COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE AUSTRALIAN TREASURY'S CONSULTATION IN RESPONSE TO THE ACCC'S DIGITAL PLATFORM REGULATORY REFORM RECOMMENDATIONS

February 14, 2023

The Antitrust Law Section and the International Law Section (the "Sections") of the American Bar Association (the "ABA") respectfully submit these comments in response to the consultation paper "Digital Platforms: Government consultation on ACCC's regulatory reform recommendations" (the "Consultation") published by the Australian Treasury ("Treasury") on December 22, 2022. The Consultation seeks stakeholder views on the Australian Competition and Consumer Commission's ("ACCC") fifth interim report in the Digital Platform Services Inquiry, November 2022 ("ACCC Report") and issues that the Treasury considers germane, such as the governance or potential risks involved in new regulatory regimes.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For over thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[1]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total approximately more than 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[2] With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

[1] Past comments of the Antitrust Law Section are available at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/. The Antitrust Law Section positions expressed in this submission have been adopted by a majority of the Section's Council after debate reflecting the diversity of viewpoints among the Section's members.

[2] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

The Sections commend the Treasury for seeking to improve, strengthen and clarify Australian competition and consumer protection policy, as set out in the Consultation, as well as for seeking input on the proposed approach.

The Sections are providing general comments related to the ACCC Report's Competition and Consumer recommendations rather than responding to the Consultation questions separately. Moreover, the Consultation is far-reaching and includes discussion of legal issues that are specific to Australia and/or go beyond the core competencies of the Sections. Accordingly, the Sections have only addressed the issues in relation to which the Sections feel confident that their experience enables them to contribute to the Consultation.

I. Competition recommendations

A. Platform designation regime

The Sections commend the Treasury for its measured approach in seeking input on the issues identified by the ACCC, noting the ACCC recommended the proposed codes only to platforms and types of conduct that "meet clear criteria relevant to their incentive and ability to harm competition".[3] As such, the Sections support in part the ACCC's approach to determining which platforms will be designated as holding a "critical" position in the Australian economy and subject to the new regime.[4]

In the Sections' experience, it is often difficult to identify a single set of criteria that would apply across multiple business sectors or business models for digital platforms when designing a designation regime. The Sections suggest that such a regulation be based on substantial market power, and thus not be potentially applicable to all businesses in a market. As the Antitrust Law Section recently commented, "some degree of market power is a prerequisite to any firm's ability to unilaterally harm the competitive process through its conduct. Prohibiting conduct without regard to market power invites arbitrary enforcement and wasteful disruption of normal competitive processes."[5] Therefore, limiting scrutiny and enforcement to platforms with market power would be a suitable approach to tailoring the regime to the segments of the digital markets where it can achieve the largest impact.

The Sections note that this appears generally aligned with the ACCC's proposal for the designation of digital platforms to be based on consideration of quantitative or qualitative criteria, or a combination of the two. Indeed, the ACCC Report notes that "[i]f qualitative criteria were used, it would be relevant for a decision maker to consider whether a digital platform firm has substantial market power in the provision of a digital platform service" because "it would not achieve the objectives of the additional competition measures to designate digital platform services that do not have a high degree of market power in the provision of a particular service."[6]

With respect to quantitative criteria, the Sections believe that a mechanistic approach to the designation assessment based purely on quantitative thresholds would not be appropriate. This is because, "outside the context of a relevant market defined by reference to market power, measures of firm size are not

[3] ACCC Report, Recommendation 3 at p 16.

[4] ACCC Report at pp 12, 31-32.

[5] Comments of the American Bar Association Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress (April 27, 2022) at p 7.

[6] ACCC Report, p. 118.

reliable predictors of market power."[7] Economic literature cautions against the application of antitrust enforcement to platforms based solely on their relative size and user base.[8]

Nonetheless, the Sections agree with the ACCC's suggestion of adopting some form of quantitative assessment as a minimum threshold or "first filter" to eliminate cases that are clearly not intended for designation (similar to how market share thresholds work for merger control in jurisdictions utilizing voluntary notification regimes). These systems provide greater certainty within the market as stakeholders are informed immediately whether they are at risk of receiving designation status.[9]

