**Question B: What responsibility or obligations should online platforms have when it comes to eliminating infringements by their users, especially in the areas of IP and unfair competition?**

# Introduction: Evolution of Platform Liability in Australia

1. Australia’s approach to online platform responsibilities regarding intellectual property infringement and unfair competition has developed through a complex interplay of legislative amendments, judicial interpretation, and regulatory policy evolution spanning nearly three decades. The current framework represents a patchwork of overlapping and sometimes contradictory regulatory mechanisms.
2. The question of what responsibilities online platforms should bear for user infringements touches fundamental tensions in Australian law between promoting innovation, protecting intellectual property rights, ensuring fair competition, and safeguarding due process. This analysis examines Australia’s regulatory landscape, traces the historical development of platform liability doctrines, evaluates current enforcement mechanisms, and considers the adequacy of existing frameworks in addressing contemporary challenges including artificial intelligence-generated content and algorithmic amplification of infringing material.

# Historical Development of Australian Platform Liability Framework

## Origins in the Copyright Act 1968

1. Australia’s platform liability framework originated with the *Copyright Act 1968* (Cth) (**Copyright Act**), which established the foundational principles for addressing online copyright infringement that continue to influence regulatory approaches across all forms of intellectual property. The original Copyright Act contained no specific provisions for online intermediaries, as the internet as we know it did not exist when the legislation was drafted. The principles of direct and authorisation liability, however, became central to how Australian law would later approach platform responsibilities.
2. The concept of authorisation liability under section 101(1) of the Copyright Act proved particularly significant in establishing that platforms could be held liable for user infringements where they had the power to prevent the infringement, maintained a relationship with the infringer, and failed to take reasonable steps to prevent the infringing activity.[[1]](#footnote-1) This framework, developed through cases such as *University of New South Wales v Moorhouse*,[[2]](#footnote-2) created the theoretical foundation for platform liability that would later be tested in the digital environment.

## The Introduction of Safe Harbour Provisions

1. Australia’s first major legislative response to online platform liability came with the introduction of safe harbour provisions in 2004 through the Copyright Act amendments.[[3]](#footnote-3) These provisions, contained in Division 2AA of Part V of the Copyright Act, were designed to provide limited liability protection for carriage service providers who complied with prescribed notice-and-takedown procedures and maintained policies for terminating repeat infringers.
2. The safe harbour framework was deliberately narrow in scope, applying only to traditional telecommunications carriers rather than the content hosting platforms that were beginning to emerge as significant intermediaries in the digital economy. This narrow interpretation reflected both the technological understanding of the time and a conservative approach to expanding liability exemptions beyond traditional infrastructure providers.
3. The 2004 safe harbour provisions established several key principles that continue to influence Australian platform liability law. First, they created a conditional immunity system where protection from liability depends on compliance with prescribed procedures rather than providing blanket immunity.[[4]](#footnote-4) Second, they required proactive policies for addressing repeat infringers, establishing the principle that platforms must take some responsibility for ongoing misconduct by users.[[5]](#footnote-5) Third, they created an expeditious takedown system that prioritised rapid response over detailed assessment of infringement claims.[[6]](#footnote-6)

## The 2018 Expansion of Safe Harbours

1. Recognising the limitations of the original framework, Parliament expanded safe harbour eligibility in 2018 to include educational institutions, libraries, archives, cultural institutions, and organisations assisting persons with disabilities.[[7]](#footnote-7) This expansion acknowledged that online service provision had become fundamental to the operations of these institutions and that the original narrow scope created unfair liability exposure for entities serving important public functions.
2. The 2018 amendments represented a significant philosophical shift toward recognising that safe harbour protections should extend beyond traditional telecommunications infrastructure to encompass entities that provide online services as part of broader social or educational missions. However, the expansion stopped short of providing protection to commercial platforms, maintaining Australia’s restrictive approach compared to other jurisdictions.
3. The amendments also introduced the concept of “online service provider” as distinct from “carriage service provider,” recognising that the digital ecosystem had evolved beyond traditional telecommunications models. This definitional expansion created possibilities for future extensions of safe harbour protections, though Parliament has not yet acted on these possibilities.

## Development of Site-Blocking Powers

1. Australia’s site-blocking regime, introduced through section 115A of the Copyright Act in 2015,[[8]](#footnote-8) represented a fundamentally different approach to addressing online infringement. Rather than focusing on platform liability, the site-blocking framework targets network-level enforcement against overseas-hosted infringing websites. This approach acknowledged the limitations of traditional copyright enforcement in a globalised digital environment where infringing content is often hosted beyond the reach of Australian jurisdiction.
2. The site-blocking framework established several important precedents for platform obligations. First, it created a class of entities (carriage service providers) with mandatory compliance obligations for court-ordered blocking. Second, it established expedited judicial procedures for obtaining blocking orders based on streamlined evidence requirements. Third, it demonstrated Parliament’s willingness to impose technological obligations on intermediaries to enforce intellectual property rights.[[9]](#footnote-9)
3. The initial section 115A framework required rights holders to demonstrate that a website’s “primary purpose” was facilitating copyright infringement. This threshold proved difficult to meet in practice, leading to the 2018 amendments that lowered the standard to “primary effect” and extended blocking powers to search engines through de-indexing orders.[[10]](#footnote-10) These changes demonstrated the ongoing evolution of Australia’s approach toward more expansive platform obligations.

