

# Australia



## Rules Under Development

In Australia, digital firms are subject to general competition and consumer protection laws applicable to all firms. In March 2021, Australia introduced a “News Media and Digital Platforms Mandatory Bargaining Code” intended to address the bargaining power imbalance between news media businesses and digital platforms. The Australian Competition and Consumer Commission is currently conducting a five-year inquiry into digital platform services, due to be finalized in March 2025. Until then, digital markets regulation in Australia remains pending and its contents uncertain.

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### 1. What rules govern competition in digital markets in Australia?

The legislation governing competition in digital markets is set out in the Competition and Consumer Act 2020 (the “Act”). In March 2021, the Act was amended to include the News Media and Digital Platforms Mandatory Bargaining Code (the “**Publisher Code**”), intended to address the bargaining power imbalance between news media businesses and digital platforms (specifically Google and Meta). The Code applies only to “*designated digital platforms*,” but the Treasurer has not yet designated any such platform.



## March 2021

IN MARCH 2021, THE COMPETITION AND CONSUMER ACT 2020 WAS AMENDED TO INCLUDE A BARGAINING CODE INTENDED TO ADDRESS THE BARGAINING POWER IMBALANCE BETWEEN MEDIA BUSINESSES AND CERTAIN DIGITAL PLATFORMS.

Any digital platform designated under the Publisher Code is required to comply with certain general requirements in relation to its designated services (*see* Question 6 for more details).

The Act is enforced by the Australian Competition and Consumer Commission (the “ACCC”), an independent government agency. The ACCC must apply to the Federal Court of Australia to seek orders enforcing the Act, including by penalties and injunctions. The ACCC is not itself a determinative body.

## 2. What is the status of any forthcoming digital markets regulation in Australia?

The ACCC is currently conducting a five-year inquiry into digital platform services (the “DPS Inquiry”), as directed by the government. Until the DPS Inquiry is finalized, digital markets regulation in Australia remains pending, and its contents uncertain.

Rod Sims’ recent remarks, however, indicate that the ACCC may recommend *ex ante* rules. On September 28, 2022, the former ACCC chair said that “*there should be ex ante rules to describe what [digital platforms] should and shouldn’t do.*” Sims referred to regulation in various jurisdictions, including Germany, the US, and the UK, before concluding that “*if Australia doesn’t get on board, the bus will leave without us.*”<sup>1</sup>

As part of the DPS Inquiry, the ACCC has published, and is continuing to publish, interim reports every six months. The DPS Inquiry will conclude with the publication of a final report, which the ACCC aims to publish by March 31, 2025.



### March 2025

THE ACCC’S DIGITAL PLATFORM SERVICES INQUIRY IS DUE TO BE FINALIZED IN MARCH 2025.

Most recently, as part of the DPS Inquiry, on November 11, 2022, the ACCC published its fifth interim report on competition and consumer issues and regulatory reform. It was published off the back of a discussion paper, published on February 28, 2022, in which the ACCC sought stakeholder views on the need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services, and if so, options for regulatory reform.

In its fifth interim report, the ACCC recommended mandatory, service-specific codes of conduct for “*designated*” digital platforms, operating under high-level principles enshrined in legislation (similar to the forthcoming regulatory regime in the UK). The ACCC also proposed strengthening consumer protection laws with an economy-wide prohibition on unfair trading practices, and rules applicable to all digital platforms on scams, harmful apps, fake reviews, dispute resolution standards, and an ombudsman scheme.

The Government will review the ACCC’s proposal and conduct further consultation before deciding whether to propose legislation. New laws and codes are unlikely to be in place until 2024.