The ACCC has proposed that quantitative criteria should include a threshold based on Australian and/or global revenue of a digital platform firm and the number of "monthly active users" of the digital platform service for which the code is developed.[10] The Sections recommend that designation assessments should be based on the firm's revenues in Australia as opposed to its global revenues. A local nexus criterion based on the firm's Australian revenues would ensure the regime focuses on firms that truly matter for the Australian economy and consumers.[11]

B. Regulatory frameworks should be tied to defined competition law concepts

The Sections recommend that the key terms in the proposed regulation be defined and consistent with competition law principles.[12] That is the true of the market power concept outlined above, but also applies elsewhere. The Sections recognize that some flexibility is necessary to allow the law to fulfill its goals as to both current and future conduct but urge the ACCC to provide as much guidance as practicable on open-ended terms such as "fairness" so that the legal and business community can understand and comply with the law.

For example, Recommendation 4 supports "targeted obligations based on legislated principles to address [among other things] unfair dealings with business users".[13] Assessing whether conduct is "unfair" often requires difficult line-drawing exercises, which risk injecting uncertainty into what is and is not permitted conduct. This risk should be considered in relation to the suggested reform in Recommendation 4 ("targeted competition obligations").[14]

The Sections suggest that the "unfair dealings with business users" in Recommendation 4 could be tied to a competitive threshold as described in Recommendation 3 ("additional competition measures for digital platforms") or could be reformulated to focus on the harm to competition that could arise from designated digital platforms engaging in these kinds of practices. The Sections recommend considering whether the thresholds for establishing contraventions in a proposed new regulatory framework could

[7] Comments of the American Bar Association Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress (April 27, 2022) at p 8.

[8] ABA's Comments on the ACCC's Preliminary Report on Digital Platforms at p 6.

[9] *See* similar approach in ABA's Comments on the New Pro-Competition Regime for Digital Markets Proposed by the Government of the UK at p 6.

[10] ACCC Report at pp 115-116.

[11] *See* similar approach in ABA's Comments on the New Pro-Competition Regime for Digital Markets Proposed by the Government of the UK at p 7.

[12] Comments of the American Bar Association Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress (April 27, 2022) at p 7.

[13] ACCC Report p. 123.

[14] Comments of the American Bar Association Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress (April 27, 2022) at pp 11 – 12; ABA's Comments on the ACCC's Preliminary Report on Digital Platforms at p 5.

be based on an effects-based analysis of harm to the competitive process rather than on indeterminate concept of "unfairness."

As already outlined by the Antitrust Law Section, failure to adequately define key terms "will inject variability and uncertainty into the administration of the law, to the potential detriment of businesses and consumers alike."[15] Accordingly, the Sections recommend clarifying key terms such as fairness, and that such definitions direct attention to analysis consistent with antitrust principles. The Sections understand that this recommendation is aligned with the ACCC Report, which acknowledges in Recommendation 4 that "the codes should be drafted so that compliance with their obligations can be assessed clearly and objectively."[16]

II. Consumer recommendations

A. The importance of ensuring the right balance between consumer rights and business competitiveness

The Sections applaud the recognition that, in reexamining consumer protection online, including in the context of subscription contracts, consumer reviews and other areas, there is a critical balance to be struck between consumer rights and business competitiveness. These twin pillars are not mutually exclusive but work in harmony to ensure a well-run transparent and fair marketplace. The Federal Trade Commission ("FTC") Act and the United States' approach to consumer protection mirrors this balance. Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[17] Deceptive practices involve a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.[18] A practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[19]

Further to this point, the Consultation notes that multiple reforms in Australia are in progress, including newly passed legislation prohibiting unfair contract terms, the introduction of the Consumer Data Right, and funding for the development of a National Anti-Scam Centre. The Sections agree that these measures often interact directly with the ACCC recommendations, and that their respective objectives should be aligned. As the impact of these recent reforms are measured, the ACCC should take those effects into account and adapt any proposed digital platform regulation accordingly.

B. Targeted measures to prevent and remove scams

The Sections endorse thoughtful and aggressive enforcement to prevent scams online, both to protect consumers and to preserve consumer trust generally in the e-commerce marketplace. To the extent the ACCC has concluded there are gaps in its general consumer protection laws that have failed to adequately protect consumers, such as in relation to cancelling online subscription programs or with use

[15] Comments of the American Bar Association Antitrust Law Section Regarding the American Innovation and Choice Online Act (S. 2992) Before the 117th Congress (April 27, 2022) at p 7.

