



ACCC DESIGNS AUSTRALIA'S FUTURE FRAMEWORK FOR REGULATING DIGITAL PLATFORMS

2022

KEY POINTS

Consistent with international examples, the Australian Competition and Consumer Commission (**ACCC**) recommends ex ante regulation as follows:

- + “Designated” digital platforms based on quantitative and/or qualitative criteria intended to reflect the significance of the platform
- + Mandatory service-specific codes including for search, app stores, ad tech, mobile operating systems and intermediary platform services
- + Targeted obligations to address specific issues including self-preferencing, interoperability, transparency, exclusivity, data barriers to competition, unfair dealings, impediments to consumer switching and price parity clauses
- + Consumer protection measures including dispute resolution and complaint escalation processes, and measures to prevent and remove scams, harmful apps and fake reviews

CONTENTS

OVERVIEW	3
COMPETITION MEASURES	4
1. What’s the ACCC’s recommended framework?	4
2. How does the ACCC framework compare overall?	7
3. Which services and digital platforms are in the ACCC’s early sights?	8
4. Does the ACCC contemplate safeguards against over-regulating beneficial conduct?	9
CONSUMER PROTECTION MEASURES	10
1. What are the ACCC’s recommendations for digital platform-specific measures?	10
2. Targeted consumer measures	10
3. What is the recommend scope of application of these targeted measures?	13
4. Economy-wide consumer measures	13
SO, WHEN WILL DIGITAL PLATFORMS ACTUALLY BE SUBJECT TO THESE FURTHER REGULATIONS IN AUSTRALIA?	14
OUR EXPERTS	15

OVERVIEW

The highly anticipated fifth instalment of the ACCC's Digital Platform Services Inquiry (**DPSI 5**) was released on 11 November 2022. DPSI 5 makes a series of recommendations for legislative reform to address issues relating to digital platforms that the ACCC has previously identified could potentially harm consumers, small businesses and competition in general.

The ACCC found that Australia's competition and consumer protection laws on their own are not sufficient to address its identified concerns relating to digital platform services. In particular, the ACCC considers that there are challenges with existing laws and enforcement action's ability to address concerns in fast-moving digital markets because of the length of time required to litigate under an ex post regime.

The ACCC flagged its concerns relating to scams, harmful apps and fake reviews, inadequate dispute resolution, increased market concentration and instances of anti-competitive conduct. Accordingly, the ACCC recommends law reform to implement an ex-ante regulatory framework for digital platforms that reflects similar principles to those of other frameworks, particularly the UK Competition and Markets Authority's (**CMA**) proposed framework and EU's Digital Markets Act (**DMA**).

Despite its concerns, the ACCC recognises that digital platforms offer many valuable services to consumers and businesses, facilitating significant positive changes in our society including to the way we work, study, communicate and do business. Nonetheless, the ACCC is concerned that the widespread use of digital platforms can create opportunities for potential misuse of the platforms in a way that could harm consumers, competition and the Australian economy.

The ACCC has sought to balance these competing notions in DPSI 5, which reflects what seems to be an evidence and principled-based approach to regulation taken by its new Chair, Gina Cass-Gottlieb.

DPSI 5 shows that the ACCC is alive to the burden that increased regulation places on digital platforms. It proposes measures that are intended to minimise this burden, where practical. This perspective is manifested through its call for targeted ex-ante regulations to address identified competition and consumer harms limited to specific services. It urges for coherence with other Australian regulatory frameworks and emerging international competition reforms.

In terms of Australia's regulatory landscape, the Federal Government is already considering a range of further regulatory and policy initiatives to address overlapping issues and harms in the digital platform space. These initiatives include: the review of the Privacy Act and the Online Privacy Code, changes to the Australian payments system, reviews to the State and Territory defamation laws, and the implementation of the Basic Online Safety Expectations by the Office of the eSafety Commissioner. Coherence between these initiatives and changes to competition and consumer laws will be vital.

The Australian Government has also been laying the groundwork for a unified approach to digital platform regulation. The Digital Platform Regulators Forum (**DP-Reg**) was formed in June 2022 to support a streamlined and cohesive approach to the regulation of digital platforms. DP-Reg brings together the Australian Communications and Media Authority (**ACMA**), the ACCC, the Office of the Australian Information Commissioner (**OAIC**) and the Office of the eSafety Commissioner. The forum allows the regulators to share information and collaborate on how competition, consumer protection, privacy online safety and data issues intersect.

