
**Digital Platform Services Inquiry**

**Response to the Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services**

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## I. Introduction

Daily Mail Australia forms part of one of the world's largest English-language group of newspaper websites, with more than 226 million global unique browsers.[1] Daily Mail Australia has a loyal readership of 8.8 million monthly unique visitors, with an average time of 24 minutes spent per person.[2] Our success is down to editorial excellence, dynamic and engaging content, and a picture-led, easily navigable format available on any device.

Digital platforms have been a source of concerns for news publishers since their inception. For instance:

- Digital platforms, such as Google and Facebook, may take advantage of news publishers' content, as well as the data generated by users' interaction with that content, without paying news publishers proper compensation.

- Google's monopolization of the ad tech stack through a combination of acquisitions and anticompetitive practices has deprived news publishers from the benefits of competition in ad tech services in terms of lower prices, product choice and innovation. It is therefore no surprise that Google's ad tech practices are investigated or subject to litigation in multiple jurisdictions.

- Apple is taking advantage of its market power on the market for the distribution of apps on iOS devices to set the rules of the game in a manner that is unfavorable to app developers. In particular, as recently observed by the UK Competition and Markets Authority ("CMA"),[3] Apple has engaged in "privacy washing" at the expense of app developers'

1 Adobe Analytics, Jan 2021, Global. In March 2020 we reached a record-high 272 million global unique browsers.

2 https://www.nielsen.com/au/en/press-releases/2020/abc-news-websites-ranks-no-1/

3 Mobile ecosystems market study interim report, 14 December 2021, available at https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report, para. 60 ("we are concerned that Apple may not be applying the same standards to itself as to third parties, and the design and implementation of the ATT prompt to users may be distorting consumer choices. Ultimately this may mean that

ability to monetize their content through ads in order to favor its own advertising activities. Google also has market power relating to the distribution of apps on Android devices and its recent announcement that it is extending is Privacy Sandbox proposals to include Android may be evidence that it intends to take advantage of that market power.

Daily Mail Australia understands that the Australian Competition & Consumer Commission ("ACCC") has already explored these issues in its work:

- In early 2021, the Australian Government passed legislation giving effect to the News Media and Digital Platforms Mandatory Bargaining Code (the "News Media Code") in order to address the consequences of the bargaining power imbalances between news media and digital platforms and, in doing so, promote the sustainability of public interest journalism in Australia. Unfortunately, it seems the News Media Code has yet to achieve its objectives, as explained below.

- In April 2021, the ACCC issued its Report on App Marketplaces, in which it found that Apple's App Store and Google's Play Store have significant market power in the distribution of mobile apps in Australia, and measures are needed to address this.

- In September 2021, the ACCC issued its Final report on the Digital Advertising Services Inquiry, in which it found that competition for ad tech services in Australia is ineffective, with Google dominating the supply of ad tech services. The ACCC recommended it should be allowed to address conflicts of interest, self-preferencing behavior, data advantage issues, and transparency problems, where these create efficiency or competition concerns.

Daily Mail Australia supports the findings made in the above reports and applauds the ACCC for its willingness to tackle the anticompetitive conducts pursued by digital platforms. We also understand that the purpose of this consultation is not primarily to gather further evidence of wrongdoing, but to obtain feedback from stakeholders on the various possible approaches to regulating digital platforms. With that in mind, Daily Mail Australia provides answers to the questions raised in the consultation that are particularly relevant to its activities.

