

A new digital competition regime

Treasury consultation on
proposal paper

February 2025

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1. A digital competition regime to support the productivity agenda

The Business Council of Australia (BCA) welcomes the opportunity to make a submission to Treasury's consultation on a new digital competition regime. A well-designed competition regime has the potential to complement the government's plans set out in the Treasurer's five pillar productivity agenda, including harnessing data and digital technology. A strong and innovative digital economy will be integral to increasing productivity across the range of areas tagged for renewed productivity focus. Attracting investment and encouraging innovation will be vital.

The BCA acknowledges the government's plan for a digital competition regime and welcomes the chance to collaborate on its development. However, from a principled perspective, Treasury's proposed model raises several concerns. This BCA submission highlights key shortcomings of the proposal and suggests constructive changes to reduce potential risks.

Policymakers should ensure any competition regulation is properly targeted and designed, and has regard to supporting Australia's opportunity to foster technological progress and increase our attractiveness as a hub for digital innovation. The proposed digital competition regime—if implemented in its current form—would run counter to the government's wider productivity agenda. The proposed regulation is likely to impose prescriptive outcomes without appropriate regard for consumer material benefit and provides highly limited procedural safeguards for affected companies.

In looking at approaches internationally, there remains doubt about the effectiveness of the EU's Digital Markets Act¹. The UK regime is difficult to assess as it has been operational for only 56 days at the time of this submission. It is too soon to determine these regimes' effectiveness or whether their benefits outweigh the risks, particularly regarding potential over-regulation and negative productivity impacts.

By contrast, incremental and targeted approaches, such as Japan's, offer a more proven and adaptable model. Japan's method involves implementing narrow, service-specific rules and assessing their effectiveness before expanding regulation. This ensures clarity and minimises industry distortion.

The US has taken a different approach and has not implemented an ex-ante regime and instead utilises its existing laws to address competition issues.

This BCA submission offers principles to underpin a more effective approach to regulation by seeking to sharpen the focus of the regulatory task and design considerations (see Section 2). Crucially, the BCA is concerned that existing laws have not been robustly tested to demonstrate an enforcement weakness that warrants the regulatory intervention proposed.

The BCA submission also responds to key elements of Treasury's proposed model and proposes changes to mitigate the risks posed by Treasury's proposal (see Section 3). Of particular concern is that the current proposal does not include a clear statutory objects clause for the regime and that the proposal lacks reasonable procedural safeguards proportionate to the types of interventions proposed. The reliance on disallowable instruments as a safeguard is a concern noting that such regulations are rarely disallowed in practice².

More generally, the absence of strong procedural safeguards throughout the regime sets a concerning precedent about government's willingness to regulate the redesign of private sector business models based on their size alone rather than on a specific finding of unlawful economic conduct or even a determination that the

¹ For example, businesses and consumers alike, have lost the benefits of integrated functions in search through prohibitions on self-preferencing, a range of technological innovations are available elsewhere but not in Europe, whilst side-loading ability potentially exposes consumers to new risks through malware, fraud, scams, and harmful content.

² BCA analysis indicates that an average of 3 disallowable instruments per annum have been disallowed over the last two decades.

relevant firm possesses a position of substantial market power (noting the discussion of competition issues in Treasury's proposal paper lacks definition and are merely a 'factor' in the current proposal).

The BCA welcomes the proposal to streamline some obligations with other jurisdictions in an attempt to reduce regulatory burden. However, this will probably not have a meaningful effect if the comparable regime, for example that in the EU, disproportionately diminishes access to innovations and is at the expense of consumer and business benefits.

The BCA represents around 130 of the largest companies operating in Australia. Our members recognise that robust legal and institutional settings underpin a competitive economy and are critical to supporting Australia's prosperity.

2. Key principles for a redesigned digital regime

The BCA recommends the following key principles to underpin a redesigned digital regime:

1. Properly test the adequacy of existing laws and regulatory tools.

The BCA urges the government to have regard to the breadth of the reforms that have been implemented, are in the process of being implemented, or are proposed to be implemented that will provide a wide-ranging ability for regulators to enforce any unlawful conduct. It is not clear to the BCA that the existing competition law framework has been used before government has decided to adopt a broad and interventionist regulatory approach.