DPSI 5 is also focused on alignment with emerging international competition reforms for digital platforms. The ACCC identifies that international coherence could help reduce the regulatory burden for affected digital platforms that operate across jurisdictions and provide greater certainty to digital platforms and related firms. In turn, international coherence may also help ensure Australian consumers and businesses benefit from law reform implemented globally.

Importantly, the ACCC does not see ex ante regulation as a complete solution supplanting ex post enforcement of existing competition and consumer protection laws. Rather, the ACCC considers the two are complementary.

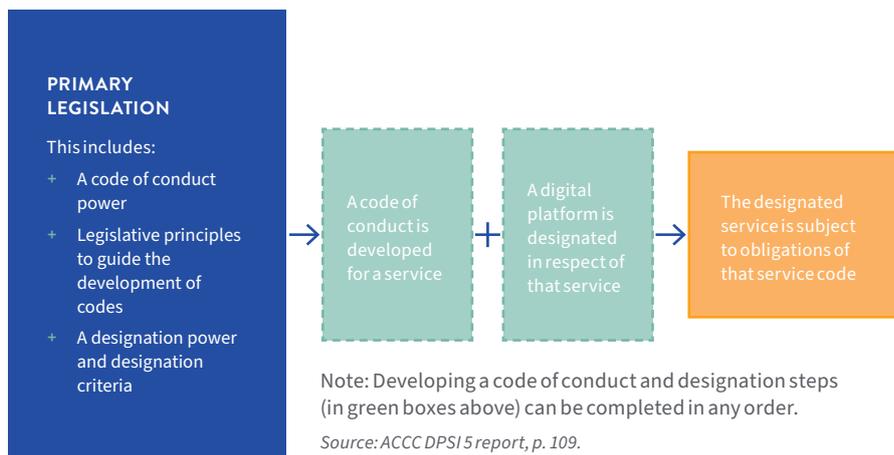
Now, we take a deep dive into the recommendations themselves and what they may mean for digital platforms, consumers and companies that interact with them and the broader Australian economy...

COMPETITION MEASURES

1. WHAT'S THE ACCC'S RECOMMENDED FRAMEWORK?

The ACCC recommends that additional competition measures in the form of mandatory service-specific codes of conduct be developed by the relevant regulator under the guidance of legislated principles. These codes would apply to 'designated' digital platforms. This allows flexibility to tailor the obligations to the specific competition issues relevant to that service as these change over time.

The ACCC has illustrated how it envisages the codes and additional measures applying (see figure on the right).



The ACCC's recommendations drew on both the reforms being proposed in the UK and the EU's recently adopted DMA. We have set out below the similarities and differences between Australia's proposed regime and those proposed in the UK and the EU.

(A) WHICH DIGITAL PLATFORMS ARE / PROPOSED TO BE REGULATED?

ACCC recommendation

A platform that is designated a 'designated' digital platform (**DDP**) in relation to a specified service. The DDP criteria could be based on:

- + **quantitative criteria** (e.g., number of Australian monthly active users or revenue);
- + **qualitative criteria** (e.g., holds an important intermediary position, has substantial market power, or operates multiple digital platform services); or
- + **a combination of both.**

There could be a mechanism to allow firms meeting the quantitative criteria to avoid designation in some circumstances, (e.g., by reference to qualitative criteria).

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DMA)
<p>If a platform is designated to have "Strategic Market Status" (SMS) it is because it has:</p> <ul style="list-style-type: none"> + substantial and entrenched market power in at least one digital activity, providing the firm with a strategic position; + a UK nexus to ensure the Digital Markets Unit (DMU) within the CMA focuses on the impact of competition in the UK; and + a minimum revenue threshold. 	<p>If a platform is designated a "gatekeeper" it is because it:</p> <ul style="list-style-type: none"> + has a significant impact on a market; + provides a core platform service (see below), which is an important gateway for business users to reach end users; and + has an entrenched and durable position. <p>Digital platforms can be presumed to have satisfied these qualitative requirements if they meet certain quantitative thresholds, which may be rebutted by the digital platform.</p> <p>A digital platform could satisfy all of the qualitative designation requirements without satisfying any quantitative criteria.</p>

(B) WHAT SERVICES WILL THE COMPETITION MEASURES APPLY TO?

