



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Digital Platform Services Inquiry

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

February 2022

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## Glossary

Term	Description
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACM	Authority for Consumers & Markets (The Netherlands)
ACMA	Australian Media and Communications Authority
Ad Tech Inquiry	Digital Advertising Services Inquiry
AEMC	Australian Energy Market Commission
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
Android	Google-owned operating system for supported devices, such as mobile phones.
Bundeskartellamt	German Competition Authority
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
CDR	Consumer Data Right
Choice architecture	The design of user interfaces that influence consumer choices by appealing to certain psychological or behavioural biases.
Click-and-query data	Data on queries that users enter into a search engine, along with their actions taken in response to the results.
CMA	Competition and Markets Authority (United Kingdom)
CNIL	Commission nationale de l'informatique et des libertés (French Data Protection Agency)
Cross-side network effects	Where an increase in the number of users on one side of the platform affects the value of the service to users on other sides of the platform.

Dark patterns	The design of user interfaces intended to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions.
Digital advertising services	Digital advertising services supplied by digital platform service providers.
Digital platform markets	The markets in the ACCC's Terms of Reference for the Digital Platform Services Inquiry. <sup>1</sup> These are internet search engine services (general and specialised search), social media services, online private messaging services (text, audio and visual messaging), digital content aggregation platform services, media referral services, electronic marketplace services.
DMA	Digital Markets Act (EU) – A legislative proposal to address economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened contestability of platform markets.
DMU	Digital Markets Unit of the CMA
DSA	Digital Services Act (EU) – A legislative proposal focusing on issues such as liability of online intermediaries for third party content, safety of users online and asymmetric due diligence obligations for different providers of information services depending on the nature of the societal risks such services represent.
EC	European Commission
Economies of scale	Cost advantages obtained by a supplier, where average costs decrease with increasing scale.
EEA	European Economic Area
EU	European Union
FTC	Federal Trade Commission (United States)
ICPEN	International Consumer Protection and Enforcement Network
In-app payments	Payments made within an app, that can be for additional features, functionality or content to be consumed within the app, as well as for physical goods and services to be consumed outside the app.
iOS	Apple's operating system for devices including the iPhone.

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<sup>1</sup> See [Competition and Consumer \(Price Inquiry–Digital Platforms\) Direction 2020](#), 10 February 2020.

Meta	The company formerly known as Facebook Inc.
NFC	Near-field communication: the NCF chip/technology allows devices within a few centimetres of each other to exchange information wirelessly, and is used, amongst other things, to facilitate 'tap-and-go' payments through an app on a mobile device.
Network effect	The effect whereby the more users there are on a platform, the more valuable that platform tends to be for its users. Also see <i>cross-side network effects</i> and <i>same-side network effects</i> .
News Media and Digital Platforms Bargaining Code	Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021.
OEM	Original equipment manufacturer – A company that manufactures and supplies an electronic product that integrates and uses applications.
OS	Operating system
P2B Regulation	Platform-to-Business Regulation (EU)
Report on App Marketplaces	The second Digital Platform Services Inquiry Interim Report (March 2021)
Report on General Online Retail Marketplaces	The fourth Digital Platform Services Inquiry Interim Report (March 2022)
Report on Online Private Messaging Services	The first Digital Platform Services Inquiry Interim Report (September 2020)
Report on Search Defaults and Choice Screens	The third Digital Platform Services Inquiry Interim Report (September 2021)
Same-side network effects	Where an increase in the number of platform users on one side of the platform affects the value of the service to other users on the same side of the platform.
Scamwatch	A website run by the ACCC to provide information to consumers and small businesses about how to recognise, avoid and report scams.
SMS	Strategic Market Status. A designation that the CMA will be allowed to make under a proposed regime in the UK for companies that have substantial, entrenched market power in at least one digital activity which provides the company with a strategic position in that market. Firms with SMS will be subject to additional regulation including a legally binding code of conduct, pro-competitive market interventions by the CMA, and enhanced merger rules



# 1. Overview

The Australian Competition and Consumer Commission (ACCC) has been examining competition and consumer issues associated with digital platforms since late 2017. During this time, the largest digital platforms have continued to grow, expanding their ecosystems and their impact on the economy and our day-to-day lives. In 2021, Australians spent an average of 6 hours and 13 minutes online per day (almost 40% of our waking hours).<sup>2</sup> More than ever, we are working, communicating, shopping, learning and seeking entertainment online, typically using services either operated by or accessed via one of the large global digital platforms.

Digital platforms provide consumers and businesses with significant benefits. Search engines provide an efficient and effective way to sort through the vast amount of information online. Social media and online private messaging services help us to connect with others quickly and easily, while app marketplaces gather and sort countless apps that provide significant benefits, increasing the value of our mobile devices. Online retail marketplaces similarly offer an easy way to find and buy a wide range of products.

Beyond these benefits, digital platforms have facilitated new and efficient ways for Australian businesses to provide innovative services, promote their products and quickly and easily reach consumers.

However, in providing these services, a few large digital platforms now hold very powerful positions, increasingly acting as gatekeepers between businesses and end users.<sup>3</sup> This position affords those platforms an immense influence on the terms of trade and competitive dynamics in these markets, as well as on society and the economy more broadly. Such influence can have negative consequences on competition as well as business users and consumers.

The characteristics of digital platform markets, such as high barriers to entry due to economies of scale and scope (including in relation to data) as well as significant network effects, have led to and entrenched the powerful positions held by some large digital platforms. These market characteristics, in addition to the fast-moving, dynamic nature of digital platform services, have created challenges for traditional competition and consumer protection law enforcement in recent years.

The ACCC has growing concerns that enforcement under existing competition and consumer protection legislation, the *Competition and Consumer Act 2010* (CCA) and the Australian Consumer Law (ACL), which by its nature takes a long time and is directed towards very specific issues, is insufficient to address the breadth of concerns arising in relation to rapidly changing digital platform services.

In light of these concerns and given that this is the half-way point of the *Digital Platform Services Inquiry*, the ACCC considers this is an appropriate time to assess whether Australia's current competition and consumer protection laws, including merger laws, are sufficient to address the competition and consumer harms that have been identified in relation to digital platform services.

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<sup>2</sup> Based on Q3 2021, figure represents the findings of a broad global survey of internet users aged 16 to 64 using the internet on any device. We Are Social and Hootsuite, [Digital 2022 Global Overview Report](#), 26 January 2022, p 27.

<sup>3</sup> End users may be consumers and/or small businesses.

The ACCC will present its views on these matters and whether any change is needed in the *Digital Platform Services Inquiry Interim Report No. 5*, due to be provided to the Treasurer in September 2022.

This Discussion Paper will inform the *Digital Platform Services Inquiry Interim Report No. 5* and seeks stakeholder views on the effectiveness of existing competition and consumer law in relation to these services and, if change is needed, possible options for reform.

## 1.1. Competition and consumer protection issues

The ACCC has growing concerns about the entrenched and durable nature of some large digital platforms' market power and their gatekeeper role, and the impact this has on consumers and business users, especially given the growing reliance of businesses and consumers on a range of digital platform services.

Reduced competition in the supply of digital platform services harms Australian businesses and consumers through increased prices for business-facing services (which may be passed on to consumers), reduced incentives to innovate and improve quality, reduced choice, and increased non-monetary costs of using digital platforms such as greater exposure to advertising and greater use of personal data. Significant market power can also be leveraged across different services, leaving consumers with less choice, higher prices and/or lower quality products and services across many interrelated markets. Ultimately, this can lead to reduced productivity and innovation in the supply of digital platform and related services.

A few large digital platforms have been able to grow and extend their market power through their acquisition strategies, with the largest digital platforms collectively making hundreds of acquisitions over the last five years.<sup>4</sup> Acquisitions, such as Meta's acquisition of WhatsApp and Instagram, have helped large platforms entrench the market power of their core services, raised barriers to entry for rivals, and enabled the platforms to expand their ecosystems, potentially hampering the emergence of vigorous competition in related markets.

The opaque operation of digital platform services also heightens concerns about competition and consumer outcomes. The ACCC has found a lack of transparency in the terms and conditions that apply to both consumers and business users. Consumers, who increasingly rely on using digital platforms, may suffer where they lack oversight and control of their data – in particular, where platforms' terms and conditions allow personal user data to be misused (for example, to target scams) or used in ways that are inconsistent with consumers' preferences.

In addition, new services and products, such as augmented and virtual reality, raise new concerns and may exacerbate existing harms. These services facilitate greater personal data collection and provide greater opportunities for consumers to be manipulated via dark patterns,<sup>5</sup> which encourage them to make particular decisions about options or features that may not be in their best interests.

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<sup>4</sup> Figure provided by [Merger Market Data](#). Additionally, these firms have together acquired approximately 4 firms per month between 2010 and 2020. See C Caffarra, G Crawford, T Valletti, "[How tech rolls': Potential competition and "reverse" killer acquisitions](#)", *VoxEU*, 11 May 2020. See also E Argentesi et al, "[Merger policy in digital markets: An ex-post assessment](#)", Centre for Economic Policy Research, Discussion Paper 14166, 2019.

<sup>5</sup> Dark patterns are the user interfaces, or choice architecture, that are used by some online platforms to lead consumers into making decisions they would not have otherwise made if they had been fully informed and capable of selecting alternatives. See also, OECD, [Roundtable on Dark Commercial Patterns Online: Summary of discussion](#), 19 February 2021.

The ACCC acknowledges that the harms associated with digital platforms extend beyond competition and consumer protection concerns, reflecting the wide scope of services offered by digital platforms, and their central role in our daily lives. The Australian Government has been focused on addressing a range of harms that impact Australians, including online safety concerns, particularly in relation to children, cyber security, online privacy, defamation in an online world and the spread of misinformation. These important areas of reform are being led by other parts of the Australian government or independent Australian government agencies. The ACCC works closely with other agencies and government departments to ensure a consistent and unified approach to addressing these important issues.

## 1.2. Options for reform

The ACCC is considering whether Australia's current competition and consumer protection laws, including merger laws, are sufficient to address the competition and consumer harms identified in relation to digital platform services or whether change is needed.

While enforcement of the CCA and ACL will continue to be a useful and relevant tool for addressing some of the harms identified, the ACCC is considering whether additional tools may be needed to address conduct that cannot be effectively dealt with under existing laws, as well as to help prevent harmful conduct before it occurs.

These additional tools could help to establish clear standards of behaviour to provide certainty about acceptable conduct and mitigate the risk of significant market power becoming further entrenched. In doing so, these new tools could help to minimise the risk of firms engaging in practices that are likely to result in an unacceptable level of consumer detriment, and the risk of dominant firms engaging in anti-competitive conduct.

This Discussion Paper presents some possible approaches for the structure and content of any reform. Some approaches to structuring a new framework include obligations and prohibitions contained in legislation, codes of conduct, rule-making powers, measures to promote competition, and third-party access regimes. Such tools could be used individually or in combination to address a range of harms such as those associated with anti-competitive conduct (such as anti-competitively preferencing a platform's own services above those of its business users), heightened barriers to entry (such as restricted access to data), bargaining imbalances, and insufficient consumer and business user protections (such as effective dispute resolution processes and protections against scams and exploitative user interfaces).

The digital platform firms potentially covered by any such reform would vary depending on the options that are ultimately pursued. In cases where new regulation sought to address the consequences of market power, for example, it is likely this would only apply to a few large digital platforms, identified by objective criteria or an assessment linked to market power and/or a strategic position, such as occupying a gatekeeper position. In other cases, such as those relating to consumer protection, new rules may apply more broadly to ensure minimum standards of consumer protection across multiple services.

The ACCC actively participates in the international debate about how best to approach the competition and consumer issues arising in relation to digital platform services. The ACCC's consideration of these issues will be informed by developments in other jurisdictions, such as the European Union (EU), the United Kingdom (UK), the United States (US), and other Asia-Pacific jurisdictions. Some of the approaches discussed in this paper are similar to proposals in overseas jurisdictions.

Alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian

consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection.

The ACCC is seeking the views of interested stakeholders on the issues identified in this Discussion Paper and welcomes stakeholder views on any other issues relevant to those raised in this Discussion Paper.

### 1.3. Structure of this Discussion Paper

**Chapter 1** (this chapter) provides an overview and summary of issues and consultation questions in this discussion paper.

**Chapter 2** describes the scope of the ACCC's *Digital Platform Services Inquiry Interim Report No. 5* and includes key dates and details about making a submission in response to this Discussion Paper.

**Chapter 3** discusses the market power held by large digital platforms in Australia, including the growth of market power through acquisitions, and the gatekeeper role being performed by some of these platforms.

**Chapter 4** outlines common and important characteristics of digital platform markets, including economies of scale, network effects, ecosystems, vertical integration and the importance of data, which contribute to market power.

**Chapter 5** summarises a number of harms identified in relation to digital platform services, including those associated with the market power of a few large digital platforms, including both the risk of anti-competitive conduct and unfair trading practices as well as broader consumer harms.

**Chapter 6** considers the effectiveness of current competition and consumer protection frameworks in relation to digital platform services in Australia.

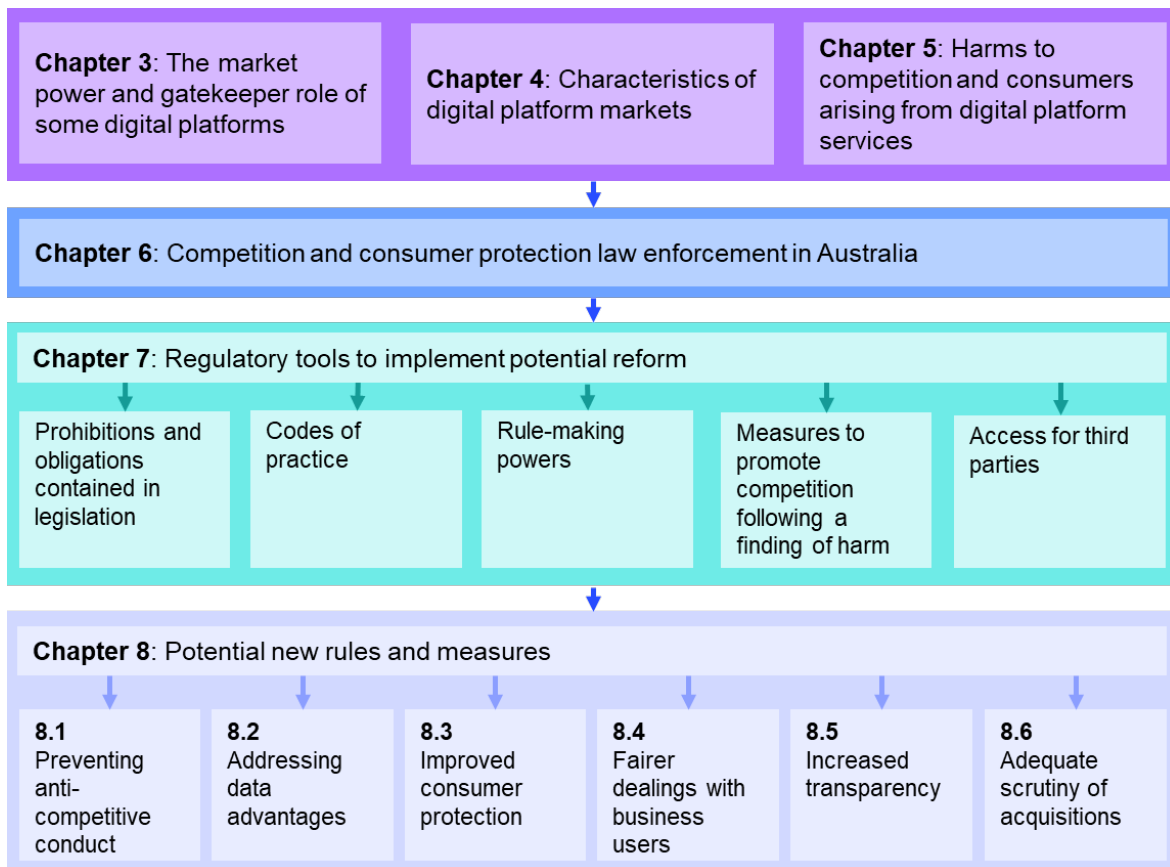
**Chapter 7** discusses possible approaches for reform and potential regulatory tools to address the competition and consumer concerns identified.