Relevant areas include:

- Australian Consumer Law (ACL) including recent amendments to tackle unfair contract terms. We note further work is on foot for unfair trading practices, specific interventions for 'subscription-traps', and consideration of expanding/augmenting the ACL to expressly target artificial intelligence.
- Competition law already includes existing prohibitions against unlawful anticompetitive conduct, including the misuse of market power prohibition. Recent reforms will also introduce a mandatory and suspensory merger regime on top of existing powers for legal challenges and penalties for unlawful, anti-competitive mergers and acquisitions.
- Ongoing changes to the privacy laws, which are undergoing their most comprehensive review since inception in 1988, including through the introduction of a tort for serious invasions of privacy, an online children's code and additional regulations around automated decision making.

The proposal paper asserts that there are difficulties with enforcing CCA obligations in dynamic digital platform markets³. However, as noted above, the competition regulator has not taken proceedings to address these concerns even with considerable existing legal tools at its disposal.

It should also be noted that many of these laws are capable of being privately litigated and that a range of businesses have availed themselves of this ability already⁴, most notably including litigation by Epic Games against Apple and Google which is awaiting judgement by the Federal Court⁵.

To be clear, the BCA is not suggesting that there are not reasonable questions for policy makers to consider as to whether existing competition and consumer frameworks are sufficiently robust to meet the challenges of the new digital economy, and more specifically digital platform services. But it is equally important that we also

³ Treasury, 2024, A new digital competition regime – Proposal paper, <https://treasury.gov.au/consultation/c2024-547447> accessed February 2025, p4.

⁴ For example, there are currently six private section 46 cases before the Courts.

⁵ Federal Court file nos NSD 1236 of 2020; NSD 190 of 2021; VID 341 of 2022; and VID 342 of 2022.

consider the impact of ever-increasing regulation which makes Australia uncompetitive. Indeed, it stands in conflict with the Office of Impact Assessment's guidance for Ministers and standard setters⁶.

2. Only impose significant regulatory interventions if those interventions are demonstrably proportionate to the magnitude and risk of harm sought to be addressed, deliver a material benefit to consumers and ensure that there remain strong incentives to continue to invest in digital platform services for Australians.

The imposition of obligations must deliver tangible net benefits for Australians. For example, self-executing obligations result in blunt outcomes, disproportionately burdening affected entities without material benefits to the consumer or end user. A more moderated, refined approach would better serve Australians' interests, encourage investment and maximise the benefits of innovation.

3. Regulatory obligations must be thoroughly assessed for their effectiveness in protecting against harm, proportionality to compliance costs, and, importantly, potential impact on whole-of-economy productivity before being implemented.

Notwithstanding the concerns expressed around the use of subordinate legislation for designation of entities under the proposed regime, there remains a challenge whether the Regulatory Impact Statement will adequately identify the wider-productivity implications of the proposed changes.

We recognise that these considerations may be captured through the role of the Minister in determining whether to designate an entity or not, but such consideration should be captured as an explicit criterion within any designation criteria.

4. A broad regime must have appropriately strong procedural safeguards reflecting the wide-ranging powers inherent in the regime notwithstanding that any exercise of power must have suitable safeguards

The current proposal is for the relevant Minister to designate an entity through subordinate legislation. There appears to be limited ability for any designated entity to challenge the basis of their designation including in circumstances where they do not have substantial market power.

The BCA notes the government is seeking to impose—at a minimum—broad obligations on designated entities including interoperability. For instance, if an interoperability obligation is imposed on a specific digital service that is highly integrated with other services, doing so would fundamentally change the service offering of the entity.

Interventions of this magnitude are similar to access regulation, set out in the National Access Regime (Part IIIA of the CCA) and the Telecommunications Access Regime (Part XIC of the CCA). Access regulation is not directly translatable to the digital platform context as it was designed for traditional natural monopolies. However, their high-level design and procedure serves as a better basis for focused, fair and workable intervention, including allowing entities 'at risk' of designation (or declaration as it is in those provisions) to propose a model of access for the regulator's consideration. Crucially, the access regime noted allowed merits review of key decisions seeing this as an important safeguard.

