



Law Council
OF AUSTRALIA

Office of the President

2 May 2022

Digital Platforms Branch
Australian Competition & Consumer Commission
Level 17, 2 Lonsdale Street
MELBOURNE 3000

By email: digitalmonitoring@accc.gov.au

Dear Australian Competition & Consumer Commission

Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services

The Law Council of Australia appreciates the opportunity to provide a submission in response to the Australian Competition & Consumer Commission's *Discussion Paper for Interim Report No. 5*, released as part of the ongoing Digital Platform Services Inquiry.

Please find enclosed the Law Council's submission, informed by its Business Law Section together with contributions from the Law Institute of Victoria.

Thank you for your consideration of the matters raised in the submission. If you would like to discuss further, please contact Dr Natasha Molt, Director of Policy, on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au.

Yours sincerely

Mr Tass Liveris
President



Law Council
OF AUSTRALIA

Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5

Australian Competition and Consumer Commission

2 May 2022

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000¹ lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

¹ Law Council of Australia, *The Lawyer Project Report* (September 2021), 9-10.

Acknowledgement

The Law Council of Australia acknowledges the assistance of its Business Law Section, particularly the following Committees:

- Media and Communications Law Committee;
- Digital Commerce Committee;
- Intellectual Property Committee;
- Privacy Committee;
- Competition and Consumer Law Committee; and
- Small and Medium Enterprise (**SME**) Business Law Committee.

The Law Council is also grateful for the contributions of the Law Institute of Victoria's Competition and Consumer Law Committee.

Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make this submission in relation to the Discussion Paper for Interim Report Number 5 (**Discussion Paper**) released by the Australian Competition and Consumer Commission (**ACCC**) in respect of updating the competition and consumer law for digital platform services.
2. The ACCC has sought views on whether existing competition and consumer laws are sufficient to address harms arising from digital platform services in Australia or if changes are required.² In this submission, the Law Council seeks to set out the principles that it considers the ACCC and the Government should take into account from a policy perspective in determining whether changes to Australia's competition and consumer laws are required.
3. The Law Council does not seek to comment on whether, and to what extent, the conduct of digital platforms has caused (or has the potential to cause) harm to consumers and businesses. It also does not seek to express a view on whether any changes to Australia's competition and consumer laws are required. Rather, the Law Council wishes to respond to the ACCC's question of whether the *Competition and Consumer Act 2010* (Cth) (**CCA**) and Australian Consumer Law are sufficient to address competition and consumer harms arising from digital platform services in Australia and to draw to the ACCC's attention the principles that should be considered before recommending the implementation of new legislation or regulation, particularly industry-specific regulation. While some members of the Business Law Section consider that the ACCC has already addressed a number of these principles to date, the majority of views received from legal practitioners is that further consideration is required consistent with best practice in the development of regulation prior to the implementation of new law reform proposals. The Law Council notes the dissenting view of some members of the Business Law Section that consider the ACCC has already found significant competition and consumer harms in a broad range of digital services markets.
4. The Law Council acknowledges that the ACCC's work in relation to digital platforms has received international attention.
5. The key matters the Law Council wishes to bring to the ACCC's attention based on the majority of views received from legal practitioners are as follows:
 - (a) **Best practice in development of regulation** – As a general principle, the critical starting point for sound regulatory intervention is to establish a clear case for action before addressing a problem. In this context, evidence of harm is highly relevant. The ACCC should have regard to any evidence of harm, where appropriate drawn from its Digital Platforms Inquiry and related inquiries,³ or from other sources.

In terms of the form of intervention, a range of feasible options must be considered including self-regulatory, co-regulatory and non-regulatory approaches, adopting the option that generates the greatest net benefit for

² ACCC, *Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5* (February 2022), 9.

³ For example, the ACCC's *Digital Platforms Inquiry - Final Report* (July 2019); *Digital Advertising Services Inquiry – Final Report* (September 2021); and each of the following reports from the ACCC's Digital Platform Services Inquiry, being all of the reports issued under that Inquiry to date: *September 2020 Interim Report* (focusing on online messaging); *March 2021 Interim Report* (focusing on app stores); and *September 2021 Interim Report* (focusing on internet search).

the community. The Law Council commends the ACCC for considering a range of issues in its Discussion Paper.