**Chapter 8** summarises a wide range of potential rules and measures that could address the competition and consumer concerns identified and be introduced as part of any new framework.

**Attachment A** sets out a summary of domestic and international regulatory developments relating to digital platform markets.

Figure 1.1 illustrates the relationship between the different chapters of this Discussion Paper and highlights areas where the ACCC is seeking stakeholder feedback.

**Figure 1.1 Discussion Paper Roadmap**



## 1.4. List of consultation questions

The ACCC is seeking feedback regarding the issues and harms set out in this discussion paper. A list of questions for stakeholders is set out below. Wherever possible, please provide reasons, relevant information and examples to support your views.

The ACCC invites views on any or all of the below questions. It is not necessary to provide views in response to each question.

### **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?

### **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?

### **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?
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 following regulatory tools to competition and consumer harms from digital platform services in Australia?
  - a) prohibitions and obligations contained in legislation
  - b) the development of code(s) of practice
  - c) the conferral of rule-making powers on a regulatory authority
  - d) the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm
  - e) the introduction of a third-party access regime, and
  - f) any other approaches not mentioned in chapter 7.
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?

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

### **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?

### **Improved consumer protection**

11. What additional measures are necessary or desirable to adequately protect consumers against:
  - a) the use of dark patterns<sup>6</sup> online
  - b) scams, harmful content, or malicious and exploitative apps?
12. Which digital platforms should any new consumer protection measures apply to?
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?

### **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?
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?

### **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?

### **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?

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<sup>6</sup> The design of user interfaces intended to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions.



## 2. Introduction

### 2.1. Scope of this Report

The ACCC is considering whether Australia's existing competition and consumer protection laws, under the CCA and the ACL, are sufficient alone to address the significant competition and consumer protection concerns identified in relation to digital platform services in Australia.

This follows the findings and recommendations made in the ACCC's:

- *Digital Platforms Inquiry Final Report (2019)*
- *Digital Platform Services Inquiry Interim Report No. 1 (Online private messaging services) (2020)*
- *Digital Platform Services Inquiry Interim Report No. 2 (App marketplaces) (2021)*
- *Digital Platform Services Inquiry Interim Report No. 3 (Search defaults and choice screens) (2021), and*
- *Digital Advertising Services Inquiry (the Ad Tech Inquiry) Final Report (2021).*

This Discussion Paper will inform the ACCC's *Digital Platform Services Inquiry Interim Report No. 5*, which the ACCC will provide to the Treasurer by 30 September 2022.<sup>7</sup>

The ACCC is seeking stakeholder views on the need for a new regulatory framework to address competition and consumer issues in relation to digital platform services to complement the CCA and ACL. The ACCC is also seeking stakeholder feedback on a number of specific questions about options for the potential structure and content of any potential new framework – see section 1.4 for a list of consolidated questions.

The Discussion Paper includes a range of possible approaches that could be taken to address the identified issues (including the option of remaining with the status quo). The inclusion of a particular approach or regulatory tool should not be taken to indicate the ACCC's support for that approach, other than in instances where the paper refers to a previous formal recommendation of the ACCC, such as in relation to the *Ad Tech Inquiry Final Report*.

### 2.2. Key dates

The ACCC invites written views from interested stakeholders by **1 April 2022**.

The ACCC may also follow up with stakeholders to discuss the views expressed in submissions. By-invitation forums may also be held with stakeholders during May and June 2022. More information about these events will be circulated to relevant stakeholders closer to the time.

The *Digital Platform Services Inquiry Interim Report No. 5* will be provided to the Treasurer by 30 September 2022.

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<sup>7</sup> On 10 February 2020, the Australian Government [directed](#) the ACCC to conduct a five-year inquiry into markets for the supply of digital platform services.

## 2.3. Responding to the discussion paper

The ACCC invites written submissions from interested stakeholders, which can be emailed to [digitalmonitoring@acc.gov.au](mailto:digitalmonitoring@acc.gov.au) by **5pm AEDT 1 April 2022**. We may also directly contact some stakeholders to request specific information.

The ACCC encourages you to provide your views on the issues most relevant to you, and it is not necessary to provide an answer to every question in this paper. We also welcome views on any other issues you consider directly relevant to the consideration of competition and consumer protection related reform regarding digital platform services in Australia.<sup>8</sup> A full list of the consultation questions is at section 1.4.

In preparing your submission, please include as much evidence as possible to support your views.

We accept public and confidential submissions. Please clearly identify any confidential information in your written submission (see box 2.1 about providing reasons for claims of confidential information). We note, however, that the ACCC's *Digital Platform Services Inquiry* is a public process and that, in general, submissions will be placed on the ACCC website to allow for public consultation.

## 2.4. Treatment of confidential information

The ACCC invites interested parties, where appropriate, to discuss confidentiality concerns with the ACCC in advance of providing written material. The Inquiry is a public process and feedback (written and oral) will generally be posted on the ACCC website.

The CCA allows interested parties that provide feedback to the *Digital Platform Services Inquiry* to make claims for confidentiality if the disclosure of information would damage their competitive position.

The ACCC can accept a claim of confidentiality from a party if:

- it is satisfied that disclosure would damage the party's competitive position, and
- it is not of the opinion that disclosure of the information is necessary in the public interest. The ACCC will consult with a party where possible and appropriate prior to publishing any information over which that party has claimed confidentiality.

### Box 2.1 Making a claim of confidentiality

1. Please provide reasons why the information is confidential and why disclosure of the information would damage your competitive position, including identifying the damage that would occur should information be disclosed. This will assist the ACCC to consider whether the confidentiality claim is justified.
2. If you are claiming confidentiality over all of the information in your submission, you must provide reasons why all of the information in your submission is confidential and set out reasons why specific items of information would damage your competitive position. As the Inquiry is a public process, please consider whether there are any parts of your submission that may be published without damaging your competitive position.

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<sup>8</sup> The Digital Platform Services Inquiry's terms of reference are limited to the consideration of laws and policy relevant to competition and consumer protection in the supply of digital platform services (see clause 5).

3. If you are claiming confidentiality over a part of the information in your submission, the information over which you claim confidentiality should be provided in a separate document and should be clearly marked as 'confidential' on every relevant page. Alternatively, you may wish to provide (1) a public version for publication on the ACCC website with the confidential information redacted, and (2) a confidential version with all of the confidential information clearly marked.
4. Contact us at [digitalmonitoring@acc.gov.au](mailto:digitalmonitoring@acc.gov.au) if you have any questions regarding making a submission containing confidential information. More information is also available on the ACCC's [website](#).

### 3. The market power and gatekeeper role of some digital platforms

This chapter summarises key findings from previous ACCC inquiries into digital platform services regarding the market power of particular digital platforms in Australia, and how some of these platforms have come to occupy a gatekeeper role.

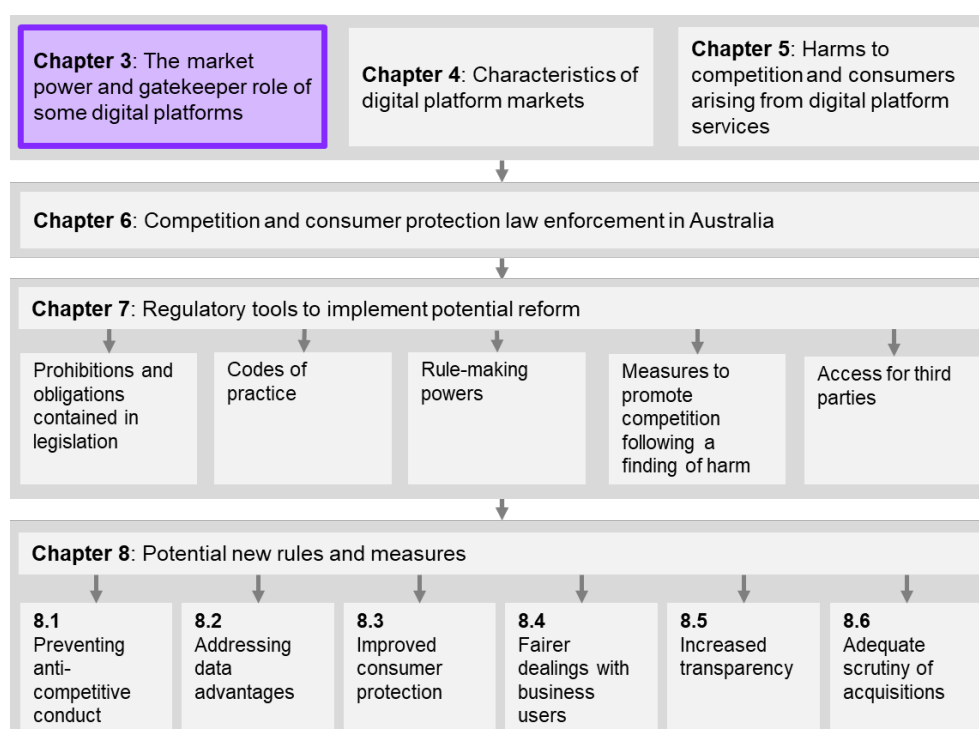
In reaching these findings, the ACCC considered a number of factors including market shares over time and the likelihood of competitive constraint including by dynamic competition, in light of barriers to entry and expansion. This chapter presents key metrics such as market shares over time. Other factors such as barriers to entry and expansion are discussed in more detail in chapter 4.

The ACCC notes that it is not illegal for a firm to have or use market power. However, a range of harms to competition and consumers can arise from the significant market power of a few large digital platforms. These harms are discussed in more detail in chapter 5.

This chapter is set out as follows:

- **Section 3.1** outlines the ACCC’s previous findings about market power in relation to certain digital platform services in Australia.
- **Section 3.2** discusses how some large digital platforms have grown their market power through acquisitions.
- **Section 3.3** discusses how some digital platforms have come to occupy key positions in relation to some digital platform services that allow them to act as a gatekeeper between businesses and consumers.
- **Section 3.4** discusses the potential future growth of some digital platforms.

#### Discussion Paper Roadmap



### 3.1. Digital platforms' market power in Australia

Large digital platforms, such as Apple, Meta (formerly known as Facebook Inc.), Google, Microsoft, and Amazon, continue to grow and expand their influence.<sup>9</sup>

Despite the economic crisis resulting from the COVID-19 pandemic, large digital platforms reported significant global revenue growth, with the pandemic driving an increase in users online for commercial as well as social transactions.<sup>10</sup> For the second quarter of 2021:

- Apple earned USD81.4 billion, a 36% increase from the same period in 2020.<sup>11</sup>
- Alphabet (Google) earned USD61.9, a 62% increase from the same period in 2020.<sup>12</sup>
- Meta earned USD29.1 billion, a 56% increase from the same period in 2020.<sup>13</sup>

While the ACCC recognises these financial metrics are not necessarily indicative of market power, the substantial revenue generated by these digital platforms is indicative of their scale and influence.

The ACCC has previously found that certain large digital platforms, such as Google, Meta and Apple, have significant market power in relation to a number of digital platform services, including, but not limited to:

- **Google** in the supply of general search engine services and search advertising, the supply of mobile operating systems, as well as likely significant market power in relation to mobile app distribution, and dominance in the ad tech supply chain.<sup>14</sup>
- **Meta** in the supply of social media services and in the supply of display advertising.<sup>15</sup>
- **Apple** in the supply of mobile operating systems and likely significant market power in relation to mobile app distribution.<sup>16</sup>

The ACCC is concerned that the market power of these digital platforms is becoming increasingly entrenched and is also expanding to adjacent and related services.

#### 3.1.1. Google's market power

The ACCC has previously found that Google has significant market power in the supply of general search engine services.<sup>17</sup> One indicator of Google's market power is its high market share, which has been consistent for the last decade as shown in figure 3.1.

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<sup>9</sup> The ACCC notes that some of the markets in which these firms operate are outside the current Ministerial Direction for the Digital Platforms Services Inquiry but have been included here to represent an overall picture of their capability.

<sup>10</sup> OECD, [Ex ante regulation in digital markets – Background Note](#), 1 December 2021, p 5.

<sup>11</sup> The reported comparable periods are for quarters ending 26 June. See Apple Inc., [Apple Reports Third Quarter Results](#), 27 July 2021. Apple reports on net sales.

<sup>12</sup> The reported comparable periods are for quarters ending 30 June. See Alphabet Inc., [Alphabet Announces Second Quarter 2021 Results](#), 27 July 2021.

<sup>13</sup> The reported comparable periods are for quarters ending 30 June. See Meta, [Facebook Reports Second Quarter 2021 Results](#), 28 July 2021.

<sup>14</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 64. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 14. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1. ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 4, 43.

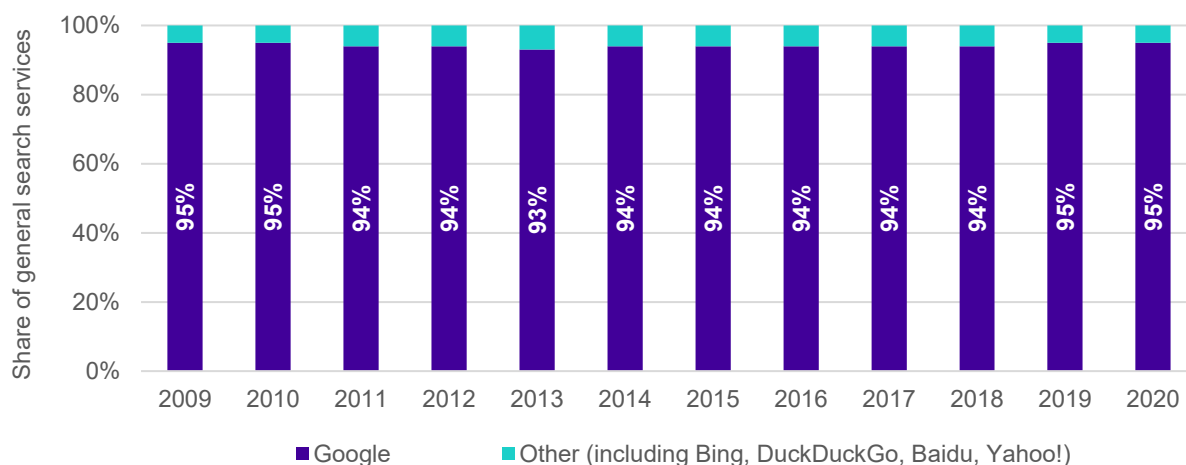
<sup>15</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 9, 77. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 14.

<sup>16</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 4, 43.

<sup>17</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24.

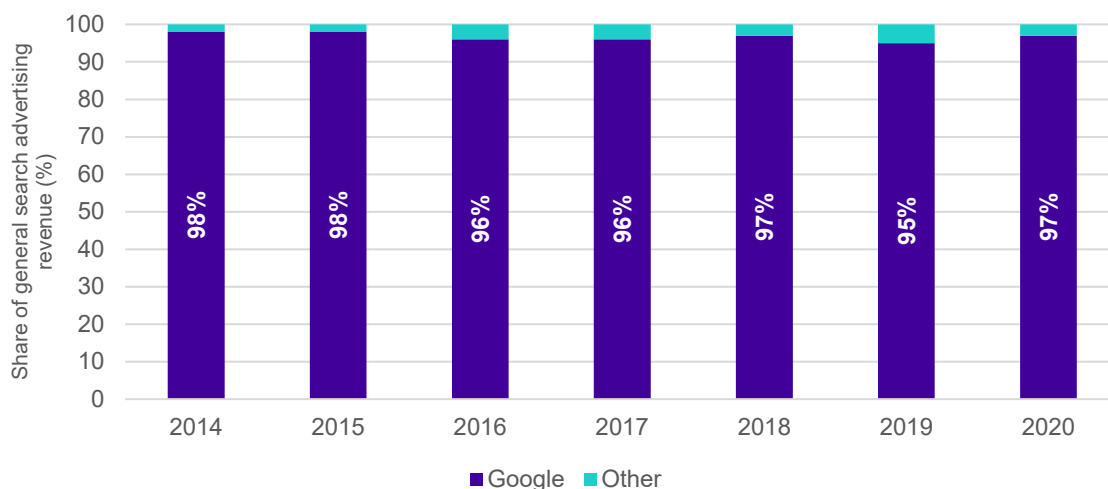
In 2020, Google’s share of general search engine services on mobile and desktop devices in Australia was 95%.<sup>18</sup>

**Figure 3.1 Share of general search services in Australia<sup>19</sup>**



Relatedly, Google also has significant market power in the supply of search advertising in Australia.<sup>20</sup> In 2020, Google’s market share was 97%<sup>21</sup> and has ranged from 95% to 98% over the last seven years, as shown in figure 3.2. This dominance in search advertising stems directly from Google’s significant market power in providing general search services.<sup>22</sup>

**Figure 3.2 Share of general search advertising revenue in Australia<sup>23</sup>**



*Note: The figures shown for 2014 to 2017 are based on a different calculation methodology to the figures shown for 2018 to 2020 and as such should not be directly compared.*

<sup>18</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24.

