



# Digital platform services inquiry

Interim report No. 4 – General online retail marketplaces

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Australian Competition and Consumer Commission  
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## Executive Summary

This fourth interim report in the Digital Platform Services Inquiry examines competition and consumer issues associated with *general online retail marketplaces* (online marketplaces) in Australia.

Online marketplaces are performing an increasingly significant role in connecting Australian consumers and businesses and are an important link in building trust and confidence in the digital economy. A growing digital economy is key to securing Australia's economic future.

The ACCC considers that now is the right time to be examining issues with these platforms to ensure fair and competitive markets for Australian sellers and strong protections for consumers, including in relation to product safety.

Online marketplaces, like other digital platforms, rely on increasing the number of sellers and consumers to grow their business. Similar to other digital platforms examined by the ACCC, an online marketplace can increase its value to users through the presence of other users,<sup>1</sup> creating a positive feedback loop that draws both more consumers and sellers to the marketplace. Accordingly, like many other digital platforms, this loop is a factor that could lead these services to 'tip' in favour of a single dominant firm.

General online retail marketplaces in Australia include, but are not limited to, Amazon, Catch, eBay and Kogan. They offer a wide variety of retail products and perform an increasingly important role in the economy, connecting consumers and sellers.

In other jurisdictions online retail makes up a substantial share of all retail sales and a single marketplace, such as Amazon, both dominates online retail and performs a significant role in retail sales more broadly. In Australia this is not the case. For example, Australian online retail sales accounted for over 16% of all retail sales in 2020–21, while in the United Kingdom online retail sales accounted for 26% of all retail sales in 2020.<sup>2</sup> In the United Kingdom and United States (where Amazon is the largest marketplace), Amazon is estimated to make up around 30% and 40% of online retail sales respectively; in Australia, no one marketplace holds a similarly significant share of online retail sales.

However, the situation in Australia is dynamic with significant potential for change. The steady growth of online marketplaces has been accelerated by the COVID-19 pandemic. Australian consumers are estimated to have spent more than \$52 billion online over 2020–21, an increase of almost 31% compared to 2019–20<sup>3</sup> and there was an increase in both the number of online marketplaces and their revenue. Out of the four largest online marketplaces, Amazon Australia experienced the largest sales growth in the last few years although its total Australian sales are still significantly below those of eBay.

The ACCC's review has found that the key online marketplaces considered in this report act and perform differently. In some instances, certain online marketplaces provide protections to consumers or provide services to sellers that other online marketplaces do not. Different business models also mean that some concerns only arise only with some online marketplaces (for example: potential self-preferencing behaviour by hybrid marketplaces, which sell both third-party products and its own products).

There are also instances where one or more marketplaces are performing better than others. For example, by providing consumers and sellers with clear information regarding data

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<sup>1</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 63.

<sup>2</sup> Australia Post, [Inside Australian Online Shopping – eCommerce Industry Report August 2021](#), 27 August 2021, p 4.; Statista, [Online share of retail sales in the United Kingdom \(UK\) from 2011 to 2021](#), 24 February 2022, accessed 4 March 2022.

<sup>3</sup> Australia Post, [Inside Australian Online Shopping – eCommerce Industry Report August 2021](#), 27 August 2021, p 4.

collection or what determines product recommendations; or providing consumers with additional protections under the Product Safety Pledge.<sup>4</sup> Where a particular marketplace performs better, this report has sought to highlight this.

This report also identifies when the ACCC has identified a need for improvement in marketplace practices and areas where the ACCC will continue to consider the practices of online marketplaces.

## Issues arising for consumers on online marketplaces

Online marketplaces provide significant benefits to Australian consumers, providing easy access to a large number of products and sellers and competitive prices; consumers clearly value the service provided by online marketplaces.

However, the report raises a number of consumer concerns, including in relation to product display and data collection and identifies areas where online marketplaces should modify their practices to be more transparent and provide consumers with greater control. While some of the concerns identified are limited to one or two online marketplaces, the ACCC found that a number of concerns apply across all large online marketplaces. Further, many of the consumer concerns identified are similar to those identified in previous ACCC reports.

### The importance of display in shaping consumer choice

Online marketplaces perform an important role in reducing the burden on consumers, providing valuable tools to facilitate consumers finding and purchasing a product, including the display of products tailored or personalised to the consumer, search tools and price comparison displays.

The ACCC has previously examined how consumers make choices and how user interfaces can direct consumers towards making certain decisions. The tools online marketplaces use to display products to consumers can clearly have a significant effect on what consumers view and purchase. This includes marketplace search algorithms which determine the products relevant to a consumer's search query, the order in which those products are displayed and what products are highlighted to consumers. For example, the majority of purchases on the Amazon platform were offers that Amazon featured on the Buy Box.<sup>5</sup>

Highlighting a small number of relevant products on an online marketplace can have clear benefits for consumers seeking to purchase online. However, the ACCC has found examples where it was not clear to consumers on online marketplaces why particular products are being shown to them in prominent positions in search results or highlighted in other ways. This is a particular concern in the case of hybrid marketplaces, where the online marketplace sells both third-party products and its own products.

Given the reliance consumers have on the tools that help them to reduce their search costs, such as the online marketplaces' search algorithms and the featuring of offers, the ACCC considers that online marketplaces should be more transparent about the factors that influence how prominently products are displayed, particularly for products that might be shown for reasons that appear less relevant to a consumer.

### Platforms' responsibility to consumers

Online marketplaces' role in facilitating or intermediating transactions between consumers and sellers has made it more difficult for consumers to identify and exercise their rights when

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<sup>4</sup> ACCC, Product Safety Australia, [Australian Product Safety Pledge](#), accessed 21 February 2022.

<sup>5</sup> The 'buy box' refers to a process in which some online marketplaces provide a single product page when the same product is listed by multiple sellers. One seller's offer will be selected by Amazon to feature on the product page, with competing offers by other sellers displayed in less prominent positions.



things go wrong. The involvement and control which an online marketplace has over transactions on their platform has made the marketplace's role in consumer protection (and dispute resolution) important.

Protections for consumers purchasing on online marketplaces should reflect this important intermediary role, which consumers are increasingly relying upon.

The ACCC notes that there are a number of specific protections, already being considered, which could play a role in addressing consumer protection issues identified with online marketplaces.

One such protection the ACCC has been advocating for is the introduction of an economy-wide prohibition on unfair trading practices, to cover harmful conduct that is currently not expressly captured by existing provisions of the Australian Consumer Law. As previously stated, the ACCC considers such a prohibition critical to addressing a range of practices across the economy which are detrimental to consumers, including practices identified in this report.

A further, potentially key, consumer protection tool is the introduction of a general safety provision. Such a provision would effectively require businesses to supply safe products to the Australian market as it is not presently illegal for unsafe products to be supplied in Australia.

Some online marketplaces do provide more protections than currently required by law. This report also highlights the importance of the measures undertaken by online marketplaces under the Product Safety Pledge.<sup>6</sup> For example, signatories commit to removing identified unsafe product listings within two business days of the dedicated contact point(s) receiving a take-down request from Australian regulatory authorities, inform authorities on the action that has been taken and any relevant outcomes.<sup>7</sup> The action undertaken by those online marketplaces (and other online businesses) which are signatories to the voluntary Product Safety Pledge, are a valuable addition to consumer protection. The ACCC welcomes and encourages other online marketplaces to join the Product Safety Pledge to further strengthen online marketplace safety.

## **Dispute resolution**

The distance between seller and consumer which exists when products are purchased on an online marketplace also affects how disputes are resolved. One barrier consumers face is working out who they have purchased from, and how to effectively engage with that seller to resolve their dispute.

Effective dispute resolution is critical for consumers (and sellers) to ensure they can exercise their rights and builds trust in the digital economy. The ACCC also considers that consumers must have adequate access to avenues for redress from harmful products. The ACCC continues to support the internal dispute resolution mechanisms and ombudsman scheme recommended in the DPI Final Report in recommendations 22 and 23,<sup>8</sup> and considers that such mechanisms should apply to online marketplaces as well as other digital platform services previously identified in ACCC reports.

## **Data collection and use**

Consumer data is a valuable input for online marketplaces, enabling marketplaces to better tailor the products displayed to buyers. While consumers can benefit from the use of their

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<sup>6</sup> ACCC, Product Safety Australia, [Australian Product Safety Pledge](#), accessed 21 February 2022.

<sup>7</sup> In 2020-2021 period, 96.6% of takedown requests were actioned within 2 days: ACCC, [Product Safety Pledge First Annual Report](#), 19 November 2021, p 4.

<sup>8</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019.

data in this way, extensive data collection practices can result in harm when consumers do not have adequate information and control about what data is being collected and how it is being used.

As with previous digital platforms examined, the ACCC is concerned that certain data practices of online marketplaces may not align with consumer preferences, including the purposes for which consumer data is used.

The ACCC considers, as always, that consumers should be given both sufficient information and adequate control to allow them to make informed choices about what data is collected and used by the digital platform.

The Attorney General is currently undertaking a review of the *Privacy Act 1988* (Cth) as part of the Australian Government's response to the DPI Final Report.<sup>9</sup> In addition, the Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021 (Cth) proposes to introduce a binding privacy code to address the particular privacy challenges posed by online platforms that collect a high volume of personal information or trade in personal information, by adapting and expanding upon the requirements under the Australian Privacy Principles.<sup>10</sup>

This Code, which will be overseen by the Office of the Australian Information Commissioner, as well as any reform resulting from the Privacy Act review, are expected to address some of the specific privacy concerns that arise from a lack of consumer awareness or control over digital platforms' data practices.

#### **Further support for previous ACCC recommendations to help address consumer protection concerns with general online retail marketplaces**

This report highlights a number of previous recommendations made by the ACCC in its digital platform reports which, if implemented will help address some of the consumer protection concerns considered in this report. In particular:

- The ACCC continues to support the introduction of a prohibition on certain unfair trading practices to cover harmful conduct that is currently not captured by existing provisions of the Australian Consumer Law. Such a prohibition may help address issues raised in relation to data collection and use, as well as potential dark patterns or nudges on online marketplaces (which may confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions). The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.
- The ACCC has strongly advocated for making unfair contract terms illegal (not just voidable), and that civil pecuniary penalties should be available for contraventions. The ACCC notes that a bill was introduced in February 2022 which would make such changes to the unfair contract terms provisions in the Australian Consumer Law. This law change would provide a significant deterrent to businesses (including online marketplaces) from using unfair terms in their consumer and small business agreements.
- The ACCC has previously recommended that digital platforms comply with minimum internal dispute resolution requirements and that, should a dispute not be resolved internally, an ombudsman scheme be established to resolve complaints and disputes with digital platform providers. The ACCC continues to support these recommendations and considers they should apply to online marketplaces as well as previously identified digital platforms.

<sup>9</sup> See <https://www.ag.gov.au/integrity/consultations/review-privacy-act-1988>.

<sup>10</sup> See <https://consultations.ag.gov.au/rights-and-protections/online-privacy-bill-exposure-draft/>.

### **Proposals to specifically address the consumer harms associated with the sale of unsafe products on online marketplaces**

There are several possible reform options currently being considered by government which may help address consumer protection issues identified in this Report.

In particular, the Australian Government's Department of the Treasury is undertaking a regulatory impact assessment on improving the effectiveness of the consumer product safety system, including the proposal to introduce a 'general safety provision' in the Australian Consumer Law. A Consultation Regulation Impact Statement was published in 2019.<sup>11</sup> A 'general safety provision' would, in principle, require businesses to supply safe products to the Australian market as it is not presently illegal to supply unsafe products. Such a provision could include clear obligations for online marketplaces to ensure the reasonable safety of products sold on their platform (for example, removal of unsafe products and monitoring safety risks).

The ACCC notes that this option would need to be carefully considered and subject to consultation to understand its impacts and potential alternatives, and would need to ensure that the effectiveness of the changes and the burden on online marketplaces is appropriately balanced.

### **Issues arising for sellers on online marketplaces**

Online marketplaces offer a valuable service to sellers by providing sellers with access to large numbers of consumers who increasingly use online marketplaces to find and purchase products. Sellers typically incur relatively lower setup costs to sell via online marketplaces than other avenues such as setting up their own websites.

The ACCC understands there is diversity in how sellers interact with online marketplaces: while some sellers use one marketplace, others use multiple online marketplaces to ensure they have access to a wide range of consumers (referred to as multi-homing).

Feedback suggests that due to switching costs and the risk to sellers of losing access to the consumers that more frequently use, or only use, a single platform (single homing), an online marketplace typically benefits from a degree of bargaining power in setting the terms and conditions to sellers, particularly smaller sellers, wishing to use their marketplace.

A number of seller concerns with the operation of online marketplaces have been identified by the ACCC and these concerns may reflect the lack of bargaining power sellers, particularly smaller sellers, have with online marketplaces.

### **Terms and conditions, and fees**

Online marketplaces set the terms and conditions for sellers using their marketplace. Online marketplaces charge sellers various fees (see Table 1).

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<sup>11</sup> Australian Government Department of the Treasury, [Consultation Regulatory Impact Statement: Improving the Effectiveness of the Consumer Product Safety System](#), 4 October 2019.



**Table 1: Comparison of fees set by online marketplaces**

	Amazon Australia	eBay Australia <sup>12</sup>	Catch	Kogan
<b>Commission or referral fees</b>	7% – 15% of total sales price depending on product. <sup>13</sup> Some product categories attract lower fees if seller uses Fulfilment by Amazon.	13.4% of final sales value plus \$0.30 transaction fee for most categories and sellers not subscribed to eBay Store. <sup>14</sup>  6.2% – 11.9% of final sales value plus \$0.30 transaction fee for eBay Store sellers. <sup>15</sup>	Dependent on product category and are set when seller signs up to marketplace. <sup>16</sup>	Individually negotiated with sellers on registration. <sup>17</sup>
<b>Other mandatory fees</b>	Individual Seller Plan – \$0 monthly fee, \$0.99 (exc. GST) per-item sold fee in addition to referral fee. <sup>18</sup>  Professional Seller Plan – \$49.95 (exc. GST) monthly fee, no per-item sold fee. <sup>19</sup>	For eBay Store sellers, \$24.95 per month (exc. GST) for a basic store, \$54.95 per month (exc. GST) for a feature store, and \$549.95 per month (exc. GST) for an anchor store. <sup>20</sup>	Fixed \$49.99 (inc. GST) monthly store fee. Fee waived during first two months of joining the marketplace. <sup>21</sup>	\$299 monthly store fee.

However, different kinds of sellers may receive different terms and conditions. The ACCC understands that large Australian sellers are often better able to negotiate terms with online marketplaces; in contrast, smaller sellers are typically required to accept whatever terms allow them to access the consumers on the marketplace.

The Report has identified that certain terms and conditions, such as seller fees and pricing restrictions, which may limit how a seller prices its own products off the platform, could have a negative effect on sellers, potentially affecting their ability to compete effectively. This is particularly likely to be the case if the conditions are applied in an arbitrary or opaque way and the seller finds the marketplace a necessary route or gateway to reach their target customers. There are also concerns that pricing restrictions imposed by an online marketplace on third-party sellers (particularly price parity clauses, which would prevent a seller from discounting on rival platforms) could potentially impede competition between rival online marketplaces.

<sup>12</sup> The ACCC notes that eBay is currently transitioning all sellers to a new managed payment system whereby payment processing fees are deducted automatically from seller funds awaiting payout. Previously, sellers on eBay were charged separately by PayPal. eBay Australia, [Getting Paid and Managing Your Earnings](#), accessed 3 March 2022.

<sup>13</sup> Amazon Australia, [Selling on Amazon Fee Schedule](#), accessed 3 March 2022.

<sup>14</sup> eBay Australia, [selling fees without an eBay store](#), accessed 3 March 2022; eBay Australia, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 21.

<sup>15</sup> eBay Australia, [eBay Stores fees for registered businesses](#), accessed 28 March 2022.

<sup>16</sup> Catch, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 16.

<sup>17</sup> Kogan, [Marketplace Seller Terms & Conditions](#), accessed 3 March 2022.

<sup>18</sup> Amazon Australia, [Selling plans](#), accessed 3 March 2022.

<sup>19</sup> Amazon Australia, [Selling plans](#), accessed 3 March 2022.

<sup>20</sup> eBay Australia, [eBay Stores fees for registered businesses](#), accessed 28 March 2022.

<sup>21</sup> Catch, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 16.

Given the reliance of sellers on large marketplaces, the ACCC considers it particularly important that the level of fees charged is transparent and that advance notice is given of any changes to these fees. The ACCC will continue to monitor these fees in the Australian context.

Further, given the concerns associated with pricing clauses which may limit competition among online marketplaces or have the effect of preventing sellers from offering a lower price through alternative avenues, the ACCC considers it is important to continue to monitor the prevalence and effect of these provisions.

### **The importance of marketplace display for sellers**

As decisions made by online marketplaces about how to display and rank products have an important effect on what consumers ultimately purchase, they also have a significant effect on a seller's business.

Opacity of algorithms or processes that determine when and how a product is seen, makes it harder for sellers to improve their product offerings. Further, if a hybrid marketplace advantages its own products above those of rival products sold by third-party sellers, many sellers will find it harder to compete on their merits to reach consumers.

While the ACCC recognises the importance of ensuring sellers are unable to 'game' the marketplaces' search algorithms, the ACCC considers it important that online marketplaces are transparent about which factors influence how prominently products are displayed.

### **Access to consumers and consumer data**

Online marketplaces are able to collect large amounts of rich data, including search and purchasing data from consumers on their platform, and use it to better tailor their services and offerings to consumers.

Because the online marketplaces intermediate between sellers and consumers, sellers are typically reliant on online marketplaces for any intelligence about consumers. Sellers have raised concerns about the imbalance between the consumer data collected by the marketplace and the information which sellers are able to obtain. This disparity prevents many sellers from tailoring their product offering in response to consumers, and is a critical factor in increasing sellers' reliance on online marketplaces to reach the relevant consumers.

### **Dispute resolution processes for sellers on online marketplaces**

The disconnect between sellers and consumers is also an issue for sellers when things go wrong or disputes arise. The ACCC considers that dispute resolution should be available to sellers as well as consumers, and processes should be in place to ensure sellers have the ability to challenge, or amend, decisions.

The ACCC considers that sellers must have adequate access to avenues for redress when they have disputes with either a consumer or the marketplace itself.

#### **Further support for previous ACCC recommendations to help address seller concerns with general online retail marketplaces**

The two changes to the Australian Consumer Law, highlighted above – the introduction of a prohibition on unfair contract terms (as opposed to them being merely voidable) and the introduction of an unfair trading practices prohibition – would also afford protection to small businesses, including small businesses that deal with online marketplaces. The ACCC notes that both of these potential reforms may help better address some potential issues with terms relating to fees, as well as issues raised in relation to data collection and use.

The ACCC has previously recommended that digital platforms comply with internal dispute resolution requirements and that, should a dispute not be resolved internally, an ombudsman scheme to resolve complaints and disputes with digital platform providers should be available. The internal dispute resolution mechanisms and ombudsman scheme recommended in the DPI Final Report could be developed in a way that would also assist sellers with resolving disputes with consumers and online marketplaces, and provide them an avenue to challenge/appeal decisions.

## The growth of hybrid marketplaces and associated concerns for both consumers and sellers

Online marketplaces which sell their own products as well as the products of third parties (known as hybrid marketplaces) are growing. Amazon, Catch and Kogan are all examples of hybrid marketplaces and their growth in Australia in the past year has significantly outpaced the growth of eBay, albeit from a much lower base.

Hybrid marketplaces create benefits for consumers by providing them with additional choices. Increasing the attractiveness of the marketplace to consumers in this way may also provide benefits to sellers, by expanding the potential purchasers of their products. However, where an online marketplace sells its own goods in competition with the third-party sellers using that marketplace, an online marketplace faces competing incentives, creating concerns for both third-party sellers and consumers.

A key concern with hybrid marketplaces is whether preferential treatment is provided by the marketplace to its own products at the expense of third-party sellers (through algorithms, policies or other decision making). As set out above, the order in which products are displayed and what products are highlighted to consumers have a substantial influence on which products are sold and accordingly, preferential treatment by the marketplace may harm both the seller and the consumer.

The ACCC is concerned about the potential for a marketplace's own products, in at least some circumstances, being given preferential treatment in how their offerings are displayed to consumers. Claims of self-preferencing behaviour arose in the ACCC's small business questionnaire.<sup>22</sup> The risk of self-preferencing behaviour has been reported and examined in other jurisdictions.<sup>23</sup> Amazon Australia stated that in the Amazon Australia Store it does not advantage its own products or offers in search results or in the Buy Box over those of third-party sellers. The ACCC sought details about inputs of Amazon's algorithms, which were not provided, so the ACCC does not have information about how Amazon's algorithms produce search results.

Information provided to the ACCC indicates that at least some hybrid marketplace algorithms (Catch and Kogan) give an additional 'boost' to products sold by the marketplace in search results.

This type of preferential treatment may raise significant competition concerns where a hybrid marketplace has a substantial degree of market power and they have the ability and incentive to prevent, or inhibit, third-party sellers from competing on their merits. At this stage, the preferential treatment observed does not appear to have resulted in extensive competitive detriments. This is likely due to the alternatives (including alternative

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<sup>22</sup> In the ACCC's small business seller questionnaire, nearly half of the respondents said they had experienced marketplaces favouring their own products on their marketplaces over third-party sellers ACCC, [small business seller questionnaire](#), Row S (n = 80).

<sup>23</sup> Aditya Kalra, [Amazon copied products and rigged search results to promote its own brands](#), documents show, *Reuters*, 13 October 2021. Overseas regulators have also remarked that marketplaces may self-preference through their search algorithms; see also Competition and Markets Authority, [Algorithms – How they can reduce competition and harm consumers](#) (see 'Exclusionary Practices; Self-preferencing'); Japan Fair Trade Commission, [Report regarding trade practices on digital platforms](#), pages 86-87; European Commission, [Competition Policy in the Digital Era](#), page 7.

marketplaces) that are available to sellers to reach consumers. However, such practices may have a significant competitive impact if a hybrid marketplace attains a dominant position in the future.

Despite this, the ACCC remains concerned that current practices affording preferential treatment to an online marketplace's own products which may influence consumers' purchasing decisions, resulting in possible consumer detriment and potentially hindering some third-party sellers from competing on their merits. Given these impacts, the ACCC considers it important that hybrid marketplaces fully inform consumers and third-party sellers when favourable treatment is being provided an online marketplace's own products.

Online marketplaces also have access to large amounts of rich data on consumers, which can allow them to better tailor their products and services to make them attractive to consumers. Third-party sellers do not have access to the same depth and breadth of data collected by an online marketplace, which can hinder sellers in their ability to test and improve their product range and strategies to the same extent an online marketplace is able to. The collection of data by a hybrid marketplace on the products of third-party sellers can raise concerns for individual sellers if that data is used by the marketplace to inform its own product development, pricing or marketing strategy, particularly where it does not provide third-party sellers with access to similar data. Such conduct may also give rise to significant competition concerns if engaged in by a dominant provider.

## General online retail marketplaces in Australia and potential future market power

### Characteristics of online marketplaces and the need for scrutiny

Network effects are an important feature of the business models of online marketplaces. The more sellers on the platform, the more attractive the marketplace is to consumers, and the more consumers using the platform, the more attractive it is to sellers. In addition to these cross-side network effects, there are same-side network effects. For example, the more consumers attracted to an online marketplace the greater the ability of the online marketplace to collect data on consumer preference. To the extent this data is used to improve the matching of consumer preferences to products, the more attractive the marketplace becomes to other consumers.

These network effects, including both the cross-side and same-side effects, mean there is the potential for tipping in favour of a single dominant firm. This would not necessarily raise competition concerns where it is the result of firms outcompeting their rivals. However, the ACCC would have significant concerns where tipping leads to a dominant firm engaging in anti-competitive conduct and/or reducing the benefits that consumers and sellers would otherwise gain from competition.

This concern is not limited to online marketplaces. The ACCC has previously identified other digital platforms whose market power is underpinned by network effects and other barriers to entry,<sup>24</sup> and whose market power is unlikely to erode in the medium term.

In other jurisdictions, including in the United Kingdom, United States and some European countries, the market has arguably already 'tipped' in favour of Amazon, where it has an overwhelming market position in online marketplaces and a strong position in overall online retail. For example, in Italy, Amazon was estimated to account for 20% online sales, and between 70% and 75% of third-party sales on active online marketplaces.<sup>25</sup> As noted above, in the United Kingdom and the United States, Amazon is estimated to account for around 30% and 40% of all online sales, respectively.

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<sup>24</sup> ACCC, [Digital Platforms Inquiry, Final Report](#), 2019, pp 64-78.

<sup>25</sup> Autorità Garante della Concorrenza e del Mercato (AGCM), [A528 - Chiusura istruttoria](#), AGCM, 9 December 2021, p 173, accessed 10 December 2021.

In a number of these countries, Amazon is subject to anti-trust scrutiny by competition agencies following allegations of anti-competitive conduct by rivals and sellers.

Further, it is expected that, in those jurisdictions which have proposed (or enacted) specific regulation to address concerns with the market power or gatekeeper role of large digital platforms, Amazon will be one of the platforms that will be scrutinised and potentially subject to the specific regulation. For example, the Bundeskartellamt (the German Federal Cartel Office) is currently considering whether Amazon's business in Germany is one of 'paramount significance for competition across markets'. This is the threshold to introduce specific rules under recent amendments to the German Competition Act.<sup>26</sup> If the Bundeskartellamt finds this is the case, the Bundeskartellamt will have the power to proactively impose conditions on how Amazon can operate in order to control certain practices.

## **Competition between online marketplaces in Australia**

The network effects which have helped contribute to Amazon's strong position in some other countries clearly also apply to the growing development of online marketplaces in Australia. However, in contrast to some overseas jurisdictions, Amazon has only recently entered the Australian market and it is not the largest marketplace.

At this point the ACCC considers that no one marketplace holds a dominant position in Australia.

The ACCC's enquiries indicate that a number of Australians use multiple online marketplaces and also use alternative means to purchase products, either physically or via online retailers. It appears that this is in part the result of the low costs facing consumers in using multiple online retail options and switching between them, and the strong product offerings of multiple online marketplaces. At the same time, the degree to which these options are substitutable is likely to depend on a range of factors, and some consumer may be more inclined to use a single marketplace (such as those who hold an online marketplace subscription).

The position of sellers is different to the position of consumers. While many of the top sellers have sales across multiple online marketplaces, there appear to be numerous smaller sellers that focus on a single marketplace. Sellers can also face a range of costs when switching away from an online marketplace, such as learning and implementation costs in the case of a new marketplace or significantly higher establishment costs if switching to selling via their own website or a physical store. Further, switching away from an online marketplace may cause the seller to forgo access to those consumers who single-home on that marketplace (a potentially significant consumer group for some sellers). As a result, the ACCC considers that many sellers, particularly smaller sellers, have a limited degree of bargaining power with the large online marketplaces. The consequences of this lack of bargaining power are likely reflected in the seller concerns identified in this report.

As Figure 1 shows, out of the four major online marketplaces in Australia, eBay Australia (the first major online retail marketplace to be established in Australia) remains the largest with annual sales of over \$5.3 billion in 2020–21.<sup>27</sup> This is followed by Amazon Australia with \$1.3 billion.<sup>28</sup>

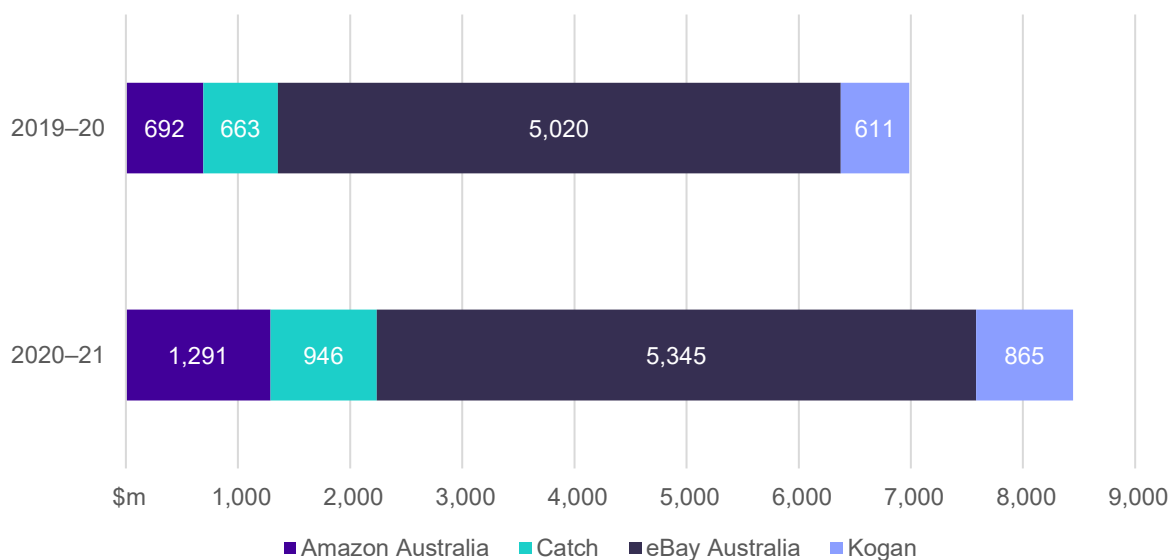
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<sup>26</sup> See [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19\\_01\\_2021\\_GWB%20Novelle.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/19_01_2021_GWB%20Novelle.html).

<sup>27</sup> Information provided to the ACCC.

<sup>28</sup> Information provided to the ACCC.

**Figure 1: Annual sales by key general online retail marketplaces in 2019–20 and 2020–21 (\$ million)**



Note: For Amazon Australia, Catch and Kogan, annual sales includes both first-party and third-party sales. Sales figures for marketplaces across 2019–20 and 2020–21 were impacted by the COVID-19 pandemic.  
Source: Information provided to the ACCC

These figures should be considered in the context of total online sales in Australia which were estimated at more than \$52 billion in 2021.<sup>29</sup> eBay Australia’s share of overall online sales in Australia is currently approximately 10% while Amazon Australia’s share is approximately 2.5%.

By way of comparison, Kmart and Big W, both large retailers with online and offline sales channels, had annual sales of almost \$6.9 billion and \$4.6 billion respectively in 2020–21.<sup>30</sup> Annual sales for each of Amazon Australia, Catch and Kogan are currently lower than the major established Australian retailers.