Now, we would like to make the following observations upfront:

- First, both the Australian government and the ACCC should proceed with a greater sense of urgency. Australia, like the UK, was at the forefront of denouncing the competitive issues raised by large digital platforms and its analytical work – in the form of reports – has been truly remarkable. Yet, because the harm created by large digital platform has already materialized and is significant, Daily Mail Australia considers that it is now time for action. While the UK and Australia were at the forefront of the debates over what needs to be done

Apple is able to entrench the position of the App Store as the main way of users discovering apps, may give an advantage to Apple's own digital advertising services, and could drive app developers to begin charging for previously free, ad-funded apps.")

with large digital platforms, other jurisdictions have now taken the lead. For instance, the European Union ("EU") is about to adopt the Digital Markets Act ("DMA"), an ambitious piece of legislation, which will apply special rules to digital gatekeepers to ensure the fairness and contestability of digital markets where gatekeepers are present. Thus, while the UK principles-based approach to the regulation of digital gatekeepers may be preferable to the more rigid approach pursued by the EU with the DMA (more on this below), the EU will soon have its regulatory regime in place. Most businesses depending on digital gatekeepers will certainly prefer to have some relief now, than a perfect regime in several years.

- Second, international experience teaches that the implementation and enforcement of the regulatory regimes that will be adopted to constrain digital gatekeepers is likely to be a major issue. Digital gatekeepers have immense resources, which they are willing to deploy to obfuscate the implementation of such regimes. Constructive non-compliance is a tactic that gatekeepers already use in the competition law field, as illustrated by the struggle experienced by the European Commission with Google over the remedies in its *Shopping* and *Android* cases. As further discussed below, Apple is using the same strategy in the Netherlands where it prefers to pay fines rather than implement the remedy imposed by the Dutch Competition Authority to bring an Article 102 TFEU breach to an end. Thus, any regulatory regime aimed at constraining digital gatekeepers must be backed up by strong sanctions.

- Third, moving forward the ACCC should take care to avoid the mistakes that were committed in relation to the News Media Code. When the ACCC first announced its Draft News Media Code, Daily Mail Australia greeted it with unreserved approval. It promised not only to oblige digital platforms to enter into negotiations over payment for content, but included an arbitration mechanism to guarantee a fair outcome, a requirement that the platforms supply the information publishers need to determine the true value of their content, and restraints on the platforms using algorithms to direct traffic away from publishers which secured a fair deal. It promised to deliver fair rewards for all publishers, both large and small, and those long established in Australian along with newer entrants to the market. In practice that has not been achieved. After the News Media Code became law Google and Facebook (now Meta) rapidly concluded lucrative deals with the largest, longest-established news publishers in Australia. However, as the political pressure eased, a fatal flaw in the legislation was exposed – that the arbitration process does not become binding unless a platform is designated under the News Media Code by the Federal Treasurer. So far no designation has taken place, nor does any decision look likely to be adopted in the future. Meanwhile smaller and more newly established news publishers have struggled to secure payment for content deals on anything like the terms offered to the major publishers.

  The net result is that, due to the lack of designating any platform and the failure of the News Media Code to become mandatory, the major beneficiaries have been the established

companies which already dominate the Australian media market. Therefore, rather than ensuring a sustainable future for all publishers, the News Media Code has reinforced existing market dominance.

## II. Responses to the consultation's questions

### Chapter 5: Harms to competition and consumers arising from digital platform services

**1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?**

Daily Mail Australia refers to the introduction to this submission in which it explains the main challenges it faces with digital platforms. The most salient of these challenges relate to its ability to monetize its content, either through online advertising (which is the largest source of revenues for Daily Mail Australia considering it does not charge readers to access to its content) or through licensing fees (to the extent that digital platforms use its content). More recently, Daily Mail Australia has suffered from Apple's App Tracking Transparency (ATT) measures,[4] which have hurt Daily Mail Australia's ability to monetize its content on iOS devices through advertising. While Daily Mail Australia supports user privacy, Apple's approach was particularly destructive because (i) it was sudden and came without prior discussion with industry stakeholders and (ii) the mechanism offered by Apple to palliate the lack of access to the IDFA (i.e., the identifier that allows to perform a number of important functions in digital advertising, including measurement) was deficient.

It is important to note in this respect that the digital platforms' conducts negatively impacting news publishers' ability to monetize their content create considerable consumer harm, as such conducts deprive news publishers of the resources they need to produce original journalistic content. Independent and reliable journalism is a cornerstone of democracy, and therefore of enormous benefit to Australian consumers to inform their democratic choices.

