

Meta response to the ACCC's Digital Platform Services Inquiry September 2022 Report Discussion Paper

28 April 2022

Executive summary

Meta welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) Discussion Paper for the fifth interim report under the Digital Platforms Services Inquiry (DPSI): Updating competition and consumer law for digital platform services (Discussion Paper).

The Discussion Paper covers a broad range of matters that have been previously considered by the Australian Government in relation to digital platforms. Many of the issues outlined in the Discussion Paper involve a restatement of contentions made in the ACCC's 2017-19 Digital Platforms Inquiry (DPI) report and the ACCC's previous three DPSI reports, without updated analysis. The Discussion Paper also:

- overlaps with work underway by other parts of the Australian Government, such as the Attorney-General's Department's consultation on cross-economy reform of the Privacy Act and the Department of Infrastructure, Transport, Regional Development and Communications' consideration of how to better protect consumers online; and
- does not pay sufficient regard to significant benefits that digital platform services have brought to Australian consumers, including lowering barriers to entry, lowering costs of expansion and facilitating new and efficient ways for Australian businesses to reach interested customers worldwide. For example, a recent report by Deloitte found that 82% of Australian small businesses reported using free, ad-supported Facebook apps to help them start their business, and 71% of Australian small businesses that use personalised advertising reported that it is important for the success of their business.¹

While we recognise the ACCC is seeking to explore whether existing competition and consumer laws for digital platforms are appropriate, any changes to the current regime should be approached with caution and backed by sufficient evidence of harm that cannot be addressed by existing laws. Australia's current competition and consumer laws are already broad and flexible. They have also recently been, or soon will be, further strengthened by amendments, such as the misuse of market power provisions in section 46 of the Competition and Consumer Act (CCA), and the proposed changes to the Australian Consumer Law (ACL).

The ACCC has not brought competition proceedings against any digital platform, or sought to test the effectiveness of section 46 to combat the harm of exclusionary self-preferencing conduct by certain digital platforms within app store or operating system markets. Given the ACCC is yet to properly test these existing competition tools – and has taken successful action in relation to a range of digital services under the ACL – there is no evidence that existing laws are not “fit for purpose” to address any genuine competition or consumer protection concerns in the supply of digital platform services.

¹*Dynamic Markets Unlocking small business innovation and growth through the rise of the personalized economy* (May 2021), Report by Deloitte, p 27. Available:

<https://www.facebook.com/business/news/new-insights-on-personalized-ads-and-social-medias-impact-on-small-businesses>; and

Dynamic Markets Report: Australia (October 2021), Report by Facebook, p 4. Available:

<https://australia.fb.com/wp-content/uploads/sites/69/2021/10/nji-fb-ausresearch-report-r26.pdf>.

Digital markets are dynamic and have evolved considerably since the DPI was announced in 2017. The focus should therefore be on updating analysis and considering new data points before moving to further reforms. In particular:

- There has been increased competition, new entry and rapid growth of Meta’s competitors since 2017. These changes are fundamentally inconsistent with any finding that Meta has market power in online advertising markets, social media or instant messaging. For example, despite contentions that Meta faces little competitive constraint in an online “display advertising” market, this does not accurately reflect significant changes including:
 - Apple’s emergence as a significant and rapidly growing competitor in the ads space, coupled with its iOS 14 policy updates which will have a direct impact on Meta’s global revenue of around \$10 billion in 2022 alone.²
 - Amazon’s rapid growth as a direct competitor to Meta. In 2021, Amazon’s advertising business generated \$31.2 billion in revenue globally, with 32% year-over-year growth,³ including a threefold revenue increase in Australia in 2021 alone.⁴
 - Rapid growth and new advertising products from a number of other companies including TikTok, Snap, Twitter and Microsoft, as well as continued growth and new services from existing participants like Google (including YouTube). TikTok has experienced significant growth and this is continuing - its ads revenue in 2022 is expected to triple to more than \$11 billion, surpassing the combined sales of Twitter and Snapchat.⁵
- Meta faces significant and growing competitive constraints which undermine any finding that it has substantial market power in “social media”, especially when considering the increasing range of competitors in Australia. Available data demonstrates that there has been significant entry and expansion by a range of competitors over the last five years. For example, Australian TikTok users spent almost one day per month (23.4 hours) on TikTok in 2021, an increase of 39% from 2020 and 200% from 2019.⁶ TikTok’s 23.4 hours per user per month in 2021 compares with 17.6 hours on Facebook and 8.3 hours on Instagram.⁷
- There have been substantial recent shifts in data availability which further highlight that the Discussion Paper misunderstands and overstates the role and value of data in conferring market power. For example, Apple’s introduction of a new App Tracking

² Transcript of Meta’s investor relations, ‘Fourth Quarter 2021 Results Conference Call’ (2 February 2022), p 10. Available: https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/Meta-Q4-2021-Earnings-Call-Transcript.pdf.

³ ‘Amazon.com Announces Fourth Quarter Results’ (3 February 2022), Amazon. Available: <https://ir.aboutamazon.com/news-release/news-release-details/2022/Amazon.com-Announces-Fourth-Quarter-Results/#:~:text=Operating%20income%20decreased%20to%20%243.5,share%2C%20in%20fourth%20quarter%202020>.

⁴ ‘Amazon triples Australian ad revenues, media execs predict it will triple again in 2022 as juggernaut starts to roll’ (22 February 2022), Mi3 article by Sam Buckingham. Available:

<https://www.mi-3.com.au/22-02-2022/amazon-tripled-its-ad-business-2021-track-more-100m-revenue-2022>.

⁵ ‘TikTok’s ad revenue to surpass Twitter and Snapchat combined in 2022 – report’ (12 April 2022), Reuters article by Bhanvi Satija. Available:

<https://www.reuters.com/technology/tiktoks-ad-revenue-surpass-twitter-snapchat-combined-2022-report-2022-04-11/>.

⁶ ‘State of Mobile 2022’ (12 January 2022), Report by data.ai, p 50. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>.

⁷ ‘State of Mobile 2022’ (12 January 2022), Report by data.ai, p 50. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>.

Transparency (ATT) framework needs to be factored into any analysis of alleged “data advantages”. The substantial proposed reforms to Australian Privacy Laws also need to be factored into any analysis. In particular, the Discussion Paper identifies “excessive online tracking” and “an absence of effective consumer control over that data” as consumer harms warranting new regulation.⁸ However, there are significant privacy law reforms underway which address these exact issues.

- Finally, since 2017, industry-led initiatives have made significant advancements in addressing consumer concerns identified in the Discussion Paper. Meta has initiated its own responses to many of the issues raised in the DPI and DPSI processes and made significant developments in our work to combat harmful online content and in providing increased transparency and user controls. The Discussion Paper does not take account of these and other industry-led changes.

The Discussion Paper also makes a number of assertions about digital markets that do not reflect current market reality. For example:

- Many of the characteristics of markets identified in the Discussion Paper (such as economies of scale, use of data, self-preferencing, optimising the user experience, and M&A activity) are not unique to digital platforms. They occur in industries right across the economy and can either deliver significant benefits or result in certain harms, depending on a range of factors. The Discussion Paper does not point to any harms with these practices that are either consistent across digital platforms (as opposed to isolated instances) or unique to digital platforms.
- Likewise, alleged issues such as the collection and use of data, the ability for small businesses to negotiate standard terms of use and scams are worthy of discussion, but they are not specific to digital platforms - they are of relevance in many other sectors like telecommunications, banking and energy. These alleged issues are also conflated as specific “competition” concerns when other areas of law reform (such as online safety or privacy) are more appropriate.

The Discussion Paper identifies a broad range of potential new regulations that are under consideration. Meta is concerned that these measures are divorced from the alleged harms identified and that the need for and efficacy of these proposals has not been established.

Importantly, the Discussion Paper does not establish that there are harms that are both unique to digital platform services and extend beyond isolated instances of conduct by individual companies such that new digital platform-specific regulation is required.

In particular:

- **Vertical integration and self-preferencing conduct** is widespread across all industries and is, in most cases, efficient and pro-competitive. In cases where it has the potential to harm competition, existing laws are fully capable of addressing any concerns of anti-competitive self-preferencing or other anti-competitive exclusionary conduct.
- The potential measures to **enhance interoperability of services** are unnecessary and risk negatively impacting consumers and competition. Interoperability issues are frequently

⁸ Discussion Paper, p 43.

best addressed at an industry level, and there are many recent examples of digital industry-led initiatives to support interoperability of services in response to consumer demand. Current competition laws are also already capable of dealing with anti-competitive exclusionary conduct, including exclusion by “limiting interoperability”.

- The potential measures relating to **limiting data use** by incumbents lack any adequate basis for adoption. “Levelling the playing field” between large platforms and smaller rivals is not an appropriate competition policy basis to introduce a general regulatory power enabling the imposition of restrictions on data use that would reduce innovation, encourage free-riding and raise prices for businesses and consumers.
- Measures to **improve consumer protection and achieve fairer dealings with business users** require further consideration. Meta supports strong, well-targeted consumer protection laws. However, it is not clear what “gap” in laws or enforcement powers the ACCC is seeking to address. There is also no basis or justification for imposing wide-ranging measures relating to transparency, particularly when those measures are divorced from any assessment of the significant, and increasing, levels of transparency that already exist, and may conflict with privacy law and ongoing reform.
- The ACCC’s **monitoring and information gathering powers** are already extensive such that further record keeping rules are not required.

Finally, the Discussion Paper’s consideration of **merger reform** does not demonstrate the need for a digital-specific regime. In particular:

- The Discussion Paper’s contention that acquisitions by large technology firms entrench market power, potentially harm innovation and disrupt the competitive process is not supported by evidence. This contention undervalues the important role that acquisitions play as part of the global innovation ecosystem.
- No evidence has been provided of harms resulting from digital mergers in Australia, nor evidence that the ACCC is unable to review digital mergers that have a nexus to Australia under the current merger review regime. Australia’s existing merger laws and processes are sufficiently flexible to enable the ACCC to properly review acquisitions in new markets, including those undertaken by digital platforms.
- The Discussion Paper has not adequately considered the significant risks and negative effects associated with proposals targeted at specific companies or the digital sector, including negative impacts on competition, consumer welfare, business formation, investment and innovation. Digital-specific reforms should also not be looked at in isolation of the ACCC’s broader economy-wide merger reform agenda.

While many international jurisdictions have been debating the need for new regulation of digital markets, there is no consensus on whether changes are necessary and, if so, what these models should look like. While consistency with international laws is an admirable objective, it is premature to implement it given the absence of consensus and the lack of evidence of effectiveness.

Meta recognises that the ACCC is only at the halfway point of the DPSI and this Discussion Paper represents a major milestone in how the ACCC conducts, and ultimately, concludes its overall five year inquiry. We welcome the opportunity to participate in this discussion and any future consultation in relation to any specific proposals for reform that are contemplated.

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1. Issues raised in the Discussion Paper need to be considered holistically within the current internet regulatory landscape nationally and internationally

1.1. Current regulatory landscape

Meta has been at the global forefront of calling for new regulation for the internet. For many years, we have encouraged like-minded countries, particularly liberal democracies, to develop new regulation in relation to areas such as online content, privacy, data portability and elections.⁹

Meta has been working constructively with the Australian Government over multiple years to identify areas where Australian regulatory frameworks should be updated in response to technological developments. Examples of our support for new regulation in Australia include:

- Notwithstanding concerns we raised about the underpinning market analysis, we supported or noted 24 of the 29 recommendations in the Final Report in the Digital Platforms Inquiry (**DPI Final Report**) in 2019.
- We supported updating Australia's privacy laws. The Attorney-General's Department review of the Privacy Act has made 62 regulatory proposals, and Meta has supported (or not objected to) 55 of them.
- We strongly called for regulatory frameworks relating to harmful content. We supported the Online Safety Act, and were the first company to publicly endorse the eSafety Commissioner's Safety by Design Guidelines.
- We supported the Government taking additional steps to better ensure Australians' complaints about digital platforms can be quickly addressed. We await the outcome of the Government's work on this front and we are ready to further assist.
- We funded expert research on best practice misinformation regulation by an Australian academic in February 2021 and we were a crucial driver in landing a world-leading industry code on misinformation and disinformation in Australia.

In the last three years, the Federal Government has pursued at least **14** new laws principally impacting digital platforms, and the Federal Government or Parliament have inquired into digital platforms through at least **18** inquiries. Meta has responded constructively to these inquiries, and we have supported many of the new laws which have resulted from them. These laws supplement existing regulations, including the CCA and ACL.

It is no longer accurate (if it ever was) to say that digital platforms are unregulated in Australia or that the risks of the internet are unexamined. The issue for policymakers is no longer a lack of regulation, but whether the existing regulations are effective and effectively used by regulators.

⁹ 'The Internet Needs New Rules' (30 March 2019), Washington Post article by Mark Zuckerberg. Available: https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html; and 'Big tech needs more regulation' (16 February 2020), Financial Times article by Mark Zuckerberg. Available: <https://www.ft.com/content/602ec7ec-4f18-11ea-95a0-43d18ec715f5>.

Australian policymakers should be alive to the risk of overlapping, duplicative or inconsistent rules across different laws. Many of the issues that the Discussion Paper raises in relation to privacy have already been considered (or are currently being considered) in:

- the DPI;
- cross-economy reform of the Privacy Act, led by the Attorney-General's Department;
- the digital platform-specific Online Privacy Code, developed by the Attorney-General's Department;
- consultation on cyber security regulation and incentives, led by the Department of Home Affairs; and
- the National Data Security Action Plan, released by the Department of Home Affairs.

Additionally, the overall regulatory approach taken by Australia needs to be viewed in the context of a global contest of competing visions of the internet. Other countries look to Australia, and it is important to consider whether Australian regulation sets an example which encourages a liberal, open and democratic approach to the internet, or an internet that is more closed, tightly controlled and fragmented. If Australia pursues laws that are specifically and arbitrarily designed to target one, two or three companies, it sets a concerning precedent that could also be applied to Australian companies who operate in the Asia-Pacific region or globally.

It is through these lenses that we consider the many potential proposals for new regulation in the Discussion Paper.

Best practice regulatory principles, in line with those articulated by regulation experts such as the Productivity Commission, the Organisation for Economic Cooperation and Development (OECD), National Federation Reform Council (previously Council of Australian Governments) and the Australian Government Guide to Regulation,¹⁰ suggest that new regulation should be:

- **Evidence-based.** Government action should be based on evidence of a clear and genuine risk to be addressed.
- **Necessary.** New proposed regulations should not be inconsistent, duplicative or overlapping with existing regulations, i.e. there is a gap in the existing regulatory frameworks.
- **Fit-for-purpose.** Regulatory proposals should directly address and improve the clear and genuine risk that is identified.

¹⁰ 'OECD Regulatory Policy Outlook 2021' (2021), OECD. Available: <https://www.oecd.org/gov/regulatory-policy/oecd-regulatory-policy-outlook-2021-38b0fdb1-en.htm>; 'Identifying and Evaluating Regulation Reforms: Productivity Commission Research Report' (December 2011), Productivity Commission. Available: <https://www.pc.gov.au/inquiries/completed/regulation-reforms/report/regulation-reforms.pdf>; and 'Council of Australian Government's RIS Process: Principles of best practice regulation' (as at 5 April 2022), Department of Prime Minister and Cabinet. Available: <https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>; <https://apo.org.au/sites/default/files/resource-files/2014-03/apo-nid270966.pdf>.

- **Proportionate, with minimal additional costs.** As the Productivity Commission outlines, regulation can distort competition and potentially discourage incentives for investment and innovation. In the case of digital platforms, if the significant benefits provided to consumers and small businesses are not properly accounted for upfront, the ultimate impact of regulation may be a reduction in the benefits to the Australian community.

The negative impacts of overregulation of digital markets for the economy and Australians are acute. Competition in these markets is highly dynamic and there are substantial benefits to be derived from innovation, which requires a longer-term view.¹¹ Complex, inflexible and burdensome regulations are likely to be self-defeating in fast-moving sectors. They could also deter innovation and economic growth locally, including by encouraging companies to shift business operations and R&D activities abroad.

- **Flexible, broad-based and technology neutral.** Prescriptive rules can increase costs for businesses that have no commensurate improvement in the effectiveness of regulation. Laws that target particular technology will become quickly outdated due to shifts in consumer behaviour, markets and technology. Similarly, regulations that arbitrarily target particular companies are short-sighted and can advantage competitors without significantly advancing the intended public policy cause.
- **Independently assessed for effectiveness.** Regulation should be automatically reviewed for effectiveness after it is passed by an independent body (i.e. not the regulator who has proposed or administered the law).
- **Global.** Where possible, regulations should aim to take consistent approaches globally. Australia needs to consider where it stands in the context of a global contest for competing visions of the internet.

There are some areas covered in the Discussion Paper where we believe some new regulation could adhere to these principles. For example:

- We remain supportive of the Government taking steps to ensure consumers' complaints about digital platforms can be quickly addressed. In our response to the DPI, we signalled a willingness to consider ombudsman-type models and we have engaged further with the Department of Infrastructure, Transport, Regional Development and Communications in the intervening years on possible workable models.
- We continue to support in-principle data portability schemes, subject to adequately protecting user's privacy and ensuring control is in the hands of users - not competitors.
- We continue to engage with the Attorney-General's Department on cross-economy privacy reform which may address some of the issues relating to data use highlighted in the Discussion Paper.

¹¹ 'CPI Conference: Digital M&A: A Flat World or a Region-Specific Issue' (16 December 2021), Conference hosted by Competition Policy International. Available: <https://www.competitionpolicyinternational.com/digital-ma-a-flat-world-or-a-region-specific-issue-session-4/>.

However, the Discussion Paper raises the prospect of additional regulation (including *ex-ante* competition regulation) which does not meet the best practice regulatory principles outlined above.

We make the following observations about the potential regulatory approaches included in the Discussion Paper:

- **There is no solid evidence that many of the new potential measures are needed.** The Discussion Paper relies on outdated or incomplete evidence to support its claims, for example, re-stating assertions from the DPI several years ago that Meta holds substantial market power in relation to social media. We encourage the ACCC to update its understanding of current developments in digital markets through this consultation.
- **Many of the issues raised in the Discussion Paper are concerns about privacy, data use, and even content moderation, not competition.** These issues are already being addressed through separate reform processes, often involving industry-led initiatives and it confuses the public policy debate to try to solve these through a competition regulation framework. Competition law will not be the best tool to solve these identified problems.
- **Competition policy cannot solve privacy concerns, and indeed, increased privacy requirements may not necessarily facilitate increased competition.**¹² There is a live global debate regarding the balance between data protection and competition, and there are significant policy and implementation risks in this area. These are already being considered as part of the privacy reform review by the Attorney-General's Department, and the ACCC should not cut across the work being carefully undertaken by another part of government. The potential measures in the Discussion Paper run the risk of inhibiting the growth and innovation of services in Australia due to regulatory inconsistency.
- **Many of the issues raised in the Discussion Paper are not specific to digital platforms, and therefore do not warrant sector-specific regulation.** For example, issues relating to transparency in consumer contracts, data access, and unfair contract terms appear in relation to banking, airlines, telecommunications, energy and many other sectors. Likewise, consumer protection issues and the impact of self-preferencing conduct by firms with market power, network effects, and vertical integration apply generally across the economy and do not raise distinct issues for digital platforms.
- **Differential regulation that applies only to digital markets, or even specific firms within this market, may lead to a range of problems.** These include:
 - for consumers, confusion and uncertainty as to the standard of protection they are afforded across different industry sectors, even when industry participants are performing similar functions; and

¹² 'Press Release: Targeted advertising / Apple's implementation of the ATT framework. The Autorité does not issue urgent interim measures against Apple but continues to investigate into the merits of the case' (17 March 2021), Autorité de la concurrence. Available: <https://www.autoritedelaconcurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue>.

- for businesses, an uneven regulatory burden across industries that perform similar functions, which may in turn distort competition by imposing different compliance costs on potential competitors.

The ACCC should avoid arbitrarily transposing frameworks from other industries such as telecommunications to digital platforms. Digital platforms operate in a significantly more competitive and innovative ecosystem, which are not characterised by privatised monopoly infrastructure assets, and the advantages of incumbency without a history of competition.

- **The consequences to innovation, investment or benefits available to consumers of digital platforms are not properly considered.** A recent report by Deloitte found that 82% of Australian small businesses reported using free, ad-supported Meta apps to help them start their business. It also found that 71% of Australian small businesses that use personalised advertising reported that it is important for the success of their business.¹³ Particularly over the past two years, personalised advertising has helped businesses target new customers when they needed to pivot away from bricks-and-mortar operations during the pandemic. Likewise, many of the best investments in safety and security are possible when systems are able to be scaled, which brings considerable benefit to consumers.

The Discussion Paper does not consider how potential measures could diminish these benefits. For example, the ACCC is consulting on hard data limitation measures, without acknowledging proposals such as these would inevitably constrict the personalisation aspects of digital platforms, which bring enormous benefit to Australian consumers and small businesses.

It is important that regulators are not given wide-ranging and open-ended rule-making powers as part of any solution. Affording any regulator wide discretion over key decisions could lead to intrusive and interventionist actions that cause significant detriments to the economy, including to consumers.

1.2. No gap in existing competition and consumer laws

Australia's competition and consumer law framework is based on established doctrines. While the Discussion Paper suggests there are multiple policy gaps in the existing competition and consumer law framework, this overlooks the broad, flexible legislative tools and processes already available to address the types of issues it has raised. Recent changes like the extension of section 46 of the CCA, which applies economy-wide to the conduct of firms that have a substantial degree of market power, have not yet been tested by the ACCC in relation to digital platforms.

In fact, the ACCC has not commenced any actions against digital platforms for contraventions of the competition prohibitions in the CCA, nor has it opposed any mergers in digital markets. Proposals to include a general prohibition against unfair trading practices are currently being considered and would broaden the reach of consumer laws economy-wide. The ACCC has also exercised its merger review powers to publicly review 8 digital platform acquisitions (in addition to

¹³ 'Dynamic Markets Unlocking small business innovation and growth through the rise of the personalized economy' (May 2021), Report by Deloitte, p 27. Available: <https://www.facebook.com/business/news/new-insights-on-personalized-ads-and-social-medias-impact-on-small-businesses>; and 'Dynamic Markets Report: Australia' (October 2021), Report by Facebook, p 4. Available: <https://australia.fb.com/wp-content/uploads/sites/69/2021/10/nji-fb-ausresearch-report-r26.pdf>.

undoubtedly a number of others on a confidential or preliminary basis) over the last 11 years. None of this suggests existing laws are not fit for purpose.

No substantive gap in existing laws

Australia has wide-ranging and comprehensive consumer protection laws, making it one of the world's leading jurisdictions for consumer protection. The ACCC has successfully used existing consumer protection laws to address conduct within digital markets, including in the instances set out in the Discussion Paper to justify the need for reform. For example, the ACCC has successfully taken action under the ACL against Google,¹⁴ HealthEngine¹⁵ and Trivago.¹⁶ It also has a number of ACL proceedings underway against digital platforms, including additional proceedings against Google,¹⁷ Uber,¹⁸ and two separate actions against Meta.¹⁹

Australia also has wide-ranging and comprehensive competition laws, which were updated in 2017 after the Harper Competition Policy Review to include a more flexible "misuse of market power" prohibition as well as introducing a new 'concerted practices' prohibition. This updated framework is being used by private litigants against digital platforms, including in current Federal Court proceedings against Apple,²⁰ Google²¹ and Meta.²² The ACCC and private litigants have also successfully taken action under existing competition laws against other companies to address the exact type of conduct mentioned in the Discussion Paper, such as anti-competitive self-preferencing and leveraging behaviour.²³

The Discussion Paper claims that there are market-wide issues necessitating new laws,²⁴ citing conduct by two identified digital platforms (not Meta) in relation to their respective ad tech and app store services. However, the ACCC has not taken any competition enforcement action using its existing powers against these two companies to address any of the concerns identified in the Discussion Paper, despite the availability of an expanded prohibition on the misuse of market

¹⁴ *ACCC v Google LLC (No 2)* [2021] FCA 637. See also 'Google misled consumers about the collection and use of location data' (16 April 2021), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/google-misled-consumers-about-the-collection-and-use-of-location-data>.

¹⁵ *ACCC v HealthEngine Pty Ltd* [2020] FCA 1203. See also 'HealthEngine to pay \$2.9 million for misleading reviews and patient referrals' (20 August 2020), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/healthengine-to-pay-29-million-for-misleading-reviews-and-patient-referrals>.

¹⁶ *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185. See also 'Trivago loses appeal after misleading consumers over hotel ads' (4 November 2020), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/trivago-loses-appeal-after-misleading-consumers-over-hotel-ads>.

¹⁷ 'Correction: ACCC alleges Google misled consumers about expanded use of personal data' (27 July 2020), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/correction-accc-alleges-google-misled-consumers-about-expanded-use-of-personal-data>.

¹⁸ 'Uber in court for misleading statements about Uber taxi fares and cancellation fees' (26 April 2022), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/uber-in-court-for-misleading-statements-about-uber-taxi-fares-and-cancellation-fees>.

¹⁹ 'ACCC takes action over alleged misleading conduct by Meta for publishing scam celebrity crypto ads on Facebook' (18 March 2022), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/accc-takes-action-over-alleged-misleading-conduct-by-meta-for-publishing-scam-celebrity-crypto-ads-on-facebook>; and 'ACCC alleges Facebook misled consumers when promoting app to 'protect' users' data' (16 December 2020), Media release by ACCC. Available:

<https://www.accc.gov.au/media-release/accc-alleges-facebook-misled-consumers-when-promoting-app-to-protect-users-data>.

²⁰ *Epic Games, Inc & Anor v Apple Inc (Case Management)* [2022] FCA 341.

²¹ *Epic Games, Inc & Anor v Google LLC & Ors* (Federal Court of Australia, NSD190/2021, commenced 8 March 2021). See also for example *Unlocked Ltd v Google Asia Pacific Pte Ltd* [2018] FCA 826 for previous private litigation.

²² *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846.

²³ See for example, *ASX Operations Pty Ltd v Pond Data Australia Pty Ltd (No 1)* (1990) 27 FCR 260, *ACCC v Cabcharge Australia Ltd* [2010] FCA 1261 and *ACCC v Baxter Healthcare* (2007) 232 CLR 1.

²⁴ Discussion Paper, p 64.

power. Any suggestion that wide-ranging new laws and powers in Australia are required to address such concerns is premature and not based on evidence of failures or gaps in the current regime.

No procedural reasons why existing laws cannot be effectively used

The Discussion Paper also suggests current enforcement tools are ineffective to address the identified harms arising in relation to digital platforms because “investigations and court proceedings are lengthy and necessarily retrospective in effect”²⁵ and “many of the competition harms in particular may be more novel and prospective, which makes them more difficult for a court to assess”.²⁶ Meta notes that while the ACCC has investigated and taken court proceedings against digital platforms in relation to consumer protection issues, it has not done so in relation to competition issues, so it is not possible to speculate about the effectiveness of existing tools when those have not been used.

Australia has the benefit of broad and flexible competition and consumer protection laws which are capable of applying to even the most “novel and prospective” theories of harm regarding new business practices and new products, if supported by evidence. For example, what the Discussion Paper terms a potential “dark pattern” in relation to Meta is just a well-recognised interface design to optimise a user’s experience to be as easy as possible. If any design is misleading or deceptive, existing consumer protection provisions are well able to address that.

To the extent the ACCC’s concern is about speed of investigations and litigation, and the challenge of identifying conduct at issue:

- That in fact reflects the complexity of the analysis required for these issues, which needs to be undertaken whether that is within an *ex-post* or *ex-ante* framework. The complexity arises because the types of conduct identified in the Discussion Paper are frequently not clearly anti-competitive and must be considered against any pro-competitive effects. It would be very concerning for a regulator to seek new laws or powers (including wide rule-making powers for itself) that circumvent the analysis required for such complex questions, purely so that regulatory action can be taken more rapidly.
- The task of investigating and then evidencing potential theories of harm must be rigorous and, like any litigation process, be governed by rules of evidence and burdens of proof which are fundamental to our justice system and are designed to afford due process to parties.
- These concerns do not require legislative solutions. It may be appropriate for the ACCC to consider proposals to streamline or improve the efficiency of its investigation processes, including seeking additional resources to allow it to pursue its investigations faster and more effectively.

Meta would be happy to engage with the ACCC in any consultation about how to constructively address the concerns set out in the Discussion Paper.

²⁵ Discussion Paper, p 63.

²⁶ Discussion Paper, p 63.

1.3. International harmony and cohesion is critical, but there is no global consensus on regulation

Meta broadly agrees with the principle set out in the Discussion Paper that alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for digital platforms. There are global conversations underway around whether existing competition frameworks can address the challenges posed by the digital economy.

While experts, academics and practitioners around the world have been discussing and proposing different approaches, a global consensus does not exist on whether new regulation is required nor, if so, how it should be designed.

Many renowned academics and experts have expressed concerns about the direction represented by *ex-ante* regulation in Europe.²⁷ A growing body of research and commentary recognises that digital ecosystems and digital markets are not sufficiently understood and that more work is necessary to understand these markets, assess them and design proper remedies. There is concern that current trends in research are disproportionately focused on identifying and codifying harms, without recognising and protecting the process by which value is created and innovation is supported on digital platforms. For example, research is identifying problematic restrictions around data or self-preferencing in the Digital Markets Act (DMA).²⁸

Even proponents of regulation have expressed discomfort with the overly prescriptive approach of the DMA, and many have voiced concern that the law is not sufficiently flexible to regulate digital markets.²⁹ The DMA is not yet finalised and its impact is not yet clear. Therefore, there is benefit in observing and advancing further research before rushing to adopt variations of the European DMA.

Beyond the ongoing developments at the EU level, global regulatory discussions are also taking place in other regions such as the UK, the US, and Japan. Unsurprisingly, given the impact the adoption of regulations could have on innovation, incentives to invest and legal certainty, no other jurisdiction has moved to adopt broad ranging legislation to date.

While both the UK and US are considering adopting new regulations that will apply to certain digital platforms,³⁰ their proposed legislation includes the possibility to account for the pro-competitive value of digital services. It remains unclear whether any of the legislation

²⁷ See for example, 'Can the EU Regulate Platforms Without Stifling Innovation?' (March 2021), Harvard Business Review article by Carmelo Cennamo and D. Daniel Sokol; 'Digital Platforms and Antitrust' (22 May 2020), Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne.

Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608397; and 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (1 December 2021), European Law Review article by Pinar Akman. Available <https://ssrn.com/abstract=3978625>.

²⁸ See for example, 'EU Closes in on Regulating Big Tech with Digital Markets Act' (13 January 2022), Insights@Questroom blog post by Marshall Van Alstyne. Available:

<https://insights.bu.edu/techtargt-eu-closes-in-on-regulating-big-tech-with-digital-markets-act>; 'Can the EU Regulate Platforms Without Stifling Innovation?' (March 2021), Harvard Business Review article by Carmelo Cennamo and D. Daniel Sokol. Available: <https://hbr.org/2021/03/can-the-eu-regulate-platforms-without-stifling-innovation>; and 'Digital Platforms and Antitrust' (22 May 2020), Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608397.

²⁹ 'Regulating Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act' (1 December 2021), European Law Review article by Pinar Akman. Available <https://ssrn.com/abstract=3978625>; and Tweet from Jacques Crémer (co-author of the Vestager Report), "[R]egulation should be based on principles and able to adapt—not a list of rules without a clear internal logic". Available: <https://twitter.com/jcremer/status/1433871699670446082>.

³⁰ 'The UK's plan to tackle Big Tech won't be one-size fits all' (27 April 2021), TechCrunch post by Natasha Lomas. Available: <https://techcrunch.com/2021/04/27/the-uks-plan-to-tackle-big-tech-wont-be-one-sized-fits-all/>.

contemplated will be adopted, as they are widely considered to be early discussion drafts needing substantial work.