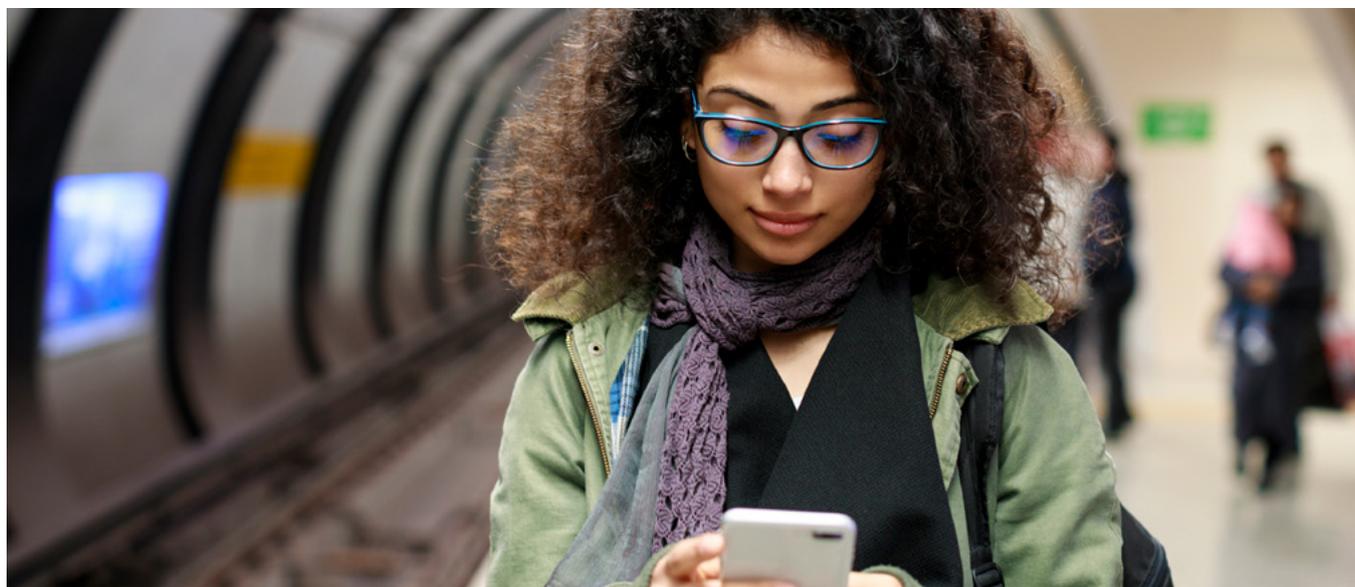
ACCC recommendation

The ACCC mentions four services that could be subject to a code in relation to specific competition measures, including: **app store, search engine, ad tech and mobile operating system (OS)** services. DPSI 5 also sets out a more expansive list of services that could be subject to a code in the future:

- + online intermediation services
- + online search engine services
- + online social media networking services
- + video-sharing platforms
- + number-independent interpersonal communications services
- + operating systems
- + web browsers
- + virtual assistants
- + cloud computing services
- + online advertising services
- + online retail marketplaces

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DMA)
<p>Legislation to set out categories of conduct requirements. The DMU will have the ability to develop binding, specific requirements in these categories for each digital platform with SMS where appropriate.</p> <p>While digital platforms are designated on the basis that they have substantial and entrenched market power in at least one digital activity, the UK Government appears to have left open the possibility of conduct requirements potentially applying to all aspects of a digital platform's business.</p>	<p>The DMA obligations apply to core platform services, which are defined as:</p> <ul style="list-style-type: none"> + online intermediation services + online search engines + online social networking services + video-sharing platform services + number-independent interpersonal communications services + operating systems + web browsers + virtual assistants + cloud computing services + online advertising services



(C) WHAT KIND OF COMPETITION MEASURES WILL APPLY TO A DESIGNATED PLATFORM?