### Chapter 6: Competition and consumer protection law enforcement in Australia

**2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?**

Daily Mail Australia agrees with the findings made in Section 6.2.1 of the Consultation Paper. While competition laws should be strictly enforced in digital markets, they have proved largely inadequate to address the anticompetitive conduct pursued by large digital platforms. Investigations are lengthy and retrospective in nature, and by the time of intervention competition and consumers may have been irreversibly harmed. Competition law may also not be able to capture all forms of

4 On such measures, see CMA Interim Report, supra note 3, at paras. 6.234 et seq.

harm created by digital platforms, and the remedies tend to be narrow and not restorative in nature. In addition, large digital platforms tend to be immune to fines given their large financial resources. Fines therefore do not produce a deterrent effect.

For that reason, Daily Mail Australia shares the emerging global consensus that some form of *ex ante* regulation is needed to address the competitive harm created by the behavior of large digital platforms.

**Chapter 7: Regulatory tools to implement potential reform**

**You may answer the following questions without prejudice to your view on whether a new regulatory framework is required to address competition and consumer harms arising from digital platform services. If the Australian Government decided new regulatory tools are needed to address competition and consumer harms in relation to digital platform services:**

3. **Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?**

As the Consultation Paper observes in Section 7.3, several jurisdictions – including Australia itself – have adopted or are planning to adopt legislation designed to address specific harms. That is for instance the case of the Korean law preventing Apple and Google from requiring app developers to use their proprietary billing system for in-app purchases,[5] or the proposed Open App Markets Act in the United States,[6] which aims to force Apple and Google to modify some of their app store policies.

While targeted intervention may be warranted in certain circumstances (e.g., when an industry raises specific concerns and the harm is localized), Daily Mail Australia considers that this approach is not desirable considering the systemic issues raised by large digital platforms, which result from the fact they have become necessary gateways between businesses and users. It is therefore preferable to regulate large digital platforms through a coherent regulatory framework, which is the approach pursued in the European Union with the DMA and the United Kingdom with the Digital Markets Unit ("DMU") regime. It is of course possible to provide for the ability to tailor the regulatory framework to the specific digital platform to ensure greater flexibility and a more targeted intervention.

4. **What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of each of the**

5 See https://www.wsj.com/articles/google-apple-hit-in-south-korea-by-worlds-first-law-ending-their-dominance-over-app-store-payments-11630403335

6 See https://www.congress.gov/bill/117th-congress/senate-bill/2710#:~:text=The%20bill%20prohibits%20a%20covered,store%2C%20or%20(3)%20taking

**following regulatory tools to competition and consumer harms from digital platform services in Australia?**

**a. prohibitions and obligations contained in legislation**

One advantage of this approach, which is exemplified by the EU DMA, is that it brings some much-needed clarity as to the practices that are prohibited for designated digital gatekeepers (i.e., digital platforms that offer "core platform services" and which are designated as gatekeepers according to certain criteria).[7] In addition, unlike in the case of competition law, the practices that are listed in Articles 5 and 6 of the DMA are *per se* illegal, i.e. there is no need to show that they produce anticompetitive effects (which is always a difficult exercise), and cannot be justified by efficiencies.

Now, the main downside of the DMA is that – with the exception of prohibitions that specifically target a core platform service (e.g., search engines or app marketplaces) – this legislation seeks to apply the same prohibitions/obligations to companies with different business models. An alternative, and generally preferable, approach is to tailor the prohibitions/obligations that apply to gatekeepers to their business model.

There is also a clear trade-off between specificity and adaptability. While the adoption of specific obligations/prohibitions has the advantage of providing clarity, there is a danger that specific rules may be quickly outdated given the dynamic nature of digital platform services. Now, nothing prevents from building adaptability in the system, by for instance allowing the regulator to adapt the rules to new developments.

**b. the development of code(s) of practice**

The development of codes of conduct or practice is an alternative approach, which is at the core of the DMU regime in the UK, which proposes individual codes of conduct for firms designated as having Strategic Market Status ("SMS") in a digital activity.