In this year's most recent Handbook on Competition Policy in the Digital Age, the OECD summarises the state of play of competition policy in the digital space, noting that "many competition law frameworks remain sufficiently flexible to tackle some of the novel theories of harm and unique market characteristics that emerge in digital markets".³¹ Further, acknowledging the move towards *ex-ante* regulation in some jurisdictions, it notes that "while many of the core objectives and concerns motivating these proposals are the same, there is a growing divergence in the precise approach taken".

While harmonisation is in-principle a goal of good regulation, there is no international consensus for Australia to follow. As the OECD suggests and as the ACCC's track record shows, Australia's competition and consumer law frameworks are sufficiently flexible to enable competition and consumer protection enforcement in digital markets. There is no evidence of a gap that must be addressed or, if there is one, that wide-ranging sector-specific rules are the way to address it.

2. The underlying analysis of digital platforms and harms is unsupported by evidence and inconsistent with commercial realities

2.1. Recent industry and consumption trends confirm Meta competes in a highly dynamic ecosystem

The Discussion Paper makes a number of broad statements about Meta's "market power" in Australia in relation to "social media" and "display advertising". Those statements are not founded on a rigorous analysis of competitive alternatives and merely repeat observations the ACCC has made in previous inquiries which vastly underestimate the significant and increasing competitive pressures on Meta. These competitive pressures are critical. We compete vigorously to attract and retain users and their attention, and face significant competition from an increasing and ever-evolving range of participants. In particular:

- **People switch and multi-home between multiple apps and websites.** They use multiple apps with social, messaging, content and features. With the constant pace of innovation across multiple apps and services, new features can become outdated overnight, and any decrease in popularity can rapidly lead to obsolescence. Any loss of user engagement with our platform - even at the margin - can have a substantial impact on our business.
- **We compete with a wide range of websites and apps, each seeking to differentiate their product offerings and attract users.** Many competing services have similar features to Facebook and Instagram that enable people to share and connect over shared personal interests, video, posts, messages and comments, even though they look very different to our services.
- **Our competitors are experiencing unprecedented growth, and in many areas we are tracking behind them.** In 2021, the most downloaded app was TikTok, the most popular video app was YouTube, the largest advertising platform was Google, and if the Microsoft/Activision transaction completes, Microsoft will be the world's third-largest

³¹ 'OECD Handbook on Competition Policy in the Digital Age' (2022), OECD. Available: <https://www.oecd.org/daf/competition/oecd-handbook-on-competition-policy-in-the-digital-age.pdf>.

gaming company by revenue, behind Tencent and Sony.³² Growth has also been, and continues to be, rapid: Apple's ad revenue is forecast to grow from its current \$2 billion to \$20 billion in 2024³³ and Amazon's ads revenue is \$31 billion and growing.³⁴ These developments over the last five years demonstrate the exact dynamic competition that the ACCC's DPI Final Report identified as imposing some competitive constraint on any "substantial market power" in relation to social media and advertising, and clearly run counter to suggestions that any market power poses "a significant barrier to entry and expansion" by other companies.³⁵

- **Some of our competitors benefit significantly from their integration and control of the hardware and operating systems we rely on to reach users.** Apple's and Google's control over their respective mobile ecosystems - hardware and software - allows them to set the 'rules of the game' for app developers who seek to use their app stores. Apple and Google have the ability and incentive to provide their own apps with a competitive advantage. For example, Apple's ATT policy entrenches Apple's App Store's position as the main way of users discovering apps and advantages Apple's advertising services,³⁶ which is experiencing a rapid increase in revenue as a result.³⁷ Likewise, Apple does not need to request camera access for its own messaging app (Apple Messages / iMessage) despite requiring this from others, like from Meta's offerings.
- **Evolving consumer demand is driving increasing feature-based competition.** Over the past few years, competitive pressures have increased in response to evolving consumer demand, declining attention spans, and increasing demand for 'newness', immersive services, features and content. We, and likewise our competitors, need to respond to any popular new product, service or feature by rapidly adding and refining better features to our apps, and this differentiation and feature-based competition continues to drive growth, as seen with the rise of TikTok, Roblox and others. Given the diverse feature sets accommodating many different use cases within a single app, apps are increasingly difficult to categorise by traditional app categories.
- **There is accelerating competition for the next phase in the evolution of online services.** We also compete to predict how people will engage tomorrow so that we can build those products and services today. Like us, our competitors take bold steps to position themselves for what consumer demand will look like in the future. For example, in the first 100 days of 2022 alone, Google purchased Raxium, a start-up manufacturing augmented

³² 'State of Mobile 2022' (12 January 2022), Report by data.ai, p 52. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>; and 'Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device' (18 January 2022), Media release by Microsoft. Available: <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>.

³³ 'Apple's privacy changes create windfall for its own advertising business' (16 October 2021), Financial Times article by Patrick McGee. Available: <https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d>.

³⁴ 'Amazon's advertising revenue is \$31 billion and growing. Here's everything we know about its blooming ad business' (4 April 2022), Business Insider. Available: <https://www.businessinsider.com/inside-amazons-growing-ad-business-everything-we-know-2019-5>.

³⁵ DPI Final Report, p 9.

³⁶ 'Mobile ecosystems: Market study interim report' (14 December 2021), Report by Competition & Markets Authority (UK), p 255. Available: <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report>.

³⁷ 'Apple Tripled Its Ad Market Share After Blocking Competitors from Targeting Consumers' (17 October 2021), The Motley Fool post by The Daily Upside. Available: <https://www.fool.com/investing/2021/10/17/apple-tripled-its-ad-market-share-after-blocking-c/>.

reality (AR) components, to fuel its AR ambitions;³⁸ Snap purchased NextMind, a neurotech start-up, to drive long-term AR research efforts;³⁹ Niantic purchased NZXR, a New Zealand-based AR studio, to accelerate new kinds of AR experiences for the real-world metaverse;⁴⁰ Sony invested another \$2 billion in Epic Games to advance their metaverse partnership with the Lego Group,⁴¹ and Microsoft is proposing to acquire Activision for \$68.7 billion to “provide the building blocks for the metaverse.”⁴²

2.2. Findings on social media are outdated and inconsistent with commercial realities

The Discussion Paper repeats a number of qualified findings from previous inquiries to suggest that Meta has significant market power in the supply of social media services in Australia.⁴³ These findings have not been borne out by the last five years.

The findings in the DPI were based on data collected in 2018 and early 2019 and, at the time, Meta raised concerns that they were selective and departed from established competition law principles. Despite the passage of several years, and the rapid evolution of the industry (particularly in the context of the global pandemic), the Discussion Paper does not seek to update its findings based on current data, and does not meaningfully engage with real competitive tensions today or recognise the competitive pressures driving the evolution of the digital industry.

It is fundamental that any competitive analysis of technology markets should take account of the pace of innovation and dynamic change.

2.2.1. Consumption patterns are shifting, driven by new innovations

The COVID-19 pandemic has accelerated changes in how people consume content.⁴⁴ New innovations and consumption patterns are continuing at pace to shape the future.

- **People are spending more time online, increasing their propensity to multi-home and switch between services.** The digitisation of the economy has exponentially increased the volume of new content that is available to users across a range of services. In response, people are spending more time online. In 2021, people in Australia spent 10% more time online than in 2020.⁴⁵ The sheer volume of content also results in people switching

³⁸ ‘Google Buys Hardware Startup Raxium to Fuel AR Ambitions’ (16 March 2022), The Information. Available: <https://www.theinformation.com/articles/google-buys-hardware-startup-raxium-to-fuel-ar-ambitions>.

³⁹ ‘Snap buys mind-controlled headband maker, NextMind’ (24 March 2022), TechCrunch post by Brian Heater. Available: <https://techcrunch.com/2022/03/23/snap-buys-mind-controlled-headband-maker-nextmind/>.

⁴⁰ ‘Welcoming Creative AR Studio NZXR To Niantic’ (5 April 2022), Niantic. Available: <https://nianticlabs.com/blog/welcome-nzxr/?hl=en>.

⁴¹ ‘Epic Games valued at about \$32 bln in funding from Sony, Lego firm’ (12 April 2022), Reuters. Available: <https://www.reuters.com/technology/epic-games-raises-2-bln-valuation-nearly-32-bln-2022-04-11/>.

⁴² ‘Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device’ (18 January 2022), Media release by Microsoft. Available: <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>.

⁴³ Discussion Paper, pp 18-19.

⁴⁴ ‘The Virus Changed the Way We Internet’ (7 April 2020), New York Times article by Ella Koeze and Nathaniel Popper. Available: <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html>.

⁴⁵ ‘Digital 2021 Australia’ (9 February 2021), Report by Simon Kemp, p 22. Available: <https://datareportal.com/reports/digital-2021-australia>; and ‘Digital 2020 Australia’ (13 February 2020), Report by Simon Kemp, p 22. Available: <https://datareportal.com/reports/digital-2020-australia>.

regularly between apps and websites to absorb information from various content streams, and this is causing average user attention spans to decline.⁴⁶ For example:

- a report from Pew Research Centre (2018)⁴⁷ shows that multi-homing is widespread among the end users of social media online platforms, and there is a substantial amount of overlap between end users of the major social media platforms: 80% - 90% of the major social media platform users, for instance, used YouTube as well as Facebook, and 73% of Twitter users and 77% of Snapchat users also indicate that they use Instagram;
- the Digital 2022: Global Overview Report states that most users have profiles on several different platforms at the same time. Only a small fraction of each platform's user base is unique, with more than 99% of Facebook, YouTube, Instagram, Pinterest, LinkedIn, Reddit, Snapchat, Twitter and TikTok users aged 16 to 64 reporting that they use at least one other social platform;⁴⁸
- a study conducted by the Australian Communications and Media Authority (ACMA) in 2020 found that between January and June 2020, 74% of all Australians used 5 or more separate communications services, 55% of Australian adult internet users used 1 to 3 apps to communicate, and 35% used 4 or more apps to communicate;⁴⁹ and
- a 2020 study conducted by Global Web Index, showed that Australians hold an average of 6.9 social media accounts.⁵⁰

The prevalence of multi-homing is clearly demonstrated by Figure 3.3 of the Discussion Paper, where vertical addition of the platform's active users equals approximately 40 million, when the total population of Australia is approximately 26 million.

The increased switching and consumer demand for 'newness' and features further fuels innovation and dynamic competition and accelerates the pace of innovation.

- **Online activity is shifting to mobile, increasing reliance on mobile operating systems.** In 2021, people spent 30% more time on Android devices than in 2019.⁵¹ Apple and Google pose a serious and increasing competitive threat because of the control they have over the devices and operating systems necessary to host Facebook and other apps. These OS-owner advantages also materialise in areas like inconsistent treatment of first-party vs. third-party apps in permissions requests vs. default permissions (e.g. for camera access), as well as in inconsistent displays to users in Settings for first-party vs. third-party apps, which incorrectly imply that third-party apps are more invasive than first-party alternatives. The control that Apple, in particular, exerts over the mobile software and

⁴⁶ 'The "online brain": how the Internet may be changing our cognition' (6 May 2019), World Psychiatric Association journal article by Joseph Firth et al. Available: <https://onlinelibrary.wiley.com/doi/full/10.1002/wps.20617>.

⁴⁷ 'Social Media Use in 2018' (1 March 2018), Pew Research Centre article by Aaron Smith and Monica Anderson. Available at: <https://www.pewresearch.org/internet/2018/03/01/social-media-use-in-2018/>.

⁴⁸ 'Digital 2022: Global Overview Report' (26 January 2022), Report by Simon Kemp, p 102. Available: <https://datareportal.com/reports/digital-2022-global-overview-report>.

⁴⁹ 'Trends in online behaviour and technology usage' (September 2020), ACMA consumer survey, p 9. Available: https://www.acma.gov.au/sites/default/files/2021-02/Trends-in-online-behaviour-and-technology-usage_ACMA-consumer-survey-2020.pdf.

⁵⁰ 'Social - GlobalWebIndex's flagship report on the latest trends in social media' (2020), Report by Global Web Index, p 16. Available: <https://amai.org/covid19/descargas/SocialGlobalWebIndex.pdf>.

⁵¹ 'State of Mobile 2022' (12 January 2022), Report by data.ai, p 6. Available: <https://www.data.ai/en/go/state-of-mobile-2022/>.

sharing ecosystem is illustrated by Apple's App Store decisions, such as its persistent rejection of updates to Instant Games on Facebook and Meta's standalone gaming app, Facebook Gaming on iOS, from the Apple App Store due to Apple's restrictive policies regarding gaming apps.⁵² This is also illustrated by Apple's recent iOS 14 privacy policy changes introducing an ATT framework.

- **The audiences that use Facebook, Instagram and other services are changing, and we need to innovate and compete to remain relevant.** Users consistently develop new behaviours and preferences, and our products (as well as many others in the market) need to adapt to serve these evolving needs. For example:
 - people are increasingly using video to communicate with friends, family, groups and their communities. Video content overall makes up 50% of all time spent on Facebook.⁵³ We have responded to this trend and increased competition by creating new AR experiences for video calls (like Group Effects on Messenger and Instagram), expanding group calling services (like increasing the number of WhatsApp group voice and video calls participants and launching Messenger Rooms) and expanding the features in Instagram Reels and launching Reels on Facebook. This has also driven significant innovation and new feature development in video and group communications by Apple, Snapchat, Telegram, Twitter, Signal and many others; and
 - since the COVID-19 pandemic, small businesses have increasingly moved to digital strategies to reach consumers who are not able to visit their premises in person. This has led to new tools and services to support small businesses.⁵⁴

The significant investments that we continue to make to innovate and stay relevant to users are not consistent with any finding of market power.

2.2.2. Any finding of market power is inconsistent with the level of new entry, rapid growth and competition from our competitors

Many of our competitors have large and engaged user bases which continue to grow as they release new and competing services and features. For example:

1. **ByteDance/TikTok** – TikTok is experiencing very significant growth,⁵⁵ and is among “the most effective competitors [Meta has] ever faced.”⁵⁶ In 2021, it was the most downloaded “social” app, both worldwide and across a number of key Asia-Pacific (**APAC**) jurisdictions,

⁵² *Apple Rejects Facebook's Gaming App, for at Least the Fifth Time* (18 June 2020), New York Times article by Seth Schiesel. Available: <https://www.nytimes.com/2020/06/18/technology/apple-ios-facebook-gaming-app.html>.

⁵³ *Mark Zuckerberg says video accounts for almost half the time spent on Facebook* (28 July 2021), Engadget article by Karissa Bell. Available: <https://www.engadget.com/facebook-q2-2021-earnings-214311750.html>; Meta Platforms, Inc. First Quarter 2022 Results – Prepared Remarks (27 April 2022). Available: https://s21.q4cdn.com/399680738/files/doc_financials/2022/q1/FB-Q1-2022-Prepared-Remarks.pdf

⁵⁴ See for example, Cheese Therapy which is using Facebook ads to connect with customers and hire more people. See, Facebook post by Artisans Bend By Cheese Therapy. Available: <https://www.facebook.com/cheesetherapyAU/photos/a.449323455116014/2838838922831110/?type=3&theater>).

⁵⁵ See for example, Meta's *Fourth Quarter 2021 Results Conference Call*, in which Mark Zuckerberg states: “People have a lot of choices for how they want to spend their time and apps like TikTok are growing very quickly”. Available: https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/Meta-Q4-2021-Earnings-Call-Transcript.pdf.

⁵⁶ Transcript of Meta's investor relations, *Third Quarter 2021 Results Conference Call* (25 October 2021), p 3. Available: https://s21.q4cdn.com/399680738/files/doc_financials/2021/q3/FB-Q3-2021-Earnings-Call-Transcript.pdf.

including Australia.⁵⁷ In 2020, TikTok boasted over 800 million monthly active users (MAU),⁵⁸ which has increased to 1.6 billion MAU in the first quarter of 2022.⁵⁹

TikTok's monthly time spent per Australian user grew 115% from 7.8 hours per month in 2019 to 16.8 hours per month in 2020.⁶⁰ Growth continued in 2021 with monthly time spent per Australian user growing 39% to 23.4 hours per month - almost a full day spent on TikTok per month.⁶¹

This has contributed to its advertising success, with TikTok's advertising revenue likely to triple in 2022 to more than \$11 billion. This exceeds the combined sales of Twitter and Snap,⁶² and places TikTok fourth in global digital ad sales. Early signs indicate that TikTok is on track for another record year of growth, achieving the highest quarterly global consumer spend ever for any app or game surpassing \$840 million in March 2022, up 40% from Q4 2021.⁶³ In 2021, ByteDance's gross profits rose 93% to \$19 billion and its annual revenue was \$34.3 billion.⁶⁴

- 2. YouTube (owned by Google)** - YouTube continues to attract a highly engaged and growing user base, with more than 1 billion hours of videos viewed per day, representing a 10-fold increase since 2012.⁶⁵ Across mobile and desktop, YouTube claims two billion monthly signed-in users⁶⁶, while the YouTube app has grown from approximately 416 million MAU to 892 million MAU since 2018.⁶⁷

YouTube continues to develop new functionalities for users and creators. For instance, YouTube Shorts has seen massive growth since launching globally in July 2021. In Q1 2022,

⁵⁷ 'State of Mobile 2022' (12 January 2022), Report by data.ai, p 52. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>.

⁵⁸ 'TikTok: Why the Enormous Success?' (31 January 2020), Forbes article by Tom Taulli. Available:

www.forbes.com/sites/tomtaulli/2020/01/31/tiktok-why-the-enormous-success/#6ab4ef6c65d.

⁵⁹ 'TikTok Saw the Most Quarterly Consumer Spend of Any App or Game at Over \$840 Million in Q1 2022' (7 April 2022), data.ai post by Gabrielle Bikker. Available:

https://www.data.ai/en/insights/market-data/tiktok-app-milestone-840-million-spend/?utm_medium=linkedin&utm_campaign=everyonesocial&utm_source=4c6df9ce-9e8c-4706-8638-ab6b898d3029&es_id=622ee7c800.

⁶⁰ 'State of Mobile 2021' (13 January 2021), Report by data.ai, p 24. Available:

<https://www.data.ai/en/go/state-of-mobile-2021/>.

⁶¹ 'State of Mobile 2022' (12 January 2022), Report by data.ai, p 50. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>.

⁶² 'TikTok's ad revenue to surpass Twitter and Snapchat combined in 2022 - report' (12 April 2022), Reuters article by Bhanvi Satija. Available:

<https://www.reuters.com/technology/tiktoks-ad-revenue-surpass-twitter-snapchat-combined-2022-report-2022-04-11/>.

⁶³ 'TikTok's ad revenue to surpass Twitter and Snapchat combined in 2022 - report' (12 April 2022), Reuters article by Bhanvi Satija. Available:

<https://www.reuters.com/technology/tiktoks-ad-revenue-surpass-twitter-snapchat-combined-2022-report-2022-04-11/>.

⁶⁴ 'TikTok Owner ByteDance's Annual Revenue Jumps to \$34.3 Billion' (17 June 2021), Wall Street Journal article by liza Lin. Available:

https://www.wsj.com/articles/tiktok-owner-bytedances-annual-revenue-jumps-to-34-3-billion-11623903622?mod=searchresults_pos1&page=1.

⁶⁵ 'You know what's cool? A billion hours' (27 February 2017), YouTube blog post by Cristos Goodrow. Available:

<https://blog.youtube/news-and-events/you-know-whats-cool-billion-hours/>; and 'YouTube Tops 1 Billion Hours of Video a Day, on Pace to Eclipse TV' (27 February 2017), Wall Street Journal article by Jack Nicas. Available:

<https://www.wsj.com/articles/youtube-tops-1-billion-hours-of-video-a-day-on-pace-to-eclipse-tv-1488220851>.

⁶⁶ Transcript of Alphabet's investor relations, 'Alphabet Q1 2022 Earnings Call' (26 April 2022). Available:

https://abc.xyz/investor/static/pdf/2022_Q1_Earnings_Transcript.pdf?cache=aded5ae.

⁶⁷ 'YouTube app monthly active users (MAU) worldwide 2018-2021' (14 February 2022), Statista post by L Ceci. Available:

[https://www.statista.com/statistics/1252627/youtube-app-mau-worldwide/#:~:text=YouTube%20app%20monthly%20active%20users%20\(MAU\)%20worldwide%202018%202021&text=As%20of%20the%20fourth%20quarter,were%20roughly%203.76%20million%20worldwide](https://www.statista.com/statistics/1252627/youtube-app-mau-worldwide/#:~:text=YouTube%20app%20monthly%20active%20users%20(MAU)%20worldwide%202018%202021&text=As%20of%20the%20fourth%20quarter,were%20roughly%203.76%20million%20worldwide).

YouTube Shorts reached over 30 billion views each day increasing 400% year-over-year,⁶⁸ and continues to expand how creators can monetise their content and interact with users. For example, it has created a \$100 million Shorts Fund for creators,⁶⁹ and is developing new features like video effects, the ability to shop directly from a Short, and the ability to reply to comments by creating a Short.⁷⁰

YouTube Gaming also continues to evolve and expand. In the first half of 2021, YouTube saw 800 billion gaming-related views, 90 million hours live streamed and over 250 million uploads.⁷¹ More recently, YouTube Gaming announced plans to launch additional features similar to Twitch, including Gifted Memberships and Live Redirect.⁷²

YouTube's paid subscription service has also seen growth, increasing the number of paid YouTube Music and YouTube premium subscribers from 20 to 50 million between 2019 to 2021.⁷³ Amongst competitors like Spotify and Apple Music, YouTube is considered the fastest growing music subscription service.⁷⁴

- 3. Twitch (owned by Amazon)** - As the leading live video game streaming platform, accounting for 71% of total hours watched⁷⁵ with 140 million MAU,⁷⁶ Twitch is in prime position to capitalise on the predicted growth of esports and video streaming.⁷⁷ Twitch's recent growth is significant: total hours watched increased from 18.5 billion hours in 2020 to 24.3 billion hours in 2021⁷⁸, global app installations increased 134% in 2020 to 80.6 million and global MAU grew 69% in March 2021 when compared to the previous two years.⁷⁹ Further, Twitch has continued its expansion into non-gaming audiences, which now account for 12% of the total Twitch hours watched (and has grown 64% since 2020).⁸⁰ In addition to continual updates to its core video streaming product, Twitch's recent

⁶⁸ Transcript of Alphabet's investor relations, 'Alphabet Q1 2022 Earnings Call' (26 April 2022). Available: https://abc.xyz/investor/static/pdf/2022_Q1_Earnings_Transcript.pdf?cache=aded5ae.

⁶⁹ 'Introducing the YouTube Shorts Fund' (11 May 2021), YouTube blog post by Amy Singer. Available: <https://blog.youtube/news-and-events/introducing-youtube-shorts-fund/>.

⁷⁰ 'A Look at 2022: Community, Collaboration, and Commerce' (10 February 2022), YouTube blog post by Neal Mohan. Available: <https://blog.youtube/inside-youtube/innovations-for-2022-at-youtube/>.

⁷¹ 'Upping our gaming' (29 October 2021), YouTube blog post by Ryan Watt. Available: <https://blog.youtube/inside-youtube/innovation-series-gaming/>.

⁷² 'Upping our gaming' (29 October 2021), YouTube blog post by Ryan Watt. Available: <https://blog.youtube/inside-youtube/innovation-series-gaming/>; and 'YouTube to add Twitch-like 'Gifted Memberships' and 'Live Redirect' for streams' (29 October 2021), 9to5Google post by Damien Wilde. Available: <https://9to5google.com/2021/10/29/youtube-to-add-twitch-like-gifted-memberships-and-live-redirect-for-streams/>.

⁷³ Transcript of Alphabet's investor relations, 'Alphabet Q4 2019 Earnings Call' (3 February 2020), p 2. Available: https://abc.xyz/investor/static/pdf/2019_Q4_Earnings_Transcript.pdf?cache=650c00a; and '50 Million' (2 September 2021), YouTube blog post. Available: <https://blog.youtube/news-and-events/50-million/>.

⁷⁴ '50 Million' (2 September 2021), YouTube blog post. Available: <https://blog.youtube/news-and-events/50-million/> citing 'Global music subscriber market shares Q1 2021' (9 July 2021), MiDIA. Available: <https://www.midiaresearch.com/blog/global-music-subscriber-market-shares-q1-2021>.

⁷⁵ '2021 Live Streaming Report' (31 January 2022), Report by Stream Hatchet, p 5. Available: <https://insights.streamhatchet.com/-2021-live-streaming-report-0>.

⁷⁶ 'The battle between Twitch and YouTube has only just begun' (14 September 2021), The Washington Post Launcher blog post by Nathan Grayson. Available: <https://www.washingtonpost.com/video-games/2021/09/14/youtube-strategy-twitch/>.

⁷⁷ 'Global Esports & Live Streaming Market Report 2021' (9 March 2021), Report by Newzoo. Available: <https://newzoo.com/insights/trend-reports/newzoos-global-esports-live-streaming-market-report-2021-free-version/>.

⁷⁸ '2021 Live Streaming Report' (31 January 2022), Stream Hatchet, p 7. Available: <https://insights.streamhatchet.com/-2021-live-streaming-report-0>.

⁷⁹ 'Twitch Hit 22 Million Installs Globally in Q1 2021, Up 62% Year-Over-Year' (May 2021), SensorTower. Available: <https://sensortower.com/blog/twitch-install-mau-growth>.

⁸⁰ '2021 Live Streaming Report' (31 January 2022), Report by Stream Hatchet, p 7. Available: <https://insights.streamhatchet.com/-2021-live-streaming-report-0>.

feature updates include allowing streamers to use Snapchat-style selfie features (in partnership with Snap).⁸¹

4. **Snapchat** - Snapchat grew from 217 million daily active users (DAU) globally in Q4 2019, to 332 million DAU globally in Q1 2022.⁸² Snapchat continues to have continued success in Australia, with an estimated 6.4 million Australian MAU,⁸³ and continued growth in user numbers.⁸⁴ Currently, over 75% of 13 to 34 year olds in the US, UK, Australia, France, and Netherlands use Snapchat.⁸⁵ Snapchat launched a short-video feed feature called Spotlight in late 2020, and the latest features announced at the start of 2022 include group messaging functionalities (which were first introduced to Messenger by Meta in 2019), as well as video and audio calling features.⁸⁶ Additionally, Snap is building an AR platform which 250 million Snapchat users interact with daily.⁸⁷
5. **Twitter** - Twitter's global monetisable DAU (mDAU)⁸⁸ grew to 217 million in Q4 2021, up 13% year-over-year.⁸⁹ Twitter's newest features demonstrate an intention to grow its video and audio offering, including through a new Explore tab and "For You" page (drawing on features launched by TikTok)⁹⁰, allowing reaction videos to tweets and an audio room feature (similar to Clubhouse) called Spaces.⁹¹ Twitter has also launched features to allow more personalised communications among communities and is exploring allowing users to

⁸¹ 'Twitch streamers are getting Snap's AR selfie filters' (26 October 2018), Engadget blog post by Edgar Alvarez. Available: <https://www.engadget.com/2018-10-26-twitch-snap-camera-snapchat-augmented-reality-filters.html>.

⁸² 'Q4 2021 Investor Deck' (February 2022), Snap Inc, p 5. Available: https://s25.q4cdn.com/442043304/files/doc_presentations/2022/02/Q4-2021-Investor-Deck.pdf; Transcript of Snap Inc.'s investor relations, 'Snap Inc. Q1 2022 Transcript' (21 April 2022). Available: https://s25.q4cdn.com/442043304/files/doc_financials/2022/q1/v2/Q1-2022-Transcript.pdf.

⁸³ 'A report to government on the adequacy of digital platforms' disinformation and news quality measures' (June 2021), Report by ACMA, p 46. Available: <https://www.acma.gov.au/sites/default/files/2021-11/Adequacy%20of%20digital%20platforms%20disinformation%20and%20news%20quality%20measures.pdf>.

⁸⁴ 'Snapchat confident of stealing share from TikTok, Instagram' (7 January 2022), The Australian article by David Swan. Available: <https://www.theaustralian.com.au/business/technology/snapchat-confident-of-stealing-share-from-tiktok-instagram-local-boss-kathryn-carter-says/news-story/c67f4df892592bd0def4b6a87794397b>.

⁸⁵ 'Q4 2021 Investor Deck' (February 2022), Snap Inc, p 7. Available: https://s25.q4cdn.com/442043304/files/doc_presentations/2022/02/Q4-2021-Investor-Deck.pdf.

⁸⁶ 'Snapchat Adds New Features to Facilitate Fun Interaction, Including Emoji Polls and Bitmoji Reactions' (12 January 2022), Social Media Today article by Andrew Hutchinson. Available: <https://www.socialmediatoday.com/news/snapchat-adds-new-features-to-facilitate-fun-interaction-including-emoji-p/617084/>.

⁸⁷ Transcript of Snap Inc.'s investor relations, 'Snap Inc. Q1 2022 Transcript' (21 April 2022). Available: https://s25.q4cdn.com/442043304/files/doc_financials/2022/q1/v2/Q1-2022-Transcript.pdf.

⁸⁸ mDAU is defined as "Twitter users who logged in or were otherwise authenticated and accessed Twitter on any given day through Twitter.com or Twitter applications that are able to show ads". See 'Q1 2019 Earnings Report' (April 2019), Report by Twitter, p 2. Available: http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/826641620/files/doc_financials/2019/q1/Q1-2019-Slide-Presentation.pdf.

⁸⁹ 'Q4 and Fiscal Year 2021 Letter to Shareholders' (10 February 2022), Report by Twitter, p 2. Available: https://s22.q4cdn.com/826641620/files/doc_financials/2021/q4/Final-Q4'21-Shareholder-letter.pdf.

⁹⁰ 'Twitter criticized for 'copying' TikTok's For You Page with new video feature' (19 March 2022), Dexterto article by Georgina Smith. Available: <https://www.dexterto.com/entertainment/twitter-criticized-for-copying-tiktoks-for-you-page-with-new-video-feature-1786812/>.

⁹¹ 'Twitter has recently added a bunch of new features, with spaces, communities, and tweets getting special attention in the process' (8 January 2022), Digital Information World blog post by Arooj Ahmed. Available: <https://www.digitalinformationworld.com/2022/01/twitter-has-recently-added-bunch-of-new.html>.

tweet to close friends (known as ‘Trusted Friends’ or ‘Flock’).⁹² Twitter is also trialling in Australia a new subscription service offering premium features, including those aimed at improving the readability of news articles on the platform, called Twitter Blue.⁹³

6. **LinkedIn (owned by Microsoft)** - LinkedIn continues to grow following its acquisition by Microsoft, with more than 810 million members in more than 200 countries,⁹⁴ and approximately 10.2 million unique MAU in Australia.⁹⁵ LinkedIn is increasing its presence in the “creator” space, having launched LinkedIn Creator Mode, which provides users with access to additional tools and features to help them create content and grow their audience base on LinkedIn.⁹⁶ LinkedIn has regularly added new features for creators - for example, users can now stream on live video, create live events or publish newsletters to reach their audience. In January 2022, LinkedIn announced plans to test LinkedIn Audio Events, where users can create virtual “audio rooms”,⁹⁷ with plans to launch this product later this year. In March 2022, LinkedIn also launched new creator-based features, including improved content analytics, new profile video tools, newsletter showcase options and a “Subscriber Bell” which enables a creator’s audience to get alerts.⁹⁸
7. **Roblox** - Roblox went public in 2021, jumping to a market cap of \$38 billion.⁹⁹ In 2021, Roblox experienced year-over-year growth of between 83% to 140% in each quarter.¹⁰⁰ In April 2021, Roblox had 202 million MAU, an increase from 146 million MAU in April 2020,¹⁰¹ and in 2021, approximately 2.5 billion chat messages a day were sent on its platform.¹⁰² While Roblox initially launched as a game, it has, over the past few years, implemented increasing features of the sharing ecosystem and describes itself as “an online community where people do things together in virtual worlds... [we refer] to these worlds as

⁹² ‘Twitter’s ‘close friends’ feature could share tweets with up to 150 select users’ (24 January 2022), The Verge article by Emma Roth. Available: <https://www.theverge.com/2022/1/24/22899387/twitter-flock-tweet-privacy-trusted-friends>.

