

CCIA Comments in Response to the Australian Treasury's Public Consultation on the Proposed New Digital Competition Regime

The Computer & Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments in response to the Australian Treasury's ("Treasury") Proposal Paper² ("the Proposal") on a new digital competition regime, released for public consultation on December 2, 2024.³ These comments follow CCIA's previous submission⁴ in response to the Australian Government's consultation document on the Australian Competition and Consumer Commission's ("ACCC") regulatory reform recommendations⁵ in February 2023.

Digital platforms offer innovative and popular services that have revolutionized the way consumers and businesses interact with each other. CCIA strongly believes that when determining if there are any potential competition concerns that need to be addressed through regulation, it is paramount for Australian policymakers to consider certain guiding principles. As such, when proposing any *ex-ante* regulatory framework for digital markets, policymakers must consider market realities and how the proposed regulation might affect businesses, consumers, and the country's overall economy. Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies, and could significantly hinder consumer choice and harm economic growth.

Given the dynamic nature of digital markets, any new regulations should be proportionate and provide sufficient legal certainty and predictability. New rules should be principle-based, rather than targeting and scoping particular companies and imposing specific obligations and prohibitions on them. Therefore, these comments offer some important regulatory principles for Australian policymakers to consider when designing a regulatory framework for digital markets, as well as recommendations regarding some of the key aspects of Australia's digital economy and its competitive ecosystem.

¹ CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

² Australian Government, The Treasury, "A new digital competition regime Proposal paper" (Dec. 2, 2024), <https://treasury.gov.au/sites/default/files/2024-12/c2024-547447-pp.pdf>.

³ Australian Government, The Treasury, "Digital platforms – a proposed new digital competition regime" (Dec. 2, 2024), <https://treasury.gov.au/consultation/c2024-547447>.

⁴ CCIA, "CCIA Submits Comments Urging the Australian Treasury to Take a Measured Approach to Digital Platform Services Regulation" (Feb. 17, 2023), <https://ccianet.org/news/2023/02/ccia-submits-comments-urging-the-australian-treasury-to-take-a-measured-approach-to-digital-platform-services-regulation/>.

⁵ Australian Government, The Treasury, "Digital Platforms: Government consultation on ACCC's regulatory reform recommendations - Consultation Document" (Dec. 2022), <https://treasury.gov.au/sites/default/files/2022-12/c2022-341745-cp.pdf>.

I. Australia's Digital Ecosystem

Australia has a booming startup and digital ecosystem, with expectations for 2025 of over 119,000 employees and driving nearly A\$45.85 billion in tech revenue, representing an 8.7 percent investment increase from 2024.⁶ Australia currently ranks 11th in the Global Startup Ecosystem Index,⁷ with Sydney rated in the top 21 startup ecosystems globally, having created A\$72 billion in Ecosystem Value⁸ from 2021 to 2023.⁹ This positions the country as a key digital startup leader in the region and globally.

Following a decade of startup and VC successes, in 2025 Australia appears to be heading toward a “golden era” for its startup and venture capital (VC) ecosystem,¹⁰ which has helped to create an unprecedentedly strong talent, capital, and innovation pipeline for the economy.¹¹ Digital platforms have also helped boost small and medium businesses (SMBs) through lowering barriers to market entry, allowing them to optimize their limited resources.¹² For example, a recent study found that each dollar spent on online advertising produced \$3.31 in revenue (a 331 percent return on investment) for the companies advertising.¹³ “Unicorn” startups such as Canva, Judo Bank, and Airwallex are some of Australia's most successful companies,¹⁴ helping establish Australia as one of the leading countries for startups worldwide.¹⁵

As Australia contemplates an *ex-ante* regulatory framework for digital markets, a particularly important point that policymakers should keep in mind is that there is a global competition for technology investment and rollout. Companies want to operate in jurisdictions and economies with clear, fair, and principle-based regulatory environments, without extreme regulatory obligations and excessive operating expenses.¹⁶ This is particularly important for the

⁶ Chevas Balloun, NuCamp, “Inside Australia's Thriving Tech Hub: Startups and Success Stories” (Dec. 23, 2024), <https://www.nucamp.co/blog/coding-bootcamp-australia-aus-inside-australias-thriving-tech-hub-startups-and-success-stories>.

⁷ StartupBlink, “The Startup Ecosystem of Australia” (2024), <https://www.startupblink.com/startup-ecosystem/australia?page=1>.

⁸ Ecosystem Value is a measure of economic impact, calculated as the value of exits and startup valuations.

⁹ Anna Chadwell, Startup Genome, “Sydney's Tech Ecosystem By the Numbers” (Sep. 30, 2024),

<https://startupgenome.com/articles/sydneys-tech-ecosystem-by-the-numbers>.

¹⁰ Rampersand VC, “Heading into a Golden Era of Startups & VC” (Dec. 4, 2024), <https://rampersand.substack.com/p/2024-wrap-up>.

¹¹ *Id.*

¹² Avi Goldfarb, Springer, The Review of Industrial Organization, “What is Different About Online Advertising?” (2024), 44(2), 115–129, <http://www.jstor.org/stable/43550450>.

¹³ Steven Tadelis, Christopher Hooton, Utsav Manjeer, Daniel Deisenroth, Nils Wernerfelt, Nick Dadson, and Lindsay Greenbaum, University of California Berkeley, National Bureau of Economic Research, “Learning, Sophistication, and the Returns to Advertising: Implications for Differences in Firm Performance” (Apr. 2023), at 17, <https://faculty.haas.berkeley.edu/stadelis/Learning%20Sophistication%20Ads.pdf>.