- (b) **Learn from international experience** – If the Australian Government determines that the competition and consumer harms the ACCC has identified justify specific regulatory reform, there is considerable law reform being considered on this issue in multiple jurisdictions and the Law Council encourages the ACCC to leverage off those learnings, having regard to market conditions in Australia where appropriate, to ensure Australia maintains a fit for purpose regulatory regime which supports the domestic economy and facilitates cross border international trade, unless there are compelling reasons for departures. In this regard, it is appropriate that the Government considers the approaches in the United Kingdom (**UK**) with the recently finalised Digital Markets Act, as well as the European Union's (**EU's**) Digital Services Act, which is in the final stages of negotiation, and the bills currently under consideration in the US Congress.⁴
- (c) **Harmonisation across regulatory frameworks** – The growth of the digital economy and changes to the way in which businesses engage with their supply chains and end users is driving regulators in several specialist areas to consider the effectiveness of their regulatory frameworks. It is critical that a harmonised approach is taken across various Australian regulators with overlapping responsibilities to ensure consistency, avoid duplication and avoid fragmentation of regulation.
- (d) **Consumer protection and competition regulation** – The Australian Consumer Law provides for both general and specific protections. Before recommending any industry-specific legislation, the ACCC should, as a threshold matter, have regard to whether there is a clear legislative gap such that harm to consumers and businesses cannot be addressed by current legislation. The ACCC should also have regard to whether any additional measures are better suited to economy-wide application rather than sector specific.
- (e) **Mergers and acquisitions** – As with consumer protection issues, the ACCC should have regard to whether there is evidence of market harm that warrants changes to the current merger regime. It should also closely consider whether the additional complexity associated with any separate regime for digital platforms may outweigh benefits to consumers, and the impact of any changes it recommends on benign or beneficial mergers.
- (f) **Privacy and data protection** – In addition to consumer protection matters as noted above, it will be important that any changes do not diminish individual privacy and, where possible, enhance such rights. Further, any changes that may impact on privacy should be consistent with or be made in parallel with the other law reform processes impacting on privacy regulation.
- (g) **Effectiveness and efficiency of existing remedies** – As recognised by the ACCC, private actions by Australian businesses and individuals to enforce relevant competition and consumer law protections against large digital platforms can potentially face considerable challenges. This should be taken into account when considering whether there is a need for reform or designing any reforms.

⁴ ACCC, *Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 2022), 114-116.

- (h) **Rule-making powers** – If it is shown there is a need to grant rule-making powers to the ACCC or another body that enables it to impose prohibitions and obligations without the need for legislative approval, such powers should be subject to appropriate checks and balances.
- (i) **Transparency** – The Law Council supports, in principle, measures which would improve transparency and improve the ability of consumers and businesses to make informed choices about digital platform services.

Best practice in the development of regulation: Industry-specific legislation

6. The Law Council recognises that the ACCC has already undertaken a substantial amount of work in relation to digital platforms and has made some recommendations. Nonetheless, the ACCC has asked interested parties for their views on whether specific digital regulation is warranted. Outlined below are the principles that the Law Council considers should apply based on the majority of views it has received from its many Committees and Constituent Bodies.
7. The Law Council particularly refers to the principles of best practice which the Council of Australian Governments (**COAG**) (now replaced by the National Federation Reform Council, National Cabinet) has agreed in respect of the development of regulation.⁵ Specifically, it states that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:
 - (a) establishing a case for action before addressing a problem. The Law Council observes that the ACCC has explored some possible harms to competition and consumers arising from digital platform services in Chapter 5 of the Discussion Paper;
 - (b) considering a range of feasible policy options, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed. The Law Council notes the ACCC is currently considering a range of regulatory tools and potential new rules and measures to implement reform, as set out in Chapters 7 and 8 of the Discussion Paper; adopting the option that generates the greatest net benefit for the community;
 - (c) in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
 - (i) the benefits of the restrictions to the community outweigh the costs; and
 - (ii) the objectives of the regulation can only be achieved by restricting competition,
 - (d) providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear;
 - (e) ensuring that regulation remains relevant and effective over time;
 - (f) consulting effectively with affected key stakeholders at all stages of the regulatory cycle; and

⁵ Department of the Prime Minister and Cabinet, *Principles of best practice regulation*, (2021) <<https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>>.