⁹³ ‘Twitter Adds New Features to its Twitter Blue Subscription Service as it Looks to Broader Launch’ (11 October 2021), Social Media Today article by Andrew Hutchinson. Available: <https://www.socialmediatoday.com/news/twitter-adds-new-features-to-its-twitter-blue-subscription-service-as-it-lo/608034/>.

⁹⁴ LinkedIn website, ‘About LinkedIn’. Available: <https://news.linkedin.com/about-us#Statistics>.

⁹⁵ ‘Digital Landscape Report - June 2020’, Report by Nielsen, p 10. Available: <https://www.nielsen.com/wp-content/uploads/sites/3/2020/09/Digital-Landscape-Report-June-2020.pdf>.

⁹⁶ LinkedIn website, ‘Creator Mode’. Available: <https://www.linkedin.com/help/linkedin/answer/a522537/linkedin-creator-mode?lang=en>.

⁹⁷ ‘Virtual Events Are Here To Stay – How We’re Investing To Build A Better Experience’ (6 January 2022), LinkedIn blog post by Jake Poses. Available: <https://www.linkedin.com/pulse/virtual-events-here-stay-how-were-investing-build-better-jake-poses/>.

⁹⁸ ‘LinkedIn Adds New Tools for Creators, Including Improved Content Analytics and Updates Profile Video Options’ (30 March 2022), Social Media Today article by Andrew Hutchinson. Available: <https://www.socialmediatoday.com/news/linkedin-adds-new-tools-for-creators-including-improved-content-analytics/621237/>.

⁹⁹ ‘Roblox jumps to \$38 billion market cap as public investors get their first crack at the popular kids game app’ (10 March 2021), CNBC article by Ari Levy and Jessiza Bursztynsky. Available: <https://www.cnbc.com/2021/03/10/roblox-rblx-starts-trading-at-64point50-after-direct-listing.html>.

¹⁰⁰ Presentation of Roblox’s investor relations, ‘Roblox Q4 2021 Earnings Conference Call - Supplemental Materials’ (15 February 2022), p 7. Available: [https://s27.q4cdn.com/984876518/files/doc_financials/2021/q4/Q4'21-Supplemental-Materials-\(FINAL-2-11-22\).pdf](https://s27.q4cdn.com/984876518/files/doc_financials/2021/q4/Q4'21-Supplemental-Materials-(FINAL-2-11-22).pdf).

¹⁰¹ ‘Roblox User and Growth Stats 2022’ (5 January 2022), Backlinko article by Brian Dean. Available: <https://backlinko.com/roblox-users>.

¹⁰² ‘A Year on Roblox: 2021 in Data’ (26 January 2022), Roblox Blog Post. Available: <https://blog.roblox.com/2022/01/year-roblox-2021-data/>.

experiences, as they better represent the wide range of 3D immersive places – from obbys to virtual concerts – that people can enjoy together with their friends.”¹⁰³

8. **Reddit** - In 2021, Reddit announced that it was aiming to double its size.¹⁰⁴ Reddit reported an average of 52 million DAU in October 2020, up 44% from the same month a year earlier.¹⁰⁵ Australia is Reddit’s fourth largest user base after the US, Canada and the UK, with Australians reportedly spending an average of 31 minutes a day on the platform.¹⁰⁶
9. **Netflix** - Netflix is one of the world’s leading online entertainment services, with approximately 222 million paid memberships through Q1 2022.¹⁰⁷ When explaining why Netflix’s engagement increased 14% during Facebook’s 4 October, 2021 outage, Netflix noted in its 2021 annual report that it competes “with a staggeringly large set of activities for consumers’ time and attention”¹⁰⁸ and that, “while consumers may maintain simultaneous relationships with multiple entertainment sources, we strive for consumers to choose us in their moments of free time.”¹⁰⁹

This is an enormous amount of growth, innovation and change in consumer behaviour in digital markets, in a short period of time. However, without further analysis, the Discussion Paper restates a view that these markets are subject to limited competition. If this conclusion was ever correct, it is now well out of date.

2.2.3. The Discussion Paper ignores the level of dynamic competition and relies on flawed data

In addition to the features set out above – which are inconsistent with any finding that we have market power in any “market” for “social media” services – the data cited in the Discussion Paper to substantiate these findings is inaccurate or incomplete. For example, the analysis contained in:

- Figure 3.3 of the Discussion Paper is flawed and, as a result, does not provide any meaningful conclusions about market share or market power. In particular:
 - The figure compares apps using different metrics. Firstly, Facebook uses Australian MAU of desktop, mobile, application and messenger services, while all other apps

¹⁰³ ‘Apple said Roblox developers don’t make games, and now Roblox agrees’ (14 May 2021), The Verge article by Adi Robertson. Available:

<https://www.theverge.com/2021/5/14/22436014/apple-roblox-epic-fortnite-trial-what-is-game-name-change>.

¹⁰⁴ ‘Reddit aims to double in size as social news site invests for growth’ (7 May 2021), The Guardian article by Alex Hearn. Available:

<https://www.theguardian.com/technology/2021/may/07/reddit-aims-to-double-in-size-as-social-news-site-invests-for-growth>.

¹⁰⁵ ‘Reddit Claims 52 Million Daily Users, Revealing a Key Figure for Social-Media Platforms’ (1 December 2020), Wall Street Journal article by Sahil Patell. Available:

<https://www.wsj.com/articles/reddit-claims-52-million-daily-users-revealing-a-key-figure-for-social-media-platforms-11606822200>.

¹⁰⁶ ‘Reddit opens Sydney office to target local advertisers’ (12 July 2021), Australian Financial Review article by Miranda Ward. Available:

<https://www.afr.com/companies/media-and-marketing/reddit-opens-sydney-office-to-target-local-advertisers-20210706-p58771#:~:text=According%20to%20Reddit%2C%20Australians%20spend,per%20cent%20aged%2035%2D49>.

¹⁰⁷ Letter to Netflix shareholders, ‘Q1-22 Shareholder Letter’ (19 April 2022). Available:

https://s22.q4cdn.com/959853165/files/doc_financials/2022/q1/FINAL-Q1-22-Shareholder-Letter.pdf.

¹⁰⁸ Letter to Netflix shareholders, ‘Q3-21 Shareholder Letter’ (19 October 2021), p 6. Available:

https://s22.q4cdn.com/959853165/files/doc_financials/2021/q3/FINAL-Q3-21-Shareholder-Letter.pdf.

¹⁰⁹ Netflix’s filed SEC Annual Report 2021, p 1. Available:

https://s22.q4cdn.com/959853165/files/doc_financials/2021/q4/da27d24b-9358-4b5c-a424-6da061d91836.pdf.

use the number of Unique Australian Visitors to that website over the monthly period.¹¹⁰ Relying on website-only user numbers and excluding app users is likely to vastly undercount those platforms relative to Facebook. Secondly, while active users are represented as MAU in most cases, for Snapchat, users for January 2018, June 2017 and January 2017 are DAU. This figure does not provide a reliable apples-for-apples comparison.

- The figure also excludes many of our competitors, including YouTube, which likely has one of the highest MAU of any platform, iMessage, Telegram, LinkedIn, Twitch, Roblox, Reddit, and Netflix, to name a few.
- The figure also uses different or unknown sources. Both Instagram and Snapchat appear to use first-party data, while the others are unknown. Because of the wide-ranging methodologies used to measure app usage data, comparing app usage across different sources is fraught with error.
- Figure 3.4 of the Discussion Paper is also inaccurate because it provides no context for the time spent on Facebook and Instagram and therefore cannot support the statement that “Facebook along with Instagram also account for a large proportion of the time Australians spend online.” In particular:
 - The figure contains no reference to the total amount of time Australians spend online. In fact, Australians over the age of 18 spend 81 hours online per month.¹¹¹ This means Australians spend less than 19% of their total monthly online time on Facebook and less than 6% of their total monthly online time on Instagram. Neither of these estimates can reasonably be considered “a large proportion”.
 - The amount of time spent on Facebook and Instagram is much less than TikTok, YouTube and some gaming apps. Australians spend 23.4 hours per month on TikTok,¹¹² which represents almost 30% of total monthly online time.¹¹³

It is critical that the ACCC engages in meaningful analysis of the proposed markets using up-to-date and accurate sources of information.

2.2.4. The Discussion Paper does not consider evolving consumer demand drives increasingly feature innovation and competition

Our competitors continually enhance their products and services by developing increasingly feature-rich apps and websites. These innovations reflect both an increase in the availability of popular features across a wide range of apps and websites, as well as the continued convergence of features.

¹¹⁰ Discussion Paper, Figure 3.3; citing ‘*Social Media Statistics*’ (2011 to 2022), SocialMediaNews.com.au. Available: <https://www.socialmedianews.com.au/social-media-statistics/>.

¹¹¹ ‘*Nielsen Digital Landscape Report*’, (November 2021), Nielsen, p 3. Available:

<https://image.nielsen-email.com/lib/fe3311727164047d7c1272/m/2/9e5fa3ac-9b23-4658-8c72-7d4f4010db24.pdf>.

¹¹² ‘*State of Mobile 2022*’ (12 January 2022), Report by data.ai, p 50. Available:

<https://www.data.ai/en/go/state-of-mobile-2022/>.

¹¹³ Average time per person spent online in November 2021 was 81 hours. See ‘*Digital Landscape Report - November 2021*’, p 3, Nielsen. Available:

<https://image.nielsen-email.com/lib/fe3311727164047d7c1272/m/2/9e5fa3ac-9b23-4658-8c72-7d4f4010db24.pdf>.

For example, TikTok has rapidly expanded the breadth of its services by developing e-commerce features,¹¹⁴ creator tools to help connect influencers with brands,¹¹⁵ and an ephemeral messaging 'Stories' feature.¹¹⁶ It is also building an AR development platform¹¹⁷ and investing in virtual reality¹¹⁸ and gaming.¹¹⁹ In July 2020, Netflix named TikTok among its main global competitors stating "TikTok's growth is astounding, showing the fluidity of internet entertainment."¹²⁰ Google Photos has also launched Memories, which is similar to Instagram Stories, and WeChat, Twitch, Line, Twitter, YouTube, Vimeo, Snap, TikTok, VK, LinkedIn, Tumblr, iMessage, Reddit, Nextdoor, Pinterest and Skype all now offer a range of services like Feed, messaging, photo sharing, video, voice/video calling, groups/forums, and events.

Other third-party services like iMessage, YouTube and TikTok have also become more social, with features for people to share and connect over the content they share. For example, multiple services now provide features that enable the development of avatar-type user personifications, such as Apple memojis, and multiple products seek to enable Creator growth and success with a host of tools.

Both in response to user demand and increased competition, we have also significantly expanded the features we provide to users. For example:

- Over the past decade, we have made significant investments in expanding video offerings (including the launch of Instagram Stories and the development of Instagram Reels) both in response to the shift of demand from users for more video content¹²¹ and as part of our competition with services like YouTube, TikTok and Snapchat for consumer attention and ad revenue.
- We consistently seek to improve the Facebook community groups offerings to better compete with offerings like Reddit, while also introducing more narrowly-focused features (e.g. the addition of local-oriented features like Neighbourhoods) as part of competing with more specialised communities products, like Nextdoor.
- In addition, COVID-related needs have spurred Meta to invest in developing more remote presence functionalities, as we seek to drive user value while competing with shifts from

¹¹⁴ 'TikTok Shopping Is Now Official' (29 September 2021), yahoo!life article by Adriana Lee. Available: <https://sg.style.yahoo.com/tiktok-shopping-now-official-151523244.html>.

¹¹⁵ 'TikTok Announces New Advertising and Branded Content Partnership Options at TikTok World Event' (28 September 2021), Social Media Today article by Andrew Hutchinson. Available: <https://www.socialmediatoday.com/news/tiktok-announces-new-advertising-and-branded-content-partnership-options-a-t/607313/>.

¹¹⁶ 'TikTok is expanding the pilot of its Stories feature' (18 March 2022), TechCrunch blog post by Amanda Silberling. Available: <https://techcrunch.com/2022/03/17/tiktok-stories-expanded-pilot-feature/#:~:text=TikTok%20is%20expanding%20the%20pilot%20of%20its%20Stories%20feature%2C%20which,and%20clicking%20their%20profile%20picture.>

¹¹⁷ 'TikTok is building its own AR development platform, TikTok Effect Studio' (24 August 2021), TechCrunch blog post by Sarah Perez. Available: <https://techcrunch.com/2022/04/12/tiktok-launches-its-own-ar-development-platform-effect-house/#:~:text=Last%20August%2C%20TechCrunch%20noted%20TikTok,House%20has%20officially%20gone%20live.>

¹¹⁸ 'TikTok owner ByteDance buys a top virtual reality hardware startup' (31 August 2021), TechCrunch blog post by Lucas Matney. Available: <https://techcrunch.com/2021/08/30/tiktok-owner-bytedance-buys-a-top-virtual-reality-hardware-company/>.

¹¹⁹ 'ByteDance acquires gaming studio Moonton at around \$4 billion valuation' (22 March 2021), Reuters article by Pei Li et al. Available: <https://www.reuters.com/article/us-bytedance-videogames-moonton-idUSKBN2BE0ES>.

¹²⁰ Letter to Netflix shareholders, 'Q2-20 Shareholder Letter' (16 July 2020), p 5. Available: https://s22.q4cdn.com/959853165/files/doc_financials/2020/q2/FINAL-Q2-20-Shareholder-Letter-V3-with-Tables.pdf.

¹²¹ Meta video products and features include video infra, live video, producing exclusive content, licensing premium sports content, dedicated video surfaces like Watch, and most recently, new short form video tools for creators.

Google's messaging and communication offerings, as well as Zoom, Apple FaceTime, and more.

The intense and growing level of feature innovation and competition illustrates the significant competitive pressures that we face in seeking to attract and retain user attention. This is not reflected in the Discussion Paper.

2.2.5. Competition has led to people spending more time on competing apps and websites, which is not accounted for in the Discussion Paper

Increased competition and choice has led to users spending more time on competing apps and websites, and less time on Facebook. For example, in Q4 2021, we experienced a decline on a quarter-over-quarter basis in the number of DAU on Facebook,¹²² although some growth returned for Q1 2022. Likewise, data in the Discussion Paper (Figure 3.4) shows that the average time spent on Facebook per month decreased from approximately 19 hours to 15 hours between October 2020 and April 2021 (a period of just 6 months).¹²³ At the same time, time spent on our rivals' services has increased. For instance, in 2021, Australian users spent over five hours more per month on TikTok than on Facebook, and over 15 hours more per month on TikTok than on Instagram.¹²⁴

However, the Discussion Paper does not in any way seek to grapple with the increased competition and choice that is driving these competitive shifts.

2.3. Findings on display advertising are outdated and do not reflect recent growth and developments in the advertising sector

The Discussion Paper repeats conclusions from the DPI Final Report and the DPSI Interim Report No 1¹²⁵ that Meta has market power in display advertising, and that “search” and “display” advertising serve different purposes.¹²⁶ We disagreed with these conclusions when they were made, but evidence over the past five years (on the one hand, increasing innovation in targeting and measurement, and on the other hand, changes by Apple and others which limit tracking and measurement) shows even more clearly why these findings are incorrect and outdated.

2.3.1. The recent growth of online and offline channels clearly evidences strong and growing competition

We compete with a wide range of advertising venues and formats, including digital, television, radio and print. Many of these continue to experience significant growth, which is not reflected or considered in the Discussion Paper. For example, in terms of online players:

¹²² Meta's filed SEC Annual Report (2021), p 13. Available:

<https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/14039b47-2e2f-4054-9dc5-71bcc7cf01ce.pdf>.

¹²³ Discussion Paper, Figure 3.4; citing 'Digital Landscape Reports' (2020 to 2021), Nielsen. Available:

<https://www.nielsen.com/au/en/solutions/digital-playbook/>.

¹²⁴ 'State of Mobile 2022' (12 January 2022), Report by data.ai, p 50. Available:

<https://www.data.ai/en/qo/state-of-mobile-2022/>.

¹²⁵ ACCC's 'Digital Platform Services Inquiry - September 2020 Interim Report' (23 October 2020). Available:

<https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Service%20Inquiry%20-%20September%2020%20interim%20report.pdf>.

¹²⁶ Discussion Paper, p 18. The ACCC also noted that search ads “typically serve a different purpose to display advertising and are not regarded as effective substitutes”. See ACCC's 'Digital Advertising Services Inquiry: Final Report' (28 September 2021), p 78. Available:

<https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

- **Google (including Google Search, Google Display Network, and YouTube):** Google is the largest supplier of digital advertising, both globally and in Australia, with eight separate offerings that each count over a billion users. In 2021, Google’s advertising revenue rose from \$146.9 billion in 2020 to \$209.5 billion globally,¹²⁷ which is almost twice as much as Meta’s advertising revenue and representing 47% of global digital advertising services.¹²⁸ This growth continues into 2022 with advertising revenues growing over 22% year-over-year in Q1.¹²⁹ Google continues to innovate at pace. In the first half of 2020 alone, Google announced 20 new advertising features and innovations.¹³⁰
- **Apple:** Apple has emerged in recent years as a significant and rapidly growing competitor through its App Store search ads and Apple News ads. Apple does not publicly report advertising revenue, but analyst reports have suggested that Apple is likely to earn \$5 billion globally from its advertising business this fiscal year, and \$20 billion annually within three years.¹³¹ Apple’s recent introduction of its ATT updates has uniquely benefited Apple’s own ad services at the expense of its competitors, including because it has visibility over the entire app customer journey (i.e. from advertising for apps to purchase decision) and control of both devices and the iOS operating system. Apple also does not need to rely on third parties to measure the effectiveness of any ad campaign and has a significant advantage in driving ads on its own services (see [section 2.3.3](#) below).
- **TikTok:** TikTok launched in 2018, and has experienced very significant growth. TikTok opened to paid advertising in 2019 and launched TikTok World in September 2021, doubling the size of its advertising product and technical teams.¹³² In 2021, TikTok’s advertising revenue was \$4 billion globally, and it is aiming to triple this to \$11 billion dollars this year.¹³³ TikTok is continuing to introduce new advertising placements for marketers. It entered into a “first-of-its-kind” global advertising agency partnership with WPP in February 2021, giving WPP greater access to TikTok’s advertising products and creators¹³⁴ and, in April 2022, it was reported that TikTok was running beta tests for ads within its search results page.¹³⁵ TikTok’s growth in advertising services is reflected in investors’

¹²⁷ Alphabet’s filed SEC Annual Report 2021, p 33. Available:

https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf?cache=fc81690.

¹²⁸ ‘Worldwide Digital Advertising Market Model’ (January 2022), Model by IDC. Available:

https://www.idc.com/getdoc.jsp?containerId=IDC_P31230.

¹²⁹ Transcript of Alphabet’s investor relations, ‘Alphabet Q1 2022 Earnings Call’ (26 April 2022). Available:

https://abc.xyz/investor/static/pdf/2022_Q1_Earnings_Transcript.pdf?cache=aded5ae.

¹³⁰ Google website, ‘Google Ads Help: New Features & Announcements’. Available:

<https://support.google.com/google-ads/announcements/9048695?hl=en>.

¹³¹ ‘Apple’s privacy changes create windfall for its own advertising business’ (17 October 2021), Financial Times article by Patrick McGee. Available: <https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d>.

¹³² ‘Can TikTok triple its ad revenue this year?’ (15 January 2022), Insider Intelligence article by Zak Stambor. Available:

<https://www.emarketer.com/content/tiktok-triple-its-ad-revenue-this-year>; and ‘Enter TikTok World and meet the next era of marketing’ (28 September 2021), TikTok blog post. Available:

<https://newsroom.tiktok.com/en-us/enter-tiktok-world-and-meet-the-next-era-of-marketing>.

¹³³ ‘Can TikTok triple its ad revenue this year?’ (15 January 2022), Insider Intelligence article by Zak Stambor. Available:

<https://www.emarketer.com/content/tiktok-triple-its-ad-revenue-this-year>.

¹³⁴ ‘WPP and TikTok Announce First-of-Its-Kind Global Agency Partnership’ (1 February 2021), Businesswire blog post by Martina Suess. Available:

<https://www.businesswire.com/news/home/20210201005466/en/WPP-and-TikTok-Announce-First-of-Its-Kind-Global-Agency-Partnership>; and ‘TikTok joins forces with WPP in new global agency partnership’ (2 February 2021), TikTok blog post. Available: <https://newsroom.tiktok.com/en-us/tiktok-wpp-news>.

¹³⁵ ‘TikTok Launches Search Ads Beta For Selected Partners’ (31 March 2022), Search Engine Journal article by Brooke Osmundson. Available:

<https://www.searchenginejournal.com/tiktok-launches-search-ads-beta-for-selected-partners/444128/#close>.

reported USD 50 billion valuation of TikTok,¹³⁶ with its owner, ByteDance, having a reported market valuation of USD 180 billion.

- **Amazon:** In 2021, Amazon's advertising business generated \$31.2 billion in revenue globally, with 32% year-over-year growth.¹³⁷ Amazon's revenue from advertising in Australia has also increased threefold in 2021 to more than A\$63 million and is predicted to triple again in 2022.¹³⁸ Amazon offers a range of advertising solutions, including search advertising, display and video advertising (both on-platform and off-platform) via Amazon Ads and Amazon DSP. Amazon's visibility over the entire customer journey (i.e. from marketing to purchase) also gives it a significant advantage in predicting purchase intent.
- **Snapchat:** Snapchat continues to experience rapid growth, with DAU increasing from 265 million in Q4 2020 to 332 million in Q1 2022, and significant year-over-year growth in each of the past 5 quarters.¹³⁹ Snapchat's revenue increased 64% year-over-year to reach \$4.1 billion global revenue annually in 2021. Snapchat has a range of different advertising formats, including Video Ads, Story Ads, Collection Ads, Dynamic Ads and Commercials, and Snapchat campaigns can be customised to raise awareness, boost consideration, and drive conversions. Marketers can also use Snapchat to re-target users, or utilise its custom audience features.¹⁴⁰
- **Twitter:** Twitter's user base continues to grow - at 31 December 2021, Twitter had approximately 217 million mDAU¹⁴¹ (compared with 192 million in the year prior),¹⁴² and its annual revenue from advertising services reached \$4.5 billion globally in 2021¹⁴³ (up from \$3.2 billion in 2020).¹⁴⁴ Twitter provides advertisers with tools to reach consumers to build awareness, boost conversion or drive conversion objectives¹⁴⁵ and can serve ads to off-Twitter audiences through the Twitter Audience Platform.¹⁴⁶

¹³⁶ 'Exclusive: ByteDance investors value TikTok at \$50 billion in takeover bid - sources' (29 July 2020), Reuters article by Echo Wang, Kane Wu and Julie Zhu. Available: <https://www.reuters.com/article/us-bytedance-tiktok-exclusive/exclusive-bytedance-investors-value-tiktok-at-50-%20billion-in-takeover-bid-sources-idUSKCN24U1M9>.

¹³⁷ 'Amazon.com Announces Fourth Quarter Results' (3 February 2022), Amazon. Available: <https://ir.aboutamazon.com/news-release/news-release-details/2022/Amazon.com-Announces-Fourth-Quarter-Results/#:~:text=Operating%20income%20decreased%20to%20%243.5,share%2C%20in%20fourth%20quarter%202020>.

¹³⁸ 'Amazon triples Australian ad revenues, media execs predict it will triple again in 2022 as juggernaut starts to roll' (22 February 2022), Mi3 article by Sam Buckingham-Jones. Available: <https://www.mi-3.com.au/22-02-2022/amazon-tripled-its-ad-business-2021-track-more-100m-revenue-2022>.

¹³⁹ 'Q4 2021 Earning Slides' (3 February 2022), Snap Inc. Available: https://s25.q4cdn.com/442043304/files/doc_financials/2021/q4/Q4'21-Earnings-Slides.pdf.

¹⁴⁰ Snapchat Business website, 'Snapchat Ads Targeting'. Available: <https://forbusiness.snapchat.com/advertising/targeting>.

¹⁴¹ Twitter's filed SEC Annual Report 2021, p 40. Available: https://s22.q4cdn.com/826641620/files/doc_financials/2021/ar/FiscalYR2021_Twitter_Annual_Report.pdf.

¹⁴² Twitter's filed SEC Annual Report 2020, p 38. Available: https://s22.q4cdn.com/826641620/files/doc_financials/2020/ar/FiscalYR2020_Twitter_Annual_Report.pdf.

¹⁴³ Twitter's filed SEC Annual Report 2021, p 40. Available: https://s22.q4cdn.com/826641620/files/doc_financials/2021/ar/FiscalYR2021_Twitter_Annual_Report.pdf.

¹⁴⁴ Twitter's filed SEC Annual Report 2020, p 38. Available: https://s22.q4cdn.com/826641620/files/doc_financials/2020/ar/FiscalYR2020_Twitter_Annual_Report.pdf.

¹⁴⁵ Twitter Business website, 'Guide to mobile app advertising'. Available: <https://business.twitter.com/en/resources/mobile-app-advertising-guide.html>; and Twitter Business website, 'How to get started with Twitter Ads'. Available: <https://business.twitter.com/content/dam/business-twitter/en/resources/downloadables/How-to-get-started-with-Twitter-Ads.pdf>

¹⁴⁶ Twitter Business website, 'Twitter Audience Platform'. Available: <https://business.twitter.com/en/help/campaign-setup/twitter-audience-platform.html>.

- **Microsoft:** Microsoft offers full funnel advertising solutions¹⁴⁷ through its Bing and LinkedIn products, as well as through the Microsoft Audience Network, which includes placements across Microsoft properties as well as on Verizon Media properties.¹⁴⁸ Microsoft recorded \$10 billion in advertising revenue globally last year.¹⁴⁹ Microsoft also announced in late December 2021 that it would acquire Xandr (including AppNexus and Clypd) from AT&T, expanding its presence in the ad-tech stack.¹⁵⁰

In addition, Netflix announced that it is developing an ad-supported version of the Netflix service on 19 April 2022.¹⁵¹ This reflects the growing number of digital streaming services that are developing advertising services, including Paramount+, Walt Disney’s Hulu and Disney+, Fox’s Tubi and Comcast’s Peacock.¹⁵²

We also compete with a wide range of traditional advertisers (e.g. television, BVOD, radio, print, outdoor) that capture a significant portion of total advertising spend. This is borne out in the data:

- In 2021 in Australia, Standard Media Index estimates that advertisers that used ad agencies spent 42.9% on all digital, 43.1% on television, 8.5% on outdoor, 3.1% on newspapers, 0.6% on cinema, 0.7% on magazines and 1.1% on other forms of advertising.
- For the same period, PWC estimates that advertisers spent 60.4% on internet advertising, 19.8% on free-to-air TV, 1.8% on subscription TV, 5.7% on newspapers, 5% on out-of-home, 6.1% on radio, 0.6% on magazines, 0.4% on interactive games and esports and 0.2% on filmed entertainment.¹⁵³

In particular, legacy advertising providers, such as news media businesses, continue to compete fiercely for advertisers’ budget and have significant reach through their digital and other properties. For example, News Corp Australia claims to reach 18 million Australians per month

¹⁴⁷ ‘Connect with customers at any stage of the purchase funnel with the Microsoft Audience Network’ (28 January 2020), Microsoft Advertising Blog post by James Murray. Available: <https://about.ads.microsoft.com/en-gb/blog/post/january-2020/connect-with-customers-at-any-stage-of-the-purchase-funnel-with-msan>.

¹⁴⁸ ‘Microsoft and Verizon Media strengthen search partnership’ (17 January 2019), Microsoft Advertising Blog post by Kya Sainsbury-Carter. Available: <https://about.ads.microsoft.com/en-au/blog/post/january-2019/microsoft-and-verizon-media-strengthen-search-partnership>.

¹⁴⁹ Transcript of Microsoft’s investor relations, ‘Microsoft Fiscal Year 2022 Second Quarter Earnings Conference Call’ (25 January 2022). Available: <https://www.microsoft.com/en-us/investor/events/fy-2022/earnings-fy-2022-q2.aspx>.

¹⁵⁰ ‘Microsoft to acquire Xandr to accelerate delivery of digital advertising and retail media solutions’ (21 December 2021), Microsoft Advertising Blog post by Mikhail Parakhin. Available: <https://about.ads.microsoft.com/en-us/blog/post/december-2021/microsoft-to-acquire-xandr-to-accelerate-its-digital-advertising-and-retail-media-solutions>.

¹⁵¹ ‘Now streaming commercials: Netflix’s 180-degree turn stuns advertisers’ (21 April 2022), Sydney Morning Herald article by Gerry Smith and Carly Wanna. Available: <https://www.smh.com.au/business/companies/now-streaming-commercials-netflix-s-180-degree-turn-stuns-advertisers-20220421-p5aevw.html>; and ‘How Netflix could introduce advertising and a crackdown on account sharing’ (21 April 2022), ABC News article by Michael Doyle. Available: <https://www.abc.net.au/news/2022-04-21/what-changes-to-netflix-could-mean-for-its-customers/101004906>.

¹⁵² NBC Universal’s streaming service Peacock does not currently operate in Australia but is considered to have long-term plans for Australia, subject to licensing deals. See ‘NBCUniversal mulls options for streaming service Peacock’ (27 September 2021), Sydney Morning Herald article by Zoe Samios. Available: <https://www.smh.com.au/business/companies/nbcuniversal-mulls-options-for-streaming-service-peacock-20210926-p58utb.html>.

¹⁵³ ‘Outlook The Australian Entertainment & Media Outlook 2021-2025’ (2021), PWC. Available: https://www.pwc.com.au/entertainment-and-media/2021/2021_australian_entertainment_media_outlook_report.pdf.

(85% of Australians aged 14+).¹⁵⁴ That is higher than the MAU figure the ACCC cites for Facebook in Australia.¹⁵⁵

2.3.2. There have been significant innovations in targeting and measurement technologies and dynamic allocation that continue to drive competition and convergence between different channels and ad formats

Advertisers' decisions about how to spend their advertising budgets are based on their expected Return on Investment (ROI), and they allocate spend between online and offline advertising channels through the conceptual framework of the "marketing funnel" to maximise their ROI. Advertisers track and measure the success of their advertising campaigns accurately and in real-time. If the ROI is not satisfactory on a particular channel, they will quickly move their spending elsewhere. This is the fundamental commercial decision-making framework driving substitutability between online and offline advertising channels, and why innovations in targeting and measurement continue to drive competition.

Recent innovations in targeting and measurement have meant advertisers - across both online and offline channels - are increasingly able to, and have more sophisticated ways to, identify audiences and deliver and optimise targeted advertising regardless of whether they are pursuing awareness, consideration or conversion marketing objectives and irrespective of where a consumer is in the marketing funnel. It also means that a wider range of advertising platforms and ad formats - both online and offline - can reach these consumers across all levels of the marketing funnel, and many provide several pricing mechanisms to match these objectives.¹⁵⁶ It is therefore no longer correct, if it ever was, that "display advertising is generally more suitable for brand awareness campaigns... [and] search advertising is a particularly effective means for obtaining conversions"¹⁵⁷ or that search, display and classified advertisements "typically serve different purposes".¹⁵⁸

As a result of these innovations, advertisers can also easily measure and track the performance of their ad campaigns regardless of their marketing objective, and can make data-driven decisions to allocate their budget based on key ROI metrics such as impressions, brand recall lift, traffic, store visits, app installations and sales.

The level of innovation in relation to targeting and measurement has continued at pace. We, as well as Google (including YouTube), Amazon, Snap, Pinterest, TikTok and many others, continue to invest heavily in new tools to enable even greater targeting, optimisation and measurement. For example, in:

¹⁵⁴ News Corp Australia website, 'Australians continue to turn to News Corp'. Available: <https://www.newscorpaustralia.com/events/stories-have-always-had-the-power-to-help-us-grow/>; and News Corp Australia website, 'Connect your story to more Australians'. Available: <https://www.newscorpaustralia.com/events/stories-have-the-power-to-weave-a-web-of-connections/>.

¹⁵⁵ Discussion Paper, p 19.