A well-designed framework should ensure both adaptability and accountability. Thoughtful policies built on strong governance and transparency will increase trust and lead to better outcomes for all stakeholders. The BCA seeks an approach that is accountable and reviewable including clear provision for entities to avail themselves of a right to be consulted, to be able to provide information for consideration by decision-makers and to challenge decisions.

⁶ Indeed, the first principle of the "Regulatory Impact Analysis Guide for Ministers' Meetings and National Standard Setting Bodies (June 2023)" states: "Policy makers should clearly demonstrate a public policy problem necessitating government intervention, and should examine a range of genuine and viable options, including non-regulatory options, to address the problem". Forgoing testing our existing competition law regime's ability to address concerns ignores the direction from the Office of Impact Assessment.

5. A broad regime needs to be balanced by sharp and explicit competition criteria to ensure the regulatory burden of the regime is limited and targeted.

The BCA recognises that a broad regime can be attractive to government given that technological developments are dynamic and uncertain, and it may be difficult to predict the impact of specific services. However, we must question a regulatory regime that provides extremely broad powers to the Minister to determine who it is subject to and how they are subjected without clear limiting constraints.

Treasury and the ACCC have highlighted that market power is the underlying issue to be addressed through the proposed regime. Accordingly, the regime should be limited to entities that possess *substantial market power* to ensure that the government's regulatory efforts do not restrict pro-competitive entities that do not possess substantial market power. This assessment should be the minimum standard in designating an entity, rather than a vague and opaque factor that the Minister may have regard to when making a designation decision.

Alternatively, if the government's view is that certain digital services should be specifically designated, subject to a prescribed code of conduct regardless of the service providers' market power, then the government should set up industry working groups on a case-by-case basis, consistent with the *Industry Codes of Conduct Policy Framework*⁷. This would enable industry to collaborate with government on the most productive and least burdensome way to address specific challenges.

Key recommendation: The BCA would welcome the opportunity to work with the Government to develop a revised proposal paper that draws on the above five principles and recommends that the proposed regulatory framework is redesigned to incorporate these high-level principles.

3. Detailed recommendations on the proposed regulatory framework

Notwithstanding our key recommendation, which is our very strong advice and preference with respect to how government should proceed, we make the following recommendations with a view to improving the specificity of the regulatory framework set out in the proposal paper.

Specific and targeted regime

1	<p>Include a specific objects clause</p> <p>The new digital competition regime should include a specific objects clause – a statement that outlines the underlying purposes of the legislation. An objects clause is an effective way of conveying the purpose and scope of the regime along with the economic criteria of affected parties.</p> <p>This would be consistent with other parts of the CCA (including Part IIIA and Part XIC of the CCA), which are also highly interventionist economic regulations. An objects clause would help provide legal certainty for both the ACCC and businesses caught by the digital competition regime.</p> <p>The BCA does not consider that the object of the CCA, as a whole, set out in section 2 of the CCA, is sufficient to frame the new regime, particularly when the discretion and powers under the regime are extremely broad. It neither addresses the exceptional justification for a bespoke</p>
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⁷ 2017, Commonwealth Treasury, *Industry Code of Conduct Policy Framework*, <https://treasury.gov.au/publication/p2017-t184652> accessed February 2025.

	regulatory regime, nor the regard the regulator or the Minister must have as they weigh actions under the regime.
2	<p>Designation criteria should include a clear competition standard, which should be whether the entity possess substantial market power</p> <p>Designation criteria should reflect the significant impost of designation on an entity. Criteria should be clear, robust and evidence-based to allow assessment against a specified competition standard. The BCA supports the use of quantitative and qualitative criteria, together, insofar as this overarching requirement is given effect.</p> <p>On proposed criteria, the BCA is firmly opposed to the inclusion of vague qualitative factors without reference to a legal competition standard such as <i>substantial market power</i>, given the proposed regime is predicated on competition concerns. At minimum, an entity should be excepted from designation if it lacks <i>substantial market power</i>. This approach would broadly align with concept of ‘gatekeeper’ and the definition of ‘strategic market status’ in the EU and UK regimes, notwithstanding our broader reservations about these regimes.</p> <p>The BCA notes the intent to use quantitative thresholds to improve certainty of the regime by excluding entities below the threshold. The quantitative threshold/s should be set by reference to conventional metrics such as turnover rather than market capitalisation. Further, the use of turnover would also align with recent merger reforms notification units. Doing this would reduce the prospect of entities being unable to comply with information requests.</p> <p>The regime should provide that all designation criteria must be met to support designation and that all criteria should have a clear nexus to Australia. The regime shouldn’t provide for designation on competition factors alone as it would undermine the certainty sought to be provided by the regime carving out entities that are below the quantitative thresholds.</p> <p>Firms that held substantial market power and were misusing their power but were otherwise below the quantitative threshold could be pursued through existing competition law.</p>