## 3. How are the proposed rules expected to be enforced?

The ACCC has indicated that it does not consider that proceedings under existing legislation will be sufficient alone to address systemic competition concerns in the digital services industry in Australia.<sup>2</sup> It therefore recommends that the new rules should allow the ACCC to develop mandatory, service-specific codes of conduct for “*designated*” digital platforms, operating under high-level principles enshrined in primary legislation.<sup>3</sup> The ACCC should be responsible for enforcing such regulatory solutions, including by

<sup>1</sup> See Monash University, [Roundtable Discussion](#) (September 28, 2022), 1:05-1:07.

<sup>2</sup> See ACCC, [Digital advertising services inquiry: Final report](#) (August 2021).

<sup>3</sup> The ACCC recommends that such principles should focus on promoting competition on the merits, informed and effective consumer choice, and fair trading and transparency. See ACCC, [Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform](#) (September 2022).

making designation decisions, which should be wider than its current enforcement powers under the Act.

The ACCC has also established a new Digital Platforms branch with AUD 27 million in funding and extensive investigative powers. According to former ACCC chair, Rod Sims, the new branch will “ensure continuous and close scrutiny of this complex sector.”<sup>4</sup>



## \$27mn

THE ACCC HAS ESTABLISHED A NEW DIGITAL PLATFORMS BRANCH WITH AUD 27 MILLION IN FUNDING AND EXTENSIVE INVESTIGATIVE POWERS.

The parameters of the proposed new regime are unclear, but the ACCC’s final report on digital advertising and interim reports for the DPS Inquiry suggest that the rules and enforcement of the new regulation may be structured as follows:

- The ACCC will develop sector specific rules to address competition concerns in digital markets (e.g., ad tech, online search, social media, and app marketplaces).
- The rules will apply to providers of digital services that meet certain criteria, which will be linked to their market power and/or strategic position in the sector.

#### 4. To which firms will the proposed rules apply?

The rules will apply to providers of digital services that meet certain predetermined criteria linked to a provider’s market power and/or strategic position. The ACCC’s final report on digital advertising, and its interim reports on search,

social media, app marketplaces, and regulatory reform as part of the DPS Inquiry, contemplate that platform owners such as Google, Apple, and Meta will be within scope of the new rules.

#### 5. What are the main substantive rules that would govern the firms covered by the proposed digital markets regulation?

The ACCC has not yet set out what its proposed *ex ante* regulations of digital platforms will cover, but it may involve obligations of the kind set out in the EU’s Digital Markets Act and under consideration in other jurisdictions.

The ACCC’s fifth interim report on regulatory reform<sup>5</sup> (published as part of the DPS Inquiry) provides some examples of what could be covered in the ACCC’s codes of conduct:

- Rules prohibiting anticompetitive **self-preferencing**;
- Rules prohibiting anticompetitive **tying** and **bundling**;
- Rules limiting **pre-installation** and **default settings** in certain circumstances;
- **Data access** and **portability** requirements, but only once privacy and security risks are appropriately managed;
- **Transparency** requirements in **app review processes**;
- **Transparency** requirements in **ad tech**; and
- **Choice screens**, following a careful examination of the effectiveness of such rules in other jurisdictions.

<sup>4</sup> ACCC, [Speech by Rod Sims: The ACCC’s Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses](#) (August 6, 2020).

<sup>5</sup> ACCC, [Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform](#) (September 2022).

As described under Question 2, the ACCC also proposes strengthening consumer protection laws with an economy-wide prohibition on unfair trading practices, and rules applicable to all digital platforms on scams, harmful apps, fake reviews, dispute resolution standards, and an ombudsman scheme.

## **6. Are there specific rules governing digital platforms' relationships with publishers in Australia?**

As described under Question 1, Australia's Publisher Code addresses the perceived bargaining power imbalance between digital platforms and news media businesses. It aims to facilitate bargaining between designated digital platforms and news media businesses for remuneration for their news content. The Publisher Code applies only to "*designated digital platforms*" and their "*designated services*." No digital platform has yet been designated by the Treasurer.