However, there has been substantial sales growth by the online marketplaces in the past twelve months. In particular, Amazon Australia’s sales have increased substantially (by 87%) from 2019–20 to 2020–21, while Catch and Kogan’s sales have increased by 43% and 42% respectively.<sup>31</sup> The significant increase in sales by online marketplaces over this period is likely due to COVID-19 pandemic and associated lockdowns, where many Australian consumers substituted from offline to online purchasing. Importantly, the growth of the online marketplaces, and Amazon in particular, has outstripped the growth of the leading online retail stores.

The ACCC also notes that there have been large increases in Australian customer subscriptions to Amazon Prime. Amazon Prime provides members with access to Amazon’s streaming-video-on-demand service and other benefits including reduced shipping costs for goods purchased on the Amazon marketplace. This growth may have a potentially significant impact on competitive dynamics in online marketplaces.

<sup>29</sup> Australia Post, [Inside Australian Online Shopping – eCommerce Industry Report August 2021](#), 27 August 2021, p 4.

<sup>30</sup> Wesfarmers, [2021 full-year results briefing presentation](#), Wesfarmers, 27 August 2021, accessed 10 February 2022, p 7.; Woolworths Group, [2021 annual report](#), Woolworths Group, 26 August 2021, accessed 10 February 2022, p 32.

<sup>31</sup> Information provided to the ACCC.



### **Future consideration by the ACCC**

The ACCC considers it important that developments in online marketplaces continue to be monitored. Overseas experience suggests that such services have the potential to tip. While the ACCC is not suggesting that this will occur in Australia, there is a risk of significant competition issues arising should this occur.

In particular, the ACCC considers it important to closely scrutinise mergers and acquisitions in this sector and that, to the extent a new framework is developed to address competition concerns caused by digital platforms, such a framework be capable of applying to an online marketplace should it attain substantial market power and/or occupies a strategic or gatekeeper position.

### **Next steps**

The ACCC is currently consulting on whether a new regulatory framework or tools are required to address the competition and consumer concerns identified with digital platform services and a Discussion Paper outlining both the competition and consumer concerns and options for reform is available on the ACCC's website [here](#). The ACCC will report to the Australian Government in the fifth interim DPSI report, due September 2022, on whether such law reform is required and if so, options for reform.

While the ACCC has not identified the same competition concerns with online marketplaces as it has with other digital platform services such as search engines, social media and mobile app online marketplaces, it is important that any framework or set of tools developed be capable of applying to online marketplaces in the future, given the potential for these markets to tip to a dominant firm. The ACCC will continue to monitor the competition and consumer concerns associated with this increasingly important sector during the course of the 2020–2024 Digital Platforms Services Inquiry.

## Glossary

Term	Description
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACL</b>	Australian Consumer Law in <i>Competition and Consumer Act 2010</i>
<b>AI</b>	Artificial intelligence – the ability of computer software to perform tasks that are complex enough to simulate a level of capability or understanding usually associated with human intelligence.
<b>Algorithm</b>	A sequence of instructions that performs a calculation or other problem-solving operation when applied to defined input data. In this report ‘algorithm’ generally refers to the algorithms used by major digital platforms to rank and display content on their services.
<b>Bricks and mortar Store</b>	A physical retail store.
<b>Buy-Box</b>	An element of a product detail page on online marketplaces which contains a featured offer and allows consumers to add items to their cart.
<b>CCA</b>	<i>Competition and Consumer Act 2010</i> (Cth)
<b>CMA</b>	Competition and Markets Authority of the United Kingdom
<b>Consumers</b>	A buyer of a good or goods on an online marketplace.
<b>Dark patterns</b>	Elements of user interfaces which have been designed to make it difficult for users to express their actual preferences, or which nudge users to take certain action that may not be in their best interests.
<b>Demand-Side Platform or DSP</b>	A platform used by advertisers to help them purchase ad inventory from suppliers of ad inventory as effectively and cheaply as possible, and which utilise various data to provide ad targeting services.
<b>Digital Advertising Services Inquiry Final Report / Ad Tech Report</b>	The <a href="#">final report</a> of the ACCC’s Digital Advertising Services Inquiry, published on 28 September 2021.
<b>Digital Platforms</b>	Digital search engines, social media platforms and other digital content aggregation platforms.
<b>DPI</b>	Digital Platforms Inquiry, an inquiry conducted by the ACCC into digital search engines, social media platforms and other digital content aggregation platforms, and their effect on media and advertising services markets.
<b>DPI Final Report</b>	The <a href="#">final report</a> of the ACCC’s Digital Platforms Inquiry, published on 26 July 2019.
<b>DPSI</b>	<a href="#">Digital Platform Services Inquiry, 2020-2025</a> , the ACCC’s five-year inquiry into the supply of digital platform services.
<b>Featured Offer</b>	A product offer from a specific seller featured in the Buy-Box of a product page.

<b>Term</b>	<b>Description</b>
<b>First DPSI Interim Report</b>	The <a href="#">first interim report of the DPSI</a> on online private messaging, search and social media services, published on 23 October 2020.
<b>General online retail marketplaces</b>	Online platforms that facilitate the supply of general goods between suppliers and Australian consumers, excluding platforms which operate only as classified services.
<b>Hybrid marketplaces</b>	Online marketplaces that sell their own goods, in addition to facilitating the supply of third-party goods.
<b>IoT</b>	Internet of Things – the use of internet-connected technology in physical devices that have not traditionally featured such technology, such as cars, household appliances and speakers.
<b>Issues Paper</b>	The <a href="#">Issues Paper</a> for the fourth interim report of the DPSI, released on 22 July 2021.
<b>Online marketplaces</b>	General online retail marketplaces.
<b>OAIC</b>	Office of the Australian Information Commissioner
<b>Online classified ad platforms</b>	Platforms which facilitate the buying and selling of goods online, but which do not facilitate financial transactions on platform.
<b>Privacy Act</b>	<i>Privacy Act 1988</i> (Cth)
<b>Product listing</b>	A digital offer of a product for sale on an online marketplace.
<b>Product Safety Pledge</b>	A voluntary initiative developed by the ACCC in collaboration with some online marketplaces which aims to protect consumers from unsafe products through several key commitments.
<b>Report</b>	The ACCC's Digital Platform Services Inquiry's March 2022 Interim Report (this report).
<b>Retargeting</b>	Form of digital advertising an online marketplace targets advertisements to consumers on other websites and apps such as Facebook or Google based on their viewing history on the marketplace.
<b>Search Algorithms</b>	Algorithms which determine which results are shown for a certain search query, and how they are ranked.
<b>Second DPSI Interim Report</b>	The <a href="#">second interim report of the DPSI</a> on app online marketplaces, published 28 April 2021.
<b>Seller</b>	A supplier of goods on an online marketplace.
<b>Third-party seller</b>	A seller on an online marketplace other than the marketplace itself.
<b>Third DPSI Interim Report</b>	The third Interim Report of the DPSI on choice screens, published on 28 October 2021.

# 1. General online retail marketplaces – overview and growth in Australia

This chapter introduces the types of platforms examined by this Report and provides context for the ACCC's analysis:

- **Section 1.1** provides an overview to the types of online marketplaces examined in this Report
- **Section 1.2** outlines the structure of in this Report

## 1.1. Overview of general online retail marketplaces

### 1.1.1. What is a general online retail marketplace?

This Report looks at *general online retail marketplaces* (referred to as online marketplaces throughout this report). The online marketplaces considered in this Report are those that display a broad range of products to consumers, such as books, children's toys, clothing, sports goods, shoes and camping equipment. They also provide services, such as advertising, to sellers and services, such as subscriptions, to consumers.

Online marketplaces have the capacity for significant growth. Unlike physical retail stores, they are able to avoid the large fixed and ongoing costs associated with establishing and maintaining physical shops. Further, the cost to the marketplace of adding an additional consumer or seller is low.

This report is not a comprehensive review of all general online retail marketplaces in Australia focusing instead on the largest of these online marketplaces in Australia (Amazon Australia, Catch, eBay Australia and Kogan). However, we have considered other online marketplaces when looking at particular issues and some of the key issues raised with consumers and sellers' experiences on the four largest online marketplaces may apply more broadly to online marketplaces.

### 1.1.2. Online marketplaces are different to online retail, online classified ad platforms and specialised retail marketplaces

For the purposes of this Report, a distinction is drawn between online marketplaces and traditional bricks and mortar retailers that also operate online (such as Big W, David Jones, Kmart, Myer and Target). Online marketplaces facilitate transactions between third-party sellers and consumers on a common platform, while traditional bricks and mortar retailers act online as the seller. In this way, online marketplaces take an intermediary role between the consumer and seller, whereas traditional retailers that sell their own products online do not.

Online marketplaces are also distinguished from online classified ad platforms such as Gumtree or Facebook Marketplace. This is because online classified ad platforms do not allow transactions to be completed through the platform; in contrast, online marketplaces *require* transactions to be completed on their platform. Some online marketplaces may also prevent the seller and consumer from communicating outside of the platform.

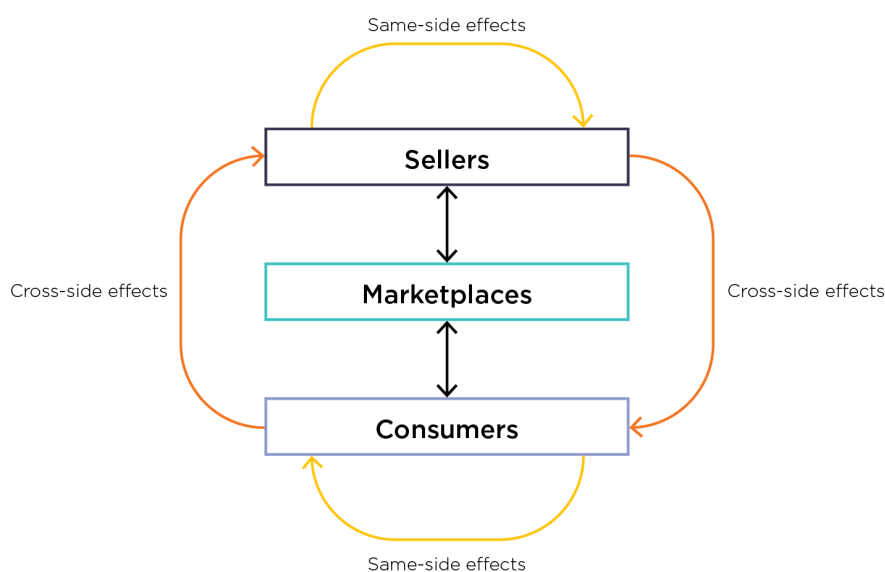
Finally, the ACCC notes that there are other online marketplaces that offer *specialised* retail products or services such as Temple & Webster and ASOS. Although specialised online marketplaces may raise similar issues to those identified in general online retail marketplaces, this Report focuses only on those online marketplaces that provide *general* online retail marketplace services, that is those marketplaces that sell a broad range of consumer products.

### 1.1.3. Characteristics of online marketplaces

Like other providers of digital platform services, online marketplaces are multi-sided platforms. That is, they connect and offer services to at least two distinct groups of users – consumers and sellers. Importantly, when these distinct groups use an online marketplace they generate externalities from which the online marketplaces create their value. This is fundamental to an online marketplace’s business model.

These externalities are known as network effects and are classified as either cross-side or same-side (see Figure 1.1). Cross-side network effects occur when an increase in the number of users on one side of a platform affects the value of the platforms to users on the other side. Same-side effects occur when an increase in the number of users one side of a platform increases the value of the platform to users of the same type. Like other externalities, network effects can be positive or negative.

**Figure 1.1: Cross and same-side network effects of an online marketplace**



There are different types of online marketplaces considered by this Report. Some online marketplaces purely facilitate trade between sellers and consumers on their platform, such as eBay. Others retail their own goods, in addition to facilitating trade between third-party sellers and consumers (referred to as ‘hybrid marketplaces’). These include Amazon, Catch and Kogan.

Online marketplaces also offer a number of different functions and services to sellers and consumers. For example, some online marketplaces enable consumers and sellers to communicate on their platform, and offer sellers on-platform advertising. This means that an online marketplace may be the supplier of multiple stages of an online transaction, including warehousing and delivery. Some online marketplaces also offer consumers subscriptions that provide consumers with free or express delivery. Table 1.1 indicates some of the different services and subscriptions offered by selected online marketplaces.

**Table 1.1: Comparison of service provided by selected online marketplaces and other retailers**

	Amazon Australia	Catch	eBay Australia	Kogan	Online classifieds (e.g.: Gum Tree and Facebook marketplace)	Physical retailer websites (Big W, Kmart)	Online-only retailer* (e.g., using Shopify)
<b>CONSUMER AND SELLER SERVICES</b>							
<b>On-platform communication<sup>32</sup></b>	Yes	Yes	Yes	Yes	Yes but also off-platform	Yes but also off-platform	Yes but also off-platform
<b>On-platform financial settlement<sup>33</sup></b>	Yes	Yes	Yes	Yes	No	Yes	Yes
<b>Third-party sellers can list</b>	Yes	Yes but curated	Yes	Yes but curated	Yes	No, must contract	Yes
<b>Third-party sellers are identifiable</b>	Yes	Yes	Yes	Yes	Yes	N/A	Yes
<b>Third-party sellers can control on-platform branding<sup>34</sup></b>	No	No	Yes (to a degree)	No	No	N/A	Yes
<b>Fulfilment for third-party sellers<sup>35</sup></b>	Yes	No	Yes	No	No	N/A	N/A
<b>Multi-channel fulfilment allowed<sup>36</sup></b>	Yes	N/A	Yes	N/A	N/A	N/A	N/A
<b>Advertise on-platform</b>	Yes	Yes	Yes	Yes	Yes	N/A	N/A
<b>Own delivery service</b>	Yes (selected metro)	No	No	Yes (selected metro)	No	No	No
<b>SUBSCRIPTION SERVICE</b>							
<b>Subscription service offered</b>	Amazon Prime	Catch Club	eBay Plus	Kogan First	No	No	No
<b>Free delivery</b>	Yes	Yes	No	Yes (selected products)	N/A	Yes (generally with minimum purchase)	Yes (generally with minimum purchase)
<b>Express delivery</b>	Yes	No	Yes (selected metro)	Yes (selected products)	N/A	Yes (additional cost)	Yes (additional cost)

<sup>32</sup> On-platform communication occurs when a platform requires the seller and consumer to communicate on the platform itself. This may involve restricting the ability for the seller and consumer to access contact details, thereby preventing the ability to communicate offline or on another communication service.

<sup>33</sup> On platform financial settlement occurs when a platform requires financial settlement between the transacting parties to occur on the platform, rather than allowing the parties to choose their own method for financial settlement (such as offline payment).

<sup>34</sup> Refers to the ability for sellers to control elements of branding on the platform. This may include the ability for a seller to set up their own webpage 'storefront' and branding.

<sup>35</sup> Fulfilment for third-party sellers refers to platforms providing storage and/or shipping capabilities on behalf of sellers that use the platform's marketplace.

<sup>36</sup> Multi-channel fulfilment allows a seller to sell products across a variety of channels (rather than just on the marketplace itself), which are then fulfilled by the marketplace platform. For example, a seller may sell a product on their own website, which is then shipped by the platform.



	Amazon Australia	Catch	eBay Australia	Kogan	Online classifieds (e.g.: Gum Tree and Facebook marketplace)	Physical retailer websites (Big W, Kmart)	Online-only retailer* (e.g., using Shopify)
Non-online marketplace offerings	Prime Video, Reading, Music and Gaming	N/A	N/A	N/A	N/A	N/A	N/A

Although there are common themes across online marketplaces, each marketplace in Australia has its own business models, strategies, and practices. This report draws out these differences as well as identifying common issues and concerns affecting Australian consumers and businesses using such online marketplaces.

#### 1.1.4. Online marketplaces are becoming increasingly important in Australia

Over the past few years online shopping in Australia has increased dramatically. Over 2020–21 it was estimated Australian consumers purchased more than \$52 billion online, an increase of almost 31% compared to 2019–20.<sup>37</sup>

A major factor driving this increase in online shopping has been the COVID-19 pandemic and associated lockdowns. A survey conducted by Monash University’s Australian Consumer and Retail Studies during September 2021 found that 84% of respondents made online purchases in the previous 3 months and 37% made online purchases on a weekly basis.<sup>38</sup> For many Australians, this represented an increase in online purchases in comparison to prior to the COVID-19 pandemic; 50% of Australian shoppers made more online purchases during the pandemic, and only 4% made less.<sup>39</sup>

The survey found that over the three months to September 2021, the main channel for online purchases by consumers was through the websites of bricks and mortar stores, through which 64% of Australians had made a purchase. This was followed by online marketplaces, with 50% of Australians having made a purchase through one over the same period.<sup>40</sup>

Australian consumer surveys across 2020 and 2021 showed that eBay, Catch, Amazon, and Kogan are the most used online marketplaces in Australia (see Figure 1.2). The most popular marketplace is eBay, with 60% of Australia consumers shopping on eBay in 2021. It is important to note eBay was one of the first online marketplaces established in Australia in 1999. This was followed by Amazon entering in 2017 and Catch and Kogan launching their online marketplaces in 2017 and 2019 respectively.

A number of traditional retailers with online stores have also launched their own marketplace offerings, allowing third-party sellers to list products on their websites. This includes retailers such as Myer, Bunnings, and Woolworths. The ACCC notes that the findings in this Report may have relevance to the online marketplaces of these businesses.

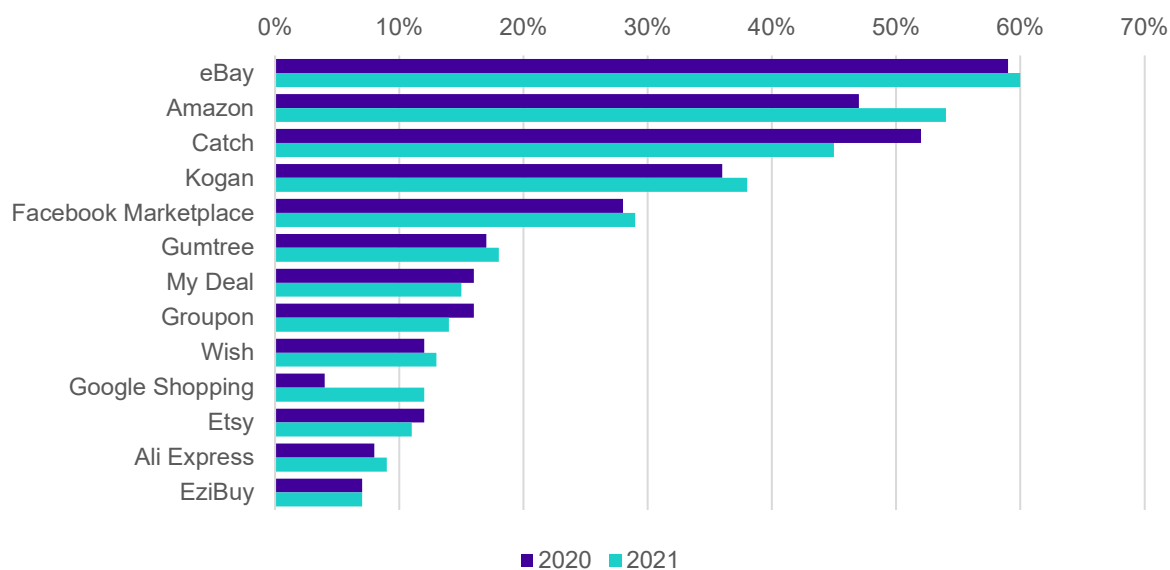
<sup>37</sup> Australia Post, [Inside Australian Online Shopping – eCommerce Update August 2021](#), 27 August 2021, p 4.

<sup>38</sup> Monash Business School, [Retail adaptation: how retail adapted during the COVID pandemic](#), 17 November 2021, accessed 20 January 2022.

<sup>39</sup> Monash Business School, [Retail adaptation: how retail adapted during the COVID pandemic](#), 17 November 2021, accessed 20 January 2022, p 6.

<sup>40</sup> Monash Business School, [Retail adaptation: how retail adapted during the COVID pandemic](#), 17 November 2021, accessed 20 January 2022, p 8.

**Figure 1.2: Australians' use of marketplaces in 2020 and 2021**



Note: Survey question asked was 'Which of the following online marketplaces have you shopped at in the last 12 months'. The ACCC notes that Power Retail Survey considered a broader range of platforms than the general online retail marketplaces considered by this report.

Source: Power Retail, [Top 3 online marketplaces revealed](#), Power Retail, 29 September 2021, accessed 18 November 2021.

In 2020–21, annual marketplace sales across Amazon Australia, Catch, eBay Australia and Kogan totalled \$8.4 billion (see figure 1.3). The largest marketplace by sales was eBay with \$5.3 billion in sales. This was followed by Amazon Australia (\$1.3 billion), Catch (\$946 million) and Kogan (\$865 million). As noted previously, online sales in 2020–21 were estimated at more than \$52 billion. eBay Australia's sales therefore equate to approximately 10% of online sales while Amazon's sales equate to approximately 2.5% of online sales and Catch and Kogan's sales each represent less than 2% of online sales.

By way of comparison, Figure 1.4 also shows the annual sales for selected major retailers (which includes both online and offline sales). Based on these figures, with the exception of eBay Australia, the major online marketplaces had much lower sales compared to major retailers, whereas eBay's annual sales were higher than Big W, David Jones, Myer, Officeworks, and Target.

However, the annual sales growth for the online marketplaces between 2019–20 and 2020–21 was markedly higher compared to the major retailers.<sup>41</sup>

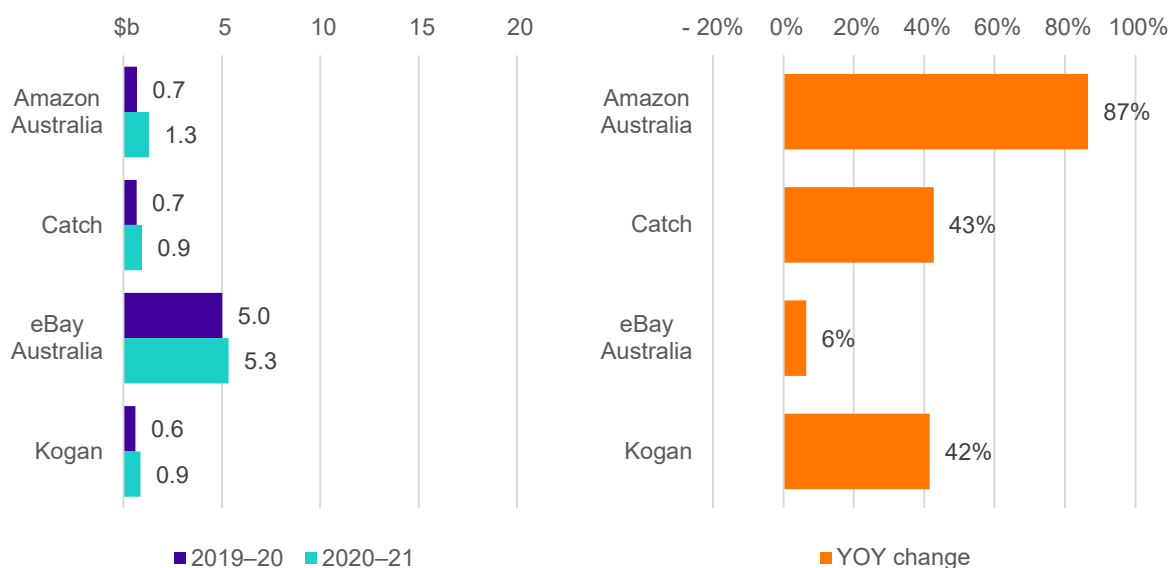
Combined annual sales for the 4 online marketplaces increased 21%.<sup>42</sup> Amazon Australia experienced the largest annual sales growth although its total sales are still significantly below those of eBay. Amazon had an 87% increase in the past two years. This was followed by Catch with 43% sales growth, Kogan with 42% sales growth and eBay with 6% sales growth. This compares to the 8 major retailers identified above, which had combined annual sales growth of 10%.<sup>43</sup> It is the significant growth of online marketplaces and their increasing role in the economy, that has led the ACCC to prepare this report.

<sup>41</sup> Information provided to the ACCC.

<sup>42</sup> Information provided to the ACCC.

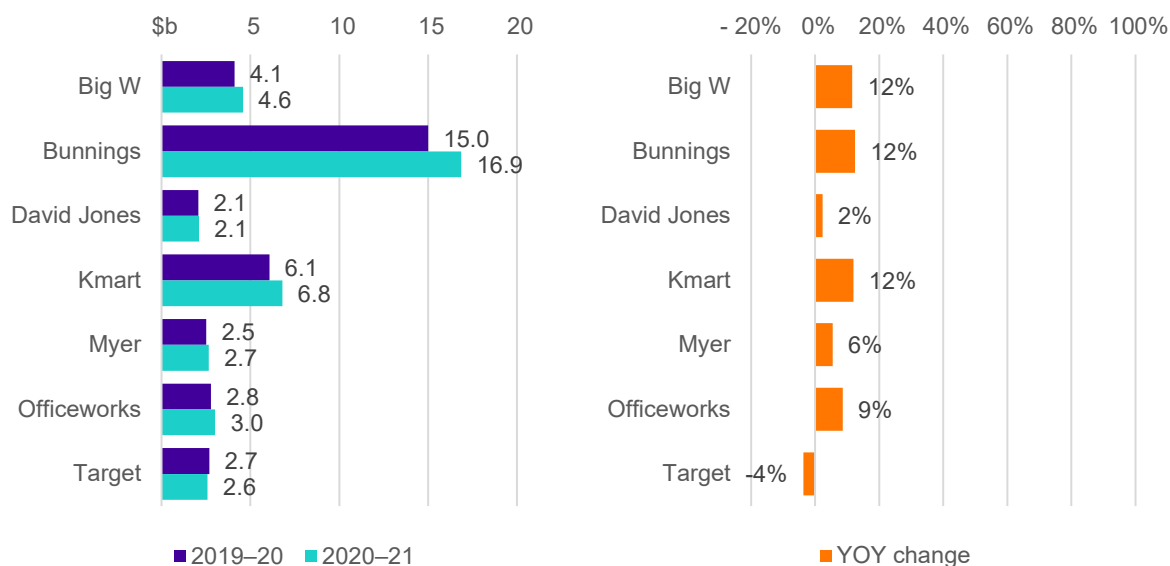
<sup>43</sup> Information provided to the ACCC.

**Figure 1.3: Annual sales of online marketplaces in 2019–20 and 2020–21 (\$ billion and per cent)**



Note: Some marketplaces are used by major retailers to sell goods. For Amazon Australia, Catch and Kogan, annual sales includes both first-party and third-party sales. Sales figures for marketplaces across 2019–20 and 2020–21 were impacted by the COVID-19 pandemic. YOY change means year-on-year percentage change.  
Source: Information provided to the ACCC

**Figure 1.4: Annual sales of selected major retailers in 2019–20 and 2020–21 (\$ billion and per cent)**



Note: These selected major retailers derive revenue from both offline and online sales channels. These figures represent the total of offline and online. Some of the selected major retailers use marketplaces to sell goods. For example, Myer has a store on eBay Australia. YOY change means year-on-year percentage change.  
Source: Myer, [Annual report 2021](#), Myer, 4 November 2021, accessed 10 February 2022, p 4; Wesfarmers, [2021 full-year results briefing presentation](#), Wesfarmers, 27 August 2021, accessed 10 February 2022, p 7.; Woolworths Group, [2021 annual report](#), Woolworths Group, 26 August 2021, accessed 10 February 2022, p 32; Woolworths Holdings ZA, [2021 annual results - final analyst presentation](#), Woolworths Holding ZA, 2 September 2021, accessed 10 February 2022, p 16.

## 1.2. Structure of this Report

The ACCC is aware of potential future risks if one or more online marketplaces achieves a degree of power that enables them to engage in anti-competitive conduct. One of the purposes of this Report is to ensure that Australia proactively monitors for such issues, to minimise the chance that such concerns will arise in the Australian context.

The Report also looks at what consumers and sellers on these online marketplaces are experiencing now.

The Report is structured as follows:

- **Chapter 2 – Consumers on online marketplaces:** this chapter examines what consumers experience when they go onto an online marketplace and follows a consumer's purchasing journey. It examines what happens when things go right and what can happen when things go wrong for consumers.
- **Chapter 3 – Sellers on general online retail marketplaces:** this chapter examines how sellers use and interact with online marketplaces. It also examines how certain online marketplaces compete with their third-party sellers when they are vertically integrated and offer their own products for sale on the marketplace.
- **Chapter 4 – The underlying mechanisms of online marketplaces:** this chapter assesses the key competitive constraints affecting the behaviour of online marketplaces, including the availability of substitutes and barriers to entry and expansion.

Finally, this Report considers potential future developments regarding the growth of online marketplaces, in light of recent trends and given the experiences of overseas markets. The epilogue of this report considers the issue of whether the sector could 'tip' and an Amazon or another marketplace attains a dominant or gatekeeper position.

## 2. The consumer experience on online marketplaces

### Key findings

- Online marketplaces assist consumers discover, choose and purchase products from a wide range of sellers.
- Online marketplaces offer a number of tools to help consumers find the products they are looking for, such as search functions. While these can dramatically reduce the costs (including in time) that consumers face in finding what they are looking for, marketplaces do not always provide consumers with adequate information on how these tools work and why certain products are presented more prominently than others.
- Consumers need to be sufficiently well informed about how marketplace algorithms work, otherwise there is a risk that consumers' purchasing decision will be adversely affected.
- While two-price comparison advertising is a useful tool to help consumers make a decision, the ACCC considers that online marketplaces have an important role to play in ensuring that any pricing offers are accurate and clear for consumers.
- Many consumers express strong preferences for limitations on the collection and use of their data. However, the data practices of online marketplaces often do not align with these preferences.
- Given their control and involvement in transactions, the ACCC considers that online marketplaces should provide a greater level of protection for consumers on their marketplace. A number of potential reforms to consumer protection laws already being considered could assist consumers, including the introduction of a general safety provision and a prohibition of unfair trading practices.
- Voluntary additional initiatives, such as the Product Safety Pledge, are an important addition to consumer protection in Australia.
- The ACCC considers that consumers on online marketplaces must have adequate access to avenues for redress from sellers for harmful products. The ACCC continues to support the introduction of minimum internal dispute resolution requirements and an ombudsman scheme, as recommended in the DPI Final Report and considers that such mechanisms should apply to online marketplaces, as well as the other digital platforms previously identified in ACCC reports.

This chapter examines the consumer experience on online marketplaces.