[16] ACCC Report at p 19.

[17] 15 U.S.C. §45(a)(4)(A).

[18] FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.* 103 F.T.C. 110, 174 (1984), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[19] 15 U.S.C. §45(n).

of dark patterns, the Sections offer the following observations to enhance digital platform compliance efforts.

- **Dark patterns**: The Sections urge the ACCC to define with specificity what online activity it includes in its definition of scams or harmful apps. For example, the ACCC Report equates the use of dark patterns online with scams. In emerging areas such as unfair "dark patterns," delineating clearly between unfair coercion and acceptable influence is critical. The open workshop conducted in April 2021 by the U.S. FTC explored dark patterns, and the Sections consider that it provides helpful background. The workshop included presentations by researchers, consumer advocates, and industry professionals, and invited public comment.[20] Similarly, the FTC has a long enforcement history of ensuring that products are described truthfully online and has provided business with guidance on what constitutes a clear and conspicuous disclosure of material information on the internet.[21]

  The Sections encourage the ACCC to continue discussion with experts and stakeholders to better understand what user interfaces qualify as dark patterns that are clearly unfair to all reasonable consumers, and to focus its efforts on eliminating these practices, while not deterring design choices that simply encourage consumers to make certain decisions. The Sections recommend that the ACCC focus in more detail on specific acts and practices that are actually misleading and harmful to consumers. While this is an area that enforcers worldwide are working to understand and balance, the Sections believe only online interfaces or website design that are found to be misleading or unfair should be deemed unlawful. In the United States, to be considered deceptive, a practice should actually mislead a meaningful number of reasonable consumers.[22] An unfair practice must be one that results in substantial consumer injury, is not reasonably avoidable, and is not outweighed by offsetting consumer or competitive benefits.[23]

- **Subscription contracts**: As an overarching framework for regulating subscriptions, the Sections encourage a focus on clear initial notice and consent, a proportionately easy method of cancellation, and affirmative consent to subscriptions at the end of trial periods. This is the framework the United States has adopted in its Restore Online Shopper's Confidence Act ("ROSCA"), which has worked well to balance the pro-consumer benefits of offering ongoing subscription programs with protections to limit the potential for abuse.[24] These rules would address broadly harmful, and well understood, practices. Given the wide and evolving range of subscription products that currently exist and may develop, we recommend against developing regulations for which exemptions and special rules applicable to particular goods, services or content are needed to avoid blocking practices that benefit consumers. Those more complex rules are also harder for stakeholders to understand and navigate, and more likely to create opportunities for harmful gaming.

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[20] Transcripts from the workshop and videos of the panels are available at https://www.ftc.gov/news-events/events-calendar/bringing-dark-patterns-light-ftc-workshop.

[21] *See* Fed. Trade Comm'n, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), *available at* https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

[22] *See* Fed. Trade Comm'n, Policy Statement on Deception (Oct. 14, 1983), *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[23] *See* Fed. Trade Comm'n, Policy Statement on Unfairness (Dec. 17, 1980), *available at* https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.

[24] 15 U.S.C. §§8401-84-5, *available at* http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter110&edition=prelim.

- **Fake reviews**: Fake reviews have a serious and detrimental impact on competition and consumer trust. With the rise of, and increase in, online sales, the impact of consumer reviews also is increasing, with reviews serving a key role in customers' decisions, both because ratings often factor into display algorithms and because consumers often seek out that information. Consumers increasingly rely on "star ratings" and consumer reviews to help them decide between products and direct their spending. Fake reviews mislead consumers and harm *bona fide* businesses through lost sales and reputational damage. The FTC recently sought public comment on the need for rulemaking to address fake reviews and endorsements.[25] When evaluating potential steps for businesses to ensure consumer reviews on their websites are genuine, the Sections believe that it is important to consider the impact on smaller businesses. While it is important to ensure that reviews are genuine and not fake, proactively verifying reviews can be time consuming and prohibitively costly for smaller businesses. The specific cost involved would likely differ by company based on its technical capabilities. While the Sections believe that businesses should be encouraged to verify that reviews are genuine, we recommend that companies be instructed to take "reasonable and proportionate" steps to do so.

