Amazon Australia[1] appreciates the opportunity to provide comments in response to the Australian Competition and Consumer Commission's (**ACCC**) "Discussion Paper for Interim Report No. 5: Updating *Competition and Consumer Law for Digital Platform Services*" (**Discussion Paper**).[2] Amazon Australia welcomes the opportunity to discuss any specific proposals further and is keen to engage constructively with the ACCC on its emerging thinking.

Amazon Australia supports a strong Australian economy, the creation and growth of successful businesses and the promotion and protection of consumer welfare. Amazon Australia's entry into Australia has expanded consumer choice by providing customers with access to a wide selection of products at everyday low competitive prices.

The ACCC recognises that "*digital platforms provide consumers and businesses with significant benefits*" and that "*digital platforms have facilitated new and efficient ways for Australian businesses to provide innovative services, promote their products and quickly and easily reach consumers*"[3]. Given this recognition of the value of digital services to Australian consumers and businesses, and noting the pace of digital innovation including the increasing digitisation of all companies, any consideration of whether new regulatory frameworks are needed must include careful evaluation of the impact on the benefits consumers have realised and future innovation and investment.

The ACCC's Discussion Paper seeks stakeholder views on: (1) whether there is a need for new regulatory tools to address competition and consumer issues in relation to the supply of "digital platform services" (which are defined by the Ministerial Direction[4]), and (2) if needed, options for regulatory reform.

On the first question of whether there is a need for new regulatory tools, Amazon Australia considers that the first step is to clearly define the specific competition or consumer harm(s) arising from specific activities. This requires detailed inquiry and investigation, based on evidence, of the relevant activities. This is the approach the ACCC has started to take through its Digital Platform Services Inquiry but more work is needed. For example, the retail sector is competitive, constantly evolving and regularly sees new entry. Retail is also omni-channel with competition occurring across all channels and while the ACCC is undertaking a "digital platform services" inquiry the full spectrum of competition, including physical retailers, needs to be taken into account. In this competitive sector, before proposing reforms the ACCC should articulate the harms from specific activities and detail the specific reform proposals (see **Part A**).

Introducing reforms pre-emptively without a detailed examination of the specific harms and underlying causes risks detrimental impacts on Australian consumers, innovation, competition, and would give rise to significant legal uncertainty undermining business confidence.

If any potential harms are identified as arising from specific activities, stakeholder views should be sought on whether the existing Competition and Consumer Act 2010 (Cth) (**CCA**) and the Australian Consumer Law (**ACL**) provisions, associated instruments and pending reforms are capable of addressing any identified harm(s). Reforms should only be introduced where there is clear evidence that the existing competition and consumer regime is not capable of addressing the identified harm (see **Part B**).

[1] Amazon Australia Commercial Service Pty Ltd (**Amazon Australia**).
[2] See Digital-platform-services-inquiry-2020-2025/September-2022-interim-report.
[3] ACCC, Discussion Paper, p 4.
[4] For the definition of "Digital Platform Services" see: Competition and Consumer (Price Inquiry—Digital Platforms) Direction 2020". Where digital platform services" is used in this submission, it is a reference to the Ministerial Direction definition.

On the second question of the shape of any proposed new regulatory tools, Amazon Australia considers that a detailed assessment of the costs and benefits, including the potential benefits to consumers and businesses and the impacts on innovation, competition, investment and economic growth, needs to be undertaken. The Discussion Paper refers, at a high level, to broad potential regulatory frameworks. Specific proposals and more detail is needed before a meaningful cost-benefit assessment can be made.

The litmus test for whether a regulatory framework works is whether it can address proven consumer harms in a targeted way that creates net benefits for consumers and the economy, without being duplicative or becoming a barrier to innovation and competition in other areas (see **Part C**).

Outside these two questions, the Discussion Paper refers broadly to "digital platforms" and "digital platform services". These broad terms may be sufficient to set the scope of an inquiry. However, taking a broad-brush approach to regulating "digital platforms" risks: (1) ignoring fundamental differences between business models; and (2) failing to take account of different competitive dynamics within and across different sectors. For example, when a customer buys online but collects instore (click-and-collect), that business should be part of any inquiry into "digital platform services". In an increasingly digitised economy all retail businesses have a "digital" component and delineating between digital and non-digital retailers ignores how retailers operate and that consumers shop offline and online. There does not seem to be a coherent basis for proposing reforms only in respect of "digital platform services" when retailers undertake the same or similar activities (eg, data collection) in a non-digital context.

While international developments are relevant to this inquiry, Amazon Australia considers that: (1) The context to those developments is crucially important. For example, commentators have observed that some EU reforms have a protectionist objective, which does not promote the interests of consumers or competition. (2) There are differentiating factors between Australia and other countries that need to be understood and considered, e.g. for retail the Australian competitive dynamics and laws, such as the ACL regime, differs significantly to other jurisdictions. (3) Rushing to adopt international developments without first pausing to observe how those reforms play out is itself a risk. Australia is not "missing out" if it waits to see whether the international developments deliver benefits to consumers and continue to promote innovation and investment. Rather, by waiting, Australia will benefit from observing how these developments unfold (see **Part D**).

Finally, while the ACCC has indicated that the Discussion Paper is a starting point for the debate on new regulatory frameworks for "digital platforms" in Australia, the ACCC's Retail Marketplaces Report[5] shows that these are not required in the retail sector. The ACCC's Report observes that that no marketplace holds a dominant position, that consumers commonly switch between marketplaces and to other retail channels, and that sellers have strong incentives to – and do often – multi-home.[6] This leads the ACCC to conclude that it has "*not identified the same competition concerns with online marketplaces as it has with other digital platform services...*"[7]. Despite these observations about the retail sector, Amazon Australia notes that the Retail Marketplaces Report concludes that "*it is important that any framework or set of tools developed be capable of applying to online marketplaces in the future, given the potential for these markets to tip to a dominant firm*".[8] Given the significance of the regulatory reforms proposed in the Discussion Paper, before that "potential" is given any weight, a thorough analysis is needed to ensure that any intervention targeting specific firms in the retail sector is justified, proportionate, based on a clear rationale, and can demonstrate that it will effectively address specific identified harms. For the retail sector, that analysis has not been undertaken (See **Part E**).

[5] ACCC, "Digital Platform Services Inquiry: Interim report No. 4 – General online retail marketplaces" (March 2022) (**Retail Marketplaces Report**), see: Retail Marketplaces Report.
[6] ACCC, Retail Marketplaces Report, p 11; pp 78-9 and p 80.
[7] ACCC, Retail Marketplaces Report, p 13.
[8] ACCC, Retail Marketplaces Report, p 13.

PART A: ARE REFORMS NEEDED?

Amazon Australia supports a strong Australian economy, enabling the creation and growth of successful businesses and the promotion and protection of consumer welfare. Since Amazon opened its store, Amazon has innovated in ways that improved the retail experience for consumers and delivered the benefits of wide selection and competitive prices to consumers worldwide. Amazon Australia has provided local businesses with access to new customers and created local jobs and economic growth through our ongoing investments.

Australia's regulatory framework is central to promoting technological advancement, competition, and ultimately delivering the benefits of innovation to consumers, businesses and to Australia's economy. Amazon Australia does not believe the case has been made that Australia's existing competition framework is unable to respond to identified harms.

A1. The existing Australian competition and consumer regime is highly effective

Australia has comprehensive competition and consumer laws. While Australia's competition laws have been subject to periodic reviews, any reforms have been targeted to specific issues that are not already addressed by the existing regime. In line with existing practice, reforms should only be introduced if there is evidence that identified harms cannot be addressed through the existing regime or upcoming amendments (referred to below). This ensures reforms are not duplicative, do not result in parallel enforcement, dampen innovation and investment or create business uncertainty.

The Australian competition law regime has been reviewed at least nine times since 1974.[9] The Hilmer Review in 1993 recommended a national competition policy to apply uniformly across industries and regardless of ownership structure, which was implemented in 1995.[10] The last significant rewrite of the competition laws took place in 2010, which were then comprehensively reviewed in March 2015 (the Harper Review). At that time, the review did not conclude the CCA was ineffective, too slow, or too narrow to deal with matters within the Australian economy (see **Annexure, Box 1, p.27**). The review ultimately found that the structure and approach of the current regime remained appropriate to serve the needs of the Australian economy, concluding that "*our competition laws have served Australia well*" and that the *"central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and **projected** needs of the Australian economy*"(emphasis added).[11]

Australia's competition and consumer law regime has shown itself to be highly flexible and capable of addressing concerns as they have emerged. The existing regime is flexible and the ACCC has achieved a high degree of success to date with limited need for entirely new legislative regimes built around particular entities or a single sector of the economy. The fact that the industry-specific price signalling regime was never used further demonstrates the effectiveness and flexibility of Australia's competition

[9] *Trade Practices Act Review* (Swanson Committee) (1976), *House of Representatives Standing Committee on Legal and Constitutional Affairs* (Griffiths Committee) (1989), *Senate Standing Committee on Legal and Constitutional Affairs* (Cooney Committee) (1991), *National Competition Policy Review* (Hilmer Report) (1993), House of Representatives Standing Committee on Financial Institutions and Public Administration, *Cultivating Competition: Inquiry into aspects of the National Competition Policy Reform Package* (1997), *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review) (2003), Productivity Commission, *Review of National Competition Policy Reforms* (2005), *The Statutory Review* (Vertigan Review) (2014), *Competition Policy Review* (Harper Review) (2015).

[10] National Competition Policy Review (1993) (Hilmer Review) Terms of Reference included the principle that "*as far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership".*

law regime. More recently, the ACCC has demonstrated the flexibility of the misleading/deceptive conduct prohibitions to regulate identified harms arising from some "digital platforms". For example, in relation to the use and tracking of data and more recently, algorithm transparency and misleading advertising practices involving social media (see **Annexure, Box 2, p.27** for further details).

A2. Pending CCA and ACL reforms should be taken into account

Some of the topic areas identified in the Discussion Paper are already being addressed (at least in part) by regulatory reforms that are close to being passed or will be addressed by proposals already recommended to Government. In considering whether new regulatory frameworks are needed, any pending regulatory reforms and existing proposals should be more expressly taken into account , and time is needed to observe the effectiveness of those reforms once they are in effect.

Reforms to the unfair standard form contracts regime were before the Federal Parliament. These reforms, once passed, will substantially expand the current regime by introducing legal prohibitions on proposing, applying or relying on an unfair contract terms, expanding the scope of small business contracts to which the rules apply, and introducing pecuniary penalties that will match the penalties available for other breaches of the ACL and CCA (which have attracted fines of up to $153 million in previous cases).[12] These changes will drive improved outcomes for consumers and small businesses and will likely address several of the concerns regarding contractual arrangements between "digital platforms" and business users.[13] The Discussion Paper itself notes that these changes are *"likely to deter digital platforms more effectively from including potential unfair contract terms in their terms of use and privacy policies."*[14]

The ACCC is concurrently advocating for an economy-wide unfair trading practices prohibition, and Commonwealth and State and Territory ministers have agreed to conduct a consultation on this issue. Such a prohibition in combination with existing regulations and other pending regulatory reforms, would likely effectively address many, if not all, of the potential consumer harms identified in the Discussion Paper.[15] It would be duplicative to design and implement new regulatory frameworks to address consumer harms independently of these reforms and while these reform are advancing.