¹⁵⁶ Meta website, 'Meta Business Help Centre: Cost per Click (All)'. Available: https://www.facebook.com/business/help/560163334110364?helpref=fag_content; and Google Ads Help website, 'Measuring brand awareness'. Available: <https://support.google.com/google-ads/answer/1722064?hl=en>. Advertisers that might consider using either a cost-per-click or a cost-per-impression pricing strategy can compare the value of these options by calculating a click-through-rate. See 'Online Advertising: Defining Relevant Markets' (2 January 2011), Journal of Competition Law and Economics article by Daniel Rubinfeld and James Ratliff. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734015.

¹⁵⁷ DPI Final Report, p 93.

¹⁵⁸ ACCC's 'Digital Advertising Services Inquiry: Final Report' (August 2021), p 2. Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>

- September 2021, TikTok launched a series of tools to “help brands easily buy ads on the platform, measure the success of their campaigns, and track performance”,¹⁵⁹
- October 2021, Amazon launched a range of new tools for marketers, including “Brand Metrics” (a self-service measurement solution which allows advertisers to track how many people are considering their brand, relative to its competitors), greater access to the Amazon Marketing Cloud (which allows advertisers to upload their own data and query it alongside data from Amazon ad campaigns) and a range of new ad formats (including via video on Fire TV, interactive audio ads and sponsored display ads on Twitch);¹⁶⁰
- each month during 2021, Google announced multiple additions to its advertising service, including data exclusion controls for Smart Bidding, standardised conversion attribution across all video campaigns, parallel tracking for video campaigns, attribution reports and better measurement for YouTube and display ads, new default ad types for search campaigns, custom notifications for the Google Ads mobile app, property promotion ads, deeper support for first-party data, Target Return on Ad Spend bidding, Reach Planner, and budget reports.¹⁶¹

We have also dedicated significant resources to developing “modelled conversions”,¹⁶² a product that uses aggregated data from different sources to enable comprehensive measurement where conversion data may be partial or missing. We have also been working with the Mozilla Foundation on a new proposal that aims to provide conversion measurement for advertising while providing strong privacy guarantees,¹⁶³ and are currently testing Advantage+ Shopping Campaigns (currently known as Automated Shopping Ads), which is aimed at “optimizing across multiple campaign levers—including creative, targeting, placements and budget—to find the best opportunities to drive conversions”.¹⁶⁴

In addition, third-party services offering cross-channel measurement have developed, allowing advertisers to compare both online and offline channels. Companies such as Oracle CX Marketing, Salesforce Marketing Cloud, Conversion Logic, Acoustic Analytics, Acxiom, AdRoll, Choozle, Cxense, Experian, LiveRamp, Merkle, Nielsen, Tapad, and Adobe all provide cross-channel measurement solutions, independent from any advertising venue.

In response to these innovations in the online sector, other channels are also developing tools that deliver more precisely targeted advertising and measure ad performance throughout the marketing funnel, and which enable them to compete closely with other online and offline channels to optimise advertising spend and ROI. For example:

¹⁵⁹ ‘Enter TikTok World and meet the next era of marketing’ (28 September 2021), TikTok blog post. Available: <https://newsroom.tiktok.com/en-us/enter-tiktok-world-and-meet-the-next-era-of-marketing>.

¹⁶⁰ ‘Amazon Advertising Unveils 8 New Tools and Features’ (26 October 2021), Adweek article by Lisa Lacy and Ronan Shields. Available: <https://www.adweek.com/commerce/amazon-advertising-unveils-8-new-tools-and-features/>; and ‘The Rundown: Amazon steps up its courtship of brand advertising dollars at Unboxed’ (26 October 2021), Digi Day article by Max Willens. Available:

<https://digiday.com/marketing/the-rundown-amazon-steps-up-its-courtship-of-brand-advertising-dollars-at-unboxed/>.

¹⁶¹ Google Ads Help, ‘New features & announcements’. Available:

<https://support.google.com/google-ads/announcements/9048695?hl=en>.

¹⁶² Meta website, ‘Meta Business Help Centre: About Facebook’s Modeled Conversions’. Available:

<https://www.facebook.com/business/help/311705270326952>.

¹⁶³ ‘Privacy Preserving Attribution for Advertising’ (8 February 2022), Distilled article by Martin Thomson. Available at:

<https://blog.mozilla.org/en/mozilla/privacy-preserving-attribution-for-advertising>.

¹⁶⁴ ‘Powering Up Performance Through ‘Meta Advantage’ Automation Ad Suite’ (22 March 2022), Meta blog post by Gokul Nebol-Perlman (VP of Product Marketing, Ads & Business Products, Meta). Available:

<https://www.facebook.com/business/news/meta-advantage-automation-ad-suite-performance>.

- New technologies, such as cable set-top boxes, and the products offered by companies like Nielsen and TiVo, have made targeted advertising on TV (and the provision of measurement data) increasingly possible.¹⁶⁵ BVOD advertising revenues grew by approximately 67.8% in Australia to A\$362.8 million in the 12 months to December 2021.¹⁶⁶
- Out-Of-Home advertising is increasingly able to be measured as a performance channel, with companies now offering products that track conversions in near-real time and measure performance across the marketing funnel, including lower funnel measurement.¹⁶⁷
- Audio advertising is increasingly moving towards detailed targeting and ad measurement. As set out in Integral Advertising Service (IAS)'s March 2022 Media Quality Report, “[a]s consumers shift their audio listening behaviour from traditional radio to digital streaming, advertisers have also started to shift their ad spending to these platforms. This change has accelerated the push to measure ad-supported audio streaming services” such that “digital audio [is] a major priority for advertisers in 2022.”¹⁶⁸ In response, IAS announced that it was launching audibility and IVT verification in H1 2022. This trend is reflected across the advertising industry. For example, in 2021, Commercial Radio Australia announced and launched “Radio360” which it described as “a major evolution in response to the rapid digitisation of audio consumption in Australia, with live streaming data to be integrated into a new multimillion dollar hybrid measurement system.”¹⁶⁹

Not only are advertisers more readily able to make decisions based on better information about switching, but this can be effected much more easily. There are a range of services and tools which have been growing and which are available to help advertisers reallocate their ad spend dynamically across offline and online channels and to optimise their ad campaigns.¹⁷⁰ For example, companies like The Trade Desk – a fast-growing demand-side advertising platform – offer advertisers the ability to plan and buy ad slots across many channels¹⁷¹ and facilitate rapid and dynamic cross-venue switching.

¹⁶⁵ Nielsen, a US-based TV-ratings firm, recently announced that it will be adding addressable TV measurement as part of its national audience currency. Addressable TV enables advertisers to deliver on live TV more targeted messages from cable, satellite or telco via set top boxes or from web-enhanced “smart” TVs. Nielsen will start measuring each ad individually (instead of calculating an average audience for all ads in a program as is the current practice), enabling brands to direct their TV ads to more specific audiences based on data. See ‘Nielsen to Begin Measuring Addressable Advertising’ (10 November 2020), Forbes article by Brad Adgate. Available: <https://www.forbes.com/sites/bradadgate/2020/11/10/nielsen-to-begin-measuring-addressable-advertising/?sh=4ca28a27535f>.

¹⁶⁶ ‘Advertisers spent \$4.1bn on TV in 2021, BVOD up 68% to 362m: ThinkTV’ (7 February 2022), Mi3 article by Sam Buckingham-Jones. Available: <https://www.mi-3.com.au/07-02-2022/advertisers-spent-41bn-tv-2021-bvod-68-362m-thinktv#:~:text=BVOD%20revenues%20rose%2068%20per.revenues%20dropped%2010%20per%20cent.>

¹⁶⁷ See for example, AdQuick website, ‘Track conversations from outdoor ads, in near real-time’. Available: <https://www.adquick.com/analytics>; and ‘Measuring the Impact of Out-of-Home (OOH) Advertising by Utilizing Data’ (15 April 2020), Business 2 Community article by Matt O’Connor. Available: <https://www.business2community.com/consumer-marketing/measuring-the-impact-of-out-of-home-ooh-advertising-by-utilizing-data-02399101>.

¹⁶⁸ ‘Media Quality Report: 16th Edition’ (30 March 2022), Report by Integral Ad Science (IAS). Available: <https://integralads.com/insider/media-quality-report-16th-edition/>.

¹⁶⁹ ‘Evolution of GfK radio ratings to hybrid audience measurement system’ (13 September 2021), News article by Commercial Radio Australia. Available: <http://www.commercialradio.com.au/content/mediareleases/2021/2021-09-13-evolution-of-gfk-radio-ratings-to-hybrid#YmpGa-hByUk>.

¹⁷⁰ See for example, Roku Advertising website, ‘TV Starts here’. Available: <https://advertising.roku.com/>; and Adobe website, ‘Adobe Advertising Cloud’. Available: <https://www.adobe.com/uk/advertising/adobe-advertising-cloud.html>.

¹⁷¹ The Trade Desk website, ‘Our Story’. Available: <https://www.thetradedesk.com/us/about-us/our-story>.

Each of these developments has further enabled advertisers to substitute to higher-performing online or offline advertising channels more frequently and immediately, and has resulted in advertisers having more choice than ever before, which is not reflected in the Discussion Paper.

2.3.3. At the same time there have been significant recent changes by Apple and others impacting the effectiveness of ads measurement

Apple has implemented tracking restrictions which have restricted the ability of advertisers to track and measure ad performance through the whole of the purchasing journey, causing substantial disruption to the advertising industry. The launch of the ATT and SKAdNetwork have resulted in signal loss, and have impaired the ability of advertisers to receive and process conversion events, and to optimise, target and report on web conversion events through non-Apple tools.

The short-term impact of these changes on advertisers has been significant. Reports estimate that Meta, YouTube, Snap, and Twitter lost nearly \$10 billion in the second half of 2021 and will lose \$16 billion in 2022.¹⁷² Twitter and YouTube's 2021 losses amounted to a 7% decrease in revenue while Snap's amounted to a 13% decrease.¹⁷³ Meta expects to lose \$10 billion in 2022 revenue.¹⁷⁴ At the same time, ATT has substantially increased reliance on Apple for ad measurement and attribution, boosting Apple's ad revenue and share of the market.

These changes have had a significant impact on the choices available to advertisers to reach people on iOS devices. For example, following Apple's implementation of these changes, some advertisers cut their spending on Facebook ads targeting iPhone users by about 90% to less than \$100 per day.¹⁷⁵

In contrast, Apple offers detailed information to anyone signing up to its ads service¹⁷⁶ enabling its advertising business to expand rapidly. As noted by the CMA in its Mobile Ecosystems Interim Report, the ATT changes are likely to favour and advantage Apple's advertising products compared to personalised advertising performed by third parties,¹⁷⁷ and this may harm competition and consumers.¹⁷⁸ The Financial Times reported that Apple "is now responsible for 58 per cent of all iPhone app downloads that result from clicking on an advert. A year ago, its share was 17 per cent... "It's like Apple Search Ads has gone from playing in the minor leagues to winning the World Series in the span of half a year," said Alex Bauer, head of product marketing at Branch."

¹⁷⁹

¹⁷² 'Apple's privacy changes are expected to wipe almost \$16 billion from Meta, YouTube, Snap, and Twitter's revenues this year' (12 April 2022), Business Insider article by Lara O'Reilly. Available:

<https://www.businessinsider.com/impact-apple-privacy-changes-meta-youtube-snap-twitter-lotame-2022-4>.

¹⁷³ 'Inside Apple's Decision to Blow Up the Digital Ads Business' (14 March 2022), The Information article by Wayne Ma. Available at: <https://www.theinformation.com/articles/inside-apples-decision-to-blow-up-the-digital-ads-business>.

¹⁷⁴ Transcript of Meta's investor relations, 'Fourth Quarter 2021 Results Conference Call' (2 February 2022), p 10. Available: https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/Meta-Q4-2021-Earnings-Call-Transcript.pdf.

¹⁷⁵ 'Facebook Advertisers Unexpectedly See Recovery After Apple Mess' (23 March 2022), The Information article by Sarah Krouse and Sylvia Varnham O'Regan. Available:

<https://www.theinformation.com/articles/facebook-advertisers-unexpectedly-see-recovery-after-apple-mess>.

¹⁷⁶ 'Apple's privacy changes create windfall for its own advertising business' (17 October 2021), Financial Times article by Patrick McGee. Available: <https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d>.

¹⁷⁷ 'Mobile ecosystems: Market study interim report' (14 December 2021), Report by Competition & Markets Authority (UK), p 332. Available: <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report>.

¹⁷⁸ 'Mobile ecosystems: Market study interim report' (14 December 2021), Report by Competition & Markets Authority (UK), pp 322-338. Available:

<https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report>.

¹⁷⁹ 'Apple's privacy changes create windfall for its own advertising business' (17 October 2021), Financial Times article by Patrick McGee. Available: <https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d>.

As highlighted in the ACCC's Final Report in the Advertising Services Inquiry (**Ad Tech Inquiry**), Google (and others) are also developing a number of proposals to replace the functions provided by third party cookies and a number of other web browsers such as Privacy Sandbox. Given Google's strength in browsers, these changes are expected to have a significant, disruptive effect on the advertising industry when they are implemented. To some extent, this has been recognised by Google which has delayed the launch of this initiative by two years "to avoid jeopardising the business models of many web publishers" and to give the advertising industry "time to migrate their services".¹⁸⁰

2.3.4. Meta does not have market power in any properly defined advertising market, and certainly no position that warrants regulatory intervention

The Discussion Paper's conclusion that Meta has market power appears to be primarily based on a misrepresentative and outdated estimate of Meta's share of digital display advertising revenue. This fails to take into account the large number of ad venues that we compete with each day, and the wide and increasing range of choices available to advertisers at all levels of the marketing funnel. Meta is only one option that is available to advertisers - and not even the largest.

IDC estimates of 2021 global digital advertising spend indicate that Google's revenues would account for 47%, while Meta would only account for 26%.¹⁸¹ Amazon, Apple, and TikTok are also significantly growing their digital advertising revenue.

These developments clearly show that Meta does not hold any position even close to market power sufficient to justify regulatory intervention.

2.4. Meta faces significant and increasing constraints in private messaging services

The Discussion Paper repeats the ACCC's Report on Online Private Messaging Services' conclusions that Meta has a "significant competitive advantage in the supply of online private messaging services in Australia through Facebook Messenger and WhatsApp".¹⁸² It also repeats previous conclusions that Meta "has a degree of freedom from competitive constraints from other suppliers of these services in Australia."¹⁸³

These statements reflect the limitations of competition analysis based on a selective functional comparison of different messaging services. The analysis did not consider the competitive constraints posed by a range of alternative private messaging services. Since then, the ACCC has not updated its analysis.

As evidenced in our detailed submission in March 2021, the supply of online private messaging services is highly competitive, with service providers innovating to attract further users. That has only intensified in the last 12 months. For example:

¹⁸⁰ 'An updated timeline for Privacy Sandbox milestone' (24 June 2021), Google blog post by Vinay Goel (Product Director, Privacy, Sandbox, Chrome). Available:

<https://blog.google/products/chrome/updated-timeline-privacy-sandbox-milestones/>.

¹⁸¹ 'Worldwide Digital Advertising Market Model' (January 2022), Model by IDC. Available:

https://www.idc.com/getdoc.jsp?containerId=IDC_P31230.

¹⁸² Discussion Paper, p 20.

¹⁸³ Discussion Paper, p 20.

- iMessage is the most popular messaging app among iPhone users in Australia and New Zealand by a wide margin. iMessage has 7.8 million DAU across Australia and New Zealand, which is more than Facebook Messenger and WhatsApp combined.¹⁸⁴
- As at February 2022, iOS comprised close to 58%¹⁸⁵ of the mobile operating system market in Australia (an increase of 4% since November 2020).
- Google Messages is the pre-installed messaging app on most Android phones,¹⁸⁶ including on Samsung mobile devices.¹⁸⁷ Google has been releasing new features for its Messages app, such as the ability to handle Apple iMessage reactions, separate tabs for business and personal messages and expanded its emoji functionality (e.g. the ‘Emoji Kitchen’, which allows users to combine two different emojis to make their own emoji).¹⁸⁸ Google has also integrated Messages with its Google Photos service to improve video sharing experiences.¹⁸⁹
- Other competing apps with messaging functionalities continue to design and innovate. For example, Snapchat introduced chat replies, Bitmoji reactions and customisable outfits, poll stickers and improved calling interface in January 2022.¹⁹⁰ Telegram has added a number of features including released a number of features including themed QR codes for users’ profiles and a new Spoiler feature allowing users to hide information and reveal hidden messages.¹⁹¹ Twitter is testing a new feature that allows users to send a direct message to a tweet’s author straight from their timelines.¹⁹² Similarly, Signal is reported to be developing a Snapchat-style ‘Stories’ feature, which allows users to post photos or videos that disappear after 24 hours.¹⁹³

¹⁸⁴ ‘The Success of Third-Party Apps on the App Store’ (April 2022), Analysis Group report by Juliette Caminade and Markus von Wartburg, p 22. Available:

<https://www.apple.com/newsroom/pdfs/the-success-of-third-party-apps-on-the-app-store.pdf>.

¹⁸⁵ Statcounter GlobalStats website, ‘Mobile Operating System Market Share Australia’. Available:

<https://gs.statcounter.com/os-market-share/mobile/australia>.

¹⁸⁶ ‘Google’s Messages app can now handle iMessage reactions, challenges Apple with new features’ (11 March 2022)

TechCrunch blog post by Sarah Perez. Available:

<https://techcrunch.com/2022/03/10/googles-message-app-can-now-handle-imessage-reactions-challenges-apple-with-new-features/>.

¹⁸⁷ ‘Google Messages, with RCS in tow, is now Samsung’s default messaging app in the US’ (14 February 2022) 9to5Google

blog post by Ben Schoon. Available: <https://9to5google.com/2022/02/14/google-messages-samsung-galaxy-s22-us/>.

¹⁸⁸ ‘Google’s Messages app can now handle iMessage reactions, challenges Apple with new features’ (11 March 2022),

TechCrunch blog post by Sarah Perez. Available:

<https://techcrunch.com/2022/03/10/googles-message-app-can-now-handle-imessage-reactions-challenges-apple-with-new-features/>; and ‘Feeling all the feels? There’s an emoji sticker for that.’ (12 February 2020), Google blog post by Jennifer Daniel. Available: <https://blog.google/products/android/feeling-all-the-feels-theres-an-emoji-sticker-for-that/>.

¹⁸⁹ ‘Google’s Messages app can now handle iMessage reactions, challenges Apple with new features’ (11 March 2022),

TechCrunch blog post by Sarah Perez. Available:

<https://techcrunch.com/2022/03/10/googles-message-app-can-now-handle-imessage-reactions-challenges-apple-with-new-features/>.

¹⁹⁰ ‘Snapchat for iOS adds threads, new communication features in latest update’ (12 January 2022), 9to5Mac blog post by

José Adorno. Available:

<https://9to5mac.com/2022/01/12/snapchat-for-ios-adds-threads-new-communication-features-in-latest-update/>.

¹⁹¹ ‘Reactions, Spoilers, Translation and QR Codes’ (30 December 2021), Telegram blog post. Available:

<https://telegram.org/blog/reactions-spoilers-translations>.

¹⁹² ‘Twitter’s new fast DM feature test raises harassment concern’ (7 February 2022), Siliconrepublic article by Vish Gain

(Web Page, 7 February 2022). Available:

<https://www.siliconrepublic.com/business/twitter-dm-direct-message-feature-harassment#:~:text=Twitter%20is%20testing%20a%20new,to%20%E2%80%9Cstart%20a%20conversation%E2%80%9D>.

¹⁹³ ‘[Update: First look] APK Teardown: Signal is working on a Snapchat-style Stories feature’ (10 March 2022), XDA

Developers blog post by Kishan Vyas. Available:

<https://www.xda-developers.com/signal-preps-snapchat-like-stories-feature/>.

- WhatsApp and Facebook Messenger continue to respond to competition by rolling out new product features. For example, WhatsApp released its View Once feature in August 2021, which allows users to send photos and videos that disappear from the chat after they have been opened. Messenger has expanded its opt-in end-to-end encryption (e2e) feature called Secret Conversations to include group messages as well as voice and video calls, has added support for reactions, GIFs and stickers in its e2e Secret Conversations feature, and has introduced screenshot notifications.

Importantly, unlike products offered by Apple and Google, Meta’s WhatsApp and Facebook Messenger products can be used across operating systems and do not have features that capture audiences, promoting multi-homing and providing a real alternative for all mobile users. Third party apps with messaging functionality such as WhatsApp, Facebook Messenger, Snapchat, Signal, Telegram, Viber, Teams, Zoom and many others enhance competition between ecosystems because they can be used to connect users on and between Apple and Android operating systems.

As noted in our March 2021 submission, traditional mobile services including SMS, voice calls and email also continue to exercise a strong constraint on Meta’s messaging services. Over 90% of Australians use SMS, voice or email services, often as their primary channel of communication.¹⁹⁴ These traditional services are provided by telcos, which have competitive advantages over other messaging services because of their control of infrastructure and long-standing customer relationships. Switching between SMS, voice calls and the various different messaging services is low cost, especially as prices for mobile services and data in Australia have continued to fall.

The ACCC has not found that Meta has market power in relation to private messaging, and the basis for its conclusion that Meta’s services have “a competitive advantage” is not supported by a deeper analysis of the dynamic markets in which the services are supplied. There is no justification for competition regulation targeting these services.

2.5. The ACCC’s focus on bargaining power ignores the benefits Meta provides to small businesses, and is inconsistent with the commercial environment we operate in

Meta disagrees with the ACCC’s finding that there is a substantial bargaining power imbalance between Meta and its business users, and with any suggestion that this finding should form the basis of digital-specific regulatory intervention.

2.5.1. The Discussion Paper ignores the many choices people have and the many benefits we provide

The Discussion Paper states that there is a significant bargaining power imbalance between digital platforms and small businesses, and that the terms on which digital platforms engage with small businesses may leave them “at a significant and enduring commercial disadvantage”.¹⁹⁵ However, the Discussion Paper does not cite any justifications for this conclusion beyond ordinary and reasonable commercial behaviour. It also ignores the significant value Meta provides to small businesses and investments in partnerships with small businesses – often at no or low cost. For example:

¹⁹⁴ ‘2020 Telco consumer experience: Australian adults, households and businesses’ (2020), ACMA report, p 8. Available: https://www.acma.gov.au/sites/default/files/2020-10/Telco%20consumer%20experience_Australian%20adults%20and%20households.pdf.

¹⁹⁵ Discussion Paper, p 54.

- our advertising services have made advertising accessible to more businesses, lowered prices and substantially grown the market, enabling advertisers (many of which are small businesses) to reach audiences previously inaccessible to them. This has been particularly important during the pandemic; and
- our services have significantly reduced the costs of distribution and barriers to entry and expansion, and have enabled businesses and consumers to connect with a much wider range of customers and suppliers than ever before possible – all at no cost.

2.5.2. The Discussion Paper conflates a number of different concepts

The Discussion Paper conflates three different terms – “substantial bargaining power”, “market power” and “gatekeeper status” – to claim that Australian small businesses are at a significant disadvantage and are harmed by digital platforms. However, there are many situations across the Australian economy where bargaining power is not equal between participants seeking to enter into a commercial arrangement. This is entirely normal and to be expected. It does not necessarily involve any harm, and any inequality is frequently based on a very wide range of commercial considerations which have little (if anything) to do with market power or any “gatekeeper status”.

2.5.3. Standard form terms are not indicative of a significant imbalance of bargaining power, nor do they give rise to any unique harm

The Discussion Paper also states that “[t]he bargaining power imbalance between large digital platforms and their business users typically limits the ability of businesses to negotiate their terms of service”.¹⁹⁶ However, the inability to negotiate terms is not *because of* an imbalance in bargaining power. To the contrary, it reflects the well-accepted view that standard-form contracts are commercially necessary and highly efficient in circumstances where it is not possible to negotiate on an individual basis with a large number of customers or users.

In addition, given the vast range of industries and commercial contexts in which standard form contracts are used, the existence of standard form contracts is demonstrably a poor indicator of “substantial bargaining power”, “market power” or any “gatekeeper status”. It also provides no basis at all for suggesting that industry-specific regulatory intervention is required. Standard form contracts are a common practice across the economy; there are a very large number of industries in which standard-form contracts have long been a feature, including airlines, banks, credit cards, telecommunications, electricity, gas, insurance, travel, and many others in which businesses have a need to contract with a large customer / user base.

It is therefore not clear why the Discussion Paper singles out digital platform services on this basis. This is particularly the case given that Meta is clearly not an essential service or “must-have” channel. As set out in sections [2.1](#) to [2.3](#) above, users and advertisers have a wide range of choices and multi-homing is widespread.

The Discussion Paper also refers to Meta temporarily blocking news on Facebook in February 2021 as an example of the “power imbalance” that exists between businesses and “gatekeeper platforms”. However, this statement mischaracterises Meta’s response to the Government’s then proposed amendments to the CCA, which involved the introduction into Parliament of imprecise legislation that was inconsistent with the commercial realities in which we operate and the value exchange between us and publishers. In particular, the ambiguous definition of news publishers

¹⁹⁶ Discussion Paper, p 53.

meant any takedown would necessarily need to apply to a broader set of organisations than the Government characterised publicly as benefitting from the legislation. Throughout the consultation process, Meta was clear with the Government and others about its concerns with the new laws, so they had an opportunity to address concerns raised by Meta and others. As stated by Meta at the time:

“The proposed law fundamentally misunderstands the relationship between our platform and publishers who use it to share news content. It has left us facing a stark choice: attempt to comply with a law that ignores the realities of this relationship, or stop allowing news content on our services in Australia. ...

Over the last three years we’ve worked with the Australian Government to find a solution that recognizes the realities of how our services work. We’ve [long worked toward rules](#) that would encourage innovation and collaboration between digital platforms and news organisations. Unfortunately this legislation does not do that. Instead it seeks to penalise Facebook for content it didn’t take or ask for.”¹⁹⁷

Meta also gave advance and repeated notice of the consequences of the legislation, particularly the imprecise definition of news content, so that business users could prepare their strategies in response.

2.5.4. There is no case for new digital-specific laws

Even if the ACCC wants to address a perceived bargaining power imbalance between Meta and its business users, new or additional digital-specific laws are not required. The ACCC already has wide powers to investigate and address any conduct that it considers might involve a misuse of market power, unconscionable conduct against consumers or small businesses, unfair contract terms in a standard-form contract, or misleading or deceptive conduct.

In addition, if the underlying concern is “unfair trading practices for business users” or “unfair terms of use or access” (as suggested by the Discussion Paper), then any laws should apply economy-wide. There is no case for new narrowly targeted and specific regulatory intervention addressing bargaining power imbalances that may exist with respect to only digital platforms.

2.6 Fundamental misconceptions about the value of data and role it plays in the competitive landscape

The Discussion Paper refers to the ACCC’s previous analysis and appears to proceed on the assumption that access to data automatically confers market power, and that large data holdings automatically confer several types of “competitive advantage”.¹⁹⁸ However, contrary to these assumptions – which form the basis for many of the potential measures put forward by the ACCC – the conditions under which data may give rise to market power, whether those conditions exist, and what effect that has on rivals are the subject of much debate and considerable nuance.¹⁹⁹

¹⁹⁷ ‘Changes to sharing and viewing news in Australia’ (17 February 2021), Facebook Newsroom article by William Easton (Managing Director, Facebook Australia & New Zealand). Available: <https://about.fb.com/news/2021/02/changes-to-sharing-and-viewing-news-on-facebook-in-australia/>.

¹⁹⁸ Discussion Paper, p 33.

¹⁹⁹ ‘Can Big Data Protect A Firm From Competition’ (18 December 2015), Anja Lambrecht and Catherine Tucker. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530; ‘Digital Data, Platforms and the Usual [Antitrust] Suspects: Network Effects, Switching Costs, Essential Facility’ (31 January 2019), Catherine Tucker. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326385; and ‘Access Barriers to Big Data’ (26 August 2016), Arizona Law Review article by Daniel Rubinfeld and Michal Gal. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830586.

These assumptions are also fundamentally inconsistent with the level of entry and growth, and significant level of innovation, by a wide range of competitors over the past 3-5 years (see sections [2.1](#) to [2.3](#) above).

There is no harm in companies using resources and inputs (in this case, data), and jostling to obtain a competitive advantage. This is the essence of competition. However, the Discussion Paper's analysis of data, and the extent to which it may confer power in any market, misunderstands both the value and role of data. Attributing Meta's success to us holding data is entirely inaccurate and inconsistent with the growth of numerous competitors like TikTok, Twitter, Zoom and Discord. Innovative digital products, and not data, is what drives competition. Data is generally only valuable if companies can find ways to turn it into insights.

In addition, the assumptions regarding data in the Discussion Paper do not recognise the significance of different types of data that participants in the industry hold. A common misconception is that all first-party data is equally useful for the purposes of ranking and displaying ads to users. This is not the case. In Meta's experience, the most valuable data tends to be that which records the end result that advertisers are seeking from their ads (i.e. a commercially valuable conversion, such as installing a mobile app or purchasing something on a website). The emphasis is on the quality of data – not the quantity – and this is why Meta is not even close to some of its largest competitors when it comes to its access to and collection of high quality first-party data for advertising. For example:

- Amazon has access to a large volume of high quality first-party data on user transactions via its online retail marketplace, Amazon.com;
- Google collects valuable user transactions data from Google Shopping, Google search queries with commercial intent as well as app downloads and in-app purchases on the Google Play Store; and
- Apple has access to first-party transactions data from the sale of its hardware devices as well as app downloads and in-app purchases on iTunes and the App Store.

The recent changes announced by web browsers (including Apple, Mozilla and Google) relating to the use of third-party cookies and Apple's iOS 14 changes also demonstrate that, far from holding a "data advantage", Meta is in fact reliant on browser and mobile device owners to reach its users.

2.6.1. Data is not rare or unique

The Discussion Paper suggests that access to "vast amounts of individual-level data" can provide "a considerable advantage".²⁰⁰ However, a competitive advantage can only arise if that data is a rare or unique asset, and this is far from the case. The adoption of digital services has driven the extensive availability and use of data across all industries, both globally and in Australia, and barriers to acquiring data are not high – there are many different ways to obtain data.

- **Companies can obtain first-party data directly from users by offering attractive services that people want to use.** First-party data is ubiquitous. Each day consumers visit and use many platforms and other online and offline services that collect information about their activity, which is then used to deliver personalised and customised services. These platforms and services include search engines, news media websites and apps, streaming and on-demand over-the-top (OTT) and cable services, e-commerce websites, browsers,

²⁰⁰ Discussion Paper, p 33.

mobile device manufacturers, smart televisions and set top boxes, and many other digital and non-digital services. It is also mistaken to assume that large volumes of data are held exclusively – or even primarily – by digital platforms. A 2019 study found that the so-called ‘big tech’ companies account for about 20% of the commercialisable data held globally, with the remaining 80% held by incumbents such as banks and fast-moving consumer goods (FMCG) companies.²⁰¹

- **Advertisers can also share access to data with advertising platforms for the purpose of targeting and personalising ads more effectively (i.e. second-party data).** This data might include information captured by the advertiser about a customer’s previous transactions, browsing history, or other information. As with first-party data, this second-party data is far from rare or unique. Advertisers can, and frequently do, provide the identical data to a range of different platforms such as Meta, Apple, Google, Amazon, Snapchat, News Corp’s News IQ, TikTok, Twitter, Pinterest, Nine and Seven West, including through the use of a pixel. This is used widely by companies and advertising platforms such as Google Analytics, Google Ads, TikTok, Amazon, Twitter, Snapchat, LinkedIn, Reddit, AdRoll and Adslot.
- **Companies have developed a wide menu of analytics tools which make third-party data readily and increasingly available.** These tools incorporate impressions metrics, readership trends, engagement rates, hashtag and keyword tracking, competitor benchmarking, and influencer identification. For example, comScore independently offers information regarding the number of impressions various websites receive, Google provides web data analytics products (via both Google Analytics and DoubleClick), and Amazon Marketing Services offers analytics for advertising on Amazon’s properties. In addition, Keyhole, FourthWall Media, Veevasell and others sell varied data and analytics suites for marketing on other online platforms, across the Web, on television, and through industry-specific channels. Further, data brokers such as Nielsen, Experian, Axciom, Oracle BlueKai, GfK, and many others provide access to rich user targeting data. Numerous digital platforms frequently purchase information from these third-party sources. This includes considerable amounts of detailed data relating to consumer demographics, location, and interests - precisely the types of data the Discussion Paper suggests are held by only limited numbers of companies (and that smaller rivals are unable to access).