Any digital platform that is designated under the Publisher Code will be required to comply with a set of general requirements in relation to its designated services and its engagement with registered news businesses. For example, designated digital platforms will be required:

- to participate in bargaining, and negotiate in good faith, upon receiving a notice from a registered news business to bargain;
- if no agreement is reached within three months, to participate in a mediation and negotiate in good faith; and
- if no agreement is reached after two months of mediation, to participate in arbitration in good faith.

The Publisher Code also allows designated digital platforms and news businesses to reach agreements outside the Code. The ACCC must be

notified of any agreements to disapply provisions of the Code.

On February 28, 2022, the Treasurer began its review of the Publisher Code in consultation with the ACCC and other Australian government departments.

## **7. Will the ACCC need to show anticompetitive effects in order to establish a breach of the proposed rules?**

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether the ACCC will need to demonstrate the effects of firms' conduct in order to establish a breach of the proposed rules.

## **8. Will firms be able to defend or objectively justify their conduct under the proposed rules?**

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether, under those rules, firms will be able to defend or objectively justify their conduct.

The ACCC's fifth interim report<sup>6</sup> (published as part of the DPS Inquiry) indicates that the ACCC is considering drafting codes of conduct that allow for defenses or justifications. In discussing its recommendations for targeted competition obligations, the ACCC explained that "*[t]he drafting of obligations should consider any justifiable reasons for the conduct (such as necessary and proportionate privacy or security justifications).*"<sup>7</sup>

<sup>6</sup> ACCC, *Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform* (September 2022).

<sup>7</sup> *Ibid.*, p. 123.

## 9. What procedural safeguards will there be under the proposed rules?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend and what procedural safeguards will accompany those rules.

## 10. What kinds of penalties or remedies will the ACCC be able to impose following a breach of the proposed rules?

Potential sanctions and penalties will likely be addressed in the ACCC's final report at the conclusion of its five-year DPS Inquiry. In its fifth interim report, the ACCC explained that "*significant financial penalties*", as well as injunctions, declarations, and disqualification orders should be available for breaches of new consumer and competition obligations.<sup>8</sup> The ACCC stated that penalties available against digital platforms should reflect the financial strength of the digital platforms and should, at a minimum, be equivalent to the largest penalties already available under the Act.<sup>9</sup>

## 11. Has the ACCC issued any guidance or reports regarding the proposed rules?

The ACCC has published a series of reports following sector inquiries into digital platforms, digital advertising services, and digital platform services:

- Digital platforms inquiry: final report (June 2019).<sup>10</sup>

- Digital advertising services inquiry: final report (August 2021).<sup>11</sup>
- Digital platform services inquiry 2020-2025, including:
  - September 2020 interim report.<sup>12</sup>
  - March 2021 interim report on app marketplaces.<sup>13</sup>
  - September 2021 interim report on search defaults and choice screens.<sup>14</sup>
  - February 2022 discussion paper seeking stakeholder views on the need for new regulatory tools to address competition and consumer issues in relation to the supply of digital platform services, and if so, options for regulatory reform.<sup>15</sup>
  - March 2022 interim report on general online retail marketplaces.<sup>16</sup>
  - September 2022 interim report on regulatory reform (published on November 11, 2022).<sup>17</sup>

## 12. Will the proposed rules be competition based, or will they target other types of conduct, such as consumer protection, moderation of content, or privacy?

Until the ACCC's DPS Inquiry final report is published, it remains unclear what rules the ACCC will recommend, and whether the regime will be competition based.

<sup>8</sup> ACCC, [Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform](#) (September 2022), p. 191.

<sup>9</sup> *Ibid.*, pp. 191-192.

<sup>10</sup> ACCC, [Digital Platforms Inquiry: Final report](#) (June 2019).

<sup>11</sup> ACCC, [Digital advertising services inquiry: Final report](#) (August 2021).

<sup>12</sup> ACCC, [Digital Platform Services Inquiry: Interim Report](#) (September 2020).