Amazon Australia suggests the ACCC allow time for the existing (ie, the unfair contracts amendments) and pending reforms (ie, the unfair practices prohibitions) to be implemented and enforced before seeking further new regulatory reforms to address similar topic areas identified in the Discussion Paper. This will allow for an understanding of the extent to which gaps - if any - exist. It will also help avoid regulatory duplication and ensure any reforms are necessary and proportionate.

A3. New regulatory frameworks should achieve the objectives served by the relevant regulator

The Discussion Paper recognises that there are also other regulatory review processes underway in Australia that cover similar ground to some of the issues raised in the Discussion Paper including the following:[16]

[12] In December 2021 the Federal Court ordered $153 million in penalties against Australian Institute of Professional Education Pty Ltd for unconscionable conduct and misleading and deceptive conduct in breach of the ACL.
[13] ACCC, Discussion Paper, pp 53 - 55.
[14] ACCC, Discussion Paper, p 43.
[15] See in particular, p 43 and following of the ACCC's Discussion Paper.
[16] ACCC, Discussion Paper, Attachment A Box A.1.

- The review of the *Privacy Act 1988* (Cth), which the Discussion Paper recognises may be able to address concerns regarding data practices of "digital platforms".

- The Review of the Australian Payments System, which considered whether the regulatory architecture of the Australian payments system remains fit-for-purpose and responsive to advances in payments technology and changes in consumer demand.

- The report by the Parliamentary Joint Committee on Corporations and Financial Services in October 2021 on Mobile Payment and Digital Wallet Financial Services.

- The Review of Australia's Cyber Security Regulations and Incentives, which proposed potential voluntary and regulatory measures in three key areas: setting cyber security expectations (including minimum standards for personal information and mandatory product standards), increased transparency, and protecting consumer rights (including remedies for consumers under the ACL).

- The Review of the Model Defamation Provisions, which included consideration of internet intermediary liability in defamation for the publication of third-party content.

As the cross-agency Digital Platform Regulators Forum acknowledged, competition, consumer protection, privacy, online safety[17] and data intersect. Recognising that there are some inevitable overlaps between the roles and responsibilities of different regulations and regulators in these areas, Amazon Australia recommends more specific consideration be given to how any proposed new regulatory framework that may be administered by the ACCC works with the other competent specialist regulators such as ACMA, the OAIC, the eSafety Commissioner and others, in order to avoid duplication, unnecessary red-tape, potential inconsistency and legal and business uncertainty.

Further, as reforms like the Review of the Australian Payments System will impact all aspects of the Australian economy, the ACCC should allow time for this (and other regulatory initiatives) to be resolved and take effect before seeking to introduce new regulatory frameworks.

A4. New regulatory frameworks for the retail sector are pre-emptive absent identified harms

The ACCC's Retail Marketplaces Report suggests the new regulatory framework proposed in the Discussion Paper should be capable of applying to marketplaces in the future.[18] This is despite the ACCC's recognition that the retail sector in Australia is dynamic, with multi-homing across sellers and consumers present, and that change can occur quickly.[19] Amazon Australia is concerned that if a framework or set of tools is introduced to apply to retail on a pre-emptive basis or developed to apply to retail in the future, absent of specific identified harms those reforms will be geared to sectors with different competitive characteristics, different activities and are therefore unlikely to be suitable for the retail sector. This risks stifling innovation and harming customers.

The Retail Marketplaces Report further recognises that some of the concerns raised by the ACCC are addressed by the proposed economy wide reforms which are already - separately - under consideration. These are a proposed unfair trading practices prohibition,[20] a proposed general safety provision,[21]

[17] For example, the *Online Safety Act 2021* (Cth) which became effective on 23 January 2022 and the industry codes which are currently being developed to address online harms.
[18] ACCC, Retail Marketplaces Report, p 13.
[19] ACCC, Retail Marketplaces Report, p 2.
[20] ACCC, Retail Marketplaces Report, pp 5, 8, 23, 39-40, 52.
[21] ACCC, Retail Marketplaces Report, pp 6, 23, 52.

penalties for unfair contract terms,[22] and proposed changes to privacy laws.[23] In circumstances where specific competition or consumer harms have not been identified and an existing packaging of pending reforms is proposed, the effectiveness of those reforms should be assessed, before seeking to introduce additional new reforms that address similar topics. This will avoid duplication and ensure that any new regulatory tools that are introduced (if and when specific harms arise) are necessary and proportionate.

PART B. OBSERVATIONS ON THE POTENTIAL NEW REGULATORY TOOLS IN THE DISCUSSION PAPER

The Discussion Paper outlines, at a high level, five potential new regulatory tools: (1) prohibitions and obligations contained in legislation, (2) codes of practice, (3) rule making powers, (4) measures to promote competition following a finding of harm, and (5) access for third parties.[24] Amazon Australia's observations on these proposals are set out below.

As an initial observation, the question about which new regulatory framework is appropriate for Australia is being asked too early. Referring to broad types of regulatory tools is not sufficiently precise to allow for an informed debate on the question of what any regulatory reforms should look like, nor does it allow for an effective assessment of the costs and benefits of different reform options for consumers and economic growth.

As a pre-cursor, the ACCC should:

- Conclude its consideration of stakeholders' responses to the Discussion Paper question "*What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia*" and its Digital Platform Inquiry. The ACCC will then be in a position to precisely articulate whether it has identified any specific competition or consumer harm(s) and provide an opportunity for industry participants to respond. Given the significant long term impact of the reforms proposed, broad references to harms from "digital services" need to be clarified and further developed, having regard to the broader sectors in which digital service providers compete.

- Conduct a fuller assessment of the extent to which existing laws and regulations provide substantive solutions to any identified harms. This should include consideration of any existing enforcement or industry compliance mechanisms that would resolve the identified harms without the need for reforms.

- Identify and consult on any remaining gaps to allow the proper assessment of whether new regulatory frameworks are necessary to address specific identified harms.

This approach would enable consideration of specific concerns and result in more effective reform proposals that create consumer, competitive, and economic benefits. It also seeks to avoid the long-term economic consequences of reduced innovation and investment. Amazon Australia looks forward to engaging further on any specific relevant reform proposals that may be developed.

B1. Prohibitions and obligations contained in legislation

The proposed regulatory tool outlined in the Discussion Paper is the potential introduction of new prohibitions and obligations in legislation, to address the issues broadly described in the Discussion Paper. This reform may include prohibitions on certain conduct and/or positive obligations requiring

[22] ACCC, Retail Marketplaces Report, pp 5, 8, 39-40.
[23] ACCC, Retail Marketplaces Report, pp 5, 40.
[24] ACCC, Discussion Paper, Chapter 7.

firms to conduct themselves in a particular manner. Amazon Australia makes the following high level observations in relation to this proposal.

First, we agree that there are challenges in crafting legislative amendments in a way which ensures they are sufficiently flexible to remain relevant and effective in response to inevitable changes to business models and the operations of digitised businesses, as well as broader innovations in digital services. This is especially true given the dynamic nature of a digital economy.

Second, proposing a "new" statutory regulatory regime in place of longstanding established competition law principles requires that the new regime is specific and sufficiently detailed to address identified harms. This makes it particularly important to have previously confirmed the activities of concern unambiguously result in consumer or competitive harm, including showing the concerns cannot be addressed through existing enforcement or remedial options (like a code) or pending reforms.

Third, the Discussion Paper does not limit this potential new regulatory tools to the CCA or ACL. However, the potential concerns described in the Discussion Paper relate to competition, consumer and fair trading issues. It seems therefore appropriate to focus on the existing broad economy-wide competition and consumer framework - including pending and potential reforms to the ACL (unfair contract terms and unfair practices), aimed at enhancing existing consumer and small business protections.

Fourth, the Discussion Paper refers to the Digital Markets Act (EU) (**DMA**) as an example of what legislative reforms might look like. The approach taken in the DMA is unique to the EU political and legislative context (see **Part D**) and there is no certainty that importing the DMA would not harm Australian innovation and investment disproportionately to its perceived benefits. A DMA style reform is also not consistent with the universality principle - i.e. that legislative prohibitions on anti-competitive conduct should be general in design not directed at one sector of the economy.[25] Additionally, numerous commentators, as well as the German government, have expressed concerns about the inflexibility of the DMA approach, and cast doubts on whether this is an appropriate long term solution in evolving digital markets (see **Annexure, Box 3, p.27**). Many of those concerns relate to the risks involved in implementing a "new" legislative regime with ambiguous provisions targeted to specific companies, each of which operate very different businesses in sectors with very different characteristics. The result is a high degree of uncertainty regarding the application of the regime and impact on competition as incumbent firms that provide the same services escape the application of the "new" regime.

Finally, no evidence is provided in the Discussion Paper that legislative reforms of the DMA's magnitude are needed in, or suitable for, Australia. Before further considering DMA style reforms, detailed consideration is needed of whether the harm to Australian innovation and investment would be disproportionate to the perceived benefits.

B2. Codes of Practice

The second potential regulatory framework outlined in the Discussion Paper is a "Code of Practice" similar to the approach being consulted on in the UK. The consultation had proposed that following a detailed investigation of a specific activity, the UK Competition and Markets Authority (**CMA**) would have the power to impose a code specific to that activity and firm.

[25] See Annexure of this submission, Box 8, p.30.

Amazon Australia submits that the type of reform being consulted on in the UK (including the adoption of activity-specific codes of conduct) is not needed. The existing CCA code regime has proven effective (see **Annexure, Box 4, p.28** for further details). The ACCC also already has the power to conduct market studies including to compel information from parties and therefore has a mechanism to address identified consumer harms (see Section **B3** below).

In relation to the ACCC's proposal to adopt aspects of the reforms being consulted on in the UK, Amazon Australia notes the following.

First, tailored interventions like those proposed in the UK (a code *plus* market intervention) to tackle the harms that arise from specific types of activities are better dealt with in a more flexible and targeted format, as provided for by the existing CCA regime. The Australian Product Safety Pledge is a good example of an Australian initiative that outlines "best practice" expectations of industry and that commits its signatories, including Amazon Australia, to a range of safety related responsibilities and reporting, beyond what is legally required of them.[26] Such an initiative drives positive behaviours and enables the identification of areas of risk and opportunities for improvement or even future regulatory reform if gaps are identified. The Australian Product Safety Pledge has been welcomed by the ACCC.

Second, in addition to voluntary initiatives such as the Australian Product Safety Pledge, mandatory industry codes are already provided for in the CCA, and have been an effective mechanism for addressing specific activities or concerns that have arisen in particular industries. The process by which industry codes are developed and implemented involves significant input from industry participants, the ACCC, and broad public consultation.[27] This process involves detailed analysis and robust evidence recognising the need to balance putting in place regulations to foster the effective operation of an industry without stifling innovation and choice. Examples include the Grocery Code[28] which was an industry led initiative, developed in response to concerns about the conduct of wholesalers and retailers towards suppliers. The Grocery Code drew on concepts included in a code developed by the CMA, but was implemented using the existing CCA framework. A subsequent review of the Code concluded that it was generally working well and had substantially improved dealings between signatories and suppliers (see **Annexure, Box 5, p.28** for further details).

The Discussion Paper refers to concerns regarding dispute resolution mechanisms. In Australia, there are good examples of effective dispute resolution measures being implemented through industry codes or, alternatively, an ombudsman appropriate to the relevant activities. Different dispute resolution processes - and in particular, different remedies - are likely to be most appropriate for different services, e.g. disputes relating to social media services/private messaging services are likely to differ from those relating to retail services and are likely to be best managed through a targeted regime. A code or ombudsman approach allows a tailored resolution and outcome specific to the concern. Targeted approaches in other sectors have been successful - for example, the Telecommunications Industry Ombudsman in the telecommunications sector (see **Annexure, Box 6, p.29** for further details).