In addition, there are no structural, economic or technological barriers that prevent other first-party operators from collecting any of the data Meta collects. This data is non rivalrous and, as a result, much of the data collected by Meta is generally held by these competitors, as well as many other companies. This is due in significant part to users multi-homing across a range of services.

2.6.2. The success of products is driven by innovative digital products, not data

Even if it is true that certain firms hold more data than others, that does not automatically create a competitive advantage, or raise barriers to entry, expansion or innovation. Access to large volumes of data is not necessary for entry, growth or success in advertising, social media services or any other services. Whether or not a business can develop a successful product is not based on the amount of data that a business has, but whether it can develop an innovative and attractive product that is differentiated from existing offerings, and can hold user attention.

²⁰¹ ‘How Old Tech could roar back’ (26 February 2019), Axios article by Steve Levine. Available: <https://www.axios.com/big-tech-new-rivalld-tech-ibm-uber-facebook-1519609801-80daea23-cee2-44bf-ad54-f65336a996c2.html>.

Meta's success and value to users and advertisers comes from its ability to consistently offer popular and attractive features, which have been developed through continued investment and commitment to innovation. This is not dissimilar to how businesses attract users and customers to their products in other industries.

Consistent with this, none of today's leading online platforms (e.g. Meta, Apple, Google, Amazon) had significant amounts of user data prior to launching. Nor did later-arriving services like Snapchat, Twitter, Pinterest, TikTok, Discord, Zoom and more. Like Meta, these companies gained access to user data because they offer popular services - they did not become popular services because they had access to user data. The rapid growth of new entrants and smaller players, which has happened without access to significant amounts of data, clearly demonstrates that access to data is not necessary to enter and succeed.

Conversely, the mere accumulation of data or greater amounts of data does not guarantee competitive success. There are many examples of platforms that have gained popularity and access to significant amounts of user data, but then failed to retain users because they lacked appealing features for users. These include AOL, Friendster, Myspace, Yahoo! and Flickr. Meta has also introduced products that have failed to attract consumers (e.g. Facebook Gifts) and Microsoft - despite having a significant amount of data (including through its control of the Windows operating system and Microsoft and Xbox hardware devices) - has not been able to make Bing and Microsoft Edge a particularly strong success.

This demonstrates a key point: data is only valuable if companies can find ways to turn it into insights. This is well recognised in economic theory and has been the subject of extensive research.²⁰² As set out in Professor Tucker's expert report to the ACCC: "by itself big data is not inherently valuable. What is valuable is the ability to make the right inferences based on the data that a firm has access to".²⁰³ A start-up with a sophisticated data algorithm can draw out more useful conclusions from data than a pre-existing competitor with larger amounts of data.

2.6.3. There are rapidly diminishing economies of scale and scope from data

Evidence shows that economies of scale and scope from data quickly diminish²⁰⁴ such that a market participant possessing a greater amount of data does not necessarily enjoy a competitive advantage proportionate to the data it possesses (if it possesses any advantages at all).

Data often has no incremental value, offers overlapping insights and a firm can get similar insights more efficiently from a fraction of the full dataset. For example, data acquired is often repetitive across time and platforms. It is therefore unlikely to continue to provide a material incremental improvement for targeting ads, training an algorithm, or offering new services. In addition, data loses its value over time. Research has indicated that the duration of relevance of data (and how

²⁰² See for example, 'Can Big Data Protect A Firm From Competition' (22 December 2015), Anja Lambrecht and Catherine Tucker. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530.

²⁰³ 'ACCC Digital Platforms Inquiry Submission' (27 November 2018), Submission by Catherine Tucker, p 42. Available: <https://www.accc.gov.au/system/files/Facebook%20Australia%20-%20expert%20report%20from%20Professor%20Catherine%20Tucker%20%28Nove....pdf>.

²⁰⁴ Researchers at MIT, University of Munich and Universidade Catholica Portuguesa found decreasing economic returns to data in the context of algorithmic recommendations in news. See 'The Editor vs. the Algorithm: Targeting, Data and Externalities in Online News' (5 June 2019), Jörg Claussen, Christian Peukert and Ananya Sen. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399947.

fast it decays over time) is a key determinant of the value of data, particularly for online platforms which are characterised by “rapidly shifting user preferences and trends”.²⁰⁵

In addition, research shows that models and algorithms can be trained effectively with relatively limited amounts of data.²⁰⁶ Large volumes of data are not necessary to build algorithms, or to make them more effective. Rather, it is the ability to analyse key pieces of data which can most effectively identify a user’s preference.

2.6.4. Recent substantial shifts in data availability is fundamentally changing dynamics

In drawing conclusions about the extent to which data confers an enduring competitive advantage, the Discussion Paper also fails to take account of a number of key shifts and other factors which have had a fundamental impact on the availability and use of data.

Meta is predominantly reliant on third parties to reach its users - whether through mobile ecosystems (owned by Apple and Google), or by web browsers (owned by, for example, Apple, Google and Mozilla). This key factor is acknowledged in the CMA’s Mobile ecosystems market study Interim Report, which found that, because Apple and Google control the way that browsers perform on their devices – and also set the terms for access to their app stores for native apps – they are able to limit competition from third parties within their ecosystems.²⁰⁷

Recent changes in relation to both mobile ecosystems and web browsers highlight the material control that Google and Apple have over their ecosystems, which cannot be consistent with Meta having any perceived data advantage. The CMA’s report notes that these changes may harm competition and consumers by “unfairly advantaging Apple’s own advertising services, and particularly its search advertising business on the App Store”.²⁰⁸ A number of businesses with an Australia presence (including Menulog, Adore Beauty, Blis and ROAS Media) have also expressed concerns regarding the negative impacts of Apple’s ATT changes (e.g. advertisers losing up to 80% of their reach and ad performance declining), and the likelihood that Apple stands to benefit the most from them.²⁰⁹

²⁰⁵ Professor Marco Iansiti further notes that “a limited but current set of data can result in similar, or even better, performance than a large amount of historical data, and increasing data volume by incorporating older datasets may even hurt performance”. See *‘The Value of Data and Its Impact on Competition’* (20 July 2021), Harvard Business School Working Paper No. 22-002 by Marco Iansiti, p 9. Available: https://www.hbs.edu/ris/Publication%20Files/22-002submitted_835f63fd-d137-494d-bf37-6ba5695c5bd3.pdf.

²⁰⁶ *‘The Value of Data and Its Impact on Competition’* (20 July 2021), Harvard Business School Working Paper No. 22-002 by Marco Iansiti, p 8. Available: https://www.hbs.edu/ris/Publication%20Files/22-002submitted_835f63fd-d137-494d-bf37-6ba5695c5bd3.pdf. See also *‘“Small Data” are also crucial for machine learning’* (19 October 2021), Scientific American article by Husanjot Chahal and Helen Toner. Available: <https://www.scientificamerican.com/article/small-data-are-also-crucial-for-machine-learning/>.

²⁰⁷ *‘Mobile ecosystems: Market study interim report’* (14 December 2021), Report by Competition & Markets Authority (UK), p 8. Available: <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report>.

²⁰⁸ As noted by the CMA, Apple’s restrictions mean that: “Without accurate targeting of customers, the value of ad inventory is lower and so advertisers are willing to pay less for in-app advertising, while app install advertising is less effective as it is unable to target ‘high-value’ customers (eg customers who make frequent in-app purchases)” and “without attribution, advertisers cannot measure effectiveness and so cannot optimise their ad spend by allocating their budget to the most effective ads (eg ads which are more effective at encouraging the desired outcome). This makes both app install advertising and in-app advertising less effective”. See *‘Mobile ecosystems: Market study interim report’* (14 December 2021), Report by Competition & Markets Authority (UK), p 322. Available: <https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report>.

²⁰⁹ *‘Australia post-cookies, post-privacy: Implications for brands, publishers & media supply’* (November 2021), Mi3 article by Brendan Coyne. Available: <https://www.mi-3.com.au/23-11-2021/australia-post-privacy-post-cookies-how-marketers-major-publishes-and-media-supply-0>; *‘It’s now an Apple ATT world, How can you reach consumers?’* (17 May 2021), The Drum article by Aaron McKee. Available: <https://www.thedrum.com/opinion/2021/05/17/it-s-now-apple-att-world-how-can-you-reach-consumers>; *‘An*

2.7. It is unclear what “gap” exists, as we provide users with significant information and control over their data

The Discussion Paper identifies “excessive online tracking” and a lack of effective consumer control over data as consumer harms that should be addressed through new regulation. However, the analysis presented by the ACCC:

- **uses loaded language such as referring to the collection of data as “online tracking” and describing it as “excessive” without providing any clear basis for that description.** Given the many ways that consumers and businesses benefit from the collection of online data from different sources, it is wrong to begin from a starting point that this is harmful. The collection of online data enables the personalisation of services to meet unique consumer needs, and there are a large number of companies across the economy that are able to provide increasingly personalised services to consumers as a result of the data they collect. The ACCC itself acknowledges these benefits in the Ad Tech Inquiry Final Report, stating that targeted advertising delivers significant value to publishers, advertisers, and can also benefit consumers “in a range of different ways”;²¹⁰
- **disregards Australia’s strong existing privacy law framework and that privacy law should be the primary regulatory framework to address issues around the collection and use of personal information.** In particular, the Privacy Act requires significant transparency from digital platforms around the ways that personal information is collected, the types of personal information that are collected and the purposes for which personal information is processed. The Privacy Act also requires that personal information be collected only by lawful and fair means and prohibits the collection of sensitive personal information without consent from consumers;
- **disregards the protections already available through Australia’s existing consumer protection regime.** Where disclosures may be misleading or inadequate, existing consumer protection provisions are well able to address any concerns;
- **does not take meaningful account of the substantial reform proposals already being considered in relation to privacy law,** particularly with respect to transparency obligations and mandated control for data subjects in the form of expanded data subject rights. The Privacy Act Review Discussion Paper alone included 67 reform proposals, many of which would fundamentally change how data is used in Australia. These proposals include introducing:
 - a new right for consumers to request that entities cease processing their personal information, which would be an unqualified right in relation to objections to the use of personal information for the purposes of direct marketing;

early red flag: *Mobile ad industry grapples with early uncertainties from Apple’s tracking crackdown* (5 May 2021), Digiday article by Seb Joseph. Available:

<https://digiday.com/marketing/an-early-red-flag-mobile-ad-industry-grapples-with-early-uncertainties-from-apples-tracking-crackdown/>; and *Performance has tanked*: *Attributable ad spend ‘cut by 30-50%’ on Facebook after Apple iOS14.5* (23 June 2021), Mi3 article by Sam Buckingham-Jones. Available: <https://www.mi-3.com.au/23-06-2021/attributable-ad-spend-cut-30-50-facebook-after-apple-ios145>.

²¹⁰ *Digital Advertising Services Inquiry: Final Report* (28 September 2021), pp 37-9. Available:

<https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

- a new right to erasure of personal information in certain circumstances, including where an objection to its processing has been made by a consumer;
- an express requirement that privacy notices are clear, current and understandable, which would strengthen existing transparency requirements under the Privacy Act;
- an overarching requirement that the collection and use of personal information must be ‘fair and reasonable’; and
- a statutory tort for invasion of privacy.²¹¹

In addition to the Privacy Act Review, the Australian Government has also proposed the creation of a specific Online Privacy Code. Other new requirements are proposed in the Department of Home Affairs’ consideration of stronger cyber security regulations²¹² and the Government’s National Data Security Action Plan.²¹³

Industry-led initiatives have also made significant developments in addressing identified consumer concerns. The Discussion Paper does not take account of these and other industry-led changes.

2.7.1. Collection and use of consumer data is not inherently harmful

The collection and the use of consumer data is not inherently harmful to consumers. In fact, the Australian Government’s own Australian Data Strategy (a document that sets out the Government’s whole-of-economy vision for data) identifies data as “an increasingly important driver of growth in our modern connected economy” that delivers a range of benefits for all Australians, including through enabling improved service delivery and promoting job creation and economic growth by facilitating the development of new products, services, business models and industries.²¹⁴

In particular, the Australian Data Strategy identifies a range of ways in which collection and use of data delivers significant benefits for consumers, including that it can “cut down the time Australians spend searching for goods and services through automated and smarter consumer preference matching and more targeted and personalised advertising.”²¹⁵ The Australian Data Strategy also notes that businesses can leverage data to expand the breadth and depth of products and services they deliver, with consumers benefiting from data-led innovation through “increased competition and higher quality goods and services that better match their preferences.”²¹⁶

These significant benefits – to consumers, advertisers and content providers – should be recognised as part of any analysis of overall benefits and alleged harms, which the Discussion Paper does not do.

²¹¹ ‘Privacy Act Review - Discussion Paper’ (October 2021), Australian Government, Attorney-General’s Department. Available: <https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper>.

²¹² Department of Home Affairs website, ‘Strengthening Australia’s cyber security regulations and incentives’. Available: <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/cyber-security-regulations-incentives>.

²¹³ Department of Home Affairs Website, ‘Consultation on Australia’s National Data Security Action Plan’. Available: <https://minister.homeaffairs.gov.au/KarenAndrews/Pages/consultation-australia-national-data-security-action-plan.aspx>.

²¹⁴ ‘Australian Data Strategy’ (14 December 2021), Department of the Prime Minister and Cabinet, p 11. Available: <https://ausdatastrategy.pmc.gov.au/sites/default/files/2021-12/australian-data-strategy.pdf>.

²¹⁵ ‘Australian Data Strategy’ (14 December 2021), Department of the Prime Minister and Cabinet, p 13. Available: <https://ausdatastrategy.pmc.gov.au/sites/default/files/2021-12/australian-data-strategy.pdf>.

²¹⁶ ‘Australian Data Strategy’ (14 December 2021), Department of the Prime Minister and Cabinet, p 14. Available: <https://ausdatastrategy.pmc.gov.au/sites/default/files/2021-12/australian-data-strategy.pdf>.

2.7.2. Meta provides consumers with significant transparency and control over their data

The Discussion Paper restates assertions that Australian consumers experience harm from digital platforms collecting data to personalise their experience, or to optimise their experience through intuitive user design. In addition to not acknowledging the significant benefits that personalisation provides to consumers, advertisers and content providers, it also does not acknowledge the significant amount of work Meta has devoted to increasing transparency of communication with people about their data, and in proactively limiting the data we collect and use to deliver consumers value.

As we stated in our submission to the Australian Privacy Act Review Issues Paper in December 2020: “Privacy and protection of people’s data are fundamental to our business. Consumers should have meaningful transparency and control over how their data is used, and Facebook has built industry-leading tools to achieve that.”²¹⁷ We have actively argued in favour of regulation in Australia that would introduce greater transparency and control.

We give users significant transparency around how their data is collected and used

We seek to build every product to be transparent so that consumers can understand how we collect, use and share data on demand. We also focus on communicating important information about privacy and our data management practices proactively, clearly and contextually, with the Meta Data Policy clearly articulating the types of data we collect and the purposes for which we process that data.

We also communicate with our users in a variety of ways about their privacy. We have long provided prominent Privacy Shortcuts to allow people to find more information, and have actively prompted users to engage with their privacy settings via Privacy Checkup. We continue to evolve these efforts and, in January this year, we announced a new Privacy Centre as a user-friendly and centralised hub for all users.

Of course, there is no doubt that the optimal design of privacy notices and controls is a highly complex undertaking. It involves balancing a range of competing considerations such as comprehensiveness of privacy information versus the likelihood that people will read and understand it. It is also important to minimise the risk of “click-fatigue” and not to overwhelm consumers with choices as that will only result in disengagement.²¹⁸

Meta is committed to addressing these challenges and has proactively contributed to the ongoing debate in this area. In July 2020, we released “Communicating About Privacy: Towards People-Centered and Accountable Design”, a white paper to encourage discussion on best practice communication about privacy. In that paper, we observed that “rather than simply meeting minimum legal standards, companies need to find new ways to both inform and empower people to make privacy choices that are meaningful for them.”²¹⁹ The paper provides a number of suggestions for encouraging development of higher quality privacy notices. These suggestions

²¹⁷ *Submission to the Australian Privacy Act Review issues paper* (6 December 2020), Facebook, p 2. Available: <https://www.ag.gov.au/sites/default/files/2021-02/facebook.PDF>.

²¹⁸ *Charting A Way Forward – Communicating About Privacy: Towards People-Centered and Accountable Design*, (July 2020), Meta, pp 6-8. Available: <https://about.fb.com/wp-content/uploads/2020/07/Privacy-Transparency-White-Paper.pdf>.

²¹⁹ *Charting A Way Forward – Communicating About Privacy: Towards People-Centered and Accountable Design*, (July 2020), Meta, p 4. Available: <https://about.fb.com/wp-content/uploads/2020/07/Privacy-Transparency-White-Paper.pdf>.

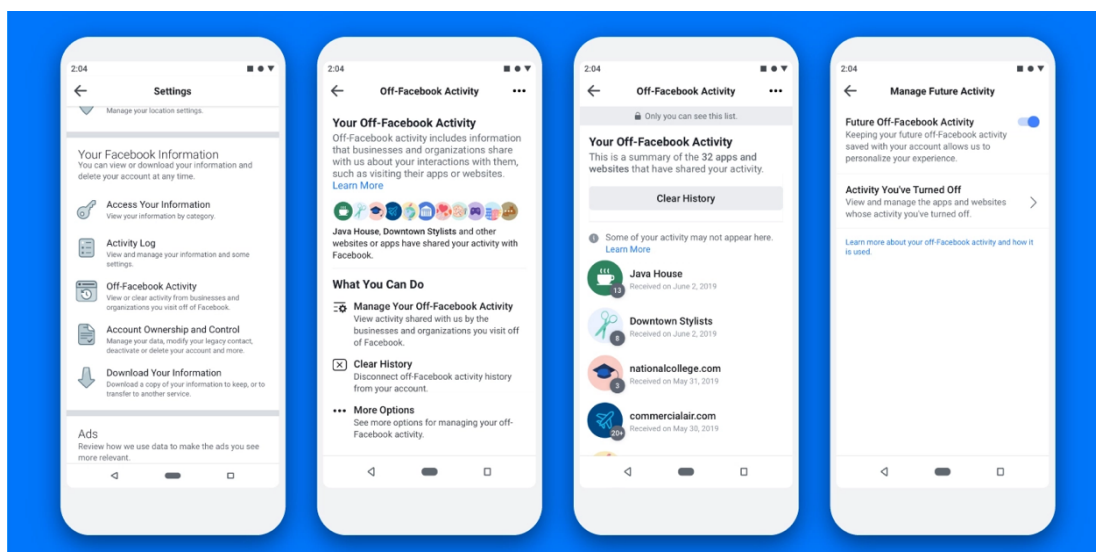
include industry and regulators working together to co-create notice standards and the re-designing of accountability measures to require adherence to a suitable privacy design process, rather than simply focusing on outcomes. We are keen to continue contributing further to progressive thinking in this space.

In the meantime, Meta is heavily focused on building and continuously investing in tools to provide consumers with meaningful transparency and control over their data.

We offer industry-leading tools to give users control over their data

Our commitment to privacy is evidenced by the tools we have built to provide transparency and give users control over the use of their data across Facebook and other apps (such as Instagram and Messenger). We have outlined just a few examples of the many tools and controls we provide below:

- **Off-Facebook Activity:** Some businesses send Facebook information about users' activity on their sites, and we use that information to personalise ads to those users. Off-Facebook Activity provides users with a summary of that information, enables them to control whether that information is cleared from their account and allows them to disconnect future off-Facebook activity from their account.²²⁰ The screenshot below shows the clear and simple layout of the Off-Facebook Activity tool on the mobile app.

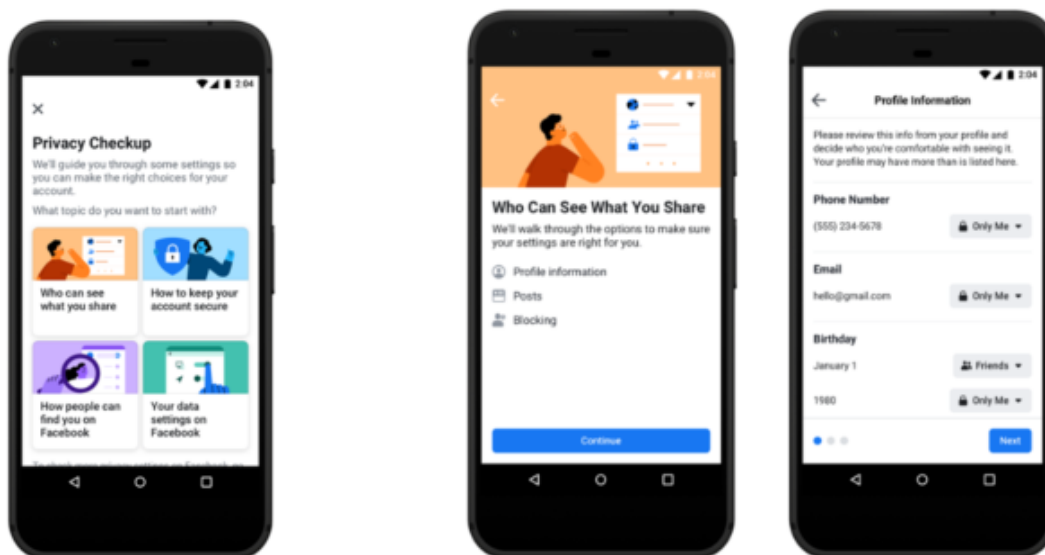


- **“Why am I seeing this ad?”:** This tool enables users to see how factors like basic demographic details, interests and website visits contribute to the ads in their News Feed. In 2019, we expanded the tool to include additional details about ads when information on an advertiser’s list matches a user’s Facebook profile.²²¹ Users can change their ad preferences through the tool if they do not wish to see similar ads in the future.
- **Privacy Checkup:** This tool prompts Meta users to double-check their existing privacy settings and make sure they are still comfortable with them. In January 2020, the tool was updated and we sent a Privacy Checkup prompt to 2 billion Facebook users globally, and

²²⁰ ‘Starting the Decade By Giving You More Control Over Your Privacy’ (28 January 2020), Meta blog post by Mark Zuckerberg. Available: <https://about.fb.com/news/2020/01/data-privacy-day-2020/>.

²²¹ ‘Understand Why You’re Seeing Certain Ads And How You Can Adjust Your Ads Experience’ (11 July 2019), Meta article. Available: <https://about.fb.com/news/2019/07/understand-why-youre-seeing-ads/>.

have continued to provide regular notification prompts. The screenshot below shows the updated Privacy Checkup features on the Facebook mobile app.



Meta does not use “dark patterns” to undermine user control

We believe that making digital services well designed, accessible, fair, clear and easy to use is critical. We want to make sure everyone understands how their data is collected, used and shared. That’s why we’ve developed tools like Privacy Checkup²²² and Privacy Basics²²³ that make it simple for people to see and manage their privacy settings. We’ve also founded and supported TTC Labs, a cross-industry effort to develop creative design solutions to make data practices easy to understand and better inform people about their data and privacy choices.²²⁴

Contrary to the claim in the DPSI Discussion Paper, we do not use “dark patterns” to “nudge consumers towards more privacy-intrusive options”.²²⁵ The example given in the Discussion Paper of Meta’s decision to adjust the location of certain privacy settings on Facebook is entirely misrepresented. As explained in the Meta Newsroom article titled “*How We’re Making it Easier to Navigate Settings*”,²²⁶ the changes we made were in response to extensive research aimed at **improving** the user’s experience and level of control over their privacy. This research showed that the redesigned layout of privacy settings:

- is more closely aligned with consumers’ mental models, with settings separated into six broad categories to make them easier for users to navigate;
- makes privacy settings more streamlined and easier to find; and
- enables users to more efficiently locate settings and make their desired changes.

²²² ‘Guiding You Through Your Privacy Choices’ (6 January 2020), Meta blog post. Available: <https://about.fb.com/news/2020/01/privacy-checkup/>.

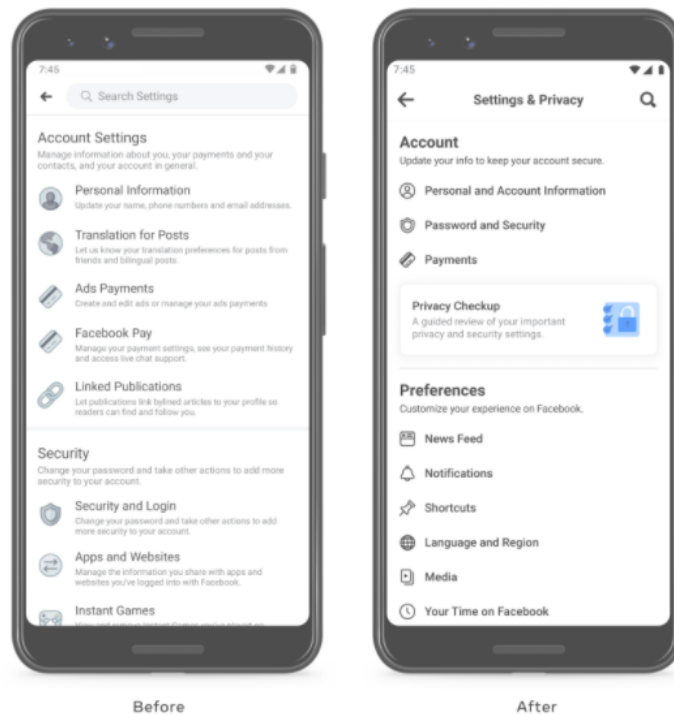
²²³ Facebook website, ‘Privacy Basics’. Available: <https://www.facebook.com/about/basics>.

²²⁴ TTC Labs website. Available: <https://www.ttclabs.net>; and ‘Making Data and Privacy Easier to Understand Through People-Centered Design’ (14 July 2020), Meta blog post by Erin Egan (VP Public Policy and Chief Privacy Officer for Policy). Available: <https://about.fb.com/news/2020/07/making-data-and-privacy-easier-to-understand/>.

²²⁵ Discussion Paper, p 46.

²²⁶ ‘How We’re Making it Easier to Navigate Settings’ (4 August 2021), Meta article. Available: <https://about.fb.com/news/2021/08/facebook-settings-redesign/>.

The screenshot below shows the improved layout following the changes that we made.



We engage constructively with policy makers and regulators to ensure that new online regulations respect the data protection principle of data minimisation

The Federal Government has pursued at least 14 new laws principally impacting digital platforms, and the Federal Government or Parliament have inquired into digital platforms through at least 18 inquiries. Meta has been engaging with regulators and policymakers across all of these proposed regulatory frameworks to ensure that proposed regulation is privacy-preserving and respects the fundamental data protection principle of data minimisation. For example, we have been working constructively with the Australian Government in relation to privacy law reform,²²⁷ anti-trolling²²⁸ and Restricted Access Systems²²⁹ to ensure that this principle is upheld and that regulation is not dependent on the collection of additional data.

²²⁷ 'Submission to the Australian Privacy Act Review Discussion Paper' (31 January 2022), Meta, p 35. Available: https://consultations.ag.gov.au/rights-and-protections/privacy-act-review-discussion-paper/consultation/view_respondent?show_all_questions=0&sort=excerpt&order=ascending&q_text=meta&uuld=350227090.

²²⁸ 'Meta's Submission on the Social Media (Anti-Trolling) Bill 2021 - Exposure Draft' (2022), Meta, p 38. Available: https://consultations.ag.gov.au/legal-system/social-media-anti-trolling-bill/consultation/view_respondent?uuld=345997054.

²²⁹ 'Facebook response to Australian regulatory proposals for age appropriate experiences online' (September 2021), Meta. Available: https://www.esafety.gov.au/sites/default/files/2021-09/Facebook%20RAS%20submission%20%28September%202021%29_0.pdf.

2.8. The safety and security of our users is of paramount importance

The Discussion Paper states that “the rise of digital platforms has enabled the growth of online scams, misleading advertisements and other harmful content”. Content of this nature breaches Meta’s Community Standards and Advertising Policies and damages Meta’s business by negatively affecting users’ experience on the platform. Protecting our users is of paramount importance, and we are committed to ensuring positive and safe experiences for users so they can connect with the people and content that matters most to them.

Scammers and other bad actors present an ongoing challenge in any online environment and, indeed, for any communications services provider. However, the Discussion Paper both oversimplifies and misdiagnoses the broader policy challenges in stopping scammers. Any discussion needs to recognise the root cause of the consumer harm, being the conduct of scammers and bad actors themselves. Scammers are becoming increasingly sophisticated (including using techniques across multiple channels), and taking steps to evade detection.

It is also not correct to suggest scams are a problem unique - or even most acute - on digital platforms. The ACCC’s own data indicates that telco and banking are the industries where consumers are most likely to submit a scam report to the ACCC. For example, ACCC Scamwatch statistics for the 2021 calendar year indicate the ACCC received the highest number of reports in respect of scams delivered by phone (144,601 reports), followed by text message (67,180), email (40,172), internet (12,499), social networking (10,139), mobile applications (6,544) and mail (2,218).²³⁰ Australians will be especially familiar with the current wave of scams occurring via SMS.

While we continue to invest heavily in systems to protect our users, and enforce against scammers, Government, regulators and users themselves – alongside digital platforms – all have a role to play in creating a safe online environment. In the case of Government and regulators, this could include taking strong, active steps to pursue offenders, investigate complaints from consumers, partner with online services and NGOs, and invest in digital education that empowers users to identify and report scams before they occur.

Unless any potential measures to address scams involve a holistic assessment and approach, it is highly unlikely that they will achieve their intended objective.

2.8.1. We invest heavily in systems to identify and remove scams, fake accounts, fake reviews and spam

All people who use our services must comply with our Community Standards, which guide what is and isn’t allowed on Facebook²³¹ and our other services,²³² and which apply to all types of content. Advertisers must also comply with our Advertising Policies, which strictly prohibit scam ads and misleading and deceptive behaviour.

People post billions of pieces of content on our services every day. Scaled detection technology is important to prevent scams and other types of misleading or inauthentic behaviour. Accordingly,

²³⁰ ScamWatch website, ‘*Scam statistics*’. Available: <https://www.scamwatch.gov.au/scam-statistics?scamid=all&date=2021>. The Discussion Paper also notes that “the majority of reported losses are from scams delivered via phone calls”. See Discussion Paper, p 48.

²³¹ Meta website, ‘*Meta Transparency Center: Facebook Community Standards*’. Available: <https://transparency.fb.com/en-gb/policies/community-standards>.

²³² See for example, Instagram Help Center website, ‘*Community Guidelines*’. Available: https://help.instagram.com/477434105621119/?helpref=hc_fnav.

we currently use and invest in a variety of methods to detect potentially violating behaviour, including advanced machine learning techniques to enhance our detection and to enable further review of content or accounts that may violate our policies.

In addition, as scams and other misleading or inauthentic behaviour are often perpetrated by fake accounts, our policies prohibit fake accounts and our goal is to remove as many fake accounts on Facebook as we can. These include accounts created with malicious intent to violate our policies and personal profiles created to represent a business or organisation. We prioritise enforcement against fake accounts that seek to cause harm. In Q4 2021, for example, we actioned 1.7 billion fake accounts, often within minutes of them being created, and 99.9% of these were detected proactively.²³³

We also invest significantly to combat spam.²³⁴ The tactics spammers use, and our ability to detect them, drive the amount of content we take action on, as well as our proactive rate. In Q4 2021, we actioned 1.2 billion pieces of content that violated our spam policies (up from 777.2 million in Q3 2021), 99.6% of which we detected proactively.²³⁵

We are also continually evolving our systems to identify and detect misleading content and scam ads. When we detect an ad that violates our Advertising Policies, we disapprove it. All ads are subject to our ad review system before they go live. The ad review system relies primarily on automated technology to apply our Advertising Policies to the millions of ads that run across our apps. We also rely on our teams to build and train these systems and, in some cases, to manually review ads identified by our technology for further consideration.²³⁶

Feedback from our users is also critical in preventing and removing scams and other misleading content. We encourage people to report content and ads, including fake recommendations or reviews and other inauthentic behaviour, that contravene our policies if they see it – and we make this a very easy process (e.g. via our “How do I report a recommendation about a business Page on Facebook?” tool²³⁷). These signals of negative feedback from people, such as people reporting, hiding, or blocking a post or an ad, help train our automated detection systems to get better at automatically detecting potentially violating content before it goes live. We’re always investigating new applications, tools and technologies to make this work more effective.