ACCC recommendation

Mandatory service-specific codes that impose **targeted obligations** based on **high-level legislative principles**, to address (as required):

- + anti-competitive **self-preferencing** or **tying**
- + exclusive **pre-installation** and **default** agreements
- + impediments to **consumer switching** or **interoperability**
- + data-related **barriers to entry and expansion**, where privacy impacts can be managed
- + a lack of **transparency**
- + **unfair dealings** with business users
- + **exclusivity** and **price parity clauses** in contracts with business users

Legislated principles will focus on promoting competition on the merits, informed and effective consumer choice, and fair trading and transparency for users of digital platforms.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DMA)
<p>Legislation setting out categories of conduct requirements based on overarching principles of fair trading, open choices, and trust and transparency e.g.:</p> <ul style="list-style-type: none"> + prohibiting discriminatory terms, conditions or policies to certain (or categories of) users + preventing bundling or tying + providing clear, relevant, accurate and accessible information to users <p>There will also be specific category of conduct requirements preventing anti-competitive leveraging, which increases or entrenches the digital platform's market power in a digital activity.</p> <p>The DMU will be able to remove or amend conduct requirements to respond to changes in the market.</p>	<p>Obligations are split into activities they can and cannot engage in. These obligations broadly relate to use of data, self-preferencing, interoperability, data access, pre-installation and defaults, switching and complaints. Except in limited cases, the obligations apply to all the core platform services the gatekeeper offers.</p> <p>Examples of obligations on gatekeepers:</p> <ul style="list-style-type: none"> + allow users to un-install pre-installed apps and change default settings + allow users to install third party apps or app stores that interoperate with their OS + allow third parties to interoperate with their services + provide advertising companies with access to their performance measuring tools + allow users to unsubscribe as easily as they subscribed + provide business users with access to data that the business generates using the gatekeeper's platform + provide users with access to effective portability of data + provide fair access to app stores <p>Example of prohibited conduct by gatekeepers:</p> <ul style="list-style-type: none"> + using business users' data when competing with these users on their own platform + favourably ranking their own products above third parties + making access to core platforms conditional on using other services + preventing businesses from offering products or services to users through direct or third party channels + restricting the ability of users to switch between apps and services <p>The DMA distinguishes between obligations that will be imposed in their entirety and those that will be tailored by the EC.</p>

(D) ARE THERE ANY EXEMPTIONS TO THESE COMPETITION OBLIGATIONS FOR A DESIGNATED PLATFORM?

ACCC recommendation

Consideration to be given to an **exemptions mechanism** that will allow the relevant regulator to consider whether a digital platform should be exempt from a particular competition obligation based on the likelihood and materiality of unintended consequences.

This could be through a mechanism allowing firms to avoid designation in certain circumstances, e.g., where privacy or security impact is established.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DMA)
<p>Framework will include a mechanism to ensure conduct that provides net benefits to consumers will not breach any conduct requirements. The DMU may exempt the firm if it is satisfied the conduct is indispensable to achieving the benefits (and the benefits outweigh the potential harm).</p>	<p>EC may fully or partially exempt digital platforms from obligations on grounds of public health or public security only.</p>



2. HOW DOES THE ACCC FRAMEWORK COMPARE OVERALL?

The ACCC’s recommended competition measures appear to most closely align the UK Government’s proposed approach (yet to be consolidated into formal legislation tabled in parliament), which envisions applying a regulator-developed mandatory code of conduct to digital platforms with SMS. In contrast, the EU imposes broad obligations through primary legislation on “gatekeepers” in relation to services specified in the legislation. However, a feature that is unique to the ACCC’s recommendation is that it envisages that a code be developed in relation to a specific service, and a digital platform is designated in respect of that service. Like both the UK and EU approaches, the ACCC also recommends an exemptions mechanism that would allow a digital platform to be exempt from complying with certain code obligations under certain circumstances.

The ACCC’s approach aims to ensure:

- + flexibility (through regulator-made codes, rather than legislation);
- + certainty (by setting upfront rules); and
- + importantly, targeted application (recognising that digital platforms all have different business models, and that there are differences in competitive dynamics in the markets they operate in).