- **Section 2.1** looks at why consumers choose to use a general online retail marketplace to find a product
- **Section 2.2** considers what consumers see when they search for a product, why they see what they see, and how it happens
- **Section 2.3** discusses what occurs when consumers are choosing which product to buy
- **Section 2.4** sets out what happens when consumers buy a product and create an account
- **Section 2.5** sets out what happens when things go wrong and the options currently available to consumers can do to fix the problem.

While online marketplaces have different approaches, there are a number of common experiences for consumers, and potential and actual harms. To the extent that there are differences between the four online marketplaces considered in this Report, we have highlighted these.

Like other online retailers and bricks and mortar stores, online marketplaces want to provide seamless shopping experience to attract consumers to purchase again and to purchase more often.<sup>44</sup> A straightforward, frictionless shopping experience appears key to this.

A crucial input in providing this experience is utilising data from consumers to make decisions relating to products and service offerings. The collection and use of consumer data online marketplaces underpins online marketplaces processes and decisions, as well as the relationship between online marketplaces and their third-party sellers (discussed in Chapter 3).

## 2.1. Searching for a product on an online marketplace

The online marketplaces examined by the ACCC all provide a wide selection of products to consumers, recognising that with a wider variety of products, there is greater choice and likely greater value for consumers.

The flipside of this wide selection is that, for a consumer, trying to find and identify which product is best suited can be difficult.

Consumers are unlikely to manually sift through potentially thousands of products to compare and assess them. When confronted with overwhelming information, consumers tend to base their decision on relatively simple 'rules of thumb',<sup>45</sup> such as choosing a brand they have owned previously or one a friend has recommended. Further, while many online marketplaces offer search functions to assist consumers with their online shopping, studies have found that consumers are disproportionately attracted to links shown at the top of a search results page.<sup>46</sup>

Research suggests that, because consumers tend to make choices this way, even small changes to the environment can induce consumers to evaluate the choice in a particular way, and ultimately influence the choices they make regarding that information.<sup>47</sup>

As such, the decisions that online marketplaces make over the display of information on their websites can have a substantive effect on consumers' purchasing decisions.

The ACCC has previously examined the impact of user interface design that nudges consumers towards decisions within digital platform services and noted that in certain circumstances nudges can provide benefits to consumers.<sup>48</sup> However, the ACCC has concerns that user interfaces which encourage consumers to make choices that are not in their best interests can hinder consumers from exercising informed choice or making their preferred purchase.<sup>49</sup>

### 2.1.1. Marketplace mechanisms to help consumer search

Online marketplaces provide ways for consumers to lessen the burden of searching for the right product through:

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<sup>44</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 7-8.

<sup>45</sup> OECD, '[Use of Behavioural Insights in Consumer Policy](#)', *OECD Science, Technology and Industry Policy Papers*, No. 36, 2 February 2017.

<sup>46</sup> CMA, '[Online search: Consumer and firm behaviour A review of the existing literature](#)', 7 April 2017, pp 38-50.

<sup>47</sup> OECD, '[Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#)', Directorate for Science, Technology and Innovation, 12 April 2018, p 20; S King and R. Smith, The shaky economic foundations of consumer protection policy and law, *Competition & Consumer Law Journal*, 18:1 (2010), pp 71-88.

<sup>48</sup> For example, preinstalled and default apps bypass the need for consumers to discover apps on app online marketplaces, and consumers tend to expect devices to have 'out of the box': ACCC, [Digital Platforms Services Inquiry Second Interim Report](#), 28 April 2021, p 101; ACCC, [Digital Platform Services Inquiry Third Interim Report](#), October 2021, p 41.

<sup>49</sup> ACCC, [Digital Platform Services Inquiry Third Interim Report](#), October 2021, p 13; ACCC, [Digital Platforms Services Inquiry Second Interim Report](#), 28 April 2021, p 110; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 430-434.



- search functions
- labelling or badging products to highlight them to the consumer
- selecting and highlighting featured offers for a particular kind of product.

Many of these functions are underpinned by algorithms, which utilise the data collected by the marketplace.

Providing these tools can reduce the time and effort that a consumer needs to expend to find a product and enable them to better compare products against each other. However, such tools can influence how a consumer makes a decision regarding which products they view, and therefore may affect which products consumers purchase.

### **Search functions**

Many online marketplaces provide a search function where consumers can input keywords or queries related to the product they are looking for, which returns a list of products in response to the inputted keyword or query. Search functions on online marketplaces order products in terms of relevance by default (where relevance is determined by the marketplace), however consumers may also filter or order results based on factors such as price or delivery times. Search results may also include sponsored results or advertisements that typically appear in a prominent location such as above the organic search results.

Search functions can dramatically reduce the effort required from consumers to find what they are looking for. However, small changes to a consumer's decision-making environment can have a material influence on their actions.

Studies have found that consumers are disproportionately attracted to links shown at the top of a search results page, and that they click on top links not only because of their higher relevance but also because they seem to have an inherent bias for links shown higher up the results page.<sup>50</sup> While the results from these studies were not conducted on search results on online marketplaces, they raise the possibility that consumers using online marketplaces' search functions could also have an inherent bias for links shown higher up the results page. Further, information available to the ACCC suggest that when consumers search on an online marketplace, as high as 45 to 50% of product page views were for listings that appeared in the first 8 search results in the first page.<sup>51</sup>

As such, it is important to understand the decisions made by online marketplaces in determining how they present search results to consumers, particularly the ordering of the results.

Given the relative importance of the search functions to consumers' experience, the ACCC has reviewed a limited number of algorithms powering the search functions of key online marketplaces. The ACCC found that for the most part online marketplaces algorithms produced results based on characteristics that are likely to be relevant to the consumer's query, taking into account data such as product titles, descriptions, and keywords. The order of results displayed generally prioritises products that consumers are most likely to value, such as products that have been popular with other consumers.<sup>52</sup>

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<sup>50</sup> CMA, '[Online search: Consumer and firm behaviour A review of the existing literature](#)', 7 April 2017, pp 38-50

<sup>51</sup> Information provided to the ACCC.

<sup>52</sup> A review of publicly available information suggested that the parameters used by key online marketplaces in Australia to determine relevance and order of results for organic search included: product title, product price, product description, buyer's location, buyer's browsing history, product location, product availability, product delivery speed, product shipping costs, customer actions (for example, how frequently an item was bought), whether an online marketplace thinks item will be of interest (for example, new item), whether item is sold by marketplace (or a first-party product), seller ratings (for example, from user feedback, defect rates), seller compliance with marketplace terms. Amazon Australia, '[Optimise listings for search](#)', accessed 16 March 2022; eBay Australia, '[Optimising your listings for Best Match](#)', accessed 16 March 2022; and Kogan, '[Kogan.com Marketplace](#)', accessed 16 March 2022.

However, the ACCC also found that some online marketplaces' search algorithms took into account characteristics such as whether:

- a product is sold by the marketplace's related retail arm
- a product is exclusive to the marketplace and/or
- there is increased revenue and profit earned by the marketplace from their sale.

Some algorithms also took into account discounts and delivery costs, which include discounts/delivery perks that are only available to consumers who were members of the online marketplaces' subscription services. These were taken into account whether or not a consumer was a member.<sup>53</sup>

It is important for consumers to know whether products are being ranked by relevance or whether there is any other preference being overlaid in the search results presented by the marketplace.

Which products are displayed in search results also has a significant impact on sellers' ability to access consumers with their products. The effect of marketplace search algorithms on marketplace sellers is discussed further in Chapter 3.

### ***Badging or labelling***

Badges or labels are markers on a product that indicate the marketplace has given it a special classification. Examples include 'Amazon's Choice' on Amazon Australia or 'Kogan's Choice' on Kogan. The criteria for badging products vary from marketplace to marketplace. The ACCC has found online marketplaces' badges appear, for the most part, to be used to highlight listings consumers will likely value, such as listings with a high user rating, competitive prices, fast delivery times, and/or are sold by highest rated sellers.<sup>54</sup>

There is also research suggesting that these badges may make consumers more likely to purchase a product. eBay stated that eBay Plus badged listings receive an increase in product page views.<sup>55</sup> A 2018 study also found that having an Amazon's Choice badge increased product conversions (or sales) by 25%.<sup>56</sup> In a 2020 study of United Kingdom shoppers by consumer advocate 'Which?', 45% of the 2,042 responses said they were more likely to purchase a product from Amazon with the Amazon's Choice badge than without.<sup>57</sup>

The ACCC notes that some online marketplaces do make available information to better inform consumers about such decisions in some circumstances. For example, Amazon does provide information for consumers on what Amazon's Choice logo means, provided the consumer clicks through/hovers over the Amazon's Choice logo on its desktop site, or clicks onto the logo on the Android app. However, the same information does not appear to be provided to Amazon's users on iOS. Other online marketplaces that attach 'badges' to product listings also do not appear to provide consumers with clear information on what the badge represents.

Accordingly, the ACCC considers that more could be done by online marketplaces to inform consumers about how labels are assigned to help assist consumers in making an informed purchasing decision.

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<sup>53</sup> Information provided to the ACCC.

<sup>54</sup> Amazon [Amazon's Choice - Frequently Asked Questions](#), accessed 25 January 2022; Kogan, [Kogan's Choice Products](#), accessed 21 February 2022; eBay, [eBay Plus for sellers](#), accessed 7 March 2022.

<sup>55</sup> eBay, [eBay Fulfilment by Orange Connex](#), accessed 2 March 2022.

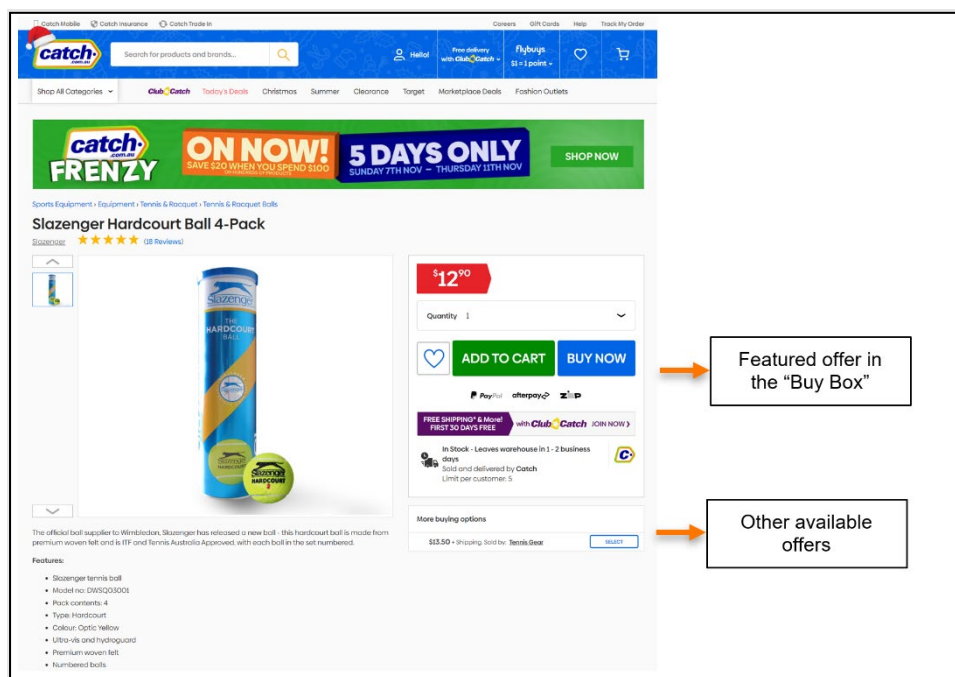
<sup>56</sup> M Waters, ['They don't have as much value': How Amazon's Choice lost some of its lustre](#), *Modern Retail*, 3 February 2021, accessed 11 February 2022.

<sup>57</sup> E Simmonds, [Amazon 'betraying trust' of millions of consumers with flawed Amazon's Choice endorsement](#), *Which?*, 6 February 2020, accessed 11 February 2022.

## Featuring offers

Some online marketplaces provide a single product page when the same product is listed by multiple sellers. In this case, one seller's offer is selected to feature on the product page, with competing offers by other sellers displayed in less prominent positions. This feature is typically called a 'Buy Box' (see Figure 2.1).

**Figure 2.1: Example of 'buy box' on Catch marketplace**



Source: Screenshot taken of Catch website on 15 December 2021

Similar to badging, featuring of products can be beneficial to consumers, particularly in instances where the featured product selected is the best offer available for that product.

The ACCC has conducted a desk top review as part of this Report to analyse which products tend to appear in the Buy Box on Catch and Amazon Australia. The ACCC observed that in most instances the products displayed in the Buy Box presented the best offer, determined according to the price of the product, the delivery cost and the rating.

However, the ACCC notes, as discussed in more detail in Chapter 3, that it may not always be apparent to consumers which factors determine the results shown and whether there are arrangements with specific sellers or preferences for an online marketplace's own products which influence the results displayed. The ACCC considers that consumers will be assisted by online marketplaces being more transparent about why products are featured and what factors are taken into account.

The ACCC also considers that consumers most benefit from search tools that show those products most relevant to the consumer's search, and not displaying products for reasons other than relevance. 'Featuring' of products represents a significant nudge to consumers to buy the featured product, which means other options are minimised in prominence. Online marketplaces should therefore also consider how other (non-featured) available offers are presented to minimise the potential to adversely affect a consumer's decision.

The effect on sellers of marketplace algorithms relating to featuring products is discussed further in Chapter 3.

## 2.2. Choosing a product

When choosing a product, consumers often consider a range of information to assess whether the product best suits their needs and preferences. This can be information on the product's physical characteristics and features, indicators of product quality and the price.

This section examines two specific features of online shopping that which are likely to influence consumer choice beyond the features of the product: reviews and two-part price comparison.

### 2.2.1. Reviews

When consumers buy a physical product online, it is often impractical or unfeasible to examine it in person before making the purchase. Consequently, they can rely on other ways to assess the quality and trustworthiness of online sellers and their products. One key factor relied upon by consumers are the views and opinions of other consumers in the form of online reviews.

Truthful online reviews are beneficial for consumers in many ways. They provide an important source of information for consumers to base purchasing decisions on and can be disseminated quickly,<sup>58</sup> and to a wide audience.<sup>59</sup>

Reviews can also be a way of regulating an online marketplace and the quality of goods sold, by providing a disincentive for sellers to sell substandard products,<sup>60</sup> and also enabling feedback through which sellers can improve the quality of products.<sup>61</sup>

However, similar to other online businesses there is the risk that reviews on online marketplaces can be manipulated. This has implications for both business users and consumers, as well as the online marketplaces themselves. The potential harms from review manipulation are discussed in further detail in Chapter 3.

### 2.2.2. Two-price comparison advertising

Many businesses, including online marketplaces, display two prices for a single product to consumers: the actual price that will be charged to the consumer and a comparison price ('two-price comparison advertising'). The comparison price is often higher, and it sometimes refers to a recommended retail price or a historical price. In the case of online marketplaces, it is the seller, not the marketplace, that sets the prices of products sold to consumers.

The form of two-price comparison advertising varies across general online marketplaces, and some online marketplaces allow for sellers to select different forms. Below are examples of two-price comparison advertising displayed on 4 online marketplaces.

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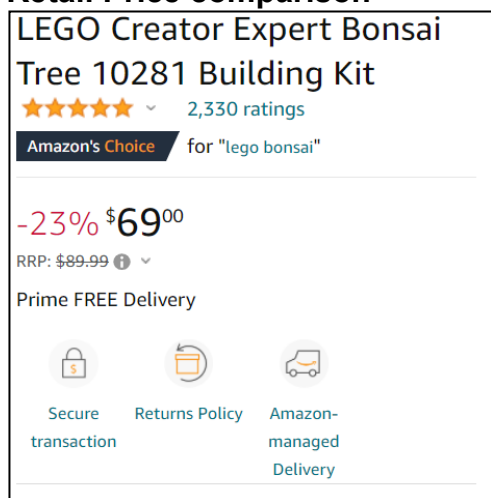
<sup>58</sup> E Manes & A Tchetik, [The role of electronic word of mouth in reducing information asymmetry: An empirical investigation of online hotel booking](#), *Journal of Business Research*, 85 (2018) p 185.

<sup>59</sup> J Salminen, [Creating and detecting fake reviews of online products](#), *Journal of Retailing and Consumer Services*, 64 (2022), p 2.

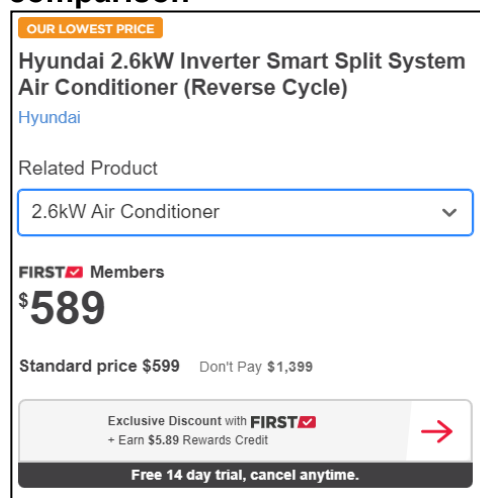
<sup>60</sup> J Malbon, [Taking Fake Online Consumer Reviews Seriously](#), *Journal of Consumer Policy* 36 (2013), p 139.

<sup>61</sup> J Salminen, [Creating and detecting fake reviews of online products](#), *Journal of Retailing and Consumer Services*, 64 (2022), p 2.

**Figure 2.2: Amazon – Recommended Retail Price comparison<sup>62</sup>**



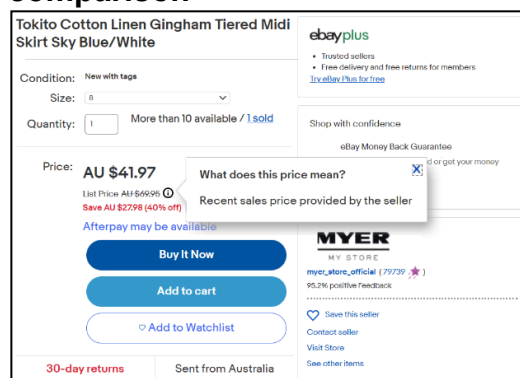
**Figure 2.3: Kogan – Don't Pay price comparison<sup>63</sup>**



**Figure 2.4: Catch – was/now price comparison<sup>64</sup>**



**Figure 2.5: eBay – was/now price comparison<sup>65</sup>**



As part of the analysis undertaken for this report, the ACCC reviewed the way in which two-price comparison advertising is used on 8 general online retail marketplaces.<sup>66</sup>

The ACCC observed that different online marketplaces have different policies regarding the use of two-price comparison advertising, with the degree to which they inform consumers on how they operate varying.

On online marketplaces such as Amazon Australia, Catch and Kogan comparison prices are generally described clearly. However, on other online marketplaces, more can be done to ensure consumers are informed about what the comparison prices mean.

Some online marketplaces provide explicit explanation on how recommended retail prices (RRP) is used on their platform. For example, Catch and Kogan inform consumers that recommended retail prices are set by suppliers and manufacturers and that it is not necessarily the case that the products have been sold at the RRP on Catch and Kogan.

<sup>62</sup> Screenshot of Amazon Australia website taken on 31 January 2022.

<sup>63</sup> Screenshot of Kogan website taken on 29 January 2022.

<sup>64</sup> Screenshot of Catch website taken on 29 January 2022.

<sup>65</sup> Screenshot of eBay website taken on 30 January 2022.

<sup>66</sup> Amazon, eBay, Catch, Kogan, AliExpress, MyDeal, Bunnings, and Fishpond.

Consumers can be misled by comparison pricing if the savings represented do not reflect the actual savings that will be realised because, for example:

- products were not sold at the ‘was’ price for a reasonable period before the discounted price was applied
- sellers were using different RRP’s for the same products.

Misleading two-price comparison advertising is against the law in Australia, and instances of such misleading (or potentially misleading) pricing has been the subject of proceedings both in Australia and overseas.<sup>67</sup>

### **Online marketplaces’ roles in seller pricing representations**

The ACCC notes that displayed prices for products are largely determined by sellers. While, as noted above, online marketplaces may set parameters for pricing, they do not tend to review the final price or offer displayed to consumers.<sup>68</sup> The ACCC considers however that given their role as interface and consumers’ reliance on the marketplace, there is an important role for the marketplace to play in ensuring that pricing displayed to consumers is accurate.

At least some online marketplaces – including Amazon Australia, eBay Australia and Kogan – have policies in place governing the use of some two-price comparison advertising.<sup>69</sup> For example, Amazon’s policy requires that sellers use the lowest previous price at which they sold their product within the past 30 days as their comparison price, and that RRP’s used are up to date. The ACCC considers this a positive step on the part of those online marketplaces, and encourages consistent monitoring and enforcement of these policies.

## **2.3. Buying the product**

A key objective of online marketplaces is to make the purchase experience as easy and straightforward for consumers as possible. This includes making the sale process as quick and streamlined as possible.

This streamlining may mean consumers do not engage with information important to their choice.

### **2.3.1. Data collection and use policies**

As a condition of using an online marketplace, the consumer must agree to the marketplace’s terms and conditions, including their data collection and use practices.

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<sup>67</sup> See, for example: ACCC v Kogan Australia Pty Ltd (No 2) [2020] FCA 1751; County of In the United States, district attorneys from the counties of Santa Clara, Alameda, Santa Cruz, and three other California counties filed suit against Amazon Inc in March 2021 for using comparison prices which were either misleading or had the tendency and capacity to mislead in violation of California’s Deceptive Pricing Statute. Amazon settled the suit filed by the California district attorneys and resolved to improve the description of its reference prices so consumers can better understand them.

<sup>68</sup> However, some online marketplaces may monitor prices set by sellers and may take action if they consider them to be harming customer experience. For example, under Amazon’s Marketplace Fair Pricing Policy, if Amazon considers that a price set by a third-party seller for a product harms customer trust, they may remove the product’s Buy Box, remove the offer, suspend the ship option, or in serious or repeated cases, suspend or terminate selling privileges. Amazon Australia, [Amazon Marketplace Fair Pricing Policy](#), accessed 8 March 2022. Other online marketplaces such as eBay also have policies against price gouging and requiring sellers to set reasonable prices for items that are considered essential. eBay may also take action against sellers not complying with this policy such as by cancelling the listing, hiding them from search results, suspending seller accounts, and more. eBay Australia, [Price gouging policy](#), accessed 8 March 2022.

<sup>69</sup> See, for example: Amazon, [Amazon Policy on Reference Prices](#), Amazon Seller Central, accessed 17 December 2021, Kogan, [Fair Pricing Policy](#), accessed 8 March 2022; eBay.



## **Online marketplaces collect significant amounts of consumer data**

While a consumer may expect that an online marketplace collects their data when they sign up to the marketplace or amend shipping or payment details, online marketplaces often also collect data about the consumer's ongoing engagement via external parties.

The specific data collected across online marketplaces varies, but generally falls under the categories outlined in Box 2.1.

### **Box 2.1: The data collected when a consumer uses an online marketplace**

#### *Volunteered data*

Volunteered data refers to data that is intentionally shared by a consumer or seller in the course of the marketplace facilitating online transactions. It includes:

- data voluntarily provided by consumers when creating an order (order details, contact details, shipping and payment details, consumer reviews)
- basic personal information volunteered by consumers including age, birthday or gender
- loyalty or subscription information volunteered by consumers
- data voluntarily provided by sellers when listing products online (product listing details and specifications, contact and payment details for seller).

#### *General contextual data*

General contextual data refers to data on the overall context in which a consumer is making online transactions. This data may be observed from a consumer's engagement or acquired from third parties. This data can be used to develop and improve can assist with informing search and product recommendation algorithms, or to facilitate targeted advertising for the consumer. It includes:

- consumer purchase history information (which can assist inventory decisions and connecting consumers to items they have previously purchased)
- data sourced from third parties – including credit rating data, or intelligence on whether a consumer may be engaged in money-laundering activity.

#### *Behavioural and engagement data*

These data sets are often derived as a result of processing multiple data sets. They primarily assist online marketplaces with informing search and product recommendation algorithms and facilitating targeted advertising. It includes

- user behavioural data, based on engagement with an online marketplace (including page and search views, banner clicks, Buy Box engagement, mouse tracking and slide/hover gestures)
- user browsing data: IP address data, geolocation data, first party tracking data<sup>70</sup>
- data from connected smart devices (for example, voice recordings from Amazon Alexa)
- social media data (for example, where a consumer consents to the linking of an online marketplace account with a social media (for example, Gmail or Facebook) account, online marketplaces may be able to obtain similar consumer behavioural data from another social media platform)

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<sup>70</sup> While many digital platforms including Facebook and Google have collected data on an individuals' interaction with external websites (for example, collect data using third-party cookies), most online marketplaces predominantly collect data on consumers' engagement on their own marketplace (that is, through first party tracker devices such as first party cookies).



- user profiles and inferred demographic data: Online marketplaces may combine any number of data sets to create an anonymised profile understanding a consumer's age, interests and infer relevant demographic information (for example, likely socio-economic status, religious or political views and so on).

### **Online marketplaces collect data beyond what is necessary to fulfil an order to better target products and services to consumers**

Online marketplaces may use data to inform search and product recommendation algorithms to 'personalise' results based on known, or inferred, consumer preferences. They may also use and share consumer data with third parties to serve targeted advertising to consumers. The data used for these activities can include data that may have been collected in the process of fulfilling an order, such as a consumer's purchase history.

Demographic data such as age and gender can also be used by online marketplaces to provide initial product recommendations to a new consumer. By identifying products purchased by pools of similar consumers, products can be recommended to a new consumer even though they don't have a purchase history or previous engagement with the platform.<sup>71</sup> Demographic data from third-party sources can be used to enrich in-house data collected by the marketplace.<sup>72</sup>

Consumer data can also be used to tailor search algorithm results to better personalise the products shown to a consumer. Based on information provided to the ACCC, an online marketplace may use behavioural and engagement data to influence the order of products returned in a consumer's search query.<sup>73</sup>

Online marketplaces have access to significant amounts of rich data on consumers and sellers which can enable them to make product inventory decisions based on data-driven demand forecasts. Detailed consumer behavioural and engagement data can prove instrumental in identifying new products and services consumers may engage with,<sup>74</sup> while real-time and historical purchase data may assist online marketplaces promote best-selling items during anticipated periods of high sales volume.<sup>75</sup>

Online marketplaces can create profiles for individual consumers using data inputs (such as browsing and search history on online marketplaces, engagement with online marketplaces and associated online advertising, and demographic information such as their age and gender).<sup>76</sup> If consumers return to the marketplace, online marketplaces can consolidate the data collected upon each visit, increasing the data attached to a consumer's profile.<sup>77</sup> This refined pool of data can be used to infer likely preferences for particular goods, and feed product recommendation algorithms to infer likely preferences for particular goods, increasing the chance of relevance of products shown to consumers (see Figure 2.6).

<sup>71</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, pp 33-34.

<sup>72</sup> Information provided to the ACCC. See also: Anna Kayfitz, '[3 ways customer data drives ecommerce conversions](#)', Practical ecommerce, 27 March 2018.

<sup>73</sup> Information provided to the ACCC.

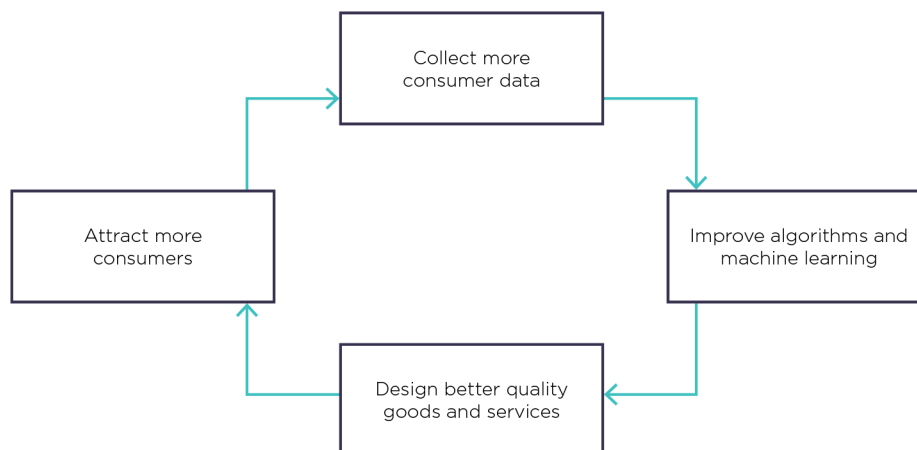
<sup>74</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, p 32

<sup>75</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, pp 31.

<sup>76</sup> G Linden, B Smith and J York, [Amazon.com Recommendations: Item-to-Item Collaborative Filtering](#), *IEEE Internet Computing* 7:1 (2003), p 1.

<sup>77</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, pp 34,36.

**Figure 2.6: The effect of more data on algorithms**



Online marketplaces can also use this data to engage in retargeting – a form of digital advertising. That is, when an online marketplace targets advertisements to consumers on other websites and apps such as Facebook or Google based on their viewing history on the marketplace. Retargeting aims to capture the consumer’s interest in the product or service and potentially close a sale.<sup>78</sup> The types of data used for retargeting include a consumer’s browsing history as well as behavioural and engagement data, which is shared with the digital advertising providers that the marketplace uses.<sup>79</sup> Online marketplaces can facilitate the sharing of consumer data by allowing an advertising provider to place a cookie, pixel or tracking technology on the marketplace that cultivates a unique identifier for a consumer and tracks their browsing and engagement on other websites.<sup>80</sup>

The data collection policies of online marketplaces also enable them to collect or purchase data from third parties including data brokers and digital advertising providers and combine it with their first party data. In some instances, the data collection policies also allow a third-party to collect data held by an online marketplace and combine it with their own third-party data:

- eBay’s User Privacy Notice states that eBay collects consumer data from data brokers and data providers (including demographic and online advertising related data), and that it may combine consumer data it collects with data from external sites.<sup>81</sup>
- By contrast, the AliExpress Privacy Policy states that third-party advertising publishers are permitted to combine consumer data collected by AliExpress (through tracking technology) with any additional data held by the advertising publisher.<sup>82</sup>

The exchange of consumer data with external parties, such as advertising providers, can increase the overall pool of consumer data held by an online marketplace and allow it to ‘build a more detailed profile on the consumer’ for advertising purposes.’<sup>83</sup> Where an online marketplace allows third-party sellers to advertise on the platform, this consumer data assists the seller to bid for prominence using sponsored search terms that would most effectively capture the target audience.<sup>84</sup>

<sup>78</sup> V Blankenship, [‘Ecommerce Retargeting 101: How to Drive Sales with Paid Ads’](#), Veeqo, 11 April 2019, accessed 1 February 2022.

<sup>79</sup> ACCC, [Digital Advertising Services Inquiry Interim Report](#), 28 January 2021, p 50 Table 1.2.