Third, the Australian Industry Codes of Conduct Policy Framework has shown itself able to address specific harms that arise from particular activities across all those involved in the activity. Under the existing Australian industry code framework:

[26] ACCC Media Release (23 November 2020), see: Link.
[27] Department of Treasury, *Industry Codes of Conduct Policy Framework* (November 2017), see: Link.
[28] Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015 (Cth) (**Grocery Code**).

- codes are generally considered after attempts to solve identified problems through industry self-regulation have failed;

- codes allow for the development of highly targeted rules to address specific identified harms in relation to specific activities, which can then apply to all relevant industry participants. The more targeted the code intervention, the more likely the code is to succeed and the less likely any unintended consequences such as a loss of innovation. Codes also avoid regulatory duplication which helps promote business certainty;

- codes are typically developed in close consultation with relevant industry participants, to ensure that requirements are adequately tailored to specific business models, commercial realities and competitive dynamics;

- codes can be subject to a mandatory regular review to allow for improvements, for example the Grocery Code and Dairy Code[29] have each been subject to a recent in-depth review. This flexibility is appropriate for digital activities;

- codes are an efficient and cost-effective mechanism and can be implemented and then amended quickly; and

- codes can have remedies but importantly are flexible and include escalation mechanisms that provide some degree of proportionality, reduce the costs of compliance and, where necessary, provide more effective redress and enforcement outcomes than other options.

These principles overlap with the principles that the UK Government has identified as lacking in the UK's current regime which illustrates why the context to international reforms is crucially important.

Fourth, codes allow regulatory solutions to be implemented quickly, which can then be used to identify activities that fall outside the existing code framework indicating where a new regulatory framework may be needed. As a result, any new regulatory framework is more likely to be proportionate and non-duplicative.

Fifth, codes under the CCA can apply across a sector to all participants. This contrasts with the UK proposal that targets individual firms based on an arbitrary distinction between "digital" and "non-digital" participants, despite the digitisation of the economy. By applying to all sector participants, the existing code processes create legal certainty, ensure a level playing field, and prevents individual firms from facing unfair barriers to investment and innovation.

A UK style regime which designates individual activities as having "Strategic Market Status" and applies a bespoke code of conduct and possibly remedies to that specific company and activity is a significant departure from an Australian regulatory framework that has worked well to date. Before considering whether to import a wholly new regulatory regime borrowed from the consultations that have been ongoing in the UK, the reasons why the existing CCA code framework is not sufficient should be explored. This is especially the case when the existing CCA framework appears to provide a number of the benefits that the UK proposal is seeking to introduce.

In summary, Australia has an existing, flexible, accepted and well known CCA code framework. The ACCC has used the CCA framework to respond to concerns identified in respect of its initial Digital Platform Inquiry. Other regulators, such as the eSafety Commissioner, are relying on codes to keep Australians

[29] Competition and Consumer (Industry Codes—Dairy) Regulations 2019 (Cth) (**Dairy Code**).

safe in their online activities. Accordingly, Amazon Australia does not believe the bespoke digital centric regulatory reforms such as those being consulted on by the UK Government are needed in Australia.[30] There is also no evidence outlined in the Discussion Paper that UK style reforms would benefit competition and Australian consumers materially more than the ACCC's existing powers.

B3. The conferral of rule-making powers on a regulatory authority

The third potential new regulatory framework outlined in the Discussion Paper is legislation to provide the ACCC or another authority with the powers to develop and implement rules to achieve overarching objectives or principles contained in legislation.

There are three reasons why rule making powers to achieve competition and consumer welfare objectives in respect of digital business are not appropriate.

First, as outlined in **Part C**, reforms should be non-discriminatory and apply to all those businesses involved in an activity. There does not seem to be a coherent basis for proposing rule-making powers for the ACCC only in respect of "digital platforms" when many businesses are increasingly digitised or provide the same or similar service in a non-digital context.

Second, there is little Australian precedent for the competition regulatory authority to have rule-making powers concerning broad policy matters and equally few examples of an authority having the ability to enforce its own rules. For example, the Australian Energy Market Commission (**AEMC**) makes rules under the legislation that governs electricity and natural gas markets but does not propose rules (except for minor or non-material changes). It makes decisions on rule changes requested by stakeholders, following a rule amendment procedure including public consultation and publication of relevant documents.[31] More recently, the ACCC's rule making powers under the Consumer Data Right have been transferred to Treasury.[32] Even where rule making powers were conferred on the ACCC, such as the ACCC's limited rule-making powers under the telecommunications regime, these have been little used with the ACCC preferring the broader powers and prohibitions contained in the CCA.

Third, rule-making powers are best vested in a regulator when those powers address highly specific, technical issues with objective criteria, such as financial services. Broad policy decisions concerning competition or consumer welfare are better suited to independent decision makers.

Even assuming it was decided to regulate a dynamic sector like the digital economy by giving the ACCC its own rule-making powers, there are two important considerations. (1) The ACCC, as a competition agency, has a long history of enforcing broad competition law principles in Australia to promote consumer welfare. A regulatory agency that dictates rules and regulations governing how businesses operate involves a belief that the agency is better placed to determine how the sector should operate. Instead of allowing competition to generate consumer benefits, with appropriate enforcement, the ACCC would become deeply involved in the daily operation of the digital economy in Australia. Proposing rule-making powers therefore involves more than taking on an additional "function" and requires a shift in operation, thinking and, indeed, conceptualisation of the agency's role in the Australian economy. This proposal is not a simple easy "add-on" to the CCA or the ACCC's existing functions. (2) The complexity associated with any such rule-making powers requires far greater

[30] In the ACCC's Online Marketplace inquiry no submissions were received by the ACCC recommending that a CMA (or DMA) style regulatory reform was needed.
[31] See: https://www.aemc.gov.au/regulation/energy-rules.
[32] These changes were introduced through the Treasury Laws Amendment (2020 Measures No 6) Bill 2020.

assessment than the current outline in the Discussion Paper. Rule-making powers should never be unconstrained, and there should always be procedural fairness checks that include, for example:

- a requirement to conduct an impact assessment of the likely costs and benefits of any changes, to ensure that they are proportionate;
- a requirement to conduct a consultation process before imposing new rules. This would ensure that affected firms can participate in the process, and would assist in reducing the risk of rules having unintended negative consequences on legitimate business activities;
- imposing time limits and periodic reviews for rules that are implemented, to ensure that they remain relevant and fit for purpose; and
- an effective appeals regime to a Court or the Australian Competition Tribunal to provide effective oversight of the decision-making process and robust quality assurance, including merits review.

When considering this proposal, it is important to assess the degree of complexity required to ensure any rule-making powers are appropriate and proportionate, including procedural fairness and appropriate review mechanisms. More detail regarding the proposed rule-making powers (the scope, application, review mechanisms and enforcement) is central to any consideration of the utility, proportionality, and costs and benefits of such a regulatory framework.[33]

B4. Pro-competition / pro-consumer measures following a finding of a competitive or consumer harm

The fourth potential new regulatory framework outlined in the Discussion Paper is a provision that would allow pro-competition or pro-consumer measures to be put in place or imposed on a particular firm or set of firms, following a finding of a competitive or consumer harm. Amazon Australia understands that this proposal is modelled on the existing UK CMA process (ie, CMA may impose remedies at the end of a market investigation but not a market study).

As with the Discussion Paper's reference to "codes of practice," there are already existing processes and tools within the CCA that enable the introduction of pro-competition or pro-consumer measures. For example, undertakings given by parties to the ACCC. Industry codes also have a role and can include positive requirements that require firms to take certain actions (as well as requirements to refrain from other actions). The Australian Government and ACCC have, in the past, recognised the benefits of industry codes as reducing regulatory burdens for business while promoting competition and benefits consumers (see **Annexure, Box 4, p.28** for comments from the ACCC, Treasury and the Business Council of Australia including that "*an industry code of conduct can be an efficient mechanism to address these issues." - Mick Keogh (Deputy Chair of the ACCC)"*).

Other measures within the existing framework that have been used to achieve pro-competition and pro-consumer outcomes include court-enforceable undertakings, which often incorporate pro-competition and pro-consumer measures. For example, in 2009 the ACCC accepted undertakings from all major supermarkets not to give effect to or enter into restrictive lease provisions that could hinder competition between supermarket. ACCC chairman Graeme Samuel noted at the time that this was *"… a major breakthrough for grocery competition in Australia… reducing the barriers to entry for new and expanding players opens the possibility for Australian consumers to have greater choices in where to*

[33] The ICN acknowledges and supports need for fair and effective procedures for administrative decision making including an opportunity to seek review by an independent, impartial adjudicative body (e.g. a court, tribunal, or appellate body).

shop, and potentially pay lower prices as a result" (emphasis added)[34] (see **Annexure, Box 7, p.29**). Likewise, various telecommunications providers have given the ACCC enforceable undertakings to improve their advertising practices so that consumers are better informed.[35]

Another example of the flexibility of the existing regulatory framework was the approach adopted in relation to the introduction of the Goods and Services Tax. Under the former s 75AU of the "price exploitation" regime in Part VB of the CCA, companies could provide a "public compliance commitment" with the provisions designed to avoid prices being increased at more than the 10% GST. These statements provided a form of competitive compliance, by allowing firms to signal their willingness, and to detail the steps they would take, to ensure that their customers were not disadvantaged by the introduction of the GST.

These are just some examples, among many, that demonstrate pro-competition remedial outcomes are achievable under the existing CCA regime. Further consideration should be given to the existing options available to the ACCC and whether these are able to resolve the ACCC's concerns, before considering a "new" remedial regulatory framework that would need to be incorporated into the CCA.

B5. The introduction of a third-party access regime

The final potential new regulatory framework outlined in the Discussion Paper is the option of classifying certain services offered by a few large companies as "essential facilities" which are subject to obligations akin to an access regime.

Third party access regimes in Australia have not historically resulted in quick outcomes for access seekers or access providers, have required multiple reviews and refinements (which have taken time to implement), and have imposed significant costs on access providers and access seekers for little benefit.

The National Access Regime (**NAR**) in Part IIIA of the CCA was introduced in 1995. In its review of the NAR in 2013[36], the Productivity Commission recommended retaining the NAR but cautioned that its application should be more strictly limited to situations where there is a clear monopoly power. It also made substantial recommendations for changes to the regime in response to widespread concerns about its core tests and the processes for resolving disputes. Experience with the NAR in operation continues to result in concerns that the regime does not produce business certainty and has resulted in significant cost and delay when invoked. This has led to questions as to whether the NAR balances efficient infrastructure investment against constraining monopolist practices. Research on recent cases under the NAR and consultation by the Office of Best Practice Regulation in 2021 has called for further amendments to remove or reduce unnecessary costs and delays.[37] While corrections may be welcome, the fact that further legislative amendment is needed shows the inefficiency of this form of regulation, with a tendency to create uncertainty and limit efficient investment.