In conjunction with these user reporting mechanisms, we provide education tools and resources for our users, focusing on how to identify and avoid scams and false ads on our platforms.²³⁸ These programs invest in building users' digital literacy, which in turn assists to build confident users of our platforms that are empowered to report suspicious activity.

²³³ Meta website, ‘Meta Transparency Center: Fake Accounts’. Available:

<https://transparency.fb.com/data/community-standards-enforcement/fake-accounts/facebook/>.

²³⁴ See for example, ‘Submission to the Australian Government Discussion Paper: Strengthening Australia’s cyber security regulations and incentives’ (September 2021), Meta. Available:

<https://www.homeaffairs.gov.au/reports-and-pubs/files/strengthening-australias-cyber-security-submissions/facebook.pdf>.

²³⁵ Meta website, ‘Meta Transparency Center: Spam’. Available:

<https://transparency.fb.com/data/community-standards-enforcement/spam/facebook/>.

²³⁶ ‘Breaking down Facebook’s ad review process’ (20 May 2021), Meta blog post by Jeff King (Meta VP, Business Integrity). Available: <https://www.facebook.com/business/news/facebook-ad-policy-process-and-review>.

²³⁷ Facebook Help Centre website, ‘How do I report a recommendation about a business Page on Facebook?’. Available: <https://www.facebook.com/help/439579999521224>.

²³⁸ Meta for Business website, ‘How to spot and avoid scams on Facebook and Instagram’. Available:

<https://www.facebook.com/business/learn/lessons/how-spot-avoid-scams>; and Facebook Safety Centre website, ‘Digital Literacy Library’ Available: <https://www.facebook.com/safety/educators/lessons>.

2.8.2. We also take significant steps to hold bad actors to account

As noted above, scams and misleading behaviour damage our business and negatively impact users' experience on our platforms. This is why we take steps to hold scammers and other bad actors to account, for example, by disabling ad accounts and removing an advertiser's ability to advertise in future. We are also taking action against bad actors under the law, creating real world consequences for their actions on our platforms. This means not just suspending and deleting accounts, Pages, and ads, but also taking legal action in certain instances against those responsible for violating our rules. For example:

- in March 2022, we commenced legal proceedings against an individual that violated our Facebook Terms and Policies by providing fake reviews and feedback for businesses to artificially increase their Facebook Customer Feedback Score and evade Meta's detection and enforcement against misleading ads;²³⁹
- in February 2022, we filed a lawsuit with a financial services company against two Nigerian-based individuals engaged in international financial scams through online impersonation;²⁴⁰
- in December 2021, we filed legal action against a Vietnamese-based group which targeted the accounts of employees of marketing companies and tricked victims into self-compromising their accounts by installing malicious software that was deceptively promoted as Facebook-affiliated tools for managing ads;²⁴¹ and
- in June 2021, we brought a lawsuit against a company and two individuals who ran deceptive ads on Facebook, which redirected users to a third-party e-commerce site and engage in a bait-and-switch scheme.²⁴² We also took action against a group of individuals who misled victims into self-compromising their accounts by installing a mobile app from the Google Play Store deceptively called "Ad Manager for Facebook", which prompted users to share their Facebook login credentials.²⁴³

We strongly believe that creating real world consequences for scam advertisers and other bad actors - including through legal action - is important to protect our users and maintain the integrity of our services. However, creating these consequences - and disrupting economic incentives - also requires that Governments and regulators play a critical role in pursuing action against scammers. Meta would welcome further action by Governments and regulators to take action against scammers on online platforms and other communication services.

²³⁹ 'Taking action against fake customer feedback and reviews' (16 March 2022), Meta Newsroom article by Jessica Romero (Director of Platform Enforcement and Litigation). Available:

<https://about.fb.com/news/2022/03/taking-action-against-fake-customer-feedback-and-reviews/>.

²⁴⁰ 'Taking legal action against financial services scams' (8 February 2022), Meta Newsroom article by Jessica Romero (Director of Platform Enforcement and Litigation). Available:

<https://about.fb.com/news/2022/02/taking-legal-action-against-financial-services-scams/>.

²⁴¹ 'Combating e-commerce scams and account takeover attacks' (29 June 2021), Meta Newsroom article by Jessica Romero (Director of Platform Enforcement and Litigation). Available:

<https://about.fb.com/news/2021/06/combating-e-commerce-scams-and-account-takeover-attacks/>.

²⁴² 'Combating e-commerce scams and account takeover attacks' (29 June 2021), Meta Newsroom article by Jessica Romero (Director of Platform Enforcement and Litigation). Available:

<https://about.fb.com/news/2021/06/combating-e-commerce-scams-and-account-takeover-attacks/>.

²⁴³ 'Combating e-commerce scams and account takeover attacks' (29 June 2021), Meta Newsroom article by Jessica Romero (Director of Platform Enforcement and Litigation). Available:

<https://about.fb.com/news/2021/06/combating-e-commerce-scams-and-account-takeover-attacks/>.

As set out in [section 3.5](#) below, we also think that there is more that can be done in partnership with the Government and other industry participants on potential approaches.

3. The need for potential new measures has not been justified and any new regulatory tools require further consideration

The Discussion Paper captures a wide range of competition and consumer rules, and different regulatory models being considered or proposed (or in some cases, implemented) by governments and regulators around the world. It points to the benefits of alignment across jurisdictions, but that is difficult when globally there is no consensus on the “right” approach to address these issues. The highly dynamic nature of the markets in which any measures would apply further complicates the assessment.

Over the past five years, the ACCC has invested (and is continuing to invest) significant resources into examining the competition dynamics of digital platform services. However, there are four fundamental issues with the way the Discussion Paper has framed the current inquiry and how it is seeking to consult on these issues:

- 1. Broad issues identified are not unique to digital platforms:** As raised in [section 1](#), self-preferencing conduct, network effects, and vertical integration issues are not unique to digital platforms. Similarly, issues relating to transparency, data access and unfair contract terms arise in many other sectors.
- 2. Specific instances of conduct are a one- or two- company issue:** Concerns raised in the Discussion Paper relate to conduct engaged in by one or two companies. Leaving aside the merits of these concerns, there is a real threshold question of whether these findings warrant considering very broad powers to regulate digital platforms, such as those the Discussion Paper is seeking input on.
- 3. The consultation seeks to cover a very significant range of topics in a short amount of time:** The Discussion Paper’s analysis covers a broad range of topics and issues. Consequently, its analysis is superficial and often based on outdated or incomplete data. It does not establish a robust basis for regulation, and significant further work is required. Regulatory consultation and inquiry into the digital ecosystem has often been more extensive overseas. For example, the EC leveraged five years of consultation on the Digital Single Market Strategy to propose the Digital Markets Act and Digital Services Act in 2020 (with further consultation occurring after this).²⁴⁴
- 4. The ACCC has to date been confined to examining certain services supplied by digital platforms, and has not conducted any holistic study of digital platforms that can justify broad reforms:** The findings cited in the Discussion Paper are limited to those in separate reports for each of the “digital platform services” listed in the Ministerial Direction for the DPSI to date, digital advertising services in the Ad Tech Inquiry²⁴⁵ and the impact of search

²⁴⁴ ‘Report from the Commission to the Council and the European Parliament: Final Report on the E-commerce Sector Inquiry’ (2017), European Commission. Available: https://ec.europa.eu/competition-policy/system/files/2021-10/2017_ecommerce_SI_final_report_en.pdf; and ‘Summary Report on the open public consultation on the Digital Services Act Package’ (15 December 2020), European Commission. Available: <https://digital-strategy.ec.europa.eu/en/summary-report-open-public-consultation-digital-services-act-package>.

²⁴⁵ ACCC’s ‘Digital Advertising Services Inquiry - final report’ (28 September 2021). Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>; specifically, digital display advertising services, digital advertising technology services and digital advertising agency services. See also ACCC’s ‘Digital Advertising Services Inquiry - Ministerial Direction’ (10 February 2020). Available: <https://www.accc.gov.au/system/files/Ministerial%20direction%20-%20Digital%20advertising%20services%20inquiry.pdf>.

engine and social media platforms and other digital content aggregation platforms on media and advertising markets in the DPI.²⁴⁶ While these comprise a mix of services, they are in no way comprehensive of all services supplied by digital platforms. Further, the dynamic and innovative nature of digital platforms means the services being provided will continue to change over time. Therefore, leaving aside whether the ACCC's conclusions from its studies are correct, they cannot justify any broad reforms applying across the whole digital sector or all services provided by any particular digital platform.

- 5. Existing laws are already highly flexible:** The Discussion Paper considers potential measures against a background of already very flexible competition and consumer laws (arguably more flexible than many other countries), and laws which have recently undergone (e.g. in the case of section 46 of the CCA) or are undergoing (e.g. in the case of unfair contract terms regime and Privacy Act review) substantial change and reform.

The Discussion Paper has not made a case for any harm that:

- cannot adequately be addressed by the existing legal framework; and
- justifies consideration of further broad regulatory powers.

It is important for all participants in the economy that the ACCC does not rush its analysis and properly considers the identified issues and any assessment of regulatory reform. Otherwise, it risks inadvertently eroding the substantial benefits that digital platform services bring to users, damaging the digital ecosystem and investment in Australia, and fundamentally altering the regulatory landscape underpinning these services. This will have significant detrimental impacts on digital platforms, advertisers, content creators, small businesses and users in Australia.

3.1. Potential measures to address self-preferencing and leveraging risk harming consumers and business

The Discussion Paper identifies specific examples of business practices of certain digital platforms where products and services are highly integrated within the firm's platform.²⁴⁷ From these specific examples, the Discussion Paper formulates a general category of self-preferencing or other leveraging conduct that is treated as a new form of competitively harmful conduct.

The Discussion Paper appropriately acknowledges a distinction between:

- self-preferencing that is "often benign" and self-preferencing conduct "which leverages market power" but is justifiable by a pro-competitive rationale; and
- self-preferencing or other leveraging conduct that affects the ability of rivals to compete in related services.²⁴⁸

²⁴⁶ ACCC's 'Digital Platform Inquiry - Ministerial Direction' (4 December 2017). Available: <https://www.accc.gov.au/system/files/Ministerial%20direction.pdf>.

²⁴⁷ Discussion Paper, p 82; ACCC's 'Digital Platform Services Inquiry: Interim Report No.3 - Search defaults and choice screens' (September 2021), pp 11-12. Available: https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202021%20-%20Full%20Report%20-%2030%20September%202021%20%283%29_1.pdf; and ACCC's 'Digital Platform Services Inquiry: Interim Report No. 2 - App Marketplaces' (March 2021) p 41. Available: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

²⁴⁸ Discussion Paper, p 85.

However, this distinction is lost from the analysis in much of the Discussion Paper. Consequently, it incorrectly suggests that self-preferencing or other leveraging conduct (at least by significant digital platforms) is itself a category of competitively harmful conduct. From this position, the Discussion Paper considers potential measures to address self-preferencing and leveraging.

Overlooking the distinction between the two different forms of self-preferencing is particularly dangerous where self-preferencing and other forms of vertical integration are a common pro-competitive business practice, and a cornerstone in developing enhanced consumer products and services in digital markets.

Such conduct has not generally resulted in market foreclosure but has encouraged competitive disruption, including in new business areas. To the extent that it is potentially competitively harmful, the Discussion Paper:

- provides only limited and contested examples of such conduct, some of which may result in significant consumer benefits; and
- does not articulate why existing competition laws are not capable of addressing the relevant competitive harm.

Accordingly, the broad measures suggested to address these narrow potential concerns should not be progressed as they carry a high risk of impeding innovation and causing other harm to consumers now and in the long run.

New rules that are tailored to target specific conduct that is not proven to be harmful would similarly cause harm to consumers and business. It could create compliance issues from a patchwork of regulation and lead to outdated laws that impede innovation in fast-moving markets.

3.1.1. Self-preferencing and leveraging are widespread business behaviours that are inherently efficient and pro-competitive

Self-preferencing and other leveraging conduct lies at the heart of competitive business models, both in digital services and more generally. Business strategies to sell more products or services or improve products or services, are the essence of rivalry and competition. Expanding offerings and giving advantages to an owned and operated business provides the same consumer benefits as any competition on the merits, including lower prices, better quality, a wider choice of new or improved goods and services, and increases the ease with which a range of different services are accessed.²⁴⁹ Conduct that results in such benefits should not be seen as anti-competitive without careful assessment, even if the conduct is by a large firm.

Self-preferencing and other leveraging conduct is often engaged in by vertically integrated firms to achieve efficiencies. Competition and consumers benefit from vertical integration even when the integration might lead to less consumer use of specific downstream competitors.²⁵⁰ In

²⁴⁹ 'Vertical Antitrust Policy as a Problem of Inference' (September 2005), International Journal of Industrial Organisation article by James C Cooper et al. Available: <https://www.sciencedirect.com/science/article/abs/pii/S0167718705000755>; and 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (17 July 2020), World Competition article by Pablo Ibáñez Colomo. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654083 ("[S]elf-preferencing is often inextricably linked to the pro-competitive benefits that come with the integration of products and services. It cannot be dissociated from them").

²⁵⁰ 'Vertical Antitrust Policy as a Problem of Inference' (September 2005), International Journal of Industrial Organisation article by James C Cooper et al. Available: <https://www.sciencedirect.com/science/article/abs/pii/S0167718705000755>; and 'Self-Preferencing: Yet Another Epithet in Need of Limiting Principles' (17 July 2020), World Competition article by Pablo Ibáñez Colomo. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654083; ("[S]elf-preferencing is

particular, vertical integration may help firms internalise transaction costs, reduce double marginalisation and develop consumer product innovations integrating products and features efficiently.²⁵¹ It may also lead to research and development synergies.²⁵²

Finally, self-preferencing and other leveraging conduct are widespread and exist in virtually all industries – including global shipping companies (e.g. promoting their own Transport Management Systems), accounting firms and banks (e.g. referring clients to other services within their own firms) and car manufacturers (e.g. making components internally, such as Tesla making the car battery). There is no real dispute about the myriad of benefits for consumers and efficiencies for the businesses engaging in such practices in these industries.

3.1.1.1. Self-preferencing and other leveraging conduct remains pro-competitive in digital markets

Digital platforms have incentives to innovate and offer new products or services to users due to the inherent efficiencies and pro-competitiveness attached to such a strategy. Digital platforms that preference their own products deliver other additional benefits which are less prominent in traditional industries because:

- They frequently increase the value of the market overall by growing the total share of users of a particular product.²⁵³
- Investments in integration that spur platform creation are made via non-profit contributions on “open platforms.”²⁵⁴ For example, Meta’s open-source software React Native and PyTorch, which are used in Meta products such as the Meta Quest, were used by Coinbase to revamp their mobile development strategy and NYU Langone Health to analyse the potential of AI to improve MRI scans.²⁵⁵
- Investment in integration can also propel competition in downstream markets. For example, Instagram Shopping promotes competition between online retailers, with over 130 million users engaging with shoppable Instagram posts monthly.²⁵⁶

often inextricably linked to the pro-competitive benefits that come with the integration of products and services. It cannot be dissociated from them”).

²⁵¹ ‘*Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*’ (29 August 2020), Geo. Mason L. Rev article by Roger D Blair et al. Available:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645537; and ‘*Invited Statement of Geoffrey A. Manne on House Judiciary Investigation Into Competition in Digital Markets: Correcting Common Misperceptions About the State of Antitrust Law and Enforcement*’ (17 April 2020) International Centre for Law & Economics. Available: https://laweconcenter.org/wpcontent/uploads/2020/04/Manne_statement_house_antitrust_20200417_FINAL3-POST.pdf.

²⁵² ‘*Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*’ (29 August 2020), Geo. Mason L. Rev article by Roger D Blair et al. Available:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645537.

²⁵³ ‘*Platform Integration and Demand Spillovers in Complementary Markets: Evidence from Facebook’s Integration of Instagram*’ (2017), Management Science article by Zhuoxin Li and Ashish Agarwal. Available: https://www.researchgate.net/publication/306266277_Platform_Integration_and_Demand_Spillovers_in_Complementary_Markets_Evidence_from_Facebook's_Integration_of_Instagram/.

²⁵⁴ ‘*Hearing on Vertical Foreclosure and Antitrust Remedies in the Information Economy – Testimony of Thomas W. Hazlett*’ (10 March 2020), Senate Judiciary Committee. Available:

<https://www.judiciary.senate.gov/imo/media/doc/Hazlett%20Testimony.pdf>.

²⁵⁵ Meta Open Source website. Available: <https://opensource.fb.com/showcase>.

²⁵⁶ Instagram website, ‘*Shopping*’. Available: <https://about.instagram.com/features/shopping>.

Empirical studies and real-world evidence demonstrate how platforms offering new or adjacent products and services to innovate and compete with other companies along the supply chain deliver substantial benefits for consumers. For example:

- **Amazon Prime Video:** Amazon’s introduction and self-promotion of its streaming service, Amazon Prime Video, has competitive and pro-innovative effects that benefit consumers. This is because Amazon legitimately promotes this adjacent product to challenge incumbents, such as Netflix and traditional TV as well as movie and video production companies (via Prime’s original movies and shows). This is a clear example of self promotion as a source of disruption, which produces competition on the merits.²⁵⁷
- **Uber Eats:** Uber leveraged economies of scope and consumption synergies in its move into the food delivery service market by leveraging its user base of Uber drivers and its existing software solutions from its transportation business. Uber’s integration of the two services within the same app environment also generated “significant consumption synergies for consumers” (e.g. easy access to the Uber Eats app when using the Uber app and vice versa). These synergies have clear pro-competitive benefits for consumers.²⁵⁸
- **Realestate.com.au Home Loans:** In 2017, REA Group launched realestate.com.au Home Loans on its property search platform realestate.com.au, which allowed users to apply for conditional approval and home loans.²⁵⁹ The addition saw Australia’s first end-to-end home search and finance experience, which resulted in time-based and personalisation consumer benefits. The personalised and online nature of REA home loans is particularly valuable in rural and regional Australia where banks have consolidated branch numbers over the past decade.²⁶⁰

3.1.1.2. Self-preferencing and other leveraging conduct are a powerful source of innovation

Entering into new markets with new products and services through self-preferencing, leveraging and vertical integration is a powerful source of innovation. Any attempt to regulate the digital sector must not impair this, particularly when frequent integration practice in digital markets has led to intense competition, multi-homing, rapid changes and new entry (more so than in traditional industries such as telecommunications).

This results in competitive constraints from many different companies – even if specialised and with differing business models. For example (as set out above in [section 2.3](#)), Meta faces competition from a range of existing competitors and new entrants. With such dynamic competition, platforms must continuously remain attractive and innovate or risk users moving to other platforms. There are many examples of successful platforms that have then drastically

²⁵⁷ ‘Please, Help Yourself’: Toward a Taxonomy of Self Preferencing’, (October 2021), Information Technology & Innovation Foundation article by Aurelien Portuese. Available: <https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf>.

²⁵⁸ ‘Digital conglomerates and killer acquisitions – A discussion of the competitive effect of start-up acquisitions by digital platforms’ (2020), Concurrences Competition Law Review article by Tristan Lécuyer. Available: https://www.concurrences.com/IMG/pdf/2020_english_edition_web.pdf?59552/617b167a81ef861c82599e7856e8d84ad252c9d3.

²⁵⁹ ‘Realestate.com.au and NAB partner to create new mortgage broking offer’ (26 June 2017), NAB News. Available: <https://news.nab.com.au/news/realestate-com-au-and-nab-form-strategic-partnership-to-boost-home-loan-offering-for-australian-homebuyers/>.

²⁶⁰ ‘ANZ and NAB to close their doors in eight more NSW towns in a move union says could be ‘near death knell’ (6 March 2018) ABC News article by Joanna Woodburn. Available: <https://www.abc.net.au/news/2018-03-06/anz-nab-close-more-regional-bank-branches/9517086>.

declined and/or failed because they were unable to innovate and adapt e.g. Friendster, MySpace and Yahoo!.

Meta and Google have also introduced products that were ultimately unsuccessful (e.g. Facebook Gifts, Google+ and Google Glass). These failures show the power of consumers and vulnerability of tech firms, even those with strong positions at a point in time. Recognising this intense competition, Meta has continued to significantly increase spending on research and development to improve the quality of its products and offer new products and experiences – spending \$24.655 billion on research and development (about 21% of revenue) in 2021.²⁶¹

Accordingly, any attempt to regulate the digital sector should not stymie such investment and innovation. The Discussion Paper suggests a broad and non-specific general prohibition on self-preferencing. If implemented, it could remove an incentive for innovation (including disruptive innovation).

3.1.2. Promoting one’s own businesses or products is only anti-competitive in narrow circumstances

“Self-preferencing” is therefore not a category of conduct that should be considered problematic *per se*. Promoting one’s own business or products is only anti-competitive if it is done by a company with market power with an exclusionary effect.²⁶² While substantial market power is usually a precondition of anti-competitive self-preferencing and leveraging, a detailed analysis is still required to show that the exclusionary effect outweighs the benefits.

Undertaking such a detailed, evidence-based assessment can take time and is the same across all industries, not just within digital markets. This reflects the complexity of such a task. Introducing *per se* generalised prohibitions on self-preferencing would circumvent this assessment. We should not be seeking to circumvent a proper assessment of benefits and efficiencies through a *per se* rule or any presumption of anti-competitive effect. This is in contrast to bilateral conduct where the anti-competitive effects are much clearer, i.e. price-fixing, bid rigging and/or supply restriction agreements.

3.1.3. Existing competition rules are already suitably versatile to deal with rare and specific examples of anti-competitive self-preferencing or other leveraging conduct

Self-preferencing and leveraging are not new practices. Accordingly, anti-competitive exclusionary conduct has been – and should continue to be – subject to a rigorous examination of anti-competitive effects on a case-by-case basis under established theories of harm and flexible existing laws. Moving away from a tried and tested framework could create a significant risk of harm to the Australian economy, including consumers, when there is no evidence of deficiencies in (and there has been no proper assessment of the consequences of departing from) the current laws.

The ACCC has successfully brought proceedings for anti-competitive self-preferencing and leveraging conduct under existing law in other industries, for example in *ASX Operations Pty Ltd v*

²⁶¹ Form 10K – Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act for the fiscal year ended December 31, 2021¹ Meta Platforms, Inc., p 64. Available: <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/14039b47-2e2f-4054-9dc5-71bcc7cf01ce.pdf>.

²⁶² ‘Please, Help Yourself: Toward a Taxonomy of Self Preferencing’, (October 2021), Information Technology & Innovation Foundation article by Aurelien Portuese. Available: <https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf>.

Pont Data Australia Pty Ltd,²⁶³ *ACCC v Cabcharge Australia Ltd*²⁶⁴ and *ACCC v Baxter Healthcare*.
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There is no reason why the existing legal framework cannot also deal with any allegations of anti-competitive preferencing or leveraging conduct engaged in by digital platforms.

Section 46 of the CCA has only recently been amended to offer greater flexibility to address such conduct, but remains untested by the ACCC with respect to digital platforms. These changes capture a much broader range of conduct and establish a lower evidentiary threshold, which not only allows for self-preferencing and leveraging conduct to be captured, but also means it may be more easily proved than the cases outlined above.

Epic Games has recognised this flexibility and has brought proceedings alleging anti-competitive self-preferencing through restrictive app store rules under this new section 46. This pending litigation is an early sign that it can effectively address anti-competitive self-preferencing and leveraging.

To date, although the ACCC has flagged it is investigating certain conduct, it has not taken enforcement action in relation to alleged exclusionary or anti-competitive self-preferencing or leveraging conduct in the digital space under this new section 46. It is hard to see any justification for entirely new reforms when the ACCC has not used its existing powers.

3.2. Potential measures to enhance interoperability of services are unnecessary and risk negatively impacting consumers and competition

The Discussion Paper foreshadows potential measures to ensure “digital platforms that control large ecosystems of services do not unfairly exclude rivals by limiting interoperability.”²⁶⁶ Interoperability is defined as the ability for services outside a digital platforms’ ecosystem being able to work together with services from inside that ecosystem.²⁶⁷

First, the current Australian competition law framework is already capable of dealing with anti-competitive exclusionary conduct, including exclusion by “limiting interoperability” provided it is actually anti-competitive. There have been successful proceedings under section 46 of the CCA brought against firms that have excluded rivals from access to their systems or to key data inputs (e.g. in *ASX v Pont Data* and in *ACCC v Cabcharge*). The case against Cabcharge in particular was essentially one concerning interoperability and is clear precedent for the applicability of section 46 to the type of conduct that the Discussion Paper is concerned with.

Second, the digital services industry has many examples of platforms taking initiatives to support interoperability of services.

- For example, in 2020 Meta launched the Transfer Your Information (TYI) tool that enables Facebook users to transfer their Facebook photos and videos directly to BackBlaze, Dropbox, Koofr, and Google Photos. Over time we’ve continued to add new data types (like

²⁶³ *ASX Operations Pty Ltd v Pont Data* [1990] FCA 710.

²⁶⁴ *Australian Competition and Consumer Commission v Cabcharge Australia Ltd* [2010] FCA 1261.

²⁶⁵ *ACCC v Baxter Healthcare* [2008] FCAFC 141.

²⁶⁶ Discussion Paper, p 87.

²⁶⁷ Discussion Paper, p 87.

notes, posts, and events) and new destinations (like Photobucket, Google Calendar, Google Docs, Blogger, and WordPress). TYI is powered by code developed through the Data Transfer Project (DTP), which is a collaboration of organisations committed to building a common framework with open-source code that can connect any two online services, enabling a seamless user-initiated portability of data between platforms in a way that is lawful, safe and trustworthy. We joined the DTP in 2018 to collaborate with industry partners to build data portability products that enable direct transfers between services.

- Meta also voluntarily makes a range of Application Programming Interfaces (APIs) available to a wide variety of third-party developers to help them build valuable experiences for the benefit of users and businesses. Further, consumers can already share content from Meta’s services to other services. For example, subject to the permissions granted by third-party apps themselves and system/format compatibility, users have the option of posting content from Instagram to a number of third-party applications, including Twitter and Tumblr.

As a result, Meta does not agree with the Discussion Paper’s suggestion that there is a market-wide interoperability issue requiring a regulatory mandate of interoperability of digital platform services. In fact, the Discussion Paper only identifies service interoperability issues specific to one firm, Apple.²⁶⁸ Even these issues do not relate to interoperability, but to third-party access to platforms or infrastructure (e.g. access to the NFC technology in iPhones to allow app developers to make use of the tap and go functionality) or self-preferencing.²⁶⁹

Contrary to what the Discussion Paper says,²⁷⁰ there is no clear evidence that mandating interoperability of digital platform services would in fact promote competition. Rather, it would create complex challenges and trade-offs around innovation, competition, security, privacy, user preferences, content moderation and user safety. The ACCC has previously recognised, in the context of ad tech services, some of these significant detriments, such as privacy risks and associated consumer harm, are not outweighed by the benefits.²⁷¹

- First, digital services differ from other industries, largely because of the rapidly evolving consumer demand and diverse and evolving products of digital platforms. Historically, certain forms of interoperability may have enhanced competition and unlocked innovation in less dynamic industries, such as those involving physical infrastructure (e.g. rail lines or telephone services) or based on more standardised formats (e.g. with web and browser standards). However, in the digital sector users can already easily switch between services, users can use multiple services almost simultaneously (i.e. multi-homing), and participants compete by offering differentiated, higher quality and more appealing services.
- Second, mandating interoperability could actually impede competition and harm innovation and consumers in the following ways:
 - Mandated interoperability would reduce the incentives for services to differentiate themselves from their competitors, and could lead to a reduction in quality to meet the innovation levels of the weakest market players. Specifically, standardisation of features would favour interoperability based on the “lowest common denominator”

²⁶⁸ Discussion Paper, p 87.

²⁶⁹ Discussion Paper, p 87.

²⁷⁰ Discussion Paper, p 87.

²⁷¹ ACCC’s ‘*Digital Advertising Services Inquiry - Final Report*’ (28 September 2021), p 20. Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

between different services, which limits performance and ability to adjust to consumer and tech trends.

- Mandated interoperability may also negatively impact users' privacy rights and expectations, and there is a risk that wide-ranging interoperability measures could undermine the primacy of users in making choices about how their data is used. For example, a user's consent for their data to be used on one app does not mean they would necessarily consent for that data to be exported to other third-party apps. Much of the personal data provided in the service or created through its use can implicate the data protection interests of multiple data subjects (e.g. if multiple users are tagged in a photo). There are also questions of how user expectations, settings, and choices would propagate across services, such as audience controls and requests to delete data.
- Mandated interoperability may risk user safety where third-party platforms cannot ensure a high standard for user protection. Large digital platforms have the incentive and resources to invest heavily in user safety and content moderation on their platforms but they cannot control what occurs off-platform. Smaller digital platforms may not have the necessary resources to ensure they meet the high standards that Meta sets for user safety.
- Mandated interoperability also raises questions of how the ecosystem will manage fixing urgent bugs, driving security updates, maintaining cross-service spam filters, limiting abuse, and other bad content, and who in a differentiated ecosystem will decide what those safety measures should be.

Consequently, any proposition to mandate interoperability could in fact lead to a number of negative outcomes. Given this, any enhancement of interoperability between services provided by digital platforms should be consumer and industry-driven, and not mandated through regulation.

3.3. Measures including increasing data access for rivals, data portability and data interoperability should be carefully considered

Meta supports the principle of data portability in response to consumer driven demand (as demonstrated by its involvement in the Data Transfer Project).²⁷² However, any regulatory obligations concerning interoperability and/or providing access for rivals could create complex trade-offs around innovation, competition, security, privacy, user preferences, content moderation and user safety (as discussed above in [section 3.2](#)).

The Discussion Paper raises a range of potential measures it considers may be effective to address what it identifies as incumbents' data advantage.²⁷³ These range from "data portability" obligations (including obligations to export data on request without excessive friction, not block tools developed to help export data, and proactively build IT systems to facilitate transfers) to data access proposals (including data pooling, data banks, mandatory data access). Each of these potential measures are complex and in practice deliver different outcomes for business and consumers. Given their wide-ranging nature and the imprecise way they have been grouped and discussed in the Discussion Paper, we have only been able to engage at a high level with these

²⁷² Data Transfer Project website. Available: <https://datatransferproject.dev/>; and Discussion Paper, p 89.

²⁷³ Discussion Paper, p 88.

potential measures. We welcome the opportunity to continue to consult if the ACCC identifies more concrete proposals in this area.

3.3.1. Data and its role in the market

The Discussion Paper's potential measures for access to data for rivals, portability and interoperability measures are premised on the conclusion that having data confers advantages that cause harm. However, as set out in [section 2.6](#) above, this mischaracterises the role data plays in digital services.

3.3.2. No evidence of any harms which justify broad measures

The Discussion Paper refers to narrow and firm-specific examples to justify considering the various portability, interoperability or data-sharing measures, including previous findings that certain search engine providers should give access to click-and-query data and potentially other datasets, and its recommendation that sector-specific rules be introduced to prevent Google from leveraging its extensive first-party data to advantage its own ad tech services.²⁷⁴ The Discussion Paper should not be suggesting general, wide-ranging portability, interoperability or data sharing measures to address these specific instances of alleged conduct by one firm, i.e. Google.