Ensuring that the designation process includes strong procedural safeguards and accountability

3	<p>Include a reasonable basis to commence a designation investigation</p> <p>A risk-based approach should be taken to identifying priority services for designation based on robust analytical techniques where degree of market power and entrenchment is the greatest. The assessment of prioritisation should be made public.</p> <p>A designation investigation should not commence unless the regulator or Minister has reasonable grounds to consider that the party or service will meet the designation criteria. Any investigation should include a public process reflecting good governance practice to enable appropriate engagement from any likely affected party.</p> <p>To prevent misuse of investigations, there should be a requirement to show evidence of harm occurring where the relevant entity has failed to address.</p> <p>A public investigations register would also be consistent with the government’s recent merger reforms which introduced a merger notification register to improve transparency across the merger control regime. As with other processes, provision could be made to protect confidential and commercial information through the investigation.</p>
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4	<p>Designation of an entity should not be made by subordinate legislation</p> <p>The designation decision should not be made by subordinate legislation as doing so provides almost no procedural safeguards to affected entities. Designation decisions should be comprehensively provided for in the primary legislation including specifying reasons where the Minister may determine to depart from findings or recommendations of the regulator.</p>
5	<p>Ministerial decision-making must be accompanied by satisfactory designation criteria (see Recommendation 3).</p> <p>Subject to robust and evidence-based designation criteria, the BCA does not oppose the responsible Minister making the designation decision. The Minister should be required to give a concise and public statement of reasons (not simply a summary) to support transparency and confidence in the designation regime.</p> <p>The Minister should be limited in their ability to depart from the regulator’s recommendation unless the decision satisfies a specified reason set out in primary legislation that provides for this departure. Further, Ministerial discretion should preclude the ability to add to the regulator’s designation proposal. This further emphasises the importance on including clear minimum criteria for designation.</p>
6	<p>Right to be heard and right to review should be integral features of all decisions, including designation decisions and the application of obligations to designated entities</p> <ul style="list-style-type: none"> ■ The primary legislation should set out clear procedural steps and timeframes, including meaningful opportunities to engage with the regulator and comment on preliminary findings or draft determination, and an obligation for submissions to be taken into account by the regulator. ■ The proposed regime should include a legislative right to be heard and for information provided to be considered by government in making a decision under the regime. ■ Decisions made under the proposed digital competition regime—including designation decisions—should be made subject to full merits review. At minimum, a level of merits review equivalent to the government’s new merger control regime should be available. Appeals under the merger review regime are to be dealt with expeditiously by an experienced and independent Australian Competition Tribunal (ACT) so the concerns being raised about the timeframe for merits review seem unfounded. <p>The BCA does not consider that the existence of an ability to potentially seek judicial review is sufficient to balance the far reaching and intrusive powers of the regime. Judicial review only applies where a decision maker makes a decision that is subject to the Act. Many of the decisions in the process outlined are proposed to be put into effect through sub-ordinated legislation, raising uncertainty as to whether even judicial review is available under the Administrative Decision (Judicial Review) Act.</p>
7	<p>Designation of services should be at a maximum of three years, subject to a ‘re-opening mechanism’ when market or technological circumstances have changed.</p> <p>Designation determinations should be set at a maximum of three years, contingent on there being a clear and effective mechanism to ‘re-open’ the determination subject to a material change in circumstances. The determination should be capable of being amended or withdrawn provided the relevant party/parties meet the stated criteria.</p>

8	<p>Embed existing independent and experienced review bodies in designation decisions</p> <p>Embed an external and independent expert body such as the National Competition Council (NCC) or Productivity Commission in designation and code decisions. The NCC has deep experience in designation decisions involving regulated industries and the Productivity Commission has expertise in productivity in Australia and the impact of regulation.</p>
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Designing obligations that are proportionate, deliver a material benefit to consumers and provide a practical pathway for compliance

