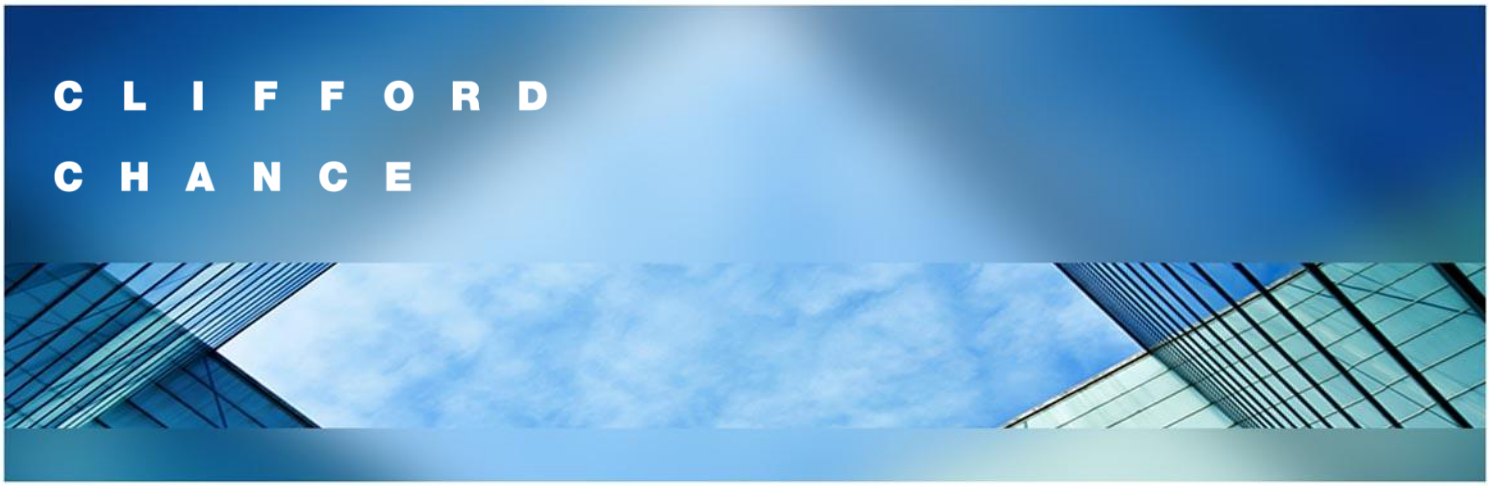


NAVIGATING THE FUTURE: AUSTRALIA'S PROPOSED DIGITAL PLATFORM REGULATION

The Australian Government has released a proposal paper outlining a new digital platform regulation aimed at fostering competition in digital markets. The digital platform regulation follows developments overseas and marks a significant new chapter for digital platforms operating in Australia.

Overview

The Australian Government has proposed a new digital platform regulation aimed at fostering competition in digital markets.[1] The Government's proposal was released almost twelve months to the day following its initial support of the Australian Competition and Consumer Commission's (**ACCC**) recommendation for additional competition measures for digital platforms.[2] The ACCC's recommendation followed its Digital Platforms and Services Inquiry (**DPSI**), whereby the ACCC identified significant concerns about the dominance of a few large digital platforms and the impact on competition.[3]

The proposal alleges that existing ex post competition laws are insufficient to address the fast-moving challenges posed by digital platforms and that ex ante digital platform regulation is required. This proposal aligns with global trends such as the *Digital Markets, Competition and Consumer Act* (**DMCCA**) in the United Kingdom and the *Digital Markets Act* (**DMA**) in the European Union. It also draws inspiration from jurisdictions such as Germany, Japan, and India.

The regulation's primary targets are digital platforms that hold a critical position in Australia's economy. Notably, three priority services and platforms have been identified:

- App marketplace services, including the Apple App Store, and Google Play Store.
- Add tech services, Google Ad Manager.
- Social media services, including Facebook and Instagram.

Key features of the proposed framework

Structure

The proposed framework would introduce new, ex ante requirements for certain "designated" digital platforms with a critical position in the Australian economy through a two-tiered approach:

1 Please see The Australian Government, Treasury, "*A New Digital Competition Regime – Proposal Paper*", December 2024, available here: https://treasury.gov.au/sites/default/files/2024-12/c2024-547447-pp.pdf .

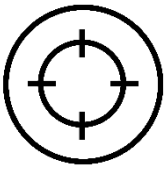
2 Please see Government Response to ACCC Digital Platform Services Inquiry, available here: https://treasury.gov.au/sites/default/files/2023-12/p2023-474029.pdf .

3 Please see ACCC "*DPSI Interim Report No. 5 – Regulatory Reform*", September 2022, p.7, available here: https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf .

- **Primary legislation**: this will outline broad, overarching obligations and establish the legal framework for designation and enforcement.
- **Subordinate legislation**: specific obligations tailored to particular services (e.g., app stores, ad tech) will be developed through consultation with the ACCC and updated as needed to reflect market changes.

Scope and designation

Which platforms will be regulated?



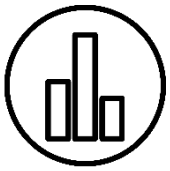
Not all digital platforms will be subject to the digital platform regulation. The proposed regulation is targeted and will apply only to digital platforms that meet specific criteria for designation. The proposal notes that the designation criteria will be set such that only platforms that provide services deemed critical to the Australian economy, and present the greatest risk of competition harms, are captured.

To avoid capturing services beyond the intended scope the proposed legislation will adopt a focused, list-based definition of "digital platform services". The initial list is expected to draw from the services outlined in the Ministerial Direction for the ACCC's DPSI and align closely with the "core platform services" regulated under the European Union's DMA.

The proposal provides the following examples of digital platforms likely to be captured under the digital platform regulation:

- App distribution services (app marketplace services).
- Digital content aggregation platform services.
- Social media services.
- Search engine services (including general and specialised search services).
- Electronic marketplace services (e.g. general online marketplace services).
- Video-sharing platform services.
- Online private messaging services (including text messaging, audio messaging and visual messaging).
- Operating systems.
- Web browsers.
- Virtual assistants.
- Cloud computing services.
- Online advertising services (including ad tech services).
- Media referral services.

Designation criteria



Designation under the proposed digital platform regulation involves both **quantitative** and **qualitative** assessments:

- **Quantitative thresholds** would include:
  - Service-specific revenue generated in Australia or globally.
  - Total number of Australian users.
  - The market capitalisation of the platform.
- **Qualitative factors** would include:
  - The platform's market position and degree of market power.

- Its role as a critical intermediary between businesses and consumers.
- The potential to harm competition through its practices.

The combined approach aligns with international regimes, including the DMCCA and DMA, which also use both quantitative and qualitative criteria to designate platforms for regulation.

Designated platforms will need to comply with obligations under the digital platform regulation. The decision to designate a platform will ultimately rest with the relevant minister, following an investigation by the ACCC. The minister will assess the quantitative and qualitative criteria, relying on the ACCC's advice to determine whether a platform meets the thresholds for designation. This process ensures that the regime remains targeted and evidence-based, focusing on platforms with the greatest impact on competition and Australian consumers.

Designation process and investigation

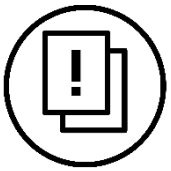
The designation process for digital platforms under the Australian government's proposed regime involves several key steps. Below is a summary of the key stages and associated timeframes:

- **Initiating the investigation**: any minister can direct the ACCC to initiate a designation investigation into a platform, or the ACCC can "self-initiate" a designation investigation. Once the ACCC initiates a designation investigation, it must inform the relevant digital platform about the investigation and conduct in-depth market enquiries. The ACCC will have powers to gather information and documents to support its assessment.
- **Investigation process**: the ACCC must complete its investigation within 6 months; short extensions will be possible. **Minister's decision**: the ACCC's investigative findings will be referred to relevant the Minister, who will make the designation decision.
- **Designation and compliance obligations**: designated platforms must comply with the digital platform obligations for a period of 5 years. It is intended that the designation decision will be reviewable, with a determination as to whether a full merits review should be available or only a limited judicial review, to be made following the consultation.
- **Renewal of designation**: designation decisions can be renewed at 5-year intervals, or earlier if there is a material change in circumstances.

Noting the significant consequences of being designated a platform, it is critical that platforms:

- actively engage with the ACCC during the designation investigation, including proactively obtaining market research, economic evidence and other material that is currently used to assess a platform's position in the market; and
- are afforded the opportunity to have a full merits review of any designation decision, which means engaging in the current consultation process.

Obligations for designated platforms



The proposed regulation introduces two types of obligations for designated platforms: broad obligations and service-specific obligations.

- **Broad obligations**: these obligations apply across all designated platforms and target anti-competitive practices that are common across services. They include:
  - Prohibitions on self-preferencing: platforms cannot favour their own products or services over competitors.
  - Restrictions on tying services: platforms must not require users to use one service to access another.
  - Facilitating switching: platforms must make it easier for users and businesses to move to competitors.

- Fair treatment of business users: platforms must offer fair terms and conditions to businesses using their services.
- Transparency: platforms must provide clear, timely information on policies, data use, and algorithms.