The fundamental concept underpinning third party access regimes in Australia is that the regime applies to services provided by means of a facility which is uneconomic to duplicate.[38] Access regimes typically identify the specific services provided by such a facility, and provide a regime by which third parties have the ability to seek access to those services, and to determine the terms and conditions of access to

[34] ACCC Media Release (18 September 2009), see: Link.
[35] See Link and Link
[36] Productivity Commission, "Inquiry Report: National Access Regime" (No. 66, 25 October 2013), available at: Link.
[37] Office of Best Practice Regulation, "Regulation Impact Statement: Timeliness of processes under the National Access Regime" (2021), available at: Link.
[38] Hilmer Review, p 239.

those services. An access regime is ill-suited to services which are not provided by way of a facility, are more akin to intellectual property services, and which are not in a dominant position.[39] The inappropriateness of imposing an access regime to such services is acknowledged in the exclusion of the use of intellectual property from the definition of "service" in the general third party access regime in Part IIIA of the CCA.

An access regime in a retail context is particularly inappropriate for the following reasons:

- First, services that have been subject to access regimes (such as ports or gas-pipelines) are non-replicable/non-substitutable services. Retail services, in contrast, can be easily replicated and substituted as shown by the entry of recent new marketplaces in Australia. Retail services for consumers should not be confused with services that are uneconomic to duplicate.

- Second, as discussed further in **Part E** below, online marketplace services are subject to rivalrous competition, comprise only a small part of the retail sector, and face significant competition from a broad range of retailers.[40] Indeed, suppliers and customers in the retail sector have more options than ever in which to distribute and purchase retail products, and there has been recent entry and innovation. There are also extremely low barriers to entry in retail. Transposing an access regime onto a contestable service such as retail would be inappropriate.

- Finally, imposing access obligations only on certain providers of retail services reduces their incentives to innovate. It could also result in retail incumbents inadvertently being insulated from competition harming consumers in the long run.

Regulatory tools need to be flexible. An access regime would be ill-suited to dynamic sectors as it risks being unable to keep up with the pace of change. If services are generally replicable (as they are not based on unique infrastructure) and customers have options, an access regime does not appear necessary or proportionate and could risk stifling innovation, and increasing costs to consumers.

B6. Are new laws needed

The context for the ACCC's inquiry is whether, as business models evolve, new laws are needed. While it is understandable to ask this question, the litmus test for whether a new regulatory framework is needed is whether it can address proven consumer harms in a targeted way, without being duplicative or becoming a barrier to innovation and competition in other areas. In Amazon Australia's view, the existing CCA regime has a long history of delivering consumers the benefits of competition in Australia. The existing CCA regime, including the pending reforms (see **Part B** above), is robust, flexible and has proven sufficient to address developments in the economy to date. Indeed, the ACCC has various tools that it could use to address the harms referred to in the Discussion Paper. These factors are amplified when the highly competitive nature of the retail sector is taken into account (see **Part E** below). Taken together, Amazon Australia suggests the proposed new regulatory frameworks would not meet this test.

The regulatory frameworks in the Discussion Paper involve the direct regulation of specific businesses. Rather than relying on competition to generate innovation, investment and consumer benefits, what is

[39] As the ACCC's Retail Marketplaces Report notes "… *no one marketplace holds a dominant position in Australia"* (p.81).
[40] Including numerous alternative marketplaces and well-established (and much larger) retail incumbents such as Coles, Woolworths, Myer and others who sell through their own and in some cases third party operated channels

proposed is a material shift in Australian competition policy away from the framework that has served Australia well for the last 50 years. Before taking such a step more consultation is needed.

The ACCC's Retail Marketplaces Report found that no one online marketplace holds a dominant position in Australia,[41] and indicated that this is not expected to occur, particularly in the short to medium term.[42] It noted that online retail does not account for a substantial share of retail sales in Australia[43] and there are many online and offline alternatives to online marketplaces.[44] It also did not identify the same competition concerns with online marketplaces as it has with other services,[45] and noted that if a firm became the top marketplace in the future, this would not necessarily raise competition concerns - unless the firm behaved in an anticompetitive manner.[46]

In the absence of any established competition harms that cannot be addressed under current laws, Amazon Australia considers that it is not appropriate to introduce new regulatory frameworks that will apply (or are capable of applying) to the retail sector as: (1) there is little clarity as to the types of regulatory tools suggested as being needed to address theoretical future concerns; and (2) the digital platforms referred to by the ACCC as raising harms differ greatly from sector to sector.

If specific harms are identified in the future, at that point, the ACCC should (1) consider the extent to which existing laws and regulations (as in place at that point in time) provide substantive solutions; and (2) identify and consult on any remaining gaps to allow the proper assessment of whether new regulatory frameworks (including, for example, an extension of any rules that are already in place for other services) are necessary and proportionate.

PART C. PRINCIPLED APPROACH TO PROPOSED CCA REFORMS

All business models inevitably evolve over time. Given this, a principles based approach is most appropriate when considering the need for, and shape of, any potential changes to the current CCA or ACL regime. Principles ensure that the right balance is struck to achieve and promote the goals of competition, choice and innovation.

C1. Overarching principles for assessing whether new regulatory frameworks are needed and if so the shape of any proposals

Amazon Australia proposes that any new regulatory framework should be consistent with and assessed in light of the principles outlined below.

Principle 1: Regulation should be targeted to focus on specific activities where there are specific identified harms, rather than companies or sectors more broadly.

The Discussion Paper seeks stakeholder views on the question "*What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?"* Identifying harms - and the specific activities that may result in those harms - is the first step to assessing whether there is any need for reforms to the existing CCA and ACL regime.

[41] ACCC, Retail Marketplaces Report, pp 2, 11, 81, 83.
[42] ACCC, Retail Marketplaces Report, p 83.
[43] ACCC, Retail Marketplaces Report, p 2.
[44] ACCC, Retail Marketplaces Report, pp 11, 76, 78-9.
[45] ACCC, Retail Marketplaces Report, p 83.
[46] ACCC, Retail Marketplaces Report, p 83.

Having posed the question, the Discussion Paper then contemplates that, in some cases, potential new regulatory frameworks might apply only to specific "digital platforms" that have entrenched market power and/or a strategic market position.[47] A presumption that regulatory intervention is justified because an entity has market power, a certain status, or a particular mode of conducting business (or form) misses the first step outlined above[48] (and the first COAG principle noted in **Section C2** below). Such presumptions carry the following risks to competition, choice and innovation:

1. *Reform proposals should be defined in a way that clearly specifies the relevant activities the subject of the reform, irrespective of the provider or whether the firm first developed as a digital business or not, or how the majority of revenue is generated.*

   As business models evolve and the line between digital and non-digital businesses blurs (especially with the increasing digitisation of all businesses), proposed reforms should focus on activities and apply to all those who engage in the activity. Otherwise, focusing on increasingly artificial and blurred concepts such as "digital" or "platforms" risks undermining the rigour needed to justify proposed reforms.

   For example, of the concerns raised in the ACCC's Discussion Paper relates to dispute resolution procedures. In Australia, targeted dispute resolution procedures to tackle specific issues have already been utilised in other sectors such as telecommunications (see **Annexure, Box 6, p.29**).

2. *Consumers will lose out if broad restrictions, not specific to an activity, are placed on selected companies, preventing these companies from injecting choice, competition, and innovation into adjacent activities.*

   Companies with innovative business models are often well placed to introduce competition to incumbents across the economy.[49] For example, Amazon's innovative introduction of "just walk out" technology in grocery stores,[50] which enables a customer to select items and leave the store without scanning items or visiting a payment point, has resulted in traditional grocers expanding their own capabilities.[51] If the result of reforms is that it becomes difficult to challenge incumbents in adjacent or unrelated sectors, consumers and competition will lose out.

3. *Focusing on specific companies could create competitive distortion between firms competing in the same market.*

   One of the most oft-quoted and well accepted principles in competition law is that competition laws protect the competitive process, not specific, individual competitors.[52] Regulation focused on selected companies' operations risks creating an unlevel playing field by inadvertently shielding well-established incumbent firms. For example, in the retail sector, large incumbents (such Woolworths or Wesfarmers) may fall outside of a designation directed at key "digital platforms" or

[47] ACCC, Discussion Paper, p 72.
[48] Being the identification of specific harms that arise as a result of specific activities.
[49] In the UK, the Government consultation recognised that leveraging is not inherently problematic or anti-competitive as entry into a new market by an operator with strategic market status in another market is likely to present a healthy disruptive force to a different incumbent with market power, and it would be wrong to stand in the way of this disruptive entry. See DCMS and BEIS, "A new pro-competitive regime for digital markets" (CP489, July 2021) paragraph 92: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.
[50] See: Link.
[51] See: Link.
[52] Maureen K. Ohlhausen and John M. Taladay, "Are Competition Officials Abandoning Competition Principles?", p 3 (Journal of European Competition Law and Policy).

a firm with a "strategic market position", notwithstanding their extensive digital presence, entrenched positions and large number of customers who use their services daily in Australia. The potential for perverse outcomes can be seen in the case of a conglomerate firm with a business unit that operates a hybrid marketplace and another business unit operating physical stores and an online marketplace. If one set of rules apply to the physical store and a different set to the hybrid store, this would create perverse incentives including to avoid offering customers an online option. It could also shield the physical stores from online competition to the detriment of consumers.

4. *Treating "digital platforms" as a single group may result in regulation that is not specific to the activities of those caught.*

   References to "digital platform"[53] capture a range of very different firms, each with different business models, each engaged in activities in sectors with very different characteristics. As a standalone concept, "digital platforms" does not promote certainty or clarity. Also, the types of services identified by the ACCC to date as raising concerns, being online private messaging, app marketplaces, ad-tech, and search services[54] give rise to very different sets of considerations.

   Consumers are best served when firms are free to innovate and stimulate competition. This becomes more difficult when a firm is subject to additional layer of, or entirely new regulatory burden simply because it is perceived to be - or satisfies an arbitrary definition of - a digital platform. Targeting specific activities causing consumer and competitive harm would avoid the risk such a broad-brush approach entails.

This focus on activities, rather than specific firms or terms like "platforms', is consistent with well-established principle that the CCA should apply to all businesses generally. This universality principle was referred to by the Harper Committee in 2018 in its review of the former repealed sector-specific price signalling regime (see **Annexure, Box 8, p.30**).

Principle 2: A detailed review of the relevant sector dynamics is necessary to consider the case for any regulatory change and to ensure that the scope of any proposal reflects commercial realities, and is proportionate to the harms identified.

If specific activities are identified and defined in accordance with Principle 1, an assessment of market dynamics is needed to determine whether reforms are proportionate or needed.

For example, the ACCC's Retail Marketplaces Report refers to concerns about hybrid marketplaces promoting the sale of its products over those of sellers.[55] Testing this concern will show that it is unlikely to lead to consumer harm. (1) Amazon's stores succeed because of Amazon's customer centric focus, delivering what customers want (selection at coemptive prices). Sellers are a significant part of this success. (2) Historically, Amazon operated separate "zShops" which provided third parties with separate product pages. When that model did not lead to sufficient seller sales, Amazon included all seller offers along-side its own on a single product page. Over the years, Amazon has implemented numerous innovations to support and increase sellers sales on the store. Amazon helps sellers compete against Amazon by investing in and offering them the very best selling tools, such as tools that help sellers manage inventory, process payments, track shipments, create reports, and sell across borders, and this includes delivery programs - which have meaningfully improved the customer experience of buying from

[53] ACCC, Discussion Paper, p 2.
[54] ACCC, Discussion Paper, p 2.
[55] ACCC, Online Marketplaces Report, p 60.

sellers. As a result, in the US sellers on Amazon have increased almost every year since 1999 to 58% of Amazon's physical gross merchandise sales (2018).[56]. This is because it is not a zero-sum game, and both can succeed. (3) Amazon Australia works hard to ensure sellers succeed as they distribute their goods across many different stores (an often different marketplaces) and Amazon must continuously earn their trust so they choose to distribute through Amazon Australia among their many options. (4) For these reasons, preferencing as outlined would be contrary to Amazon Australia's economic incentives and it is a contradiction to suggest Amazon Australia would act to harm the sellers Amazon is investing in and supporting.[57]

The ACCC's "digital platform" reports involve the ACCC examining certain digital activities involving certain participants within the economy. As a next step, there should be a detailed assessment of any activity identified as giving rise to consumer or competitive harm, encompassing all relevant participants, and the full range of constraints on those participants. This assessment should include: (1) whether the existing regulatory framework including pending reforms is already capable of addressing the identified harms; and (2) if not, the appropriate scope and shape of any potential new framework. This approach would ensure that the scope of proposed reforms capture all those involved in the relevant activity, irrespective of whether they are a "digital" business or not.