9	<p>Obligations should be set out in primary legislation and should be proportionate to deliver real outcomes for consumers</p> <p>As with the designation decision, the application of service-specific obligations should not be through subordinate legislation, but a reviewable decision provided for in the primary legislation.</p> <p>The twin approach to broad and service-specific obligations will not mitigate against the blunt outcomes seen in Europe and create compliance uncertainty in practice. A service-specific approach is crucial—designation should depend on a firm’s position in the specific service, not its broader business operations.</p> <p>Obligations should be subject to a statutory requirement that the application of obligations to a designated entity or service is proportionate and having regard to whether there is a material benefit to the consumer or end-user.</p> <p>If ‘broad’ and ‘specific’ concepts are retained, ‘broad obligations’ could be translated to ‘obligation factors’ or ‘considerations’ whilst ‘service-specific obligations’ could be drawn from a list of possible obligation types set out in primary legislation. This would ensure that there is greater specificity in primary legislation, provide a tighter regulatory perimeter to remove ambiguity and impose a single set of obligations rather than a multi-layered approach.</p> <p>Given the likely breadth and reach of obligations proposed, additional obligations should only be added by way of amendment to primary legislation.</p> <p>Designated entities must be consulted on the design of service-specific obligations. Imposing obligations without regard and understanding of the underlying operational aspects and reasons for particular practices will only lead to unintended consequences and undue regulatory burden.</p>
10	<p>Exemptions or carve-outs should be considered earlier in the process</p> <p>The proposed digital competition regime should consider exemptions far earlier in the regulation process, ideally in concert with designation and obligation design decisions to the greatest extent possible. The proposed six-month review period is too long and at the end of the regulatory process. This could leave users exposed to harms or unnecessarily impacted by regulatory decisions.</p> <p>The regime should provide for exemptions to both broad and specific obligations (notwithstanding that the BCA does not support the inclusion of ‘broad’ obligations), modelled on the approach taken in the UK’s legislation, namely of countervailing benefits which is provided for in the primary legislation. However, the regime should also include provision for an in-built exception process drawing on Japan’s model to address serious and emergent concerns including security and privacy risks.</p> <p>It is foreseeable that there will be frequently occurring instances of matters of public importance including security, privacy and health matters that require urgent activation and not be suitable for a lengthy exemption process. The regime should provide designated entities the ability to self-</p>

	<p>execute these matters but could also be balanced by a simple notification regime or other regulatory guardrail.</p> <p>The mechanisms and requirements for these types of exemptions should be included in primary legislation. Any mechanisms should be sufficiently flexible to account for the dynamic nature of the digital services sector.</p> <p>Depending on precisely how exemptions are incorporated, exemption decisions should be subject to merits and judicial review.</p>
11	<p>The exemption process should provide certainty to designated entities</p> <p>Practically, the decision to grant an exemption should provide reasonable certainty to the affected party/parties and should not be reopened unless there is a material change of circumstances or if there was a serious breach of a condition of exemption. Non-serious breaches or mere changes in circumstance should not be grounds for revocation.</p>
12	<p>Include an ability for the regulator to accept a compliance undertaking from an entity under specific legislated criteria and safeguards, including in relation to compliance with another jurisdiction’s requirements.</p> <p>The BCA supports the proposal to allow entities to submit a compliance proposal based on compliance with another jurisdiction’s requirements as compliance with Australian obligations. However, it is clear further work is needed to understand on what basis or criteria the ACCC would accept a proposal. To avoid the risk of the value of this helpful proposal being lost because it becomes wholly subject to the ACCC’s discretion, clear criteria need to be established in legislation to guide the ACCC and provide certainty for business in respect of how their application will be dealt with. Further, the utility in the proposal would be lost if the ACCC has a material ability to vary or require changes to overseas derived compliance proposals. That is because the value of this proposal is that a party can seek to use the same processes in Australia without incurring new costs. Once changes are introduced, this impacts the cost/benefit of proceeding with a compliance proposal.</p> <p>The BCA further recommends that Government considers expanding this proposal to allow a designated party to propose an alternative means of compliance. In other words, a designated entity should not be limited to the entity’s compliance with other jurisdiction’s obligations but be able to propose an Australian solution to proposed Australian obligations. This would reduce, in part, the regulatory burden of the regime by enabling entities to address the obligations in the least burdensome way for their businesses whilst meeting the requirements of designation.</p> <p>Non-compliance should only be assessed having regard to any enforceable undertaking rather than the specified obligations in those circumstances.</p>
13	<p>Designated entities should be provided with a reasonable transition period</p> <p>A sufficient transition period should be provided following designation and determination of obligations to allow entities sufficient time to undertake the significant work likely required given the nature of the broad obligations in addition to the specific obligations may be considerable.</p> <p>For this reason, the BCA recommends a minimum period of nine months.</p>