## TEQSA Act Site-Blocking Extension

1. The extension of site-blocking powers to academic cheating services through section 127A of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) (**TEQSA Act**) represents the most recent development in Australia’s platform liability framework.[[11]](#footnote-11) This provision demonstrates Parliament’s willingness to apply site-blocking mechanisms beyond copyright to address other forms of harmful online conduct that undermine important policy objectives.
2. The TEQSA Act site-blocking framework differs from the copyright model in several important respects. It requires no finding of “primary purpose” or “primary effect,” instead allowing blocking based on the provision or advertising of commercial academic cheating services. It operates through administrative rather than judicial processes, with TEQSA having direct authority to seek blocking orders. It focuses on protecting academic integrity rather than intellectual property rights, demonstrating the potential for site-blocking to address broader categories of harmful online conduct.[[12]](#footnote-12)

## Online Safety Act Framework

1. The *Online Safety Act 2021* (Cth) (**Online Safety Act**) introduced yet another framework for addressing harmful online content, creating overlapping jurisdiction with existing intellectual property enforcement mechanisms.[[13]](#footnote-13) While the Online Safety Act’s primary focus is on content that is harmful to individuals (particularly children) rather than intellectual property infringement, it establishes important precedents for platform obligations that influence the broader regulatory environment.
2. The Online Safety Act creates a tiered system of obligations based on service type and size, with different requirements for social media services, relevant electronic services, and designated internet services. This approach recognises that platform responsibilities should vary based on the nature and scale of the service provided, a principle that could be extended to intellectual property enforcement.
3. The Online Safety Act’s notice-and-takedown system operates on much shorter timeframes than copyright safe harbours (24 hours compared to expeditious action), demonstrating that Australia is willing to impose rapid response obligations on platforms when addressing certain types of harmful content. The Online Safety Act also grants the eSafety Commissioner significant discretion in determining what constitutes reasonable steps for content removal, including the possibility of geo-blocking rather than global takedown.

# Current Legal Framework for Platform Liability

## Copyright Law and Authorisation Liability

1. The foundation of Australia’s platform liability framework remains the authorisation provisions of the Copyright Act. Section 101(1) provides that a person infringes copyright if they authorise another person to do an act comprised in the copyright, establishing indirect liability for platforms that facilitate user infringement.[[14]](#footnote-14) The authorisation test, as refined by the High Court in *Roadshow Films Pty Ltd v iiNet Pty Ltd*,[[15]](#footnote-15) requires consideration of three factors: the extent of the defendant’s power to prevent the infringement, the nature of the relationship between the defendant and the infringer, and whether the defendant took reasonable steps to prevent the infringement.
2. The iiNet decision established important limitations on authorisation liability that continue to protect platforms implementing good faith compliance efforts.[[16]](#footnote-16) The High Court held that merely providing the means for infringement is insufficient to establish authorisation without additional conduct that sanctions, approves, or countenances the infringement. The decision also established that platforms cannot be required to take steps that are not reasonable in the circumstances, including technical measures that would fundamentally alter their business model or impose disproportionate costs.
3. However, the iiNet decision also clarified that authorisation liability can arise where platforms have actual knowledge of specific infringements and the power to prevent them but choose not to act.[[17]](#footnote-17) This creates ongoing liability risks for platforms that receive detailed infringement notices but fail to implement effective response procedures.
4. The authorisation framework applies across all forms of intellectual property covered by the Copyright Act, including literary works, artistic works, musical works, sound recordings, cinematograph films, and broadcasts. This comprehensive coverage means that platforms hosting user-generated content face potential liability for a wide range of creative works without regard to the specific nature of the platform or its primary purpose.

## Trade Mark Law and Platform Liability

1. Platform liability for trademark infringement operates through different mechanisms than copyright law, primarily because trademark law lacks specific authorisation provisions equivalent to those in the Copyright Act. Instead, platform liability typically arises through direct infringement theories where platforms are alleged to “use” trademarks in the course of trade, or through accessorial liability under general tort principles.
2. The *Trade Marks Act 1995* (Cth) defines “use” of a trade mark to include using the mark on goods or in relation to services, or in advertising or promotional material.[[18]](#footnote-18) This definition creates potential liability for platforms that display trade marks in user-generated content, search results, or advertising materials, though courts have generally been reluctant to find platform liability absent evidence of commercial use that would confuse consumers about the source of goods or services.
3. Unlike copyright law, Australian trademark law does not recognise “infringement by authorisation”. The Full Federal Court in *PDP Capital Pty Ltd v Grasshopper Ventures Pty Ltd* [[19]](#footnote-19) reaffirmed that "a registered trademark can only be infringed by the primary user of a trademark and there is no concept of authorisation of infringement recognised under Australian trademark law”. Australian courts are reluctant to impose liability on passive intermediaries, with courts examining whether platforms play an “active” versus “passive” role. The assessment often considers the platform’s knowledge of wrongdoing and whether it takes steps to prevent infringement.[[20]](#footnote-20)
4. Platform liability for trademark infringement becomes more likely where platforms play an active role in creating or editing allegedly infringing content, or where they receive specific notice of infringement and fail to act despite having practical ability to remove the infringing material. However, the absence of statutory safe harbours for trademark infringement means that platforms cannot rely on the procedural protections available in copyright contexts.

## Competition Law and Platform Conduct

1. The *Competition and Consumer Act 2010* (Cth) creates several potential sources of platform liability related to user infringements and unfair competition. Schedule 2 to the *Competition and Consumer Act 2010* (Cth) is the Australian Consumer Law. It is also the uniform consumer law adopted by each of the states and territories in Australia. The Australian Consumer Law provisions addressing misleading or deceptive conduct,[13] unconscionable conduct,[14] and unfair contract terms[15] all create potential liability for platforms that facilitate or enable problematic user behaviour. It is important to note that some of these provisions apply across all transactions, not just those which concern consumers.[[21]](#footnote-21)
2. Platform liability under the Australian Consumer Law typically requires that the platform’s own conduct be misleading, deceptive, or unconscionable, rather than imposing liability for user misconduct. However, platforms can face liability where their design, operation, or promotional activities create misleading impressions about the legitimacy of user-generated content or the protections available to consumers transacting through the platform.
3. The Australian Competition and Consumer Commission has demonstrated increasing willingness to pursue platform liability under consumer protection provisions, particularly in cases involving fake reviews, misleading product representations, and unfair trading practices that exploit platform design features. Recent enforcement actions have targeted platforms that fail to implement adequate verification systems for user-generated commercial content or that use algorithmic systems to promote potentially misleading advertisements.
4. The competition law framework also addresses platform liability through merger control provisions that consider the impact of platform acquisitions on competition in relevant markets.[[22]](#footnote-22)