<sup>80</sup> ACCC, [Digital Advertising Services Inquiry Interim Report](#), 28 January 2021, p 50 Table 1.2.

<sup>81</sup> eBay, [eBay User Privacy Notice](#), 23 December 2021, accessed 1 February 2022, section 4.4.

<sup>82</sup> AliExpress, [AliExpress.com Privacy Policy](#), 1 July 2021, accessed 1 February 2022, section C.

<sup>83</sup> Dr K Kemp, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 16 August 2021, pp 4-5.

<sup>84</sup> M Graham, [Amazon is turning advertising into its next huge business – here’s how](#), CNBC, 17 July 2019, accessed 3 December 2021; eBay Ads, [Turn insights into Auction](#), accessed 3 January 2022.

External parties also benefit from obtaining more data on consumers and being able to track their browsing history through an online marketplace.

Online marketplaces can also use consumer data for other purposes. Previous analysis undertaken by the ACCC found that platforms can obtain user data through their role in providing advertising and other services to websites and mobile applications. In particular, the ACCC has previously found Amazon's third-party scripts (which are embedded into websites to provide certain functionality, such as for analytics or advertising purposes) were present on nearly 30% of the top 1000 popular websites in Australia.<sup>85</sup> Amazon also has a demand-side platform (DSP) which allows third-party advertisers to identify consumer groups or audiences on Amazon, and then use the Amazon DSP to target ads to the consumer group on either Amazon websites or third-party websites.<sup>86</sup> As noted in the Ad Tech report, Amazon's DSP has a substantially smaller market presence than Google's DSP services (which accounted for approximately 60–70% of the expenditure on DSP services in Australia in 2019).<sup>87</sup>

### **Consumer preferences in data collection**

The ACCC considers that the extent of data collection, use and disclosure by digital platforms, including online marketplaces, as described above often does not align with consumer preferences regarding data collection. The Office of the Australian Information Commissioner's (OAIC) recent *Australian Community Attitudes to Privacy Survey 2020* found that at least half of Australians are uncomfortable (and 3 in 10 very uncomfortable) with digital platforms and other online businesses tracking their location, keeping databases of information on what they have said and done online, and targeting advertising based on what they have said and done online (see Figure 2.7).<sup>88</sup>

This survey also found that 'commercial profiling activities generally drive higher levels of discomfort', with 55% of consumers uncomfortable with digital platforms creating consumer profiles based on data.<sup>89</sup>

A 2020 Data and Technology Consumer Survey undertaken by the Consumer Policy Research Centre also highlighted consumers concerns with platform data collection and use, with:

- 94% of consumers indicating that they did not feel comfortable with how their personal information is collected' by platform including online marketplaces
- 92% of consumers agreeing that companies should only collect information they need for providing their product/service

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<sup>85</sup> ACCC, [Digital Platform Services Inquiry First Interim Report](#), 28 October 2029, p 4. Third-party scripts are offered by developers and organisations, and can be embedded into websites to provide certain functionality, such as for analytics or advertising purposes.

<sup>86</sup> M Graham, [Amazon is turning advertising into its next huge business – here's how](#), *CNBC*, 17 July 2019, accessed 3 December 2021; eBay Ads, [Turn insights into Auction](#), accessed 3 January 2022.

<sup>87</sup> ACCC, [Digital Advertising Services Inquiry Interim Report](#), 28 January 2021, p 13.

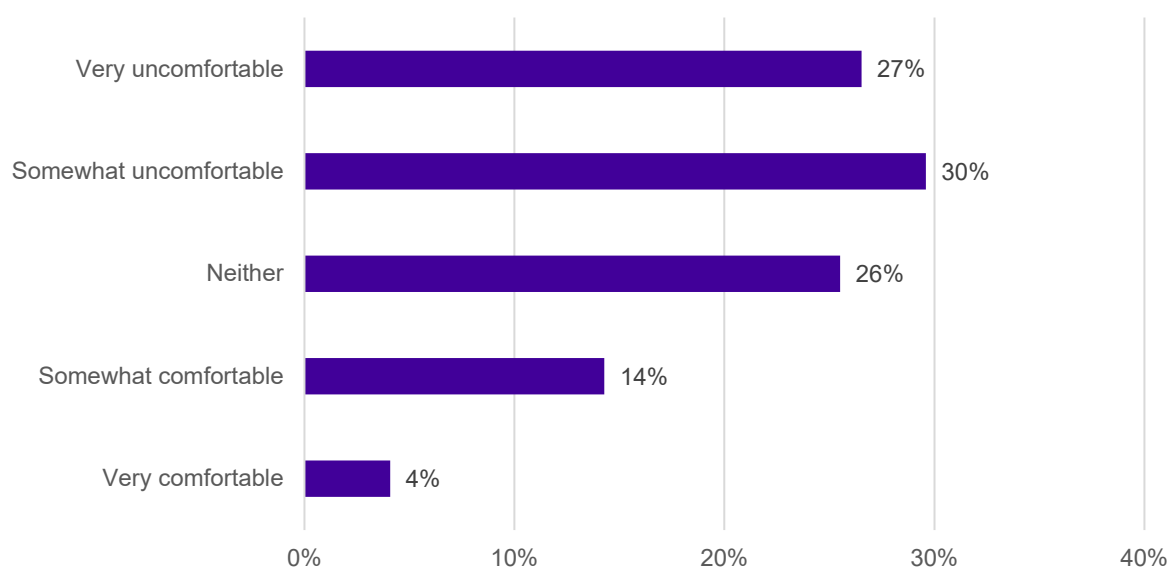
<sup>88</sup> OAIC, [Australian Community Attitudes to Privacy Survey 2020](#), 28 September 2020, p 29. Figure 13: Comfort with digital platforms' data practices. 'At least half of Australians are uncomfortable (and 3 in 10 very uncomfortable) with digital platforms and other online businesses like social media sites:

- tracking their location (62% uncomfortable, including 37% very uncomfortable),
- keeping databases of information on what they have said and done online (62% uncomfortable, including 36% very uncomfortable), and
- targeting advertising based on what they have said and done online (58% uncomfortable, including 31% very uncomfortable).'

<sup>89</sup> OAIC, [Australian Community Attitudes to Privacy Survey 2020](#), 28 September 2020, p 32.

- 60% of consumers considering it very or somewhat unacceptable for their online behaviour to be monitored for targeted ads and offers.<sup>90</sup>

**Figure 2.7: Consumer comfort with digital platforms**



Note: 2% of survey respondents did not provide a response to this question; these have been excluded from the visualisation. Source: OAIC, [Australian Community Attitudes to Privacy Survey 2020](#), 28 September 2020, p 32.

In its submission to the ACCC, the Australia Institute noted concerns about the extent of data collected by online marketplaces.<sup>91</sup>

### Box 2.2: Consumer harms from data collection

The ACCC has examined the potential and real harms that arise from increased tracking and profiling of consumers as part of its DPI Final Report and DPSI interim reports.<sup>92</sup>

Based on the data collection practices of online marketplaces, the ACCC considers that the following potential consumer harms may arise:

- Decreased consumer welfare from decreased privacy, particularly if the targeted advertising activities of online marketplaces leads to unsolicited marketing, data breach, online identity fraud or other scams or the loss of personal information.
- Risks to consumers from increased profiling in circumstances where consumer profiles may allow an online marketplace or third-party advertisers to influence the behaviour of particular groups or demographics.
- Risks to consumers from discrimination and exclusion particularly if consumer profiles allow an online marketplace, ad tech provider, or third-party advertiser to segment and potentially discriminate against particular consumer groups. According to the Consumer Policy Research Centre, 83% of Australian consumers would consider it unacceptable for data relating to their payment behaviour to be used to assess their eligibility for essential products and services.<sup>93</sup>

<sup>90</sup> Consumer Policy Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 18 August 2021, p 4, citing Consumer Policy Research Centre, *Consumer Policy Research Centre 2020 Data and Technology Consumer Survey*, December 2020.

<sup>91</sup> The Australia Institute, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 19 August 2021, p 3.

<sup>92</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, s 7.9.1.

<sup>93</sup> Consumer Policy Research Centre, [The Digital Checkout](#), 16 December 2021, p 18.

## **Consumers are not being given the opportunity to make a fully informed choice about how their data is collected and used**

The ACCC recognises that consumers have different levels of comfort regarding the collection and use of their data. Regardless of the level of comfort, it is important that consumers are fully informed of and fully understand the data that will be collected when they use an online marketplace. It is also important for consumers to have control over the type and extent of data collected by online marketplaces. Without these, consumers will not be able to make a fully informed decision about the collection of their data that aligns with their own preferences.<sup>94</sup>

As part of this review, the ACCC reviewed how certain online marketplaces in Australia disclose their data practices and seek consent from consumers regarding their terms and conditions and privacy policies before being able to sign-up or make a purchase.<sup>95</sup> This review found that none of the online marketplaces reviewed, except for Wish.com, proactively presented terms and conditions and privacy policies to consumers throughout the purchasing journey.

The ACCC also reviewed the terms and conditions and privacy policies offered by four key online marketplaces in Australia.<sup>96</sup> The ACCC found several elements of online marketplaces' presentation of privacy policies and terms that may prevent consumers from selecting their preferred data collection settings (see Table 2.1).

**Table 2.1: Terms and conditions offered by key online marketplaces**

<b>Term or condition</b>	<b>Example of term's use on an online marketplace</b>
<b>Unclear terms</b>	<p><b>Kogan Privacy Policy<sup>97</sup></b></p> <ul style="list-style-type: none"> <li>It is unclear from section 3 of 'Collection', Kogan's Privacy Policy whether Kogan only collects personal information from consumers directly or whether it also collects personal information about consumers from third parties.</li> </ul> <p><i>'Kogan will only collect personal information about you directly from you. Kogan may collect your personal information from reputable third-party lead generation sources....'</i></p>
<b>Take-it-or-leave-it terms regarding data collection</b>	<p><b>Amazon Australia Privacy Notice<sup>98</sup></b></p> <p><i>'...You can choose not to provide certain information, but then you might not be able to take advantage of many of our Amazon Services.'</i></p> <p><b>Kogan Privacy Policy</b></p> <ul style="list-style-type: none"> <li>'If you use a pseudonym when dealing with us or you do not provide identifiable information Kogan may not be able to provide you with any or all of our services as requested. If you wish to remain anonymous when you use our website do not sign into it or provide any information that might identify you.'</li> </ul>

<sup>94</sup> OECD, [Consumer Data Rights and Competition – Background Note](#), 10-12 June 2020, p 36.

<sup>95</sup> Amazon Australia, eBay, Catch, Kogan, AliExpress, and Wish.com.

<sup>96</sup> Amazon, Catch, eBay, Kogan.

<sup>97</sup> Kogan, [Privacy Policy](#), accessed 22 February 2022.

<sup>98</sup> Amazon, [Privacy policy](#), accessed 22 February 2022.

<b>Term or condition</b>	<b>Example of term's use on an online marketplace</b>
<b>Terms across multiple documents</b>	<p><b>eBay Australia User Cookie Notice</b></p> <p>eBay's terms regarding their use of data collected through cookies, and specific information related to consumer choices for cookie settings,<sup>99</sup> is in a separate Cookie Notice separate to the terms and conditions.<sup>100</sup></p>
<b>Omission of information</b>	<p><b>Kogan Privacy Policy</b></p> <p>The ACCC understands that Kogan collects browser history (within the Kogan marketplace) and behavioural data on consumers on an aggregated basis through generic Google Analytics software.<sup>101</sup></p> <p>Kogan's Privacy Policy does not explicitly state that browser history (within the Kogan marketplace) and behavioural data is collected.<sup>102</sup></p>

Without the provision of clear, transparent and readily accessible information for consumers to understand and act upon, information asymmetries are likely to persist between online marketplaces and consumers.

Further, information asymmetries due to the lack of transparency about data practices are likely to limit the ability of online marketplaces to effectively compete on the basis of the strength of their privacy protections. This may in turn contribute to 'a race to the bottom' with respect to data collection.

While consumers in Australia can choose between a number of online marketplaces, the common approaches and practices of the major online marketplaces to data collection and use mean that consumers have little effective choice in the amount of data they share. This limits the bargaining power that consumers have with any individual marketplace in regard to the collection, use and disclosure of their personal data. As summarised by Dr Kemp's submission to the ACCC, 'consumers wishing to browse or purchase...should not be forced to 'consent' to third parties unnecessarily sharing data about them.'<sup>103</sup>

The concerns identified in marketplace terms and conditions are similar to the issues identified in relation to other digital platforms terms and conditions, including the use of take-it-or-leave-it terms and terms split across multiple documents.<sup>104</sup> While take-it-or-leave-it terms may be offered for a range of reasons, including because the cost of customising terms for each user may be prohibitive relative to the amount of value generated from each user, they may also reflect a stronger bargaining position held by an online marketplace compared with its consumers.

In addition, the ACCC's review of marketplace privacy policies found the use of bundled consents, whereby the relevant terms of use for an online marketplace require consumers to agree to the terms and conditions of relevant privacy policies in order to use the service and complete their purchase. In this context, bundled consents have the potential to take advantage of the behavioural biases of consumers to provide their consent before being shown any relevant terms and conditions.

<sup>99</sup> eBay, [Cookies, web beacons and similar technology \("Cookie Notice"\)](#), accessed 22 February 2022.

<sup>100</sup> eBay, [user privacy notice](#), accessed 22 February 2022.

<sup>101</sup> Information provided to the ACCC.

<sup>102</sup> For example, Amazon's *Privacy Notice* explicitly states that it 'automatically collects and stores certain types of information about your use of Amazon Services, including information about your interaction with content and services available through Amazon Services.' Amazon, [Amazon.com.au Privacy Notice](#), 31 August 2020, accessed 28 January 2022, 'What Personal Information About Customers Does Amazon Collect?'

<sup>103</sup> Dr. Katharine Kemp, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), p 5, section 2.3.

<sup>104</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, section 7.4.1 (use of multiple documents to display relevant terms), section 7.4.2 (Take-it-or-leave-it terms).



The ACCC also notes the use of terms in Privacy Policies that present a limited choice set to consumers concerning data collection settings. As noted in Table 2.2, some terms suggest that actions taken to opt out of cookie data collection will limit a consumer’s ability to use the marketplace. They do not clearly identify actions that consumers can take to opt out of cookie data collection while retaining the ability to use the marketplace.

**Table 2.2: Examples of terms that outline the risks of opting out of cookie data collection**

Amazon Australia Privacy Notice <sup>105</sup>	eBay Cookie Notice <sup>106</sup>	Kogan Privacy Policy <sup>107</sup>
‘Because cookies and identifiers allow you to take advantage of some essential features of Amazon Services, we recommend that you leave them turned on. For instance, <b>if you block or otherwise reject our cookies, you will not be able to add items to your Shopping Cart, proceed to Checkout, or use any Services that require you to Sign in.</b> ’	‘If you delete all cookies on your device, <b>any opt-out cookies that have already been set will be deleted, so that you will have to declare again any opt-outs that have already been declared.</b> ’	You have the ability to accept or decline cookies. <b>If you choose to decline cookies, you may not be able to fully experience the interactive features</b> of the Kogan Group websites...’

The ACCC also observed that the terms of use for an online marketplace often appeared in:

- ‘browse-wrap agreements’, in which a consumer is said to provide ‘consent’ to all terms (including the privacy policy) by simply accessing or browsing the marketplace, and
- ‘click-wrap agreements’, which are online agreements using digital prompts that request users to provide their consent to online terms and policies without requiring them to fully engage with the terms and policies of use.

Where relevant information on the terms of use is not provided to consumers clearly and in a readily accessible format, and where this information is difficult to find and comprehend, it is likely that consumers will not be adequately informed about an online marketplace’s data collection practices.

Behavioural biases may also be exploited through the presentation of click-wrap agreements for the purchase of products in the virtual checkout, requiring consent to a range of broad terms and conditions (often set out in multiple separate documents) in order to place an order. Seeking agreement in this way is particularly concerning when the terms and conditions are presented in greyed out, small font under the final button to place a final order (see Figure 2.8). Behavioural biases may also be used to create a sense of urgency for consumers to complete a purchase (and accept the terms). For example, Catch’s below presentation of its Privacy Policy and Collection Statement at the ‘Submit Order’ page. By this point a consumer may be pressing to complete their transaction quickly, especially where there is limited stock available as indicated in the below message.

<sup>105</sup> Amazon Australia, [Privacy policy](#), accessed 22 February 2022.

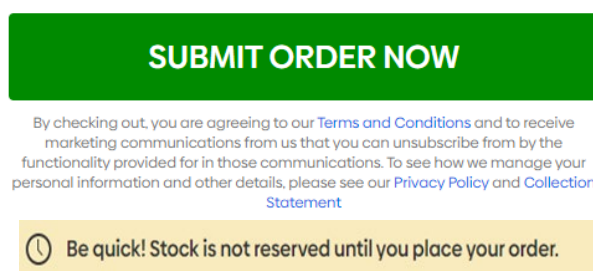
<sup>106</sup> eBay Australia, [User privacy notice](#), accessed 22 February 2022.

<sup>107</sup> Kogan, [Privacy Policy](#), accessed 22 February 2022.

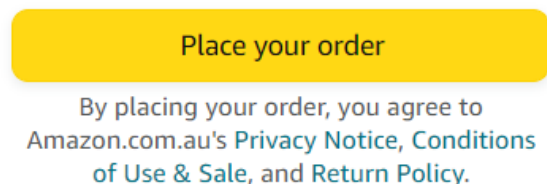


**Figure 2.8: Terms and conditions and privacy policy disclosures relative to buy buttons on Catch and Amazon**

**Catch submit order now display and additional message**



**Amazon submit order display**



Source: Screenshot of Catch desktop web app taken on 29 October 2021. Screenshot of Amazon.com.au desktop web app taken on 29 October 2021.

### **Box 2.3: Consumer concerns around engagement with privacy terms**

Surveys conducted by the Consumer Policy Research Centre on consumer engagement with the privacy and data collection terms of digital platforms noted the following:

- 91% of respondents did not read all data and privacy terms and conditions that applied to them
- of the consumers that did read data and privacy terms and conditions, 69% reported accepting unfavourable terms, with most saying they accepted them as it was the only way to access an online product or service.<sup>108</sup>

While online marketplaces enable consumers to obtain copies of data collected about them by the online marketplaces, consumers appear unable to compel the erasure of that data. It would appear difficult for online marketplaces to comply with any such request, given the widespread disclosure of consumer data to third parties (particularly in the context of targeted advertising). Unlike more conventional retail relationships in which a consumer can walk out of a store or select 'unsubscribe' to direct marketing, an online marketplace user may find it more difficult to extract themselves from a relationship with an online marketplace that stores and shares their consumer data.

### ***Consumers should be given the opportunity to make meaningful choices regarding their data***

The concerns identified in this report regarding the data practices of online marketplaces are similar to the concerns that the ACCC has previously raised in respect of other digital platforms.

Many Australian consumers express strong preferences for limits on tracking, contrary to the data practices of multiple leading digital platforms. The ACCC considers that consumers of online marketplaces, like users of other digital platforms, should be provided with adequate and clear information about what data is being collected and used to enable them to make a meaningful choice about the extent of that collection and use.

The ACCC continues to support recommendations from the original DPI Final Report regarding amending the Australian Consumer Law (ACL) to prohibit unfair contract terms (recommendation 20) and certain unfair trading practices (recommendation 21). These recommendations could address some of the concerns identified above. In particular:

<sup>108</sup> Consumer Policy Research Centre, [The Digital Checkout](#), 16 December 2021, p 22.

- recommendation 20 regarding amending the ACL so that unfair contract terms are prohibited (not just voidable) and subject to civil pecuniary penalties, which would help address information asymmetries between online marketplaces and consumers with respect to the collection, use and disclosure of their personal data
- recommendation 21 regarding amending the ACL to include a prohibition on certain unfair trading practices which are not expressly prohibited by the Australian Consumer Law, including certain practices that are significantly detrimental to consumers.

The ACCC notes that ongoing processes are already in place in relation to these recommendations. Regarding recommendation 20, a bill was introduced on 9 February 2022.<sup>109</sup> The ACCC also notes that we will continue to examine these issues as part of the upcoming September 2022 interim report.

The ACCC notes the ongoing Privacy Act review by the Attorney-General's Department, which is considering options for range of issues including the need for strengthened privacy protections and consent requirements including default privacy settings.<sup>110</sup> As noted in the DPI Final Report, the current privacy framework does not adequately address the harm arising from information asymmetries and choice architecture that discourage, or make it harder for consumers to select settings that reflect their preferences.

### **2.3.2. Adding products to the user's shopping cart without consent**

Before finalising their purchase, consumers are often given the opportunity to add, remove, or confirm the items in their cart. Issues may arise if consumers are induced towards buying additional products as part of the streamlined process for purchasing.

Other jurisdictions have identified and sought to address this. Under the European Consumer Rights Directive, businesses are required to seek express consent from consumers prior to taking payment for products or services in addition to those that they have agreed to with the consumer. The European Consumer Rights Directive requires that consent be provided by consumers expressly and not inferred through default options which the consumer might be required to reject in order to avoid additional payments.<sup>111</sup>

The ACCC has observed some limited instances where additional products have been placed by the marketplace into consumers' shopping carts by default, and without their express consent. However, those products added without consent were 'free trial' products at no immediate additional charge. We have not seen strong evidence of this conduct being otherwise widespread.

## **2.4. When things go wrong**

Online marketplaces are increasingly a part of the Australian online shopping experience for consumers. Because of their increased role in connecting consumers and sellers, and the revenue they make from this role, online marketplaces have a vital role to play in preventing and addressing detriment on their platforms.

The ACCC considers that in the vast majority of cases, consumers are content with their marketplace experiences.

However, in some circumstances, some consumers may have a substandard experience or be experience harm in relation to their use of online marketplaces. These experiences are examined in the following section of the Report.

<sup>109</sup> This bill includes amendments to enhance the protections against unfair contract terms in the Australian Consumer Law and the Australian Securities and Investments Commission Act 2001.

<sup>110</sup> Attorney-General's Department, [Review of the Privacy Act 1988 \(Cth\) – Discussion Paper](#), October 2021, accessed 3 February 2022, pp 2, 99.

<sup>111</sup> See [Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011](#), Article 22.

### 2.4.1. Sometimes consumers do not get what they were expecting in a sale

The shift towards online marketplaces has changed the way that sellers and consumers interact, as the traditional relationship between buyer and seller has become less direct. This has implications for consumer protection and dispute resolution.

As discussed above, a key incentive for online marketplaces is to provide a positive experience for users of their platform; as part of this, there are incentives for online marketplaces to protect consumers from harmful experiences which may make them less likely to use that marketplace again in the future.<sup>112</sup>

In some circumstances, consumers may experience detriment in their use of online marketplaces, including from:

- harmful products – including products that are unsafe; products that are faulty, substandard or that are inauthentic<sup>113</sup>
- making purchases based on misleading or fake reviews
- scams relating to products or sellers
- where the product was not what they were expecting, or if they are dissatisfied with the transaction in other ways.

#### Box 2.4: Harmful products on online marketplaces

Increasing globalisation and e-commerce has meant that counterfeit, unsafe, banned or recalled products are easier to integrate into global supply chains.<sup>114</sup> Some commentators have also claimed that the increased use of platforms has resulted in an influx of unsafe and defective products to consumer retail markets.<sup>115</sup>

As part of the Organisation for Economic Cooperation and Development (OECD) Product Safety Sweep in 2015, regulators in 25 jurisdictions selected products which were a 'safety or compliance priority' for their jurisdiction and assessed the products' level of compliance with voluntary and mandatory safety standards.<sup>116</sup> Overall, non-compliance was twice as high for goods sold online from an overseas jurisdiction (88%) compared to those sold online domestically (44%).<sup>117</sup> Online marketplaces that operate across multiple countries, and provide greater distance between buyer and seller than traditional retail, may further reduce the impact of factors which dissuade manufacturers from distributing dangerous products on the market.<sup>118</sup> Different product safety standards across jurisdictions (including different standards in the host country of an online marketplace) can also influence the treatment of harmful products on online marketplaces.

<sup>112</sup> Lu B, Zhang S. [A Conjoint Approach to Understanding Online Consumers' Decisions towards Online Marketplaces](#). *Journal of Theoretical and Applied Electronic Commerce Research*. 2020; 15(3):69-83, p 77.

<sup>113</sup> Accord Australia, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 19 August 2021; Arts Law, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 19 August 2021; Assistive Tech, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 10 August 2021; Complementary Medicines Australia, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 19 August 2021; Consumer Electronics Suppliers Association, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 18 August 2021.

<sup>114</sup> OECD, [Online Product Safety Sweep Results](#), 3 November 2016, p 6; K Lewis, [The fake and the fatal: the consequences of counterfeits](#), *The Park Place Economist*, 17:1 (2009), 47, p 50.

<sup>115</sup> C Busch, [Rethinking Product Liability Rules for Online marketplaces: A Comparative Perspective](#), *Consumer Law Scholars Conference*, Boston, 4-5 March 2021, p 5.

<sup>116</sup> OECD, [Online Product Safety Sweep Results](#), 3 November 2016, p 43.

<sup>117</sup> OECD, [Online Product Safety Sweep Results](#), 3 November 2016, p 16; see also Treasury, [Consultation Regulation Impact Statement - Improving the effectiveness of the Consumer Product Safety System](#), p 14.

<sup>118</sup> 'S Bender, [Product Liability's Amazon Problem](#), *Journal of Law and Technology at Texas*, 4:1 95, (2021), p 98; J Emont, [Amazon's Heavy Recruitment of Chinese Sellers Puts Consumers at Risk](#), *WSJ*, 11 November 2019, accessed 10 February 2022; M Waters, [Amazon Briefing: The relationship between Chinese sellers and Amazon is straining](#), *Modern Retail*, 30 September 2021, accessed 10 February 2022.

The availability of unsafe products on online marketplaces have been of concern to consumer regulators. Online marketplaces have attracted criticism from consumer protection organisations for facilitating the sale of unsafe or otherwise harmful products such as toxic toy slime, flammable Halloween costumes, faulty carbon monoxide alarms and unsafe child seats.<sup>119</sup>

The 2015 OECD Product Safety Sweep found listed for sale online a large number of products that were banned, recalled, displaying inadequate product labelling or non-compliant with safety standards:<sup>120</sup>

- more than two thirds of banned or recalled products inspected were found for sale online in the Product Safety Sweep participants' respective jurisdictions
- over half of products inspected did not display adequate safety labelling
- over half of products inspected did not comply with safety standards.

Recently the ACCC co-lead the 2021 OECD Online Sweep, in which 19 participating countries surveyed consumer goods available for purchase online to identify those which are banned or recalled, have inadequate product labelling or warnings, or do not meet safety requirements. The findings of the 2021 Sweep will be published by the OECD and inform educational messaging in the OECD's 2022 global awareness campaign, which will focus on product safety online.

### ***Harmful products***

Harm caused to consumers from unsafe products can be wide-ranging and include both monetary and non-monetary detriment, including a loss of wellbeing, medical expenses, reduced productivity, property damage, and in extreme cases, loss of life.<sup>121</sup> In certain categories of products such as pharmaceutical and electrical goods, counterfeits may pose serious health and safety risks to consumers.<sup>122</sup>

Products that do not meet the ACL consumer guarantees, such as faulty and defective products can also negatively affect consumers through the costs that consumers incur in purchasing products they otherwise would not have, or in seeking remedies for a faulty product,<sup>123</sup> as well as inconvenience.

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<sup>119</sup> Which?, [Online marketplaces and product safety](#), 20 November 2019, pp 5-7.

<sup>120</sup> OECD, [Online Product Safety Sweep Results](#), 3 November 2016.

<sup>121</sup> Treasury, [Consultation Regulation Impact Statement - Improving the effectiveness of the Consumer Product Safety System](#), p 16.

<sup>122</sup> K Lewis, [The fake and the fatal: the consequences of counterfeits](#), *The Park Place Economist*, 17:1 (2009), 47, p 49; Electric Safety First, [Counterfeit and imitation Apple chargers](#), December 2017, p 4.

<sup>123</sup> Treasury, [Improving the effectiveness of the consumer guarantee and supplier indemnification provisions under the Australian Consumer Law](#), Consultation Regulation Impact Statement, December 2021 p 18.

## **Box 2.5: Relevant consumer protections under the ACL in Australia**

### *Guarantees for consumers in Australia*

In Australia, if a person supplies goods to a consumer, there are guarantees under the ACL that are held to apply. Most relevantly, there is a guarantee that goods supplied to a consumer in trade or commerce will be of 'acceptable quality'<sup>124</sup> In this context, goods are of 'acceptable quality' if they are:

- (a) fit for all the purposes for which goods of that kind are commonly supplied
- (b) acceptable in appearance and finish
- (c) free from defects
- (d) safe
- (e) durable.<sup>125</sup>

There is also a guarantee that goods supplied will be 'fit for any disclosed purpose.'<sup>126</sup>

### *Misleading or deceptive conduct*

The ACL prohibits businesses from engaging in conduct that is misleading or deceptive or likely to mislead or deceive consumers or other businesses.<sup>127</sup> Advertisements, promotions, quotes, statements or representations about the price, value or quality of a good or service are all examples of conduct that may be misleading, regardless of the intention of the business engaging in the conduct.

### *False or misleading representations*

In addition to the prohibition against misleading or deceptive conduct, the ACL prohibits businesses from making false or misleading representations about goods or services.<sup>128</sup> What is considered false or misleading will depend on the circumstances but can include inaccurate claims or statements that goods are of a particular quality, value, grade, composition, style or model or have had a particular history or previous use.

### *Product safety provisions*

In addition to consumer product safety guarantees, the ACL contains product safety provisions that set out how the Australian, state and territory governments can regulate consumer goods to address safety hazards.<sup>129</sup> The product safety provisions allow governments to impose mandatory safety standards, ban certain consumer goods, issue recall notices, and regulate the responsibilities of suppliers in relation to unsafe products.

## ***Purchases based on misleading reviews***

One key issue arising on online marketplaces is deliberate manipulation of online reviews. While genuine reviews can assist consumers in determining whether to make a purchase or choosing a particular online seller, fake reviews can erode trust and lead to consumers purchasing unsuitable or harmful products.

In the online environment, where it is often impractical or unfeasible to physically examine products, consumers rely on other indicators to determine the quality of goods, including online reviews. Most Australians use and trust online reviews. Of those that responded to the

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<sup>124</sup> ACL, s 54. s 54 ACL.

<sup>125</sup> ACL, s 54(2).

<sup>126</sup> ACL, s 55.

<sup>127</sup> ACL, s 18.

<sup>128</sup> ACL, s 29.