As aptly described in Section 7.3.2 of the Consultation Paper, the DMU regime would apply as follows:

- The SMS designation is proposed to apply to an entire corporate group, but the code/codes would only apply to the activity or activities in which the firm is found to have SMS.

- Each code would be governed by high level objectives ("fair trading", "open choices" and "trust and transparency") that may be set out in legislation. Such high-level objectives

7 Note that the overarching criteria for designating a gatekeeper are qualitative. However, a core platform service provider is *presumed* to meet these criteria if it exceeds certain quantitative thresholds. This is a rebuttable presumption, the burden resting on the core platform service provider.

would then be translated into specific principles that provide a more detailed articulation of what the firm must do (or not do) to comply.

- The DMU would also issue guidance to SMS firms, which may provide a non-exhaustive list of examples of specific conduct that would be considered to breach the principles informing the codes.

Daily Mail Australia considers that this principles-based approach makes sense as it combines flexibility with specificity. The following observations should, however, be taken into account:

- First, while it may make sense to develop such codes of conduct in collaboration with the SMS firm, it is important to ensure that this does not allow the SMS firm to drag its feet. As the harm created by digital platforms is already present and often significant, such codes of conduct should be adopted within reasonable timeframes, and a backstop mechanism should be available when SMS firms refuse to collaborate (for instance, the administrative body responsible for developing the code should be able to proceed and adopt the code if the SMS firm does not cooperate).

- Second, the codes of conduct should be mandatory, and compliance should be ensured through strict penalties in case of breach. Considering that large digital platforms have vast financial resources, financial penalties should be set at a level that will create deterrence. In case of continued non-compliance, personal sanctions such as director disqualification should also be contemplated.

**c. the conferral of rule-making powers on a regulatory authority**

It seems that this approach is compatible with the UK approach discussed above in that the drafting of codes of conduct involves the power of the DMU to develop and implement rules.

**d. the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm**

As in the case of the UK DMU regime, the ability for the sectoral regulator to adopt pro-competition interventions is a good complement to the codes of conduct. As the Consultation Paper observes in Section 7.3.4, these pro-competitive interventions are intended to be agile and flexible to keep pace with fast-moving and dynamic digital markets, and could include measures to overcome network effects and barriers to entry and expansion, such as mandating interoperability, increasing consumer control over data or certain separation measures. Daily Mail Australia considers that the ability to adopt such interventions should be part of the sectoral regulator's toolbox.

**5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their**

**users (both business users and consumers)? What are the key elements that should be aligned?**

Considering that digital platform services are generally offered on a global basis, regulatory alignment is desirable. Such alignment should generally be possible considering that the reports that have been commissioned by governments and competition authorities are generally consistent in their substantive findings. At the very least, regulators across the world should apply the same substantive principles, even if local variations may sometimes be necessary. Thus, to the extent it decides to regulate digital platforms, Australia should try to be in line with the substantive approaches in major jurisdictions, such as the EU, the United States, and the UK.

For instance, the EU DMA contains a clear set of obligations relating to app stores that are generally in line with what is done in other parts of the world (e.g., Korea) and which could be easily transposed in Australia.

**Chapter 8: Potential new rules and measures Preventing anti-competitive conduct**

6. **Noting that the ACCC has already formed a view on the need for specific rules to prevent anti-competitive conduct in the supply of ad tech services and also general search services, what are the benefits and risks of implementing some form of regulation to prevent anti-competitive conduct in the supply of the following digital platform services examined by this Inquiry, including:**
    a. **social media services**
    b. **online private messaging services (including text messaging, audio messaging, and visual messaging)**
    c. **electronic marketplace services (such as app marketplaces), and**
    d. **other digital platform services?**

Daily Mail Australia supports the view that there is a need for specific rules to prevent anti-competitive conduct in the supply of ad tech services and general search services. Beyond that, we believe that some form of *ex ante* regulation is also needed for social media services and app marketplaces.