## Industry-Specific Regulatory Frameworks

1. Australia has developed several industry-specific frameworks that address platform responsibilities in particular sectors, creating additional layers of potential liability beyond general intellectual property and competition law. These frameworks demonstrate Parliament’s recognition that general liability rules may be insufficient to address sector-specific risks and market dynamics.
2. The Therapeutic Goods Administration regulates platform liability for health-related products and services, requiring platforms to ensure that user-generated content complies with advertising standards for therapeutic goods.[[23]](#footnote-23) This framework creates potential liability for platforms that host user-generated content promoting medical treatments or products without adequate verification of compliance with therapeutic goods legislation.
3. The Australian Securities and Investments Commission regulates platform liability for financial services content, requiring platforms to ensure that user-generated investment advice or financial product promotion complies with licensing and disclosure requirements.[[24]](#footnote-24) This framework creates particular challenges for platforms hosting user-generated financial content, as the line between general discussion and regulated financial advice can be difficult to determine.
4. The Australian Communications and Media Authority regulates platform obligations related to broadcasting content, gambling advertising, and telecommunications services.[[25]](#footnote-25) These frameworks create overlapping compliance obligations for platforms that host user-generated content related to regulated industries, often with different notice procedures and liability standards than those applying to intellectual property infringement.

# Current Enforcement Mechanisms and Judicial Interpretation

## Federal Court Approach to Site-Blocking

1. Australian courts have developed a sophisticated approach to site-blocking that demonstrates both the potential and limitations of current enforcement mechanisms. Since the first site-blocking order in Roadshow Films Pty Ltd v Telstra Corporation Ltd,[[26]](#footnote-26) Federal Court decisions have consistently expanded the scope and efficiency of blocking procedures while maintaining judicial oversight of fundamental rights and proportionality concerns.
2. The Federal Court’s approach to site-blocking demonstrates several important trends in judicial thinking about platform obligations. First, courts have shown willingness to grant blocking orders on streamlined evidence where rights holders can demonstrate flagrant infringement, suggesting judicial acceptance of efficient enforcement mechanisms for clear cases. Second, courts have consistently rejected arguments that site-blocking is ineffective or disproportionate, instead viewing blocking as one component of a broader enforcement strategy. Third, courts have demonstrated flexibility in adapting blocking orders to technological developments, including recent orders addressing circumvention techniques and mirror sites.
3. Recent Federal Court decisions have also clarified the boundaries of site-blocking authority, particularly regarding the scope of entities subject to blocking obligations and the geographical reach of Australian court orders. The 2024 decision in Roadshow Films v Telstra[[27]](#footnote-27) established that blocking obligations extend to all carriage service providers operating in Australia regardless of their primary business focus, while maintaining that courts cannot compel global enforcement actions beyond Australian jurisdiction.
4. The Federal Court’s approach to costs allocation in site-blocking cases has also evolved to address concerns about the burden on carriage service providers. Recent decisions have established that rights holders must bear the reasonable costs of implementing blocking orders, while carriage service providers must demonstrate that costs are genuinely attributable to the blocking requirements rather than ordinary network management activities.

## TEQSA Enforcement Against Academic Cheating Services

1. The Tertiary Education Quality and Standards Agency’s implementation of site-blocking powers under section 127A demonstrates an alternative model for platform enforcement that operates through administrative rather than judicial processes. TEQSA’s approach has achieved significant practical results, with successful blocking of hundreds of academic cheating websites since the power was introduced.[[28]](#footnote-28)
2. TEQSA’s enforcement strategy demonstrates several important features that differentiate it from copyright site-blocking. First, TEQSA operates proactively to identify problematic websites rather than relying primarily on complaints from affected parties. Second, TEQSA coordinates with international regulators and educational institutions to develop comprehensive approaches to academic integrity enforcement. Third, TEQSA has developed detailed guidance for platforms seeking to avoid liability, providing clearer compliance pathways than exist in copyright contexts.
3. The Federal Court’s decision in *TEQSA v Ahmed* established important precedents for TEQSA enforcement that may influence broader platform liability developments.[[29]](#footnote-29) The Court held that TEQSA’s blocking powers extend to websites that facilitate academic cheating regardless of whether the website’s primary purpose is providing cheating services, establishing a lower threshold than the copyright “primary effect” test. The Court also recognised TEQSA’s authority to seek injunctive relief against platforms that restructure their operations to avoid blocking orders.

## eSafety Commissioner Content Removal Orders

1. The eSafety Commissioner’s implementation of the Online Safety Act demonstrates yet another enforcement model with different implications for platform obligations. The Commissioner’s approach emphasises rapid response and graduated enforcement, with initial focus on voluntary compliance followed by formal notice procedures and potential court enforcement for non-compliance.
2. The *eSafety Commissioner v X Corp* litigation provides important insights into the boundaries of Australian regulatory authority over global platforms.[[30]](#footnote-30) Justice Kennett’s decision established that Australian law can require geo-blocking of content from Australian users but cannot compel global content removal that would affect users in other jurisdictions. This decision clarifies the territorial limits of Australian platform regulation while confirming regulatory authority within Australian jurisdiction.[[31]](#footnote-31)
3. The eSafety Commissioner’s enforcement approach also demonstrates the practical challenges of implementing rapid takedown requirements across different platform types and technologies. The Commissioner’s guidance emphasises that “reasonable steps” for content removal may vary based on platform capabilities and the nature of the harmful content, creating a flexible but potentially unpredictable compliance environment.

## ACCC Digital Platform Enforcement

1. The Australian Competition and Consumer Commission’s increasing focus on digital platform enforcement represents another significant development in the regulatory landscape. The ACCC’s approach emphasises systemic harm assessment and market-wide remedies rather than individual platform liability, though enforcement actions create important precedents for platform responsibilities.
2. The ACCC’s Digital Platform Services Inquiry demonstrates the Commission’s comprehensive approach to understanding platform market dynamics and their impact on competition and consumer welfare.[[32]](#footnote-32) The Inquiry’s findings regarding platform market power, data collection practices, and algorithmic decision-making provide the factual foundation for potential future enforcement actions and regulatory reforms.
3. The ACCC has demonstrated a willingness to apply traditional consumer protection concepts to platform operations while adapting enforcement strategies to address the unique characteristics of digital markets.