<sup>129</sup> ACL, Part 3-3.

ACCC's consumer questionnaire, consumers mostly considered that reviews were an important factor in looking at products, 44% of those responding rating it very important and only 6% (8 respondents) saying it was not important.<sup>130</sup>

A survey conducted by the Consumer Policy Research Centre found that:

- 82% of Australians reported looking at online reviews or ratings at least sometimes<sup>131</sup>
- 70% of Australians considered online reviews as important as word of mouth from friends or family.<sup>132</sup>

The impact of reviews on consumer purchasing behaviour, as well as the importance of search results ranking or having a product featured, creates an incentive for fraudulent actors to engage in review manipulation, either to enhance the attractiveness of their products and services, or to degrade a competitor's reputation.<sup>133</sup>

Review manipulation can include

- the practice of intentionally creating misleading or false positive reviews for the business, and/or misleading or false negative reviews for competitors
- the practice of removing of negative reviews for the business, or
- otherwise manipulating reviews in a deceptive way (for example, offering rewards to genuine consumers if they remove a negative review, offering rewards to genuine consumers but only if they post 5-star reviews).

Fake reviews can result in consumers purchasing products they would not have purchased if they had accurate information,<sup>134</sup> or even purchasing an unsafe product.<sup>135</sup> Manipulated reviews also degrade the credibility of all reviews, including authentic reviews, resulting in a loss of consumer trust which can undermine the efficient operation of markets.<sup>136</sup>

Major online marketplaces have been an enduring target for review manipulation, with media reports highlighting the problem from as early as 2009.<sup>137</sup> Online marketplaces,<sup>138</sup> as well as the ACCC and international regulators, have also taken action against review manipulation.<sup>139</sup>

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<sup>130</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), column M.

<sup>131</sup> CPRC [Online reviews, a guide not gospel](#), December 2019, p 3.

<sup>132</sup> CPRC [Online reviews, a guide not gospel](#), December 2019, p 3.

<sup>133</sup> Xu, H., Liu, D., Wang, H., & Stavrou, A. (2015, May). [E-commerce reputation manipulation: The emergence of reputation-escalation-as-a-service](#). p 1; CPRC [Online reviews, a guide not gospel](#), December 2019, p 5.

<sup>134</sup> He, S., Hollenbeck, B., & Proserpio, D. [The market for fake reviews, 2021](#).

<sup>135</sup> Which?, [The real impact of fake reviews](#), 29 May 2020, p 3.

<sup>136</sup> Malbon, Justin, [Taking Fake Online Consumer Reviews Seriously](#), *Journal of Consumer Policy* (2013) 36:139-157, p 148-149

<sup>137</sup> Engadget, [Belkin rep hiring folks to write fake reviews on Amazon](#), 18 January 2009; The Guardian, [Amazon blames social media for struggle with fake reviews](#), 16 June 2021; ABC News, [Read online review sites? Here are all the ways they're faked and manipulated](#), 17 August 2018, WSJ, [Fake reviews and inflated ratings are still a problem for Amazon](#), 13 June 2021;

<sup>138</sup> Amazon has been initiating legal action against fake review purveyors since 2015: Aisha Gani, ['Amazon sues 1,000 "fake reviewers"'](#), *The Guardian*, 18 October 2015

<sup>139</sup> For example: Citymove Pty Ltd has paid a \$6,600 infringement notice and provided a court enforceable undertaking after it published false consumer testimonials on its Moving Review website: ACCC, Media release, ACCC: Removalist admits publishing false testimonials, 9 November 2011. Regulators around the world have begun to take action on review manipulation. Following an investigation in May 2020, the United Kingdom CMA opened a formal probe into fake reviews on Amazon and Google in June 2021 stating that 'millions of consumers could be misled' by false online reviews.<sup>139</sup> The CMA raised concerns that the companies had not done enough to detect, investigate and prevent fake reviews on their platforms. Similarly, China's State Administration for Market Regulation (SAMR), began a crackdown on fake online reviews in 2021, imposing fines totalling US\$31.8 million.

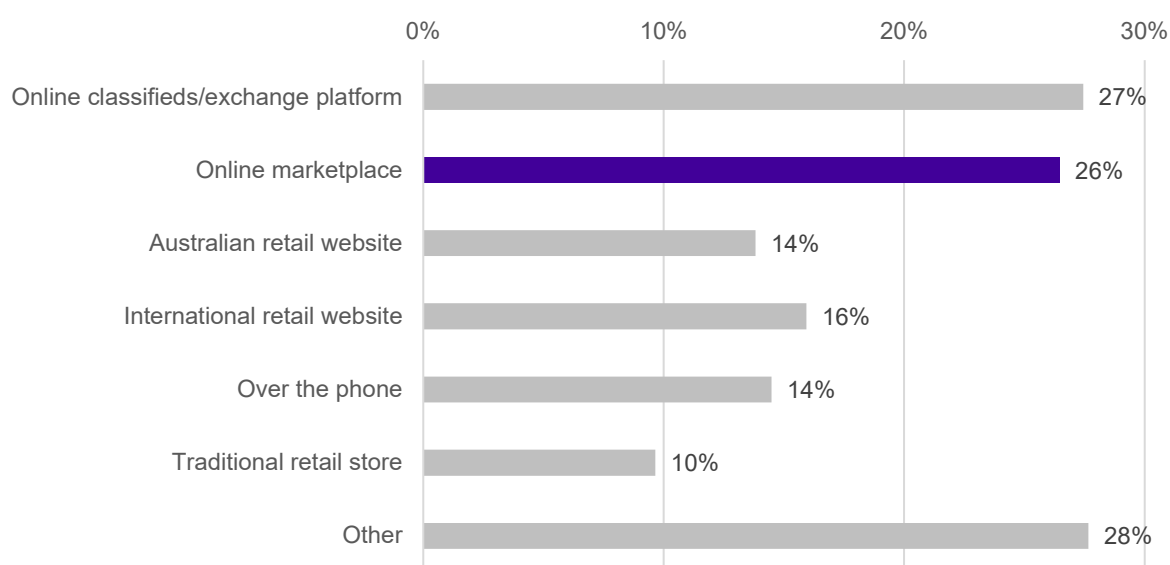


## Scams

Online shopping scams have been increasing in Australia. In 2020, a record \$11.9 million of losses due to online shopping and classified scams was reported to Scamwatch.<sup>140</sup> Given ACCC research shows that only around 13% of all scam victims report to Scamwatch, the actual amount of losses is likely a lot higher.

Fraudulent conduct by sellers on online marketplaces can (and does) occur and has the potential to negatively affect users of online marketplaces.<sup>141</sup> Recent research of Australians who reported being a victim of scam and fraud found higher incidences of this occurring on an online marketplace, as compared to domestic online retailers (see Figure 2.9).

**Figure 2.9: Australian consumers reporting being a victim of a scams or fraud**



Source: Consumer Policy Research Centre, [Unfair Trading Practices in Digital Markets – Evidence and Regulatory Gaps](#), December 2020, Annex 1 Table 4.

The ACCC has previously recognised that there are a number of scams that are either unique to digital platforms, or are more easily facilitated on digital platforms.<sup>142</sup>

### 2.4.2. Consumer recourse on online marketplaces

As noted above, the relationship between sellers and consumers is less direct when transactions take place on online marketplaces.

However, online marketplaces, as intermediaries between sellers and consumers, have relatively limited consumer protection obligations in relation to transactions between consumers and sellers on their platforms, which can raise concerns for consumers seeking recourse.

Online platforms, including online marketplaces, traditionally played the role of an intermediary between two sides of a market.<sup>143</sup>

<sup>140</sup> ACCC, [Targeting Scams Report 2020](#), 7 June 2021, p 9.

<sup>141</sup> eBay Inc., [Form 10-K lodged with the United States Securities and Exchange Commission](#), for the fiscal year ended December 31 2020, pp 17-18; Amazon [Annual Report](#) (2020), p 8; Kogan [Annual Report](#) (2021), p 10.

<sup>142</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019.

<sup>143</sup> OECD, [The Economic and Social Role of Internet Intermediaries](#), April 2010, p 15.



However the nature, role, size and scope of digital intermediaries is rapidly evolving, enabled by technological advances.<sup>144</sup> This is especially true in relation to the online marketplaces considered in this report. These online marketplaces take an increasingly active role in determining how, when and between whom transactions are made.

For example:

- search – Online marketplaces set the rules which determine how prominent a seller and their products are in the on-platform search results
- dispute resolution – Online marketplaces determine policies which must be adhered to, and in cases of dispute may act as the forum, adjudicator and fact-finding body to determine the outcome of disputes
- fulfilment and delivery services – Online marketplaces provide fulfilment services and deliver goods in packaging that displays marketplace branding rather than that of a third-party seller
- commingling of goods from different suppliers in the same warehouse<sup>145</sup>
- online marketplaces control how data is collected and used to curate what consumers see, including consumer profiles that inform search and product recommendation algorithms and are used to deliver targeted advertising (see Subsection 2.3.2).

### ***What legal responsibilities do online marketplaces have when consumers have a problem?***

As discussed above, there are a number of consumer protections under the ACL relevant to consumers.

In certain circumstances, publishing fake reviews or not removing reviews that are known to be fake can breach the ACL. The ACCC has previously undertaken action against businesses which published false customer testimonials.<sup>146</sup>

Whether or not an online marketplace can be considered to engage in misleading or deceptive conduct due to the conduct of a third-party seller will depend on the specific facts and nature of the conduct.<sup>147</sup>

There is a lack of clarity as to how the ACL applies to online marketplaces, which has been identified as a 'key barrier' to consumers knowing and exercising their rights, and accessing remedies from sellers when the transaction is via an online retail marketplace.<sup>148</sup> Obligations under the ACL apply to the supplier of the relevant goods. In this way, the drafting of the ACL reflects 'traditional' transactions between two parties, rather than transactions involving a buyer and seller which take place through an intermediary such as an online marketplace.

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<sup>144</sup> OECD, [The Economic and Social Role of Internet Intermediaries](#), April 2010, p 4.

<sup>145</sup> S Bender, [Product Liability's Amazon Problem](#), *Journal of Law and Technology at Texas*, 4:1 95, (2021), p 129.

<sup>146</sup> For example: Citymove Pty Ltd has paid a \$6,600 infringement notice and provided a court enforceable undertaking after it published false consumer testimonials on its Moving Review website: ACCC, Media release, ACCC: Removalist admits publishing false testimonials, 9 November 2011.

<sup>147</sup> *Google Inc v Australian Competition and Consumer Commission* [2013] HCA 1.

<sup>148</sup> Consumer Policy Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 18 August 2021, p 5.

## Box 2.6: Online marketplaces and the definition of supply

Under section 2 of the ACL 'supply':

*when used as a verb includes:*

*(a) in relation to goods – supply (including re-supply) by way of sale, exchange, lease, hire or hire purchase*

*(b) in relation to services – provide, grant or confer*

*and when used as a noun, has a corresponding meaning, and supplied and supplier have corresponding meanings.*

Given the definition above, whether an online marketplace can be considered to 'supply' a product to a consumer will require consideration of the operation of the marketplace in question and the specific circumstances of a particular transaction.

An online marketplace may not be 'supplier' under the ACL solely because a good has been listed on its platform for sale by a user of the platform, but increasingly some marketplaces are more actively engaged in the process than that.

### ***What additional responsibility are some online marketplaces taking?***

As online marketplaces have grown and consumer use of online retail and online marketplaces has risen, some online marketplaces have adopted measures designed to limit the damage caused by harmful products to consumers, businesses and the marketplace. These measures vary among online marketplaces and have changed over time.

These measures include:

- obliging sellers to ensure product safety and quality standards through seller policies and contracts<sup>149</sup>
- educating sellers about their contractual and statutory obligations through publishing guides and informational material<sup>150</sup>
- implementing technology-driven tools to proactively prevent harmful products from being listed and remove harmful products that are already listed<sup>151</sup>
- implementing intellectual property and trademark protection tools for sellers, such as Amazon's Brand Registry, and eBay's Verified Rights Owner Program<sup>152</sup>
- monitoring emerging trends and hazards and issuing product safety recalls<sup>153</sup>
- investigations, audits and seller sanctions.<sup>154</sup>

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<sup>149</sup> Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 13; Amazon [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 27 August 2021, p 17; eBay, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021 p 5.

<sup>150</sup> Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 13; Amazon [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 27 August 2021, p 17.

<sup>151</sup> ACCC, [Product Safety Pledge First Annual Report](#), 19 November 2021, p 7.

<sup>152</sup> eBay, [Verified Rights Owner Program](#), accessed 10 February 2022; Amazon, [Build and protect your brand](#), accessed 10 February 2022

<sup>153</sup> Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 13; Amazon [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 27 August 2021, p 17

<sup>154</sup> eBay, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021 p 16. Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 14.

Larger online marketplaces such as Amazon and eBay have tens of thousands of sellers listing millions of products for sale.<sup>155</sup> The ACCC notes that conducting manual pre-listing checks is likely a resource intensive process; but also notes that, increasingly, larger online marketplaces rely on more automated processes such as algorithms and machine learning technology to prevent, detect and take-down listings which may contravene marketplace policies.<sup>156</sup>

Another source of protections for Australian consumers is the Product Safety Pledge (see Box 2.7). A voluntary initiative developed by the ACCC, in collaboration with some online marketplaces,<sup>157</sup> which aims to protect consumers from unsafe products. Five of Australia's largest online retail businesses – AliExpress, Amazon Australia, Catch, eBay Australia, MyDeal.com.au – are signatories to the Pledge.

### **Box 2.7: The Product Safety Pledge**

The primary purpose of the Pledge is to reduce the number of unsafe goods sold online, facilitate faster and more efficient removal of unsafe products, raise consumer and supplier awareness of the importance of product safety, and encourage online businesses to adopt measures to protect consumers from unsafe products.

Signatories to the Pledge make 12 key commitments:

- Regularly consult the Product Safety Australia website and other relevant sources for information on recalled/unsafe products. Take appropriate action on these products once they are identified.
- Provide a dedicated contact point(s) for Australian regulatory authorities to notify and request take-downs of recalled/unsafe products.
- Remove identified unsafe product listings within two business days of the dedicated contact point(s) receiving a take-down request from Australian regulatory authorities. Inform authorities on the action that has been taken and any relevant outcomes.
- Cooperate with Australian regulatory authorities in identifying, as far as possible, the supply chain of unsafe products by responding to data/information requests within ten business days should relevant information not be publicly available.
- Have an internal mechanism for processing data/information requests and take-downs of unsafe products.
- Provide a clear pathway for consumers to notify the pledge signatory directly of unsafe product listings. Such notifications are treated according to the signatory's processes and where responses to consumers are appropriate, they are given within five business days.
- Implement measures to facilitate sellers' compliance with Australian product safety laws. Share information with sellers on compliance training/guidance, including a link to the ACCC's Selling online page on the Product Safety Australia website.
- Cooperate with Australian regulatory authorities and sellers to inform consumers about relevant recalls or corrective actions on unsafe products.
- Set up processes aimed at preventing or restricting the sale of banned, non-compliant and recalled products as appropriate.

<sup>155</sup> Statista, [Number of products listed on Amazon in Australia on December 2017 and January 2018](#), January 2018, accessed 23 February 2022; eBay, [Everything you need to know about selling on eBay, in one place](#), accessed 23 February 2022; Statista, [Number of Amazon sellers in Australia from January to August 2018](#), August 2018, accessed 23 February 2022.

<sup>156</sup> Amazon [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 27 August 2021, p 17; eBay [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021 p 16.

<sup>157</sup> Amazon, eBay, Catch and AliExpress

- Put in place reasonable measures to act against repeat offenders selling unsafe products, including in cooperation with Australian regulatory authorities.
- Take measures aimed at preventing the reappearance of unsafe product listings already removed.
- Explore the potential use of new technologies and innovation to improve the detection and removal of unsafe products.

Signatories have demonstrated a strong commitment to the Product Safety Pledge since its inception, and the ACCC recognises the positive outcomes that have come out of the Pledge. The first Product Safety Pledge Annual Report highlighted that over 96% of product take-down requests were actioned within 2 business days, and over 92% of listings removed within 2 business days after consultation from other sources, such as the Product Safety Australia website.<sup>158</sup>

Signatories to the Pledge have also implemented a variety of proactive and reactive measures aimed at promoting seller compliance and informing and supporting consumers.<sup>159</sup> These measures include technology driven initiatives designed to prevent, detect, remove and deter unsafe products.

The ACCC notes that while the Product Safety Pledge is a positive development, it is limited in its application to online marketplaces that have signed up to the code. In addition, products which may cause detriment to consumers in other ways, such as counterfeits are not directly covered by the Product Safety Pledge. The effectiveness of the Product Safety Pledge will also be seen as more online marketplaces join the Pledge, which the ACCC actively encourages interested online marketplaces to do.

### ***Should online marketplaces be doing more to protect consumers?***

Despite the measures taken by online marketplaces, issues relating to the safety, quality, compliance and authenticity of products continue to affect online marketplaces and consumers.

Online marketplaces, as digital platforms, actively participate in the online retail sector.

Online marketplaces have large amounts of data, technology, and control over their platforms. Like other digital platforms, online marketplaces themselves are likely to be best placed to prevent and mitigate consumer harms occurring on their platforms.<sup>160</sup> Although it varies across online marketplaces, the degree of involvement by some online marketplaces in transactions between consumers and sellers on their platform means that in the ACCC's view, they are acting as more than just a mere listing service or conduit for the sale of goods on their platform. For example, as discussed in Subsection 2.4.3, online marketplaces greatly influence how, when and between whom transactions are made by controlling search, dispute resolution, fulfilment, data collection and data use on their platforms. Because of this, the ACCC's view is that online marketplaces could and should do more to protect consumers who use their online marketplaces.

#### **2.4.3. What can consumers do in a dispute with sellers?**

As with protecting consumers from harmful products, online marketplaces play a significant role in helping to assist consumers in disputes with sellers, including in the fact-finding and adjudication of disputes.

<sup>158</sup> ACCC, [Product Safety Pledge First Annual Report](#), 19 November 2021, p 4.

<sup>159</sup> ACCC, [Product Safety Pledge First Annual Report](#), 19 November 2021, p 7.

<sup>160</sup> Y Lefouili and L Madio, The Economics of Platform Liability, CESifo Working Paper No. 8919, 29 June 2021; M Cusumano, A Gawer and D Yoffe, Can Self Regulation Save Digital Platforms, *Industrial and Corporate Change* 30(5) (2021): 1259-1285

Disputes on online marketplaces are largely low in individual value but high in volume.<sup>161</sup> The low value of these disputes as well as their cross jurisdictional nature often means that using the State and Courts as an enforcement mechanism is not practicable or cost effective.

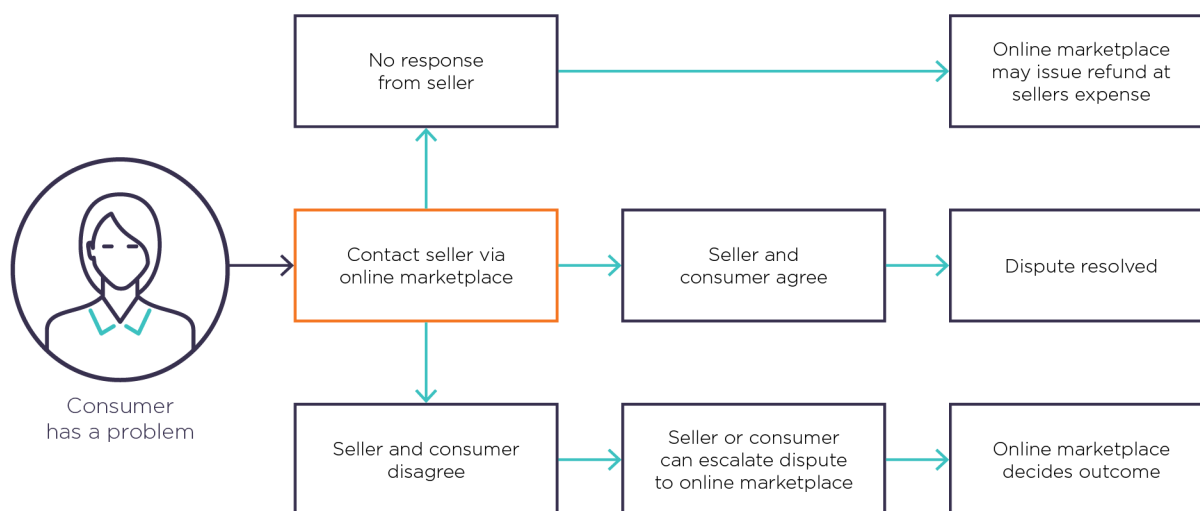
Every year, millions of buyer-seller disputes originate on online marketplaces such as eBay and Amazon. For millions of these disputes, parties communicate and negotiate with each other on-platform. Some sources estimate that globally, eBay handles 60 million disputes every year.<sup>162</sup>

To handle these complaints, online marketplaces generally have processes for consumers to resolve disputes and obtain remedies. These processes include:

- communication tools for consumers and sellers to negotiate
- marketplace-provided money-back guarantees
- escalation pathways (see Figure 2.10).

Marketplace-provided money back guarantees are different to those afforded to consumers under the ACL. These marketplace-provided guarantees, such as the eBay Money-Back Guarantee or the Amazon A-to-Z guarantee, generally operate by promising consumers the right to a refund in situations where their product does not arrive, is faulty, or not as described. These guarantees are facilitated by standardised procedures, time frames and escalation pathways, and generally operate to the benefit of consumers.

**Figure 2.10: Escalation pathways for consumer disputes**



### **Limitations to the existing dispute resolutions processes**

While online marketplaces do have dispute resolution processes in place, these processes may be far less effective for certain types of disputes. For example, platform money-back guarantees which limit when and how much a consumer can claim,<sup>163</sup> may not be useful for:

- disputes surrounding problems with a product that do not arise immediately
- disputes of higher value than the cost of the product and its postage or return costs
- disputes where replacement or repair is the preferred remedy.

<sup>161</sup> O Tihamiyu, [The Impending Battle for the Soul of Online Dispute Resolution](#), *Cardozo Journal of Conflict Resolution* (Forthcoming), p 5.

<sup>162</sup> BBC News, ['eBay-style online courts could resolve smaller claims'](#), 16 February 2015, accessed 8 February 2021.

<sup>163</sup> Amazon, [A-Z Guarantee](#), accessed 20 December 2021; eBay, [eBay Money Back Guarantee Policy](#), accessed 20 December 2021; Kogan, [Kogan Guarantee](#), accessed 17 December 2021.

The effectiveness of online marketplaces' dispute resolution processes also relies on consumers being able to easily identify and act on their rights to seek remedies from the seller. As the Consumer Policy Research Centre noted in its submission, in general, consumers struggle to know, understand, and act on their rights to seek remedies.<sup>164</sup> This may be exacerbated in the digital environment created by major online marketplaces, as it is not always clear exactly who a buyer is transacting with.<sup>165</sup>

Submissions made to the ACCC as well as academic literature highlight the disadvantage that consumers may face where a seller's identity is not readily apparent.<sup>166</sup> as discussed above, the way an online marketplace presents its platform and the products on its marketplace may diminish the prominence of the seller, making it more difficult for consumers to identify who they are transacting with.

Another barrier to dispute resolution is a lack of clear channels of communication for consumers. Some consumers on online marketplaces have also reported difficulties in trying to communicate with an online marketplace or the seller of the product as shown in Box 2.8.

#### **Box 2.8: Some responses from the ACCC consumer questionnaire**

*'The last online purchase my wife made was pants on eBay. No goods arrived, tried contacting seller with no response. Contacted eBay who also tried contacting seller with no luck. eBay refunded purchase price. Overseas platforms can just ignore you.'*

*'some sellers do not want to refund or take return, make it difficult, excessive battling to get resolution'*

*'I only make a negative review as making a complaint is near impossible jumping thru all their hoops ,this makes a great deterrent.'*

The ACCC notes that online marketplaces' consumer dispute processes play a positive part in helping consumers seek redress and resolve disputes. The ACCC considers it important for consumers to know about, and be able to access, robust dispute resolution processes, including the ability to escalate their complaints to an external body if they are not satisfied with the outcome of the marketplace's internal dispute resolution processes.

#### **2.4.4. How can consumer protection be improved?**

The ACCC considers consumers need to be provided with greater protections when purchasing goods online. While the Product Safety Pledge, and involvement of some online marketplaces, is encouraging, this initiative is voluntary and further regulatory intervention may be needed.

Possible reform options are noted below. However, these options will need to be carefully considered and subject to consultation to understand their impact and possibly identify potential alternatives. Any reforms would need to ensure that the effectiveness of the changes and the burden on online marketplaces is appropriately balanced.

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<sup>164</sup> Consumer Policy Research Centre, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 18 August 2021, p 5.

<sup>165</sup> T Monestier, [Amazon as a Seller of Marketplace Goods Under Article 2](#), *Cornell Law Review*, Forthcoming (2021), p 57-65.

<sup>166</sup> Gladwin Legal, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 9 August 2021 para 3.1; See T Monestier, [Amazon as a Seller of Marketplace Goods Under Article 2](#), *Cornell Law Review*, Forthcoming (2021), p 57-65.



## ***General Safety Provision (GSP)***

A GSP is a law that aims to ensure traders take reasonable steps to ensure the safety of a product before selling it onto market. Similar laws operate in most OECD countries but not in Australia.

The Australian Government's Department of the Treasury is undertaking a regulatory impact assessment on improving the effectiveness of the consumer product safety system, including the introduction of a GSP in Australia.<sup>167</sup> A Consultation Regulation Impact Statement was published in 2019 and outlines two options for a GSP in Australia. Subject to policy development, online marketplaces could be covered by the proposed GSP models. For example, a GSP could place obligations onto online marketplaces to ensure the reasonable safety of products sold on their platform, such as through quality control processes and promptly actioning issues in products sold by third parties and removing harmful products.

## ***Unfair Trading Practices***

The Australian and state and territory consumer ministers have agreed to conduct a consultation process to consider the nature and extent of the problem of unfair trading practices that are not currently captured by existing provisions of the ACL, and potential options to address the problems.

The ACCC considers the introduction of a prohibition on unfair trading practices in Australia, as advocated in the DPI Final Report, may be useful in addressing issues faced by consumers when purchasing products online. The ACCC considers that a prohibition on unfair trading practices should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.<sup>168</sup>

## ***Internal and external dispute resolution processes***

The ACCC has previously recommended that digital platforms comply with minimum internal dispute resolution requirements and that, should a dispute not be resolved internally, an ombudsman scheme be established to resolve complaints and disputes with digital platform providers.

The ACCC considers the introduction of a requirement for online marketplaces to comply with minimum internal dispute resolution requirements would also help address issues experienced by consumers on online marketplaces. The ACCC continues to support the establishment of an ombudsman scheme to help consumers resolve disputes with digital platform providers not resolved by the internal dispute resolution processes, and considers that this should cover online marketplaces as well as other digital platforms previously identified by the ACCC.

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<sup>167</sup> Australian Government Department of the Treasury, [Consultation Regulatory Impact Statement: Improving the Effectiveness of the Consumer Product Safety System](#), 4 October 2019.

<sup>168</sup> Consumer Affairs Forum, Communiqués, [Meeting 12 - Meeting of Ministers for Consumer Affairs](#), 6 November 2020.



### 3. Selling on general online retail marketplaces

#### Key findings

- There are many types of sellers active on online marketplaces (including big business and small sellers), and their experiences with online marketplaces varies.
- Prominence of products on the marketplace is critical to sellers. Opacity in algorithms that determine when/how a product is seen, makes it harder for sellers to know, and improve, on the effectiveness of their product offerings.
- On some online marketplaces, third-party sellers may be competing with the marketplace's own products. If an online marketplace were to set algorithms to preference its own products in search results, this could lead to many sellers struggling to effectively compete for sales on the marketplace.
- The ACCC considers it important that sellers have adequate access to avenues to resolve disputes with the online marketplaces (and consumers). An external dispute resolution mechanism such as an Ombudsman scheme, as well as accompanying minimum requirements for internal dispute resolution, as recommended in the DPI Final Report, would assist sellers obtain that redress and help address some of the consequences of the imbalance in bargaining power between sellers and the online marketplaces.

This chapter examines seller experiences of online marketplaces, providing an overview of how sellers use online marketplaces and how they interact with them.

This chapter looks at:

- **Section 3.1** how and why sellers select an online marketplace to sell on
- **Section 3.2** the typical terms and conditions sellers must agree to when using an online marketplace
- **Section 3.3** how products are displayed on online marketplaces, and to what extent sellers are able to get listing prominence for their products
- **Section 3.4** what happens when things go wrong, what sellers can do to try and fix it.

Sellers on online marketplaces are diverse, consisting of individuals, small businesses, large marketplace-only sellers and well-known bricks and mortar retailers.<sup>169</sup> While sellers on online marketplaces include bricks and mortar retailers and large marketplace-only sellers,<sup>170</sup> the vast majority of sellers on online marketplaces are small businesses.<sup>171</sup> Amazon states that globally, small and medium business products account for more than 50% of all units sold globally in its online stores.<sup>172</sup>

Online marketplaces also differ in terms of the origin of their sellers. For example: more than 90% of eBay sellers on eBay EU were Australian sellers;<sup>173</sup> based on a 2021 third-party estimate of the number of third-party sellers on Amazon Australia, around 20% of third-party sellers on the Amazon Australia marketplace were Australian sellers.<sup>174</sup>

<sup>169</sup> Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 5; eBay, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021, p 6.

<sup>170</sup> Catch, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 24 August 2021, p 5; eBay, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021, p 6.

<sup>171</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 25.

<sup>172</sup> Amazon.com.au, [Small Businesses - About Amazon Australia](#).

<sup>173</sup> Information provided to the ACCC. Australian Sellers are sellers with a registered address located in Australia.

<sup>174</sup> Marketplace Pulse, [Amazon tops six million third-party sellers](#), 24 March 2021; Amazon, [from here to anywhere — how Amazon is helping to take Aussie SMBs to the international stage](#), 10 February 2022.

There are significant advantages for sellers in using online marketplaces. Online marketplaces facilitate significant sales by providing sellers with access to a large number of consumers, particularly consumers who are actively looking to purchase goods. As set out in Chapter 1, the number of consumers purchasing from online marketplaces has grown significantly in recent years.

Online marketplaces are a particularly attractive channel for small businesses particularly where an online marketplace offers to provide additional services to assist small businesses such as warehousing and distribution. Selling via online marketplaces also typically involves much lower setup costs compared to those required to reach consumers directly through a seller's own website, or via a traditional bricks and mortar store.

