



QUAY INSIGHTS

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50 years on: evolution in Australian competition and consumer protection law

On the 50th anniversary of the commencement of federal regulation of competition and consumer law in Australia, there is an open question as to whether the Government will miss the opportunity to implement necessary changes to that regulatory regime to address unique issues arising from challenges created in the digital services sector, where a small number of digital platforms are dominant across a wide range of different services.

The Australian Treasurer has noted that 2024 is the 50th anniversary of Australia's regulation of competition and consumer protection, initially through the Trade Practices Act 1974 and since 2010 through the Competition and Consumer Act. That critical Act, the Government's primary tool to promote competition and protect against consumer harm, needs to continue to evolve to meet contemporary challenges.

In that context, the Government's public response, issued in late 2023, to the ACCC's September 2022 Digital Platform Services Inquiry recommendations for regulatory change to meet the challenges arising in the digital services sector, disappointingly fails to seize the opportunity to take timely steps to reform our laws to facilitate improvements in Australia's productivity.

In September 2022, the ACCC recommended that the Government supplement the Act with enforceable codes of conduct focusing on particular types of digital services, to address well known harms. The Government has announced that "in principle" it accepts the ACCC's views and that Treasury will "commence work" on the development of ex ante codes, following "extensive consultation". While there appears to be a genuine rationale for Treasury to take the primary role in designing the codes which the ACCC would then enforce, the Government must reflect on the delay that this separation of responsibilities will create.

Australia was at the forefront of recognising the importance of competition and consumer protection issues in the context of digital platforms at the time of the ACCC's groundbreaking Digital Platforms Inquiry which was completed in 2019. The ACCC's final report shone a light on the operation and commercial incentives of digital platforms, recognising not only the positive contributions but also the competition and consumer issues arising in this sector.

This publication is not intended to be comprehensive on the topics with which it deals. It is not intended to be relied upon or provide legal advice on the topic. Specific professional advice should be sought.

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The Government has said, in its response to the ACCC's recommendations, that it will look to international experience. If the Government does look to international trends, it will see that Australia has now, in only a few short years, fallen far behind our peers in implementing the regulation required to promote competitive digital services markets and to protect Australian consumers. If the Government does not move quickly to implement appropriate regulation, including to address developments in tech such as generative AI, it will be very difficult to take action at a later point, where global digital services platforms have entrenched their market positions in Australia, including those arising through the vast data holdings that these platforms continue to accrue.

A simple example demonstrates this issue. In this time of cost of living pressures, with the urgent need for a sensible energy transition that does not make those pressures worse, meaningful reform of competition laws to manage the digital economy will provide positive benefits. Innovations in smart technology would allow home owners to better manage use of solar energy, allow farmers to grow crops more efficiently and facilitate management of traffic congestion and efficient transport options. Without appropriate regulation to ensure vigorous competition in digital platform services, including by requiring interoperability and ensuring the availability of apps offered by Australian innovators, which would allow the development of required smart technology, sensible energy transition will be adversely impacted, meaning higher costs for Australians as well as avoidable harm to the environment.

Comparing Australia with the European Union provides salutary lessons. Digital platforms have made changes to their business practices and services to comply with the EU's Digital Markets Act, improving competition for the benefit of European consumers, but have not applied those changes in Australia. This disadvantages Australian businesses and consumers. Unless Australia takes action, we will not benefit from reforms implemented in other jurisdictions.

The ACCC's recently published 7th Interim Report from its Digital Platform Services Inquiry looked at the ever-expanding ecosystems of the largest digital platforms and highlighted the importance of digital platform services to Australians. The interim report noted that in 2022 the value of mobile wallet transactions in Australia was AUD93 billion and that Australians spent almost 6 hours a day on their smart devices in January 2023. This reinforces, as we all know and is highlighted by the ACCC, that the daily lives of Australians are heavily reliant on these services.

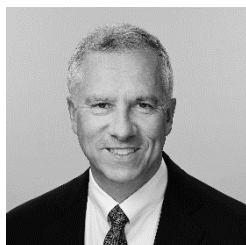
As against that background, now is the time for the Australian Government to move forward. Sufficient consultation has already been undertaken by both the ACCC (and the Australian Treasury) on the ACCC's proposed digital services reforms. Furthermore, there are many international regimes that could be used as a model for the required regulatory changes in Australia.

Reformed regulation, administered by the ACCC, with its deep knowledge of digital platforms markets, will create a solid base to address market power, attempts to circumvent pro-competitive rules of the road and technical interoperability that will lay a groundwork for a more innovative and technologically productive environment for Australian consumers and businesses, in a wide range of different sectors.

The 1993 Hilmer Review facilitated a much-needed overhaul of Australia's competition and consumer protection laws. Those reforms were so important that they are still talked about today. The Productivity Commission estimated that the Hilmer reforms boosted Australian productivity by billions of dollars, which Assistant Minister Andrew Leigh recently estimated was worth around \$5,000 per Australian household. The 50th anniversary of the Act provides an opportunity for the

Government to move forward expeditiously to implement reforms that will provide equivalent benefits for the digital economy. It must seize that opportunity with both hands.

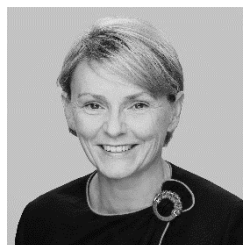
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