# Critical Assessment of Current Framework Adequacy

## Fragmentation and Compliance Complexity

1. Australia’s current approach to platform liability operates through multiple overlapping frameworks, each with distinct thresholds, procedural requirements, and enforcement mechanisms. The primary regulatory instruments include the *Copyright Act 1968* (Cth), the *Competition and Consumer Act 2010* (Cth), the *Online Safety Act 2021* (Cth), and various industry-specific regulatory schemes.
2. The fragmentation creates significant compliance complexity without delivering corresponding benefits for rights protection or user welfare. Platforms operating in Australia must navigate six distinct regulatory frameworks administered by different agencies with varying enforcement priorities and interpretative approaches. The absence of coordination mechanisms between different regulatory agencies exacerbates the fragmentation problem. While the Digital Platform Regulators Forum (**DP-REG**) provides some coordination.
3. Although DP-REG lacks authority to resolve conflicts between competing regulatory requirements or to develop unified compliance standards, it works to ensure that different agencies reach consistent conclusions about the same platform conduct. This means that they do not pursue conflicting remedies for related problems.

## Adequacy of Safe Harbour Protections

1. Australia’s safe harbour framework remains significantly narrower than comparable protections in other jurisdictions. The restriction of safe harbour eligibility to traditional carriage service providers and select institutional categories excludes most commercial platforms that host user-generated content.
2. It has been argued that the narrow scope of safe harbour protections creates particular problems for innovation in content moderation technologies. There is a recent example that suggests otherwise. The *Online Safety Amendment (Social Media Minimum Age) Act 2024* (Cth) was passed by Parliament in November 2024, and takes effect on December 10, 2025. It introduces a mandatory minimum age of 16 for accounts on most social media platforms, with no parental consent exceptions. It requires those platforms to take reasonable steps to prevent under-16s from creating or maintaining accounts. The eSafety Commissioner has issued regulatory guidance on the reasonable steps expectations.[[33]](#footnote-33) However, implementation is left to the platforms.
3. The absence of safe harbour protections for trade mark infringement creates some uncertainty for platforms hosting commercial content. Unlike copyright infringement, where platforms can rely on safe harbour procedures for qualifying activities, trade mark liability depends on general tort principles that provide less predictable compliance pathways.
4. The safe harbour framework’s focus on reactive takedown procedures rather than proactive content moderation also fails to address the realities of modern platform operations. Large platforms process millions of pieces of content daily using automated systems that can identify potential infringements more efficiently than traditional notice-and-takedown procedures. Although the current framework provides no recognition or protection for these proactive efforts, the continuing need for traditional notice-and-takedown procedures suggests that they are not addressing all of the requirements under Australian law.

## Limitations of Site-Blocking Approaches

1. While site-blocking has achieved significant practical results in reducing access to clearly infringing websites, the approach suffers from fundamental limitations that restrict its effectiveness as a comprehensive platform liability solution. Site-blocking addresses only overseas-hosted content beyond Australian jurisdiction. This is because enforcement against domestic platforms that host infringing user-generated content does not require platform specific law.
2. The reactive nature of site-blocking means that new infringing websites can operate freely until rights holders identify them and obtain blocking orders, creating ongoing cat-and-mouse dynamics that impose significant costs on both rights holders and the court system. The streamlined blocking procedures have improved efficiency, but still require substantial resources and legal expertise that may be unavailable to smaller rights holders.
3. Site-blocking orders also face inherent technological limitations as circumvention techniques become more sophisticated and widely available. While courts have attempted to address circumvention through expanded blocking orders covering mirror sites and proxy services, these measures increase compliance costs for carriage service providers while providing diminishing marginal effectiveness.
4. The expansion of site-blocking beyond copyright to academic cheating services demonstrates both the potential and risks of the approach. While TEQSA has achieved practical success in disrupting academic cheating services, the administrative rather than judicial process raises concerns about due process and appeals rights that may become more significant as site-blocking expands to additional content categories.

## Challenges from Emerging Technologies

1. Current platform liability frameworks were designed for traditional hosting models where platforms provide technical infrastructure for user-created content. These frameworks become increasingly inadequate as platforms integrate artificial intelligence systems that actively curate, modify, and generate content based on user inputs and algorithmic analysis.
2. AI-powered content generation creates novel liability questions that existing frameworks cannot adequately address. When AI systems trained on potentially infringing datasets generate content that reproduces copyrighted material, traditional concepts of direct, vicarious, and contributory infringement become difficult to apply. The question of platform liability for AI-generated infringement depends on complex technical questions about the nature of machine learning, the relationship between training data and generated outputs, and the extent of platform control over AI system behaviour.
3. Algorithmic content curation and recommendation systems also challenge traditional safe harbour assumptions about passive hosting. When platforms use AI systems to actively promote or amplify user content based on engagement metrics or commercial considerations, the distinction between passive hosting and active facilitation becomes unclear. Current safe harbour frameworks provide no guidance about how algorithmic promotion affects platform liability for user infringement.
4. There is case law on this area. In Australian Competition and Consumer Commission v Trivago N.V.,[[34]](#footnote-34) the Federal Court found that Trivago contravened the Australian Consumer Law by misleading consumers about its hotel price comparison service. Trivago had advertised that its website would “quickly and easily help users identify the best deal or cheapest rates available for a given hotel,” but in fact used an algorithm that placed significant weight on which online hotel booking site paid Trivago the highest cost-per-click fee. Expert evidence showed that higher-priced room rates were selected as the “Top Position Offer” over cheaper alternatives in 66.8% of listings. The Court also found that Trivago’s strike-through pricing displays gave consumers a false impression of savings by comparing offers for different room types at the same hotel. Trivago's appeal was dismissed by the Full Federal Court in Trivago N.V. v Australian Competition and Consumer Commission.[[35]](#footnote-35) In the subsequent penalty hearing,[[36]](#footnote-36) Justice Moshinsky ordered Trivago to pay $A44.7 million in pecuniary penalties.
5. The scale and speed of modern content moderation create challenges for traditional notice-and-takedown procedures. Large platforms process takedown requests using automated systems that may not distinguish adequately between legitimate infringement claims and abuse of takedown procedures. The absence of standardised procedures for counter-notices and appeals creates due process concerns that become more significant as automated moderation becomes more prevalent.