Cost recovery

14	<p>Regulated businesses should not fund a regulatory regime without clear benefits</p> <p>Cost recovery should be generally limited and justified only where there are clear benefits to the community and the regulated entities. If imposed at all, there should be a five-year exemption from cost recovery for entities from the date of designation.</p> <p>It is inappropriate to require businesses to pay for being regulated, especially without clear benefits. Being forced to fund their own regulation creates a financial burden on businesses, particularly when the regulatory framework is still evolving and its effectiveness unproven.</p> <p>Without the discipline of bearing the administrative cost of regulation, the government would be without any meaningful budgetary constraint (even if notionally subject to the appropriations process). This introduces a moral hazard and should not be borne by the businesses.</p> <p>A regulatory regime is meant to benefit the community. It is therefore appropriate that the community pay for the regime through general revenue. Instead of imposing financial burdens on businesses, governments should focus on appropriate resourcing of the regulator.</p>
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Penalties

15	<ul style="list-style-type: none">■ Existing penalties available under the CCA are significant and are an appropriate disincentive for breaches of competition and Australian consumer law which are sought to be incorporated into the ex-ante regime.■ Penalties for breaches of the code should be aligned with existing penalties under other mandatory codes – specifically the greatest of \$10 million, 3 x the benefit obtained or 10 per cent of turnover for 12 months to the date of the contravention.■ The BCA does not support provision for allowing for structural penalties for breaches of the regime. Structural remedies are appropriate in the context of unlawful mergers and acquisitions but are not appropriate as a penalty⁸.■ The BCA is opposed to extending the ability to issue infringement notices currently available under the CCA to the digital competition regime as infringement notices are typically used in more clear-cut circumstances whereas it is likely that assessment of breaches would involve a more nuanced and complex assessment.
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Independent review of the regime

16	<p>An independent review should be conducted no later than three years from the regime's commencement</p> <p>This review should be conducted by an appropriately qualified independent panel of experts. The review of the regime should consider the performance of the regime along with the regime's impacts in the Australian economy including for consumers and businesses. The investigation should expressly consider Australia's access to technological innovation and impact on productivity.</p>
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⁸ BCA, 2024, Submission to the Senate Select Committee on Supermarket Prices regarding the Competition and Consumer Amendment (Divestiture Powers) Bill 2024, Submission number nine, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Supermarket_Prices/DivestiturePowersBill2024/Submissions accessed February 2025.

Other matters

17	<p>Insufficient detail provided to assess the reasonableness of ACCC undertaking technical rule-making function</p> <p>The proposal document lacks detail on the range and scope of rule-making powers by the ACCC. It is therefore difficult to assess the reasonableness of the proposal. For example, it is unclear what 'limited' entails and the resourcing and skill of the 'rule makers'. The scope of the ACCC's powers to set rules should be clearly defined in the primary legislation, and government should explore with industry options to develop industry standards rather than impose rules in the first instance.</p> <p>Any proposed rules should be the subject of public consultation prior to adoption.</p>
18	<p>Ensure that the use of section 155s are subject to internal review and by the Australian Competition Tribunal consistent with reforms made under merger reform.</p> <p>Use of section 155 notices is a well-established information gathering mechanism for the ACCC to obtain information for its regulatory activities. A helpful procedural safeguard introduced as part of the government's merger reform was for the merger applicant to seek review of a s155 notice, amongst other decisions. Ensuring a similar protection for the use of section 155s under a digital competition regime would be a valuable additional safeguard for the regime.</p>

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