Principle 3: The scope of any proposals should be clearly and precisely articulated, to ensure that they are necessary and proportionate and do not create an unlevel playing field to the detriment of consumers and competition.

If specific consumer harms are identified and defined in accordance with Principles 1 and 2 and existing laws are insufficient, any potential new regulatory tools should be designed with precision to address the specific harms identified and not go beyond what is required to address the harm.

Precision is necessary to ensure any proposed new regulatory tools do not impinge on legitimate and pro-competitive business activities to the detriment of consumers, or lead to legal and business uncertainty. To meet the objectives of competition, choice and innovation, any proposed new regulatory tool should have: (1) a clearly defined objective and scope; and (2) a clear analytical framework for assessing issues such as market power or market status, with mechanisms built in to avoid errors.

Precisely articulated reforms will then help to test whether the reforms risk creating an unlevel playing field and shield "non-digital" businesses. For example, concerns raised in the ACCC's Discussion Paper often do not relate solely to "platform" businesses, nor solely to "digital competitors". For example: (1) Risks associated with collection and use of consumer data are not unique to digital or "platform" businesses. All businesses, across different sectors and with varying business models, gather and use data. In recent decades, improvements and cost reductions in computing have enabled companies to more efficiently store and process information and various industries have been quick to embrace data-driven methods, including airlines, banks, cinemas, hotels, restaurants and retailers (with long standing loyalty schemes), telecom, and finance (including credit cards, banking, and insurance). (2) Self-preferencing can present a risk in any business that supplies its own brand products alongside competing third party products or services, or facilitates access to third party products or services (for example, traditional retailers and grocery stores). If new regulatory frameworks only apply to certain firms this could be to detriment of competition and consumers.

[56] See Jeff Bezos, Letter to Amazon Shareholders, 2018. Available at: Link
[57] See Julie Carlson, "Don't Bite the Hand That Feeds You: Amazon's Self-Preferencing Paradox" 2 May 2022. See Link.

Principle 3 promotes competition and consumers' interests by ensuring that any proposed reforms can be shown to be: (1) proportionate to and address the specific activities where harms have been proven to exist, and (2) non-discriminatory, by applying to all firms engaged in those activities.

Principle 4: New regulatory frameworks, if considered, should be as flexible as possible and kept under regular review, so that they can easily adapt to address evolving issues.

In addition to reform proposals being clear and precise, in accordance with Principle 3, any reforms must recognise that business models and developments in technology will continue to evolve. Accordingly, any proposals for new regulatory frameworks should address how they remain relevant and continue to effectively protect competition, choice and innovation over time. One important mechanism for achieving this is the inclusion of review processes. For example, industry codes prescribed by regulation under s51AE of the CCA include regular review mechanisms. The Competition and Consumer (Industry Codes - Food and Grocery) Regulation 2015 requires that the Minister must cause 2 reviews to be undertaken in relation to the operation of the Food and Grocery Code of Conduct 2 to 3 years after commencement, to assess the impact of the code in improving commercial relations between grocery retailers, wholesalers and suppliers (see **Annexure, Box 9, p.30** for details of review mechanisms).

Principle 5: New regulatory frameworks should also factor in procedural fairness and certainty.

If proposed reforms are precise and adaptable in accordance with Principles 3 and 4, the proposal needs to cover procedural fairness concerns and allow affected parties to request an appropriate form of review of decisions that have a material impact on their activities. The Discussion Paper outlines a very broad range of potential reform frameworks, ranging from legislative change to rules made by a regulator, and the appropriate procedural and substantive review mechanism is likely to differ, depending on the reforms proposed. Amazon Australia submits that procedural fairness requirements are central to any further development of the Discussion Paper's proposed reforms.

Business certainty is also equally important. In this respect, Amazon Australia notes the ACCC's recent announcement of the cross-agency Digital Platform Regulators Forum as a mechanism to increase cooperation and information sharing between regulators, avoid duplication and streamline regulatory initiatives.[58] As recognised by the Regulators Forum, proposed reforms should not be duplicative or result in parallel enforcement and must ultimately promote business certainty.

C2. The Council of Australian Governments (COAG) principles

The principles outlined are consistent with, and should be followed alongside, COAG principles of best practice for the development of regulation[59] (outlined in **Annexure, Box 10, p.31**). The COAG principles include a direction to "*consider a range of feasible policy options, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed".*

C3. Reforms in retail are not needed but if proposed should follow a principled approach

The ACCC's Retail Marketplaces Report did not identify current competition concerns but suggests that regulatory tools developed to address concerns for other services be capable of applying to online

[58] ACCC Media Release (11 March 2022). See: Link.
[59] See: Link.

marketplaces.[60] This broad-brush suggestion appears contrary to the principles outlined above and what the ACCC says in its Discussion Paper, namely that *"the rules might need to be specifically tailored to each digital platform service with a high level of precision, to target the specific conduct that causes anti-competitive harm."*[61] A pre-emptive approach, such as that suggested, would present the following risks:

- Focusing reform solely to target regulation of online marketplaces risks creating an unlevel playing field and shielding non-marketplace retail businesses to the detriment of consumers and competition. The ACCC's Report recognised that consumers switch between online and offline alternatives,[62] and several of the potential concerns raised by in the ACCC's Report are not unique to marketplaces. For example, self-preferencing, to the extent it raises competition concerns, can occur in any retail business where a business sells its own products alongside third party products. Indeed, "private brands" are much more prevalent in some of Australia's largest bricks and mortar retailers, with some having a very high proportion of private brands relative to their suppliers' brands.

- The retail sector is highly competitive, dynamic, and quickly evolving - as recognised by the ACCC.[63] If concerns about any possible specific harms were to emerge, to ensure that the scope of any future reforms is correctly drawn and captures all market participants engaging in the relevant activity, reform proposals would need to account for sector dynamics at play at the time that specific harms are identified.

- Other firms in scope of the ACCC's Digital Platform Inquiry have different business models and operate in sector with fundamentally different characteristics to Amazon Australia's business - as set out in the ACCC's prior interim reports. Treating marketplaces in the same way is inconsistent with the principles set out above.

We urge the ACCC to monitor and wait until specific identifiable harms – if any – emerge in the retail sector. If competitive or consumer harms are identified, the ACCC should follow the principled approach suggested rather than applying a broad-brush approach.

Data portability

The Discussion Paper states that the ACCC is considering whether measures to address "incumbents' data advantage", such as remedies aimed at promoting data portability, may be effective in addressing competition concerns in the supply of "digital platform services".[64] The Discussion Paper then states that potential measures could include those found by the ACCC in its earlier reports. For example, the Search Defaults and Choice Screens Report[65] recommends that, subject to consideration of privacy impacts as well as careful design and ongoing monitoring, search engine providers should provide access to click-and-query data, and potentially other datasets. Applying these proposals to retail marketplaces raises the following concerns:

[60] ACCC, Discussion Paper, p 3.
[61] ACCC, Discussion Paper, p 87.
[62] ACCC, Retail Marketplaces Report, pp 11, 76, 78-9.
[63] See for example, ACCC, Retail Marketplaces Report, p 2.
[64] ACCC, Discussion Paper, p 88.
[65] ACCC, "Digital Platform Services Inquiry – September 2021 Report on market dynamics and consumer choice screens in search services and web browsers: Issues Paper" (March 2021) (**Search Defaults and Choice Screens Report**).

First, retail marketplace services are wholly unlike search engine services. As The ACCC found in the Retail Marketplaces Report Amazon Australia is not the largest marketplace,[66] consumers and sellers have options and shop across channels; they also have data alternatives, and marketplaces entry has occurred and some have grown quickly[67] (see **Part E** for further detail).

Second, the ACCC accepts that data enables marketplaces to improve their services and improve product recommendation algorithms which benefit consumers.[68]

Third, while some marketplace sellers would value access to data on consumers that purchase their products, including contact details, "*the ACCC recognises the inherent complexities in sharing this data, including the potential impact on an online marketplace's incentives to invest in its services and likely significant privacy concerns with sharing consumer data*."[69] Other complexities include defining the scope of what is or isn't subject to data portability, how to transfer data given data formats, and dealing with proprietary data intertwined with a business's intellectual property.

Fourth, data portability is a form of forced sharing and for reasons set out in **Section B5**, that concept is not appropriate in a sector like retail where competition is strong, entry costs are low, and marketplace sellers have many options and can acquire data in an easily usable form through range of e-commerce solution providers like Omnivore,[70] Channel Advisor,[71] and many others.

Finally, developing measures to address incumbents' data advantage in internet search engine services and applying those measures to retail would impose a regulatory framework conceived for a very different industry and activity. The type of data considered in the Retail Marketplaces Report (data on consumers that purchase products and contact details) is different from data derived from and generated by search engines.

Before data portability reforms are proposed a careful cost/benefit assessment taking into account the sector's characteristics and dynamics would be appropriate. For example, could reforms stifle an online marketplace's incentives to analyse its data to improve services offered to customers?

Transparency

The Discussion Paper refers to a lack of transparency in "digital platform services" noting the ACCC is considering measures to address perceived opacity in areas such as algorithms and pricing.[72] The paper however refers to opacity in relation to prices for digital advertising and ad tech services.[73] Concerns about ad tech and digital advertising services do not provide a basis for the ACCC to recommend the introduction of a new regulatory framework developed for the purpose of addressing a perceived need in those sectors, in the retail sector.

Taking the retail sector (of which marketplaces are a small part) as an example:

[66] ACCC, Retail Marketplaces Report, p 82.
[67] ACCC, Retail Marketplaces Report, p 78.
[68] ACCC, Retail Marketplaces Report, p 76.
[69] ACCC, Retail Marketplaces Report, p 75.
[70] See https://www.omnivore.com.au/
[71] See https://www.channeladvisor.com/au/
[72] ACCC, Discussion Paper, p 101.
[73] ACCC, Discussion Paper, pp 101 - 102.

- Customers can access a wealth of product and pricing information online. All retailers and sellers can access specialist third party ecommerce providers to assist them optimise their product offering.

- The development of algorithms requires significant investment and resources. As the ACCC's Retail Marketplaces Report found opacity on the working of algorithms serves a legitimate purpose in preventing potential competitors from copying and otherwise free-riding the investment required to develop the algorithms.[74]

- The ACCC's Retail Marketplaces Report also found that maintaining a degree of opacity over algorithms prevents sellers from misusing or gaming the algorithms to harm other sellers and results in poorer outcomes for customers.[75].

Reforms designed for online search and then applied to algorithms for marketplaces without considering the specific sector (and differences) and finding consumer or competitive harm, risk stifling legitimate conduct that promotes efficiencies[76] and delivers consumers benefits.