# Specific Challenges in Intellectual Property Enforcement

## Fair Dealing and Automated Content Filtering

1. The increasing reliance on automated content filtering systems poses significant risks to fair dealing and other copyright exceptions that depend on contextual analysis of use purpose and character. Automated systems optimise for single metrics like similarity to copyrighted works while struggling to assess whether particular uses qualify for protection under fair dealing exceptions for criticism, review, parody, satire, news reporting, or educational purposes. From an Australian perspective, the automation seems to be unable to draw the distinction between Australian “fair dealing” and US “fair use”.
2. Australia’s fair dealing exceptions require consideration of factors including the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the market for the original work.[[37]](#footnote-37) These contextual assessments require understanding of creative intent, market dynamics, and cultural meaning that current automated systems cannot reliably perform.
3. The risk of over-removal of legitimate content is particularly concerning for transformative uses like parody and criticism that often involve substantial similarity to original works while serving entirely different purposes. Academic research demonstrates that automated filtering systems have difficulty distinguishing between infringing reproduction and protected transformative use, leading to significant rates of false positives that chill legitimate expression.[[38]](#footnote-38)
4. The absence of specific procedural protections for fair dealing in Australia’s platform liability framework exacerbates these problems. Unlike some jurisdictions that require human review of takedown requests claiming fair use, Australia’s frameworks provide no special procedures for content that may qualify for copyright exceptions. This creates particular risks for educational content, news commentary, and creative criticism that depend on fair dealing protections.

## Trademark Enforcement Complexities

1. Platform liability for trademark infringement creates particular complexities because trademark rights depend on use in particular categories of goods and services, creating fact-specific assessments that are difficult to standardise across platform types and content categories. Unlike copyright infringement, where substantial similarity can often be assessed through automated comparison, trademark infringement requires analysis of consumer confusion likelihood that depends on contextual factors including market dynamics, consumer sophistication, and competitive relationships.
2. The territorial nature of trademark rights also creates challenges for global platforms operating across multiple jurisdictions. A trademark that is registered and protected in Australia may not be protected in other jurisdictions where platform users are located, creating complex questions about the geographical scope of platform takedown obligations and the appropriate response to international trademark disputes.
3. Platform liability for trademark infringement in user-generated content also raises significant free speech concerns because trademarks are often used in legitimate commentary, criticism, and comparative advertising that receives constitutional protection. The absence of clear fair use or nominative use protections in Australian trademark law creates uncertainty about platform obligations when users invoke trademarks for legitimate expressive purposes.
4. The emergence of brand impersonation and counterfeiting on social media platforms creates additional enforcement challenges because these activities often involve sophisticated attempts to mimic legitimate brand accounts and websites. Traditional trademark enforcement mechanisms designed for physical counterfeiting may be inadequate for addressing the speed and scale of online brand abuse across multiple platform types.

## Patent Enforcement in Digital Platforms

1. Platform liability for patent infringement creates unique challenges because patent rights cover methods and systems rather than expressive content, creating potential liability for platforms that implement patented technologies in their operations rather than just hosting infringing user content. This creates particular concerns for software platforms that may inadvertently implement patented algorithms or methods in their content processing systems.
2. The emergence of standard-essential patents covering fundamental internet technologies creates additional complexity for platform operations. Platforms may face patent liability for implementing standard internet protocols or content delivery mechanisms that are essential for platform functionality but covered by patent rights held by entities that are not participants in standard-setting processes.
3. Patent trolling activities targeting platforms create enforcement challenges because platforms may lack the technical expertise to assess patent validity and infringement claims, particularly for complex software patents covering algorithmic methods. The high costs of patent litigation and the potential for injunctive relief create significant pressure for settlement even where patent claims lack merit.
4. The territorial nature of patent rights also creates challenges for global platforms because patent infringement liability depends on the location where patented methods are performed rather than where content is accessed. This creates complex questions about platform obligations to implement different technical solutions in different jurisdictions to avoid patent liability.

# Consumer Protection and Unfair Competition Dimensions

## Misleading and Deceptive Conduct on Platforms

1. Platform liability for user-generated misleading and deceptive conduct creates significant challenges under the Australian Consumer Law because the platform’s own conduct must be misleading or deceptive to establish liability. Courts have generally held that merely providing technical infrastructure for user-generated content is insufficient to establish platform liability absent additional conduct that endorses or promotes misleading claims.
2. However, platforms can face liability where their design, promotional activities, or verification systems create misleading impressions about the legitimacy or accuracy of user-generated commercial content. Recent enforcement actions such as *Trivago* have targeted platforms that use algorithmic promotion to amplify potentially misleading advertisements or that fail to implement adequate disclosure requirements for sponsored content.
3. The integration of artificial intelligence into platform operations creates additional complexity for misleading conduct liability because AI systems may automatically generate or promote misleading content without direct human oversight. The question of platform liability for AI-generated misleading content depends on complex assessments of platform control over AI system behaviour and the foreseeability of harmful outputs.
4. Platform liability for fake reviews and manipulated user feedback creates particular enforcement challenges because platforms must balance user expression rights against the need to maintain authentic commercial information. The difficulty of distinguishing between legitimate negative reviews and malicious fake content creates ongoing compliance challenges for platforms implementing content moderation systems.