¹⁴ Statista, “Startups in Australia - statistics & facts” (Jan. 21, 2025), <https://www.statista.com/topics/4729/start-ups-in-australia/#topicOverview>.

¹⁵ Statista, “Leading countries for startups worldwide in 2024, by total score” (2024), <https://www.statista.com/statistics/1275240/leading-countries-startups-worldwide/>.

¹⁶ See, e.g., Christian M. Dippon and Matthew D. Hoell, NERA Economic Consulting, CCIA Research Center, “A Quantitative Evaluation: The Economic Costs of Structural Separation, Line of Business Restrictions, and Common Carrier Regulation of

global export competitiveness of Australian companies as well. The important question from a business perspective is – how does Australia want to position itself in this global competition for investment?¹⁷

II. Key Considerations and Principles to Guide Regulatory Proposals

Global digitalization across several industries of the economy has provided consumers and businesses with tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided business models create and stimulate competition in the economy.¹⁸ Given the dynamic and innovative nature of digital markets, any proposed digital regulation needs to consider the wider potential implications for businesses, consumers, innovation, and the broader economy.

Digital technology is diffusing across the entire economy in industries as diverse as advertising, agriculture, automotive, manufacturing, and retail. With the ongoing digitalization across the global economy,¹⁹ many industries have digital components and digital offerings that also compete with physical ones, including retail and telemedicine.²⁰ Businesses usually

Online Platforms and Marketplaces,” (Mar. 18, 2022), <https://research.ccianet.org/reports/economic-costs-regulation-online-platforms-marketplaces/#main-content>; Engine and CCIA Research Center, “Tools to Compete Lower Costs, More Resources, and the Symbiosis of the Tech Ecosystem” (Jan. 25, 2023), <https://research.ccianet.org/reports/tools-to-compete/#main-content>.

¹⁷ See, Australian Trade and Investment Commission, “Why Australia Benchmark Report 2024: Discover why Australia is a great investment destination” (2024), <https://international.austrade.gov.au/en/why-australia/benchmark-report>, (“Strong growth has solidified Australia’s position as the world’s 13th-largest economy with nominal gross domestic product (GDP) reaching A\$2.6 trillion (US\$1.7 trillion) in 2023. Australia was home to just 0.3% of the world’s population, but accounted for 1.7% of the global economy”).

¹⁸ See, e.g., European Commission, “Staff Working Document: Evaluation of the Vertical Block Exemption Regulation” (Sep. 8, 2020), at 32, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52020SC0172> (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”); Oxera, “How platforms create value for their users: implications for the Digital Markets Act” (May 12, 2021), at 34, <https://www.oxera.com/wp-content/uploads/2021/05/How-platforms-create-value.pdf> (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies”).

¹⁹ See, e.g., Sarah Robson and Tim Cowell, AVEVA, “The four pillars of a trusted industrial information infrastructure” (2023), https://discover.aveva.com/paid-search-industrial-cloud-hybrid-saas/whitepaper-the-four-pillars-of-a-trusted-industrial-information-infrastructure?https://discover.aveva.com/paid-search-industrial-cloud-hybrid-saas/whitepaper-the-four-pillars-of-a-trusted-industrial-information-infrastructure&utm_term=industrial%20digitalization&utm_campaign=G_S_A_NA_All_Campaign_Solution_Cloud_Industrial%20Cloud%20Hybrid%20SaaS&utm_source=adwords&utm_medium=ppc&gad_source=1&gclid=Cj0KCQjwir2xBhC_ARIsAMTXk87r9vMQVFqoLJ5eh0XMKGAY_cDwx6mfund3avCiupvdLEEQ0UbGRnAaAmYmEALw_wcB; Yifat Perry, NetApp BlueXP, “Digital Transformation: Examples from 5 Industries” (Jun. 24, 2022), <https://bluexp.netapp.com/blog/cvo-blg-digital-transformation-examples-from-5-industries>.

²⁰ Rosa Abrantes-Metz and Mame Maloney, CCIA Research Center, “Competitive Dynamics of Online and Brick-and-Mortar Retail Prices” (Aug. 2, 2022), <https://research.ccianet.org/reports/competitive-dynamics-online-brick-mortar-retail-prices/>; Trevor Wagener, Jeff Simpson, and David Kearns, Deloitte, InsightIQ, “Consumer Preferences Embrace a Mix of Physical and Digital” (Jan. 31, 2022), <https://ccianet.org/research/reports/consumer-preferences-embrace-mix-physical-digital-shopping/>; John Glaser and Kyle Zebley, Harvard Business Review, “It’s Time to Cement Telehealth’s Place in U.S. Health Care” (Jan. 20, 2023), <https://hbr.org/2023/01/its-time-to-cement-telehealths-place-in-u-s-health-care>; Prashant Gandhi, Somesh Khanna, and Sree Ramaswamy, Harvard Business Review, “Which Industries Are the Most Digital (and Why)?” (Apr. 1, 2016), <https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why>.

described as “digital” are companies that adopted early on the use of technology and digital tools across various industries. Hence, as the entire economy is moving towards digitalization, creating a different set of rules for digital companies could create asymmetric results in the market, leading to ambiguity and inconsistency.