At the same time, the online marketplaces derive value from having a large number of sellers. Online marketplaces are attractive to consumers due the wide range and large number of products; having additional sellers (and their products) on an online marketplace can increase the value of the marketplace to consumers.

### 3.1. Choosing an online marketplace

As with the wide variety of sellers, there are multiple ways sellers use online marketplaces.

While some sellers only use one marketplace, many sellers appear to use multiple online marketplaces to reach consumers (often referred to as multi-homing). In response to the ACCC small business seller questionnaire, sellers who sold on multiple online marketplaces said this was to increase reach to different consumers, with a number of sellers responding that consumers tend to stick with a particular marketplace.<sup>175</sup>

#### **Box 3.1: Some responses from the small seller questionnaire**

*'We sell products on as many online marketplaces as possible as it allows for the largest possible customer base. We have found that many customers are fairly loyal to 1 marketplace and don't tend to shop around as much.'*

*'We sell on multiple online marketplaces for a few reasons. Firstly, they have different customer bases and marketing targeting, meaning our products are exposed to more customers. Secondly, we are wary of having our eggs in one basket if one marketplace were to fail or change their fees/policies so it was no longer possible to sell on it. We do not sell on more than two online marketplaces as each takes staff time and knowledge to manage, and more online marketplaces seem to give diminishing returns.'*

The ACCC understands that sellers with strong brand recognition and a large number of customers also have a strong incentive to be on many or all of the major online marketplaces.

Online marketplaces have different characteristics and entry requirements and attract different consumer demographics. They also offer different terms and conditions, with requirements that sellers must meet to get onto, and stay on, an online marketplace.

### 3.2. Terms and conditions for using an online marketplace

Each marketplace sets terms and conditions for sellers to access the marketplace. The ACCC notes that, while larger sellers may have some bargaining power to negotiate the terms of its agreement with an online marketplace, smaller sellers typically do not have this level of bargaining power which may limit their ability to negotiate terms with online marketplaces.

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<sup>175</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#).

### 3.2.1. Seller costs

Each marketplace also has a number of costs or fees payable by sellers (Box 3.2). For some online marketplaces these include monthly subscription fees and commissions. Commissions typically vary by product type and can, in some cases, be negotiated on a seller-by-seller basis. On Amazon Australia sellers using the Fulfilment by Amazon service also pay fulfilment and warehousing costs.

#### Box 3.2: Seller fees and commissions

Some online marketplaces charge a monthly subscription or store fee. Sometimes a commission is also taken per order, the overall level of commission being agreed beforehand.

	Amazon Australia	eBay Australia <sup>176</sup>	Catch	Kogan
<b>Commission or referral fees</b>	7% – 15% of total sales price depending on product. <sup>177</sup> Some product categories attract lower fees if seller uses Fulfilment by Amazon.	13.4% of final sales value plus \$0.30 transaction fee for most categories and sellers not subscribed to eBay Store. <sup>178</sup>  6.2% – 11.9% of final sales value plus \$0.30 transaction fee for eBay Store sellers. <sup>179</sup>	Dependent on product category and are set when seller signs up to marketplace. <sup>180</sup>	Individually negotiated with sellers on registration. <sup>181</sup>
<b>Other mandatory fees</b>	Individual Seller Plan – \$0 monthly fee, \$0.99 (exc. GST) per-item sold fee in addition to referral fee. <sup>182</sup>  Professional Seller Plan – \$49.95 (exc. GST) monthly fee, no per-item sold fee. <sup>183</sup>	For eBay Store sellers, \$24.95 per month (exc. GST) for a basic store, \$54.95 per month (exc. GST) for a feature store, and \$549.95 per month (exc. GST) for an anchor store.	Fixed \$49.99 (inc. GST) monthly store fee. Fee waived during first two months of joining the marketplace. <sup>184</sup>	Monthly store fee of \$299.

<sup>176</sup> The ACCC notes that eBay is currently transitioning all sellers to a new managed payment system whereby payment processing fees are deducted automatically from seller funds awaiting payout. Previously, sellers on eBay were charged separately by PayPal. eBay Australia, [Getting Paid and Managing Your Earnings](#), accessed 3 March 2022.

<sup>177</sup> Amazon Australia, [Selling on Amazon Fee Schedule](#), accessed 3 March 2022.

<sup>178</sup> eBay Australia, [selling fees without an eBay store](#), accessed 28 March 2022; eBay Australia, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 21.

<sup>179</sup> eBay Australia, [eBay Stores fees for registered businesses](#), accessed 28 March 2022.

<sup>180</sup> Catch, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 16.

<sup>181</sup> Kogan, [Marketplace Seller Terms & Conditions](#), accessed 3 March 2022.

<sup>182</sup> Amazon Australia, [Selling plans](#), accessed 3 March 2022.

<sup>183</sup> Amazon Australia, [Selling plans](#), accessed 3 March 2022.

<sup>184</sup> Catch, [Submission to the ACCC Digital Platforms Services Inquiry Fourth Interim Report](#), 20 October 2021, p 16.

Catch and Kogan<sup>185</sup> are examples of online marketplaces with larger sellers and brands that charge a monthly subscription fee. Catch's monthly subscription fee is \$49.99.<sup>186</sup> The ACCC understands that Kogan's monthly store fee payable by sellers has increased substantially since late 2021, and currently stands at \$299.<sup>187</sup>

eBay Australia similarly sets subscription fees and commissions (with the commission ranging from 6.2% to 11.9%) for larger sellers that operate an eBay store.<sup>188</sup> Smaller sellers (including those participating in classifieds-like listings) are required to meet a fixed order fee of \$0.30. eBay's commission on sales below \$4,000 is 13.4% (and 2.5% for orders above \$4,000).<sup>189</sup>

Amazon Australia provides a two-tier seller fee structure; individual plans (where sales are fewer than 50 units a month) attract a \$0.99 per month subscription fee whilst the Professional plan (for sellers that sell more than 50 items a month) costs \$49.95 per month. In addition, commissions ('Referral fees') on each item vary from 7-15% depending on product category. Where a seller chooses to use Amazon's fulfilment system, a fee ranging from \$3.94 to \$27.17 is charged, depending on the size and weight of parcels.<sup>190</sup>

The ACCC has received numerous complaints from sellers in relation to the limited and delayed transparency with which online marketplaces set and change their fees, and the seller's ability to ensure changing charges are properly accounted for.<sup>191</sup>

The ACCC recognises that seller fees support investment by an online marketplace into things including advertising, as well as search and product recommendation algorithms that help build a consumer base. As the Marketplace Council submitted, fees may 'reflect the benefit to the seller for a sale they might not have otherwise been able to attract or afford through other channels, including their own webstore.'<sup>192</sup>

Other concerns were raised in relation to the increasing role online marketplaces are taking in managing and processing payments to sellers. At a broad level, this control reduces the direct relationship between sellers and consumers. Specific concerns were raised in relation to online marketplaces managing payments and automatic deductions for seller fees and commissions by the marketplace. The ACCC received submissions from sellers raising concerns about the impact of eBay's recent transition from PayPal-enabled payments to a managed payments system:<sup>193</sup>

### **Box 3.3: Some responses from the small seller questionnaire**

*'We've recently been forced to sign up to a 'managed payments' system where we do not get our income from selling directly anymore. We used to get our income directly from PayPal and could deposit it directly into our bank accounts. eBay now holds our income, automatically takes fees out and pays us our money when they want to.'*

*'Terms and conditions like this are unfair because, first, it makes it impossible to get our money back when eBay makes a mistake and, second, it forces us to use services that are put in place only to make the platform more money.'*

<sup>185</sup> Information provided to the ACCC.

<sup>186</sup> Catch, [Marketplace FAQs](#), accessed 8 February 2022.

<sup>187</sup> Information provided to the ACCC.

<sup>188</sup> eBay, [eBay Stores fees for registered businesses](#), accessed 28 March 2022.

<sup>189</sup> eBay, [Selling fees without an eBay Store](#), accessed 8 February 2022.

<sup>190</sup> Amazon, [Pricing](#), accessed 8 February 2022.

<sup>191</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), rows 3, 5.

<sup>192</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 16.

<sup>193</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), row 7.

In its submission to the ACCC, eBay Australia noted that, as part of the transition, ‘sellers will see higher fees from eBay (as we now manage the payment process), (but) most can expect to see overall savings as they transition onto the new payment system.’<sup>194</sup> The ACCC has previously examined requirements for sellers to use specific payment systems, and noted that the inability to offer alternative payment options leads to a loss of consumer choice over which payment system to use; as well as recognising the potential risk of less secure payment systems being offered if alternative systems were allowed.<sup>195</sup>

Separately, sellers raised concerns over Amazon returning unused stock and charging sellers a new fulfilment fee when it re-orders units:<sup>196</sup>

When you use [fulfilment by Amazon] they are also very prone to generating large minimum holds of stock and then sending large amounts of it back to you at your expense to then turn around the next month and order those units back at our expense. You have to book deliveries to their system which also requires the use of a time critical courier which once again increases costs that they don't have...

The ACCC notes that there is an increasing reliance on automation to manage seller payments. Although automation assists online marketplaces to manage aspects such as fulfilment or price changes, it is important that sellers are able to understand and engage with any processes.

The ACCC considers it is important, given the reliance of sellers on online marketplaces, that the level of fees charged is transparent and that advance notice is given of any changes to this policy.

The ACCC also notes the importance of greater choice in payment options in increasing choice for consumers. The ACCC notes that this should be balanced against any potential risk of consumer harm from those payment systems.

### **3.2.2. Influencing the price of products**

Generally third-party sellers set the price of the products they sell on online marketplaces. However, some online marketplaces impose restrictions on third-party sellers’ ability to set prices. Online marketplaces may require that sellers not to offer their products for sale at a higher price than the prices they offer for the same product on other websites (referred to as a price parity clause).

For example, while eBay’s broad User Agreement Policy does not contain any price-parity-like obligations on sellers at-large, eBay requests that some individual sellers offer competitive pricing for their products or maintain price parity for prices listed on their websites and on eBay. These obligations can carry across to discounts or promotions offered by at least some eBay sellers.<sup>197</sup>

Some Amazon seller agreements include an obligation [on the seller] to ‘ensure that your offers on the Amazon Store deliver great value for our customers and provides that ‘discounted referral fees are provided in part to assist you offer great prices to customers on the Amazon Store.’<sup>198</sup>

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<sup>194</sup> eBay, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 2 September 2021, p 20.

<sup>195</sup> ACCC, [Digital Platform Services Inquiry Second Interim Report](#), 28 April 2021, pp 77-78.

<sup>196</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), row 5.

<sup>197</sup> Information provided to the ACCC.

<sup>198</sup> Information provided to the ACCC.

Price parity provisions can generate economic efficiencies, for example, by preventing freeriding and protecting a platform's investment incentives.<sup>199</sup> However, concerns have also been raised in relation to the use of these pricing provisions by online marketplaces.<sup>200</sup> For example, concerns have been raised that pricing provisions may limit the ability of new and rival platforms to enter and expand by competing on pricing. Should this occur, sellers may not be able to optimise their profits by selling at lower prices on alternative platforms with lower fees or commission rates, or on their own website.

Overseas, pricing provisions are also reported to be included by online marketplaces in their terms of use and media reports refer to examples of alleged consequences for sellers that do not comply, with the marketplace reportedly 'suppressing the visibility of (their) products and (thereby) dramatically reducing their sales.'<sup>201</sup>

In Australia, one seller submitted to the ACCC their concerns that Amazon sought to exert pressure to ensure competitive pricing:

Amazon was very focused on price, and kept emailing us or stopping our listings if we were 'too expensive'. When onboarding with them they were very explicit in telling us we couldn't sell cheaper anywhere else.<sup>202</sup>

Another seller submitted to the ACCC that clauses relating to price parity may also appear in co-funded promotions between marketplace and seller, aside from any standard supply arrangement:

eBay runs 'co-funded promotions' where we offer say a 10% discount to eBay customers and eBay covers say 5%. However participation in these promotions involves signing a separate contract, which includes a 'price parity' clause...I refuse to sign these contracts and am badgered at least several times a month by various eBay employees trying to get me to sign and participate...<sup>203</sup>

Price parity clauses have been examined in other jurisdictions, where it has been noted that these types of clauses could result in a '...loss of choice, innovation and competition among online retail sales platforms, as other...platforms were not able to use lower product prices to lure buyers and sellers to their competing online retail sales platforms.'<sup>204</sup>

In 2017, Amazon and the European Commission agreed to rescind such clauses in e-book seller agreements across Europe, after the Commission raised concerns that these types of clauses 'made it more difficult for other e-book platforms to innovate and compete effectively with Amazon'.<sup>205</sup>

As such, although there may be some benefits from price parity clauses, material concerns have been raised that these provisions may limit competition among online marketplaces, as well as preventing sellers from offering a lower price through alternative avenues. The ACCC considers it is important to continue to monitor the prevalence and effect of these provisions.

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<sup>199</sup> For example, a consumer may conduct a number of product searches on an online marketplace, benefitting from the investments the marketplace made to offer the search function. However, after finding the most suited product for their needs, and that product's seller, the consumer might be incentivised to make the purchase on the seller's own website if the product is available there at a lower price to the marketplace. If many sellers and consumers engage with an online marketplace in this way, this may dampen incentives for the marketplace to invest in the first place.

<sup>200</sup> J Baker and F Morton, [Antitrust Enforcement Against Platform MFNs](#), *Yale Law Journal*, 127:7 (2018) p 2916.

<sup>201</sup> Institute for Local Self-Reliance, [Report: Amazon's Monopoly Tollbooth](#), 28 July 2020; Bloomberg reported that sellers that did not comply with MFN obligations received alerts that stated 'One or more of your offers is currently ineligible for being a featured offer on the product detail page because those items are priced higher on Amazon than at other retailers.' See S Soper, [Amazon Squeezes Sellers That Offer Better Prices on Walmart](#), *Yahoo!Finance*, 6 August 2019, accessed 4 February 2022.

<sup>202</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021, row 4.

<sup>203</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021, row 17

<sup>204</sup> *District of Columbia v Amazon.com Inc*, [Complaint filed in the Superior Court of the District of Columbia](#), 25 May 2021, p 2.

<sup>205</sup> K Cowdrey, [European Commission makes Amazon's removal of MFN clauses legally binding](#) *The Bookseller*, 4 May 2017, accessed 4 February 2022.



### 3.3. Getting products before consumers

As discussed in Chapter 2, the large number of products offered by online marketplaces means that what consumers see depends on the processes and decisions online marketplaces make in how they present information on their online marketplaces.

For sellers, the success of their products on online marketplaces is also dependent on how online marketplaces choose to present their products, and changes in the operation of marketplace discovery tools can have a substantial effect on a seller's ability to reach consumers and to compete effectively. In response to the ACCC's small seller questionnaire, nearly three quarters of respondents considered prominence on an online marketplace either crucial or very important. Many sellers who considered it crucial submitted that consumers were unlikely to look beyond the highest listed products on search results.<sup>206</sup>

Similarly, for sellers, becoming the featured offer or winning the buy box is crucial to success on Amazon and Catch. Data available to the ACCC indicates that on Catch and Amazon, the majority of add to cart events occurred from the Buy Box.<sup>207</sup>

#### 3.3.1. Transparency over how products are displayed

Online marketplaces use algorithms (with different inputs) to underpin the processes it provides to help consumers search: including search algorithms, featured items, and product badging.

A key concern for many sellers, then, is knowing how marketplace processes work. Almost three quarters of sellers responded to the ACCC's small seller questionnaire stated they were dissatisfied with the transparency by online marketplaces on how search algorithms work.<sup>208</sup>

As part of this Report, the ACCC examined what went into determining a product's prominence, as well as how much information online marketplaces provided to sellers about this. The ACCC has found that marketplaces are opaque and are not transparent about how their algorithms operate to decide how products are displayed to consumers.

Each marketplace has policies and processes in relation to how products are displayed. They also provide different information to third-party sellers about how their products can achieve greater prominence on the marketplace (for example, in listing priority or as a featured offer). The ACCC also notes that these online marketplaces, like other digital platforms, have legitimate incentives to maintain a degree of opacity over their search algorithms in order to prevent sellers from misusing or gaming the algorithms to their benefit.<sup>209</sup> The ACCC also recognises that the development of search algorithms requires significant investment and resources. Opacity on the working of these algorithms prevents potential competitors from copying and otherwise free-riding from an online marketplace's investment; Allowing such free-riding and/or sellers to game the algorithm would clearly result in a poor outcome for consumers and businesses.

While the ACCC understands that there are legitimate reasons for online marketplaces to maintain a degree of opacity over their algorithms, it important that any changes are communicated clearly and in a timely manner to sellers particularly where this relates to product visibility or charges.

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<sup>206</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021, column Y.

<sup>207</sup> Information provided to the ACCC.

<sup>208</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021, column Z.

<sup>209</sup> D Mattioli, 'Amazon's search and deploy algorithm', *The Australian*, 19 September 2019, accessed 4 February 2022; ACCC, [Digital Platforms Services Inquiry Second Interim Report](#), 28 April 2021, p 91 – 92.

### 3.3.2. Competing against the marketplace for product visibility can be difficult for third-party sellers

As noted above, hybrid marketplaces may have competing incentives. For example, online marketplaces have an incentive to offer consumers a broad range of competitively priced products from a range of different sellers. An online marketplace that also sells its own products has an added incentive to promote the sale of its products, potentially over those of third-party sellers.

Understanding how algorithms work is important for sellers in reaching consumers. This is particularly the case because, as discussed in Chapter 2, consumers' actions can be affected.

As part its analysis of marketplace algorithms, the ACCC found that price, delivery costs and ratings were not always determinative of search outcomes for a consumer, and that whether or not a product was sold directly by the marketplace rather than a third-party seller was also on occasion a relevant factor.

#### **Box 3.4: How algorithms determine what products a consumer is shown in search results**

A wide variety of different considerations can go into what an algorithm determines should be shown to a consumer. An algorithm's output, while influenced significantly in how it has been designed by the marketplace and the business objectives it is meant to achieve, may also be influenced by sellers through the descriptions they provide for their products, quality of product images, etc.

In its review of how online marketplaces determine which products appear (and in what order) following a consumer product search query, the ACCC identified a number of instances where the algorithm of a hybrid marketplace results in products sold by the marketplace having an advantage, meaning they will appear higher in search results over listings by third-party sellers.

For example, based on information provided to the ACCC:

- Catch's search algorithm is subject to a number of 'boosts' which refine search results based on a variety of factors, including users' preferences and purchase histories. The boosts return and rank the most relevant search results to search queries based on a variety of factors including high conversion rate products, products sold by Catch, and Catch OnePass eligible products.<sup>210</sup>
- Kogan products that are eligible for 'Kogan First' and exclusive brands (which must be sold by Kogan) receive boosts in search.<sup>211</sup> Kogan also informs sellers that products sold by Kogan may be prioritised in search results over those sold by third-party sellers. Kogan notes:

When selling on Kogan.com Marketplace, your products may be presented alongside products sold by other sellers and by Kogan.com itself. The prominence of your products displayed on the website will be determined by various factors, including their popularity, price competitiveness, shipping speed, your seller performance, and other factors. Products sold by Kogan.com may be prioritised over your products.<sup>212</sup>

Amazon Australia stated that in the Amazon Australia Store it does not advantage its own products or offers in search results or in the Buy Box over those of third-party sellers. The

<sup>210</sup> Information provided to the ACCC. The ACCC notes that any consumer is able to sign up for a free 30-day trial of Catch OnePass to access those discounts or delivery benefits that are accounted for in the search algorithm.

<sup>211</sup> Information provided to the ACCC.

<sup>212</sup> Kogan, [Kogan marketplace](#), accessed 14 February 2022.

ACCC sought details about inputs of Amazon’s algorithms, which were not provided, so the ACCC does not have information about how Amazon’s algorithms produce search results.<sup>213</sup>

As part of its analysis, the ACCC also considered whether some online marketplaces were likely in some instances to feature their own products in the Buy Box rather than a product selected based on price, delivery costs and ratings.

### **Box 3.5: Becoming the featured offer on Catch and Amazon**

The ACCC conducted a desk top review of a small, randomly selected, group of products sold on Catch and Amazon to understand the practical effects of their respective algorithms used to select the featured offer. For Amazon, the ACCC followed a small set of products from September 2021 to January 2022 and observed how the featured offer was allocated.

The ACCC found that, for the most part, having the lowest total cost, as determined by the price of the product plus the shipping cost, appeared to have a very strong influence in becoming the featured offer in the Buy Box on both online marketplaces.

In relation to Amazon, the ACCC observed that other factors were also likely taken into account in determining which offers were featured in the Buy Box, as offers with the lowest price plus shipping alone were not always winning the featured offer. The ACCC understands that delivery speed and seller performance metrics are also relevant to the algorithm. The ACCC observed that, on Amazon, a high number of the featured offers were from sellers which used Fulfilment by Amazon.

Information provided to the ACCC by Catch confirms that on its marketplace offers by sellers with the lowest prices and lowest shipping costs tend to win the Buy Box.<sup>214</sup> However, the ACCC understands that Catch products may be advantaged in some instances in the following ways

- the algorithm used to determine which offer appears in the Buy Box assumes products sold by Catch have zero shipping costs, whereas that is only the case for those with a Catch-Club membership. This means that, in some instances, offers by Catch become featured in the Buy Box even when the total price (that is, product price + shipping cost) is more expensive than a competing offer
- if there is a tie in the offers between Catch and a third-party seller – the algorithm would feature the offer by Catch in the Buy Box solely on the basis that the offer is by Catch.<sup>215</sup>

In the below example, the final cost of the Catch offer that was featured in the Buy Box would be \$95 for a member of Catch’s OnePass. If the consumer was not a subscriber to Catch’s OnePass (and the vast majority of Catch users are not subscribers to Catch’s OnePass) the cost for the consumer was \$104.95 (plus \$9.95 in delivery charges).<sup>216</sup> This is more expensive than the alternative offer by Appliance Wholesale Partner, not featured in the Buy Box, of \$100.47 (plus \$9.99 in shipping cost).<sup>217</sup>

<sup>213</sup> Information provided to the ACCC.

<sup>214</sup> Information provided to the ACCC.

<sup>215</sup> Information provided to the ACCC. The ACCC notes that any consumer is able to join OnePass for a, free, 30-day trial so as to receive any eligible discounts or delivery benefits which are accounted for in the search algorithm.

<sup>216</sup> Information provided to the ACCC.

<sup>217</sup> The ACCC notes that in some locations, Catch’s offer (plus \$9.99 in shipping cost) was cheaper than alternative offers due to higher shipping costs for alternative offers.

**Figure 3.1: Example of featured offer on Catch**

**Sunbeam Alinea 4-Slice Toaster - Ocean Mist White TA2740W**

Sunbeam ★★★★★ (9 Reviews)

**\$95** SAVE \$14

Quantity 1

**ADD TO CART** **BUY NOW**

FREE SHIPPING\* & More! FIRST 30 DAYS FREE with **Club Catch** JOIN NOW >

In Stock - Leaves warehouse in 1 - 2 business days  
Sold and delivered by Catch  
Limit per customer: 5

**Will my item arrive before Christmas?**  
Enter your postcode 3003  
Upgrade to Express Post or select Pick up from Target or Kmart at checkout to receive this by Christmas. ⓘ

**Warranty**  
Manufacturer warranty. [Learn more](#)

**More buying options**

**\$90.48 + Shipping** Sold by: [Appliance Wholesale Partner](#) **SELECT**

**\$97.00 + Shipping** Sold by: [Oakley Electrical](#) **SELECT**

**Features:**

- Sunbeam appliances
- Model: Alinea 4-Slice Toaster
- Luxurious matte finish
- QuickCheck allows you to check on the browning progress
- Removable crumb tray for easy cleaning
- Defrost and reheat settings available
- Choose from 1-9 browning options
- Includes storage for cord
- Materials: N/A
- Power: 1950W
- Cord length (approx. cm): 90
- Model no.: TA2740W
- Colour: Ocean Mist White

In certain situations, the operation of the algorithms in these ways could benefit consumers and/or sellers. For example, online marketplaces boosting products that are subject to discounts or offers via the online marketplaces' subscription service may assist consumers to more easily find attractive offers. Further, the consumer may receive the same price for a product and not be concerned that it is sold by the marketplace rather than a third-party seller, or may prefer the marketplace's own products. For example, Catch has indicated that it boosts its first-party products in search results based on internal data that shows its consumers prefer its first party products over those of third-party sellers.<sup>218</sup> Assuming consumers' shopping experience is indeed enhanced, consumers may look to return to the marketplace for future purchases. Sellers may also benefit from the consumer traffic and generate additional sales provided that their products are discoverable to consumers.

Concerns arise where an online marketplace's favouring of its own products means that products which maybe more relevant to the consumer's search are given less prominence without the consumer realising that is the case. Further, to the extent that this hinders third-party sellers from competing on their merits, this may reduce their incentives to participate on online marketplaces, and subsequently reduce the benefits that third-party sellers bring to consumers.

### **3.3.3. Subscribing to fulfilment services provided by some online marketplaces may increase visibility and improve access to consumers**

On some online marketplaces, subscribing to related fulfilment services may result in significant benefits for sellers. On eBay Australia, subscribing to Fulfilment by eBay can improve visibility of products in search results.<sup>219</sup> Subscribing to Fulfilment by eBay also results in automatic eligibility to have the eBay Plus badge displayed on the seller's listings

<sup>218</sup> Information provided to the ACCC.

<sup>219</sup> eBay, [eBay Fulfilment by Orange Connex](#), accessed 2 March 2022.

and enable them to reach eBay Plus members; eBay states that eBay Plus members spend up to six times more than the average eBay user.<sup>220</sup>

On Amazon Australia, there are stringent requirements that third-party sellers typically need to adhere to in order to be eligible to have their offers featured on the Buy Box of a product. In order to be eligible to be the featured offer on Amazon for example:

- sellers must be subscribed to a Professional Selling Plan (as opposed to just the Individual Selling Plan)
- sellers must meet certain performance metrics relating to their order defect rate, cancellation rate, and late shipment rates
- sellers must meet order volume thresholds, which varies among categories of products.<sup>221</sup>

However, if sellers subscribe to Fulfilment by Amazon, their offers are automatically eligible to being featured on the Buy Box.<sup>222</sup>

Participating in Fulfilment by Amazon is also one of the main ways third-party sellers may become 'Prime-eligible'.<sup>223</sup> The ACCC understands Amazon's algorithm looks at a number of factors to identify the featured offer, including: price, availability, delivery speed, and customer service. Sellers who offer faster shipping options are more likely to be the Featured Offer. A Seller whose products are fulfilled by Amazon, which makes that product eligible for Amazon Australia Prime delivery, may have a faster delivery speed than other sellers, which is taken into account when considering the featured offer on the Buy Box..<sup>224</sup>

Becoming Prime-eligible through Fulfilment by Amazon would also enable third-party sellers to participate in lucrative Amazon sales events such as Lightning Deals, as well as special sales events such as Prime Day, Black Friday, Cyber Monday, etc.<sup>225</sup> Prime Day in particular drives significant sales for third-party sellers and Amazon has described the 2021 Prime Day event as 'the two biggest days ever for small Australian businesses' on the marketplace.<sup>226</sup> Sellers that are not Prime-eligible cannot submit deals to participate on these sales events.

While third-party sellers are free to choose whether or not to use Fulfilment by Amazon, there appears to be very strong incentives for third-party sellers to use Fulfilment by Amazon as competing fulfilment services may not provide many of the benefits that Fulfilment by Amazon can – and these benefits are significant. The ACCC considers there may be risks to competition in fulfilment services should Amazon's market position significantly increase and Fulfilment by Amazon continues to provide significant benefits that cannot be replicated by others. The ACCC notes that Amazon was found to be in breach of European competition law in Italy for preventing competing fulfilment services from presenting themselves as providers of comparable quality to Fulfilment by Amazon.<sup>227</sup>

### ***Consumer data and control over the seller-consumer relationship***

In contrast to traditional two-party transactions (that is, the seller and the consumer dealing directly), the transaction on an online marketplace is undertaken through the marketplace. In

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<sup>220</sup> eBay, [eBay Fulfilment by Orange Connex](#), accessed 2 March 2022.

<sup>221</sup> Amazon Australia, [Featured Offer eligibility](#), accessed 14 February 2022.

<sup>222</sup> Amazon Australia, [Featured Offer eligibility](#), accessed 14 February 2022.

<sup>223</sup> Amazon Australia, [The benefits of Fulfilment by Amazon](#), accessed 14 February 2022.

<sup>224</sup> Information provided to the ACCC.

<sup>225</sup> Amazon Australia, [Make your products eligible for deals](#), accessed 15 February 2022.

<sup>226</sup> Amazon Australia, [More Australian Prime members shopped than ever before, this Prime Day](#), accessed 15 February 2022.

<sup>227</sup> Autorità Garante della Concorrenza e del Mercato, [A528 - Italian Competition Authority: Amazon fined over € 1,128 billion for abusing its dominant position](#), 9 December 2021, accessed 15 February 2022; E Pollina and M Quaglia, [Italy fines Amazon record \\$1.3 bln for abuse of market dominance](#), *Reuters*, 10 December 2021, accessed 15 February 2022.

some instances, the marketplace provides only the platform for a consumer and seller to find each other; in other instances, an online marketplace has a much higher degree of control. For example, some online marketplaces have control over the transfer of money, where the consumer's payment goes to the marketplace, which the marketplace then remits to the seller; rather than directly to the seller.

Some online marketplaces may make data or insights available to sellers, but decisions around the extent of data being shared and how data or insights are provided to sellers rest with the online marketplace. Amazon's Brand Analytics tool provides sellers with data on search (including most popular searched keywords), market basket analytics (identifying products bought in a consumer's shopping cart alongside a seller's products) and demographic data on consumers (including age, household income, marital status and education) that may help identify the shopping behaviours of a target audience.<sup>228</sup> eBay provides sellers with data on demand and supply trends through Terapeak Product Research.<sup>229</sup>

However, these data or insights do not represent the full extent of consumer data collected by an online marketplace, nor the full extent of data that could be shared with a seller. This control by online marketplaces means that third-party sellers often do not have the same information as they would have if they were dealing directly with the consumer (see Figure 3.2). Sellers are therefore not in a position to grow their consumer base or directly communicate or target the consumers they are after. While some online marketplaces may provide some consumer contact details on a per-order basis, sellers may be expressly prohibited from contacting consumers directly in an attempt to prevent off-platform transactions from occurring:<sup>230</sup>

**Figure 3.2: Online marketplaces' place in the consumer-seller transaction**



Unequal access to, and control over, consumer data is a concern raised by sellers. A large proportion of sellers who responded to the ACCC's small business questionnaire raised concerns with the data collected by online marketplaces in comparison to what they have access to, and concerns with how an online marketplace might use that data to its own advantage.