## Unconscionable Conduct and Platform Terms

1. Platform liability for unconscionable conduct typically focuses on the platform’s own terms and conditions rather than user-to-user transactions facilitated by the platform. Courts assess unconscionability based on the stronger party’s exploitation of a special disadvantage affecting the weaker party’s ability to protect their own interests, creating potential liability for platforms that exploit user dependency or information asymmetries.
2. Amendments to the Australian Consumer Law have expanded unconscionability protections to small business transactions,[[39]](#footnote-39) creating additional potential liability for platforms that serve as intermediaries in business-to-business commerce. These provisions are particularly relevant for platforms that facilitate transactions between established businesses and smaller suppliers or service providers.
3. The complexity of platform terms and conditions creates potential unconscionability issues when platforms implement complex algorithmic decision-making systems that users cannot understand or predict. Courts may find unconscionability where platforms use incomprehensible terms to mask significant disadvantages imposed on users who have no realistic alternative to accepting platform terms.
4. Platform liability for unconscionable conduct in payment processing and dispute resolution creates additional compliance challenges because platforms often exercise significant control over financial relationships between users while disclaiming responsibility for transaction outcomes. The emergence of platform-controlled payment systems and digital wallets creates potential liability for unconscionable conduct in financial services provision.

## Unfair Contract Terms in Platform Agreements

1. The expansion of unfair contract terms protections to small business contracts creates significant new liability exposure for platforms that serve business users through standard form agreements.[[40]](#footnote-40) Platforms must now ensure that their terms and conditions do not contain provisions that create significant imbalances in the rights and obligations of the parties, are not reasonably necessary to protect legitimate business interests, and would cause detriment if applied.
2. The matching provisions in respect of financial services have been enforced by ASIC. In ASIC v PayPal Australia Pty Ltd[[41]](#footnote-41) the Federal Court declared a “Fee Error Term” used by PayPal in its standard form contracts with small businesses to be unfair. The term required small businesses to notify PayPal of fee errors within 60 days or accept the fees as accurate. The Court found the term unfair because PayPal was better positioned to identify overcharges (as these were not easily visible on business statements), there was no reciprocal right for businesses to benefit from undercharging, and the 60-day notification requirement placed an unfair burden on small businesses.
3. Platform terms that grant broad intellectual property licences, limit liability for platform failures, or provide unilateral termination rights may face scrutiny under unfair contract terms provisions. The assessment of unfairness depends on the specific circumstances of each platform relationship, creating compliance challenges for platforms serving diverse user communities with varying levels of sophistication and dependency.
4. The territorial scope of unfair contract terms protections creates additional complexity for global platforms because terms that are enforceable in other jurisdictions may be unenforceable in Australia. Platforms must either implement jurisdiction-specific terms or accept that some provisions may be unenforceable in particular markets.
5. The interaction between unfair contract terms protections and platform intellectual property policies creates compliance challenges. Terms that require users to grant broad intellectual property licences or that disclaim platform liability for copyright infringement may be necessary to protect legitimate platform interests while potentially creating unfair imbalances under consumer protection law.

## Right to Fair Trial and Legal Process

1. Platform liability frameworks that emphasise rapid takedown and blocking procedures may not provide adequate opportunities for affected parties to present evidence and arguments before adverse action is taken. The streamlined procedures developed for site-blocking cases prioritise efficiency over comprehensive fact-finding, creating risks that legitimate websites may be blocked based on incomplete evidence.
2. The administrative nature of some platform enforcement mechanisms, particularly TEQSA’s site-blocking powers, raises concerns about the separation of powers and the appropriate role of executive agencies in determining legal rights. While administrative efficiency has advantages, the absence of automatic judicial review may not provide adequate protection for affected parties.
3. Platform liability frameworks also create concerns about access to justice because small rights holders may lack the resources to pursue traditional legal remedies while large platforms may use procedural complexity to discourage legitimate claims. The costs and complexity of platform liability litigation may systematically favour well-resourced parties over individual creators and small businesses.
4. The territorial reach of Australian platform regulation creates additional due process concerns for international users and platforms who may be subject to Australian legal requirements without adequate notice or opportunity to participate in legal proceedings. The global nature of platform operations creates complex questions about the appropriate limits of national regulatory authority.

## Due Process and Fundamental Rights Considerations

### Procedural Fairness in Content Moderation

1. Australian platform liability frameworks incorporate several procedural safeguards that provide meaningful protection for users facing content removal or account termination. Under the Copyright Act, takedown notices must meet specific evidential requirements and be supportable with proper legal basis, preventing frivolous or unsupported claims from triggering automatic removal.
2. The counter-notice provisions in Australian copyright safe harbours provide users with clear procedures to challenge wrongful removals, including statutory timeframes for restoration of content and requirements for complainants to commence court proceedings if they wish to maintain the takedown. These procedures offer more robust protection than suggested by frameworks in some other jurisdictions.
3. However, implementation challenges remain regarding automated content moderation systems, where algorithmic decision-making may still struggle to assess contextual factors relevant to fair dealing and other exceptions. While platforms are not required to implement fully automated systems, the scale of content moderation creates practical pressures that may undermine the intended procedural protections.
4. The availability of interlocutory injunction procedures provides an additional layer of protection for users who face coordinated abuse of takedown systems or who depend on platform access for their livelihood. Courts can intervene to prevent wrongful removals while substantive disputes are resolved, though the costs and complexity of seeking such relief may limit its practical accessibility.

## Freedom of Expression and Platform Censorship

1. Australian platform liability frameworks attempt to balance takedown efficiency with expression rights through requirements that notices be legally supportable and provision of counter-notice procedures. The statutory recognition of fair dealing exceptions provides some protection for legitimate commentary and criticism, though platform implementation of these protections varies considerably.
2. The counter-notice system allows for restoration of wrongfully removed content, but temporary suppression during the notice period can still harm time-sensitive expression such as news commentary and political criticism. While the framework provides for relatively rapid restoration (typically 10-14 business days), this timeframe may be inadequate for highly topical content.
3. Platform implementation of proactive content filtering raises ongoing concerns about prior restraint, particularly where automated systems may lack sufficient sophistication to recognise fair dealing or other exceptions. However, the requirement that takedown notices be supportable means that platforms cannot rely solely on automated claims processing without some human oversight.
4. The emergence of AI-generated content creates new challenges for expression protection, as platforms must balance obligations to respond to supportable infringement claims against the risk of over-censoring AI tools with legitimate creative applications. The requirement for evidential support in takedown notices provides some protection, but may not fully address the complexities of AI-generated content assessment.