Importantly, any overly burdensome and heavy-handed digital regulation could significantly hinder innovation and economic growth. This should be a particularly important consideration for economies with thriving innovation and digital ecosystems such as Australia. The country’s tech sector is valued at A\$167 billion, and it grew almost 80 percent from 2016 to 2021.²¹ Increasing digitalization is expected to provide almost A\$315 billion in potential benefits to the Australian economy by 2031.²² An important point for Australian policymakers to consider is that any proposed new regulatory framework, if needed, should be generally applicable at a principle-level, and not target particular companies and imposing specific provisions against them.²³

Policymakers should take into account that any regulatory proposal for digital markets will likely have a significant impact not only from a competition enforcement and policy perspective, but on other policy areas as well, such as data privacy, national security, cybersecurity, and intellectual property, with important ramifications for businesses operating in Australia. This interconnectedness of policy areas in the digital space requires a particularly careful calibration of any *ex-ante* regulatory considerations in this area.²⁴

For example, the Proposal identifies restrictions on interoperability²⁵ and accumulation of data²⁶ as potential topics of concern. Certain proposed solutions, such as mandates on interoperability and data sharing, can have a significant negative impact on data security, posing a risk to user privacy. Such obligations can affect integrity and security, as tools and technologies to fight spam, scams, and other harmful activities would be compromised if third-party apps are not obligated to meet those same standards and allow such tools to work on their

²¹ Australian Government, Australia Trade and Investment Commission, “Why Australia Digital Economy” (2023), <https://international.austrade.gov.au/en/news-and-analysis/publications-and-reports/digital-technology-report>.

²² See, e.g., Australian Government, “Digital Economy Strategy 2030 (2021), at 3, <https://apo.org.au/sites/default/files/resource-files/2021-05/apo-nid312247.pdf>; Alhabeta, “Digital Innovation: Australia’s \$315B Opportunity” (Sep. 2018), at 8, https://accesspartnership.com/wp-content/uploads/2023/03/csiro-data61_digital-innovation-report.pdf.

²³ Julia Black, Martin Hopper, and Christa Band, Law and Financial Markets Review, “Making a success of Principles-based regulation” (2007), 1(3), at 192, https://www.researchgate.net/publication/263174265_Making_a_Success_of_Principles-Based_Regulation.

²⁴ See, e.g., United Nations, Report of the UN Secretary-General’s High-level Panel on Digital Cooperation, “The age of digital interdependence” (2019), at 6, <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>.

²⁵ *Supra* n. 2, at 9.

²⁶ *Supra* n. 2, at 10.

networks.²⁷ Forced data sharing could enable harms such as theft or corruption of data, unauthorized cyber intrusion, widespread disinformation, and manipulation.²⁸

I.1. Policymakers Should Carefully Consider the Potential Costs of New Regulations

Given the potentially significant economic impact of regulating digital markets, it is fundamental for policymakers to engage with stakeholders in the development of any *ex-ante* regulatory framework. Introducing new regulation is not costless, particularly given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regulatory framework should be to promote and stimulate competition and innovation.

As the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN) have underscored, to ensure that the cost of any new regulation does not outweigh its benefits, it should allow for clearly procompetitive or competitively benign conducts, and recognize justifications for legitimate protections.²⁹ Without appropriate safeguards, burdensome regulation may harm Australian consumers and businesses, including the small and medium-sized businesses (SMBs) that use and rely on digital services. Therefore, CCIA encourages the Treasury to analyze the potential impact of any *ex-ante* regulation and whether its benefits would outweigh its potential harms to the country’s consumers, businesses, and economy.³⁰

As the Treasury notes in the Proposal, the new regulatory framework would need significant resources to support its ongoing administration and enforcement, an amount that would only be known depending on the final parameters, scope, and complexity of the new competition regime and the pace of its implementation.³¹ CCIA is concerned, however, with the initial proposal for the designated companies to bear the cost of the new regime. As proposed by

²⁷ Kati Suominen, Center for Strategic & International Studies, “New Costs and Cybersecurity Challenges Flagged as DMA Compliance Starts” (Mar. 22, 2024), <https://www.csis.org/analysis/new-costs-and-cybersecurity-challenges-flagged-dma-compliance-starts>.

²⁸ Brandon Pugh, R Street, “What does the Google antitrust case mean for cybersecurity?” (Oct. 7, 2024), <https://www.rstreet.org/commentary/what-does-the-google-antitrust-case-mean-for-cybersecurity/> (“[I]f sensitive data ends up in the hands of an adversary or criminal group—or a company with weak data security and privacy protections—the consequences can be detrimental.”)

²⁹ OECD, “Key Issues in Digital Trade Review: OECD Global Forum on Trade 2023 “Making Digital Trade Work for All” (Oct. 2023), at 13, https://www.oecd.org/en/publications/key-issues-in-digital-trade-review_b2a9c4b1-en.html; ICN, ICN Advocacy Working Group, “Framework of Competition Assessment Regimes” (Apr. 2015), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_FrameworkCompetitionAssessmentRegimes.pdf.

³⁰ See OECD, Regulatory Policy Outlook (2021), https://www.oecd-ilibrary.org/governance/oecd-regulatory-policy-outlook-2021_38b0fdb1-en; OECD, Regulatory Impact Assessment (2020), <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>.

³¹ *Supra* n. 2, at 32.

the Treasury, the implementation costs would be recovered from the designated platforms based on the Australian Government's Cost Recovery Policy via levies or fees for service.³² This funding mechanism would create an additional financial burden that would increase the compliance costs for designated companies, in addition to those associated with the broad and specific obligations they would be required to comply with. Ultimately, these costs will be borne by consumers, as companies would likely be forced to increase the prices of their products to offset these additional regulatory costs. As seen with the European Union's (EU) Digital Markets Act (DMA), the uncertainty and compliance costs associated with these new rules could lead to reduced and delayed launches of new innovative products and services,³³ to the detriment of both businesses and consumers.