<sup>19</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p B2.

<sup>20</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24.

<sup>21</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24.

<sup>22</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 91.

<sup>23</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 95. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p B9. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 24.

Google also supplies one of the two main mobile operating systems (OS) available in Australia and globally – the Android OS – the only main mobile OS that is available to third party mobile manufacturers. Google’s Android OS has approximately a 50% market share of mobile OS in Australia and holds a much higher market share worldwide (excluding China) of approximately 73%.<sup>24</sup> High barriers to entry and expansion, including from consumer lock-in, protect Google’s market power in supplying its mobile OS. Relatedly, Google likely also has significant market power in relation to mobile app distribution given its operation of the Android OS.

Google is also the largest supplier of ad tech services across the entire ad tech supply chain in Australia with no other provider having the same scale or reach in relation to these services which have high barriers to entry and expansion.<sup>25</sup> Across the various ad tech services, the ACCC estimated that Google’s share of ad impressions<sup>26</sup> in Australia in 2020 ranged from 70% to 100%. For those ad tech services where revenue information was available, Google’s share of revenue<sup>27</sup> ranged from 40% to 70%.<sup>28</sup> Unlike many other ad tech providers, Google is also a key ‘publisher’ or source of ad space, as it supplies ad spaces to advertisers on its own services, including YouTube, Gmail and Google Search. The ACCC observed that the level of fees charged for the supply of ad tech services likely reflected the market power that Google is able to exercise in its dealings with advertisers and publishers.<sup>29</sup> Google’s dominance is underpinned by multiple factors including its data advantage, access to exclusive inventory and advertiser demand, and integration across its services.<sup>30</sup>

Google also supplies a range of other business and consumer facing products and services across its ecosystem, which is discussed further in section 4.4, including Google Maps, G Suite for Education, Google Workspace and Google Assistant.<sup>31</sup>

### 3.1.2. Meta’s market power

The ACCC has previously found that Meta has significant market power in the supply of social media services in Australia through Facebook and Instagram.<sup>32</sup> While other social media services, such as TikTok and Snapchat, appear to have grown in popularity, particularly with younger audiences (for example, TikTok’s users grew 81% from July 2020 to July 2021),<sup>33</sup> Meta’s Facebook has consistently remained the most popular social media platform in Australia (by number of users) over the last decade as shown in figure 3.3. Facebook along with Instagram also account for a large proportion of the time Australians

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<sup>24</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 4. Australia: Kantar reports estimated smartphone sales shares of around 54% for Android OS and 46% for iOS for the three months ending December 2020. See Kantar, [Smartphone OS market share](#), 2020, accessed 24 March 2021. StatCounter reports estimated mobile OS shares of 54% for iOS and 46% for Android OS for December 2020, based on mobile OS shares of webpage views. See StatCounter, [Mobile operating system market share Australia](#), 2021, accessed 24 March 2021. Worldwide: Statista, [Mobile operating systems’ market share worldwide from January 2012 to January 2021](#), 8 February 2021, accessed 16 March 2021.

<sup>25</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1.

<sup>26</sup> Share of ad impressions is an ad tech provider’s share of the total ad impressions traded or served by the main providers of the service in Australia, in relation to open display advertising served to users in Australia.

<sup>27</sup> Share of revenue is an ad tech provider’s share of the total revenue earned by the main providers of the service in Australia, in relation to open display advertising served to users in Australia.

<sup>28</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5.

<sup>29</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 10.

<sup>30</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 1.

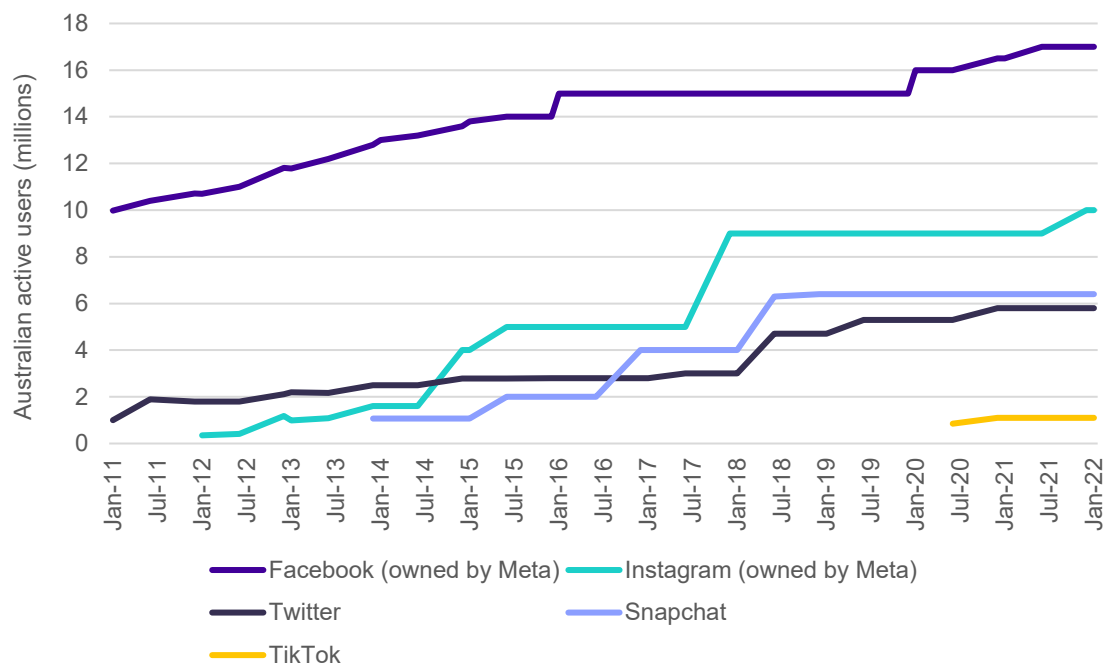
<sup>31</sup> Google Assistant is a voice assistant used by more than 500 million people globally every month across smartphones, TVs, cars, smart displays and other devices. See ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 5. Google Assistant is often the default voice assistant on devices using the Android OS.

<sup>32</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 9.

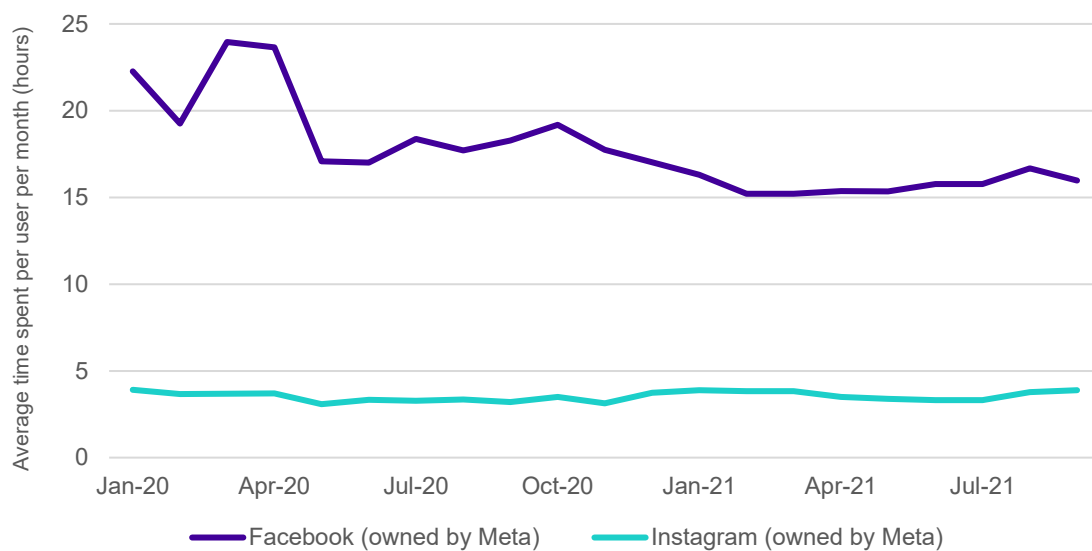
<sup>33</sup> E Shepherd, [Research finds TikTok the ‘most untrustworthy social media platform’, as users jump 81% in Aus](#), Mumbrella, 8 October 2021.

spend online, as shown in figure 3.4, particularly during the first COVID-19 lockdown in 2020.<sup>34</sup>

**Figure 3.3 Active Australian users of select social media platforms<sup>35</sup>**



**Figure 3.4 Average time spent on Facebook and Instagram (Australian users 18+ monthly total) during 2020 and 2021<sup>36</sup>**



<sup>34</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 3.

<sup>35</sup> Active users are represented as monthly active users in most cases. For Snapchat, users for January 2018, June 2017 and January 2017 are daily active users. This data source first reported user numbers for Instagram in January 2012, Snapchat in November 2013 and TikTok in February 2020. Social Media News, [Social Media Statistics](#), accessed 24 February 2022.

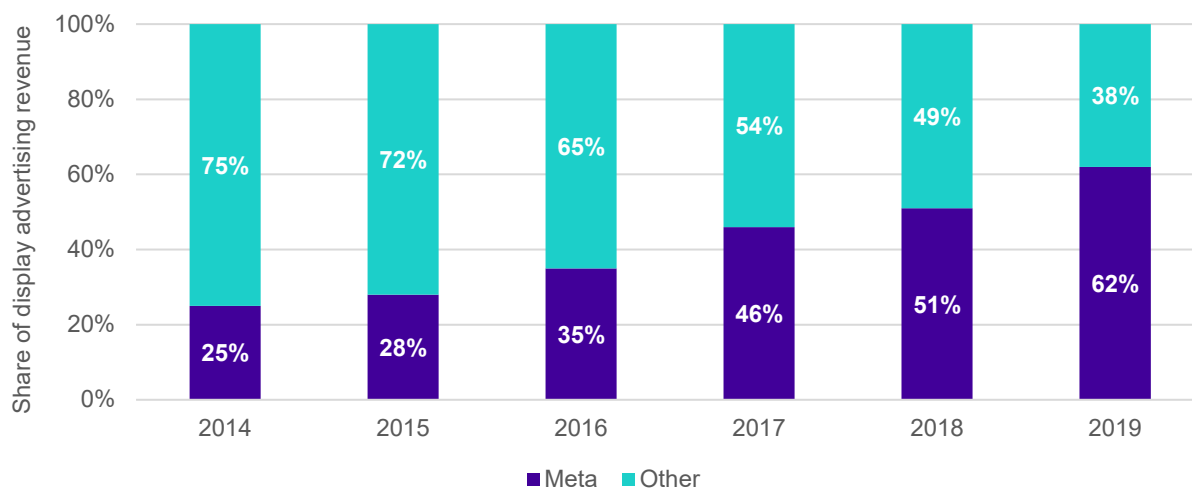
<sup>36</sup> Nielsen, [Digital Landscape Reports](#), Average time spent, 2020, 2021.



Relatedly, the ACCC found that Meta also has significant market power in the supply of online display advertising in Australia.<sup>37</sup>

This is due in part to its unrivalled access to consumers on social media,<sup>38</sup> which may form a differentiated segment of online display advertising. In 2019, through Facebook and Instagram, Meta had a 62% share of display advertising revenue earned in Australia, an increase of 11% from 2018, as shown in figure 3.5.<sup>39</sup>

**Figure 3.5 Share of display advertising revenues in Australia<sup>40</sup>**



Meta also has a significant competitive advantage in the supply of online private messaging services in Australia through Facebook Messenger and WhatsApp. The ACCC has previously found that Meta has a degree of freedom from competitive constraints from other suppliers of these services in Australia.<sup>41</sup>

### 3.1.3. Apple’s market power

The ACCC has found that Apple, through Apple iOS, has significant market power in the supply of mobile OS, holding around 50% of the market in Australia.<sup>42</sup> Worldwide, excluding China, Apple has around 27% market share in the supply of mobile OS.<sup>43</sup>

Apple’s market power in the supply of mobile OS provides it with market power in relation to the distribution of mobile apps through the Apple App Store, and the ACCC considers it is likely that this market power is significant. To reach users of Apple devices, app developers can only offer apps through the Apple App Store. Any competitive constraint provided by other app marketplaces (such as the Google Play Store) is limited once a user is within the

<sup>37</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 97.

<sup>38</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 6.

<sup>39</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p B11.

<sup>40</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p B11.

<sup>41</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 1. The ACCC notes that Facebook expressed concerns with the ACCC’s finding that Facebook’s online private messaging services are not competitively constrained by other online private messaging services in a [submission in response](#) to this Interim Report.

<sup>42</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 4. Kantar reports estimated smartphone sales shares of around 54% for Android OS and 46% for iOS for the three months ending December 2020. See Kantar, [Smartphone OS market share, 2020](#), accessed 24 March 2021. StatCounter reports estimated mobile OS shares of 54% for iOS and 46% for Android OS for December 2020, based on mobile OS shares of webpage views. See StatCounter, [Mobile operating system market share Australia, 2021](#), accessed 24 March 2021.

<sup>43</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 4. Statista, [Mobile operating systems’ market share worldwide from January 2012 to January 2021](#), 8 February 2021, accessed 16 March 2021.

Apple ecosystem, as the user would need to purchase a new device with a different OS to use a different app marketplace.

Apple's market power may be enhanced by the breadth of the products and services offered within its ecosystem, which include iMessage, Siri, Apple Arcade, Apple Pay, Apple Music, and Apple TV. In particular, the ACCC has found that iMessage has a large number of daily active users in Australia in the market for online private messaging services.<sup>44</sup> Apple also supplies its own voice assistant, Siri, which can be used across Apple's own devices as well as on some third-party devices.<sup>45</sup> The range of other products and services supplied by Apple is discussed in section 4.4.

### 3.1.4. Other digital platforms

The ACCC's reports to date, including those under the *Digital Platforms Service Inquiry*, have focused on the digital platforms that fall within the relevant inquiry terms of reference.

The current *Digital Platforms Services Inquiry* directs the ACCC to look at 'digital platform services'<sup>46</sup> which is defined as meaning (a) internet search engine services (including general search services and specialised search services); (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<sup>47</sup> provided in the course of providing one or more of the services mentioned in paragraphs (a) to (d); (f) electronic marketplace services.

In this respect, the ACCC is currently examining general online retail marketplaces in Australia, including eBay, Amazon, Catch.com.au and Kogan, including competition between and within marketplaces and whether any marketplaces hold market power.<sup>48</sup> The ACCC's views in relation to these services will be included in the *Digital Platform Services Inquiry Interim Report #4*, which is due to the Treasurer in March 2022.

Subsequent reports by the ACCC under the *Digital Platforms Services Inquiry* will likely focus on other digital platform services which fall within the above definition.

While the ACCC's reports under the *Digital Platforms Services Inquiry* are required to focus on digital platform services, as defined in the Ministerial Direction, the ACCC recognises that the market power concerns it has identified in relation to the above platforms could apply in relation to other digital platform services and indeed other digital services.