- (g) ensuring that any government action is effective and proportional to the issue being addressed.
- 8. Accordingly, the Law Council submits that industry-specific legislation should only follow where there is evidence that existing laws and regulations are insufficient to address the concerns raised in the Discussion Paper.⁶ The Law Council encourages the ACCC to undertake a gap analysis to identify areas where existing laws are inadequate.
- 9. The Law Council submits that the introduction of any industry-specific legislation should not be duplicative and unnecessary. Consumer protection provisions and prohibitions against anti-competitive conduct under the CCA generally apply broadly. While the Law Council accepts that industry-specific legislation or regulation may be appropriate in some circumstances where evidence of harm exists and there are current examples, careful consideration should be given to any unintended consequences that may arise from having industry-specific legislation that overlaps with the CCA.

Learn from international experience

- 10. The Discussion Paper references law reform on the issues occurring simultaneously in several international jurisdictions.
- 11. The Law Council commends the ACCC for taking a multi-jurisdictional approach and suggests that considering such international experience, to the extent applicable to Australia's market conditions or other circumstances (such as Australia's existing regulatory environment), is prudent to ensure that Australia can learn from those experiences, avoid unnecessary pitfalls and drive efficiency and international compatibility in the law reform process.
- 12. Taking into account those lessons will also assist in ensuring that Australia maintains a fit for purpose regulatory regime which supports the domestic economy and facilitates cross border international trade to the extent it is appropriate to Australia's case.
- 13. In this context it is appropriate for the ACCC to consider the approach in the UK, with the recently finalised Digital Markets Act. The Government should also consider the EU's Digital Services Act, which is in the final stages of negotiation, as well as the bills currently under consideration in the US Congress.⁷ At the same time, the Law Council emphasises that any consideration of overseas reforms must take into account commercial and market realities, as well as existing regulatory frameworks in Australia.

Cross-regulation harmonisation

- 14. The growth of the digital economy and changes to the way in which businesses engage with their supply chain and end users in the digital economy is driving regulators in several specialist areas to consider the effectiveness of their regulatory frameworks. It is critical that a harmonised approach is taken across regulators to ensure consistency and avoid duplication or fragmentation of regulation.

⁶ In this regard, the Law Council notes the work the ACCC has conducted to date on its Digital Platform Inquiry and other related inquiries.

⁷ ACCC, *Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services* (February 2022), 114-116.

15. The Law Council is encouraged to hear that the ACCC, the Australian Communications and Media Authority, the Office of the Australian Information Commissioner and the Office of the eSafety Commissioner have recently come together to form the Digital Platform Regulators Forum to facilitate cooperation between digital platform regulators, including approaches to regulation.
16. In the last 12 months, the Law Council has seen multiple concurrent law reform initiatives which touch on the same, or closely-related, subjects. It is critical that there be a concerted effort to avoid fragmentation in the various Australian reform processes to reduce uncertainty and unintended consequences for those subject to multiple regulatory frameworks. The Law Council is of the view that a complementary and holistic approach is important for improving transparency for consumers and small businesses as well as for regulatory consistency.
17. Further, the Law Council notes that many of the legal issues raised in the ACCC's Discussion Paper depend critically on definitions. Precise consideration of foundational terms (e.g., "digital platform", "gatekeeper" or "consumer harm") and terms that appear to be used as shorthand for different but similar concepts must be addressed so that draft legislation across regulatory frameworks adequately ensures legal certainty. Common definitions will also address a complementary set of policy objectives and is consistent with community expectations.
18. For example, "digital platforms" is not a term of art. The Discussion Paper uses that term to primarily describe large suppliers of search, social media, online private messaging, app marketplaces, display advertising, search advertising and ad tech services. However, in common business and consumer parlance, the concept of a "digital platform" is much broader. It is one that is often used regardless of the market share of the provider. It can refer to any business of any size which enables its own or third parties' supplies of goods and services via the direct use of online methods. For example, businesses which provide online managed IT services using third party infrastructure (such as Amazon Web Services or Microsoft Azure) promote themselves as offering platform services. Clarity on this would assist in both the workability of any reforms and in ensuring they do not inadvertently impede innovation or erode investment.