I.2. Balancing Competition and Regulation in Digital Markets

Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies.³⁴ Therefore, any *ex-ante* regulation should only be introduced to address particular market failures, which is not the same as the mere existence of market power. Dynamic competition, which is particularly relevant in digital markets, comes forth as a natural way to resolve market failures by firms competing for the market and creating new and innovative products.³⁵

Ex-ante regulation for digital markets, in the absence of a specific market failure that requires correction, would hinder not only the growth of companies in the digital and connected markets, but it would also harm innovation and competition, and thereby the overall economy.³⁶

³² *Id.*

³³ See, e.g., Paola Talavera, Competitive Enterprise Institute, "EU's Digital Markets Act: An obstruction to AI innovation?" (Jul. 30, 2024), <https://cei.org/blog/eus-digital-markets-act-an-obstruction-to-ai-innovation/>; Bloomberg, Samuel Stolton and Mark Gurman, "Apple Won't Roll Out AI Tech In EU Market Over Regulatory Concerns" (Jun. 21, 2024), <https://www.bloomberg.com/news/articles/2024-06-21/apple-won-t-roll-out-ai-tech-in-eu-market-over-regulatory-concerns?embedded-checkout=true>; Lauren Feiner, CNBC, "Threads, Meta's Twitter competitor, is not yet available in the EU due to regulatory concerns" (Jul. 6, 2023), <https://www.cnbc.com/2023/07/06/metat-threads-not-available-in-the-eu-due-to-legal-complexity.html>; Jess Weatherbed, The Verge, "Meta won't release its multimodal Llama AI model in the EU" (Jul. 18, 2024), <https://www.theverge.com/2024/7/18/24201041/meta-multimodal-llama-ai-model-launch-eu-regulations>; Nanna-Louise Linde, Microsoft EU Policy Blog, "Microsoft announces changes to Microsoft 365 and Office 365 to address European competition concerns" (Aug. 31, 2023), <https://blogs.microsoft.com/eupolicy/2023/08/31/european-competition-teams-office-microsoft-365/>.

³⁴ See, e.g., Aghion, Philippe and Bergeaud, Antonin and Van Reenen, John, "The Impact of Regulation on Innovation" (Jan. 16, 2023), Banque de France Working Paper No. 804, <https://ssrn.com/abstract=4325116>; OECD, "Regulatory Reform and Innovation," <https://web.archive.org/2012-06-15/164801-2102514.pdf>; William D. Eggers, Sam J Walsh, Carsten Joergensen, and Pankaj Kamleshkumar Kishnani, "Regulation that enables innovation" (Mar. 23, 2023), <https://www2.deloitte.com/us/en/insights/industry/public-sector/government-trends/2023/regulatory-agencies-and-innovation.html>.

³⁵ Joseph A. Schumpeter, "Capitalism, Socialism, and Democracy," 81 (1942).

³⁶ OECD, Directorate For Financial and Enterprise Affairs, Competition Committee, "Ex-Ante Regulation and Competition in Digital markets - Note by BIAC" (Dec. 2, 2021), at 4, [https://one.oecd.org/document/DAF/COMP/WD\(2021\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)79/en/pdf); Badri Narayanan and Hosuk Lee-Makiyama, ECIPE, Economic Costs of Ex-Ante Regulations" (Oct. 2020), https://ecipe.org/wp-content/uploads/2020/10/ECI_20_OccPaper_07_2020_Ex-ante_Regulations_LY06.pdf; Fed. Trade Comm'n, Broadband Connectivity Competition Policy Staff Report 9 (Jun. 2007),

As such, any proposed new regulation needs to be carefully tailored to address specific market failures to avoid harming competition and creating an uneven playing field.

In this regard, a key consideration before proposing any *ex-ante* regulation is whether the existing enforcement and policy frameworks, including competition, consumer protection, and data privacy already provide more proportionate ways to achieve the desired outcomes. Therefore, clarifying the expected outcomes of a proposed digital regulatory framework in advance is particularly important for consumers and businesses alike.

I.3. Policymakers Should Be Cautious in Relying on Untested International Regulatory Experiments

Ex-ante digital regulatory proposals are currently being discussed and debated in several jurisdictions worldwide.³⁷ However, it is important to underscore how so far, there are only two jurisdictions with fully operational *ex-ante* digital regulatory frameworks: Germany, through the 10th amendment of the German Competition Act (GWB)³⁸ and Section 19a of the GWB,³⁹ and the EU's DMA,⁴⁰ which became fully operational in March 2024.⁴¹ The United Kingdom's (UK) Digital Markets, Competition, and Consumers Act (DMCC)⁴² came into force on January 1st, 2025, and is only expected to be fully operational in April 2025.⁴³

Despite being fully operational for under a year, the experience with the EU's DMA suggests that rigid *ex-ante* regulations, which do not adequately consider their impact on consumers, can lead to worse user experiences and diminished access to beneficial digital services.⁴⁴ The implementation of such regulation has not only affected consumer access to

<https://www.ftc.gov/sites/default/files/documents/reports/broadband-connectivity-competition-policy/v070000report.pdf> (advising that “[i]n evaluating whether new proscriptions are necessary, we advise proceeding with caution before enacting broad, ex-ante restrictions in an unsettled, dynamic environment”).

³⁷ See, e.g., Center for Strategic and International Studies (CSIS), “Digital Competition Policy Tracker” (Apr. 2024), <https://www.csis.org/programs/scholl-chair-international-business/competition-policy-digital-era>.