## 3.2. Growth and entrenchment of market power through acquisitions

The rapid growth of the leading digital platforms such as Google, Meta, Apple, Microsoft, and Amazon, and the extension of their activities and services, has been driven by acquisitions as well as organic expansion. These platforms are serial acquirers, collectively making 296 acquisitions between January 2016 and December 2020.<sup>49</sup>

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<sup>44</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 34.

<sup>45</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 87.

<sup>46</sup> In addition to Digital Platform Services, the ACCC is also directed to look at data brokers.

<sup>47</sup> For discussion on the meaning of 'media referral services', see ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 103-104.

<sup>48</sup> See ACCC, [Digital Platform Services Inquiry Interim Report #4 \(General Online Retail Marketplaces\)](#), March 2022.

<sup>49</sup> Figure provided by [Merger Market Data](#). Additionally, these firms have together acquired approximately 4 firms per month between 2010 and 2020. See C Caffarra, G Crawford, T Valletti, 'How tech rolls' Potential competition and 'reverse' killer acquisitions, 11 May 2020. See also E Argentesi, P Buccirosi, E Calvano, T Duso, A Marazo, & S Nava, [Merger policy in digital markets: An ex-post assessment](#), Centre for Economic Policy Research, Discussion Paper 14166, 2019.

While some of these acquisitions have been benign or beneficial for consumers, a number of reports, including those by the UK Digital Competition Expert Panel, the expert report commissioned by Commissioner Vestager for the European Commission<sup>50</sup> and the Stigler Center, have raised concerns about acquisitions of firms who may – if not acquired – have become effective rivals in the future (i.e. potential or nascent competitors); as well as acquisitions that have extended market power into related or adjacent markets.<sup>51</sup> In particular, acquisitions of data-driven businesses can enable a platform that already has access to a large volume and scope of data to extend its market power to other markets.<sup>52</sup>

As noted by the Stigler Center, in concentrated markets such as many digital platform markets, the competitive constraint from small firms may be the most significant source of competition to an incumbent firm.<sup>53</sup> In these markets, the competitive process may primarily involve competition ‘for the market’, rather than competition ‘in the market’. Firms with substantial positions in these markets can undermine this process by acquiring nascent competitors before they have the opportunity to become a substantial threat to their market power. A large digital platform has strong incentives to remove such threats given the benefits associated with occupying a dominant position in its core market.

Additionally, where acquisitions enable platforms to expand into related markets, they may also facilitate an expansion of platforms’ ecosystems and facilitate consumer lock-in, helping to further entrench their market power in the original market.<sup>54</sup>

As noted in the *Ad Tech Inquiry Final Report*, a number of Google’s acquisitions (YouTube, DoubleClick, Admob and AdMeld) may have enabled it to remove potential competitors or provided it with access to exclusive inventory and data. The acquisitions have therefore contributed to Google’s strong position in the supply of ad tech services and assisted its expansion into related markets.<sup>55</sup>

The ACCC has also previously found that Meta’s acquisitions (including WhatsApp and Instagram) have had the effect of entrenching its market power in the supply of social media services by removing potential competitors, facilitating advantages of scope and reducing competition.<sup>56</sup> This has also likely strengthened Meta’s position in the market for display advertising.

The ACCC is concerned that acquisitions that protect or extend the market power of large digital platforms may harm innovation and disrupt the competitive process. As noted by the UK Digital Competition Expert Panel in its *Unlocking Digital Competition* report, this in turn, harms consumers through reduced choice, lower quality services and higher prices (noting that that this could involve increased exposure to unsolicited advertising, lower levels of privacy and greater use of personal data).<sup>57</sup>

On the other hand, commentators have suggested that the prospect of investment from, or potential acquisition by, a large digital platform may incentivise some start-ups, encouraging

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<sup>50</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019.

<sup>51</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, pp 75, 88. Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, pp 27, 40. J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, pp 110-112.

<sup>52</sup> ACCC, [Digital Platform Services Inquiry September 2020 interim report](#), 23 October 2020, p 80.

<sup>53</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 67.

<sup>54</sup> ACCC, [Digital Platform Services Inquiry September 2020 interim report](#), 23 October 2020, p 75.

<sup>55</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 76, 193.

<sup>56</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 80-84.

<sup>57</sup> Digital Competition Expert Panel, [Unlocking digital competition report](#), 2019, p 45.

them to introduce new products and services to the market and also help them attract venture capital.<sup>58</sup> Further, post-acquisition, access to capital and larger user bases may lead to rapid deployment of innovative products by the large platforms.

However, a strategy of acquiring nascent competitors before they have had the chance to develop into an effective rival can be, and likely is being, used to reduce competitive constraints and protect positions of substantial market power.<sup>59</sup> Indeed, a number of studies have found that entry and funding in target markets decline following the acquisition of a start-up by one of the largest digital platforms.<sup>60</sup>

The University of East Anglia's Centre for Competition Policy also found that acquisitions by digital platforms can impact the direction of innovation. That is, acquisitions can encourage start-ups to invest in 'incremental innovation' that results in improvements to a platform's existing products, instead of 'disruptive innovation' that would result in direct competition with the incumbent dominant platform.<sup>61</sup> This influence on innovation may again limit the nature and range of new and beneficial products and services available to consumers, as well as further reducing the competitive constraint placed on digital platform firms.

### 3.3. Digital platforms' position as gatekeepers

This paper uses the term 'gatekeepers' to refer to digital platforms that serve as an important and necessary intermediary between two sets of users (for example, business users and consumers), and which benefit from an entrenched and durable position.<sup>62</sup> This gatekeeper status enables platforms to control businesses' access to end consumers, and effectively confers on them rule-making authority. This is particularly relevant given that the ACCC has found that small businesses are increasingly reliant on platforms as means of accessing, advertising to, and communicating with, consumers and potential customers.<sup>63</sup>

The ACCC has found that Google, Meta and Apple all occupy key positions for businesses seeking to reach Australian consumers, and accordingly could be seen to act as 'gatekeepers' in relation to at least some of their services.<sup>64</sup> The ACCC recognises that there may be other platforms with gatekeeper status and will continue to look at these issues as part of this Inquiry.

Through its general search services, Google acts as a gatekeeper between consumers seeking information online and businesses offering or advertising those goods and services online.<sup>65</sup> It has a market share of 95% for general search services in Australia and Google Search is the pre-set default search engine on both Google Chrome and Apple Safari web

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<sup>58</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p. 55; University of East Anglia Centre for Competition Policy, [Competition and innovation in digital markets](#), Report on behalf of the Department for Business, Energy & Industrial Strategy, April 2021, p 29; G Phillips, A Zhdanov, [R&D and the incentives from merger and acquisition activity](#), *The Review of Financial Studies*, 26(1), January 2013, pp 34-78.

<sup>59</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 74-76 and 80-84.

<sup>60</sup> University of East Anglia Centre for Competition Policy, [Competition and innovation in digital markets](#), Report on behalf of the Department for Business, Energy & Industrial Strategy, April 2021, p. 30.

<sup>61</sup> University of East Anglia Centre for Competition Policy [Competition and innovation in digital markets](#), Report on behalf of the Department for Business, Energy & Industrial Strategy, April 2021, p 29.

<sup>62</sup> D Geradin, [What is a digital gatekeeper? Which platforms should be captured by the EC proposal for a Digital Market Act?](#), 18 February 2021, p 6.

<sup>63</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 69.

<sup>64</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 6. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 69-70. ACCC, [Report on App Marketplaces](#), 28 April 2021, p 44.

<sup>65</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 9.

browsers.<sup>66</sup> These web browsers have a combined browser market share of over 80% on desktop devices and almost 90% on mobile devices.<sup>67</sup>

Increasingly, Meta, through its dominance in social media service markets, also has a gatekeeper role between consumers and businesses, particularly smaller businesses.<sup>68</sup>

Both Apple and Google also perform gatekeeper roles by controlling app developers' access to their respective app marketplaces, and can unilaterally set, amend, interpret and enforce the terms and conditions that app developers must follow to reach consumers.<sup>69</sup> The ability of digital platforms to operate as gatekeepers for businesses and consumers reliant on their services, combined with their substantial market power, has a number of consequences.

First, it allows the relevant digital platform to unilaterally set the 'rules of the game' for large swathes of economic activity. Secondly, it provides the opportunity to impose terms of use and access for consumers and businesses that can be unfavourable, opaque and subject to change without input or notice. Thirdly, as discussed in section 4.3, gatekeeper digital platforms who are vertically integrated may have the ability and incentive to engage in anti-competitive conduct. The growing ecosystems of the large digital platforms which extends beyond the core gatekeeper roles (but are nonetheless affected by these roles) is also set out in chapter 4. The issues and the potential harms that may arise due to a digital platform's gatekeeper status are discussed further in chapter 5.

The ACCC is also currently considering potential future issues posed by online marketplaces, and in particular, the extent that a marketplace may be able to exercise market power in its dealings with third-party sellers and consumers.<sup>70</sup> In this respect, the ACCC notes that Amazon's conduct as operator of the Amazon online marketplace (alongside other large digital platforms) is currently under investigation by the Bundeskartellamt – see box 3.1. The ACCC notes, however, that an assessment of the competitive constraints on online marketplaces will take into account the different characteristics in which the online marketplaces operate in Australia.

### **Box 3.1 Bundeskartellamt proceedings to investigate gatekeeper digital platforms**

Section 19a of the recently amended German Competition Act gives the Bundeskartellamt the ability to prohibit companies found to have paramount significance for competition across markets from engaging in a list of seven potentially anti-competitive practices such as self-preferencing of a group's own services, engaging in tying or bundling strategies, and engaging in data practices that create or raise barriers to market entry.<sup>71</sup>

This amendment came into force in January 2021 and Google was the first company to be designated under the new provisions in early 2022.<sup>72</sup> The Bundeskartellamt has also commenced proceedings under §19a of the German Competition Act to examine whether each of Meta, Amazon and Apple are of 'paramount significance for competition across markets'.<sup>73</sup> If these

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<sup>66</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 9.

<sup>67</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 9.

<sup>68</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 69-70.

<sup>69</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 44.

<sup>70</sup> ACCC, [Report on General Online Retail Marketplaces Issues Paper](#), 22 July 2021, p 2.

<sup>71</sup> [German Competition Act](#), §19a(2), English translation, accessed 24 February 2022.

<sup>72</sup> Bundeskartellamt, [Alphabet / Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines 'paramount significance across markets'](#), 5 January 2022.

<sup>73</sup> Bundeskartellamt, [First proceeding based on new rules for digital companies – Bundeskartellamt also assesses new Section 19a GWB in its Facebook/Oculus case](#), Press Release, 28 January 2021; Bundeskartellamt, [Proceedings against Amazon based on new rules for large digital companies \(Section 19a GWB\)](#), Press Release, 18 May 2021; Bundeskartellamt, [Proceeding against Google based on new rules for large digital players \(Section 19a GWB\)](#), Press Release, 25 May 2021; and

digital platforms are found to have such a market position, the Bundeskartellamt would be able to take action to prohibit some or all of the types of potentially anti-competitive practices under the updated German Competition Act.

### 3.4. Future growth of some digital platforms

The ACCC will continue to monitor competitive dynamics in relation to digital platform services and, in particular, the competitive position of the large digital platforms identified in this chapter as well as those platforms with a growing international and Australian presence.

While there has been new entry in some digital platform services, such as social media services, at this point, the ACCC expects that the digital platforms identified in this chapter will continue to occupy strong positions in the medium term.

The ACCC also expects it is likely these platforms will continue their growth trajectory, as indicated by the respective share prices of these companies. Notwithstanding the recent share price drop in the case of Meta, the current share price valuation for each of Meta, Alphabet, and Apple all appear to incorporate a substantial margin for projected growth.<sup>74</sup>

Based on the ACCC's calculations, approximately:

- 15-43% of the current share price for **Meta** (Facebook) could be attributed to expectations for future growth.
- 46-64% of the current share price for **Alphabet** (Google) could be attributed to expectations for future growth.
- 57-72% the current share price for **Apple** could be attributed to expectations for future growth.

As the ACCC noted in the *Digital Platforms Inquiry Final Report*, we do not have concerns with digital platforms pursuing growth and profitability as this is fundamental to the effective functioning of a market economy. However, it is important to recognise that for most digital platforms (like most businesses), the overriding objective is to pursue profits, which can at times be in conflict with implementing measures to protect consumers (for example, limits regarding the collection of personal data).<sup>75</sup>

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Bundeskartellamt, [Proceeding against Apple based on new rules for large digital companies \(Section 19a\(1\) GWB\)](#), Press Release, 21 June 2021.

<sup>74</sup> ACCC estimates based on the global earnings of Meta, Alphabet and Apple from their respective end of year financial statements for 2021 and the Nasdaq stock price at close on 22 February 2022. The ACCC notes that prior to Meta's decline in share price on 3 February 2022, this range was approximately 46-64% based on the share price of 1 February 2022.

<sup>75</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 7.

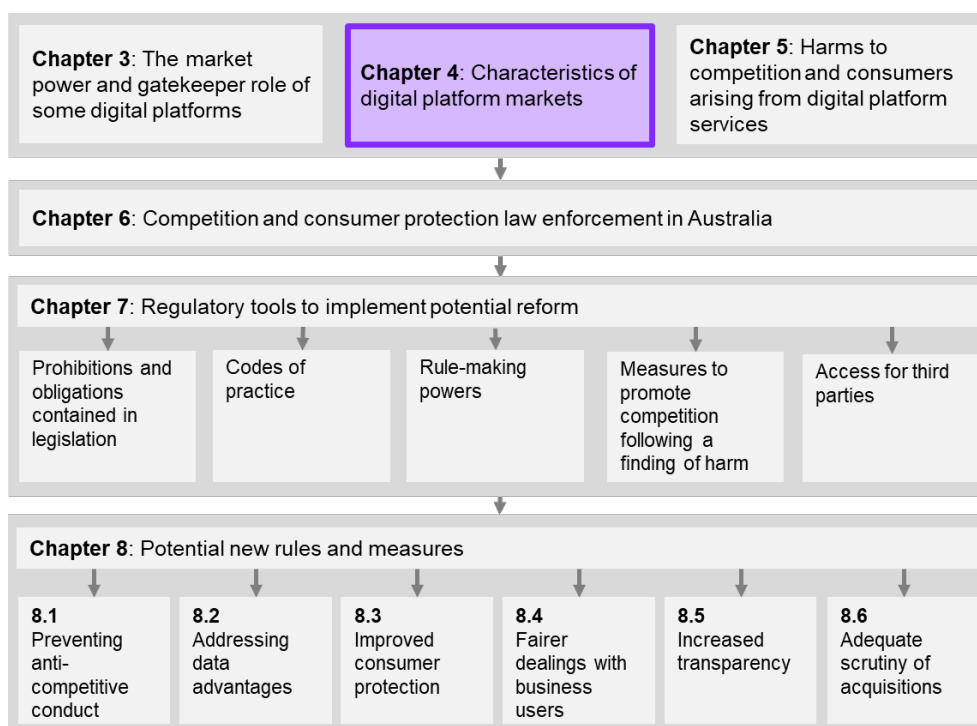
## 4. Characteristics of digital platform markets

This chapter discusses some of the characteristics of digital platform markets that can contribute to market power – see Discussion Paper Roadmap. The digital platform markets that the ACCC has examined to date include search, social media, online private messaging, app marketplaces, display advertising, search advertising and ad tech services.

This chapter is set out as follows:

- **Section 4.1** discusses economies of scale in digital platform markets and how these can create barriers to entry and expansion.
- **Section 4.2** outlines the types of network effects observed in digital platform markets and how these can create barriers to entry and expansion.
- **Section 4.3** discusses the nature and impact of vertical integration in digital platform markets.
- **Section 4.4** discusses the growing ecosystems of some digital platforms and the impact on competition.
- **Section 4.5** outlines the importance of having access to data to compete effectively in some digital platform markets.