## Right to Fair Trial and Legal Process

1. Australian platform liability frameworks preserve access to judicial remedies through interlocutory injunction procedures and substantive court proceedings. When parties disagree with takedown decisions, they can seek interlocutory relief to maintain the status quo while disputes are resolved through proper judicial consideration.
2. The availability of expedited court procedures for urgent matters, including applications for interlocutory injunctions, provides meaningful opportunities for affected parties to present evidence and arguments before final determinations are made. While administrative takedown procedures prioritize efficiency, the ultimate resolution of substantive disputes remains within the judicial system.
3. However, practical access to these procedural protections remains constrained by costs and complexity. While the legal framework provides appropriate safeguards, small rights holders and individual users may lack the resources to effectively utilise interlocutory injunction procedures or pursue comprehensive court proceedings. This creates systemic advantages for well-resourced parties despite the formal availability of procedural protections.
4. The territorial application of Australian platform regulation to international platforms creates due process challenges, though the requirement for supportable evidence in takedown notices and availability of judicial review provides some protection for foreign parties. The global nature of platform operations continues to create complex questions about appropriate jurisdictional limits and procedural fairness for international users.

# Recommendations for Reform

## The Rickard Review and the Duty of Care Framework

1. The most significant potential development in Australian platform liability law occurred with Delia Rickard PSM’s 2024 statutory review of the Online Safety Act 2021 (Cth).[[42]](#footnote-42) Following comprehensive consultation with stakeholders, examination of international best practices, and analysis of emerging technological challenges, the Rickard Review concluded that Australia’s current reactive approach to platform regulation is fundamentally inadequate for addressing the scale and complexity of contemporary online harms.
2. The Review’s central recommendation represents a paradigm shift in regulatory philosophy: Australia should adopt “a singular and overarching duty of care that encompasses due diligence, and is underpinned by safety by design principles, risk assessment, risk mitigation and measurement.” This framework would require online service providers to take reasonable steps to prevent foreseeable harms on their services, shifting the burden of safety from individual users to the platforms best positioned to identify and address systemic risks. A similar finding was made by a joint (both houses) parliamentary committee.[[43]](#footnote-43)

## Categories of Harm Under the Duty of Care

1. The Rickard Review identified five enduring categories of harm that should be addressed under the statutory duty of care. The first category encompasses harms to young people, including child sexual exploitation and abuse (including grooming), bullying and problematic internet use. This category recognises the particular vulnerability of children online and the need for platforms to implement age-appropriate safety measures. The second category addresses harms to mental and physical wellbeing, including threats to harm or kill, or attacks based on protected characteristics such as sex, gender, sexual orientation, race, ethnicity, disability, age or religion. This encompasses online hate speech, cyberbullying, and other forms of targeted harassment that cause psychological harm.
2. The third category covers instruction or promotion of harmful practices, such as self-harm/suicide, disordered eating and dares that could lead to grievous harm. This category addresses the role of algorithms and content recommendation systems in amplifying dangerous content. The fourth category concerns threats to national security and social cohesion, such as through promotion of terrorism and abhorrent violent extremist content. This recognises the potential for platforms to be exploited for radicalisation and coordinated harmful activities. Finally, the framework includes other illegal content, conduct and activity as a catch-all category that ensures the framework can address emerging forms of illegal behaviour that may not fit neatly into other categories.

## Recommendations for Reform

### Primary Recommendation: Implementation of Statutory Duty of Care

1. Australia should implement the Rickard Review’s central recommendation by enacting a comprehensive statutory duty of care that fundamentally transforms the approach to platform liability. This framework should operate through four interconnected components.
	* 1. First, platforms must conduct regular, systematic assessments of the potential harms arising from their design, operation, and use. This includes evaluation of algorithmic systems, content moderation processes, user interaction features, and business model incentives that may contribute to harmful outcomes.
		2. Second, all new platform features and significant changes to existing services must incorporate safety considerations from the outset through safety by design principles. This proactive approach prevents harms rather than attempting to address them after they occur.
		3. Third, where risks are identified, platforms must implement appropriate mitigation measures proportionate to the severity and likelihood of harm through mitigation and response obligations. This includes both technological solutions and policy interventions.
		4. Finally, platforms must provide regular reporting on their risk assessments, mitigation efforts, and effectiveness measures through transparency and accountability measures. This enables regulatory oversight and public accountability for platform safety decisions.

## Supporting Regulatory Reforms

### Unified Platform Liability Framework

1. To support the duty of care, Australia should consolidate its fragmented regulatory approach into a unified platform liability framework. This should establish three tiers of obligations. The first tier provides basic safe harbour protections for genuine intermediaries that provide technical infrastructure without editorial control over content. The second tier establishes enhanced due diligence obligations for active platforms that curate, promote, or monetise user-generated content through algorithmic systems. The third tier imposes systematic risk assessment requirements for dominant platforms with significant market influence or user dependency.

### Modernised Safe Harbour Provisions

1. Australia should significantly expand safe harbour eligibility to include commercial platforms that implement effective safety measures, bringing Australian law into alignment with international standards. The modernised framework should include specific protections for algorithmic content moderation systems that meet prescribed technical standards.

### Enhanced Enforcement Mechanisms

1. The duty of care framework requires substantially stronger enforcement mechanisms. Maximum penalties should increase to the greater of 5 per cent of global annual turnover or $50 million, providing genuine deterrent effect for large technology corporations. The framework should prioritise remedial measures that bring platforms into compliance rather than simply imposing financial penalties.

### International Cooperation and Coordination

1. Australia should develop bilateral and multilateral agreements with major trading partners that establish mutual recognition procedures for platform enforcement orders and facilitate cooperation in addressing cross-border harmful content and conduct.

## Critical Assessment of the Duty of Care Approach

### Advantages of the Framework

1. The duty of care approach addresses fundamental limitations of Australia’s current reactive regulatory model. By focusing on systemic risk management rather than individual content removal, it can address the scale of online activity more effectively than complaint-based schemes. The framework is technology-neutral and sufficiently flexible to address emerging harms and technological developments.
2. The approach aligns with international regulatory trends, including the European Union’s Digital Services Act and the United Kingdom’s *Online Safety Act 2023*, potentially reducing compliance burdens for global platforms operating across multiple jurisdictions.