³⁸ 10th Amendment to the German Competition Act (GWB), Federal Law Gazette Volume 2021 Part I No. 1, issued in Bonn on January 18, 2021, https://www.bgbl.de/xaver/bgbl/start.xav#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl121s0002.pdf%27%5D_1701266446605.

³⁹ *Id.*, Section 19a (“The Bundeskartellamt may issue a decision declaring that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets.”).

⁴⁰ Regulation (EU) 2022/1925 of The European Parliament and of The Council (Sep. 14, 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC.

⁴¹ European Commission, News Announcement, “Designated gatekeepers must now comply with all obligations under the Digital Markets Act” (March 7, 2024), https://digital-markets-act.ec.europa.eu/designated-gatekeepers-must-now-comply-all-obligations-under-digital-markets-act-2024-03-07_en.

⁴² UK Legislation, “Digital Markets, Competition and Consumers Act 2024” (May 24, 2024), <https://www.legislation.gov.uk/ukpga/2024/13/introduction>.

⁴³ Competition and Markets Authority, Press Release, “CMA sets out initial plans as new digital markets competition regime comes into force” (Jan. 7, 2025), <https://www.gov.uk/government/news/cma-sets-out-initial-plans-as-new-digital-markets-competition-regime-comes-into-force>.

⁴⁴ *Supra* n. 33.

information but has also harmed smaller businesses by, in some cases, redirecting traffic away from them.⁴⁵

Given the extremely limited international experience with *ex-ante* digital regulations, Australian policymakers are in an advantageous position to learn from the experience of other jurisdictions. This would provide Australian policymakers with the opportunity to carefully analyze if these international proposals work or not, and if they are fit for purpose for the Australian ecosystem. Therefore, CCIA strongly recommends being cautious when seeking to rely on untested, experimental international regulatory frameworks.

Although digital reforms are being considered in various jurisdictions, there are no convergent proposals or results in sight. For example, the U.S. antitrust bills targeting a handful of technology companies raised numerous major concerns and seem to have no political support to be adopted.⁴⁶ Brazil is discussing a digital regulatory proposal by the Ministry of Finance,⁴⁷ which has not yet been introduced to Congress. Discussions in India's legislature about a digital competition bill also seem to have slowed down.⁴⁸

Based on the extremely limited experience with recent *ex-ante* regulatory proposals worldwide, CCIA recommends that Australian policymakers take a step back to analyze the potential effects of importing these international regulatory experiments. The recommended approach for countries analyzing these types of proposals would be to first allow some time to gauge how these international experiments are working in practice and then evaluate whether the reforms end up benefiting or harming consumers and innovation.⁴⁹

⁴⁵ See, e.g., Javier Delgado, Mirai, "DMA implementation sinks 30% of clicks and bookings on Google Hotel Ads" (May 7, 2024), <https://www.mirai.com/blog/dma-implementation-sinks-30-of-clicks-and-bookings-on-google-hotel-ads/>; Adam Cohen, Google The Keyword, "New Competition Rules Come With Trade-Offs" (Apr. 5, 2024), <https://blog.google/around-the-globe/google-europe/new-competition-rules-come-with-trade-offs/>.

⁴⁶ See, e.g., Krisztian Katona, Project DisCo, "AICOA's Data Security, Privacy, and Content Moderation Issues Call for Risk Assessment" (Jun. 7, 2022), <https://www.project-disco.org/privacy/060722-aicoas-data-security-privacy-and-content-moderation-issues-call-for-risk-assessment/>; Project DisCo, "AICOA's Failure and the Future of Competition Policy in Congress" (Jan. 6, 2023), <https://www.project-disco.org/competition/010623-aicoas-failure-and-the-future-of-competition-policy-in-congress/>.

⁴⁷ Ministry of Finance, "Ministry of Finance presents proposals to improve competition protection in the digital platform environment" (Oct. 10, 2024), <https://www.gov.br/fazenda/pt-br/assuntos/noticias/2024/outubro/ministerio-da-fazenda-apresenta-propostas-para-aprimorar-a-defesa-da-concorrencia-no-ambiente-de-plataformas-digitais>.

⁴⁸ Ministry of Corporate Affairs, Government of India, "Report of the Committee on Digital Competition Law – Draft Digital Competition Bill, 2024" (Feb. 27, 2024), at 151, <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%253D%253D&type=open>; The Hindu Business Line, "Digital Competition Bill faces potential delay as House Panel revisits digital framework" (Dec. 19, 2024), <https://www.thehindubusinessline.com/news/digital-competition-bill-faces-potential-delay-as-house-panel-revisits-digital-framework/article69003282.ece>.

⁴⁹ See, e.g., "Interview with Alexandre Cordeiro Macedo, President, Administrative Council for Economic Defense (CADE)," Conducted by Krisztian Katona on behalf of the ABA Antitrust Magazine (Jun. 30, 2023), https://www.americanbar.org/groups/antitrust_law/resources/source/2023-june/interview-with-alexandre-cordeiro-macedo/.

III. Designation and Threshold Considerations

While the designation process to determine the designated entities under the new framework would occur later on through subordinate legislation,⁵⁰ the Proposal appears to have an overly narrow scoping of the targets of the new regulatory framework. The Treasury notes how there are some so-called “Priority Services” that would be the first services to be investigated for designation under the proposed framework due to their alleged competitive harms.⁵¹ However, it would seem like the Proposal is primarily targeting products and services of specific U.S. companies.⁵²

In this regard, it is important to consider that an accurate definition of market shares—based on a robust scoping of broadly competitive services—is critical for the designation process, as it would determine which entities will be subject to the new broad and specific obligations. A comprehensive definition of market shares that accounts for all relevant forms of user engagement is essential to ensure a balanced and equitable application of the law. Without such precision, the designation process may overlook significant competitive dynamics, resulting in disproportionate regulatory burdens for specific companies. Further, this consultation should refrain from narrowly scoping its definitions of the web services, advertising, and online communication markets to exclude domestic competitors from consideration.