### Discussion Paper Roadmap



## 4.1. Economies of scale

The ACCC has found that once a digital platform reaches a certain size it can be very difficult for smaller new entrants to effectively challenge them, due in part to economies of scale.<sup>76</sup>

Google benefits from economies of scale in the supply of general search services, as there are substantial fixed costs in operating a search engine, but low marginal costs associated with providing search services to additional users. The ACCC considers Google's substantial and enduring market power in the supply of general search services is in part due to these economies of scale, which help to insulate it from competition.<sup>77</sup>

In particular, there appear to be significant economies of scale in relation to the crawling and indexing of webpages. Google and Microsoft's Bing are the only English-language search engines that maintain an extensive index of web pages. The UK Competition and Markets Authority (CMA) estimates that crawling and indexing of webpages costs Google and Microsoft's Bing hundreds of millions of dollars each year, and that to replicate Google's search engine from scratch would cost between AUD13.5 billion and AUD40.5 billion.<sup>78</sup>

Given these considerable costs, most rival search engines such as DuckDuckGo and Ecosia syndicate search results through negotiated agreements. The ACCC notes that Microsoft's Bing is the only provider that currently offers syndicated search results in any real capacity in Australia and that it is aware of only one Google syndication partner.<sup>79</sup> The ACCC has found the competitive constraint on Google from search providers reliant on syndicated search engine services is likely to be limited.<sup>80</sup>

Meta benefits from significant economies of scale in the supply of social media services, with large, fixed costs associated with research and development.<sup>81</sup>

The ACCC also found that app marketplaces operated by Apple and Google both benefit from large economies of scale as the establishment and operation of an app marketplace involves significant costs. Once established, there are only small incremental costs involved to add more apps or supply more consumers.<sup>82</sup> Amazon has commented on the high costs of entry to develop and commercialise its app marketplace, noting that it has dedicated hundreds of employees and tens of millions of dollars each year over several years. These costs include engineering, operation development and consumer marketing, business development, and developer relations.<sup>83</sup>

## 4.2. Network effects

Both same-side and cross-side network effects are evident in many digital platform markets. Incumbent digital platforms can leverage these network effects to build and protect their market power.

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<sup>76</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 73, 76, 79. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp B2-B3. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 88.

<sup>77</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 76.

<sup>78</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 93. Competition and Markets Authority, [Online platforms and digital advertising market study](#), Appendix I: search quality and economies of scale, 1 July 2020, pp I20-I22, converted to Australian dollars in July 2021 from GBP using RBA exchange rate for July 2020 (AUD/GBP = 0.5553).

<sup>79</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 97-98.

<sup>80</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 69.

<sup>81</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 79.

<sup>82</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 40.

<sup>83</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 40.



### 4.2.1. Same-side network effects

Some digital platform services, such as social media services, exhibit same-side network effects on the user side, such that an increase in the number of users tends to increase the value of a platform to a given user.<sup>84</sup>

The presence of same-side network effects gives rise to a self-reinforcing feedback effect whereby a digital platform with a large number of users can easily attract even more users, making the platform even more valuable and likely strengthening its market power.

Social media platforms like Facebook and Instagram (both owned by Meta) have a greater ability to attract users than a smaller platform due to their large user base.<sup>85</sup> The ACCC considers that these network effects likely contribute to Meta's substantial market power and help to protect it from competition to a degree.<sup>86</sup>

The ACCC has also found that online private messaging services, such as Facebook Messenger and WhatsApp (both owned by Meta), benefit from identity-based same-side network effects, which give rise to a key barrier to entry and expansion in this market. In order to attract individual consumers away from these Meta services, rival services would need to attract some or all of the consumer's contacts to their service as well.<sup>87</sup> The ACCC found that the presence of these network effects and the large user base of Meta's services provides Meta with a significant competitive advantage in the supply of online private message services.<sup>88</sup>

Google similarly benefits from same-side network effects in respect of its general search services, due to its ability to collect data from its users to improve its search service.<sup>89</sup> That is, more users enable Google to collect more click-and-query data, which it uses to improve the relevance of search results and hence, the quality of its service, which in turn attracts users.<sup>90</sup>

Where same-side network effects are sufficiently strong, users are drawn towards the platform with the highest number of users. This further enhances the attractiveness of the platform which has the potential to lead to a market eventually tipping in favour of this platform. In these circumstances, the competitive process could involve competition for the market rather than competition in the market.

### 4.2.2. Cross-side network effects

The ACCC found that app marketplaces are subject to cross-side network effects, whereby an increase in the number of users on one side of a platform affects the value of the service to a given user on another side of the platform.<sup>91</sup> These network effects operate in both directions for app marketplaces, creating a positive feedback loop, as more consumers using the app marketplace will likely attract more app developers, which is likely to attract more consumers and so on. These network effects appear to only be limited by the potential for 'congestion' where there are so many app developers that consumer search costs increase

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<sup>84</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 79.

<sup>85</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 79.

<sup>86</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 84.

<sup>87</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 32.

<sup>88</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 33.

<sup>89</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 66-67. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 88.

<sup>90</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p. 88.

<sup>91</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 40.

or app quality decreases.<sup>92</sup> To compete effectively, potential new entrants would need to reach a critical mass of both app developers and consumers.

Markets involving advertising also tend to involve cross-side network effects. For example, Google benefits from cross-side network effects in the supply of search advertising services.<sup>93</sup> That is, an increase in the number of search users and the data gathered about those users affects the value of the service to advertisers. The ACCC has found that Google's competitive advantages arising from cross-side network effects (an ability to attract advertisers and show more relevant ads) mean that it is likely to enjoy relatively higher prices (measured as cost per click) and more clicks when compared to its rivals.<sup>94</sup> For similar reasons, Meta obtains competitive advantages from cross-side network effects between consumers and advertisers on its social media platforms.<sup>95</sup>

### 4.3. Vertical integration

Many digital platforms are vertically integrated in some or all of the services they supply. This integration can give rise to efficiencies and provide benefits to businesses and consumers. However, vertical integration can also lead to significant competition and consumer harms where vertically integrated firms have the ability and incentive to engage in anti-competitive conduct. The ACCC holds concerns that anti-competitive conduct is occurring, or has occurred, in relation to some digital platforms' services, including in contexts where downstream competitors cannot access key inputs under the same conditions as dominant, vertically integrated digital platforms, and where the conduct exacerbates consumer lock-in – see also discussion in section 5.3.4.

Through its inquiries, the ACCC has observed vertical integration of digital platforms, including in the supply of app distribution (shown in figure 4.1) and the supply of ad tech services (shown in figure 4.2).

Vertical integration may create conflicts of interest where a vertically integrated firm is acting to advantage the interests of its other businesses over those of its customers. Issues may also arise where a firm supplies services to different groups of customers in a supply chain (for example, an ad tech service provider supplying services to both advertisers and publishers).<sup>96</sup> In this case, the interests of the different groups of customers will not always be aligned, and the firm may act in the interest of maintaining its position in that supply chain, rather than the interests of its customers. These conflicts of interest can, in some cases, lead a digital platform to favour its related products or services over other alternatives, which may distort competition and result in consumers ultimately purchasing poorer quality products or services, as well as paying higher prices – see further discussion in section 5.2.

Vertical integration generally causes significant concern where a firm has a significant degree of market power and where it has both the ability and incentive to leverage its market power from one market to restrict or limit competition in a related market. Relevant issues to consider include the strength of the firm's position in the first market or service, and whether

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<sup>92</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 40.

<sup>93</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 67. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 88.

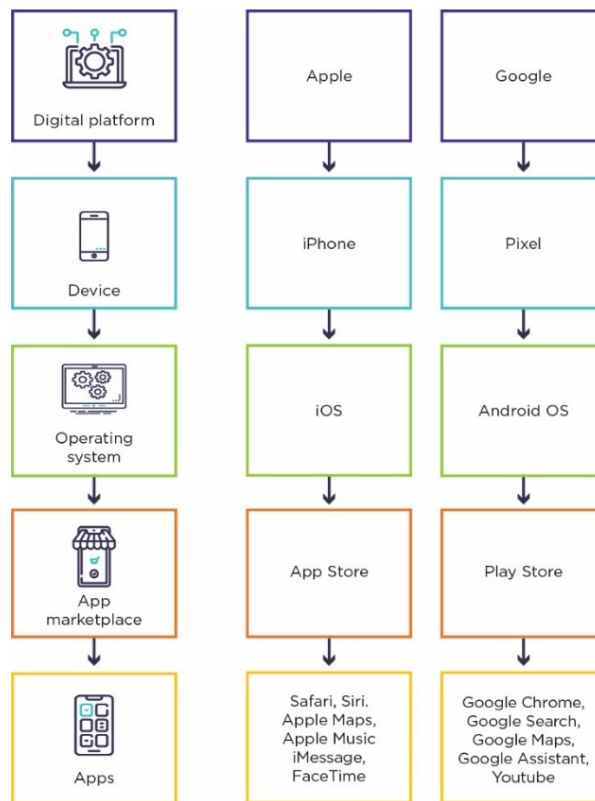
<sup>94</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 92.

<sup>95</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 79, 99.

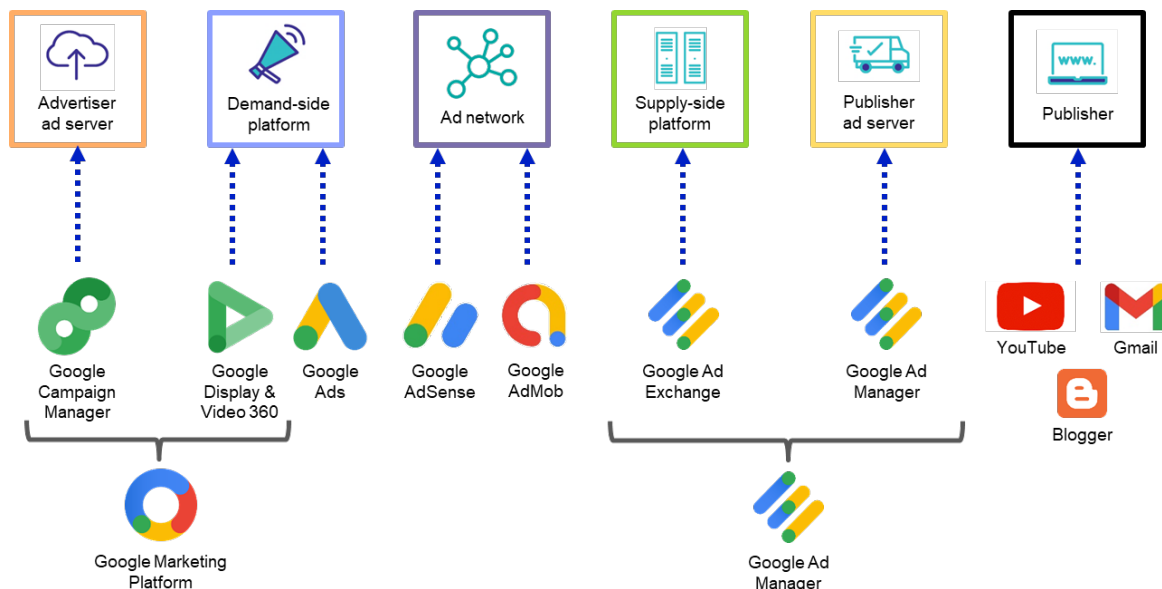
<sup>96</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 89.

the gain to the firm from reducing competitive constraints offsets any potential loss from the leveraging conduct.<sup>97</sup>

**Figure 4.1 Vertical integration in app distribution**



**Figure 4.2 Vertical integration in the supply of ad tech services<sup>98</sup>**



<sup>97</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 92.

<sup>98</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 54.

## 4.4. Expanding digital platform ecosystems

Large digital platforms are continuing to expand their ecosystems by acquiring firms and developing new products and services that enable them to expand into existing and new markets.<sup>99</sup> Although expanding ecosystems can benefit consumers by increasing convenience or reducing friction when moving between different services and devices within an ecosystem, when coupled with a lack of interoperability of services between ecosystems, they may result in increased switching costs for consumers, reduced competition (and therefore the prospect of innovation) in related services, and reduced competition between digital platforms' ecosystems.

Ecosystems can also entrench an incumbent's control over access to consumers, thereby consolidating its gatekeeper position. Without interoperability, the expanding ecosystems provided and controlled by single digital platform firms will also likely raise barriers to entry for smaller rivals, who will need to supply a wider range of services and overcome higher switching costs to meaningfully compete with the ecosystems of incumbents.

Microsoft and Apple each provide a broad range of hardware and software products and services to consumers that work with each other and may have the effect of encouraging users to stay within their ecosystems when purchasing or using new products and services.<sup>100</sup> For example, Apple supplies computers and smartphones that are sold bundled with its own operating system and pre-installed apps such as the Apple App Store, Safari web browser, Siri voice assistant, Apple Health, Apple Pay, and Apple Maps (see figure 4.3).

Similarly, Google also derives advantages from its control of multiple services across the mobile ecosystem, including the Android OS. Among other things, it has an ability to incentivise mobile original equipment manufacturers (OEMs) to have Google services, such as Google Search, Google Chrome and the Play Store, pre-installed on mobile devices using the Android operating system. Through its agreements with OEMs and additional agreements with suppliers of browsers, Google has default access to approximately 92% of search engine users in Australia.<sup>101</sup> The wide range of hardware on which Google's software is pre-installed is illustrated at figure 4.4.

Google offers over 60 different online services,<sup>102</sup> including Google Maps and Gmail, as well as a range of enterprise and education products, such as G Suite for Education and Google Workspace. It is also expanding into artificial intelligence, fitness trackers and online payment systems. Google's privacy policy, which is incorporated into Google's Terms of Service, states that it collects user information across its services and that '[w]e may combine the information we collect among our services and across your devices'.<sup>103</sup> Google's terms and conditions are also increasingly applied across separate services, including those offered by third parties.<sup>104</sup>

Meta and Amazon have also been developing new products and services that expand their ecosystems.<sup>105</sup>

There also appears to be a recent trend of large platforms integrating vertically into various parts of the telecommunications infrastructure supply chain, which is likely incentivised by

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<sup>99</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 7.

<sup>100</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 83.

<sup>101</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 89.

<sup>102</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 379.

<sup>103</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 399.

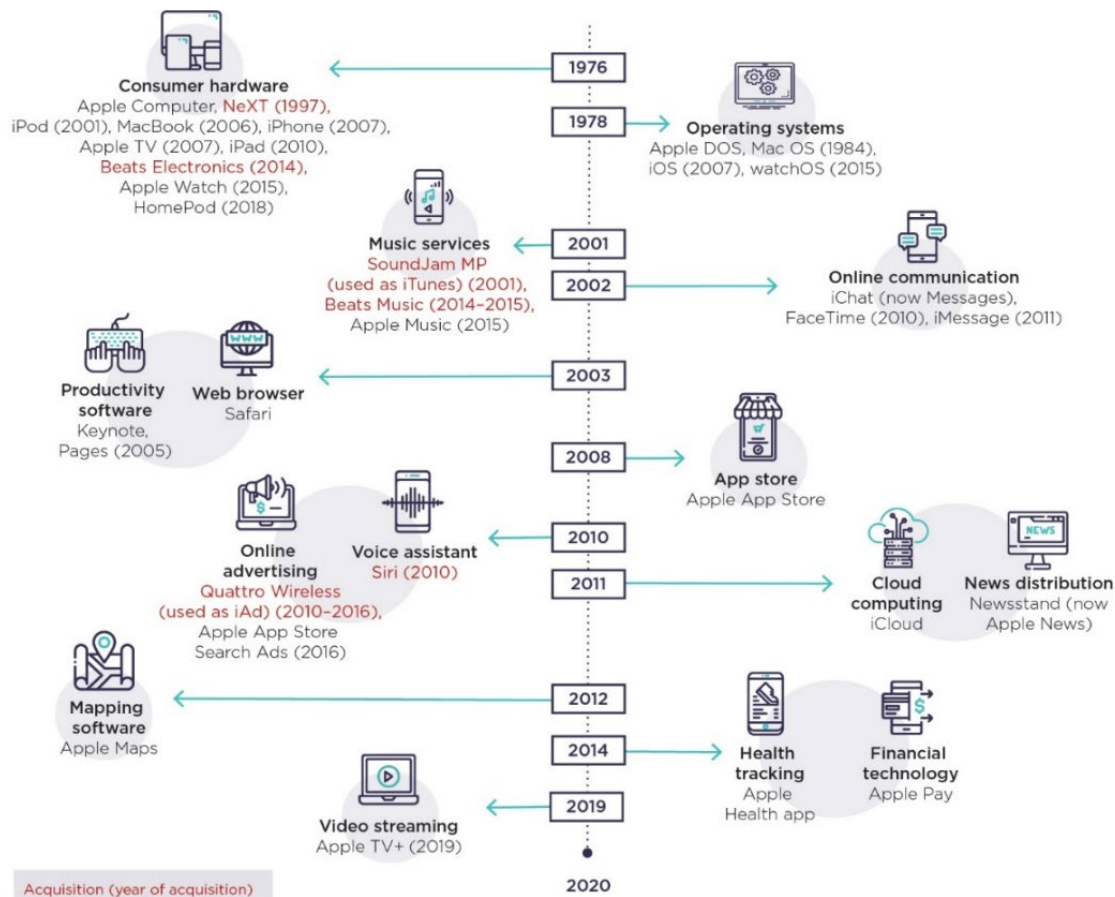
<sup>104</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 84.