Consumer protection and Competition Regulation.

19. The ACCC should satisfy itself whether the scope of current laws is adequate in determining whether new laws are required and whether industry-specific prohibitions would be preferable and are required from a consumer protection perspective. As part of making this determination, it is relevant to consider the evidence of harm identified by the ACCC. The Law Council considers that it is also critical that individuals can access justice and have access to effective remedies.
20. As to the scope of current laws, the Law Council observes that there are currently general and specific provisions which seek to provide mechanisms to protect businesses and consumers, including those outlined below.
21. Chapters 2 and 3 of the Australian Consumer Law provide various general and specific protections to consumers and small businesses. These include:
 - (a) Section 18 of the Australian Consumer Law which prevents companies from engaging in misleading or deceptive conduct. Additionally, sections 29, 33, 34, 35, 36 prohibit companies from engaging in various forms of false, misleading, or deceptive conduct.

- (b) Sections 20 and 21 of the Australian Consumer Law which prohibit companies from engaging in unconscionable conduct when dealing with other businesses or their customers. Unconscionable conduct means conduct that is so harsh it goes against good conscience. The Law Council notes that the ACCC is seeking to have the law clarified through its appeal in the Mazda case.⁸
 - (c) Section 23 of the Australian Consumer Law provides that a term of a consumer contract or small business contract is void and, since 2021, is prohibited if the term is unfair and the contract is a standard form contract. Amendments proposed by the *Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022 (UCT Bill)* include making the use of unfair contract terms illegal and introducing large penalties for breach of these provisions.
22. The CCA prohibits a range of conduct that broadly has the purpose, effect, or likely effect of substantially lessening competition in a market. For example, section 46 of the CCA prohibits companies with substantial market power from engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.
23. The Law Council supports the ACCC continuing to use its existing powers and considering the extent to which such provisions have, in practice, been effective at preventing such problematic conduct having regard to the practical challenges, if any.⁹ The Law Council notes that victims of online fraud and scams may have additional remedies in common law and in equity.
24. The following paragraphs outline existing provisions which the Law Council observes may apply to certain conduct identified in the Discussion Paper. As explained above, the Law Council does not seek to comment on the adequacy of these provisions and simply recommends that the ACCC take these into account in any gap analysis to determine whether existing laws are adequate, as recommended above.

Intellectual property rights

25. It is important to preserve intellectual property rights as part of any reform measures introduced to promote competition. Careful consideration should be given to whether any technology or data access reform measures could, in effect, amount to mandatory/statutory licensing. An example of an important IP preservation measure is in the *Data Availability and Transparency Act 2022 (Cth)* at subsection 17(3).

Dark patterns

26. A particular issue identified by the ACCC in its Discussion Paper was the use of dark patterns by digital businesses to mislead consumers and businesses into making incorrect purchasing decisions. It appears to the Law Council that existing prohibitions on misleading and deceptive conduct may apply to such conduct. To some extent this may be evidenced by the success which the ACCC has had in both the *Trivago*¹⁰ and *Viagogo*¹¹ cases which arguably involved the use of dark patterns.

⁸ Appeal of *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493.

⁹ For example, those described in the 'Effectiveness and efficiency of private actions by corporations and individuals' section below.

¹⁰ See, *ACCC v Trivago N.V.* [2020] FCA 16 (20 January 2020) and subsequent appeal. On 22 April 2022, the Federal Court ordered Trivago to pay penalties of \$44.7 million.

¹¹ See, *ACCC v Viagogo AG (No 3)* [2020] FCA 1423.

Online tracking

27. Other issues identified in the Discussion Paper relate to online tracking and include:

- reduced privacy and data security;
- risks to consumers from increased profiling;
- risks to consumers from discrimination and exclusion; and
- increased risks to vulnerable consumers and children.