A designation of primarily U.S.-based companies might result in giving discriminatory or “less favorable treatment” to U.S. service suppliers, potentially violating Australia’s non-discrimination obligations under the World Trade Organization’s General Agreement on Trade in Services (GATS)⁵³ and the Australia-United States Free Trade Agreement (AUSFTA).⁵⁴ If the logic of the priority services section of the report is followed in the drafting of the legislation, U.S. companies would likely be the only firms designated and therefore subject to significant prohibitions and obligations (including with respect to funding the oversight mechanism). These requirements would not apply to domestic or third-country service providers that are not in scope due to size-based and service-specific thresholds, despite the fact that out-of-scope companies may be competing in the same or an overlapping market. Such an approach would result in a definition of service providers that spare domestic (or third-country) suppliers who compete

⁵⁰ *Supra* n. 2, at 16.

⁵¹ *Supra* n. 2, at 9.

⁵² The report only references three U.S. companies in the primary services section.

⁵³ World Trade Organization, Art. V (1)(b), “General Agreement on Trade in Services” (accessed Jan. 22, 2025), https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

⁵⁴ Australia-United States Free Trade Agreement, Articles 10.2 and 11.3 (accessed Feb. 13, 2025), <https://www.dfat.gov.au/trade/agreements/in-force/ausfta/official-documents/Pages/official-documents>.

against U.S. providers, providing them a competitive advantage. These hindrances that would provide preferential treatment to domestic (or third-country) suppliers include the requirement for designated suppliers not to self-prefer their own digital products, meet heightened transparency and interoperability obligations, and take some actions concerning default settings and user data, all of which are burdens their competitors would not be subject to. Such a regime of differential obligations, if applicable predominantly to U.S. firms, could implicate Australia's national treatment and most-favored-nation (MFN) obligations in both AUSFTA and the GATS. In this regard, it is important to highlight the additional scrutiny that the United States Government has recently stated will be applied to foreign government measures that impose regulatory burdens or restrictions that disproportionately impact U.S. digital service providers.⁵⁵

Moreover, the Proposal suggests the designation process would consider both qualitative and quantitative thresholds,⁵⁶ relying on the latter as the primary criteria to only target large digital platforms with critical positions in the Australian economy.⁵⁷ Given the highly innovative and dynamic nature of digital markets, CCIA is concerned that the qualitative factors considered listed in the Proposal may potentially result in overly-broad regulation, resulting in unintended consequences that hinder innovation and harm consumers. A more flexible approach to these thresholds, such as requiring consideration of the same factors as under Section 46 of the Competition and Consumer Act of 2010 (CCA),⁵⁸ would give a higher priority to qualitative considerations. Such an approach might better account for the fast-changing nature of digital markets.⁵⁹ This would allow for any proposed new regulation to avoid being overly-broad, and avoid some of the issues that such regulation would have.

Finally, as the proposed framework would introduce new ex-ante obligations for designated digital platforms with critical positions in the Australian economy,⁶⁰ both the quantitative and qualitative thresholds applied should only consider a service's presence in the Australian economy and not its global presence, size, or revenue. The designation thresholds should be tailored to Australia-specific services and companies to prevent over-regulation.

⁵⁵ White House, Presidential Memorandum of February 21, 2025, "Defending American Companies and Innovators From Overseas Extortion and Unfair Fines and Penalties" (accessed Feb. 24, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/defending-american-companies-and-innovators-from-overseas-extortion-and-unfair-fines-and-penalties/>.

⁵⁶ *Supra* n. 2, at 12, ("Quantitative thresholds would include Australian and/or global service-specific revenue, Australian and/or firm-wide revenue, the number of Australian users or business users for the service and/or the relevant entity's market capitalisation").

⁵⁷ *Id.* at 13.

⁵⁸ Commonwealth Consolidated Acts, Competition And Consumer Act 2010 - Sec. 46 Misuse of market power (last accessed Jan. 31, 2025), https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/caca2010265/s46.html.

⁵⁹ *Hunt-Wesson Foods, Inc. v. Ragu Foods*, 627 F.2d 919, 927 (9th Cir. 1980) ("Blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition").

⁶⁰ *Supra* n. 2, at 6.

IV. A Robust Appeals Process

As noted by the Treasury, it is a paramount safeguard for parties to have access to a robust, timely, and effective review process to ensure the integrity of any proposed framework.⁶¹ This is particularly important when considering the significantly burdensome obligations designated entities would need to comply with, as well as the onerous penalties that would amount to the maximum monetary penalty under the CCA⁶² (the greatest of A\$50 million, three times the value of the benefit obtained, or 30 percent of adjusted turnover during the breach period).⁶³ Judicial review may be appropriate when regulators and courts have acquired significant experience overseeing an industry, which is often the case in other regulated industries,⁶⁴ however merits review will be more suitable for a new regime that would apply to dynamic and evolving digital markets.

The ACCC should remain cognizant of the potentially negative impact that designation investigations can have on targeted businesses. Given the dynamic nature and rapid evolution of digital markets, overregulating this sector without appropriate safeguards could pose significant concerns for innovation and the broader economy. Designation investigations should only be commenced based on clear and objective criteria. Such investigations, or uncertain threats thereof, can place significant burdens of time and resources on platforms. To minimize the risk of adverse impact of designation investigations, the ACCC should only commence such investigations when there is an identified harm, and there are reasonable grounds for considering that a firm is likely to meet the designation criteria.