<sup>105</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 75.

digital platforms' reliance on telecommunications networks to provide many of their services.<sup>106</sup> For example, Meta, Google, Microsoft and Amazon now have a range of partnerships with telecommunications providers in overseas markets.<sup>107</sup>

The ACCC also notes the concentration and vertical integration in cloud computing services with the large digital platforms with Amazon, Microsoft and Google owning the three largest cloud computing providers (Amazon Web Services, Microsoft Azure and Google Cloud Platforms, respectively).<sup>108</sup>

**Figure 4.3 Apple's expanding ecosystem<sup>109</sup>**



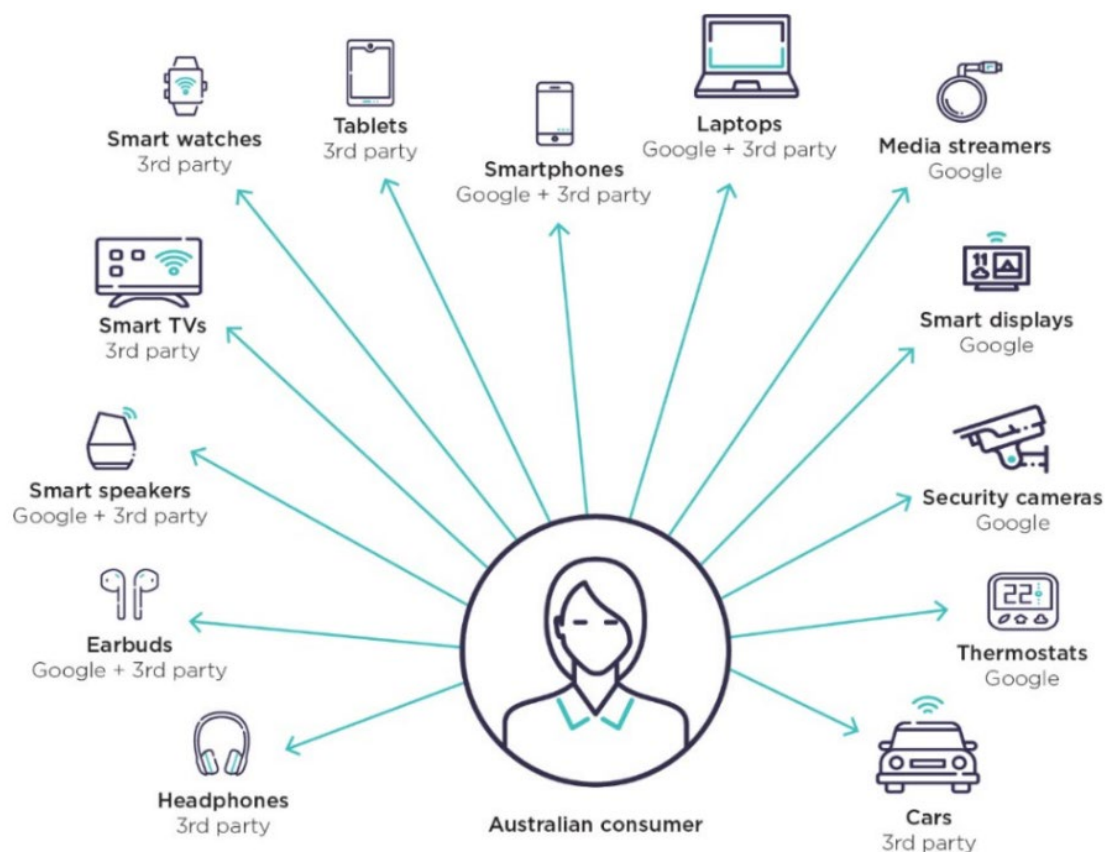
<sup>106</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 79.

<sup>107</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 80.

<sup>108</sup> The ACCC notes that cloud computing services are not within the scope of the Digital Platform Services Inquiry. Synergy Research Group, [As Quarterly Cloud Spending Jumps to Over \\$50B, Microsoft Looms Larger in Amazon's Rear Mirror](#), 3 February 2022.

<sup>109</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 76.

Figure 4.4 Hardware on which Google software is pre-installed<sup>110</sup>



#### 4.5. Importance of data

The ACCC's past analysis of digital platform services and many overseas reports have emphasised the importance of data in the supply of digital platform services.<sup>111</sup> Access to vast amounts of individual-level data over time can provide a considerable competitive advantage to established digital platforms relative to smaller rivals, particularly where data is an important input in the development and training of algorithms.<sup>112</sup> Acquisitions of businesses have contributed to the large digital platforms' agglomeration of data.<sup>113</sup>

There are several types of competitive advantages that derive from access to large data holdings:

1. Data may allow a firm to improve its products and services or assist in the development of new products. This may result from the insights provided by the data

<sup>110</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 83.

<sup>111</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 7-9, 73. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 76; Autorité de la concurrence, [Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector](#), 6 March 2018, p 42; Bundeskartellamt and Autorité de la concurrence, [Competition Law and Data](#), 10 May 2016, pp 11-13; Competition and Markets Authority, [Online platforms and digital advertising market study](#), 1 July 2020, p 47; Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019; Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, pp 32-33.

<sup>112</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, pp 30-31. Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 40. Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, pp 32-33.

<sup>113</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 75.

or from the opportunity to train algorithms using the data. As a consequence, a positive feedback loop may arise if the improvements attract more users, which, in turn, allows the firm to obtain access to more data.

2. Data may enhance a platform's ad targeting service, potentially increasing its advertising revenue.
3. Data may increase profitability by allowing a firm to improve its ability to forecast product demand and market trends.

Due to the competitive advantages described above, a lack of access to comparable data resources can create barriers to entry, expansion and innovation for new entrants and smaller rivals in digital platform markets.<sup>114</sup> These barriers can be difficult for smaller rivals to overcome, which weakens the competitive constraint posed by small and potential competitors on established digital platforms.

In particular, digital platforms often use large amounts of data to train the algorithms behind key services, including to provide personalised content and targeted advertising.<sup>115</sup> For example, the ACCC has found that access to a broad range of first-party and/or third-party data is a factor that significantly increases barriers to entry and expansion in the supply of ad tech services.<sup>116</sup> This is because access to a broad range of high quality first-party and third-party data, and the ability to combine that data with accuracy, is important to being able to supply ad targeting and ad attribution services.<sup>117</sup> As such, large digital platforms supplying personalised content and ads, such as Google and Meta, benefit from a significant data advantage in some digital platform markets – see further discussion in box 4.1.

#### **Box 4.1 ACCC findings regarding Google's and Meta's data advantage**

No other businesses come close to the level of online consumer tracking conducted by each of Google and Meta.<sup>118</sup> The ACCC considers that the breadth and depth of the user data collected by Google and Meta provides each of them with strong competitive advantages.<sup>119</sup> For example, the click-and-query data Google collects from its search engine allows it to improve its search algorithm, making Google Search more attractive to search users. Similarly, user data collected by Meta allows it to improve the quality and relevance of its Facebook news feed algorithm and targeted digital display advertising.

In addition to numerous sources of first-party data collected directly from consumers, Google and Meta have the two largest networks of tracking technologies on third-party websites and mobile apps. In an analysis of 1000 popular websites in Australia, the ACCC found that Google and Meta had third-party tracking technologies on 58% and 38% respectively of the websites analysed.<sup>120</sup> That is, if a consumer visited those 1000 websites, Google would have tracked their actions on around 580 of those websites, and Meta would have tracked their actions on around 380 of those websites.

ACCC-commissioned research by AppCensus further found that Google's tracker for advertising purposes was found in more than half of the top 1000 popular mobile apps available in the Google

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<sup>114</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 76; Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 40. CMA, [Online platforms and digital advertising market study](#), 1 July 2020, pp 254-255.

<sup>115</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 40.

<sup>116</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 76.

<sup>117</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 76.

<sup>118</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 58.

<sup>119</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 58.

<sup>120</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 71.

Play Store<sup>121</sup> and Meta was observed to be receiving data from approximately 40% of all apps analysed.<sup>122</sup>

Access to large amounts of relevant data enables Google and Meta to compile detailed online profiles of users for targeted advertising purposes and attract more advertisers who value the granularity of their ad targeting tools. As such, the ACCC has found that the scope of Google and Meta's unparalleled access to user data gives them a competitive advantage in the supply of targeted advertising.<sup>123</sup>

In the ACCC's *Ad Tech Inquiry Final Report*, the ACCC found that Google's access to a large volume and range of first-party and third-party data appears to provide it with a competitive advantage in the supply of ad tech services, especially the supply of demand-side platform services.<sup>124</sup> Google submitted to the ACCC that, contrary to widespread industry perception, Google's ad tech services do not use its first-party data to provide targeted advertising on websites and apps not owned by Google.<sup>125</sup> However, this does not prevent Google from using its first-party data to provide targeted advertising on Google's own products.<sup>126</sup> This also would not prevent Google from using its vast amounts of first-party data for numerous other purposes in accordance with its privacy policy, such as improving or developing new services or providing personalised content.<sup>127</sup>

Moreover, the ACCC has noted concerns that digital platforms with large ecosystems may benefit from the ability to access and control key sources of data that may help them attain or maintain their power across many products.<sup>128</sup> For example, Google's breadth of consumer-facing services provide over 60 different sources of first-party user data that may be combined and associated with a single user account.<sup>129</sup> The terms and conditions relating to Google's use of this data are extremely broad, allowing Google to use the data for a wide range of purposes outside of those necessary to provide the particular service, including improving services, developing new services, or providing personalised content and ads.<sup>130</sup>

Finally, research has also shown that data may have increasing marginal returns in the supply of targeted advertising, where the incremental value of additional data remains large relative to the incremental cost of obtaining the data.<sup>131</sup> This may be because even where a firm has access to enough data to make sufficiently accurate inferences about a group of consumers, it may be possible to significantly improve its confidence in these inferences with more specific information about a given individual, therefore making it possible to better tailor services and ads.<sup>132</sup> Where data displays increasing marginal returns, the vast data holdings of large digital platforms and the greater scope of their data collection is likely to confer

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<sup>121</sup> This tracker is called the Android Advertising ID, also known as the 'Google Advertising ID'. Google's developer guidelines required that this is the only identified that is used for advertising and analytics purposes. AppCensus, [1000 Mobile Apps in Australia: A Report for the ACCC](#), 24 September 2020, p II.

<sup>122</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 5.

<sup>123</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 84.

<sup>124</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 6.

<sup>125</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 6.

<sup>126</sup> Google, [Submission to the Ad Tech Inquiry Interim Report](#), 12 March 2021, p 63.

<sup>127</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 415.

<sup>128</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 85.

<sup>129</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 379.

<sup>130</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 415. The ACCC notes that, despite widely-held industry perception, Google has submitted to the ACCC that it does not use its first-party data to provide targeted advertising through its ad tech services on websites and apps Google doesn't own. See ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 6.

<sup>131</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 24-28.

<sup>132</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 24-28.



significant and increasing competitive advantages on these large incumbents over new entrants or smaller rivals with smaller databases and smaller ecosystems of services that serve as touchpoints for data collection.<sup>133</sup> This can give rise to substantial barriers to entry and expansion where there is a lack of access to comparable data resources.

The importance of data to the supply of digital platform services means that limited or unequal access to data can have significant impacts on competition and consumer outcomes in digital platform markets, including the potential to entrench the market power of incumbent digital platforms. In addition, harms to competition arising from data-related anti-competitive self-preferencing conduct is discussed further at section 5.2.1. Harms to consumers arising from excessive data collection is discussed at section 5.3.1.

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<sup>133</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 25.

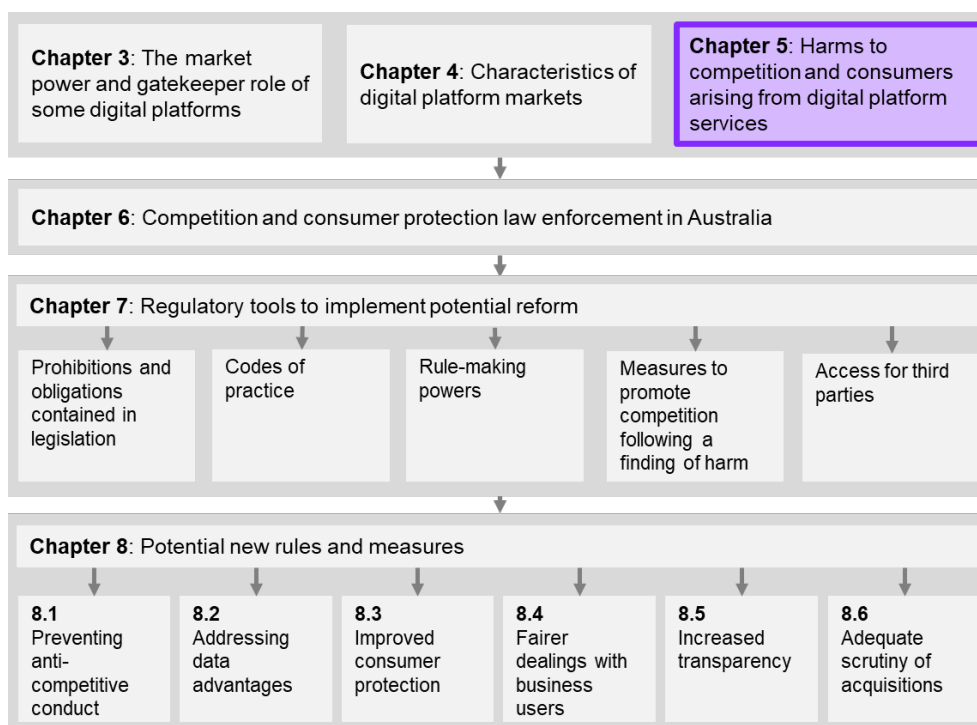
## 5. Harms to competition and consumers arising from digital platform services

This chapter discusses how the significant market power of a few large digital platforms can negatively impact consumers and businesses. It outlines the ACCC's previous findings and observations in relation to competition and consumer harms arising from digital platform services – see Discussion Paper Roadmap.

This chapter is set out as follows:

- **Section 5.1** discusses the harms from reduced competition in the supply of digital platform services.
- **Section 5.2** discusses harms arising from anti-competitive conduct in the supply of digital platform services, including anti-competitive self-preferencing and other exclusionary practices.
- **Section 5.3** discusses additional harms to consumers from excessive online tracking; the use of dark patterns; the rise in online scams, harmful apps and fake reviews; and consumer lock-in.
- **Section 5.4** discusses harms to business users arising from some digital platforms' unfair trading practices, including unfair terms of access, a lack of transparency, and ineffective dispute resolution processes.

### Discussion Paper Roadmap



## Consultation question

The question below applies to all of the discussion in chapter 5.

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

### 5.1. Harms from reduced competition

Market power broadly concerns a firm's ability to act independently from the constraints of other actors in the market. In competitive markets, firms that raise prices or reduce the quality of their products or services risk losing sales to their competitors. This loss in sales would offset the increase in price (or benefits from reducing quality), making it unprofitable. In contrast, a firm with significant market power is generally able to profitably increase prices above competitive levels as there is little or no risk of losing substantial sales to competitors. This can lead to direct impacts for consumers, such as higher prices.