It appears from DPSI 5 that the ACCC has considered both the strengths and weaknesses of the UK and EU approaches and has tailored its design to address their respective potential pitfalls. In particular, the UK approach has been criticised for how powerful the DMU would be (e.g., given the proposal to impose financial penalties on senior management), while the EU’s legislative principles have been criticised for being too high-level, creating

uncertainty and confusion as to their application to businesses. Although the ACCC’s proposals are full of potential to achieve a balance between the needs for regulation, accountability and certainty, we of course do not yet know whether its version of ex ante competition regulation will hit the mark. The devil is in the detail, and we are unlikely to see those details until some time next year at the earliest, when the Government begins its consultation on the proposals.

3. WHICH SERVICES AND DIGITAL PLATFORMS ARE IN THE ACCC'S EARLY SIGHTS?

ACCC Chair Cass-Gottlieb has confirmed the ACCC's intention to prioritise mandatory codes for **app stores** and **search engines**. DPI5 expressed concerns about providers of these services engaging in self-preferencing, exclusive pre-installation agreements / defaults and frustrating consumer switching. The ACCC also restates that it has observed high levels of concentration and entrenched market power in both app stores (Google and Apple) and search (Google). Accordingly, if the Government accepts the ACCC's proposals, we may well see mandatory obligations first imposed on Google in relation to search services and on both Apple and Google in relation to app stores.

The following table maps out the types of obligations the ACCC envisages could apply to a DDP in relation to its app stores and search services under a mandatory code.

HARM IDENTIFIED	POSSIBLE APP STORE CODE OBLIGATIONS	POSSIBLE SEARCH CODE OBLIGATIONS
Anti-competitive self-preferencing	DDPs cannot: <ul style="list-style-type: none"> + favourably treat their own apps in app stores search result rankings + use commercially sensitive data collected from the app review process to develop their own apps eg. through data separation requirements 	
Anti-competitive tying	DDPs cannot require: <ul style="list-style-type: none"> + app developers to use their first party in-app payment systems as a condition of using their app store + device manufacturers to pre-install other first-party apps as a condition of pre-installing their app stores 	
Exclusive pre-installation agreements and defaults	DDPs must allow consumers to delete or uninstall certain pre-installed apps , and to change default settings to a third party service.	DDPs cannot enter into pre-installation arrangements that are, in practice or effect, exclusive . DDPs must provide choice screens in respect of specific services that act as 'search access points'. The ACCC notes any choice screen's design and implementation would need to be subject to detailed consultation with industry participants and user testing, and be informed by implementation of choice screens overseas.
Difficulty switching	DDPs cannot: <ul style="list-style-type: none"> + use dark patterns to restrict a consumer's ability to change defaults and switch to alternative services + restrict an app developer's ability to communicate with consumers both within and outside its apps about alternative payment options, including information about cost and pricing 	DDPs cannot use dark patterns to restrict a consumer's ability to change defaults and switch to alternative services.

HARM IDENTIFIED	POSSIBLE APP STORE CODE OBLIGATIONS	POSSIBLE SEARCH CODE OBLIGATIONS
Low interoperability	DDPs must allow third party app stores (including cloud gaming stores) to be compatible with their OS and made available for download in their own app stores.	
Data-related barriers to entry and expansion		DDPs must share certain click-and-query data (and/or facilitate data portability in respect of that data).
Lack of transparency	DDPs must provide a transparent app review process.	
Unfair treatment of business users	DDPs must: <ul style="list-style-type: none"> + apply app review processes fairly and consistently + ensure their terms and conditions do not unreasonably prevent business users from exercising or enforcing their legal rights + address any significant and unwarranted deterioration in the terms of service due to a DDP's unilateral change 	
Exclusivity and price parity clauses	DDPs cannot use blanket exclusivity or price parity clauses .	

4. DOES THE ACCC CONTEMPLATE SAFEGUARDS AGAINST OVER-REGULATING BENEFICIAL CONDUCT?

DPSI 5 steps through the conduct and complaints that have led to the suggested obligations. However, it also stresses that many instances of conduct may not be anti-competitive. For example, if self-preferencing generates stronger competition between ecosystems by making a platform more beneficial to consumers (e.g., secure), this might outweigh competition impacts in other markets, especially if those benefits cannot be achieved in other ways. Accordingly, the ACCC also recommends consideration of a mechanism that would exempt a DDP from particular code obligations based on the “likelihood and materiality of unintended consequences”. An exemptions mechanism is a familiar concept under Australian competition laws, such as the currently ability for firms to seek exemptions for cartel conduct through the ACCC’s authorisation process or an exemption for resale price maintenance through the ACCC’s notification process. An exemptions mechanism would also be consistent with both the UK proposals and the EU regime, which both provide a mechanism for exempting digital platforms from obligations under certain circumstances.