As both designations and specific obligations are made through subordinate legislation following the completion of an investigation,⁶⁵ the Proposal seems to suggest that the designation of digital platforms is made without the opportunity for newly designated platforms to offer additional comment on the specific obligations they would be subject to. Such obligations impose considerable costs on designated platforms and could have detrimental effects on consumers. They could also create competitive disadvantages for designated platforms, allowing competitors to leverage the disparity in regulatory burden to gain market share. As such, CCIA

⁶¹ *Id.* at 31.

⁶² *Id.* at 29.

⁶³ Commonwealth Consolidated Acts, “Competition And Consumer Act 2010” (last accessed Feb. 13, 2025), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6923.

⁶⁴ Dirk Auer, “The Digital Markets, Competition and Consumers Bill could strike a hammer blow to UK digital investment” (Oct. 19, 2023), <https://conservativehome.com/2023/10/19/dirk-auer-the-digital-markets-competition-and-consumers-bill-could-strike-a-hammer-blow-to-uk-digital-investment/>.

⁶⁵ *Supra* n. 2, at 18 “These service-specific obligations would be contained in subordinate legislation (developed by government, in consultation with the ACCC).”

recommends that prior to the ACCC recommending to the relevant minister any service-specific obligations of particular designated platforms, that designated companies and third parties have the opportunity to offer additional comments regarding these specific obligations. These would ensure that such obligations are narrowly-targeted to address the particular identified areas of concern, in ways that limit the additional regulatory burden associated with such obligations.

Given the highly dynamic and innovative nature of digital markets, frameworks that regulate these industries need to be equally flexible to adapt to the changing nature of these markets. A shorter, three-year designation period similar to the EU's DMA⁶⁶ would be more responsive to market changes than the five-year term included in the current Proposal.⁶⁷ A shorter designation period would allow for the ACCC to carefully study and reassess designations, while maintaining a level of regulatory flexibility to adapt to rapidly-changing market conditions.

While the Proposal does allow for an exemptions appeal process to mitigate the adverse economic impact of certain specific obligations, CCIA is concerned with the Proposal's recommendation to raise the threshold for the "countervailing benefits" exemption above the "net public benefit" test as currently exists under Australian law.⁶⁸ Platforms in the scope of the new rules should be able to defend conduct that is necessary, objectively justified, efficient, or contributes to innovation and consumer welfare. By establishing a higher exemption threshold that only applies for designated platforms, such a proposed regulatory framework would further hamper their ability to compete with other firms that do not have the additional burden to justify an exemption for otherwise anticompetitive behavior. The proposed exemptions process and heightened threshold limit companies' ability to highlight how their products and services benefit consumers, such as through user convenience and protecting user privacy and security.

It is important to consider that any new *ex-ante* regulation should preserve due process protections. As such, CCIA encourages the Treasury to consider that any investigation should allow affected parties to defend themselves in all stages of the process and be secured by suitable protections. This includes procedural safeguards and clear procedures to protect due process and defense rights as well as access to appeals on the merits. This is particularly important, given the

⁶⁶ Regulation (EU) 2022/1925 of The European Parliament and of The Council (Sep. 14, 2022), Article 53, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC.

⁶⁷ *Supra* n. 2 at 17.

⁶⁸ *Id.* at 24 "It is proposed that the threshold for a 'countervailing benefits' exemption under this regime would be higher than the current 'net public benefit' test."

new and untested digital regulatory regime being proposed,⁶⁹ as the lack of strong safeguards significantly affects business certainty and predictability, investment, and innovation.

V. New Study

CCIA engaged National Economic Research Associates (NERA) Economic Consulting to conduct a study into the proposed new digital competition regime in Australia, which is attached to these comments.⁷⁰ The study evaluates the economic risks of this approach, drawing on economic literature and policy experiences from other jurisdictions and analyzing potential impacts. Several highlights are included in these comments for ease of reference, while the full paper can be reviewed as an attachment. NERA's economic analysis of proposed obligations under the new regime notes numerous risks highlighted in the existing literature, including:

- **Self-Preferencing:** The regime seeks to prohibit digital platforms from favoring their own services (e.g., app store rankings or ad tech preferences). However, economic literature finds that self-preferencing can have procompetitive benefits, such as reducing prices via the elimination of double marginalization. Studies indicate that prohibiting self-preferencing may not always improve consumer welfare and could lead to higher prices or reduced platform attractiveness.
- **Tying:** The regime targets tying practices (e.g., requiring pre-installed apps). Economic research highlights that tying can improve efficiency, lower costs, and enhance product quality. Courts have traditionally used a case-by-case approach to assess tying, as anti-competitive effects depend on market conditions. Some models show tying can increase consumer welfare, particularly in multi-sided markets.
- **Lack of Interoperability and Consumer Switching Barriers:** The regime aims to mandate interoperability and reduce switching costs. While greater interoperability can lower barriers for new entrants, economic studies show that it may also reduce differentiation, increase security risks, and limit innovation. Studies suggest that imposing interoperability may harm competition under certain conditions by reducing incentives for firms to improve their own ecosystems.
- **Lack of Transparency:** The regime requires platforms to disclose policies and pricing structures. However, economic research finds that transparency mandates can discourage

⁶⁹ *Supra* n. 2.