Similar impacts can occur in respect of quality. For example, in zero-monetary price markets, such as in many digital platform markets, a firm with significant market power can profitably reduce or limit the quality of its services. The ubiquity of certain dominant digital platforms in the daily lives of consumers means that many consumers are obliged to join or use their services, accepting their non-negotiable terms of service and privacy policies, to receive communications and remain involved in community life. Harms to consumers might include degraded user privacy, the collection of additional consumer data, firms failing to invest in service improvements, and increasing user exposure to unsolicited advertising.

A lack of competitive constraints (including in the market or from new entry) also tends to reduce a firm's incentive to improve the efficiency of its processes and to innovate with new products and services. In this way, market power can lead to lower productive, allocative and dynamic efficiency, and can harm consumers through higher prices, lower quality, limited control over user data, and reduced innovation and choice.<sup>134</sup>

Indirect harms to consumers can also result from the impacts of this reduced competition in related markets. For example, in the case of digital advertising, a lack of competition could lead to higher advertising prices, affecting consumers in the form of higher prices for goods and services and lower publisher revenue, reducing the quality and range of media content online.<sup>135</sup> Alternatively, concerns have been raised that competition might be affected in non-platforms markets, such as reducing innovation in the provision of payment services.<sup>136</sup>

A simplified diagram of direct and indirect consumer harms arising from reduced competition in digital platform markets is set out at figure 5.1.<sup>137</sup>

Market power, and subsequent harms to consumers, can arise from structural factors, such as high barriers to entry, economies of scale or network effects (discussed in chapter 4), or natural monopoly.<sup>138</sup> In addition, market power can arise from or be entrenched by anti-

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<sup>134</sup> CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 69.

<sup>135</sup> CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, pp 70-71.

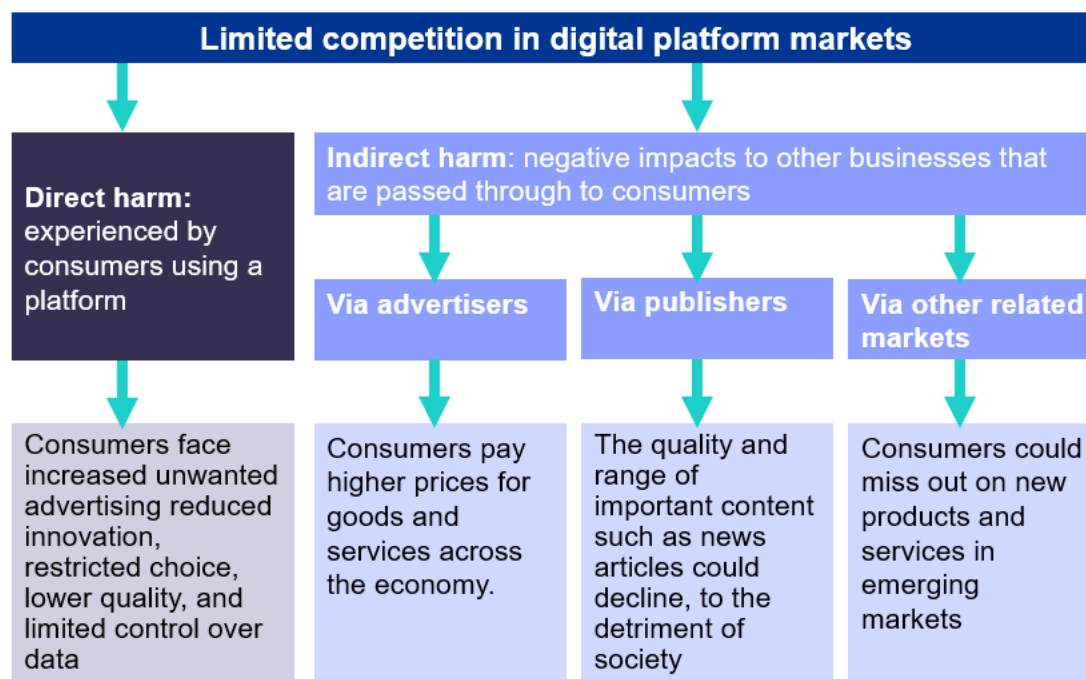
<sup>136</sup> Parliamentary Joint Committee on Corporations and Financial Services, [Mobile Payment and Digital Wallet Financial Services](#), October 2021, p xiv.

<sup>137</sup> CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, pp 70-71.

<sup>138</sup> Natural monopolies exist where it is uneconomic to duplicate certain infrastructure, such as gas, water and electricity distribution, typically leading to one provider owning and operating the infrastructure.

competitive conduct, anti-competitive agreements, collusion, and anti-competitive mergers which consolidate market power – see further sections 3.2 and 5.2.

**Figure 5.1 Harm to consumers from a lack of competition**<sup>139</sup>



## 5.2. Anti-competitive conduct leading to consumer and competition harm

Market power can provide firms with the ability to engage in anti-competitive conduct. To the extent that dominant digital platforms engage in anti-competitive conduct, this can lead to higher prices, reduced quality, reduced investment and innovation, and reduced choice. For example, where the conduct hinders rivals from competing on their merits, this lessens competition and may mean that there will be fewer competitors in the market and may prevent potential new innovations from reaching the market.

Similarly, conduct that reduces the pay-off from entering a new market – for example, where a gatekeeper firm is able to extract a higher share of the profits – may also lead to lower investment and innovation in downstream or adjacent markets. A lack of innovation can harm consumers by reducing choice and could impact the quality and/or price of products and services in the market. Some examples of different types of anti-competitive conduct are discussed below.

### 5.2.1. Anti-competitive self-preferencing

The ACCC has found that there is a risk that digital platforms with market power may use this to give preferential treatment to their own products or services.<sup>140</sup> Such conduct is often referred to as ‘self-preferencing’ and can have an anti-competitive effect if it excludes or impedes rival firms from competing with the platform on their merits.

<sup>139</sup> Adapted from CMA, [Online platforms and digital advertising market study, Final Report](#), 1 July 2020, p 69.

<sup>140</sup> J Cremer, YA de Montjoye and H Schweitzer, [Competition Policy for the Digital Era](#), 20 May 2019, p 7.

In light of the growing digital ecosystems owned by Google, Meta and Apple, for example, there is also potential for harm to occur across several markets where a digital platform is able to exercise its market power from one market into adjacent markets across its ecosystem. For example, Apple could use its market power in the supply of mobile OS to harm competition in adjacent markets, such as in relation to payments systems and mobile gaming services, where it can impose restrictions that limit its rivals' ability to compete and offer an equivalent product.<sup>141</sup> The incentive to self-preference in relation to mobile gaming may be particularly strong, as it is both the largest and the fastest-growing segment of the gaming market – gaming transactions on iOS devices accounted for 68% of Apple's total App Store revenues in 2020.<sup>142</sup>

Google has also been able to use its market power across several services to influence competition in the supply of ad tech services, as discussed in box 5.1.

#### **Box 5.1 Google's self-preferencing conduct impacts competition in ad tech services**

The ACCC has concerns that Google's vertical integration and dominance across the ad tech supply chain, and in related services, has allowed it to engage in leveraging and self-preferencing conduct that has interfered with the competitive process and lessened competition over time. In particular, Google has restricted the purchase of advertising on YouTube (which is Google-owned) to advertisers using its own demand-side platforms; restricted how its supply-side platform works with third-party ad servers; and used its publisher ad server to preference its own supply-side platforms over time.<sup>143</sup>

The ACCC considers that the cumulative effect of Google's conduct in ad tech has been to prevent both actual and future rival providers of ad tech services from competing effectively with Google's vertically integrated services.<sup>144</sup>

In the supply of mobile OS, the distribution of mobile apps, and the supply of services through their own apps, both Apple and Google are vertically integrated and have substantial market power in relation to a number of services. The ACCC has found Apple and Google each have the ability and incentive to engage in anti-competitive self-preferencing to favour their own apps over rival third-party apps, as discussed in box 5.2. This conduct could occur where Apple and Google provide greater discoverability to their own apps in their app marketplaces, implement and enforce favourable pre-installation and default settings, and withhold or limit third-party access to device functionality.<sup>145</sup> The ACCC also has concerns that Apple and Google have engaged in anti-competitive self-preferencing of their own apps through their access to the data generated by third-party apps, which gives them access to complete market information, such as new apps in development or the success of particular apps.<sup>146</sup>

The ACCC is considering potential measures to address the risks of a range of anti-competitive self-preferencing conduct in digital platform markets – see discussion at section 8.1.

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<sup>141</sup> *Epic Games, Inc. v Apple Inc.*, [Complaint filed in the US District Court for the Northern District of California, Rule 52 order after trial on the merits](#), 9 October 2021, pp 144-145.

<sup>142</sup> *Epic Games, Inc. v Apple Inc.*, [Complaint filed in the US District Court for the Northern District of California, Rule 52 order after trial on the merits](#), 9 October 2021, p 124.

<sup>143</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 7.

<sup>144</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 8.

<sup>145</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 6.

<sup>146</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 85.

### **Box 5.2 Anti-competitive self-preferencing behaviour in app marketplaces**

The ACCC has raised concerns about the ability and incentive of Apple and Google to use their positions as app marketplace operators to monitor downstream competitors.<sup>147</sup> Such conduct has the potential to impede competition in downstream app markets by reducing incentives to innovate and pursue novel ideas where there is a risk that Apple and/or Google may free ride on this innovation, and potentially limit the success of a third-party app.

The ACCC found Apple's Developer Agreement (which app developers must agree to) allows Apple to develop, acquire, license, market, promote or distribute products, software or technologies that perform the same or similar functions as, or otherwise compete with, any of the products, software or technologies provided by app developers that use the App Store. In contrast, Apple requires that these app developers follow obligations to avoid being 'copycats' and to 'come up with your own ideas', because it 'isn't fair to your fellow developers.'<sup>148</sup>

Such conduct may reduce incentives for investment and innovation in downstream app markets, which has flow-on effects for consumers (for example, if there are fewer new apps available, or if the quality of apps diminishes). A study by the Connected Commerce Council found that the threat of Google's entry into different app markets affects the level of innovation of third-party app developers, as well as the focus of their efforts. App developers directed investment and innovation away from apps vulnerable to Google's entry and towards other apps.<sup>149</sup> This means consumers may have few options but to use an app offered by Google, regardless of whether it meets their needs.

### **5.2.2. Other exclusionary practices**

A digital platform with market power may be able to anti-competitively leverage its dominance across services, particularly if it is vertically integrated, as discussed above. The ACCC is concerned by the potential for digital platforms with market power to engage in a range of anti-competitive practices such as anti-competitive tying, bundling and refusals to deal, in addition to concerns about anti-competitive self-preferencing outlined in section 5.2.1.

Google's control of the Android OS and consequently, the Play Store, provides Google with the ability to tie the supply of the Play Store to OEMs with the preinstallation of other Google services, such as Google Chrome and Google Search. Google's pre-installation and default arrangements give it default access to approximately 92% of users of search engine services in Australia as the pre-installed default search service.<sup>150</sup> Given the power of defaults, meaning many consumers stick with the preinstalled defaults, Google is able to foreclose rivals' access to users and generate beneficial economies of scale and network effects, such as access to more click-and-query data<sup>151</sup> than its rivals, which allows Google to continually improve the relevance of its search results. This in turn attracts more users and further entrenches Google's dominance. This has likely reduced competition in the market for general search engine services, and in turn, reduced incentives for investment and innovation, with likely implications for the quality and range of search engines available to consumers.<sup>152</sup>

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<sup>147</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 134.

<sup>148</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 134.

<sup>149</sup> A Asoni, [The effect of platform integration on competition and innovation](#), Charles River Associations Connected Commerce Council, June 2021, p 5.

<sup>150</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 64.

<sup>151</sup> Click-and-query data includes data on queries that users enter into a search engine, along with their actions taken in response to the results.

<sup>152</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 64.

In the supply of ad tech services, Google has restricted the purchase of advertising on YouTube (which is Google-owned) to its own demand-side platforms, which could be characterised as tying conduct or a refusal to deal.<sup>153</sup> This has raised concerns that Google is leveraging the ‘must-have’ status of YouTube as a video advertising space into its demand-side platform services.

Similar concerns have arisen regarding the operation of Apple and Google’s respective app marketplaces, due to their gatekeeper positions. This includes concerns about Apple and Google’s ability to set and enforce terms and conditions for access to the app marketplaces including the mandatory and exclusive use of proprietary billing systems for in-app payments.<sup>154</sup> That is, access to the App Store or the Play Store is tied to the use of Apple or Google’s proprietary billing system for in-app payments, with each imposing a commission of 15 or 30% on these in-app payments.<sup>155</sup> The ACCC has found that it is highly likely that the commissions charged by Apple and Google on in-app payments are inflated by their market power.<sup>156</sup>

The ACCC notes that the CMA has made similar findings that, as a result of the in-app purchase commissions, Apple and Google are making substantial and growing profits, with high margins from their respective app stores.<sup>157</sup> In addition, the CMA considers both Apple and Google, as a result of their market power, are likely to be charging above a competitive rate of commission to app developers, which may result in users paying higher prices for subscriptions and in-app purchases, such as within games.<sup>158</sup> The CMA also found that the limited switching between iOS and Android shows that iOS is insulated from competition by barriers to switching, limited price competition, and no serious threat of entry by new mobile OS providers.<sup>159</sup>

The ACCC notes concerns from app developers regarding the restrictions placed on their ability to directly communicate with consumers about alternative off-app payment methods.<sup>160</sup> In addition, information imbalances between app marketplaces and app developers appear to impede complaints handling, with stakeholders raising concerns about the extent to which gatekeeper digital platforms control third-party access to information and customers.<sup>161</sup>

The ACCC is also aware of concerns from app developers regarding Apple delaying or denying access to certain functionality for third-party apps, which could be classified as a refusal to deal. For example, Apple denies third-party apps’ access to the ‘tap-and-go’ payment functionality of the iPhone’s near-field communication (NFC) chip, which may restrict the ability of prospective rivals to supply payment apps or digital wallets on iPhones to compete with Apple Pay. Concerns about this conduct and the potential implications for competition in payments and financial services markets have been raised in a number of recent government, parliamentary and regulatory reviews in Australia.<sup>162</sup> Apple also allows third-party apps only limited access to the ultra-wideband short-range proximity tracking and

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<sup>153</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 7.

<sup>154</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 22.

<sup>155</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 9.

<sup>156</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 63.

<sup>157</sup> CMA, [Mobile ecosystems: Market study interim report](#), 14 December 2021, p 20.

<sup>158</sup> CMA, [Mobile ecosystems: Market study interim report](#), 14 December 2021, p 61.

<sup>159</sup> CMA, [Mobile ecosystems: Market study interim report](#), 14 December 2021, pp 122-123.

<sup>160</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 81.

<sup>161</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 125.

<sup>162</sup> Australian Government, [Payments system review – from system to ecosystem](#), June 2021, p 79; Parliamentary Joint Committee on Corporations and Financial Services, [Mobile Payment and Digital Wallet Financial Services](#), October 2021, p 49; RBA, [Review of Retail Payments Regulation Conclusions Paper](#), October 2021, p 60.

data transfer technology present in iPhones, which may reduce future innovation and limit the future products made available to consumers.<sup>163</sup>

### 5.3. Additional harms to consumers

In addition to the harms to consumers from reduced competition discussed at sections 5.1 and 5.2, the ACCC has identified additional consumer harms that may arise from digital platform services, including harms from:

- excessive online tracking (section 5.3.1)
- the use of dark patterns (section 5.3.2)
- online scams, harmful apps and fake reviews (section 5.3.3)
- consumer lock-in and reduced choice (section 5.3.4).