### Implementation Challenges

1. The duty of care framework faces significant implementation challenges. The concept of “reasonable steps” requires careful definition to provide adequate guidance for platform compliance while maintaining flexibility for different service types and emerging technologies. The framework must balance innovation incentives with safety obligations to avoid stifling beneficial technological development.
2. Enforcement against overseas platforms remains challenging despite enhanced penalties. The framework’s effectiveness depends on platforms’ willingness to engage constructively with Australian regulatory requirements and the regulator’s capacity to conduct sophisticated risk assessments and compliance monitoring.

### Overall

1. The Rickard Review’s recommendation for a statutory duty of care represents the most significant proposed reform to Australian platform liability law since the introduction of safe harbour provisions in 2004. The framework offers a coherent response to the limitations of Australia’s current fragmented and reactive approach, potentially providing more effective protection for users while reducing compliance complexity for platforms.
2. However, successful implementation requires careful attention to definitional precision, enforcement mechanisms, and international coordination. The stakes extend beyond technical legal questions to fundamental issues about the appropriate limits of platform responsibility and the role of government regulation in digital environments.
3. The duty of care approach represents a necessary evolution in platform liability law, but its ultimate success will depend on thoughtful implementation that balances competing interests while maintaining focus on the primary objective of reducing online harms for Australian users.

# Conclusion

1. Australia’s current approach to platform responsibilities and obligations for user infringements reflects nearly three decades of incremental development that has created a complex regulatory framework. The fragmentation across multiple statutes and agencies creates compliance complexity.
2. The emergence of artificial intelligence systems and algorithmic content curation creates fundamental challenges that current frameworks cannot adequately address. Traditional concepts of platform liability based on passive hosting models become increasingly irrelevant as platforms integrate AI systems that actively generate, curate, and promote content based on user inputs and commercial considerations. The absence of specific frameworks for addressing AI-generated infringement and algorithmic amplification of infringing content creates significant regulatory gaps that undermine the effectiveness of traditional enforcement mechanisms.
3. Reform of Australia’s platform liability framework presents an opportunity to address these structural problems while positioning Australia as a leader in balanced platform regulation that protects both rights holders and platform users. The recommendations outlined in this analysis would create a more coherent and effective regulatory framework that provides clear compliance pathways for platforms while maintaining adequate protection for intellectual property rights and user interests.
4. Success in platform liability reform will require careful balance between competing policy objectives including innovation promotion, rights protection, due process maintenance, and international competitiveness. The stakes extend beyond technical legal questions to fundamental issues about the appropriate limits of private power in digital environments and the role of algorithmic systems in determining access to information and economic opportunities.
5. The international trend toward comprehensive platform regulation demonstrates that Australia cannot maintain its current fragmented approach without risking regulatory obsolescence and competitive disadvantage. However, Australia’s reform efforts should be guided by distinctively Australian values and constitutional principles rather than simply copying approaches developed in other jurisdictions with different legal traditions and policy priorities.
6. The window for proactive reform may be limited as technological developments and international regulatory trends create pressure for reactive responses to emerging crises. Australia’s platform liability framework should be designed with sufficient flexibility to address future technological developments while maintaining clear compliance standards and adequate protection for fundamental rights. The goal should be creating a regulatory framework that promotes innovation and competition while ensuring that platform power is exercised in ways that serve broader public interests.
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3. *Copyright Amendment Act 2004* (Cth). [↑](#footnote-ref-3)
4. Matthew Rimmer, ‘Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement’ (2006) 11(3) *First Monday* 1. [↑](#footnote-ref-4)
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6. Rebecca Giblin, ‘The Uncertainties, Baby: Hidden Perils of Australia’s Authorisation Law’ (2009) 20 *Australian Intellectual Property Journal* 148. [↑](#footnote-ref-6)
7. *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2. [↑](#footnote-ref-7)
8. Copyright Amendment (Online Infringement) Act 2015 (Cth) sch 1. [↑](#footnote-ref-8)
9. Rob Nicholls, ‘Limiting Access, Limited Blocking: Evidence and Practice in s 115A Injunctions’ (2020) 30 *Australian Intellectual Property Journal* 114. [↑](#footnote-ref-9)
10. *Copyright Amendment (Online Infringement) Act 2018* (Cth) sch 1. [↑](#footnote-ref-10)
11. *Tertiary Education Quality and Standards Agency Act 2011* (Cth) s 127A. [↑](#footnote-ref-11)
12. Andrew Groves’ and Victoria Nagy, ‘Meaningful Crime Prevention or Just an “Act”: Discourse Analysis of the Criminalisation of Contract Cheating Services in Australia’. [↑](#footnote-ref-12)
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19. [2021] FCAFC 128. [↑](#footnote-ref-19)
20. Pappalardo and Suzor (n 5). [↑](#footnote-ref-20)
21. Russell V Miller, *Miller’s Australian Competition and Consumer Law Annotated* (LawBook Co, 2018). [↑](#footnote-ref-21)
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23. *Therapeutic Goods Act 1989* (Cth) pt 5-1. [↑](#footnote-ref-23)
24. *Corporations Act 2001* (Cth) ch 7. [↑](#footnote-ref-24)
25. *Broadcasting Services Act 1992* (Cth); *Interactive Gambling Act 2001* (Cth). [↑](#footnote-ref-25)
26. [2016] FCA 1503. [↑](#footnote-ref-26)
27. [2024] FCA 485. [↑](#footnote-ref-27)
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32. ACCC n22 above. [↑](#footnote-ref-32)
33. ‘Regulatory Guidance | eSafety Commissioner’ (n 31). [↑](#footnote-ref-33)
34. [2020] FCA 16 (**Trivago**). [↑](#footnote-ref-34)
35. [2020] FCAFC 185. [↑](#footnote-ref-35)
36. [2022] FCA 417. [↑](#footnote-ref-36)
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