CONSUMER PROTECTION MEASURES

To address the consumer protection harms it has identified, the ACCC has proposed both measures that are specific to digital platforms and measures that it considers should apply economy-wide.

1. WHAT ARE THE ACCC'S RECOMMENDATIONS FOR DIGITAL PLATFORM-SPECIFIC MEASURES?

The ACCC recommends introducing the following measures in relation to all digital platforms:

- + **Mandatory processes to prevent and remove scams, harmful apps and fake reviews**, including notice-and-action mechanisms, verification of certain business users, additional verification of advertisers of financial services and products, improved review verification disclosures and public reporting on mitigation efforts.
- + **Mandatory internal dispute resolution standards** that ensure accessibility, timeliness, accountability, the ability to escalate to a human representative and transparency.
- + Ensuring consumers and small businesses have **access to an independent external ombuds scheme**.

2. TARGETED CONSUMER MEASURES

The targeted measures relating to processes to remove scams, harmful apps and fake reviews, as well as mandatory internal dispute resolution standards, are very similar to notice-and-action measures imposed on digital platforms under the EU's Digital Services Act (**DSA**), which also requires digital platforms to address systemic risks such as dissemination of illegal content. We set out below the similarities and differences between the ACCC's proposed targeted consumer protection measures with the approach taken in the EU and the UK.

(A) WHICH DIGITAL PLATFORMS WOULD THE PROPOSED MEASURES APPLY TO?

ACCC recommendation

The measures will apply to "[A]ll relevant digital platform services". Measures should apply, at a minimum, to:

- + **for scams:** search, social media, online private messaging, app stores, online retail marketplaces and digital advertising services;
- + **for harmful apps:** app stores; and
- + **for fake reviews:** search, social media, app stores, and online retail marketplaces services.

Dispute resolution requirements should apply to all the above digital platform services.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DSA AND P2B REGULATION)
<p>The consumer obligations proposed in the Online Safety Bill (OS Bill) will apply to user-to-user service platforms (platforms where the content generated on the service by a user may be encountered by another service) and search services (e.g., social media platforms and search engines).</p> <p>For SMS firms (see competition measures section), there will also be consumer measures under the overarching principles of 'open choice', 'fair trading' and 'trust and transparency'.</p>	<p>Obligations apply to all intermediary services offering network infrastructure, including internet access providers, domain name registrars and hosting services. This includes cloud, webhosting services and online platforms (which include online marketplaces, app stores, collaborative economy platforms and social media platforms).</p> <p>Obligations vary depending on the role, size and impact of the affected service.</p>

(B) WHAT ARE THE MEASURES ADDRESSING SCAMS / HARMFUL APPS / FAKE REVIEWS?ACCC recommendation

- + **Notice-and-action mechanisms** allowing users to report a scam or harmful app, and requiring the platform to respond and address the concern in a particular manner.
- + **Verification of certain business users** (e.g., advertisers, app developers, merchants) and **advertisers offering financial products and services**.
- + Inform customers about **review and rating verification measures**.
- + **Public reporting** on digital platforms' mitigation efforts.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DSA AND P2B REGULATION)
<ul style="list-style-type: none"> + OS Bill will impose a duty on digital platforms to remove “illegal content” and other duties to address fraudulent advertising. + The UK Financial Conduct Authority can take enforcement action against digital platforms for displaying unapproved financial adverts. + CMA also interprets UK's general prohibition on engaging in unfair commercial practices against consumers requiring digital platforms to minimise harmful content, rather than simply responding to reports. 	<ul style="list-style-type: none"> + The DSA contains obligations relating to illegal content, including requiring all intermediary services to comply with any judicial or administrative authority's orders to act against illegal content. Hosting services are also required to have mechanisms to notify illegal content. + The DSA also requires online platforms to work with specialised 'trusted flaggers' to identify and report illegal content, suspend users that provide illegal content, and implement dispute resolution mechanisms for users regarding the removal of illegal content.