28. The Full Federal Court in *Facebook Inc v Australian Information Commissioner* [2022] FCAFC 9 found that Facebook Inc was subject to the Australian *Privacy Act 1988* (Cth) (**Privacy Act**) as there was a prima facie case that it was carrying on business in Australia by virtue of its conduct in installing and managing cookies on the physical devices of Australian users providing certain functionality to Australian developers through its Graph Application Programming Interface (**API**), and intra group agreements on how various services are to be delivered and governed, although it is noted that this case is on appeal to the High Court.

29. Risks relating to consumers suffering discrimination and exclusion are subject to existing discrimination laws and concerns about increased risks to vulnerable consumers and children appear to be addressed by the mandate of the eSafety Commissioner.

Other harms

30. The ACCC has also identified a number of further harms, as follows:

- online scams;
- harmful apps;
- fake reviews;
- lock-in;
- unfair terms / practices;
- lack of transparency; and
- ineffective dispute resolution.

31. Online scams remain a significant problem for both consumers and small businesses. Often the best outcome that regulators can hope to achieve is to disrupt scams and educate consumers and small businesses, given that many online scams are often operated by criminal groups. The Law Council observes the ACCC's recent action against Meta in relation to crypto scams which may have the potential to provide additional protections to consumers and small businesses. The Law Council supports the ACCC having regard to the need to take action against online scams, particularly where it is difficult for consumers to do so. The ACCC should have regard to the availability and effectiveness of existing mechanisms prior to considering whether further protections may be required.

32. The Law Council considers that existing consumer protection provisions in the Australian Consumer Law should be adequate to deal with fake reviews. Indeed, the

ACCC has previously taken a number of successful actions in relation to fake reviews.¹²

33. The ACCC should have regard to whether the existing laws in relation to unfair contract terms and the proposal to extend the law under the UCT Bill would adequately address concerns about unfair contract terms. The UCT Bill would, amongst other matters, make the use of unfair contract terms illegal and introduce large penalties for breach of these provisions. As such, the ACCC should have regard to the likelihood it will be able to seek orders declaring particular unfair contract terms illegal and imposing multi-million-dollar penalties following the likely enactment of the UCT Bill when recommending whether it requires additional powers.

Mergers and acquisitions

34. The Law Council encourages the ACCC to have regard to the general principles set out in this section when determining whether it should recommend industry-specific rules applying to digital platform mergers as distinct from economy-wide rules.

There must be clear evidence justifying changes to the current regime

35. The Law Council does not support intervention that prevents mergers in the absence of evidence that the merger would harm competition. Accordingly, as a threshold matter, the Law Council considers that there must be compelling evidence of market harm which demonstrates that the current economy-wide regime is not fit-for-purpose before any changes (whether applicable to all industries or digital platforms only) are proposed or implemented. This is especially important in relation to significant changes such as any proposed reversal of the onus of proof.
36. The Law Council is not aware of such evidence to date and considers that, in the absence of such evidence, it would be prudent to refrain from proposing changes such as an industry-specific regime for digital platforms given the far-reaching implications of any changes on consumers, businesses and the economy as discussed below.

Impact on innovation and investment

37. The ACCC must also consider the negative impacts on innovation or incentives to innovate, which would be a significant detriment ultimately borne by consumers.
38. The Law Council encourages the ACCC to consider whether industry-specific measures are necessary as a threshold matter before it turns its mind to the drafting of industry-specific rules. The Law Council agrees with the ACCC's comment that any tailored merger rules developed for large digital platforms will require careful consideration and drafting to ensure that they capture anti-competitive acquisitions but do not reduce incentives for innovation and investment.¹³ The Law Council considers the ACCC should have regard to the same considerations when determining whether industry-specific merger rules are in fact needed.

¹² For example, see ACCC media releases: *Federal Court orders Electrodry franchisor to pay \$215,000 in penalties for fake testimonials* (18 December 2015), *Live Life Alarms pays penalties for allegedly misleading statements on its website* (30 September 2020), *Service Seeking to pay penalty for misleading online 'customer' reviews* (22 July 2020), *True Value Solar discontinues incentives for positive online reviews* (11 April 2016).

¹³ ACCC, *Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5* (February 2022), 79.