<sup>13</sup> ACCC, [Digital Platforms Services Inquiry Interim Report No. 2: App marketplaces](#) (March 2021).

<sup>14</sup> ACCC, [Digital Platforms Services Inquiry Interim Report No. 3: Search defaults and choice screens](#) (September 2021).

<sup>15</sup> ACCC, [Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#) (February 2022).

<sup>16</sup> ACCC, [Digital platform services Inquiry Interim Report No. 4: General online retail marketplaces](#) (March 2022).

<sup>17</sup> ACCC, [Digital Platforms Services Inquiry Interim Report No. 5: Regulatory Reform](#) (September 2022).

In light of the ACCC's fifth interim report<sup>18</sup> (published as part of the DPS Inquiry), it is likely that any new regime, if proposed, will touch on a range of related issues, from competition to consumer protection and online privacy.

The ACCC's fifth interim report proposes regulation to address the harms to competition and consumers arising from digital platform services, and discusses how to implement regulation without causing more harm than good, for example by safeguarding consumers' privacy.

### 13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the proposed rules?

Enforcement action against digital platforms has largely focused on consumer protection measures, as opposed to breaches of antitrust law. Recent enforcement action includes:

- Federal Court finding against Google that it misled consumers about personal location data collected through Android mobile devices between 2017-2018 (April 2021).<sup>19</sup>
- Federal Court proceedings against Meta that it misled consumers by representing that the free Onavo Protect app would keep users' data private, but instead used the data for its commercial benefit (since December 2020).<sup>20</sup>
- Federal Court proceedings against Meta, alleging that the company engaged in false, misleading, or deceptive conduct by publishing scam advertisements featuring prominent Australian public figures (since March 2022).<sup>21</sup>

<sup>18</sup> Ibid.

<sup>19</sup> ACCC, [Google misled consumers about the collection and use of location data](#) (April 16, 2021).

<sup>20</sup> ACCC, [ACCC alleges Facebook misled consumers when promoting app to 'protect' users' data](#) (December 16, 2020).

<sup>21</sup> ACCC, [ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook](#) (March 18, 2022).

<sup>22</sup> ACCC, [Digital Platforms Inquiry: Final report](#) (June 2019).

### 14. Are there merger rules specific to digital platforms in Australia?

While new merger control rules for digital platforms are not yet in force, the ACCC recommended the following changes to Australian merger control in its final report on the Digital Platforms inquiry:<sup>22</sup>

- Amend the relevant part of the Act to include the following additional factors to be taken into account in the merger analysis:
  - the likelihood that the acquisition would result in the removal from the market of a potential competitor; and
  - the nature and significance of assets, including data and technology, being acquired.
- Require large digital platforms to provide advance notice to the ACCC of any proposed acquisitions that may impact competition in Australia. The ACCC proposes that the details of the notification protocol be agreed between it and each digital platform, and would specify:
  - the types of acquisitions would require notification, including minimum transaction value; and
  - the minimum advance notification period prior to completion for ACCC to assess the proposed acquisition.

In August 2021, the ACCC proposed a further set of significant revisions to Australian merger control, stating that the current regime is not

“*fit for purpose*.”<sup>23</sup> These wider-ranging proposals include:

- Changing Australia’s current voluntary merger review regime to a mandatory or suspensory one, where merging parties contemplating transactions that exceed certain thresholds cannot complete pending ACCC approval.
- Confining appeals against ACCC decisions to limited merits review.
- Changing the substance of the merger test, including by:
  - updating the factors to be taken into account (as above);
  - lowering the current threshold of “*likely*” to substantially lessen the competition in the market;
  - introducing a presumption that transactions where a merger party has substantial market power substantially lessens competition; and
  - introducing special rules for acquisitions involving large digital platforms, to address the particular challenges these transactions can pose.

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<sup>23</sup> ACCC, [Speech by Rod Sims: Protecting and promoting competition in Australia](#) (August 27, 2021).