(C) WHAT ARE THE MEASURES ADDRESSING DARK PATTERNS / CHOICE ARCHITECTURE / MANIPULATION OF CONSUMERS?ACCC recommendation

The mandatory service-specific codes for DDPs (see competition measures section) could include targeted obligations to address conduct that **impedes switching** (including **dark patterns**). The ACCC also supports an economy-wide unfair trading practices prohibition, which it considers would capture dark patterns.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DSA AND P2B REGULATION)
<p>For SMS firms, may include conduct requirements to reduce or remove barriers preventing users from choosing freely and easily between services provided by firms with SMS and other firms (i.e., under the 'open choice' guiding principle).</p>	<p>The DSA prohibits online platforms from deceiving or using nudging techniques to influence users' behaviour through dark patterns. These prohibitions apply to all online platforms.</p>

(D) WHAT ARE THE MEASURES ADDRESSING FAIR DEALINGS WITH BUSINESS USERS?ACCC recommendation

Principles to be in legislation, including those focusing on **fair trading** and **transparency** for users of digital platforms. The ACCC's recommendation on a general prohibition on unfair trading practices above and on dispute resolution processes (see below) would also be relevant.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DSA AND P2B REGULATION)
For SMS firms, conduct requirements to ensure that users are treated fairly and able to trade on reasonable commercial terms with digital platforms with SMS (i.e., through 'fair trading' guiding principle).	The EU's Platform to Business Regulation (P2B regulation) prohibits certain unfair trading practices such as suspending, terminating or otherwise restricting accounts without clear reasons, or failing to give appropriate notice of changes to T&Cs. The DSA also imposes fairness obligations on all intermediary services.

(E) WHAT ARE THE MEASURES TO PROVIDE DISPUTE RESOLUTION PROCESSES?ACCC recommendation

- + Digital platforms to **meet mandatory minimum internal dispute resolution standards**, which should apply, at a minimum, to search, social media, online private messaging, app stores, online retail marketplaces, and digital advertising services.
- + **External dispute resolution scheme for digital platforms** in the form of a mandatory ombuds scheme, which would support proposed mandatory internal dispute resolution standards.

How does this compare?

UK (PROPOSED BY UK GOVT)	EU (UNDER THE DSA AND P2B REGULATION)
The UK Government has not proposed equivalent dispute resolution measures for consumers. However, the UK Government has indicated that once the OS Bill has been implemented and established, it may consider introducing an ombuds-service into the scheme.	The P2B regulation requires online platforms to identify in their terms and conditions two or more mediators they are willing to engage with for out of court dispute resolution. The DSA imposes obligations on all online platforms to have complaint and redress and out of court dispute settlement mechanisms .

The ACCC's proposals for mandatory internal dispute resolution standards and an external dispute resolution scheme are not new concepts to Australia's regulatory landscape, particularly in relation to regulation of the telecommunications and financial services sectors. For example, in the financial services sector, the Australian Financial Complaints Authority operates as a single external complaints resolution scheme for consumers and small businesses as an alternative to Tribunals and Courts and certain financial services providers are required by ASIC to maintain internal dispute resolution procedures. Similarly in the telecommunications sector, the Telecommunications Industry Ombudsman provides an external dispute resolution service for consumers and small businesses and telecommunications providers are required to be members of this scheme. Accordingly, there is Australian precedent for the Government to draw on should it accept the ACCC's recommendations regarding dispute resolution processes for digital platforms.

3. WHAT IS THE RECOMMEND SCOPE OF APPLICATION OF THESE TARGETED MEASURES?

The ACCC recommends these targeted consumer measures apply to **all digital platforms, regardless of size, revenue and/or market position**. Although the ACCC has not defined a digital platform in this report, 'digital platform services' are defined in the DPSI's terms of reference as:



Internet search engine services



Digital content aggregation platform services



Social media services



Electronic marketplace services



Online private messaging services



The DPSI terms of reference also covers digital advertising services provided by digital platforms and data brokers.

DPSI 5 does expressly refer to the need to ensure a consistent approach in definitions across both the proposed consumer and competition measures, as well as developing a consistent approach to certain concepts and terms being used across the various regulatory regimes, especially where the terms are defined in legislation.