Search

The Discussion Paper notes the ACCC has formed a view on the need for specific rules to prevent anti-competitive conduct by particular search engine providers in the supply of general search services.[77] Such measures should not apply to the retail marketplaces.

The ACCC's Retail Marketplaces Report acknowledges, it has not identified the same competition concerns with online marketplaces as it has with services such as search engines.[78] The ACCC also observed that self-preferencing does not appear to have resulted in competitive detriments, likely due to the alternative available to sellers to reach consumers.[79] The Discussion Paper acknowledges there may be legitimate justifications for conduct (e.g. promoting efficiency) that need to be carefully considered in each instance.[80] Indeed, the benefits of search in retail marketplaces include that: (1) search functions offered by online marketplaces can reduce the effort required from consumers to find what they are looking for;[81] and (2) the search function provided by marketplaces generally prioritises products that consumers are most likely to value.[82]

Absent identified harms there appears little justification for proposing search reforms for marketplaces in the retail sector. If broad-brush search reforms were proposed, this could lead to reduced or inefficient search functionality as the incentives to invest to improve the consumers' shopping experience change.

Summary

New regulatory frameworks of the magnitude and significance like those outlined in the Discussion Paper should follow clear principles as outlined in this **Part C**. Any further future consideration of the

[74] ACCC, Retail Marketplaces Report, p 59.
[75] ACCC, Retail Marketplaces Report, p 59.
[76] ACCC, Retail Marketplaces Report, p 66: "*Second, sellers' adoption of pricing algorithms can also benefit the competitive process if sellers are using them to compete for sales".*
[77] ACCC, Discussion Paper, p 82.
[78] ACCC, Retail Marketplaces Report, p 13.
[79] ACCC, Retail Marketplaces Report, p 73.
[80] ACCC, Discussion Paper, p 87.
[81] ACCC, Retail Marketplaces Report, p 23.
[82] ACCC, Retail Marketplaces Report, p 23.

Discussion Papers' reforms should be reformulated to show how the proposed reforms satisfy a clear set of guiding principles. This avoids proposing reforms when none are needed or proposing reforms specific to some firms which could prioritise and protect incumbent competitors instead of the competitive process.

PART D. THE RELEVANCE OF GLOBAL PROPOSALS

There can be benefits in sharing experiences across borders and learning from other jurisdictions. This does not however suggest that Australia should follow regulatory reforms adopted in other jurisdictions.

D1. The context to international reforms

International reforms are often developed and imposed in very different political, economic and legal contexts which need to be considered along with the reforms themselves. A good example is the EU's DMA which took a highly prescriptive legislative approach to avoid fragmented implementation across the 27 Member States. In addition, some commentators have observed that a key political driver behind the DMA was a desire to promote local European "champions" – an objective contrary to competition principles.[83] As Frederic Jenny, Chair of the OECD Competition Committee observed: *"Some of the obligations to be imposed on the 'gatekeepers' platforms contemplated by the EU proposal seem to misunderstand the function of an ecosystem and could actually restrict competition or innovation of such ecosystems in the name of fairness or of protecting competition within an ecosystem.*[84] Commentary on the political and economic context for DMA is set out in **Annexure, Box 11, p.31**. In light of this example, caution is needed when referring to international regulatory developments as a basis for Australian competition law reforms.

Even if reforms are introduced in other jurisdictions, as the ACCC has identified, it is important to carefully assess of the costs of such reforms in light of Australia's unique position.[85] A recent study by Oxera found that the broad proposals contained in the DMA could have an adverse impact on innovation in Europe if not implemented carefully. In particular, the study highlighted the following three ways in which the proposed measures could damage innovation:

- First, European innovators would be likely to have reduced incentives to strive towards becoming the "next big thing" if regulation reduced the size of their prize;
- Second, European-only regulation could reduce the size of the market accessible to global innovators, reducing their overall incentives to innovate, or reducing their incentive to roll out innovations in the EU even as they may be introduced elsewhere, such as in Asia and the USA; and
- Finally, if larger (global) firms were restricted in their ability to innovate, smaller (local) rivals would be unlikely to fill the gap, with a negative impact on European consumers—who would lose out through a reduction in services.[86]

[83] See commentary and citations at pages 15-16 of Maureen K. Ohlhausen and John M. Taladay, "Are Competition Officials Abandoning Competition Principles?"(Journal of European Competition Law and Policy).
[84] Frederic Jenny, "Competition law and digital ecosystems: Learning to walk before we run" (Industrial and Corporate Change, 2021) p 1–25. See: Link.
[85] ACCC, Discussion Paper, pp 6-7, 73. Regulatory fragmentation across jurisdictions could have unintended outcomes given differences between Australia and other jurisdictions and create uncertainty and increase regulatory burdens for global businesses.
[86] See: Link.

It seems prudent and appropriate to allow for a period of time for reforms in other jurisdictions, in particular the DMA, to unfold. While the DMA has just been agreed, concerns about the DMA are emerging. For example, the German Government has criticised the DMA's lack of flexibility in not allowing "objective justification" exemptions.[87] Senior officials in regulators and ministries have noted that the DMA's inflexibility runs the risk of stifling innovation (for example, Chris Philp, UK Parliamentary Under Secretary of State (Minister for Tech and the Digital Economy)[88] or comments attributed to a Commissioner at the Japanese Ministry of Economy, Trade and Industry[89]). For example, Tania Van den Brande, Director of Economics Ofcom UK, has commented on rules-based versus principles-based regulation.[90] The President of the Brazil Competition Authority also expressed strong concern about the EU approach of overly regulating digital markets, as measures may restrict growth, reduce investments and stifle innovation.[91]

Australia's competition and consumer regime has not been shown to be ineffective. There are various pending reforms both legal, and sectoral, and existing tools such as codes which have proven effective in responding to specific harms identified by the ACCC. All of this suggests that there is an opportunity for the ACCC and Australia to pause and properly assesses how the international regulatory reforms perform before seeking to import these reforms (or aspects of) into the CCA or ACL.

As a first step, Amazon Australia recommends using the framework set out in **Section C** to focus on specific activities and identified harms in light of Australia's comprehensive CCA and ACL regime.

D2. Market dynamics and enforcement action in other jurisdictions

The ACCC's Retail Marketplaces Report and Discussion Paper refer to international developments specific to Amazon. At the same time, the ACCC's Retail Marketplace Report acknowledges "*Australia's experience with online marketplaces is somewhat different to that overseas."*[92] Given the retail dynamics that apply in Australia which are accepted by the ACCC (See **Part E** below), caution should be applied to the adoption of any international developments specific to the dynamics and characteristics of those jurisdictions.

PART E. THE AUSTRALIAN RETAIL SECTOR

New regulatory frameworks are not justified in Australia's competitive retail sector.

[87] See: Link.
[88] Chris Philp, UK Parliamentary Under Secretary of State (Minister for Tech and the Digital Economy), 8 February 2022: "Our regime represents a more flexible and targeted approach than the one being taken by the EU. Our proposals ensure obligations are tailored to individual firms and activities, which has generally been favoured by stakeholders." See: Link.
[89] Mitsuru Murase, Deputy Director in charge of Transparency Act, Ministry of Economy, Trade and Industry (METI), Japan, 9 June 2021: "I believe that by stipulating many prohibitions in the law, market innovation will be stifled as a result. This is not the future we want. We hope that that the "co-regulation" scheme will work and promote mutual understanding among the parties involved, so that the industry as a whole can develop in a health manner" (translation from Japanese): See Link.
[90] Tania Van den Brande, Director of Economics Ofcom UK, 3 August 2022: "Writing specific rules on how firms should behave in dynamic markets also carries a greater risk of unintended consequences. Market dynamics can make it more challenging to predict the impact of rules, especially if such impacts are not immediate. For example, if a large platform is uniquely well-suited to enter a market with a powerful incumbent, then blanket rules that limit the ability of the platform to enter new markets may weaken competition faced by that incumbent." See: Link.
[91] Alexandre Cordeiro Macedo, President of the Brazilian Competition Authority (CADE), 19 July 2021: "I am very concerned about highly regulated markets," said Cordeiro, claiming that Cade should intervene to the limit to ensure competition, avoiding the risk of inhibiting market growth and innovation capacity. See: Link.
[92] ACCC, Retail Marketplaces Report, p 82.

E1. The ACCC's Retail Marketplaces Report does not identify specific competition concerns

The starting point is the ACCC's Retail Marketplaces Report finding that "*… the ACCC has not identified the same competition concerns with online marketplaces as it has with other digital platform services*".[93] In this regard, Amazon Australia makes two points.

First, Amazon Australia has a different business model to other types of "digital platforms" that have been the focus of the ACCC's inquiries and findings to date.

- Amazon Australia is first and foremost a retailer competing to deliver the same physical products to customers that are available at many other retailers.

- Amazon Australia's business is built on three key pillars: price, selection and convenience. We aim to conveniently provide customers with the products they want to buy at low prices. This delivers direct benefits to consumers, and fuels competition and innovation in the competitive retail sector, where suppliers and customers have more options than ever for the distribution and purchase of products. Having set customer expectations high, Amazon's continued success depends on delivering a high-quality customer experience and maintaining customer trust in the Amazon Store, whether customers are buying from Amazon retail or sellers.

- Amazon Australia has invested and continues to invest heavily to build a business that is consistently rated by customers as first class. It is Amazon's belief that we must continuously innovate to provide customers with a compelling offering in a highly competitive environment.

- Amazon Australia has stimulated competition in the retail sector and enabled new opportunities for thousands of SMEs as well as larger players.

- Amazon Australia's innovative business model has caused long entrenched incumbents to themselves innovate to meet customer expectations.[94]

- Amazon Australia launched in Australia long after other well-known retailers like eBay (1999) and Catch.com.au (2006) (and recently Woolworths' 'Everyday Market') and is just one of many retailers offering goods to customers and services to other retailers including suppliers.

Second, the characteristics and dynamics of the retail sector are important to recognise and different to other sectors referred to in the ACCC's "digital platform services" inquiry.

- *Retail:* In Australia retail margins are low. At the same time retail has been the 10th fastest growing sector over the past five years comprising over 130,000 retailers.[95] In addition, around 20% of Australian online sales come from retailers outside of Australia, further enhancing retail competition. Amazon Australia's sales - and online sales more generally - account for only a very small proportion of retail sales.[96] The ACCC's Marketplace Report does not find that Amazon

[93] ACCC, Retail Marketplaces Report, p 13.
[94] For example, following Amazon's entry in 2017, Wesfarmers purchased Catch in 2019, and traditional retailers including Myer, Bunnings, Coles and Woolworths have launched their own online marketplaces.
[95] See: Link, accessed April 2022.
[96] ACCC, Retail Marketplaces Report, p 12 and 82 "*Amazon is not the largest marketplace in Australia and currently only comprises around 2.5% of online retail sales.*"

Australia: is the sole or predominant provider of any product or service, has market power, or is 'gatekeeper' in any way in Australia.

- *Consumers*: Consumer search online and shop across a large number of channels with "*very low or no*" switching costs[97], and are highly sensitive to the selection of products offered by different retailers and their prices. Over 75% of consumers responding to the ACCC's survey said they used more than one online retail marketplace.[98] At the same time, in a recent survey the majority of Australian shoppers still prefer to shop in a store.[99] As the ACCC's Retail Marketplaces Report concludes "*a consumer could purchase from Amazon Australia, Catch, Big W, Myer and/or a local shop*".[100]

- *Sellers and retailers*: Sellers have "*strong incentives*" to multi-home noting that multi-homing allows sellers to diversify their revenue risk as well as improve their brand coverage.[101] Australian retailers use a variety of channels to reach consumers (omni-channel retailing). Amazon Australia faces competition from a broad range of established businesses and new entrants with innovative business models, for example 49% of Australian shoppers like to order online and pick-up in store.[102] Many of these businesses are among the largest and most well-known companies in Australia.