A large number of people consume news through social media services whose algorithms can have a significant impact on the visibility of the news publishers' content.

As to app marketplaces, it is critically important to curb Apple and Google's market power in app distribution. As recently observed in the Interim Report of the CMA's mobile ecosystem market study, Apple and Google effectively have a duopoly in relation to mobile operating systems.[8] Moreover, once a user has acquired an iOS device, the App Store represents the only way to download apps. In the case of Google, while Android device holders can in theory download apps

8 See CMA Interim Report, supra note 3, at para. 35.

from rival app stores, these app stores have extremely small market shares and do not constrain Google. This gives gatekeeper power to Apple and Google, which these companies can take advantage of by imposing unfavorable terms and conditions on app developers. It is thus important to adopt measures to stimulate competition both *between* and *within* these mobile ecosystems.

7. **Which platforms should such regulation apply to?**

See our response to question 6.

**Addressing data advantages**

8. **A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access. In relation to each of these potential options:**
    a. **What are the benefits and risks of each measure?**
    b. **Which data access measure is most appropriate for each of the key digital platform services identified in question 6 (i.e. which would be the most effective in increasing competition for each of these services)?**
    c. **What types of data (for example, click-and-query data, pricing data, consumer usage data) should be subject to these measures? d) What types of safeguards would be required to ensure that these measures do not compromise consumers' privacy?**

9. **Data limitation measures would limit data use in the supply of digital platform services in Australia:**
    a. **What are the benefits and risks of introducing such measures?**
    b. **Which digital platform services, out of those identified in question 6, would benefit (in terms of increased competition or reduced consumer harm) from the introduction of data limitation measures and in what circumstances?**
    c. **Which types of data should be subject to a data limitation measure?**

10. **In what circumstances might increasing data access be appropriate and in what circumstances might limiting data use be appropriate? What are the relative benefits and risks of these two approaches?**

Responses to questions 8-10:

Daily Mail Australia does not have a view as to whether measures such as data portability, data interoperability, data sharing, or mandatory data access, are desirable to lower barriers to entry for the provision of some digital platform services, although it suspects it may be the case.

By contrast, Daily Mail Australia considers that it would be beneficial to introduce some data limitation measures in the supply of digital platform services. As the ACCC knows, news publishers are competing with digital platforms, such as Google and Facebook, for advertising dollars. Yet, there are at a serious data disadvantage given these platforms' ability to collect vast troves of data through the services they provide to businesses (e.g., authentication services, ad tech services) and individual users (social media in the case of Facebook; search and a host of additional consumer-facing services in the case of Google).

In this context, Daily Mail Australia considers that the following measures should be taken:

- The ability of digital gatekeepers to combine personal data across their services should be strictly limited as (i) this is what gives them a huge data advantage in the provision of multiple digital platform services and (ii) gives them incentives to enter into new such services in order to collect additional data.

  For instance, Article 5(a) of the DMA proposal provides that digital gatekeepers should

  > "refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679."

  Although this provision has been rightly criticized for allowing digital gatekeepers to combine personal data across services when they obtain consent (which they usually manage to extract from users), this is a starting point.

- When gatekeepers adopt measures allegedly on privacy grounds (platforms indeed engage in "privacy washing") that limit publishers' access to personal user data, they should adopt alternative privacy-compliant mechanisms that will allow publishers to continue to be able to monetize effectively their ad inventory. As illustrated by Google's Privacy Sandbox changes and the CMA's related investigation, there is indeed a risk that such initiatives may reduce the ability of publishers to engage in effective advertising, while companies like Google can continue advertising on their own and operated properties in an unperturbed manner.

**Improved consumer protection**

**11. What additional measures are necessary or desirable to adequately protect consumers against:**
   **a. the use of dark patterns online**
   **b. scams, harmful content, or malicious and exploitative apps?**

Daily Mail Australia supports measures designed to protect consumers against harm provided such measures are not instrumentalized by large digital platforms to protect their market power. For instance, Apple's core argument against reform of its App Store policies is that such reforms would have a negative impact on the security of iOS devices and/or the privacy of iOS users.[9] While device security and user privacy are important, we consider that Apple uses such arguments to maintain the status quo.