Emerging international competition and consumer reforms may guide us as to how digital platform services may be defined. The EU's recently enacted DSA defines digital services to be all "intermediary services" offered to recipients in the EU, which are "mere conduit" services (think internet access and other communication service providers), hosting services and caching services. This definition incorporates a large category of online services, from simple websites to internet infrastructure services and online platforms.

4. ECONOMY-WIDE CONSUMER MEASURES

DPSI 5 continues a long campaign by the ACCC to introduce a prohibition on unfair trading practices in Australia. The ACCC argues that certain harmful practices are not caught by the current Australian Consumer Law (**ACL**), including:

- + inducing consent or agreement by very long contracts (e.g., online terms of service), providing insufficient time to consider contracts or all-or-nothing 'clickwrap' consents;
- + engaging in harmful and excessive data tracking, collection and use; and
- + using dark patterns and other interface design strategies which impede choice and harm consumers (see [G+T's article about dark patterns](#) to learn more). The ACCC considers that these forms of conduct fall short of unconscionable or misleading or deceptive conduct under the ACL and aren't caught under the unfair contract terms (**UCT**) regime but are nonetheless harmful to consumers. See [G+T's article for a deep-dive on the context behind the proposal to prohibit UTPs](#).

The ACCC also uses DPSI 5 to show support for reform to the UCT regime. Incidentally, changes to this regime are underway with the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 having become law on 10 November 2022, with the UCT changes coming into effect in November 2023. For more information about what's changed under Australia's UCT regime see [G+T's article](#).

SO, WHEN WILL DIGITAL PLATFORMS ACTUALLY BE SUBJECT TO THESE FURTHER REGULATIONS IN AUSTRALIA?

We are still some time away from additional ex ante regulation of digital platforms. The DPSI 5 proposals are only recommendations and the Australian Government will need to consider them and respond. To the extent that the Government agrees with the recommendations, there will then be a process of consultation and legislative drafting. The Government has not provided much detail on how it will progress consultations on the ACCC's recommendations, and has simply said it is considering them and "[will consult publicly to seek the views of stakeholders as part of its efforts to ensure Australia has the right regulations in place to be a leading digital economy.](#)"

ACCC's Chair Cass-Gottlieb has said subsequent to DPSI 5's release that the ACCC hopes the Government's consultation and/or consideration of its recommendations will happen in the first half of 2023.

Under the ACCC's proposal, if accepted in full, the Government would need to pass legislation and/or regulations implementing the proposed consumer measures. For the competition measures proposed, the Government would also need to pass legislation enabling the relevant regulator to have code-making functions (as well as the principles that will guide the design of the code), the ability to designate a digital platform as well as the appropriate enforcement powers, such as information gathering powers and/or ability to issue penalties.

We also know from ACCC Chair Cass-Gottlieb's recent statements that there will be a "significant amount of consultation" on the codes, with a wide range of stakeholders. The ACCC has also indicated that Australia can learn from first movers on digital platform regimes overseas, such as in the EU, the UK and Japan.



OUR EXPERTS



Elizabeth Avery
Partner
T +61 2 9263 4362
E eavery@gtlaw.com.au



Louise Klamka
Partner
T +61 2 9263 4371
E lklamka@gtlaw.com.au



Andrew Low
Partner
T +61 2 9263 4793
E alow@gtlaw.com.au



Haidee Leung
Special Counsel
T +61 2 9263 4728
E hhleung@gtlaw.com.au



Sarah Lynch
Special Counsel
T +61 2 9263 4688
E sllynch@gtlaw.com.au



Amelia Douglass
Lawyer
T +61 2 9263 4468
E adouglass@gtlaw.com.au



Anna Belgiorno-Nettis
Lawyer
T +61 2 9263 4409
E abelgiorno-nettis@gtlaw.com.au



Katie Latham
Lawyer
T +61 2 9263 4618
E klatham@gtlaw.com.au



Marina Yang
Lawyer
T +61 2 9263 4250
E marina.yang@gtlaw.com.au



Michelle Xu
Lawyer
T +61 2 9263 4827
E mxu@gtlaw.com.au



Stephanie Dixon
Lawyer
T +61 2 9263 4560
E sdixon@gtlaw.com.au



Adrian Vipond
Lawyer
T +61 2 9263 4815
E avipond@gtlaw.com.au