⁷⁰ CCIA, "A New Digital Competition Regime: Insights into Economic Risks" (Feb. 27, 2025), <https://ccianet.org/research/reports/a-new-digital-competition-regime-insights-into-economic-risks/>.

innovation by reducing firms' incentives to invest in proprietary technologies. Some studies indicate that forced data-sharing can lead to higher prices and reduced consumer welfare.

NERA's study identifies several distinct economic risks of ex-ante regulation, including:

- Compliance and Technical Costs

These costs would necessarily require additional financial, staff, and time resources from digital platforms. Absent the new regulation, these resources could have been reallocated to other purposes and could have been spent on product innovation, product quality, or other productive uses.

- Investment Deterrence

Upfront requirements and obligations could discourage investments in Australia because digital platforms would need to allocate substantial resources to meet regulatory standards, and potential investors may perceive a lower return on their investment due to these added expenses. Moreover, the proposed regime may reduce the likelihood that investments are successful if new products being developed by digital platforms may be prohibited by the regime in the future or may fail to be exempted from an obligation. If stakeholders are discouraged from investing in Australia, this will exacerbate the existing gap in tech innovation in Australia compared to other global economies and may discourage firms from operating in Australia altogether, lowering incentives for entry. It may also discourage digital platforms from diversifying into new businesses or entering new markets, even if it is pro-competitive for them to do so. A lower number of new entrants would in turn decrease innovation and product diversity in the market, ultimately harming Australian customers.

- Higher Consumer Prices

Additional costs to firms may be passed on to consumers. Moreover, if investments aimed at increasing efficiency are reduced, this may also result in higher prices for users.

- Innovation Risks

The compliance burdens created by the proposed regime could limit the flexibility needed for designated digital platforms to adapt and experiment and may deter new ideas, ultimately hindering technological progress and slowing market growth. Successful innovation requires

trial and error, which may be discouraged if every update in functionality involves administrative costs. Common regulatory standards may also hinder differentiation and undermine the variety and diversity across digital platform services.

- Diminished User Experience

The proposed broad and service-specific obligations can alter user experience. For example, requiring platforms to enable interactivity with third parties may create practical challenges to the delivery of quality and convenient digital services to consumers. Common standardisation may also make it harder to improve user interfaces over time.

- Product Delays and Discontinuity

The regulatory burdens and technical challenges could lead designated digital platforms to delay the launch of new functionalities and features in Australia. These delays could be due to the longer delivery times necessary to ensure the new product meets regulatory requirements, time spent negotiating with the ACCC or third parties, or the delays while waiting for an exemption approval. This would have a direct impact on consumer welfare because Australian users, for some period of time, would not benefit from new products and services that would have otherwise been available on the market. Product innovations may even be delayed indefinitely or abandoned entirely. Existing products may be discontinued if the necessary updates to make them compliant are too expensive or technically infeasible.

- Harm to Domestic and International Competition

The proposed framework would lead to disparity of treatment among rival companies that may disturb the competitive environment. Indeed, the Minister or the ACCC would be able to pick “winners and losers” among digital platforms, with some platforms being forced to comply with regulations, while other platforms, falling just below the regime’s thresholds, would be free of any obligations. Moreover, it may distort competition between offline and online platforms in Australia since offline competitors would be excluded from this regulation. The proposed framework may hinder Australian businesses’ ability to compete on a global scale with international competitors. If Australian companies only have access to second-best tools and products, then this could increase the already existing gap in tech development in Australia compared to other global economies.

The study quantifies four different economic effects of the proposed regime on the Australian economy:

- “Lost Consumer Welfare: We measure consumers’ lost benefits resulting from delays in the launch of products and innovations caused by the New Digital Competition Regime.
- Spillover Effects on Labor Productivity: We estimate the overall effect of reduced investments in the tech sector on Australia’s total labor productivity.
- Direct and Indirect Effects on GDP: We measure the changes in the economic activity of the tech sector and other sectors resulting from the New Digital Competition Regime.
- Lost Investments in Digital Services: We estimate the potential reduction in investment resulting from delays in the launch of new digital products and services caused by the New Digital Competition Regime.”

NERA estimated quantitative economic costs of the proposed regime to Australia and Australians, including:

Estimated Costs of the New Digital Competition Regime		
	Lower Bound	Upper Bound
<i>Social Welfare</i>		
Lost Consumer Surplus (NPV)	\$4.4 billion	\$16.8 billion
Spillover Effects on Productivity Growth	0.41pp	1.64pp
<i>Economic Activity</i>		
Direct and Indirect Effects on GDP (NPV)	\$10.6 billion	\$21.8 billion
Lost Investments in Digital Services	5.2%	17.4%

Source: NERA calculations.

NERA’s study concludes that the proposed Australian Digital Competition Regime presents substantial economic risks, including compliance costs, reduced investment, innovation deterrence, and diminished consumer welfare. Economic literature suggests that many of the targeted platform behaviors have pro-competitive effects, and a case-by-case approach would be preferable to broad, preemptive regulation. Given the unintended consequences seen in European markets following the DMA, Australia should carefully assess whether the proposed framework will deliver net benefits to consumers and competition.

VI. Conclusion

Before proposing an *ex-ante* regulatory framework for digital markets, Australian policymakers should consider the costs and benefits of a proposed regulation and its potentially



significant impact on investment, innovation, and competition. Overly burdensome regulations based on international experiments risk disrupting Australia's position as a leading and growing hub for digital startups in the region and globally. Therefore, the role of Australian policymakers remains to ensure that the country's competition regime and regulatory framework are fit for purpose and support economic growth, promote innovation, and deliver benefits to consumers.

CCIA is pleased to provide this input and looks forward to continuing to engage in this important discussion with the Treasury.