Thus, when a digital gatekeeper opposes pro-competitive regulation or intervention on security and/or privacy grounds it should bear the burden of proof of showing that the implementation of the proposed rules would undermine security/privacy. It should also have to show that its existing practices (which the proposed rules would seek to modify) are the least restrictive and most proportionate way to protect security and user privacy.

**12. Which digital platforms should any new consumer protection measures apply to?**

Any new consumer protection measures should at the very least apply to Google, Facebook (Meta), and Apple. However, it should be possible to apply the new consumer protection regime to additional digital platforms if they are shown to pose threats to consumers.

**13. Should digital platforms that operate app marketplaces be subject to additional obligations regarding the monitoring of their app marketplaces for malicious or exploitative apps? If so, what types of additional obligations?**

Apple's position is that allowing users to download apps from the Internet (so-called sideloading) or from alternative app stores would open the door to cyber-criminals. The trouble is that the App Store contains numerous scam apps as has been reported in the press.[10] The ACCC should thus take Apple's claim that its security track record is flawless (and that this justifies its monopoly of app distribution) with a pinch of salt.

As to whether additional obligations are needed to improve the security of app marketplaces, Daily Mail Australia is not best positioned to respond. But to the extent such obligations were imposed, their implementation would need to be monitored by independent third-parties.

**Fairer dealings with business users**

**14. What types of fair-trading obligations might be required for digital platform services in Australia? What are the benefits and risks of such obligations? Which digital platforms should any such fair-trading obligations apply to?**

9 Id. at para. 84.

10 Reed Albergotti and Chris Alcantara, Apple's tightly controlled App Store is teeming with scams, 6 June 2021, available at https://www.washingtonpost.com/technology/2021/06/06/apple-app-store-scams-fraud/

Daily Mail Australia considers that the imposition of fair-trading obligations on digital gatekeepers is desirable. As correctly observed in Section 8.4.1 of the Consultation Paper, *"[t]he bargaining power imbalance between gatekeeper digital platforms and their business users can lead to business users being charged prohibitive access fees or commissions or being required to accept other unfair or restrictive contractual terms*."

One of the reasons why the imposition of fair-trading obligations is important is not only that unfair trading terms are frequently imposed by digital gatekeepers, but also because unfair trading terms cannot be effectively tackled under competition law (which instead focuses on exclusionary behaviour).

The imposition of fair-trading obligations would also be in line with overseas regulations seeking to promote fair trading, such as the UK DMU regime (with "fair trading" being one of the key objectives guiding the codes of conduct recommended by the CMA), as well as the Platform to Business regulation,[11] and the proposed Digital Services Act and DMA in the EU.

Ideally, such fair-trading obligations should be clearly specified, as leaving it to decide what is "fair" in individual instances may lead to protracted litigation.

**15. Should specific requirements be imposed on digital platforms (or a subset of digital platforms) to improve aspects of their processes for resolving disputes with business users and/or consumers? What sorts of obligations might be required to improve dispute resolution processes for consumers and business users of digital platform services in Australia?**

Daily Mail Australia considers that there is an urgent need to improve the dispute settlement processes available to businesses and users relying on the services of digital platforms. These processes are either absent (e.g., if a business user whose traffic depends on Google Search sees its traffic evaporate due to a sudden algorithmic change, it has typically nowhere to turn to) or inadequate (e.g., in instances where an app developer has a new app rejected by Apple, it is very hard to engage in a meaningful exchange with the app review team).

We thus consider that digital gatekeepers should develop more robust, efficient and transparent dispute settlement processes. While such processes can be mainly automated, there should always be the possibility to escalate the problem with a human representative when the problem is not sufficiently addressed. While this may have a cost, digital gatekeepers are sufficiently profitable to shoulder it.