- The Retail Marketplaces Report recognises that marketplaces provide substantial benefits for both consumers and sellers, and that both consumer and sellers have alternatives.[103]

- *Entry*: New retailers are constantly entering the retail sector. The "entry rate" of new retailers into the retail sector is higher than the average for the economy and existing large retailers are expanding their offers across all retail channels. As the Retail Marketplaces Report observes, online marketplaces lower barriers to entry for smaller retailers: "*Online marketplaces are a particularly attractive channel for small businesses particularly where an online marketplace offers to provide additional services to assist small businesses such as warehousing and distribution. Selling via online marketplaces also typically involves much lower setup costs compared to those required to reach consumers directly through a seller's own website, or via a traditional bricks and mortar store.*"[104]

- *Tipping:* The ACCC's Retail Marketplaces Report observed that the issues discussed were only concerning **if** the retail sector tips in favour of a single dominant firm and that this would not necessarily raise competition concerns where it follows from the firm "*outcompeting its rivals*"[105] (see **Annexure, Box 12, p.31** where the Harper Panel reaffirmed the focus on prohibiting conduct that harms competition, not protecting competitors). Further, any potential to tip is highly

[97] ACCC, Retail Marketplaces Report, p 79.
[98] ACCC, Retail Marketplaces Report, p 79.
[99] See: Link, accessed April 2022.
[100] ACCC, Retail Marketplaces Report, p 79.
[101] ACCC, Retail Marketplaces Report, p 80.
[102] EcommerceDB, "Ecommerce in Australia 2020"(December 2020), p 24.
[103] ACCC, Retail Marketplaces Report: "*…the entry and growth of online marketplaces in Australia has created benefits and challenges for both consumers and sellers.*" (p 82) and "*Consumers have a number of alternatives to shopping on a given marketplace*")p 9 and 73).
[104] ACCC, Retail Marketplaces Report, p 54.
[105] ACCC, Retail Marketplaces Report, p 83. *"A key question facing Australia is whether we will observe tipping in favour Amazon Australia or another online marketplace. This would not necessarily raise competition concerns where it follows from the firm outcompeting its rivals"*

speculative and uncertain which the ACCC appears to accept concluding that it "*is not suggesting that this future [tipping] will occur, particularly in the short to medium term*"[106]

The competitive process in retail is strong. Any new regulatory frameworks proposed by the ACCC should be assessed in light of state of competition in retail to determine whether consumers and suppliers will benefit.

E2. Little justification for new regulatory frameworks in the retail sector

The digitisation of all sectors of the economy has transformed retail, delivering substantial benefits to consumers in the form of increased choice, lower and more transparent prices, convenience, and constant innovation. The retail sector is dynamic, competitive and fragmented. Suppliers have many options. Before proposing new regulatory frameworks, the ACCC should first engage in further assessments of the retail sector taking into account all the retail substitutes that consumers and sellers regularly use beyond marketplace services. This will assist to clarify whether activities in the retail sector give rise to harms, noting the ACCC's Retail Marketplaces Report observes that at present, there are no harms that justify a new regulatory framework.[107]

The CCA and ACL have proven capable of addressing competition and consumer harms, as demonstrated by the successful outcomes of multiple retail competition reviews in recent decades including, most recently, the Harper Review (see **Annexure, Box 1, p.27**). The ACCC has a strong enforcement record including in the retail sector (see **Annexure, Box 13, p.32** – overall for FYI 2020-21 $250 million in penalties were ordered by the Courts in respect of ACCC proceedings). In the near future, the ACCC will very likely have additional options to address consumer issues in retail with an expanded unfair contract terms regime and it is advocating for an unfair trading practices prohibition.

No evidence is provided in the Discussion Paper that new regulatory frameworks of the magnitude proposed for the CCA are needed in respect of the retail sector. Consumers and businesses benefit immensely from the additional options offered by digital retail services and there is no evidence that any of the new regulatory frameworks proposed would deliver additional benefits. Rather, reforms could create an unlevel playing field and disadvantage Australia's nascent online retail sector to the advantage of Australia's much larger, incumbent retail operators. Reforms also could risk limiting Amazon Australia's ability to continue to innovate and to inspire other retailers to do so.

[106] ACCC, Retail Marketplaces Report, p 83.

[107] ACCC, Retail Marketplaces Report, p 81. For example in relation to hybrid marketplaces' algorithms the ACCC found "*… such practices do not, at this stage, appear to have resulted in any significant and extensive competitive detriments. The ACCC expects that this is likely due to the alternatives (including alternative online marketplaces) available to sellers to reach consumers."*

ANNEXURE: SUBMISSION CASE STUDIES

Box 1 | Case study: Harper Review

The object of the CCA is to "*enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"* (CCA, s 2). The Competition Policy Review (Harper Review) was commissioned by the Government in 2014 to comprehensively and independently review the CCA by conducting the following tasks:

(a) identifying regulations across the economy that restrict competition and reduce productivity;

(b) ensuring the CCA drives efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets;

(c) examining the competition provisions and the special protections for small business in the CCA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future;

(d) considering whether the structure and powers of the competition institutions remain appropriate, in light of ongoing changes in the economy and the desire to reduce the regulatory impost on business; and

(e) reviewing government involvement in markets through government business enterprises, direct ownership of assets and the competitive neutrality policy, with a view to reducing government involvement where there is no longer a clear public interest need. [108]

While the Harper Review made a number of recommendations for the improvement of the CCA as it applies to all business activities, the Harper Review concluded that "*our competition laws have served Australia well*" and that the *"central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy"*.[109]

Box 2 | Flexibility of existing misleading conduct provisions

Recent Federal Court misleading and deceptive conduct outcomes:

Trivago: On 22 April 2022, the Federal Court ordered Trivago to pay penalties of $44.7 million for making misleading representations when representing that its website would quickly and easily help users identify the best deal or cheapest rates available for a given hotel when in fact Trivago used an algorithm which placed significant weight on which online hotel booking site paid Trivago the highest cost-per-click fee in determining which rates to highlight on its website and as a result often did not highlight the cheapest rates for consumers.

Uber: On 26 April 2022, the ACCC announced it has commenced proceedings against Uber, the ACCC reporting that Uber has admitted it engaged in misleading and deceptive conduct and made false or misleading representations in the Uber ridesharing app. Amongst other things, the Uber app displayed an estimated fare range for the "Uber Taxi" ride option which Uber has admitted falsely represented that the fare of a taxi booked through that option would likely be within an estimated fare range shown in the app. In fact, the algorithm used to calculate the estimated fare range inflated these estimates so that the actual taxi fare was almost always lower than that range, and consequently cheaper than Uber's lowest estimate.

iSelect: On 8 October 2020, the Federal Court ordered iSelect Limited to pay $8.5 million in penalties for making false or misleading representations about its electricity comparison service. iSelect admitted that it misled consumers by representing on its website that it would compare all electricity plans offered by its partners and recommend the most suitable or competitive plan, when this was not the case. The ACCC Chairman said "*Comparator websites also have a responsibility to ensure that their algorithms are correct, and must implement measures to prevent incorrect recommendations. This is particularly so when they generate significant revenue in commissions from those recommendations.*"

Box 3 | Case study: EU Digital Markets Act

The DMA law reform responds to calls for swift action from the European Parliament in June 2020, which asked the European Commission (EC) to "assess the possibility of imposing ex ante regulatory obligations where

[108] Department of Treasury, "Terms of Reference", see: Link.
[109] Harper Review Panel, *Competition Policy Review - Final Report* (March 2015) (**Harper Review**) pp 9, 55, see: link.

competition law is not enough to ensure contestability" in digital markets. Ultimately, intervention at the EU level was deemed appropriate.

In response to the legislative approach, comments from UK Government have observed:

"We are taking a pro-innovation approach, which will be more agile and lighter-touch than the approach taken by the EU…Our regime represents a more flexible and targeted approach" to "ensure obligations are tailored to individual firms and activities, which has generally been favoured by stakeholders".

"We think our approach is more flexible, it's more proportionate, it will better enable innovation, it'll avoid the risk of squashing developing tech businesses". "We think it's better than the EU approach, which runs the risk of stifling innovation being rather blunt in its approach. We think our approach is more pro-innovation, is more pro-growth".

The German government has made the following comments in relation to its own antitrust legislation:

"the combination of more abstract criteria and more specific examples" which "is likely to create fewer problems associated with the long-term viability of the provisions than the static rules and prohibitions of the DMA drafts".

Box 4 | Case study: Benefits of industry codes

Industry codes have received widespread support as an effective regulatory measure to promote competition and benefit consumers. The Australian Government, ACCC and industry participants have emphasised the benefits of industry codes:

"*Codes are designed to complement the objectives of the CCA — to enhance the welfare of Australians through the promotion of competition and fair trading. They give industry a unique mechanism to recast fundamental CCA principles into more practical and relevant requirements to directly address specific problems.*"- Department of Treasury[110]

"*Where an industry is found to have widespread issues relating to both contracts and competition, an industry code of conduct can be an efficient mechanism to address these issues.*" - Mick Keogh (Deputy Chair of the ACCC)[111]

"*Evidence from within Australia and overseas shows that voluntary, industry-led codes have greater 'buy in' from businesses, ultimately benefiting everyone concerned and avoiding cost to taxpayers.*" - Business Council of Australia[112]

"*Codes can play a role in getting the balance right by putting in place necessary regulations to foster the effective operation of the industry*." - Department of Treasury[113]

"*The ACCC encourages industry to develop codes that will deliver effective compliance with the Competition and Consumer Act 2010. Effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business.*" - ACCC[114]

Box 5 | Case study: Grocery Code

The Grocery Code is a voluntary industry code of conduct that is prescribed for the purposes of Part IVB of the CCA. The Grocery Code governs certain conduct by the supermarkets (also referred to as retailers) and wholesalers in their dealings with suppliers, with the aim to improve standards of business conduct in the food and grocery industry. It was developed in response to concerns about the conduct of retailers and wholesalers towards suppliers.

The Grocery Code is an industry-led initiative that was jointly developed by Coles, Woolworths and the Australian Food and Grocery Council (a supplier representative organisation). Following a period of public

[110] Department of Treasury, *Industry Codes of Conduct: Policy Framework* (November 2015), p 1.
[111] Mick Keogh, "Observations from the ACCC market study into the wine grape industry"(Speech delivered at the 17th Australian Wine Industry Technical Conference, 22 July 2019).
[112] Business Council of Australia, Media Release (29 May 2017), see: Link.
[113] Department of Treasury, *Industry Codes of Conduct: Policy Framework* (November 2015), p iv.
[114] ACCC, "Voluntary Codes", see: Link.

consultation, the Government agreed to prescribe the Grocery Code under the Competition and Consumer (Industry Codes—Food and Grocery) Regulation 2015. The purpose of the Grocery Code is to:

• help to regulate standards of business conduct in the grocery supply chain and to build and sustain trust and cooperation throughout that chain;

• ensure transparency and certainty in commercial transactions in the grocery supply chain and to minimise disputes arising from a lack of certainty in respect of the commercial terms agreed between parties;

• provide an effective, fair and equitable dispute resolution process for raising and investigating complaints and resolving disputes arising between retailers or wholesalers and suppliers; and

• promote and support good faith in commercial dealings between retailers, wholesalers and suppliers.