Outright prohibitions are not appropriate in any circumstances

39. The Discussion Paper refers to suggestions that it may be appropriate to prohibit large digital platforms from acquiring businesses in certain categories, such as businesses operating in the same or adjacent markets or businesses that would allow a digital platform to expand or entrench its market power.¹⁴
40. The Law Council opposes the outright prohibition of any category of mergers, whether involving a digital platform or otherwise. Any such *per se* prohibition would create the significant risk that benign, or even beneficial, mergers would be prevented. This would be highly undesirable from a consumer perspective and could have widespread consequences for the economy. As a related matter, it would run directly counter to the fundamental principle that only mergers which have a substantial and negative impact on competition should be prevented. Identifying such problematic mergers generally necessitates some form of merger review (and in some cases very in-depth and complex review), which an outright prohibition would preclude in its entirety.

Mandatory notification scheme

41. The ACCC is considering whether an industry-specific notification regime is required for acquisitions by digital platforms.¹⁵
42. As a general matter, the Law Council observes that although notification is not currently mandatory, in the vast majority of cases parties voluntarily notify the ACCC when a merger poses potential competition issues to avoid the uncertainty and costs associated with the ACCC subsequently intervening .
43. The ACCC has expressed concern that there have been instances where the ACCC was not notified of acquisitions before completion and which it considered warranted close review.¹⁶ The Law Council questions whether this conduct occurs with sufficient frequency relative to the large number of mergers that are notified to justify changes to the current regime (whether applying to all mergers or to digital platform mergers only). Where this has occurred, it appears that the ACCC generally has sufficient powers to address the issue, for example, by obtaining an injunction to prevent completion.¹⁷

More moderate measures should be taken where possible

44. The ACCC should give priority to more moderate measures if they would achieve similar ends.
45. If, for example, the ACCC concludes it requires greater flexibility to take into account issues that are more salient in respect of digital platforms (such as access to and control of data), the Law Council supports including additional merger factors in section 50(3) to capture these considerations if there is benefit in doing so. Notwithstanding this, the Law Council observes that the ACCC can, and in practice does, flexibly take into account these factors in its assessments, as the merger factors are not exhaustive, although they are mandatory.

¹⁴ Ibid 108.

¹⁵ Ibid 105.

¹⁶ Ibid.

¹⁷ *Australian Competition and Consumer Commission v IVF Finance Pty Ltd* [2021] FCA 1295.

‘No issues’ deals should not be captured

46. The ACCC is considering industry-specific notification thresholds.¹⁸ The Law Council encourages the ACCC to approach any such recommendation with caution and carefully consider the risk of capturing mergers which are unlikely to substantially impact competition.
47. Not doing so risks placing unnecessary burden on both the merger parties and the ACCC of needing to respectively notify and review 'no issues' deals caught by thresholds that are necessarily arbitrary to some degree.

A cautious approach should be taken to lowering the probability of competitive harm threshold

48. The ACCC has previously expressed concern about the approach taken by the Court and Tribunal when assessing whether a substantial lessening of competition is 'likely' under section 50. It has previously advocated for 'likely' to mean 'a possibility that is not remote', instead of a 'real chance' or 'real commercial likelihood'.¹⁹ In its Discussion Paper, the ACCC has explained that it is considering applying a lower probability of competitive harm threshold to digital platform mergers.²⁰ This is to allow the ACCC to intervene in circumstances where there may be a low probability that the acquisition would substantially lessen competition but where the impact of any substantial lessening of competition is likely to be very substantial and long-lasting.²¹ The Law Council observes the current test of "likely to substantially lessen competition" arguably implies an element of counterbalancing the severity of the loss of competition with the probability of that harm arising. The Law Council also foresees potential challenges with articulating an alternative test with sufficient legal certainty.
49. The Law Council considers that the ACCC should be cognisant of the risk that any lowering of the probability threshold, whether in relation to all mergers or digital platform mergers only by changing the meaning of 'likely' or otherwise, could skew the test toward blocking mergers that would not have lessened competition and result in the loss of potentially beneficial mergers. This may have significant consequences and negatively impact consumers and small businesses and the economy more broadly.
50. The Law Council also encourages the ACCC to carefully consider challenges posed by a lower probability threshold, including the need to quantify the likelihood of particular outcomes and the effect on competition associated with each outcome.