11 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

Note that in some cases, disputes could be adjudicated through arbitration mechanisms. One of the challenges raised by the gatekeepers' dispute settlement processes is that they lack independence, in that it is the gatekeeper itself which will decide whether the claim raised by one of its users has merits. Small disputes could be adjudicated by one arbitrator, whereas more important conflicts could be subject to a panel.

**Increased transparency**

16. **In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?**
    a. **What additional information do consumers need?**
    b. **What additional information do business users need?**
    c. **What information might be required to monitor and enforce compliance with any new regulatory framework?**

Lack of transparency is a problem frequently encountered by businesses which depend on digital platform services. That can be illustrated by the following examples:

- Lack of transparency over algorithmic changes (when such changes take place, businesses will typically only find out due to alteration of their traffic or services);

- Lack of transparency over ad tech services (such services, the provision of which is dominated by Google, are highly nontransparent; moreover, Google regularly brings changes to the way in which it provides the service without properly informing users (Google often limits itself to introducing such changes via an obscure blog post)).

Thus, independently of the exact regulatory approach pursued by the Australian government and the ACCC, greater transparency requirements should play a central role.

Sub-question c above asks "*what information might be required to monitor and enforce compliance with any new regulatory framework*". While transparency may facilitate compliance monitoring, we consider that the first priority is to create a proper enforcement system. Experience teaches that digital gatekeepers are willing to go to great length to obfuscate regulatory processes, as well as to delay compliance. Apple's recent refusal to comply with an order of the Dutch Competition Authority, preferring instead to pay a €5 million weekly fine, is a case in point.[12] Given their vast financial resources, digital gatekeepers will use every available legal mechanism to delay the implementation of the rules to which they are subject and when they have exhausted such mechanisms, as is the case of Apple in the Netherlands, they might still prefer to pay fines rather than complying with the law.

12 See Dutch watchdog fines Apple again; company argues it has complied, 28 February 2022, available at https://www.reuters.com/technology/apple-says-it-has-complied-with-dutch-watchdog-letter-2022-02-28/#:~:text=AMSTERDAM%2C%20Feb%2028%20(Reuters),dating%20apps%20in%20the%20Netherlands.

In practice this means that those authorities in charge of implementing and enforcing the regulatory regimes that may be adopted to tackle the market power of digital gatekeepers:

- Must have sufficient human resources to perform their enforcement activities;
- Must have the ability to impose sanctions that have a deterrent effect (this includes high fines, but also when such fines fail to produce a deterrent effect, personal sanctions).

**Adequate scrutiny of acquisitions**

17. **Do you consider that reform is required to ensure that Australia's merger laws can prevent anti-competitive acquisitions by digital platforms? Why/why not?**

18. **Without prejudice to whether reform is required, what are the benefits and risks (including in relation to implementation and potential impacts on incentives for innovation and investment) of the proposals to address anti-competitive acquisitions by digital platforms, identified in this Discussion Paper, including:**
    a. **changing the probability threshold applicable to the assessment of the competitive harm from such acquisitions**
    b. **placing the burden of proof on the merger parties to establish the lack of competitive harm from a proposed acquisition**
    c. **introducing specific merger notification requirements for acquisitions by large digital platforms**
    d. **updating the current merger factors in section 50(3) of the CCA to reflect particular concerns relating to digital platform acquisitions**
    e. **introducing a 'deeming' provision to apply in situations where the digital platform has substantial market power, or meets other pre-identified criteria (whereby an acquisition by such a platform would be deemed to substantially lessen competition if it likely entrenched, materially increased or materially extended that market power) f) any other approaches to address potentially anti-competitive acquisitions by digital platforms?**

19. **Which digital platforms should be subject to tailored merger control rules, and what criteria or assessment process could be employed to identify these platforms?**

Daily Mail Australia does not have much to contribute on this point, except that it supports regulatory reforms designed to strengthen the review of acquisitions made by digital gatekeepers.

Note that new rules may not be necessary to strengthen merger review. For instance, over the past year, the CMA has used its existing merger control rules to take an increasingly tough stance on mergers in the digital space that restrict competition.

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