On 2 March 2018 the Government announced the independent Review of the Grocery Code.[115] The purpose of the Review was to assess the impact of the Grocery Code in improving the commercial relations between grocery retailers, wholesalers and suppliers. In October 2018, the independent reviewer published his report noting the Grocery Code is generally working well. The broad feedback was that dealings between the signatories and their suppliers improved significantly in the three years since the Grocery Code was introduced, with recommendations targeting specific areas the independent reviewer concluded had not delivered the intended policy outcome.

Box 6 | Case study: Telecommunications Industry Ombudsman (TIO)

The TIO was formally established in 1993. The rationale for the TIO as described in Parliament in 1991 were: *"an industry ombudsman…will be of advantage to the industry in its attempts to monitor complaints, to investigate the carriers' own failings, and generally to ensure a higher standard of service to consumers"* and in 1996: *"consumers will also benefit from the safeguards contained in this telecommunications package. A free market does not of itself necessarily provide the community with the level of surety it requires… the Telecommunications Industry Ombudsman will be expanded."*[116]

The Australian Communications Consumer Action Network reported that the TIO has shown the power of effective industry codes with complaints reducing across 2020-2021.[117]

Box 7 | Case study: Supermarket lease provisions

In the *Report of the ACCC Inquiry into the competitiveness of retail prices for standard groceries* published in July 2008, the ACCC observed that major supermarket chains were including terms in their leases to prevent shopping centre managers leasing space in shopping centres to competing supermarkets, usually in the form of an outright prohibition on introducing a second or further supermarket into a centre for a specified period (commonly around 10 years).[118]

On 17 September 2009, both Coles and Woolworths entered into court enforceable undertakings not to give effect to any restrictive lease provisions, or to enter into any further lease agreements including restrictive provisions. Following these undertakings the ACCC noted:

"This is a major breakthrough for grocery competition in Australia… ***reducing the barriers to entry*** *for new and expanding players opens the possibility for Australian* ***consumers to have greater choices*** *in where to shop, and potentially pay lower prices as a result"* (emphasis added).

On 23 December 2009, ALDI Foods, SPAR Australia Ltd, Franklins Pty Ltd, Metcash Ltd, and Australian United Retailers Ltd (Foodworks) all gave corresponding undertakings. On 2 May 2011, upon Supabarn Supermarkets giving a similar undertaking in relation to the Canberra Centre, the ACCC stated:[119]

[115] Australian Government the Treasury, "Independent Review of the Food and Grocery Code of Conduct: Final Report" (September 2018), see: Link.
[116] Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 1997, page 678 (Christopher Pyne), see: link.
[117] TIO, "Annual Report" (2020-2021), p 8, see: link.
[118] ACCC, "Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries" (July 2008), pp xviii, 176, 182, see: link.
[119] ACCC, "Undertaking by Supabarn Supermarkets Pty Ltd", see: link.

ANNEXURE: SUBMISSION CASE STUDIES

"[This] now concludes the ACCC's program to ensure that leases between grocery retailers and shopping centres will not potentially restrict competition…The ACCC has been committed to phasing out restrictive provisions in supermarket leases since it carried out the Grocery Inquiry."

Box 8 | Case study: Sector specific price signalling regime

In 2011, the ACCC supported amendments to the CCA prohibiting both: (a) private price disclosures outside the ordinary course of business, regardless of their purpose; and (b) public and private disclosures concerning price, capacity to supply or any aspect of commercial strategy, where that disclosure was made for the purpose of substantially lessening competition.[120] These prohibitions applied only to the banking sector and were commonly referred to as the "price signalling regime".

These provisions of the CCA were repealed in 2017 and were replaced by the concerted practices prohibition which applies to all sectors of trade and commerce in Australia. The Harper Panel's Competition Policy Review Final Report recommended the repeal of the price signalling regime noting that:

"in their current form, the prohibitions against 'price signalling' in the CCA do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct." Being confined in their operation to a single industry (banking), the current provisions are also inconsistent with the principle that the CCA should apply to all businesses generally."[121] **…** *"competition laws ought to be capable of general application to all parts of the economy."*[122]

Of the 484 submissions made to the Harper Panel's Draft Report, none of the submissions supported the price signalling regime.[123] The repeal of the price signalling regime was also supported by the ACCC who submitted in response to the Harper Panel's Issues Paper that:

"the ACCC recommends that anti-competitive disclosure of information provisions should apply across the economy. This is consistent with the universality principle that anti-competitive conduct should be prohibited regardless of the sector of the economy in which it occurs."[124]

Box 9 | Case study: Code review mechanisms

The CCA includes a flexible framework in Part IVB (Industry Codes). For example, the legislative changes to Part IVB of the CCA make provision for the News Media Bargaining Code[125] to include a review requirement in s52ZZS as follows:

(1) Within the period of 12 months after commencement, the Minister must cause a review of the operation of the changes to be commenced.

(2) The review must be completed no later than 12 months after the commencement of the review.

(3) A written report of the review must be given to the Minister and the Communications Minister.

(4) The Minister must ensure that copies of the report are available for public inspection as soon as practicable after the period of 28 days beginning on the day the report is given to the Minister.

Other industry codes prescribed by regulation under s51AE of the CCA include regular review mechanisms. For example, the Competition and Consumer (Industry Codes - Food and Grocery) Regulation 2015[126] requires that the Minister must cause 2 reviews to be undertaken in relation to the operation of the Food and Grocery Code of Conduct 2 to 3 years after commencement, to assess the impact of the code in improving commercial relations between grocery retailers, wholesalers and suppliers.

[120] *Competition and Consumer Amendment Act (No 1) 2011* (Cth).
[121] Harper Review p 59.
[122] Harper Review, p 370.
[123] Harper Review, p 370.
[124] ACCC, "Reinvigorating Australia's Competition Policy - ACCC Submission to the Competition Policy Review" (25 June 2014) p81, see: link.
[125] *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth).
[126] Grocery Code, reg 5.

ANNEXURE: SUBMISSION CASE STUDIES

Box 10 | The Council of Australian Governments (COAG) principles

The COAG principles of best practice for the development of regulation include the following:

- establish a case for action before addressing a problem;
- consider a range of feasible policy options, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed;
- adopt the option that generates the greatest net benefit for the community;
- not restrict competition unless it can be demonstrated that: the benefits of the restrictions to the community outweigh the costs, and the objectives of the regulation can only be achieved by restricting competition;
- ensure that regulation remains relevant and effective over time;
- consult effectively with affected key stakeholders at all stages of the regulatory cycle; and

ensure that any government intervention is effective and proportional to the issue being addressed.

Box 11 | Case study: Commentary on the EU Digital Markets Act

The proposed DMA is a response to a request by the European Parliament in June 2020, which asked the EC to "*assess the possibility of imposing ex ante regulatory obligations on specific digital companies*".[127] Intervention at the EU level was deemed appropriate is that legislation on a national basis was considered ineffective as each EU member state would develop unique rules and could only address market failures in its jurisdiction. This fragmented approach would increase costs for firms which operate across Europe.

Commentators have also argued that the DMA has been politically motivated. For example:

Frederic Jenny, Chair of the OECD Competition Committee has observed that: "[the DMA] *does not seem to aim at solving the competition issues raised by gatekeepers in the digital sector in general but limits itself to the sub-set of these problems raised by a small number of very large platforms without providing a clear rationale for this choice. Thus, it is difficult to avoid the impression that this proposal is driven more by the political desire to act against these large platforms than by the desire to promote competition and innovation in the digital sector in general".*[128]

In a letter to US President Joe Biden, US Senators Ron Wyden and Mike Crapo argued that: *"Left unaddressed, these discriminatory policies will distort trade by disadvantaging U.S. companies and their workers; protecting domestic European firms; and giving an unfair competitive advantage to other foreign companies, including those based in countries like China and Russia".*[129]

Similar arguments about the DMA's focus on large US companies have been made by other commentators. Others have also noted that French president Emmanuel Macron is seeking to finalise the DMA before French presidential elections occur in April, to demonstrate to voters he is tough on digital platforms.[130]

Box 12 | Case Study: History of retail competition reviews in Australia

The retail sector in Australia has been reviewed as part of a number of Federal Parliamentary and ACCC inquiries over the past 45 years, including the Independent Review of the competition provisions of the Trade Practices Act 1974 and their administration (the Dawson Committee) 2003, the ACCC's Unleaded Petrol Price Inquiry 2007 (and subsequent annual monitoring reports) and the ACCC's Grocery Inquiry 2008 (which found the sector to be workably competitive).

[127] Impact Assessment Report, para 10.
[128] Frederic Jenny, "Competition law and digital ecosystems: Learning to walk before we run" (Industrial and Corporate Change) 2021, pp 1–25, see: Link.
[129] US Senators Ron Wyden and Mike Crapo, Chairman and Ranking Member of the Senate Finance Committee, "Letter to President Biden" (1 February 2022), see: Link.
[130] Zach Meyes, Centre for European Reform, "No pain, no gain? The Digital Markets Act" (Research Paper, 10 January 2022), see: Link.

ANNEXURE: SUBMISSION CASE STUDIES

Competition in retail markets was an important focus of the Harper Review, which concluded: *Australia's grocery market is concentrated, but not uniquely so (see Box 15.1). Although concentration is relevant, it is not determinative of the level of competition in a market. A concentrated market with significant barriers to entry may be conducive to weak competition, but competition between supermarkets in Australia appears to have intensified in recent years following Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco. Consequently, few concerns have been raised about prices charged to consumers by supermarkets…".*[131]

The CCA has a range of provisions designed to address anti-competitive conduct, in particular provisions that relate to the misuse of market power and unconscionable conduct. …the Panel reaffirms that these provisions should only prohibit conduct that harms competition, not individual competitors. In particular, the CCA does not, and should not, seek to restrain a competitor because it is big or because its scale or scope of operations enables it to innovate and thus provide benefits for consumers.[132]

Box 13 | Case Study: ACCC enforcement action

The ACCC has many enforcement tools available to it including bringing court proceedings, accepting court enforceable undertakings, issuing infringement notices, issuing public warning notices, resolving matters administratively, and education campaigns and other compliance initiatives.

ACCC Annual Reports show that the ACCC has met or exceeded its targets for the number of competition enforcement interventions (court proceedings commenced, section 87B undertakings accepted, administrative resolutions) in four of the last five financial years.[133] Equivalent targets for ACL enforcement interventions have consistently exceeded the ACCC's targets in the last five financial years.

In FY 2020-21 alone: (i) over $250 million in penalties were orders by the Court (over $230 million in consumer protection matters and approximately $24 million in competition matters); (ii) the ACCC commenced 15 court cases, 27 cases concluding and 15 were ongoing as the end of the financial year.

Pecuniary penalties have increased markedly over time - particularly after the law was changed in 2018 to increase ACL penalties to bring them into line with competition law penalties. In 2017, the highest pecuniary penalty ordered in an ACL case was $8 million. In 2021 it was $153 million. Between 2017 and 2021, pecuniary penalties were ordered in 74 ACL court cases brought by the ACCC (with fines totalling > $550 million). In the same period the ACCC issued 50 infringement notices for ACL breaches (with fines totalling > $2 million).

[131] Harper Review, p 283.
[132] Harper Review, p 285.