merits review of the decision.

Decisions about service-specific obligations

62. A decision to develop service-specific obligations by way of subordinate legislation appears to involve a process of consultation by government with the ACCC and then putting the proposed subordinate legislation out for broader public consultation. In principle, merits review may not be appropriate for subordinate legislation developed in this way. However, the process by which that legislation is developed should include requirements for meaningful engagement with the affected designated platform(s) (and consultation with interested parties).

63. The primary legislation should be also very clear as to the scope and limits of such subordinate legislation. If the process involves decisions made by the ACCC or Minister as to the scope or content of the subordinate legislation, such decisions should be subject at least to judicial review. To the extent those decisions affect the rights of the designated platform, and involve discretionary considerations, in principle merits review may be appropriate.

Exemption decisions

64. In principle, exemption decisions appear similar to current ACCC authorisation decisions and could be reviewed in the same way as review of ACCC authorisation decisions currently.

Compliance proposal decisions

65. A decision by the ACCC to accept a compliance proposal is in principle similar to decision by the ACCC to accept an undertaking under s87B. In principle there would be no need for merits review of such decisions. Judicial review would always be available.

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The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

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The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

The Section's website is www.lawcouncil.asn.au/business-law.