<sup>228</sup> D Vamanan, '[Amazon Brand Analytics: How it Helps Sellers To Target Their Audience?](#)', *Seller App*, 27 January 2022, accessed 4 February 2022.

<sup>229</sup> eBay, '[Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#)', 2 September 2021, p 11

<sup>230</sup> J Kaziukenas, '[Renting Amazon Customers](#)', *Marketplace Pulse*, April 8 2021, accessed 4 February 2021.



### **Box 3.6: Some comments from the ACCC small business seller questionnaire and submissions to the issues paper**

*'I get pretty much nothing. We get the name and address of the customer so we can send the parcel to them, but we don't get any email address. Some online marketplaces provide the customer's phone number, but they have strict rules on when and how contact can be made direct with the end buyer.'*

*'All [online marketplaces] strictly prohibit us from sending marketing of any type to the customers, they consider them their customers not ours.'*

*'Consumer's browsing, search or sales history is not made available to sellers, but is used in aggregate by marketplace algorithms to influence curated offers and marketing...'<sup>231</sup>*

In contrast, and as discussed in Chapter 2, online marketplaces have access to a large volume of granular consumer and seller data, which they are able to use to build detailed profiles of individual consumers and to better target individual consumers through personalised product recommendations and advertising. Granular data on existing consumers can also be used to better tailor offers to first time consumers. This data may also be used at a more aggregate level to improve an online marketplace's ability to identify the types of products that are becoming increasingly popular.

The ACCC's seller questionnaire revealed strong support amongst many sellers for access to data on consumers that purchase their products and their contact details. While access to this data could enable sellers to build their brand through direct marketing and improve their services (including addressing product returns), the ACCC acknowledges there are complexities in sharing consumer data with sellers, including:

- online marketplaces' incentives to invest in their services may be driven in part by their 'ownership' of the consumer relationship. As such, sharing consumer level information with sellers may reduce incentives to invest in the marketplace itself
- the prevalence of multichannel listing software may mitigate the information asymmetries between online marketplaces and sellers in some cases
- consumers may also have reservations around their data being shared with sellers particularly for direct marketing purposes (see the discussion of data collection practices above at section 2.3.1).

#### **3.3.4. Dynamic pricing services and algorithms**

On online marketplaces, sellers can make use of dynamic pricing services and pricing algorithms (or pricing rules) to automatically set the prices of their products. Price algorithms take various types of data as inputs to return a price for the product as an output. Possible input data includes data on product inventory, product demand, consumer characteristics, and competitors' pricing. The outputted price can either be presented to a human decision-maker as a recommendation or, in the case of a dynamic pricing algorithm, can be automatically implemented.

A seller on an online marketplace has three options for using dynamic pricing algorithms to set prices on their products:

- The seller can develop and maintain pricing algorithms themselves.
- The seller may be able to select from in-built pricing algorithms on an online marketplace. For example, Amazon offers sellers who have subscribed to the Professional selling plan

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<sup>231</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 20

an Automate Pricing tool to create pricing rules.<sup>232</sup> This involves selecting a rule type from a drop-down list, setting the rule parameters (including filters, such as ‘comparing to Fulfilled by Amazon offers only’) and then selecting the specific products to which the rule applies.

- The seller can use a third-party provider of algorithmic pricing. There are a large number of third-party providers of algorithmic pricing, which supply either pricing algorithms, or pricing directly, or some combination of both. Many of these providers’ algorithms and prices can be integrated into marketplace ecosystems directly or via ecommerce platforms such as Shopify, Magento or WooCommerce.

Some pricing algorithms implement a particular pricing rule as defined by a programmer or user, for example:

- matching the second lowest-priced competitor’s price
- pricing \$0.05 lower than the highest-priced competitor’s price
- pricing 5% above the lowest-priced competitor’s price.

Such pricing rules have been implemented by sellers long before the advent of online marketplaces. For example, lowest price and price match guarantees are commonplace in the retail sector,<sup>233</sup> and price undercutting as a concept has underpinned competition theory since its inception.

Other pricing algorithms are designed using machine learning. These algorithms learn from historical data to implement more complex rules with the goal of optimising some specified value (such as revenue or profit). Uptake of such algorithms is currently much less popular than rule-based algorithms, but it appears to be increasing.

### ***The advantages of pricing algorithms in online marketplaces***

The digital application of pricing rules provides two significant advantages over manual application of pricing rules.

First, pricing algorithms remove the need for sellers to manually compare prices set by competitors. While the seller still needs to decide what the general rule should be, the remainder of the process of price comparison is automated. Use of algorithmic pricing creates efficiencies by significantly reducing costs associated with employing labour to analyse and set prices. For example, repricing software provider Omnia claims to save sellers about 10 hours each week, while Seller Snap claims to save sellers about 60 hours per week.<sup>234</sup>

Second, sellers’ adoption of pricing algorithms can also benefit the competitive process if sellers are using them to compete for sales.<sup>235</sup> Online marketplaces assist consumers in searching for and comparing products, and price is usually a dominant factor when determining which product to purchase. Sellers can therefore seek to increase their sales on online marketplaces by competing on price, and dynamic pricing algorithms facilitate that

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<sup>232</sup> Amazon Australia, [Create a Pricing Rule](#), accessed 21 January 2022.

<sup>233</sup> See, for example: Bing Lee, [Competitor pricing policy](#), accessed 4 February 2022; Bunnings, [Price policy](#), accessed 4 February 2022; David Jones, [Price promise](#), accessed 4 February 2022; Harvey Norman 2021, [Price guarantee](#), accessed 4 February 2022; Myer, [Competitive pricing policy](#), accessed 4 February 2022; Officeworks 2021, [Price beat guarantee](#), accessed 4 February 2022.

<sup>234</sup> Baldwin, [Why dynamic pricing is less risky than you think](#), *Price Points*, 5 July 2019, accessed 12 January 2022; Seller Snap, [Save time. Avoid price wars. Maximize profits](#), accessed 12 January 2022.

<sup>235</sup> Using dynamic pricing algorithms to engage in predatory pricing (by, for example, setting the minimum price guard below cost price) would be an anticompetitive exception to this scenario.

process. Algorithmic price competition is especially vigorous because of the speed with which the algorithms respond to one another – in some instances a matter of minutes.<sup>236</sup>

### ***Use of pricing algorithms also increases the risk of harming the competitive process and consumers***

Although the use of dynamic pricing algorithms can reduce business costs for sellers and increase price competition to the benefit of consumers, the ACCC considers that there are also risks associated with the use of dynamic pricing algorithms, namely: algorithmic-assisted collusion, price gouging and the application of personalised pricing.

The risk of algorithmic-assisted collusion arises from the increased transparency of up-to-date pricing data, the enhanced ability to monitor and retaliate in real time, and the availability of mechanisms which automatically respond and adapt with limited need for (slower and less reliable) human engagement.

The risk of price gouging arises from dynamic pricing algorithms using dynamic pricing data to enable firms to quickly identify profit-maximising pricing, which in rapidly changing market conditions where demand suddenly outstrips supply can lead to excessive prices.

### ***Collusion***

The risk that algorithms may facilitate collusion and enable new forms of coordination is referred to as ‘algorithmic collusion’.<sup>237</sup> This can raise competition risks under Part IV of the *Competition and Consumer Act 2010* (Cth). Box 3.7 below describes how collusion can occur, and where competition risks arise.

#### **Box 3.7: What is collusion?**

In a healthy and competitive market, businesses compete fiercely over a range of factors such as product features, service and prices. Prices are set independently by each a business, based on factors such as the firm’s operating costs and revenue targets, and, where observable, the pricing of their competitors.

However, pricing algorithms could potentially lead to collusion amongst competing businesses. Collusion refers to coordination or agreement among competitors with the objective of raising profits which might harm consumers. It can be explicit or tacit.

‘Explicit collusion’ involves competitors explicitly agreeing to work together. This agreement can be written or oral. ‘Tacit collusion’ on the other hand involves coordination between competitors without an explicit agreement. There are number of ways tacit collusion could occur, including, for example, where competitors use the same algorithm to determine their prices or react to market changes.

Explicit and tacit collusion can give rise to contraventions of the Competition and Consumer Act in a number of ways.

Most notably, when competing sellers make (or attempt to make) or give effect to a contract, arrangement or understanding for the purpose, or with the effect or likely effect, of fixing or controlling prices for their products, they are engaging in illegal price fixing cartel conduct. Such illegal arrangements between competitors may be reached directly between the competitors themselves, but they can also be reached indirectly – for example, via the marketplace or other third-party coordinating prices on behalf of the sellers in a ‘hub and spoke’ type cartel.

<sup>236</sup> Boostmyshop, [myPricing: Dynamic pricing & repricing software](#), accessed 12 January 2022; Eva, [The most intelligent platform to maximize your Amazon sales](#), accessed 12 January 2022.

<sup>237</sup> OECD, [Algorithms and collusion: competition policy in the digital age](#), 2017, p 7.

When competing sellers do not go so far as to reach a contract, arrangement or understanding, they can nevertheless contravene the prohibition on anti-competitive concerted practices if they choose to engage in cooperative conduct rather than compete, with the purpose, effect or likely effect of substantially lessening competition in a market.

### **Price Gouging**

Pricing algorithms enable sellers to price their products according to changing supply/demand conditions. Numerous third-party providers of algorithmic pricing advocate this as a key rationale for using their solutions.<sup>238</sup>

Where this can become an issue is where demand dramatically outweighs supply, creating opportunities for 'price gouging'. Price gouging typically refers to instances where consumers are charged significantly inflated and unfair prices. This can cause significant consumer detriment especially if it occurs at times of great consumer need.

Price gouging itself is not a breach of the Australian Consumer Law. However, a business will breach the Australian Consumer Law if it engages in misleading or deceptive conduct about prices, or the reasons for price changes. In some limited circumstances, excessive pricing may constitute unconscionable conduct under the Australian Consumer Law.

The ACCC notes, during the COVID-19 pandemic, various online marketplaces implemented policies to prevent or address sellers exceeding reasonable price ceilings for items of high demand including hand sanitisers, rapid antigen tests and face masks/or to restrict or limit the sale of such products altogether while supply chain issues persisted. The ACCC considers that these policies are a valuable tool in addressing and preventing 'price gouging' behaviour by sellers.

### **Personalised pricing**

Another potential consideration of algorithms is its use in personalised pricing, which the ACCC has also considered in previous reports.<sup>239</sup> The growth of online retailing, as well as the type, volume, timeliness and quality of the data available to digital firms, has enhanced the scope for personalised pricing, including on online marketplaces.

Personalised pricing may have the effect of making some consumers better off if they are charged lower prices that reflect their lower willingness to pay and are able to purchase more goods or services as a result. However, it has the potential to disadvantage consumers if it results in firms setting higher prices that reflect the consumers' relatively high willingness to pay, and where consumers cannot mitigate the higher price by seeking better offers from alternative suppliers. Personalised pricing can also reduce trust in the operation of markets, particularly if there is limited transparency of the consumer data available to sellers and how they are using it.

## **3.4. When things go wrong**

Sometimes sellers can be dissatisfied with a transaction, or issues may arise relating to their interactions with the online marketplaces themselves. The ability of sellers to engage with, and resolve, such disputes is reliant on whichever the policies and practices that each marketplace has in place.

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<sup>238</sup> For example: Aifora states 'The aifora retail automation platform uses precise demand forecasts to optimize pricing and inventory across sales channels.' Aifora, [Drive demand with intelligent price and inventory management](#), accessed 15 January 2022; Clear Demand states 'Machine Learning enables highly accurate determination of each item's demand curve and most efficient price': Clear Demand, [Regular Price Optimization](#), accessed 3 February 2022.

<sup>239</sup> The ACCC's First Interim DPSI report considered the role of platforms, and the potential implications of 'personalised pricing' (A form of price discrimination whereby different consumers may receive different prices, set using information about their characteristics and what a business thinks they are willing to pay): ACCC, First DPSI interim report, pp 100 - 103.

### 3.4.1. Review manipulation

As discussed in Chapter 2, the nature of online retail means that reviews are increasingly important for consumers in making purchasing decisions. It also means that sellers can be increasingly harmed by fake or otherwise manipulated reviews.

Misleading reviews (which can amount to a false representation under the ACL) can include fake reviews being added to the products of their competitors or by misleading negative reviews being added to their own products. The ACCC has previously taken action in relation to specific instances of fake reviews.<sup>240</sup>

In some instances, marketplace review systems may be gamed to make reviews for one product appear next to a product that is completely different.<sup>241</sup>

Sellers are harmed by this when a consumer, relying on reviews, makes a selection that they wouldn't have made with accurate reviews. Not only does this result in sellers losing sales they would have otherwise made, but they may incur additional costs such as the resource costs involved in having inaccurate reviews removed or damage to their reputation. The widespread presence of fake reviews also means consumers may be less likely to trust reviews, even real ones.

The harm caused by fake reviews is of particular concern to small businesses. Recently, Australian Small Business and Family Enterprise Ombudsman raised concerns with the effect of fake reviews, and recommended that online marketplaces should adopt processes to prevent fake reviews as well as create a more accessible and transparent review system.<sup>242</sup>

Some online marketplaces have processes in place designed to combat fake reviews. Some online marketplaces also provide ways for sellers to report consumers that have breached marketplace policies relating to reviews.<sup>243</sup> eBay also allows sellers to request that consumer revise a piece of feedback they have posted, when a seller believes a review to be inaccurate or unfair. However, eBay limits the number of times a year that sellers can request a feedback revision to 5 requests per 1000 feedback ratings a seller receives.<sup>244</sup>

### 3.4.2. What can sellers do in a dispute with consumers?

As discussed above in Chapter 2, the rise in online shopping – and the nature of the transactions – means that online marketplaces occupy a central role when consumers are dissatisfied with a seller or a product.

As also discussed, online marketplaces have an incentive to make a consumer's experience as streamlined and positive as possible; and this can include dispute resolution processes that are consumer-centric in nature.

Sellers who responded to the ACCC's small business seller questionnaire had a range of experiences with dispute resolution processes, including those that considered the processes fine, to those that had negative experiences. Those that had negative experiences raised the consumer-biased nature of review processes.

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<sup>240</sup> For example: Citymove Pty Ltd has paid a \$6,600 infringement notice and provided a court enforceable undertaking after it published false consumer testimonials on its Moving Review website: ACCC, Media release, ACCC: Removalist admits publishing false testimonials, 9 November 2011.

<sup>241</sup> Hannah Walsh, [How eBay's review system is promoting fake, counterfeit and even dangerous products](#), *Which?*, 13 March 2020, accessed 4 March 2022; Greg Sterling, Review fraud: [Hijacked Amazon reviews a big problem says Consumer Reports](#), *Search Engine Land*, 27 August 2019, accessed 4 March 2022.

<sup>242</sup> Tech Business News, [Tech companies urged to make it easier to have online fake reviews removed](#), 13 January 2021, accessed 21 January 2021.

<sup>243</sup> eBay, [Report an issue with a buyer](#), accessed 22 February 2022; Amazon, [Report a violation](#), accessed 22 February 2022.

<sup>244</sup> eBay, [Replying to Feedback you received for an item you sold](#), accessed 22 February 2022.

### Box 3.8: Some comments from the ACCC small business seller questionnaire

*'It is extremely buyer centric. Almost impossible to win a dispute as a seller even when you know the buyer is scamming/lying.'*

*'Generally unsatisfactory. Some reviews have been completed in seconds and seem to be automated. Generally, you need to go through the appeal process to obtain an appropriate outcome.'*

*'The buyer always wins. eBay has an automated process to ensure this. The seller is then made to chase eBay and explain why it shouldn't go in the consumer's favour.'*

Different online marketplaces have different approaches to dispute resolution, with some offering sellers more clear and easy dispute resolution processes than others (see Table 3.1).

**Table 3.1: Dispute resolution processes**

Platform	Time limit for sellers to resolve dispute	Escalation to platform	Marketplace 'guarantee'	Internal appeal
Amazon Australia	48 hours	Yes	Where a claim is granted in favour of the buyer, the buyer will be refunded the cost of the order, and in the case of damaged, defective, or materially different products, reimbursed for any return postage costs. <sup>245</sup>	Yes
eBay Australia	3 business days	Yes	The eBay Money Back Guarantee generally allows consumers to be refunded the cost of the product and delivery and in most cases obligates the seller to bear the cost of return postage. <sup>246</sup>	Yes
Kogan	3 business days	Yes	in the event a consumer does not receive the product they ordered; the amount paid will be refunded. <sup>247</sup>	No
Catch	Unspecified	Yes		No

Not all online marketplaces have formal dispute resolution for sellers in place. While all major online marketplaces have processes in place for consumers wishing to dispute a transaction, information provided to the ACCC shows that Kogan does not have any internal procedures for handling a dispute or complaint request from a seller. Rather, cases are assessed on an individual basis.<sup>248</sup>

<sup>245</sup> Amazon Seller Central, [About Amazon's A-to-z Guarantee claims](#), accessed 13 December 2021.

<sup>246</sup> eBay, [eBay Money Back Guarantee](#), accessed 13 December 2021.

<sup>247</sup> Kogan, [Kogan Guarantee](#), accessed 17 December 2021.

<sup>248</sup> Information provided to the ACCC. Kogan notes that it has a relatively small number of third-party sellers on its platform. As it operates a curated online marketplace, it usually receives a small number of complaints by sellers that are dealt with on an individual and personalised basis.



There is also inconsistency in whether, and how easily, sellers can seek to initiate dispute resolution. For example, some online marketplaces provide sellers the ability to contact consumers to resolve issues in certain circumstances,<sup>249</sup> or to report issues with consumers; whereas others do not.

Small business sellers also raised concerns with the application of marketplace-specific guarantees (which are in addition to consumer guarantees under the ACL). These sellers were concerned that these marketplace-provided guarantees are often geared towards the consumer's favour; and some sellers submitting that the consumer-friendly nature of these marketplace processes lends them to exploitation or misuse by consumers.<sup>250</sup>

In recognition that policies and rules may be applied incorrectly, some platforms have in place appeals processes through which sellers can appeal certain decisions made by a platform in relation to the seller. For example, eBay and Amazon have in place appeals processes, allowing for appeal in decisions including those made in relation to:

- an A-to-z or eBay Money Back Guarantee claim
- an account defect on eBay
- an account deactivation or item delisting on Amazon.

Although each dispute may require treatment in a different way, a lack of standard policies or procedures relating to how a seller dispute is handled may result in inequitable outcomes if sellers are treated inconsistently, an issue raised by the Marketplaces Council of Australia.<sup>251</sup>

### 3.4.3. What can sellers do in a dispute with online marketplaces?

Sellers face a range of effects from negative outcomes in dispute resolution processes (see Box 3.9).

#### **Box 3.9: Effect on sellers of negative outcomes in dispute resolution**

In addition to having to bear the cost of refunding, replacing, or repairing an item, online marketplaces may treat sellers differently. For example:

- On Amazon, sellers must maintain an 'order defect rate' (ODR) of less than 1% in order to sell in the Amazon Store. One of the components of ODR include the A-Z Guarantee claim rate, which is given by the number of orders with a relevant claim (including pending claims) divided by the number of orders in a given 60-day time period.
- On Catch, sellers must maintain an 'incident and dispute rate' of below 3% as a condition of participation in the marketplace. Failure to maintain a rate below 3% may result in termination or suspension of sellers' accounts.<sup>252</sup>
- Kogan online marketplaces sellers must maintain a dispute rate and incident rate below 5% or risk suspension or termination.<sup>253</sup>
- On eBay, a dispute case which is closed by eBay and concluded as being the seller's fault is counted as a 'case closed without seller resolution', which affects a seller's performance level. When a seller's percentage of 'case closed without resolution'

<sup>249</sup> Amazon, [Send a critical message to a buyer](#), accessed 3 February 2022; eBay, [Resolving buyer issues](#), accessed 3 February 2022.

<sup>250</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021, responses 7AP, 8W, 79W, 81W, 82W & AP

<sup>251</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 30.

<sup>252</sup> Catch, [Catch Marketplace Seller Participation Agreement](#), clause 6.3(c) accessed 3 February 2022.

<sup>253</sup> Kogan, [Service Level Agreement](#), accessed 24 December 2021.

exceeds 0.3%, eBay may designate that seller as being 'Below Standard' which can result in reduced discoverability, higher fees, and withholding funds.<sup>254</sup>

As well as sanctions for disputes which are held to be the fault of the seller, online marketplaces may penalise sellers for their lack of adherence to performance metrics and seller policies. Examples of performance metrics include cancellation rate, late shipment rates, and response rate to consumer queries.

This system provides incentives for sellers on an online marketplace to maintain high standards, which can benefit all sellers by increasing the marketplace's reputation. But issues arise where disputes are handled unfairly or opaquely by the online marketplaces. Policies that govern these sanctions are incorporated in standard form terms and conditions that sellers must adhere to as a condition of selling on an online marketplace. However, online marketplaces appear to have broad discretion as to when sanctions are handed out to sellers.

Increasingly, automated systems and AI are being relied on to tackle issues such as fraud and product safety.<sup>255</sup> While these automated systems are a practical way for platforms to tackle issues at scale, they can and reportedly have made errors which can lead to sellers being sanctioned or de-platformed.<sup>256</sup> Additionally, there have been reports of automated systems being gamed by bad actors to sabotage competition. For example, a competing seller leaving a fake review or making a false intellectual property claim.<sup>257</sup>

Sellers have raised the issue with automation stymying their ability to resolve disputes. In the ACCC's small business seller questionnaire, sellers raised concerns that automation often made it difficult to effectively resolve disputes, with a number highlighting the value of having consumer service representatives to deal with.<sup>258</sup>

Given the potential magnitude of harm to sellers as a result of being unfairly sanctioned, whether as a result of automated processes, human error or inconsistent application of relevant policies, robust and accessible review mechanisms are an important part in ensuring that sellers are not unfairly treated in their dealings with online marketplaces.

## Conclusion

Just as the ACCC supports dispute resolution mechanisms that are straightforward and fair for consumers, it also considers that dispute resolution should be available to sellers as well. Processes should be in place to ensure sellers have the ability to challenge, or amend, decisions. As discussed in Chapter 2, the ACCC continues to support recommendations to amend the *Competition and Consumer Act 2010* (Cth) to make unfair contract terms illegal (they are currently just voidable) and to prohibit certain unfair trading practices. The ACCC considers that both measures will help assist the concerns of small business sellers, as well as consumer concerns in their interaction with online marketplaces.

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<sup>254</sup> eBay, [Seller levels and performance standards](#), accessed 17 December 2021.

<sup>255</sup> Amazon, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 27 August 2021, p 17; ACCC, [Product Safety Pledge First Annual Report](#), 19 November 2021.

<sup>256</sup> K Long, 'Amazon abruptly banned Washington state treat-maker Chukar Cherries. Months of appeals went unheeded', *The Seattle Times*, 27 September 2021, accessed 3 February 2022; J Dzieza, 'Prime and Punishment: Dirty Dealing in the \$175 Billion Amazon Marketplace,' *The Verge*, 19 December 2018, accessed 3 February 2022.

<sup>257</sup> J Dzieza, 'Prime and Punishment: Dirty Dealing in the \$175 Billion Amazon Marketplace,' *The Verge*, 19 December 2018, accessed 3 February 2022; A Zubatov, 'How Amazon Crushes Small Business,' *The American Conservative*, 15 December 2021, accessed 3 February 2022; D Hamrick, 'Amazon Account Suspensions,' *Jungle Scout*, 28 January 2020, accessed 3 February 2022.

<sup>258</sup> ACCC, [General online retail marketplaces report – seller questionnaire responses](#), 20 October 2021

## 4. Economic considerations with the operation of online marketplaces

### Key findings

- Network effects and data are important to the business models of online marketplaces, and therefore the benefits that they ultimately generate for consumers. However, these factors can also create challenges for sellers and potential new entrants.
- Consumers have a number of alternatives to shopping on a given marketplace. However, the degree to which these are viable substitutes depends on a range of factors, including the nature of the product, preferences for physical purchasing and brand loyalty. While it appears that a large proportion of consumer access multiple marketplaces, some limit their patronage to a particular marketplace.
- For sellers, switching from an online marketplace to alternative channels, such as selling via one's own website or a physical store, may involve significant costs. Further, while one marketplace may be a substitute to another marketplace for some sellers, many sellers view one marketplace as a complement to another marketplace. These sellers may have relatively little bargaining power in their dealings with online marketplaces. Other sellers may have effective alternatives or act as an important drawcard for consumers to the marketplace, and may therefore have more bargaining power with online marketplaces.
- A key concern with hybrid marketplaces relates to the harms to competition that can stem from anti-competitive, preferential treatment of their own products over third-party sellers' products. In particular, where a hybrid marketplace has a substantial degree of market power, they may have the ability and incentive to prevent, or inhibit, third-party sellers from competing on their merits leading to significant harms to competition. Self-preferencing by online marketplaces risks disadvantaging individual sellers who compete directly against the online marketplaces' own products.
- At this stage this does not appear to have resulted in competitive detriments across the product markets in which they compete. This is likely due to the alternative (including alternative online marketplaces) that are available to sellers to reach consumers. However, such practices may have a significant competitive impact if a hybrid marketplace attains a dominant position in the future. Further, as discussed in chapters 2 and 3, where these practices adversely influence consumers' purchasing decisions they may still lead to consumer detriment, and may hinder third-party sellers from competing on their merits.
- The ACCC's Discussion Paper for the September 2022 interim report, released on 28 February 2022, seeks views on regulatory reform for digital platform services. This includes the risk of anti-competitive conduct (such as self-preferencing) by large digital platforms. Given the potential for a dominant online marketplace to emerge in Australia (as set out in the epilogue), the ACCC considers it will be important to ensure that any such framework is capable of covering such conduct by an online marketplace, should any requisite thresholds linked to market power or strategic/gatekeeper status be reached by such a platform.

This chapter examines the economic factors that underpin the operation of online marketplaces, including network effects, data, and the potentially competitive impact of self-preferencing by hybrid marketplaces.

This chapter looks at:

- **Section 4.1** the role network effects and data have for online marketplaces' business models

- **Section 4.2** the potential substitutes available to consumers and sellers
- **Section 4.3** hybrid marketplaces and the competitive impact of self-preferencing.

It is important to note the ACCC has not conducted a formal market definition exercise to determine the precise markets in which online marketplaces compete. The focus of this part of the report is to assess the competitive constraints affecting the behaviour of online marketplaces in Australia, including the availability of substitutes and barriers to entry and expansion. The epilogue following this section, considers the potential future position of online marketplaces in Australia, and given overseas experience, the possibility that the market may tip in favour of a single marketplace.

## 4.1. Network effects and data are important factors

The ACCC considers that network effects and data are important factors for an online marketplace's business model. These two factors are linked and are the key drivers of the value of online marketplaces and, subsequently, the benefits that they can generate for consumers. However, they may create barriers to entry and expansion for new and smaller online marketplaces and have the potential to cause concerns for sellers on online marketplaces.

### 4.1.1. Network effects

As noted in Chapter 1, online marketplaces connect and offer services to consumers and sellers. Importantly, when these distinct groups use an online marketplace they generate externalities from which the online marketplaces create their value.

Both same and cross-side networks effects are important to online marketplaces' business model. First, online marketplaces generate significant positive cross-side effects for both consumers and sellers. For consumers, more sellers joining an online marketplace means they would benefit from greater choice, diversity in product selection, and competition. For sellers, more consumers joining an online marketplace provides greater potential for sales, revenues and profit.

Second, online marketplaces generate some same-side networks effects. While less important than cross side network effects, they still drive scale. For example, the more consumers using an online marketplace, the greater the ability of the marketplace to collect information on consumer preferences and to improve the shopping experience for other consumers in the form of:

- increased number of user reviews on a wider selection of products
- improved user interface design online marketplaces based on data collected on how consumers interact with parts of their platform (discussed further below)
- better product discovery experience based on data collected by the marketplace.<sup>259</sup>

These network effects represent a major part of the value proposition that online marketplaces provide to both consumers and sellers and an important aspect of their business model. These network effects are also key drivers of growth for Australia's online marketplaces. All of Australia's online marketplaces seek to exploit and maintain these network effects. It is evident that a key strategy of online marketplaces is attracting consumers to their platform. Typically, this is through advertising campaigns and efforts behind the scenes to continually improve the shopping experience.

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<sup>259</sup> Information provided to the ACCC.

#### 4.1.2. Data

Inextricably linked to these network effects is data collected and used by the online marketplaces. As noted in chapters 2 and 3, online marketplaces collect vast amounts of data from consumers, and to a lesser extent from sellers.

The more consumers and, to a lesser extent, sellers that join an online marketplace, and the more times they interact with it, the more data an online marketplace collects and more potential insights they can derive. Understandably, all online marketplaces seek to harness and analyse the data collected to improve their business and service to consumers and sellers. In many respects data collected by online marketplaces is not unlike other (physical) assets of an online marketplace through which they would seek to use to increase profits. As with other assets, data collection and analysis by online marketplaces may also require some ongoing maintenance and occasional capital improvements.

As discussed in Chapter 3, online marketplaces use consumer data to attract and retain customers by tailoring their offerings to consumers and also for targeted advertising. Data collection and analysis helps the 'matching' of consumers and sellers, contributing to revenue growth for online marketplaces and increasing the attractiveness of the platform to sellers.

Further, in the case of Amazon, consumer data collected on the Amazon marketplace is used by Amazon's ad tech business, in particular its advertiser facing demand-side platform which connects third-party advertisers to consumer segments for targeted advertising. Amazon is effectively able to leverage its consumer data from the Amazon marketplace to make its demand side platform service more lucrative.<sup>260</sup>

The possession and control of this data by online marketplaces can also provide them with distinct advantages over third-party sellers using their platform. While some online marketplaces make datasets and insights available to sellers, these do not represent the full extent of data collected by an online marketplace. As such, sellers do not have access to the same depth and breadth of data collected by an online marketplace, and do not have the option to take advantage of that data.

This can create challenges for third-party sellers. For example, sellers may be hindered in their ability to test and improve their product range and strategies if there are limitations in datasets available to them on product trends.

Further, when sellers have limited data preventing them from identifying their repeat consumers on an online marketplace (or whether an online marketplace is in fact the most effective avenue for reaching repeat consumers) they may not be able to make fully informed decisions about how to reach consumers. As noted in Chapter 3, the ACCC's seller questionnaire revealed strong support amongst sellers for access to data on consumers that purchase their products, including contact details.