III. Procedural safeguards

The Sections commend the Treasury for focusing on a crucial aspect in any proposed reforms, namely "[w]hat checks and balances should be in place on decision makers and across the various stages of the policy (e.g., code making, designation process, code enforcement)." (Consultation, page 13).

The Sections have previously advocated globally that any proposed regulation creating new prohibitions for designated platforms should feature procedural safeguards with clear procedures as to the responsible regulator, investigative and enforcement powers, defense rights and access to judicial review.[26]

As an international example of how such safeguards could be designed, the International Competition Network ("ICN") and the Organisation for Economic Co-operation and Development ("OECD") have developed a body of work outlining some of the core features of fundamental due process in competition enforcement. Among others, these core features include direct and meaningful engagement between the parties and the regulator's investigative staff and decision-makers, the ability to present a defense to decision-makers within an appropriate timeframe and ensuring checks and balances on decision-making (including meaningful access to independent courts).[27]

Consistent with these principles, the Sections recommend that designated platform declarations last a defined period of time appropriate to the market dynamics of that platform, after which they should be reviewed to ensure that their designation is still warranted. The Sections also believe that firms should be allowed to request a review of their designation status at any time before the end of the designated period if they believe that the request is warranted by new market conditions, such as the introduction

[25] *See* Fed. Trade Comm'n, Proposed Trade Regulation Rule on the Use of Reviews and Endorsements (Nov. 8, 2022), *available at* https://www.federalregister.gov/documents/2022/11/08/2022-24139/trade-regulation-rule-on-the-use-of-reviews-and-endorsements

[26] ABA's Comments on the ACCC's Preliminary Report on Digital Platforms at p 5.

[27] *See* ABA's Comments on the EC's Proposal for a New Competition Tool, citing Koren W. Wong-Ervin, Protecting Intellectual Property Rights Abroad, Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies 3 (6 April 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract id=2947749&download=yes. *See also*, Best Practices for Antitrust Procedure: Report of the ABA Section of Antitrust Law International Task Force, May 22, 2015, reprinted in Abbott B Lipsky, Jr & Randolph Tritell, 'Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model' (ABA Antitrust Law Section, Antitrust Source, Dec 2015).

of new technologies, new rival entries and other related factors. While the ACCC Report recognizes the possibility of an expiry date for designation decisions in section 5.4.2 entitled "Procedural elements of designation," the Sections believe that further clarity would be useful in this respect. The Sections also note their support of proposals in other jurisdictions in relation to a proposed rule that the relevant regulator would not be required to review a firm's designation status within twelve months of declining a previous request or an adverse finding.

The Sections believe that these safeguards have additional and substantial benefits to agencies and regulators. These include allowing regulators to efficiently reach duly informed and considered decisions, generating credibility with stakeholders and the public at large, facilitating reliable deterrence and avoiding cooperation gaps in parallel investigations due to asymmetric information, which often contributes to different analysis and conflicting outcomes.[28]

In summary, the Sections recommend that any mandatory codes of conduct include procedural safeguards with clear procedures as to the responsible regulator, investigative and enforcement powers, defense rights and access to judicial review.

IV. International alignment

The ACCC has taken the view that it is in the interests of Australian consumers and businesses to consider and align regulatory reforms in Australia with reforms occurring internationally. The Sections support the objective of avoiding inconsistent regimes and recognize the value of alignment of Australian law with developments in other jurisdictions.[29]

At the same time, the Sections are of the view that international alignment must include an analysis and consideration of the domestic Australian economic and market conditions. Ex-ante regimes regulating digital players are in the experimental phase. Identifying the most successful regime will therefore take time. In addition, while global competitors active in digital markets may replicate their business models globally, potential antitrust concerns raised by business practices may be different from one jurisdiction to another as a result of factors such as the existence of large local competitors, local barriers to entry, consumer preferences, etc.

V. Conclusion

The Sections appreciate the Treasury's consideration of these comments and would be pleased to discuss any such comments in more detail if useful.

[28] *Id*, citing Fed. Judicial Ctr., Reference Manual on Scientific Evidence 407-08 (3d ed. 2011), https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf.

[29] ABA Comments on the EC's Proposal for a New Competition Tool at p 12.