- **Service-specific obligations**: these obligations are tailored to address the unique challenges presented by certain platform services.
  - They provide more detailed rules on how platforms must behave in relation to those services and can be updated as market conditions and technology evolve. Examples include rules about prioritising apps in search results or ensuring transparency in ad tech pricing and performance.

Compliance and record-keeping

Designated platforms may need to report annually on their compliance efforts, similar to the DMA. They will also be required to maintain records such as Australian revenue, user numbers, and compliance measures for up to two years. These records will support ongoing monitoring and designation decisions.

Penalties for non-compliance

Non-compliance with the new regime will be subject to penalties. The proposal seeks to adopt the penalty regime for contraventions of Part IV of the *Competition and Consumer Act* (**CCA**), notably that maximum penalty should be AUD 50 million, three times the value of the benefit obtained or 30% of adjusted turnover during the breach period. The proposal additionally suggests that other remedies available under the CCA should be available for non-compliance with the digital platform regulation, including injunctions, disqualification orders and declarations. Notably, the proposal supports extending broad structural remedies for non-compliance (e.g., divestment remedies) but the government is also seeking views on whether there should be new powers to require that a structural remedy imposed overseas also be deployed in Australia.

Exemptions

The ACCC will have the authority to grant exemptions to digital platforms from certain obligations if it determines that the conduct in question is justifiable, such as for public health, public security, or where there are countervailing benefits that outweigh any competitive harm. The proposed regime is designed to be adaptable, similar to international examples like DMA which allows exemptions for public health or security, and the DMCCA which includes a "countervailing benefits" exemption for conduct that offers substantial user benefits and does not harm competition significantly.

To apply for an exemption, a digital platform must submit an application to the ACCC, which will assess whether the platform meets the necessary criteria. The ACCC has a specified period (e.g., 6 months) to review and decide on the exemption request. During this process, the ACCC may consult with relevant stakeholders and use its information-gathering powers. The platform must continue to comply with the obligations until the exemption is granted. Additionally, the ACCC has the authority to review and revoke exemptions if conditions change, or if the platform fails to comply with the exemption's terms, ensuring that exemptions remain appropriate and do not undermine competition in the digital market.

Other considerations

Recognising international compliance

Platforms complying with similar international regimes can submit compliance proposals to the ACCC. If accepted, the platform will be deemed compliant with corresponding Australian obligations. Non-compliance with the proposal will result in penalties equal to those for breaching Australian obligations. Platforms need to be conscious of assessing benefits of adopting universal compliance measures which

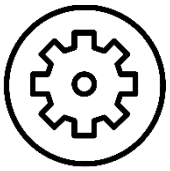
meet the strictest obligations as against tailoring compliance obligations to each specific jurisdiction, noting that certain jurisdictions will impose substantially less stringent obligations.

Cost Recovery Arrangements

Treasury is exploring cost recovery options to fund the ongoing administration and enforcement of the regime. Potential models include:

- **Levy**: a levy could be applied to designated platforms, covering the costs of activities like compliance monitoring, investigations, and enforcement. For example, platforms would contribute to the cost of ACCC's general regulatory functions under the regime.
- **Fee-for-service**: a fee-for-service model could be used for specific services like assessing exemption applications or issuing licences. This would ensure platforms pay for the direct costs incurred by the government in these processes.

Flexibility and Adaptability



The regime will incorporate several mechanisms to maintain flexibility and adapt to the dynamic digital platform landscape. These include:

- **Updating the list of services**: the minister can specify additional digital platform services subject to the regime, ensuring it remains relevant as new technologies emerge.
- **Developing service-specific obligations**: specific obligations will be created for different digital platform services, offering clearer guidelines. These obligations will be updated in response to technological changes and feedback from the ACCC's proactive monitoring.
- **Consultation and updates**: any updates or changes to service-specific obligations will be made in consultation with stakeholders, ensuring that the regime remains fit-for-purpose.

Next Steps and Consultation

The consultation period for feedback runs until 14 February 2025. Interested parties are encouraged make submissions. For more information on how this regime may impact your business, don't hesitate to get in touch.

CONTACTS

Elizabeth Richmond
Partner

T + 8922 8011
E elizabeth.richmond @cliffordchance.com

Mark Grime
Counsel

T: +61 2 8922 8072
E: mark.grime @cliffordchance.com

Ryan Draper
Senior Associate

T +61 2 8922 8583
E ryan.draper @cliffordchance.com

Sam Frouhar
Senior Associate

T +61 2 8922 8053
E sam.frouhar @cliffordchance.com

Angel Fu
Senior Associate

T +61 2 8922 8089
E angel.fu @cliffordchance.com

Nicholas Tzortzis
Law Graduate

T +61 2 9947 8300
E nicholas.tzortzis @cliffordchance.com