While access to this data could enable sellers to build their brand through direct marketing and improve their services (including addressing product returns), the ACCC recognises the inherent complexities in sharing this data, including the potential impact on an online marketplace's incentives to invest in its services and likely significant privacy concerns with sharing consumer data.

#### 4.1.3. Barriers to entry and expansion for online marketplaces

The heights of barriers to entry and expansion are important elements affecting the competitive dynamic in most markets. From a competition perspective, a key question is

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<sup>260</sup> Globally, in 2020 Amazon's advertising revenue increased by 52% to \$14.63 billion. See M Graham, '[Amazon is turning advertising into its next huge business – here's how](#)', *CNBC*, 17 July 2019, accessed 3 February 2022; M Waters, '[As privacy changes loom, Amazon stands to reap the greatest reward](#)' *Digiday*, 6 April 2021, accessed 3 February 2022.

whether the significant role of network effects and data associated with online marketplaces limit the ability of new and small online marketplaces to compete directly with large online marketplaces. For example, network effects may create barriers to entry and expansion if new and small-scale online marketplaces need to make significant sunk investments to attract enough consumers to their platform to, in turn, be a viable channel for third-party sellers, and vice versa. These sunk investments may be material as both consumers and sellers may find larger scale incumbent online marketplaces more attractive. Similarly, barriers to entry and expansion related to data may exist if new entrants need to make significant sunk investments to obtain sufficient data to develop competitive product recommendation algorithms. Potential barriers to entry and expansion relating to data are discussed in more detail in Box 4.1.

#### **Box 4.1: Examples of potential barriers to entry and expansion relating to data collected by online marketplaces**

##### *Scale of data collected and product recommendation algorithms*

Analysing whether data raises barriers to entry and expansion may involve inquiries into whether an online marketplace can improve its products and services by collecting a greater volume of data. Online marketplaces may be able to improve their services with a greater volume of data where additional information can be used to improve product recommendation algorithms.

Product recommendations can create positive network effects, as they increase customer satisfaction by way of reduced search costs and improved product fit; the more consumers engage with a platform and therefore create a pool of engagement data, the more the product recommendation algorithm is refined. Larger-scale retailers with a broader variety of goods and a large consumer base may be able to realise 'higher customer satisfaction by providing personalised recommendations (that) benefit from higher customer loyalty due to the personalisation of a consumer's decision process.'<sup>261</sup>

This may give rise to barriers to entry and expansion for new and smaller-scale online marketplaces who lack access to the same scale of consumer engagement as larger-scale marketplace. This means that the quality of their product recommendation algorithms are not enough to enable them to compete closely with the services offered by larger-scale online marketplaces.<sup>262</sup>

These barriers may be limited by a number of factors, including the prevalence of multi-homing by consumers. This may enable smaller-scale online marketplaces, or new market entrants, to collect the scale and scope of consumer engagement data necessary to provide competitive product recommendation algorithms.

There may also be a point in which greater volume of data collected does not translate into further improvements on services. In particular, this could occur when an online marketplace captures sufficient data on consumer engagement across the products or services it offers.

##### *Advantages of scope in through data*

Some online marketplaces offer products and services in related markets, and this may enable them to collect additional data on their consumers. If this additional data can be combined with the consumer data collected from the marketplace service, and where this enables an online marketplace to improve their services, this can give them an advantage of scope over their rivals. The magnitude of this advantage will depend on a number of factors, including the degree to which other online marketplaces can access similar additional data. Barriers to entry and expansion may be raised where new or small-scale

<sup>261</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, p 39.

<sup>262</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, p 71.



online marketplaces have limited access to similar additional data and where this constrains their ability to compete with incumbents operating across multiple markets.

For example, Amazon's collection of consumer data related to its marketplace through the Alexa voice assistant and related Internet of Things (IoT) devices may provide it with an advantage of scope through data accumulation over other online marketplaces. Voice recordings - a form of biometric data<sup>263</sup> collected by Amazon's Alexa voice assistant - may be able to 'collect user data in many more contexts of users' everyday life', providing new data-driven insights that could inform or influence search and product recommendation algorithms or targeted advertising.<sup>264</sup> The European Commission's Inquiry into the Consumer Internet of Things notes that biometric data may provide particular monetisation opportunities in digital advertising, where the pervasiveness of smart or IoT devices in consumer's homes and personal lives 'can increase the value of...data for (consumer) profiling purposes.'<sup>265</sup>

The European Commission's Inquiry also notes that providers of voice-assistant technology may be able to leverage data flows and consumer relationships into adjacent markets.<sup>266</sup> The ACCC considers that this topic may warrant further investigation, particularly any connection between consumer biometric data obtained by online marketplaces and entry into adjacent markets.

The ACCC notes there are also likely to be many other factors which may raise barriers to entry and expansion for online marketplaces. For example, the brand power of large incumbent firms can create barriers to entry and expansion for new and smaller firms. The ACCC has previously noted that brand recognition can have additional influences on consumer choice, such as where consumers use it as an indicator of the quality of the product.<sup>267</sup> The Competition and Consumer Commission of Singapore's report into ecommerce examined several of these factors.<sup>268</sup> The ACCC notes these, and other factors, may be considered in more detail in particular scenarios, such as assessing the competitive effects of a merger. However, in this report, the ACCC has focused on network effects and data given their importance to competitiveness of online marketplaces.

While network effects, including those related to data, can create barriers to entry and expansion, as noted in Chapter 1 many online marketplaces have grown quickly in recent years. Further, several new online marketplaces have recently established in Australia. For example:

- Woolworths Everyday Market was established in 2021. Woolworths noted its marketplace is 'designed to complement its existing food and grocery range at Woolworths.com.au, with a key focus on aisle extension in the household appliance, baby, toys, pet care, health and beauty categories'.<sup>269</sup>
- Bunnings Marketplace was established in 2019. Wesfarmers stated that its marketplace 'is about creating a highly curated range of products that extends and complements our

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<sup>263</sup> The ACCC also notes, from a consumer welfare perspective, that the collection of biometric data may give rise to heightened concerns around information asymmetries where consumers 'don't understand the extent to which their current data and behaviours are being tracked and monitored' through IoT enabled devices. See The Australia Institute, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 19 August 2021, p 7.

<sup>264</sup> J Kramer, D Schnurr, S Micova, Centre on Regulation in Europe, [The Role of Data for Digital Markets Contestability: Case Studies and Data Access Remedies](#), September 2020, p 42.

<sup>265</sup> European Commission, [Report from the Commission to the Council and the European Parliament, Final report – sector inquiry into consumer Internet of Things](#), 20 January 2022, p 9.

<sup>266</sup> European Commission, [Report from the Commission to the Council and the European Parliament, Final report – sector inquiry into consumer Internet of Things](#), 20 January 2022, p 10.

<sup>267</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019.

<sup>268</sup> Competition and Consumer Commission Singapore, [E-commerce Platforms Market Study](#), 10 September 2020.

<sup>269</sup> Woolworths, [Woolworths launches Everyday Market nationwide to help meet more of Australia's everyday needs online](#), accessed 16 November 2021.

in-store range, creating a one stop shop for our customers' home and lifestyle needs – everything from the front gate to the back fence'.<sup>270</sup>

- Kogan Marketplace was established in 2019. Kogan said its marketplace would give its 'customers more choice than ever and allow businesses to reach more customers through the Kogan.com platform'.<sup>271</sup>

The ACCC notes both Woolworths and Wesfarmers were well established in both physical and online retailing in Australia with their own existing consumers bases prior to establishing their online marketplaces.

In addition, the ACCC also notes the Competition and Consumer Commission of Singapore's report into ecommerce found that:

while the data collected by ecommerce platforms is beneficial in allowing platform operators to improve the quality of the service offered to customers, the absence or lack of data is not currently regarded as an insurmountable barrier to entry or a severe limitation on the ability of ecommerce platform operators to compete effectively against other competitors.<sup>272</sup>

Despite the competitive advantages that network effects and data can confer on large incumbents, in recent years entry has occurred and some online marketplaces have grown quickly. This indicates that barriers to entry for new online marketplaces are not insurmountable for some firms, such as those with an existing physical or online presence. The ACCC considers it is more likely to be the case that the network effects and data held by larger or more established online marketplaces puts them in a more advantageous position, likely raising barriers to expansion to new or smaller online marketplaces. The ACCC welcomes any further insights from stakeholders on this issue.

The ACCC also notes that several online marketplaces provide complementary services to their marketplace service. For example, Amazon Australia provides fulfilment and delivery services, enabling express delivery of goods to consumers. Where these services require fixed investments, such as into warehousing and transportation, they can exhibit economies of scale. As such, these economies of scale may create barriers to entry and expansion in these complementary services.

## 4.2. The availability of substitutes for consumers and sellers

Generally, the greater the potential close substitutes available to the parties to a transaction, the lower the risk that one party will have bargaining power over the other, and the lower the risk that either party will have market power. In the ACCC's experience, a product or service is more likely to be a substitute if it meets the same needs, is available at the same location, and there is a willingness and ability to change.

This section examines what potential close substitutes are available to consumers and sellers.

### 4.2.1. Consumers have a number of options

The ACCC considers consumers have a number of options (beyond online marketplaces) when shopping. However, the number of options, and the degree to which these options are close substitutes, is likely to depend on a range of factors, including the nature of a product sought by a consumer, travel time between options, preferences for physical purchasing and

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<sup>270</sup> Wesfarmers, [Bunnings to launch online marketplace offer](#), accessed 16 November 2021

<sup>271</sup> Kogan, [Kogan.com launches Kogan Marketplace](#), accessed 16 November 2021.

<sup>272</sup> Competition and Consumer Commission Singapore, [E-commerce Platforms Market Study](#), 10 September 2020; p 42.

brand loyalty. For example, a consumer seeking generic homewares could purchase from the:

- major online marketplaces (like Amazon Australia, Catch, eBay Australia or Kogan),
- smaller online marketplaces (like Woolworths Marketplace, Bunnings Marketplace or MyDeal)
- online-only retailers (like those created through Shopify)
- physical retailer websites (like Big W, Target, Kmart, Myer or David Jones)
- physical retailer stores (like a local shop).

A consumer seeking a highly niche product is likely to have a more limited number of potential close substitutes.

The ACCC also notes it appears there is a high degree of multi-homing by many consumers. That is, consumers purchase products from many alternatives. For instance, the ACCC's consumer questionnaire found three-quarters of responders said they used multiple online marketplaces. In addition, a 2020 international survey found 56% of Australian respondents used more than one marketplace during the past 12 months.<sup>273</sup> Therefore, a consumer could purchase from Amazon Australia, Catch, Big W, Myer and/or a local shop. This is likely to be due, in part to many consumers facing very low or no costs to using multiple online retail options and switching between them.

For some consumers, marketplace offers (like subscription offers that result in cheaper prices and access for some goods and services), brand reputation or ease of use may mean that they are more inclined to use a single marketplace. Marketplace offers could be acting as a potential lock-in for the consumers and forcing these consumers to pay a higher price than they would at alternative retailers for other goods. The ACCC strongly encourages all consumers to shop around when purchasing products, and not purchase through retailers due to the sunk cost of a subscription.

#### **4.2.2. For sellers it is more complex**

Sellers are in a more complex situation compared to consumers. The ACCC considers that for many sellers, particularly small and medium sized sellers, there are unlikely to be close alternatives to selling through an online marketplace.

As examined in Chapter 3, a great benefit of online marketplaces has been creating a lower cost channel for sellers to become established and sell products to consumers. Online marketplaces have enabled sellers to reach consumers while avoiding the upfront costs associated with establishing a physical shop front or advertising to attract consumers to their website. As a result, some sellers might incur significant increases in fixed and ongoing costs (like for advertising) if they were to switch away from selling on online marketplaces to selling through other channels.

As such, for many sellers the closest alternative to a given marketplace will be another marketplace.

The ACCC also found many sellers multi-home across several online marketplaces. The Marketplaces Council submitted:

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<sup>273</sup> P Akman, [A Web of Paradoxes: Empirical Evidence on Online Platform Users and Implications for Competition and Regulation in Digital Markets](#) (2021), p 12.

It is very common for third-party sellers to be offering their goods on multiple online marketplaces in Australia. Many of these sellers began as eBay sellers, and have added other online marketplaces as they have become available.<sup>274</sup>

There appear to be strong incentives for sellers to multi-home. Multi-homing allows sellers to diversify their revenue risk as well as improve their brand coverage. While most consumers appear to multi-home, sellers do not have full information on consumers searching patterns or where certain types of consumers make purchases. Sellers may also multi-home to ensure they reach consumers who tend to use a single marketplace. This could include consumers who hold a subscription to a single marketplace (such as Amazon Prime). For these reasons, sellers who multi-home could view one marketplace as a complement to another marketplace rather than a substitute.

Many of the top sellers on the four major online marketplaces have sales distributed across multiple online marketplaces. Out of the top 100 sellers on each of Amazon Australia, Catch, eBay Australia and Kogan, the ACCC identified 43 sellers were present across two or more online marketplaces.<sup>275</sup> There are also likely to be numerous sellers focused on a single marketplace. A reason for this is that while there are incentives to diversify, increased costs or operational issues may mean this is not financially possible.

The ACCC considers that these differences in the closeness of alternatives to different sellers means that some sellers have a relatively little bargaining power when dealing with online marketplaces, while other sellers may have a stronger bargaining position.<sup>276</sup> Some sellers bargaining power may be limited because they face large costs to switch away from an online marketplace. For example, where switching would involve significant costs to build a seller's brand to attract consumers to their own website or learning and implementation costs to use an alternative marketplace. Sellers may also have limited bargaining power if switching would mean that they would forgo access to a significant volume of consumers or an important customer group. This is more likely to be the case for small to medium sized sellers. On the other hand, some sellers may have a relatively strong bargaining position, for example if they provide online marketplaces with a range of products that consumers demand, and where online marketplaces would risk losing a material volume of consumers and sales if they lost these sellers.

### 4.3. Hybrid marketplaces and the competitive impact of self-preferencing

As highlighted throughout this report, the incentives for hybrid marketplaces, such as Amazon, Catch and Kogan are different than those for pure platforms (like eBay). A hybrid marketplace is an example of a vertically integrated business, offering its own products in competition with the third-party sellers that use the platform. Organisationally, this typically involves an online marketplace establishing a different business unit separate from the operation of the marketplace, focussed on selling the marketplace's own products.

A key concern with hybrid marketplaces is the implications of any preferential treatment provided by the marketplace to the products sold by its own business unit at the expense of third-party sellers. Favouring its own products in the ranking or display of products to consumers (through algorithms, policies or other decision making) has implications for both consumers and sellers. As set out in Chapter 2, consumers may suffer detriment if they have

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<sup>274</sup> Marketplaces Council, [Submission to the ACCC Digital Platform Services Inquiry Fourth Interim Report](#), 7 September 2021, p 6.

<sup>275</sup> Information provided to the ACCC. The above calculations may not take into account a Top 100 Seller operating on more than one marketplace through different trading names.

<sup>276</sup> Bargaining power relates to the relative ability of parties in a negotiation to exert pressure and influence over each other. One party to a transaction is likely to have substantial bargaining power if it has a number of strong 'outside options', and it is able to impose a substantial cost on the other party or withdraw a substantial benefit if the other party does not agree to its terms and conditions.

the expectation that the marketplace is displaying those goods which best meet the consumer's search criteria or needs and are not aware that the marketplace is giving priority to its own products. Self-preferencing may also impact the ability of sellers to compete on their merits with the products supplied by the vertically integrated firm.

This type of self-preferencing conduct by vertically integrated firms may also be related to more significant and extensive competition concerns. While vertical integration can be efficiency enhancing and provide benefits to consumers and sellers, where a vertically integrated firm has a substantial degree of market power and sellers rely on access to the goods and services provided by the vertically integrated firm in order to compete in a downstream market, then significant competition concerns may arise. This is because the vertically integrated firm may have the ability and incentive to foreclose rivals (in this case, third-party sellers) access to its critical service, preventing or inhibiting them from competing on their merits in downstream markets. In this context, preferential treatment provided by a dominant marketplace to its own products will raise significant competition concerns.

While the ACCC considers that some third-party sellers active on Australian online marketplaces are unable to bargain with the online marketplaces, the ACCC considers that, at this point, no one marketplace holds a dominant position in Australia. Accordingly, while the ACCC has identified examples where hybrid marketplaces' algorithms afford preferential treatment to their own products, such practices do not, at this stage, appear to have resulted in any significant and extensive competitive detriments. The ACCC expects that this is likely due to the alternatives (including alternative online marketplaces) available to sellers to reach consumers.

However, as set out in the epilogue, given the strong role of network effects in the supply of online marketplaces, the supply of these services may 'tip' and a single marketplace may attain substantial market power and/or a gatekeeper status. If this occurs, then preferential treatment by such an online marketplace may cause significant competition concerns.

The ACCC is currently considering whether regulatory reform is required to address the competition and consumer concerns associated more broadly with digital platform services. This includes the risk of anti-competitive conduct such as self-preferencing by large digital platforms. A Discussion Paper seeking views on the need for such reform, including options for regulatory tools or a framework was released on 28 February 2022.<sup>277</sup>

Given that a dominant marketplace could emerge in Australia, the ACCC considers it will be important to ensure that any such framework is capable of covering such conduct by an online marketplace, should any requisite thresholds linked to market power or strategic/gatekeeper status be reached by such a platform.

The Discussion Paper identifies a number of potential measures which could address the risk of anti-competitive self-preferencing by a large vertically integrated digital platform:

- obligations to provide greater transparency to sellers and prospective sellers on how certain decisions (such as ranking algorithms) are made
- an obligation to not discriminate in the terms and conditions applicable to third-party users and an internal business unit
- operational and/or data separation obligations.

These more broadly applicable measures could potentially be applied to an online marketplace if it attains substantial market power or gatekeeper status, in order to address the risk of anti-competitive self-preferencing.

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<sup>277</sup> ACCC, [Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services](#), 28 February 2022.



## Epilogue: will the market tip?

As has been discussed throughout this Report, the entry and growth of online marketplaces in Australia has created benefits and challenges for both consumers and sellers. The Report has provided insights on concerns, as well as potential improvements which would benefit consumers and sellers.

Australia's experience with online marketplaces is somewhat different to that overseas. Amazon is not the largest marketplace in Australia and currently only comprises around 2.5% of online retail sales. In many other countries, Amazon is the dominant marketplace.

For example:

- In France, Amazon is the largest marketplace, estimated to account for 19% of online sales, and well clear of its next closest rival.<sup>278</sup>
- In Italy, Amazon is the largest marketplace, estimated to account for around 20% of online sales.<sup>279</sup> However, Italy's Autorità Garante della Concorrenza e del Mercato (Competition and Market Authority) estimated it accounted for between 70% and 75% of third-party sales on online marketplaces.<sup>280</sup>
- In Germany, Amazon is the largest online retailer and marketplace, with an estimated €14 billion of retail sales (or around 20% of sales generated by the top 1000 companies) and over €35 billion in third-party seller marketplace sales.<sup>281</sup> It is also estimated that almost 45% of examined online retailers have a profile on Amazon.<sup>282</sup>
- In the United Kingdom, Amazon is the largest marketplace, estimated to account for over 30% of online sales.<sup>283</sup> Amazon's sales are three times larger than its closest rival eBay UK.
- In the United States, Amazon is the largest marketplace, estimated to account for around 40% of online sales.<sup>284</sup> Amazon has also extended into groceries (through its purchase of Wholefoods in 2017) and other physical retail stores. Amazon is also estimated to account for between 65% and 70% of all online marketplace sales in the United States.<sup>285</sup>

In the context of this dominant position, the ACCC notes that Amazon has been alleged to have engaged in anti-competitive conducts in multiple jurisdictions. The European Commission and German Bundeskartellamt are currently conducting investigations into Amazon's conduct while the Italian Competition Authority recently fined Amazon €1.1 billion (\$1.7 billion) for abuse of dominance.<sup>286</sup>

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<sup>278</sup> P Sabbe, '[Amazon loses market share in France](#),' *Retail Detail*, 22 March 2021, accessed 3 February 2022.

<sup>279</sup> eCommerceDB, '[The eCommerce market in Italy](#),' n.d., accessed 17 February 2022.

<sup>280</sup> Autorità Garante della Concorrenza e del Mercato (AGCM), '[A528 - Chiusura istruttoria](#),' AGCM, 9 December 2021, p 173, accessed 10 December 2021.

<sup>281</sup> EHI Retail Institute, '[Marktplätze: Die Umsatztreiber des Onlinehandels](#),' EHI Retail Institute, 10 December 2021, accessed 3 February 2022.

<sup>282</sup> EHI Retail Institute, '[Marktplätze: Die Umsatztreiber des Onlinehandels](#),' EHI Retail Institute, 10 December 2021, accessed 3 February 2022.

<sup>283</sup> B Stevens, '[Amazon accounted for more than 30% of all UK online sales in 2019](#),' *Charged*, 10 December 2019, accessed 3 February 2022.

<sup>284</sup> P Wahba, '[Amazon's paltry sales growth shows why it needs more stores](#),' *Fortune*, 30 October 2021, accessed 3 February 2022.

<sup>285</sup> United States House of Representatives Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, '[Investigation into competition in digital markets: Majority staff report and recommendations](#),' 11 November 2020, p 255.

<sup>286</sup> European Commission, '[Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices](#),' 10 November 2020; Bundeskartellamt, '[Proceedings against Amazon based on new rules for large digital companies \(Section 19a GWB\)](#),' 18 May 2021; Autorità Garante della Concorrenza e del Mercato, '[A528 - Italian Competition Authority: Amazon fined over € 1.128 billion for abusing its dominant position](#),' 9 December 2021.



The ACCC considers a major factor which has driven Amazon's rise overseas has been its ability to innovate and provide services that consumers want, and to harness the power of network effects and consumer data. In addition, Amazon's significant investments in distribution, delivery and other areas, at the expense of short-term profits, have provided it with significant first mover and scale advantages.

However, while sales on Amazon Australia are much lower compared to major established retailers, its sales increased substantially (by 87%) from 2019–20 to 2020–21.<sup>287</sup> Further to this, the number of Australian consumers which have subscribed to Amazon Prime has been increasing significantly. According to a poll of Australian consumers in 2021, an estimated 31% are now users of Amazon Prime, a significant increase from 2020.<sup>288</sup> A further 15% of consumers stated they intend to sign up to Amazon Prime in 2022.<sup>289</sup> Studies of Amazon users in other countries show that once they join Amazon Prime, they are more likely to buy from Amazon more frequently.<sup>290</sup>

Information available to the ACCC confirms the increased loyalty of Amazon Prime members: between July 2019 and July 2021, total monthly merchandise purchases by all users of Amazon Australia increased by more than 50%. This growth was higher for Amazon Prime Members.<sup>291</sup> To put this in perspective, across this period, approximately one quarter of non-Amazon Prime users of Amazon Australia made at least one merchandise purchase per month. This rate was higher for Amazon Prime Members. Continued growth in the number of Amazon Prime Members would likely result in continued strong growth in sales on Amazon Australia.

A key question facing Australia is whether we will observe tipping in favour Amazon Australia or another online marketplace. This would not necessarily raise competition concerns where it follows from the firm outcompeting its rivals. However, the ACCC would hold concerns where a dominant marketplace engages in anti-competitive conduct and reduces the benefits that consumers and sellers would otherwise gain from competition between online marketplaces. In this future, sellers may find that they have few alternatives to the dominant marketplace online marketplaces to reach consumers. Where an online marketplace holds this gatekeeper position, the ACCC would hold significant concerns if a lack of competitive constraint enabled significant increases in sellers' costs, particularly if this had the effect of sellers exiting or reducing their pace of innovation. The ACCC would also hold significant concerns if a dominant marketplace engaged in anti-competitive conduct that restricted the ability of third-party sellers on its platform to compete on their merits.

It is important to note the ACCC is not suggesting that this future will occur, particularly in the short to medium term. However, overseas experiences indicates there is the potential for competition issues to arise with online marketplaces. As such, the ACCC considers it important to continue to monitor developments, including acquisitions, in online marketplaces.

In the meantime, and as noted in Chapter 4, the ACCC invites views on whether new frameworks or regulatory tools are required to address competition and consumer concerns in digital platform markets as well as other options for reform.<sup>292</sup>

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<sup>287</sup> Information provided to the ACCC.

<sup>288</sup> Pattern, [Amazon Australia Shopper Report 2021 - How consumers used Amazon during lockdown, and the lasting impact on their shopping habits](#), accessed 17 February 2022.

<sup>289</sup> Pattern, [Amazon Australia Shopper Report 2021 - How consumers used Amazon during lockdown, and the lasting impact on their shopping habits](#), accessed 17 February 2022; M Bain, [Prime has never been more important to Amazon](#), *Quartz*, 4 May 2021, accessed 17 February 2022; S Butler, [Almost 90% of UK shoppers use Amazon, research reveals](#), *Guardian*, 7 March 2019, accessed 17 February 2022.

<sup>290</sup> Pattern, [Amazon Australia Shopper Report 2021 - How consumers used Amazon during lockdown, and the lasting impact on their shopping habits](#), accessed 17 February 2022.

<sup>291</sup> Information provided to the ACCC.

<sup>292</sup> See <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025/september-2022-interim-report>.

## Appendix: Ministerial direction



### **Competition and Consumer (Price Inquiry— Digital Platforms) Direction 2020**

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I, Josh Frydenberg, Treasurer, give the following direction to the Australian Competition and Consumer Commission.

Dated: 10 February 2020

Josh Frydenberg  
Treasurer

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## Part 1—Preliminary

### 1 Name

This instrument is the *Competition and Consumer (Price Inquiry—Digital Platforms) Direction 2020*.

### 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

### 3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.

### 4 Definitions

Note: Expressions have the same meaning in this instrument as in the *Competition and Consumer Act 2010* as in force from time to time—see paragraph 13(1)(b) of the *Legislation Act 2003*.

In this instrument:

**Australian law** means a law of the Commonwealth, a State, or a Territory (whether written or unwritten).

**data broker** means a supplier who collects personal or other information on persons, and sells this information to, or shares this information with, others.

**digital content aggregation platform** means an online system that collects information from disparate sources and presents it to consumers as a collated, curated product in which users may be able to customise or filter their aggregation, or to use a search function.

**digital platform services** means any of the following:

- (a) internet search engine services (including general search services and specialised search services);

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- (b) social media services;
- (c) online private messaging services (including text messaging; audio messaging and visual messaging);
- (d) digital content aggregation platform services;
- (e) media referral services provided in the course of providing one or more of the services mentioned in paragraphs (a) to (d);
- (f) electronic marketplace services.

**electronic marketplace services** means a service (including a website, internet portal, gateway, store or marketplace) that:

- (a) facilitates the supply of goods or services between suppliers and consumers; and
- (b) is delivered by means of electronic communication; and
- (c) is *not* solely a carriage service (within the meaning of the *Telecommunications Act 1997*) or solely consisting of one or more of the following:
  - (i) providing access to a payment system;
  - (ii) processing payments.

**exempt supply** has the meaning given by subsection 95A(1) of the Act.

**goods** has the meaning given by subsection 95A(1) of the Act.

**inquiry** has the meaning given by subsection 95A(1) of the Act.

**services** has the meaning given by subsection 95A(1) of the Act.

**State or Territory authority** has the meaning given by subsection 95A(1) of the Act.

**supply** has the meaning given by subsection 95A(1) of the Act.

**the Act** means the *Competition and Consumer Act 2010*.

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## **Part 2—Price inquiry into supply of digital platform services**

### **5 Commission to hold an inquiry**

- (1) Under subsection 95H(1) of the Act, the Commission is required to hold an inquiry into the markets for the supply of digital platform services. The inquiry is *not* to extend to any of the following:
  - (a) the supply of a good or service by a State or Territory authority;
  - (b) the supply of a good or service that is an exempt supply;
  - (c) reviewing the operation of any Australian law (other than the Act) relating to communications, broadcasting, media, privacy or taxation;
  - (d) reviewing the operation of any program funded by the Commonwealth, or any policy of the Commonwealth (other than policies relating to competition and consumer protection).
- (2) For the purposes of subsection 95J(1), the inquiry is to be held in relation to goods and services of the following descriptions:
  - (a) digital platform services;
  - (b) digital advertising services supplied by digital platform service providers;
  - (c) data collection, storage, supply, processing and analysis services supplied by:
    - (i) digital platform service providers; or
    - (ii) data brokers.
- (3) Under subsection 95J(2), the inquiry is not to be held in relation to the supply of goods and services by a particular person or persons.

### **6 Directions on matters to be taken into consideration in the inquiry**

Under subsection 95J(6) of the Act, the Commission is directed to take into consideration all of the following matters in holding the inquiry:

- (a) the intensity of competition in the markets for the supply of digital platform services, with particular regard to:
  - (i) the concentration of power in the markets amongst and between suppliers; and
  - (ii) the behaviour of suppliers in the markets, including:
    - (A) the nature, characteristics and quality of the services they offer; and
    - (B) the pricing and other terms and conditions they offer to consumers and businesses; and

Example: Terms and conditions relating to data collection and use.
- (iii) changes in the range of services offered by suppliers, and any associated impacts those changes had or may have on other markets; and
- (iv) mergers and acquisitions in the markets for digital platform services; and



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- (v) matters that may act as a barrier to market entry, expansion or exit, and the extent to which those matters act as such a barrier;
- (b) practices of individual suppliers in the markets for digital platform services which may result in consumer harm, including supplier policies relating to privacy and data collection, management and disclosure;
- (c) market trends, including innovation and technology change, that may affect the degree of market power, and its durability, held by suppliers of digital platform services;
- (d) changes over time in the nature of, characteristics and quality of digital platform services arising from innovation and technological change;
- (e) developments in markets for the supply of digital platform services outside Australia.

**7 Directions as to holding of the inquiry**

- (1) Under subsection 95J(6) of the Act, the Commission is directed to do the following in holding the inquiry:
  - (a) regularly monitor the markets for the supply of digital platform services for changes in the markets, particularly focussing on the matters referred to in section 6 of this instrument; and
  - (b) give to the Treasurer an interim report on the inquiry by 30 September 2020, and then further interim reports every 6 months thereafter, on:
    - (i) any changes observed by the Commission in the markets since the last report; and
    - (ii) any other matter, within the scope of the inquiry, the Commission believes appropriate.
- (2) Under subsection 95P(3) of the Act, the Commission is directed not to make available for public inspection, copies of any interim report until the Treasurer, in writing, authorises the Commission to do so.

**8 Period for completing the inquiry**

For the purposes of subsection 95K(1) of the Act, the inquiry is to be completed, and a report on the matter of inquiry given to the Treasurer, by no later than 31 March 2025.