Preserving an effects-based assessment

51. The ACCC considers a 'deeming' provision²² for firms with substantial market power to be particularly important for acquisitions by large digital platforms.²³

¹⁸ ACCC, *Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5* (February 2022), 104.

¹⁹ Mr Rod Sims, 'Protecting and promoting competition in Australia' Competition and Consumer Workshop 2021' (Speech, Competition and Consumer Workshop - Law Council of Australia, 27 August 2021), <www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia>.

²⁰ ACCC, *Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5* (February 2022), 106.

²¹ *Ibid.*

²² *Ibid* 108 – the deeming provision contemplated is 'acquisitions where one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended would be deemed to substantially lessen competition'.

²³ *Ibid.*

52. The Law Council notes that while key jurisdictions, such as the European Union and a number of European Member States, have regard to whether a merger would create or strengthen a firm's dominant position in a market, this is ultimately evaluated as part of an overall effects-based assessment.
53. Similarly, although the US merger law may, in some limited circumstances, operate to create a rebuttable presumption,²⁴ this arises only after a plaintiff has demonstrated a significant anticompetitive effect arising from the merger (i.e., after an effects-based assessment has taken place).
54. The Law Council is not aware of material differences in Australia's market conditions or other circumstances which would warrant a departure from an effects-based approach. Indeed, it is not aware of any evidence that the effects-based assessment underlying the current regime prevents the Court or the ACCC from assessing the effect of deals that could lead to an entrenchment of market power. On the contrary, the Law Council considers that the statutory test under section 50 allows the Court and the ACCC to take such factors into account and the Court and the ACCC already do so in practice.
55. Consequently, in the absence of such evidence, the Law Council does not consider the adoption of any deeming provisions, or any other move away from an effects-based assessment, is warranted. As a general matter, a deeming provision would be a blunt tool for a fringe issue; it may apply to a large number of mergers and create uncertainty for a large number of companies which would be disproportionate to addressing issues arising from marginal cases (if any).
56. There is also a risk that a 'deeming' provision may place undue focus on whether merger parties have substantial market power and require detailed and expensive analyses regarding market definition. This may have important implications for the resources that the ACCC will need to commit to its reviews, the efficiency and timeliness of its review process, and the burden on merger parties to provide the requisite information to undertake these analyses.

Privacy and Data Protection

57. The Law Council appreciates that the focus of the inquiry is consumer protection and the digital environment and that privacy considerations are the subject of the review of the Privacy Act.²⁵ The plan was that the review was to progress alongside the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021*.
58. It will be important to ensure that the process and outcomes of this inquiry are complementary and align with the process and substance of the pending reforms of the Privacy Act. To that end, the Law Council notes that the terms of reference for the Privacy Act review²⁶ overlap with many of the matters that are traversed by this inquiry. Notably, the Privacy Act review was itself an outcome of the ACCC Digital Platforms Inquiry. A key driver is 'implementing a number of privacy-specific

²⁴ Under the United States' 'rule of reason' approach: (1) plaintiff must firstly show a significant anticompetitive effect; (2) the burden shifts to the defendant to demonstrate a legitimate procompetitive justification; (3) if the defendant successfully makes this showing, the burden shifts back to the plaintiff to demonstrate that the restraint is not reasonably necessary to achieve the restraint's objectives; and (4) the court balances the restraint's anticompetitive and procompetitive effects.

²⁵ See Commonwealth Attorney-General's Department, 'Review of the Privacy Act 1988' (January 2022), <<https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>>.

²⁶ See Commonwealth Attorney-General's Department, 'Privacy Act Review: Terms of Reference' (October 2020), <<https://www.ag.gov.au/system/files/2020-10/privacy-act-review-terms-of-reference.pdf>>.

recommendations to better empower consumers, protect their data and best serve the Australian economy’.