Meta notes the ACCC previously decided against recommending potential data interoperability measures for certain ad tech services (such as common user IDs and transaction IDs) because of concerns that any competition benefits would be outweighed by privacy risks and associated consumer harm.²⁷⁵ Similarly, the ACCC also decided not to recommend data portability measures, including the Consumer Data Right (CDR), for ad tech services because it was not convinced that data portability would effectively address its competition concerns in ad tech services, and did not anticipate many consumers would agree for their data to be shared with different ad tech providers.²⁷⁶

Meta agrees with the ACCC's previous approach of carefully considering and weighing up the potential detriments and benefits of any potential measures. However, as there has been no articulation of any harm beyond the isolated examples described above, there can be no need for a debate on whether mandatory portability, interoperability or other sharing requirements (such as data pooling arrangements or data and information banks) are beneficial and would not be outweighed by adverse consequences to privacy, competition and innovation.

As discussed above in [section 3.2](#), there is already a consumer-driven trend towards interoperability and industry participants have already been progressing ways to give users greater control over their data, like the DTP. Digital services also operate in a competitive environment with extensive multi-homing and low barriers to entry and switching. It is unclear how any mandated data portability, interoperability or other sharing measures can have a meaningful impact on facilitating new entry and expansion. This is consistent with the ACCC's previous findings regarding portability and interoperability discussed above.²⁷⁷

²⁷⁴ Discussion Paper, pp 88-89.

²⁷⁵ ACCC's 'Digital Advertising Services Inquiry: Final Report' (28 September 2021), pp 78-79. Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²⁷⁶ ACCC's 'Digital Advertising Services Inquiry: Final Report' (28 September 2021), pp 79-80. Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

²⁷⁷ DPI Final Report, p 115.

3.3.3. Meta supports industry-driven third-party data sharing which can enhance competition and provide greater control to users, but details matter

Meta considers any data sharing measures should be user-initiated and always be subject to important considerations around privacy, security, and any impact on competition and innovation. Broad-brush measures or powers mandating data access, portability or interoperability risk undermining the primacy of users and their privacy rights, and negatively impacting innovation and competition.

Mandating data sharing creates a “data paradox” putting user data privacy protections in tension with incentives for digital services to collect and share more user data. Meta believes that data in general should only be shared as directed or permitted by the user, and welcomes the ACCC’s statement that consumer and privacy impacts should be carefully considered before implementing potential measures that increase data access.²⁷⁸

There are material consequences of getting the design of such measures wrong. Given the significant risk of harming competition and consumer welfare and the complex privacy, data protection and data security issues involved, Meta encourages the ACCC to ensure it has properly considered whether there are clear circumstances warranting such measures, the potential economic impact of such measures on businesses and consumers, and has weighed the costs against the purported benefits.

3.4. Potential measures limiting data use by incumbents lack any adequate basis for adoption

The Discussion Paper suggests there may be a case for introducing measures to limit data use as a way of addressing the alleged data advantages held by some digital platforms. It suggests that data silos could regulate the internal sharing of data within a firm by prohibiting the combination of some types of datasets for a broad range of purposes.²⁷⁹

The policy goal identified in the Discussion Paper supporting regulatory data separation measures is to “level the playing field” between large platforms with a significant data advantage and smaller rivals. This is essentially seeking to limit the commercial advantage of businesses that have obtained data (or the ability to draw insights from data) by heavily investing in innovative products that attract customers. This proposal would impede one firm from pursuing a competitive advantage through its own business initiatives so another firm with an inferior offering can “compete”.

“Levelling the playing field” in this context protects competitors, not competition or consumers. It follows that it is not a genuine competition policy goal nor an appropriate basis for a general regulatory power to impose data use restriction measures and data regulation. If adopted, it would promote free-riding and reduce investment and innovation.

The limited cases where the Discussion Paper has identified a data advantage underpinning a broader competition issue are company and product-specific. It refers to the ACCC’s previous recommendations to limit Google’s use of data in ad tech (i.e. its ability to use data it collects from its consumer-facing services to provide ad tech services on third-party sites and apps),²⁸⁰ and to

²⁷⁸ Discussion Paper, p 92.

²⁷⁹ Discussion Paper, p 92.

²⁸⁰ ACCC’s ‘*Digital Advertising Services Inquiry: Final Report*’ (28 September 2021), p 78. Available: <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>.

prevent Google’s and Apple’s use of certain data in app marketplaces (i.e. their ability to use data from their non-app marketplace operations to gain an unfair competitive advantage over third-party app developers).²⁸¹ These examples are not new forms of anti-competitive conduct or alleged harms. To the extent such conduct gives rise to unfair competitive advantages, the existing legal framework is sufficiently flexible to address this kind of conduct (see [section 3.1.3](#) above).

In light of the above, it is premature to be debating measures involving a broad regulatory power to impose firm-specific data restrictions. Rather, there still needs to be a proper assessment of:

- the extent to which there is evidence of a genuine and prevalent anti-competitive harm from “data advantages”;
- the significant benefits that data collection and use confers across the economy generally; and
- the risk that seeking to hobble such data advantages will reduce the incentive for digital services to attract new users and, consequently, reduce innovation and competition.²⁸²

3.5. Measures to improve consumer protection and achieve fairer dealings should be economy-wide and holistically designed

Meta supports strong consumer protection laws, but it is not clear what “gap” in laws or enforcement powers the ACCC is seeking to address

We support strong and well-targeted consumer protection laws. These laws should apply across the entire economy and to all businesses, regardless of their position or strength in any market. They should not be limited to the digital sector, or to certain participants in the digital sector.

Australia’s existing consumer protection laws are comprehensive and flexible. They apply to both consumers and small businesses, and include laws in relation to misleading or deceptive conduct, false and misleading representations, unconscionable conduct, and unfair contract terms (which will be further strengthened following the passage of the Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill).

The ACCC has strong enforcement powers that it frequently and successfully uses to enforce these laws, including in the digital space.

Accordingly, it is not clear what “gap” (if any) exists in Australia’s current laws or the ACCC’s enforcement powers in relation to the specific harms identified in the Discussion Paper – scams, malicious apps, fake reviews, dark patterns, and unreasonably broad restrictions on business users.

Online scams

It is in Meta’s business interest to invest in ensuring that people have a positive and safe experience when interacting on our platforms. This is why we invest substantial resources in detecting and removing fake accounts, spam, scams and other inauthentic behaviour such as fake

²⁸¹ ACCC’s ‘*Digital Platform Services Inquiry: Interim Report No. 2 - App Marketplaces*’ (March 2021) p 9. Available: <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

²⁸² See for example, ‘*Value Creation by Ad-Funded Platforms*’ (January 2022), CESfio Working Paper No. 9525 by Gregor Langus and Vilen Lipatov. Available: <https://www.cesifo.org/en/publikationen/2022/working-paper/value-creation-ad-funded-platforms>

reviews, increasingly before people are exposed to them. We also invest significantly in partnerships and awareness campaigns to educate people to identify and avoid scams.

However, as set out in [section 2.8](#) above, the ACCC and Government cannot solve issues surrounding scams, misleading ads, malicious apps or fake reviews simply by creating new obligations that apply solely to digital platforms. There are limits to regulation, including:

- scammers and other bad actors change their tactics so quickly that prescriptive regulation will struggle to keep pace;
- overregulation can encourage a mindset focussed on compliance rather than one focussed on continuous improvement and best practices; and
- it is also important to make sure that regulation is targeted to the areas of greatest risk and ultimately assigns penalties to bad actors who are perpetrating misleading or inauthentic content such as scams, malicious apps or fake reviews.

We already engage closely with law enforcement authorities in Australia and overseas to help keep the public and the community safe. We also work collaboratively with a wide range of government and regulatory bodies to tackle scams and other misleading or inauthentic behaviour. These include the ASBFEO, state and territory consumer protection agencies, as well as industry partners and charities such as IDCare and Puppy Scams Awareness Australia.²⁸³ For instance, Meta has partnered with IDCare, nbn and Westpac to support IDCare’s Cyber Resilience Outreach Clinics initiative,²⁸⁴ which involves outreach and mobile pop-up clinics across outback Australia that are designed to empower users to detect, prevent, respond to, and fight cybercrime.²⁸⁵

However, we think there is more that can be done in terms of collaborative approaches between government and industry (including to support further digital literacy and education) before defaulting to industry-specific regulation.

We welcome the opportunity to discuss how the Government, regulators and industry can collaborate to take action in this area. We recommend a response that includes:

- cooperation between numerous parties to develop strategies and take action. This includes Meta – which is why we continue to invest significantly in systems to protect our users. But it also includes governments, regulators, NGOs, other industry participants and users themselves; and
- governments and regulators actively pursuing the scammers and bad actors themselves under existing laws. This could include government and regulators investigating complaints by consumers, partnering with digital platforms and communication services to facilitate action, and further investing in digital consumer education.

Effective dispute resolution processes

As part of the DPI, Meta supported dispute resolution recommendations to deal with certain types of complaints, namely utilising an ombudsman scheme as a forum to deal with complaints regarding advertiser scam content, and complaints by small businesses about advertising and

²⁸³ Facebook website, ‘*Staying safe online*’. Available: <https://australia.fb.com/staying-safe-online/>.

²⁸⁴ ‘*Finding good friends: Westpac, Meta and nbn*’, ID Care. Available: <https://mailchi.mp/idcare.org/sick-of-scams-its-time-to-try-something-new#friends>.

²⁸⁵ ID Care website. Available: <https://www.idcare.org/croc/home>.

suspended business accounts that cannot be resolved through existing processes within a reasonable timeframe. We welcomed the opportunity to work with Australian policy makers and regulators to respond to complaints by consumers and small business owners in Australia.

In its response to the DPI Final Report, the Government also stated that it would “develop a pilot external dispute resolution scheme in consultation with major digital platforms, consumer groups and relevant government agencies”.²⁸⁶

There are naturally a number of considerations that would need to be taken into account and worked through before launching any pilot or other program. The details will be important, as not all types of disputes are equally suited to external dispute resolution. However, Meta remains willing and ready to work constructively with the Government and other industry participants on potential approaches.

3.6. Meta is committed to providing meaningful transparency and control for users

Transparency is important, both to us and to the people and businesses who use our products and services. However, the transparency increasing measures raised in the Discussion Paper do not contain sufficient detail for participants to constructively engage with them. The Discussion Paper also overlooks the considerable transparency measures that we already implement and, in many cases, it is not clear what harms the potential measures are seeking to address or how they would promote better outcomes for consumers.

3.6.1. The narrow transparency concerns identified by the ACCC do not support a need for wide-reaching measures

The measures identified in the Discussion Paper appear to be directed towards addressing very specific issues that the ACCC has identified in previous inquiries. In particular:

- the pricing transparency measures set out in section 8.5.1 of the Discussion Paper appear to be directed primarily towards “specific concerns with the level of transparency in relation to Google’s ad tech services” combined with “the dominance and ubiquity of Google’s ad tech services” which “gives Google the ability to retain hidden fees”,²⁸⁷ and
- the non-price transparency recommendations set out in section 8.5.2 of the Discussion Paper appear to be directed primarily towards the “risk of [Google and Apple] self-preferencing in app marketplace discoverability and display” services.²⁸⁸

Notwithstanding these potential harms involving specific companies for specific services, the Discussion Paper suggests that transparency measures should apply more widely, across a far broader range of digital services.

²⁸⁶ ‘*Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry*’ (2019), Australian Government, p 19. Available: <https://treasury.gov.au/publication/p2019-41708>.

²⁸⁷ Discussion Paper, p 101; citing ACCC’s ‘*Digital Advertising Services Inquiry: Final Report*’ (28 September 2021) pp 13-14 and 155. Available:

<https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>; and DPI Final Report, p 12.

²⁸⁸ Discussion Paper, p 102; citing ACCC’s ‘*Report on App Marketplaces*’ (28 April 2021), p 14. Available:

<https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

There is no justification for this. There are already significant levels of transparency and user choice and control for many other services (see [section 2.7](#) above). Further, there has been no detailed analysis of any potential harms arising from the existing level of transparency in relation to these other services, nor the benefits and costs of any of the measures being suggested. These assessments are an essential precondition to considering whether any measures are in fact necessary and what form any intervention should take, so that it does not result in worse outcomes for consumers.

3.6.2. Any regulatory intervention to impose transparency measures is premature

Transparency is only meaningful if it helps people and businesses understand and make informed choices about their use of a product or service. For this reason, we consult widely with users, industry stakeholders, regulators and governments and continue to look for ways to design people-centred, accountable products²⁸⁹ that effectively communicate how our products work, and help people make informed choices about using them. As set out in [section 2.7](#), we also design features to provide people with control over how they use our products.

Meta's approach starts with consulting on industry-leading measures and involves a robust assessment of the potential benefits and detriments associated with individual design features and user communications. Meta considers this is likely to ensure far better outcomes for consumers than regulatory intervention. This is particularly the case where it is not clear why any genuine harm to consumers cannot be addressed under existing laws (e.g. under the ACL).

3.6.3. Any concerns about price transparency should not apply to advertising services

It is important not to conflate any potential price transparency issues in the ad tech stack with transparency in the advertising industry more generally.

The advertising industry is highly competitive, and we compete with a wide range of other ad venues to provide – advertisers with detailed information about their ROI and how their advertising campaign is performing. We also compete to provide choice and controls to help them compare the price and performance of our advertising services. Our pricing is determined by a competitive, transparent auction mechanism, and we provide extensive information and support to advertisers to help them understand our ad auction, and to select the marketing objectives and strategy that work best for their business. This information is set out in detail on the Meta for Business website on advertising,²⁹⁰ in the guide about Ads Manager,²⁹¹ in the Meta for Business Help Centre pages 'About ad auctions'²⁹² and 'How ad billing works on Facebook',²⁹³ and in a wide range of Meta Blueprint courses.²⁹⁴

We also:

²⁸⁹ See for example, 'Communicating About Privacy: Towards People-Centred and Accountable Design (White Paper)' (July 2020), Facebook. Available: <https://about.fb.com/wp-content/uploads/2020/07/Privacy-Transparency-White-Paper.pdf>.

²⁹⁰ Meta website, 'Facebook Ads: Target future customers and fans'. Available: <https://en-gb.facebook.com/business/ads>.

²⁹¹ Meta website, 'Ads Manager'. Available: <https://en-gb.facebook.com/business/tools/ads-manager>.

²⁹² Meta website, 'Meta Business Help Centre: About Ad Options'. Available: <https://en-gb.facebook.com/business/help/430291176997542?id=561906377587030>.

²⁹³ Meta website, 'Meta Business Help Centre: How ad billing works on Facebook'. Available: <https://www.facebook.com/business/help/716180208457684?id=1792465934137726>.

²⁹⁴ Meta Blueprint website. Available: <https://www.facebookblueprint.com/student/catalog>.

- offer metrics that provide advertisers with detailed information about what their ad spend is achieving and real-time controls to manage their ad campaigns and marketing budget, which can be accessed via Facebook’s self-service tools. These include ad reporting metrics, insights metrics and conversion metrics;²⁹⁵
- partner with more than 40 companies around the world who provide independent third party metrics for our ads, including metrics relating to reach, viewability, attribution, brand lift and outcome lift; and
- provide extensive pricing, performance and bidding information to our publisher customers that use Audience Network,²⁹⁶ and encourage publishers who use Audience Network to adopt technology that enables them to transact transparently with multiple ad exchanges and ad networks.²⁹⁷

Accordingly, any concerns about price transparency in the ad tech stack are a narrow, single-company concern and any potential measures should be appropriately confined to resolving that harm.

3.6.4. It is not clear what potential harms the ACCC’s proposals to improve non-price transparency are seeking to address

The Discussion Paper states that “digital platforms’ data practices and... the key decision-making algorithms [that] digital platforms use to display content and advertising, rank search results, and personalise services” are opaque.²⁹⁸ From this, it suggests there needs to be greater algorithmic transparency.

We provide significant transparency, control and choice in relation to the personalisation of our services, including meaningful tools to empower people to make informed choices about our products. It is therefore not clear what precise harms to competition or consumers the ACCC is seeking to address or how the potential measures would promote better outcomes for consumers or align with industry best practice, which is itself rapidly evolving.

It follows that it is premature to consider any potential for regulatory intervention. This is particularly the case when it is unclear why any genuine harm to consumers could not be addressed under existing laws.

We provide significant information to enable people and businesses to make meaningful choices

Offering a personalised experience is a central component of the value our services provide, and algorithms play a key role in delivering that personalised experience. Providing transparency about how personalisation works helps us to provide engaging experiences for users, drive value for small businesses, and ultimately compete with the many other suppliers of digital services.

As set out above, transparency is only meaningful when it empowers people to make meaningful choices about the services they use. That is why we work to provide transparency to users in

²⁹⁵ These tools include AdsManager, Brand Lift, Business Manager, Conversion Lift, Offline Reporting, Facebook Analytics and Audience Insights.

²⁹⁶ Meta website, ‘*Meta Audience Network: Optimise revenue with in-depth reporting*’. Available: <https://en-gb.facebook.com/audiencenetwork/monetize/optimization/monetization-manager>.

²⁹⁷ Meta website, ‘*Meta Audience Network: Mediation platforms*’. Available: <https://en-gb.facebook.com/audiencenetwork/monetize/bidding/mediation>.

²⁹⁸ Discussion Paper, p 101.

context, through a range of tools that provide information about the data we collect and how our algorithms use that data to deliver meaningful, relevant content, as well as a range of built-in controls over how that information is collected and used. For example, we provide our users with a clear explanation of the factors that influence the posts and ads that they see through our “Why Am I Seeing This” Post²⁹⁹ and “Why Am I Seeing This” Ad³⁰⁰ tools. We also provide people with significant controls over the News Feed posts and ads they see, including through our suite of News feed preference tools including the Favourites tool and Feed Filter Bar³⁰¹ and ad preferences tools.³⁰²

We also provide transparency around ranking algorithms. We frequently publish blog posts in Newsroom³⁰³ to explain the machine learning ranking system that powers News Feed,³⁰⁴ and to update on significant ranking changes that we are implementing. Our updates also provide insights into how those changes will work and why Meta has pursued them. This practice, which dates back many years, provides publishers and other users more information about new ranking changes like those designed to address clickbait,³⁰⁵ misinformation³⁰⁶ or sensational health claims.³⁰⁷ We have also recently published Facebook’s Content Distribution Guidelines to share more detail on the types of content that we demote in News Feed.³⁰⁸

The level of transparency we provide to users contrasts strongly with the “considerable opacity” that the ACCC may have identified in relation to other services. Consequently, there should not be any one-size fits all regulatory measure that applies to all digital services and/or all digital platforms.

We invest in industry-led initiatives to promote increased transparency

Meta continues to design tools and to improve our services in consultation with interdisciplinary experts, industry stakeholders, regulators and governments. This includes improving services to provide clear, understandable and actionable transparency for users.

Transparency initiatives are subject to ongoing interdisciplinary development by the industry. Best practices, practical standards and technical frameworks for measuring and assessing algorithmic systems are also continuing to evolve and be articulated. It is therefore highly premature to consider any regulatory intervention measures involving transparency.

²⁹⁹ ‘Why Am I Seeing This? We have an answer for you’ (31 March 2019), Meta Newsroom article. Available:

<https://about.fb.com/news/2019/03/why-am-i-seeing-this/>.

³⁰⁰ ‘Understand why you’re seeing certain ads and how you can adjust your ad experience’ (11 July 2019), Meta Newsroom article. Available: <https://about.fb.com/news/2019/07/understand-why-youre-seeing-ads/>.

³⁰¹ Facebook Help Centre website, ‘How can I see and adjust my Facebook News Feed preferences?’ Available: <https://www.facebook.com/help/371675846332829>.

³⁰² Facebook Help Centre website, ‘What are my ad preferences and how can I adjust them on Facebook?’. Available: <https://www.facebook.com/help/247395082112892>.

³⁰³ Meta website. Available: <https://about.facebook.com/>.

³⁰⁴ ‘How Does News Feed Predict What You Want to See?’ (26 January 2021), About Facebook blog post by Akos Lada and Tak Yan. Available: <https://about.fb.com/news/2021/01/how-does-news-feed-predict-what-you-want-to-see/>.

³⁰⁵ ‘News Feed FYI: Click-baiting’ (25 August 2014), About Facebook blog post by Khalid El-Arini and Joyce Tang. Available: <https://about.fb.com/news/2014/08/news-feed-fyi-click-baiting/>.

³⁰⁶ ‘Working to Stop Misinformation and False News’ (7 April 2017), Meta for Media blog post by Adam Mosseri. Available: <https://www.facebook.com/formedia/blog/working-to-stop-misinformation-and-false-news>.

³⁰⁷ ‘Addressing Sensational Health Claims’ (2 July 2019), About Facebook blog post: Travis Yeh. Available: <https://about.fb.com/news/2019/07/addressing-sensational-health-claims/>.

³⁰⁸ ‘Types of content we demote’ (17 March 2022), Meta Transparency Centre blog post. Available: <https://transparency.fb.com/en-gb/features/approach-to-ranking/types-of-content-we-demote/>.

Given it is not clear what harms the transparency measures set out in the Discussion Paper are seeking to address or how those measures would promote better outcomes for consumers, any consideration of such regulatory intervention is premature.

3.7. The ACCC's monitoring and information gathering powers are already extensive and no further record keeping rules are required

The Discussion Paper considers introducing record keeping rules that require market participants to provide information to assist the ACCC to monitor competition and market developments.

Record keeping rules are not an appropriate general information gathering power for simply keeping the ACCC abreast of developments. Information gathering powers should enable a regulator to perform a specific regulatory task, for example price monitoring or monitoring compliance with a regulatory standard. The Discussion Paper does not identify what information the ACCC would require to perform a specific regulatory task that would not otherwise be available to it, nor does it justify mandating a requirement on businesses to keep such information. It is not appropriate for the ACCC to be given such a broad power to formulate potentially burdensome rules without a proper identification of the requirement for such rules.

Critically, the ACCC already has substantial capacity to monitor competition and market developments, and a strong track record of exercising that capacity. It is unclear why the ACCC needs further powers when the ACCC is already able to do this by:

- issuing a section 155 notice to a party that is the subject of an ACCC investigation of a possible contravention of the CCA (including merger control) or ACL, or to other third parties who may have relevant information, documents or evidence for the investigation;³⁰⁹
- issuing a section 95ZK notice to a party where there is reason to believe they are capable of giving information or documents relevant to an inquiry being conducted by the ACCC, price notification or monitoring under Part VIIA of the CCA;³¹⁰
- summoning a witness to give evidence and provide documents at an inquiry being conducted by the ACCC;³¹¹ and
- obtaining information by entering a premises under a search warrant generally in relation to a possible contravention of the CCA.³¹²

The ACCC has used its information gathering powers extensively and successfully, including in digital markets. For example, in FY2021 alone the ACCC issued 276 section 155 notices and 211 section 95ZK notices, none of which were challenged.³¹³ Further, the ACCC retains a broad discretion to use such information obtained under these powers (or voluntarily) for its other regulatory functions.³¹⁴

³⁰⁹ *Competition and Consumer Act 2010* (Cth) s 155.

³¹⁰ *Competition and Consumer Act 2010* (Cth) s 95ZK.

³¹¹ *Competition and Consumer Act 2010* (Cth) ss 95S, 95R. The ACCC can also summon a witness for arbitrations under Part IIIA of the *Competition and Consumer Act 2010* (Cth) s 44ZH.

³¹² *Competition and Consumer Act 2010* (Cth) pt XIX.

³¹³ ACCC and Australian Energy Regulator's 'Annual Report 2020-2021' (20 October 2021), p 238. Available: <https://www.accc.gov.au/system/files/Annual%20Report%202020%2021%20-%20Web.pdf>.

³¹⁴ 'ACCC/AER Information Policy' (June 2014), ACCC and AER, p 1. Available: <https://www.accc.gov.au/system/files/ACCC-AER%20Information%20Policy.pdf>; and 'Section 155 notices: A basic guide for individuals and small businesses' (June 2019), ACCC, pp 6-7. Available:

The Discussion Paper only suggests one purpose for record keeping rules, which is to collect information about the operation of algorithms to “inform the public and other market participants about the use of algorithms to promote greater transparency.”³¹⁵ However, the Discussion Paper does not identify or consider whether there is a need for general regulatory oversight of algorithms. If the ACCC does not have a role in regulating the use of algorithms, it should not be able to require market participants to keep records for this purpose. The purpose of informing the public about the use of algorithms is vague and does not in any way establish that the ACCC requires any power in relation to algorithms.

Record keeping powers in relation to algorithms would be problematic as it could take information that is confidential and potentially valuable commercial intellectual property and make it available to competitors. As well as being unnecessary, given the sheer number and frequency of improvements made to enhance algorithms (most of which have minimal impacts for market participants and consumers) such a measure would place an unreasonable burden on platforms that outweighs any potential benefit.

4. Merger reform

Australia has a long-standing and highly effective merger control regime. It appropriately balances procedural flexibility and certainty and provides adaptable analytical tools that can apply to markets economy-wide, including digital platforms. Meta supports the important role that Australian competition laws and the ACCC play to guard against anti-competitive mergers and recognises the importance of effective merger review globally.

Meta recognises that the ACCC’s merger reform proposals are still in the early stages of development and the debate has only just started.³¹⁶ However, these reforms have the potential to move away from established economic principles and decades of merger law and practice in Australia. Meta encourages the ACCC to thoroughly analyse these issues and welcomes the opportunity to engage as it continues to consult on merger law reform.

As part of this inquiry, the Discussion Paper is only engaging on digital-specific merger reform measures. These measures should not be looked at in isolation of the broader industry-wide reforms. Fundamentally, Meta has concerns about the basis on which digital-specific merger reforms are considered necessary and their potential to significantly distort investment and innovation in already dynamic and highly competitive markets.

- First, Meta is concerned that the Discussion Paper’s contention that acquisitions by large technology firms entrench market power, potentially harm innovation and disrupt the competitive process is simply not supported by the evidence. Critically, this contention undervalues the important role that acquisitions play as part of the global innovation ecosystem. They are central to product development that further stimulates competitive responses in dynamic technology markets, which ultimately result in clear consumer benefit in the form of better products.

<https://www.accc.gov.au/system/files/1582%20Section%20155%20notices%20FA.pdf>. Even when provided voluntarily, the ACCC will generally not accept conditions that seek to limit the use of information to a particular matter (unless there is a specific legal requirement to the contrary).

³¹⁵ Discussion Paper, p 103.

³¹⁶ The Discussion Paper notes that the aim of ACCC Chair Rod Sims’ address to the Law Council of Australia on 27 August 2021, was to “start a debate on merger reform in Australia”: see Discussion Paper, p 103.

- Second, there is no evidence of any gap in Australia’s existing merger laws that warrants reform. These laws are flexible enough for the ACCC to properly review acquisitions in new markets, including those undertaken by digital platforms, even where novel theories of harm arise. The ACCC has reviewed a number of digital mergers, including those reviewed by other global agencies, through voluntary notifications and as part of ACCC-initiated reviews. The ACCC has not opposed any acquisitions involving a digital platform to date.
- Third, the potential measures outlined in the Discussion Paper presume acquisitions by large technology firms are *prima facie* likely to result in a substantial lessening of competition. This presumption is not supported by facts and must not be ingrained in the debate.³¹⁷ There is no basis for the assertions that Meta’s acquisitions of Instagram and WhatsApp have entrenched its market power in the supply of social media services by “removing potential competitors, facilitating advantages of scope and reducing competition” and “likely strengthened Meta’s position in the market for display advertising”.³¹⁸ As discussed in [section 2.2](#), Meta faces significant competitive constraints that are inconsistent with it having market power and there is no evidence that these acquisitions negatively impacted competition. Rather, Meta’s acquisitions resulted in investments and improvements in Instagram’s and WhatsApp’s products to the benefit of consumers that were not possible absent the acquisitions.
- Fourth, no case has been made for company or digital-specific reforms. The Discussion Paper has not properly considered the significant risks and negative effects associated with measures targeted at specific companies or the digital sector only, including on competition and innovation that will ultimately harm consumer welfare. The ACCC cannot adequately assess which regulatory options would generate the greatest (if any) net benefit to consumers if it has not properly considered the detrimental impacts of such regulation, in accordance with good regulatory processes.

For these reasons, introducing digital-specific merger reforms will not enhance the effectiveness of Australia’s merger control regime to the benefit of consumers in relation to digital services. It would only provide the ACCC with greater freedom to oppose transactions involving speculative theories of harm, circumventing proper evidence-based analysis. This will ultimately dampen competition and lead to worse outcomes for consumers.

4.1. Merger and acquisition activity by large technology firms drives global investment that supports innovation for start-ups and drives innovation in consumer services

Acquisitions are part of the innovation ecosystem which enables innovative ideas to be efficiently generated, developed into products, tested and ultimately scaled for commercial impact. They encourage innovation, with many start-ups listing acquisition as their most likely metric of success.³¹⁹ Businesses use acquisitions to kick-start their own innovation processes, bringing their

³¹⁷ See for example, ‘*How do top acquirers compare in technology mergers? New evidence from an S&P taxonomy*’ (January 2022) National Bureau of Economic Research Working Paper 29642 by Ginger Zhe Mario Leccese and Liad Wagman. Available: https://www.nber.org/system/files/working_papers/w29642/w29642.pdf. This paper’s findings suggest that technology acquisition does not shield “GAFAM” firms (Google, Apple, Facebook, Amazon and Microsoft) from competition, and run counter to the argument that acquisitions by incumbent firms deter entry by competitors.

³¹⁸ Discussion Paper, p 22.

³¹⁹ ‘*2020 Global Startup Outlook: Key Insights from the Silicon Valley Bank: Startup Outlook Survey*’ (2020), Silicon Valley Bank, p 7. Available: https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/su_o_global_report_2020-final.pdf.

capital, scale and technology to improve existing products and make them accessible to more consumers, often at a lower cost. M&A by larger technology firms spurs investment and innovation in both the start-ups' first wave development stage and post-acquisition.

Acquisitions provide start-ups with a viable exit strategy, helping them to obtain venture capital funding at their infancy and encouraging entrepreneurs to take the risk of starting a new business and pursuing new innovations. The ACCC has itself recognised this.³²⁰ Entrepreneurial exit is crucial to a well-functioning entrepreneurial ecosystem (not limited to digital start-ups). Around 50% of Silicon Valley start-ups are looking to be acquired³²¹ and vertical mergers are now the most usual form of exit for founders/venture capitalists. Both Sydney and Melbourne have been recognised for their high exit growth index,³²² and in 2016 Australia was ranked 7th globally for the number of tech start-up exits.³²³

Start-ups often look to acquisition because they lack a viable path for monetisation (IPOs are difficult for start-ups) but still have a useful product or service,³²⁴ which they are incentivised to develop if they can scale a venture to exit and recoup their investment. If digital platforms cannot compete in these deals, there will be fewer exit strategies for investors and venture capital firms. This may in turn chill investment and stifle innovation. For instance, a recent survey by the Coalition for the Digital Economy found that over 92.5% of start-up investors asked would stop or reduce their investments in UK start-ups if their ability to exit was significantly restricted.³²⁵

Acquisitions spur on future competition and innovation through capital generation. Larger companies can bring new technologies to market sooner and more successfully when they seek new talent and technologies through acquisitions. An acquirer can contribute resources, know-how, technology, and personnel to the target. In turn, a target may possess specialised experience, know-how, or other resources that it can contribute to the buyer. Those synergies enable the development of new products and technologies, accelerate innovation and product launches, lower prices and lead to improved consumer offers. The ACCC has recognised that, in many cases, acquisitions by digital platforms provide substantial benefits including increased efficiencies and enhanced product offerings to consumers.³²⁶

A clear example of this “exit and reinvest” cycle is eBay’s US\$1.5 billion acquisition of PayPal in 2002.³²⁷ Following this, PayPal’s founders went on to create some of the world’s leading tech companies: Tesla, SpaceX, LinkedIn, Palantir, and YouTube – companies that injected huge competitive forces into established industries globally. Evidence from academic literature also shows that acquired firms are more likely to generate spinoffs than non-acquired firms,³²⁸ and the

³²⁰ Discussion Paper, pp 22-23.

³²¹ ‘2020 Global Startup Outlook: Key Insights from the Silicon Valley Bank: Startup Outlook Survey’ (2020), Silicon Valley Bank, p 7. Available: https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/startup_outlook_report/su_o_global_report_2020-final.pdf.