59. A high degree of collaboration and cooperation between various stakeholders (regulators and civil society alike) will be needed to avoid fragmentation and potentially counterproductive or unintended outcomes for consumer protection, promotion of digital economy and an individual’s right to privacy. The high degree of collaboration and cooperation is made especially pertinent by the expanded uses of machine learning and various forms of artificial intelligence in the digital age as these processes, by necessity, rely on vast amounts of data, including personal information and drive many of the processes and outcomes relied upon by digital platforms. The Law Council notes work undertaken taken by the European Parliament and the Special Committee on Artificial Intelligence in a Digital Age.²⁷

Effectiveness and efficiency of private actions by corporations and individuals

60. The Law Council recognises the practical challenges faced by Australian businesses and individuals in bringing private actions to enforce relevant competition and fair-trading protections against large digital platforms are relevant considerations. Traditional court proceedings can be lengthy and generally seek to address competition and consumer harms after they have occurred, although in some cases injunctions and other relief can be sought to prevent harm occurring. Due to the dynamic nature of digital platform services, the Law Council supports the ACCC having regard to the risk that market power can be extended and/or entrenched relatively quickly while a case is being investigated and that further harm may occur, with potentially irreversible consequences. However, this should not detract from the time required to gather and appropriately consider evidence. The Law Council accepts that any competition harms in this context may be more novel and prospective, which may make them more difficult for a court to assess.
61. The immediacy and the reach of conduct online means that where a harm arises it needs to be assessed and addressed as quickly as possible (within the confines of proper process and consideration of evidence). Traditional litigation timelines may only provide limited relief to applicants and whether this is compounded by the potential need to identify a defendant within the jurisdiction and validate their financial position, so that any eventual judgment is not merely a pyrrhic victory. The Law Council acknowledges that consideration of alternative dispute resolution approaches is appropriate, but encourages the ACCC to also have regard to the other principles set out in this submission in determining whether such measures are necessary and desirable. Similar considerations apply to statutory torts and individual rights of action under the Privacy Act, hence the concerns regarding fragmentation, as noted above in relation to privacy and data protection.
62. The Law Council supports steps to improve the quality and timeliness of the dispute resolution processes, subject to fundamental legal principles of fairness and proper procedure being followed.

Any rule-making powers should be subject to checks and balances

²⁷ Special Committee on Artificial Intelligence in a Digital Age, ‘*Report on artificial intelligence in a digital age*’ (5 April 2022), <https://www.europarl.europa.eu/cmsdata/246872/A9-0088_2022_EN.pdf>.

63. It would be preferable for any industry-specific digital regulation to be implemented by way of legislation or regulation rather than providing rule-making powers to the ACCC or another body. However, the Law Council considers that any grant of rule-making powers to the ACCC or another body that enables it to impose prohibitions and obligations without the need for legislative approval should be subject to appropriate checks and balances. The Law Council encourages appropriate consultation on the scope of any such powers and the subjects, and criteria for determining the subjects, of any such rules if any grant of rule-making power is made.
64. One such check or balance could be the availability of a merits based right to appeal any decisions made by the ACCC or other responsible body (as the case may be).
65. An alternative to granting rule-making powers to the ACCC or another body may be to enable regulations to be created under the broad statutory prohibitions to address specific issues. These regulations would be made by the Government on the recommendation of the ACCC or other body (as applicable) which would consequently have the benefit of having been appropriately reviewed and considered by the legislature before being implemented. They would also, of course, be subject to the usual disallowance regime by either House of Parliament.

Transparency

66. The ACCC identifies the lack of transparency as an issue of considerable concern to small businesses and consumers.²⁸ For example, small businesses may be unable to understand the pricing, quality and operations of many digital platforms which may impede their ability to make informed choices about the services to purchase and whether they are getting value for money. The ACCC also identifies concerns about the opacity of a number of issues including algorithms, the operation of ad tech auctions, prices and fees of ad tech services, as well as the performance of demand-side services such as ad verification and attribution services.
67. The Law Council supports, in principle, measures which would improve transparency in these areas but considers it is appropriate to also take into account other considerations set out in the Discussion Paper including in respect of privacy, the burden on affected digital platforms and the need to discourage fraudulent conduct and the inappropriate use of dark patterns.

²⁸ ACCC, *Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5* (February 2022), 55.