³²² ‘The Global Startup Ecosystem Report’ (25 June 2020), Startup Genome, pp 130, 145. Available: <https://startupgenome.com/reports/gser2020>.

³²³ ‘2016 Global Tech Exits Report’ (31 January 2017), CB Insights. Available: <https://www.cbinsights.com/research/report/tech-exits-2016/>.

³²⁴ ‘The Importance of Exit Via Acquisition to Venture Capital, Entrepreneurship, and Innovation’ (2022), Devin Reilly, Daniel Sokol and David Toniatti, p 3. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981970.

³²⁵ ‘The Digital Markets Unit: On the Side of Startups? An Investor perspective’ (September 2021), Coadec. Available: https://coadec.com/wp-content/uploads/2021/09/On-the-Side-of-Startups_-1.pdf.

³²⁶ Discussion Paper, p 69.

³²⁷ ‘eBay to Buy PayPal, a Rival in Online Payments’ (9 July 2002, New York Times article by Matt Richtel. Available: <https://www.nytimes.com/2002/07/09/business/ebay-to-buy-paypal-a-rival-in-online-payments.html>.

³²⁸ ‘The Importance of Exit Via Acquisition to Venture Capital, Entrepreneurship, and Innovation’ (2022), Devin Reilly, Daniel Sokol and David Toniatti. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981970.

cycle of investment, development, exit by acquisition and reinvestment creates a more dynamic and diverse marketplace that drives greater competition.³²⁹

Australia's start-up landscape has also been growing and thriving in recent years. Australia had the 6th highest start-up rate worldwide in 2020.³³⁰ The start-up ecosystems in Sydney and Melbourne alone are worth a combined A\$34.5 billion,³³¹ and in the last three years Victoria's start-up ecosystem has also more than tripled in value.³³² There have been more than a dozen new companies passing the A\$1 billion "unicorn" mark in 2021.³³³ PitchBook reports that US\$5 billion was invested in Australian tech companies in 2021, far exceeding the total of \$US4.8 billion investment over 2018, 2019 and 2020.³³⁴

At the same time as this highly successful start-up activity, M&A of start-ups are also thriving. In the first three quarters of 2021, 229 private Australian companies were acquired and at least five of those were for A\$100 million or more.³³⁵ The vibrancy of Australia's start-up landscape is a testament to the fact that competition in the digital economy is vigorous and that acquisitions by larger firms have not diminished this dynamism.

Any digital platform specific merger measure should fully consider the important role acquisitions play in innovation, which the Discussion Paper does not. Instead, the Discussion Paper appears to assume, without supporting evidence, that innovation stops or slows when a larger digital player acquires a start-up. However, this is not Meta's experience of markets.³³⁶

For example, and contrary to assumptions in the Discussion Paper, Meta's own acquisitions were pro-competitive and led to better products, services and experiences to the benefit of businesses and consumers.

- Instagram was a mobile-only photo sharing app with 13 employees, 30 million users and no revenue. Today, Instagram allows users to share stories and videos as well as photos, Meta has added innovations like Instagram live, and Instagram now has over 1 billion monthly users with an estimated revenue in 2020 of \$21 billion. These new features resulted from Meta constantly investing in its products and capabilities in response to competitive pressures in a dynamic environment (e.g. the introduction of "Reels" as part of competing with services like TikTok).

³²⁹ *The Importance of Exit Via Acquisition to Venture Capital, Entrepreneurship, and Innovation* (2022), Devin Reilly, Daniel Sokol and David Toniatti, p 8. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981970.

³³⁰ 'Start-up rate worldwide in 2020, by country', (1 March 2022), Statista post by M Szmigiera. Available: <https://www.statista.com/statistics/268786/start-ups-in-leading-economic-nations/>.

³³¹ 'Sydney's startup ecosystem is worth \$24 billion, Melbourne's \$10.5 billion' (23 September 2021), Startup Daily article by Simon Thomsen. Available:

<https://www.startupdaily.net/2021/09/sydneys-startup-ecosystem-is-worth-24-billion-melbournes-10-5bn/>.

³³² *Global Startup Ecosystem GSER Report* (2021), Startup Genome, p 199. Available:

<https://startupgenome.com/report/gser2021>.

³³³ 'Start-up investment tripled in 2021 in bumper year for tech' (13 February 2022), David Swan. Available:

<https://www.theaustralian.com.au/business/technology/startup-investment-tripled-in-2021-in-bumper-year-for-tech/news-story/07718ef6b745bb4e2c48bd4c6cf99e30#>.

³³⁴ 'Start-up investment tripled in 2021 in bumper year for tech' (13 February 2022), David Swan. Available:

<https://www.theaustralian.com.au/business/technology/startup-investment-tripled-in-2021-in-bumper-year-for-tech/news-story/07718ef6b745bb4e2c48bd4c6cf99e30#>.

³³⁵ 'Five Aussie startups acquired for more than \$100 million in 2021' (19 October 2021), Smart Company article by Stephanie Palmer-Derrien. Available:

<https://www.smartcompany.com.au/finance/mergers-and-acquisitions/aussie-startups-acquired-2021/>.

³³⁶ See also 'How do top acquirers compare in technology mergers? New evidence from an S&P taxonomy' (January 2022) National Bureau of Economic Research Working Paper 29642 by Ginger Zhe, Mario Leccese and Liad Wagman. Available: https://www.nber.org/system/files/working_papers/w29642/w29642.pdf.

- WhatsApp was previously a messaging service users needed to pay for. Today, it is a free, secure and reliable service used by over 2 billion users with around \$5 billion revenue in 2020, and Meta has added features like video calls, carts and dark mode to enhance the consumer experience. The development and expansion of WhatsApp under Meta's ownership has enabled consumers globally to access safe and free messaging services, including in areas where they had few alternatives. It has brought significant competition for incumbent messaging services like SMS and provided a cross-OS alternative to services like iMessage. These are significant competition benefits, as well as improvements in consumer experience.
- Oculus pre-acquisition had development kits but no virtual reality headsets or other products on the market today, Oculus (now known as Meta Quest) is shaping the future of augmented and virtual reality with millions of headsets sold globally, is creating a thriving VR ecosystem for developers, creators and users, and is driving continuous improvement in the resolution, graphics, and AI capability of the services.

If firms cannot develop and innovate through acquisition, this will only leave the ability to innovate internally or contracting out. This will limit innovation possibilities and result in worse outcomes for consumers. Complicating the acquisition process can disincentivise investors to the ultimate disadvantage of nascent start-ups and consumers, and risk undermining early-stage innovation by raising barriers to acquisitions. This is an important consideration which the ACCC should weigh carefully before taking any concrete steps on merger reform, especially when the academic literature is increasingly realising the pivotal role that innovation (including by large digital platforms) plays in driving competition.³³⁷

4.2. No evidence that the existing merger framework is insufficient to allow adequate scrutiny of acquisitions

Any change from the established body of competition law requires clear evidence of a significant problem with it. This is because any shift away from established economic principles and frameworks creates considerable risks. The ACCC has not cited evidence of a problem with assessing digital mergers under the existing substantive test or that it has systematically been unable to review such mergers that have an Australian nexus. Instead, evidence shows that the existing merger regime is fit for purpose and capable of (and is) being used for assessing acquisitions, including in digital markets.

In both its announcement of its proposed merger reforms in August 2021 and the Discussion Paper, the ACCC expressed concerns with the broader merger landscape, including with the “merger enforcement” model and the way merger laws are applied.³³⁸ The basis of these concerns is unclear from the Discussion Paper, especially when the ACCC has “not opposed any acquisitions involving digital platforms under its informal merger review process to date” and has decided to clear multiple transactions involving digital platforms.³³⁹ The ACCC also had the opportunity to consider acquisitions concerning digital platforms in its February 2022 *ex-post* mergers review³⁴⁰ (e.g. Google's acquisition of DoubleClick in October 2007 and Motorola in 2012, Microsoft's

³³⁷ ‘*Innovating Big Tech firms and competition policy: favoring dynamic over static competition*’ (20 July 2021), Nicolas Petit and David Teece. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3229180.

³³⁸ ‘*Protecting and promoting competition in Australia*’ (27 August 2021), speech by Rod Sims. Available: <https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia>; and Discussion Paper, pp 66-67.

³³⁹ Discussion paper, pp 65-66.

³⁴⁰ ACCC's ‘*Ex post review of ACCC merger decisions*’ (25 February 2022). Available: <https://www.accc.gov.au/system/files/Ex%20post%20review%20of%20merger%20decisions.pdf>.

acquisition of Skype in 2011 and Amazon’s acquisition of The Book Depository International in 2011), but chose not to. There is accordingly no evidence of a problem, let alone a significant problem warranting a shift away from established economic principles and frameworks in Australia.

In fact, Lear’s *ex-post* assessment of merger control decisions in digital markets in the UK found that a number of mergers perceived to be missed opportunities by competition authorities (including Meta/Instagram and Google/Waze), did not lead to detrimental outcomes.³⁴¹ Rather, these acquisitions have likely resulted in efficiencies.³⁴² Further, in the case of many prominent acquisitions, the companies were not competitors and there is no evidence they would have directly competed absent the acquisition.

Acquisitions that involve access to data can be (and are) appropriately assessed under the established competition analysis framework in Australia. The ACCC already considers data (like any other asset) when reviewing transactions, including by testing whether data access creates barriers to entry in any relevant markets. In Google/Fitbit, the ACCC had the opportunity to accept a remedy (in line with other international jurisdictions) that would resolve its concerns about data aggregation through acquisitions, but chose not to do so.

4.3. The existing merger regime is fit for purpose and capable of being used for the assessment of mergers in digital markets

The existing merger regime and the ACCC’s powers within it are well-established, well-used and have always been flexible enough to enable the ACCC to review acquisitions in current and new markets, including those involving digital platforms. It also has an open-ended “call-in” power to proactively review any transactions it wants without being notified (indeed, the ACCC exercises this power frequently).

- **The voluntary notification system has functioned very well and has not prevented the ACCC from reviewing acquisitions by tech companies or intervening in transactions that it is concerned with.** There are high levels of voluntary notification of proposed transactions in Australia by reference to the ACCC’s Merger Guidelines. There are typically between 800-1000 merger and acquisitions annually in Australia,³⁴³ and the ACCC reviews around 300 transactions each year.³⁴⁴ The ACCC’s public reviews of Google/Fitbit, Meta/Kustomer, Microsoft/Nuance, Salesforce.com/Slack Technologies, Amazon/MGM, Microsoft/Skype, Amazon/The Book Depository International, Google/Motorola (in addition to undoubtedly a number of others on a confidential or preliminary basis) over the last 11 years demonstrates that there are no barriers to the ACCC’s review of digital

³⁴¹ ‘*Ex-post Assessment of Merger Control Decisions in Digital Markets for the UK Competition and Markets Authority*’ (9 May 2019), Report by Lear. Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

³⁴² ‘*Ex-post Assessment of Merger Control Decisions in Digital Markets for the UK Competition and Markets Authority*’ (9 May 2019), Report by Lear, p 118. Available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf.

³⁴³ The number of M&A transactions between 2013 and 2019 was as follows: (2013), 817 (2014), 799 (2015), 927 (2016), 945 (2017), 810 (2018), 1040 (2019) and 354 (2020). See ‘*Dealtracker 2020: Australian M&A and IPO Market Insights*’ (November 2020), Grant Thornton. Available: https://www.grantthornton.com.au/globalassets/1.-member-firms/australian-website/services/advisory/pdfs/gtal_2020_dealtracker.pdf.

³⁴⁴ Between FY2009/2010 and FY2020/2021, the ACCC reviewed between 281 and 424 transactions each financial year. See ACCC website, ‘*ACCC & AER annual report*’. Available: <https://www.accc.gov.au/publications/accc-aer-annual-report>.

transactions. While there are examples of transactions that were reviewed by an overseas competition regulator (e.g. Microsoft/GitHub³⁴⁵ and Apple/Shazam³⁴⁶), but which the ACCC did not publicly review, it was open to the ACCC to investigate these transactions.

- **The ACCC has the ability to and does call in any transactions by tech companies for review.** The fact that some acquisitions are not voluntarily notified by parties has not prevented the ACCC from reviewing these acquisitions. The ACCC has exercised its ability to review a number of acquisitions that were not notified, including Menulog/Eat Now,³⁴⁷ DC Payments Australasia/First Data³⁴⁸ and Primary Health Care/Healthscope.³⁴⁹ **[Confidential]**
- **Across the economy, the ACCC has a strong track record of preventing transactions that give it serious concerns.** Between 2009 and 2020, the ACCC opposed or expressed concerns in relation to 140 proposed transactions.³⁵⁰ In 96% of these cases (being 134 of the 140 mergers), the transaction did not proceed following an unfavourable ACCC merger review decision, despite the ACCC having no power to itself enforce that decision.³⁵¹ If transactions where the ACCC raised concerns but subsequently accepted a remedy to resolve them are included, the ACCC's track record in securing merger clearance outcomes that give it comfort becomes even stronger.
- **Substantively, the existing merger factors in section 50 of the CCA are sufficiently flexible to address all the issues identified by the ACCC.** The Discussion Paper is concerned with acquisitions by digital platforms that protect or extend the market power of large digital platforms, which may harm innovation and disrupt the competitive process.³⁵² It is concerned that acquisitions of “data-driven businesses can enable a platform to expand into related markets to other markets”, or use its expansion to “further entrench their market power in the original market”.³⁵³ However, the current section 50 is geared towards addressing these very issues relating to market power and its impact on competitive processes. The current merger factors and the forward-looking nature of the process of counterfactual analysis enables the ACCC to consider likely competition within the market with and without the proposed acquisition, allowing consideration of both actual and future competition within the short to medium term. Section 50(3) expressly requires consideration of certain factors, including the dynamic characteristics of the market and the likelihood that a vigorous and effective competitor is removed.³⁵⁴ Importantly, the ‘merger factors’ set out in section 50(3) are non-exhaustive. Indeed, the

³⁴⁵ Reviewed by the EC and US DOJ.

³⁴⁶ Reviewed by the EC.

³⁴⁷ ‘*Menulog Pty Ltd - completed merger with Eat Now Services Pty Ltd*’, ACCC. Available:

<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/menulog-pty-ltd-completed-merger-with-eat-now-services-pty-ltd>.

³⁴⁸ ‘*DC Payments Australasia Pty Ltd - completed acquisition of First Data Corporation's "Cashcard" ATM business*’, ACCC. Available:

<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/dc-payments-australasia-pty-ltd-completed-acquisition-of-first-data-corporations-cashcard-atm-business>.

³⁴⁹ ‘*Primary Health Care Limited - acquisition of pathology assets previously operated by Healthscope in Queensland*’, ACCC. Available:

<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/primary-health-care-limited-acquisition-of-pathology-assets-previously-operated-by-healthscope-in-queensland>.

³⁵⁰ Being the total number of mergers opposed by the ACCC after confidential review (56) and merger discontinued during the course or after public or confidential review (84). See ACCC website, ‘*ACCC & AER annual report*’. Available:

<https://www.accc.gov.au/publications/accc-aer-annual-report>.

³⁵¹ ACCC website, ‘*ACCC & AER annual report*’. Available: <https://www.accc.gov.au/publications/accc-aer-annual-report>.

³⁵² Discussion Paper, p 22.

³⁵³ Discussion Paper, p 22.

³⁵⁴ *Competition and Consumer Act 2010* (Cth), s 50(3).

2003 Dawson Report considered that there was no benefit gained from listing additional items for consideration as they can already be considered under the test without being given undue emphasis.³⁵⁵ Consequently, the ACCC and courts have the flexibility to consider other factors in a dynamic and evolving way, provided they are sufficiently grounded in the evidence and supported by economic theory.

- **The ACCC already has the ability to prevent mergers under the current regime:** Under the current merger regime, the ACCC has the standing to apply to the Federal Court for injunctive relief to block a merger it considers may contravene section 50 of the CCA or to bring proceedings seeking a remedy for an alleged contravention of section 50 of the CCA including to unwind or void a transaction. The ACCC has recently succeeded in doing so and stated that it “will not hesitate to take appropriate action in the Federal Court to prevent completion of a transaction if it is concerned that the transaction is likely to substantially lessen competition”.³⁵⁶ In practice, the ACCC does not have to take parties to court to prevent a transaction from completing when 96% of mergers did not proceed after an unfavourable merger review outcome between 2009 and 2020. According to the ACCC’s merger register, a further 11 mergers have been withdrawn since 6 January 2020.³⁵⁷

4.4. Digital-specific reforms cannot be looked at in isolation of the ACCC’s broader economy-wide merger reform agenda

Even if the ACCC’s concerns regarding acquisitions by digital platforms can be validated, the ACCC should not design and seek to implement digital platforms-specific reforms when it is considering economy-wide reforms that potentially address the same issues. The ACCC has itself acknowledged:

- if its economy-wide merger reform proposals were to be implemented, they would address many of the ACCC concerns regarding digital platform acquisitions,³⁵⁸ and
- critical aspects of the proposals for digital platform acquisitions would not be capable of being implemented in isolation, requiring consideration as to how the reforms work together as a package, including any broader economy-wide merger reforms.³⁵⁹

Seeking to consult on, design and implement an industry-specific framework in isolation risks inconsistency, and uncertainty when overlaid with an economy-wide framework. In particular:

- A mandatory notification regime for digital platforms that meet specified criteria duplicates the proposal for mandatory notification of acquisitions industry-wide meeting certain thresholds. A consultation on digital-specific mandatory notification regime may be rendered redundant by the broader review process or, if implemented in parallel, lead to significant inconsistencies in the operation of the merger laws. To the extent the ACCC is drawing from developments in other jurisdictions considering digital-specific notification

³⁵⁵ ‘Chapter 2: Mergers: Review of the Competition Law Provisions of the Trade Practices Act’ (April 2003), Dawson Committee. Available:

<https://web.archive.org/web/20090914085738/http://tpareview.treasury.gov.au/content/report/html/Chpt2.asp>.

³⁵⁶ ‘Virtus abandons proposed acquisition of Adora’ (17 December 2021), ACCC. Available:

<https://www.accc.gov.au/media-release/virtus-abandons-proposed-acquisition-of-adora>.

³⁵⁷ ACCC website. Available: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews>.

³⁵⁸ Discussion Paper, p 104.

³⁵⁹ Discussion Paper, p 104.

thresholds, those other jurisdictions already have existing thresholds that apply economy-wide (e.g. the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) in the US), or are considering in-parallel reforms to notification thresholds that apply economy-wide (e.g. the UK's proposed pro-competition regime for digital markets).

- The potential measures to change the substantive test, introduce a rebuttable presumption and change the onus of proof for digital platforms cut across proposals for similar reforms that would apply economy-wide.³⁶⁰ Again, these substantive proposals appear to stem from concerns that the ACCC has found it difficult to win merger cases under section 50 of the CCA.³⁶¹ Yet, there is no evidence suggesting these concerns apply uniquely (or at all) to acquisitions made by certain digital platforms. It is not clear why it would be more difficult to prove such acquisitions breach the current section 50 than an acquisition in any other sector so as to warrant a different standard to the broader merger reform proposals.

4.5. There is no case for a company or industry-specific notification or review regime

The Discussion Paper has not provided evidence justifying a specific merger control framework applying to only a small handful of tech companies, being Apple, Google, Meta, Microsoft and Amazon. It has only focused on examining acquisitions by a limited number of players and in relation to certain products and services (i.e. those subject to the DPI and DPSI reports to date). However, the relevant competition questions when assessing a merger are not unique for digital platforms, let alone a handful of tech companies.³⁶² Imposing a distinct set of rules for selected companies would have an unfair and distortionary effect in acquisition markets. Any companies targeted by a specific regime will inevitably be at a competitive disadvantage against other bidders, irrespective of the prospective transaction's competitive effect. Consequently, the regime will only protect competitors rather than competition in markets.³⁶³ Meta competes with a broad range of companies when bidding for potential targets and this competitive process would be compromised if it were subject to different rules than other firms.³⁶⁴

Moreover, it is unclear why hypothetical concerns about acquisitions by certain digital platforms would not apply in other sectors and their firms, such as technology acquisitions by banks (e.g. CBA's acquisition of health technology provider, Whitecoat),³⁶⁵ other large businesses (e.g. Wesfarmers acquisition of online retailer Catch),³⁶⁶ or companies with access to consumer data

³⁶⁰ Discussion Paper, pp 106-108.

³⁶¹ 'Protecting and Promoting Competition in Australia' (27 August 2021), speech by Rod Sims. Available: <https://www.accc.gov.au/speech/protecting-and-promoting-competition-in-australia>.

³⁶² See for example, 'How do top acquirers compare in technology mergers? New evidence from an S&P taxonomy' (January 2022) National Bureau of Economic Research Working Paper 29642 by Ginger Zhe Mario Leccese and Liad Wagman. Available: https://www.nber.org/system/files/working_papers/w29642/w29642.pdf. This paper suggests that any evaluation of competition law reform in relation to the acquisition of startups should not be limited to GAFAM firms.

³⁶³ Discussion Paper, p 22.

³⁶⁴ See for example, 'How do top acquirers compare in technology mergers? New evidence from an S&P taxonomy' (January 2022) National Bureau of Economic Research Working Paper 29642 by Ginger Zhe Mario Leccese and Liad Wagman. Available: https://www.nber.org/system/files/working_papers/w29642/w29642.pdf.

³⁶⁵ 'CBA strengthens digital healthcare capabilities with Whitecoat acquisition' (4 May 2021), Commbank. Available: <https://www.commbank.com.au/articles/newsroom/2021/05/whitecoat-acquisition.html#:~:text=CBA%20has%20today%20announced%20the,solution%20for%20the%20healthcare%20industry>.

³⁶⁶ 'Wesfarmers Limited proposed acquisition of Catch Group Holdings Limited', ACCC. Available: <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/wesfarmers-limited-proposed-acquisition-of-catch-group-holdings-limited>.

(e.g. Woolworths taking control of science firm Quantum).³⁶⁷ Even at the height of concern surrounding acquisitions in the supermarket sector – an essential industry with high levels of horizontal and vertical integration – there was no proposal or introduction of an industry-specific regulatory regime. Instead, the ACCC proposed and introduced a voluntary notification protocol.³⁶⁸

4.6. A company-specific regime or specific-industry regime poses material risks to competition and innovation, and is bad policy

Even assuming there is justification for a company or digital-specific regime, the Discussion Paper has not adequately considered the risks of detrimental and/or negative effects that should form part of any assessment of which regulatory options would generate the greatest (if any) net benefit to consumers in accordance with good regulatory processes,³⁶⁹ including the following:

- The impact of a company or digital-specific regime on pro-competitive dynamics specific to tech industries, including:
 - rapid innovation and very low barriers to entry, which allowed rivals such as TikTok to enter and compete successfully against Meta and other providers; and
 - the ease of switching and multi-homing, which has facilitated competition in many tech services, including in media streaming (e.g. users readily switch between Netflix, Stan, Binge etc.) and communication services, ridesharing apps depending on availability and pricing, and other online services competing for user attention such as Facebook and LinkedIn to reach separate audiences.³⁷⁰
- The negative impact on the development of competition law principles and on the effective administration of competition law in Australia. For example, requiring regulators to look at every acquisition in a certain sector or by certain companies would place a large burden on the agency and unfairly hinder M&A activity by the affected parties because of lengthy review timeframes and unnecessary additional compliance costs.
- The unintended consequence of stifling competition and innovation, particularly in adjacent markets, including:
 - treating digital companies asymmetrically and potential over-enforcement risks discouraging investment which ultimately decreases consumer welfare;³⁷¹

³⁶⁷ 'Woolworths doubles down on data, takes control of Quantum' (20 April 2021), Sue Mitchell. Available: <https://www.afr.com/companies/retail/woolworths-doubles-down-on-data-takes-control-of-quantium-20210420-p57knw/>

³⁶⁸ 'Only Limited Acceptance by the Major Supermarket Chains of ACCC's Proposed Streamlined Acquisition Assessment Protocol' (7 December 2012), ACCC. Available: <https://www.accc.gov.au/media-release/only-limited-acceptance-by-the-major-supermarket-chains-of-accc%E2%80%99s-proposed-streamlined-acquisition-assessment-protocol>.

³⁶⁹ Australian Government website. Available: <https://www.pmc.gov.au/ria-mooc/coag/principles-best-practice-regulation>.

³⁷⁰ See also 'Concurrences, 2nd International Merger Conference webinar' (20 May 2021). Available: <https://www.concurrences.com/en/conferences/international-mergers-conference-4-challenges-for-mergers-in-the-digital>.

³⁷¹ 'Concurrences, 2nd International Merger Conference webinar' (20 May 2021). Available: <https://www.concurrences.com/en/conferences/international-mergers-conference-4-challenges-for-mergers-in-the-digital>.

- designating specific digital companies could have the effect of discouraging challengers from improving their competitiveness to avoid being designated; and
- as the UK Government has explicitly recognised, firms with a strong proposition in one market/activity may present a healthy disruptive force to an adjacent market and reforms should not stand in the way of such disruptive entry and expansion, as a digital-specific or company-specific regime would do.

4.7. Prohibitions on certain categories of acquisitions is not appropriate, and would be adverse to competition and consumers

The Discussion Paper notes the suggestion that it may be appropriate to prohibit digital platforms that meet certain criteria from acquiring businesses in certain categories, such as businesses operating in the same or adjacent markets.³⁷² It recognises that this option could “severely restrict the ability of digital platforms to acquire other businesses”, and is therefore interested in feedback on whether this approach is warranted and any potentially adverse impacts of such an approach on competition and efficiencies in the long term.³⁷³

For the same reasons outlined above, this suggestion is fundamentally inappropriate, would be bad law, and would result in severe adverse effects on competition, efficiencies and innovation, to the detriment of consumers and the Australian economy.

There should not be a *per se* prohibition on any category of acquisitions because it is not possible to pre-judge any type or category of acquisition as innately bad without a proper analysis of the competitive effects. Any category of acquisitions can have potential benefits and pro-competitive effects. Accordingly, banning whole categories of acquisitions will severely risk dampening investment and R&D, damaging whole segments of particular industries, and ultimately decreasing consumer welfare.³⁷⁴

4.8. The potential introduction of a digital-specific merger regime raises significant risks for consumer welfare, investment and innovation, and regulatory certainty

Meta recognises that these potential measures represent thinking at the early stages of the merger reform debate and may evolve as the ACCC considers these questions further. However, as a fundamental threshold issue, Meta reiterates that a digital-specific merger regime should not be considered where economy-wide proposals could address any issues that the industry-specific proposal is designed to address. It should also not be considered when the Discussion Paper has not adequately identified limitations of the existing merger framework that makes the potential change necessary. Nonetheless, Meta provides the following comments with respect to each of the possible elements of the regime described in the Discussion Paper.

³⁷² Discussion Paper, p 108.

³⁷³ Discussion Paper, p 108.

³⁷⁴ ‘Concurrences, 2nd International Merger Conference webinar’ (20 May 2021). Available: <https://www.concurrences.com/en/conferences/international-mergers-conference-4-challenges-for-mergers-in-the-digital>.

Merger reform option	Risks and Issues with proposal
<p>Mandatory notification – Requiring digital platforms to notify acquisitions.</p>	<ul style="list-style-type: none"> • May negatively impact the effective administration of competition law in Australia, including by unnecessarily increasing regulatory costs and already constrained resources associated with unnecessary increased filings. • Risks delaying commercial decisions where time may be of the essence, as was considered by the Government when choosing not to adopt the 1984 Green paper recommendation to introduce a compulsory pre-merger notification scheme.³⁷⁵ • Puts companies required to notify at a competitive disadvantage against other bidders irrespective of the prospective transaction’s competitive effect, fundamentally shifting commercial incentives and potentially compromising competitive tender processes.
<p>Probability threshold – Applying a lower probability of competitive harm threshold to all acquisitions by large digital platforms that meet relevant criteria or adopting the balance of harm assessment proposed in the UK.</p>	<ul style="list-style-type: none"> • Substantially increases the likelihood of mergers being blocked which are not harmful to competition, by requiring less rigour and evidence to support the ACCC’s findings. This would compromise procedural fairness and undermine robust and legitimate regulatory decision-making. • Increases risk of over-enforcement of merger control, and in doing so erodes the attractiveness of investment in Australia.
<p>Burden of proof – Reversal of onus of proof for showing the acquisition does not substantially lessen competition or introducing a rebuttable presumption that certain acquisitions by digital platforms that meet relevant criteria result in competitive harm.</p>	<ul style="list-style-type: none"> • No evidence or economic analysis that suggests shifting the burden of proof onto the merger parties would effectively capture anti-competitive transactions. • Rebuttable presumption can generate more errors in determining whether a particular merger is harmful compared to the current regime, which is based on a broad, fact-based inquiry. • Reversing the onus of proof out of step with other significant jurisdictions around the world. In particular, the UK’s Digital Markets Taskforce did not recommend a reversal of the onus of proof be introduced as it would be difficult for merger parties to meet this burden in the vast majority of cases.
<p>Merger Factors – Changes to the merger factors in section 50(3) of the CCA. In particular, the factors that place greater focus on structural changes and factors relating to the loss of</p>	<ul style="list-style-type: none"> • Existing merger framework is sufficiently flexible and already allows the Discussion Paper’s proposed additional factors to be considered, making any change unnecessary. This is recognised by the Government’s responses to the DPI.³⁷⁶ In particular:

³⁷⁵ The Attorney-General’s Department provided this evidence in a submission to the Griffiths Committee during the course of preparation of the 1989 Griffiths Report. Although a copy of this submission is not available online, the Griffiths Report extracts the reasons for the Attorney-General’s decision in paragraph 5.3.2. See ‘*Mergers, Takeovers and Monopolies: Profiting from Competition?*’ (May 1989), Parliament of the Commonwealth of Australia, p 48. Available: <https://nla.gov.au/nla.obj-2013267542/view?partId=nla.obj-2018022184#page/n74/mode/1up>. The 2003 Dawson Report also recommended to retain the current information clearance process so that most merger proposals would continue to be dealt with expeditiously. See ‘*Chapter 2: Mergers: Review of the Competition Law Provisions of the Trade Practices Act*’ (April 2003), Dawson Committee. Available: <https://web.archive.org/web/20090914085738/http://tpareview.treasury.gov.au/content/report/html/Chpt2.asp>.

³⁷⁶ ‘*Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry*’ (2019), Australian Government, p 8. Available: <https://treasury.gov.au/publication/p2019-41708>.

Merger reform option	Risks and Issues with proposal
<p>potential competition rivalry and/or increased access to or control of data, technology or other significant assets.</p>	<ul style="list-style-type: none"> ○ Existing section 50(3) factors allow the ACCC and courts the flexibility to consider the extent to which a merger removes potential competition, even where parties are not currently competing in the same markets, provided there is supporting evidence. ○ Section 50(3) already specifies structural factors that the ACCC must consider in any merger review, for example the height of barriers to entry and the level of concentration in the market. ○ Section 50(3) is non-exhaustive, so the ACCC and courts have a high level of flexibility to consider other factors in a dynamic and evolving way, provided they are sufficiently grounded in the evidence and supported by economic analysis. ○ ACCC can consider the impact on data, like any other asset. ○ Forward-looking nature of the counterfactual analysis process enables the ACCC to consider both actual and future competition within the short to medium term.
<p>Deeming provision - Enhanced deeming provision applicable to digital platforms with a substantial degree of market power or meets other pre-identified criteria (whereby an acquisition by such a platform would be deemed to substantially lessen competition if it likely entrenched, materially increased or materially extended that market power).</p>	<ul style="list-style-type: none"> ● May capture and prohibit pro-competitive mergers given specific proof of competitive effects is not required in order for the acquisition to be considered unlawful. ● Effectively a “per se” prohibition against acquisitions made by certain types of companies, unless they can prove a “defence”. <i>Per se</i> prohibition should be limited to conduct like cartels because it is widely accepted that they are likely to result in competitive harm, so it would be a waste of resources to prove effects in every case. The same cannot be said for mergers. ● Will result in significant prejudice to those businesses and severely disrupt the competitive process if deeming provision affects only specific businesses.