Some of these harms may be addressed by the ACCC's recommendations that the CCA is amended so that unfair contract terms are prohibited and to prohibit certain unfair trading practices.<sup>164</sup>

The ACCC notes that the Australian Government has introduced a bill to enhance and strengthen the ACL by prohibiting unfair contract terms.<sup>165</sup> Unfair contract terms are currently only voidable if found in breach of the ACL but there are no penalties for their use in standard-form contracts. The bill to prohibit unfair contract terms would apply civil pecuniary penalties would apply to their use in any standard form consumer or small business contract. This amendment is likely to deter digital platforms more effectively from including potential unfair contract terms in their terms of use and privacy policies.<sup>166</sup>

The Commonwealth and state and territory consumer ministers have also 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 options to address the problems, including a potential prohibition on unfair trading practices.<sup>167</sup>

Other potential measures that may further address these consumer harms are discussed in chapter 8.

#### 5.3.1. Excessive online tracking

As discussed in section 4.5, data often confers a competitive advantage in the supply of some digital platform services. As such, digital platforms have an incentive to collect large amounts of data on consumers' online and offline activities.

The ACCC is concerned that a lack of transparency about what data is being collected and how it is being used, as well as an absence of effective consumer control over that data, allows user data to be used in ways contrary to consumers' expectations and wishes.<sup>168</sup> For instance, despite consumers being concerned by location tracking, online tracking for

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<sup>163</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 58-59.

<sup>164</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 33-34. ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 16.

<sup>165</sup> [Treasury Laws Amendment \(Enhancing Tax Integrity and Supporting Business Investment\) Bill 2022 \(Cth\)](#).

<sup>166</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 497.

<sup>167</sup> Consumer Affairs Forum, Communiqués, [Meeting 12 - Meeting of Ministers for Consumer Affairs](#), 6 November 2020.

<sup>168</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 55.



targeted advertising and third-party data-sharing, these data practices continue to be generally permitted under digital platforms' privacy policies.<sup>169</sup>

Concerns with data practices also extend to mobile apps. The ACCC has previously found that Google, through the Google Play Store and, to a lesser extent Apple, through the Apple App Store, are not taking sufficient steps to ensure user privacy in the apps distributed via their app marketplaces, resulting in app users being left open to potentially invasive data practices.<sup>170</sup>

A lack of transparency in data practices and meaningful consumer control over their user data are just some examples of the consequences of a lack of competition and information asymmetries present in digital platform markets. Where consumers feel they are obliged to join or use a particular digital platform and have no choice but to accept non-negotiable terms of service, the dominant digital platform does not need to ensure they meet their user's preferences (including in respect of privacy). The continuation of such practices despite consumer concerns may suggest that additional rules may be needed to govern conduct in the supply of some digital platform services (see further discussion in chapter 8).

Limited control over their user data is one of the direct consumer harms that may result from limited competition and information asymmetries in relation to digital platform services. A lack of competition, in combination with information asymmetries, means consumers are often unaware of data practices and lack control over (or meaningful choice about) how their data is collected and used. Consumers are likely to be discouraged from engaging with digital platforms' data practices by the lack of easily accessible, clear and accurate disclosures as well as a lack of effective opt-outs or meaningful controls.<sup>171</sup>

The ACCC has found that a lack of consumer awareness and control over the collection and use of their personal information by digital platforms result in specific consumer harms, including:<sup>172</sup>

- (a) **Reduced privacy and data security** that exposes consumers to increased risks of data breaches, online identity fraud, and more effective targeting of scams, which may result in financial loss, reputational damage, and emotional distress.<sup>173</sup>
- (b) **Risks to consumers from increased profiling**, which can be used to influence consumers' behaviour and carries risks associated with manipulation and loss of autonomy.<sup>174</sup> These risks can also increase risks of consumer harm from more effective targeting of scams, as discussed further in section 5.3.3.
- (c) **Risks to consumers from discrimination and exclusion** resulting from the increased ability of firms to create highly detailed segments of consumers to assist automated decision-making in finance, insurance, employment or other industries, which are usually opaque for consumers and do not provide a way for consumers to verify or appeal these decisions.<sup>175</sup>

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<sup>169</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 374.

<sup>170</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 136. The ACCC notes that, in late 2020, Apple took steps to increase data transparency on apps available on its App Store, including requiring developers to disclose the data their apps collect and whether this is used to track users.

<sup>171</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 421, 433.

<sup>172</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 442.

<sup>173</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 444-445.

<sup>174</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 445-446.

<sup>175</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 446-447.

- (d) **Increased risks to vulnerable consumers and children**, who are at risk of their vulnerabilities being identified or inferred, increasing the likelihood of being targeted with inappropriate products or scams, discriminated against, or inappropriately excluded from markets.<sup>176</sup>
- (e) **Reduced choice and reduced quality of digital platform services**, as consumers' preferences for greater control and transparency over the collection and use of their data remain unmet.<sup>177</sup>
- (f) **Reduced consumer trust in digital platform services**, leading to consumers reducing their use of digital platform services or seeking ways to undermine the accuracy of data collection, which compromises the free flow of information and hinders data-based innovation and data-driven technologies.<sup>178</sup>

The ACCC has brought several cases under the ACL regarding the disclosure of the extent and manner of consumer tracking undertaken by large digital platforms, as discussed in section 6.1.

The Australian Government is currently undertaking a review of the *Privacy Act 1988* (Cth) as a part of its response to the *Digital Platforms Inquiry Final Report*. This important review, the resulting law reform, as well as the proposed Online Platforms Code to be overseen by the Office of the Australian Information Commissioner, 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.<sup>179</sup> However, as discussed below, consumer harms associated with digital platform services extend beyond privacy concerns.

### 5.3.2. Use of dark patterns

Platforms can influence consumers by designing user interfaces that take advantage of certain psychological or behavioural biases; this is sometimes referred to as choice architecture.<sup>180</sup> The ACCC is concerned about the use of 'dark patterns', or choice architecture that is used to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions.<sup>181</sup>

Consumers may face direct harms where dark patterns impact their ability to make free and informed decisions about, for example:

- which services best serve their needs
- whether to sign up for or continue with ongoing paid subscriptions, or
- whether to accept particular terms and conditions, including in relation to digital platforms' data practices.

This can result in consumer detriment. For example, consumers may be induced into making purchases, including signing up to ongoing subscriptions, which do not meet their needs. Dark patterns may be employed in a user interface to cause consumers to make selections

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<sup>176</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 447-448.

<sup>177</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 448.

<sup>178</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 442-443.

<sup>179</sup> See Attorney-General's Department, [Review of the Privacy Act 1988](#); Office of the Australian Information Commissioner, [Exposure Draft – Online Safety Bill 2020](#), 13 February 2021.

<sup>180</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 57.

<sup>181</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 57.

that do not reflect their personal privacy preferences,<sup>182</sup> or may make it difficult for a consumer to change their privacy settings to better meet their needs.

Markets function best when consumers are well informed and able to select products and services that best serve their interests. The use of dark patterns and other exploitative design practices significantly undermines the effective and efficient operation of digital platform markets by undermining consumer choice and autonomy.

Use of dark patterns may also directly raise competition issues by discouraging consumers from switching to alternative suppliers and facilitating consumer lock-in.<sup>183</sup> The ACCC has found that dark patterns can create obstacles to switching, which raises barriers to entry and expansion in the supply of search engine services.<sup>184</sup> In particular, some digital platforms use dark patterns to cause friction and forced action, which may make it more difficult for consumers to change their browser or search engines from the default options – see further discussion of some examples of dark patterns in box 5.3.<sup>185</sup>

### Box 5.3 Examples of potential dark patterns

**Cancelling paid subscriptions:** A key example is when platforms use choice architecture to make it quick and easy for consumers to sign up for services, including free trials, but difficult or unclear how to navigate a user interface to cancel their paid subscriptions. The Norwegian Consumer Council has compared the very easy process used by Amazon for consumers to sign up for Amazon Prime, which requires only a couple of clicks on a prominent advertising banner, with the lengthy and confusing process of cancelling the subscription, which requires at least seven clicks to complete.<sup>186</sup>

**Privacy controls and settings:** The ACCC has found that digital platforms' privacy controls and settings are often presented in ways that nudge consumers towards more privacy-intrusive options.<sup>187</sup> In the aftermath of the Cambridge Analytica data breach in March 2018, Meta centralised its mobile privacy settings on Facebook to make them easier for users to find.<sup>188</sup> However in August 2021, Meta rolled back this change, unbundling its privacy settings into three different menu settings under Permission, Audience and Visibility, and Your Information.<sup>189</sup>

**Changing default settings:** The ACCC has found that, although consumers can benefit from having browsers pre-installed and search engines pre-set as defaults on their mobile devices, consumer 'lock-in' may result due to default bias and information asymmetries.<sup>190</sup> This is heightened by the user interfaces that exacerbate default biases and create obstacles to switching, which may not always be in consumers' best interests.<sup>191</sup> For example, during the process of downloading the Ecosia search engine browser extension on Microsoft Edge, the ACCC observed that Microsoft Edge turned off this extension, disabling the choices affirmatively made by consumers.<sup>192</sup> The ACCC also found that, during the process of downloading the Ecosia

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<sup>182</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 62-63.

<sup>183</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 12.

<sup>184</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 14.

<sup>185</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 58-61.

<sup>186</sup> Norwegian Consumer Council, [You Can Log Out but You Can Never Leave](#), 14 January 2021, pp 11, 29.

<sup>187</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 433.

<sup>188</sup> Meta Newsroom, [Facebook: It's Time to Make Our Privacy Tools Easier to Find](#), 28 March 2018, accessed 24 February 2022.

<sup>189</sup> Meta Newsroom, [Facebook: How We're Making it Easier to Navigate Settings](#), 4 August 2021, accessed 24 February 2022.

<sup>190</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 43.

<sup>191</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 56.

<sup>192</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, pp 58-59.

search browser extension to Chrome, Google presented a pop-up warning to users and provided options to 'Add extension' or 'Cancel', with the 'Cancel' option displayed more prominently.<sup>193</sup>

Algorithmic systems may be used to optimise choice architecture in ways that benefit or harm consumers.<sup>194</sup> For example, decisions about the position of a 'Buy' button on a website, the colour of an information banner, or default payment methods are examples of choice architecture that may exploit consumers' limited attention, inertia and behavioural biases such as loss aversion or susceptibility to defaults.<sup>195</sup> Firms may exploit these inherent biases in ways that result in direct consumer harm such as inducing them to make purchasing decisions that they would not otherwise make under different choice architecture, or to undermine competition by engaging in non-transparent self-preferencing behaviour to exclude or marginalise rivals.<sup>196</sup>

Moreover, harmful, malicious and exploitative apps often use dark patterns to coerce, steer, or deceive consumers into making unintended and potentially harmful decisions.<sup>197</sup> Examples of potential dark patterns include using opt-out check boxes to slip unwanted items into online shopping carts or subscriptions that are easy to start but difficult to cancel.<sup>198</sup> A 2020 analysis of dark patterns in 240 'free' apps on the Play Store found that 95% contained at least one dark pattern, with an average of 7 different types of dark patterns per app.<sup>199</sup> The ACCC is considering the impact of practices to influence consumers to purchase goods in its interim report on general online retail marketplaces due in March 2022.<sup>200</sup>

### 5.3.3. Online scams, harmful apps and fake reviews

#### (a) Online scams

The rise of digital platforms has enabled the growth of online scams, misleading advertisements and other harmful content on apps and websites, which result in significant losses for consumers and small businesses.<sup>201</sup> These concerns are in addition to the online harms such as cyberbullying, image-based abuse and illegal and restricted online content, which the new Online Safety Act seeks to address.<sup>202</sup>

The ACCC is concerned by the ease with which third party scammers use digital platforms to conduct scams and distribute advertisements containing false representations, and the sophisticated nature of these scams.<sup>203</sup>

The ACCC has a key role in disrupting and preventing scams through Scamwatch.<sup>204</sup> Scamwatch raises awareness about how to recognise, avoid and report scams, and also

<sup>193</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 65.

<sup>194</sup> CMA, [Algorithms: how they can reduce competition and harm consumers](#), 19 January 2021, section 2 Theories of harm.

<sup>195</sup> CMA, [Algorithms: how they can reduce competition and harm consumers](#), 19 January 2021.

<sup>196</sup> CMA, [Algorithms: how they can reduce competition and harm consumers](#), 19 January 2021.

<sup>197</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 110, citing OECD, [OECD Digital Economy Outlook 2020, Chapter 8 - Consumer policy in the digital transformation](#).

<sup>198</sup> OECD, [OECD Digital Economy Outlook 2020, Chapter 8 - Consumer policy in the digital transformation](#).

<sup>199</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 110, citing L Geronimo et al, [UI Dark Patterns and Where to Find Them: A Study on Mobile Applications and User Perception](#), CHI '20: *Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems*, April 2020, p 1.

<sup>200</sup> ACCC, [Report on General Online Retail Marketplaces Issues Paper](#), 22 July 2021.

<sup>201</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 503.

<sup>202</sup> eSafety Commissioner, [New online safety laws come into force](#), 23 January 2022.

<sup>203</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 503.

<sup>204</sup> See Scamwatch [website](#).

shares intelligence, working with government and the private sector to disrupt and prevent scams. Scamwatch also formulates scam prevention strategies and implements initiatives to minimise the harms caused by scams.

The ACCC has found that both the number of reported scams and amount of associated consumer loss involving online private messaging, social media and search services has steadily increased in recent years.<sup>205</sup> In 2021, Australians reported a total loss from scams of over AUD323 million to Scamwatch – an increase of 84% compared to the previous year.<sup>206</sup> The ACCC also notes research showing that only around 13% of scam victims report to Scamwatch, suggesting that the true amount lost to scams is likely to be considerably higher than the reported amount.<sup>207</sup>

Although the majority of reported losses are from scams delivered via phone calls,<sup>208</sup> the amount of reported losses from scams delivered online has increased significantly over the past two years of the COVID-19 pandemic. Compared to pre-pandemic reported losses in 2019, Australian consumers in 2021 reported a 153% increase in losses to scams delivered via social networking (to AUD56 million), a 70% increase in losses to scams delivered via email (to AUD48 million), and a 64% increase in losses to internet-based scams (to AUD51 million).<sup>209</sup>

In 2021, the top three scams causing the most harm to Australian consumers, where initial contact was by social networking, were:

1. investment scams: AUD26.6 million, up 207% on 2020
2. romance scams: AUD22.7 million, up 58% on 2020
3. online shopping scams: AUD1 million, up 16% on 2020.

In the US, social media has become the most profitable way for scammers to reach people, with the US FTC reporting around USD770 million in losses due to fraud initiated on social media platforms in 2021 – an eighteenfold increase over 2017 reported losses.<sup>210</sup>

The extensive data collected by digital platforms may provide scammers with information that helps the scammers identify (or infer) an individual's vulnerabilities.<sup>211</sup> This not only places particularly vulnerable groups of consumers, including children, at risk of being targeted by scammers, including via contact methods outside the digital platforms, but also enables the more effective targeting of scams generally.

The ACCC is also aware of consumers being directed to scam websites via digital platforms' services. For example, there are media reports that scam investment comparison websites are being promoted to consumers via AdWords-sponsored results on Google that direct prospective investors to fraudulent fintech products.<sup>212</sup>

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<sup>205</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 56.

<sup>206</sup> Based on statistics from the ScamWatch website, [Scam statistics](#).

<sup>207</sup> Roy Morgan ACCC scam survey 2019.

<sup>208</sup> In 2021, reported losses due to scams delivered via phone amounted to over AUD100 million and accounted for over 30% of total reported losses due to scams: see ScamWatch, [Scam statistics](#).

<sup>209</sup> See ScamWatch, [Scam statistics](#). The ACCC notes that scams often involve a combination of contact methods. The Scamwatch service only collects one contact method. Consumers may select 'mobile app' or 'internet' for a scam that occurred on social networking platform.

<sup>210</sup> FTC, [Social media a gold mine for scammers in 2021](#), 25 January 2022.

<sup>211</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 444. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 6.

<sup>212</sup> See M Roddan and J Shapiro, [Google promotes bond scam amid police probe](#), *Australian Financial Review*, 31 May 2021; M Roddan and J Shapiro, [Millions vanish into crypto world in high-yield bond scam](#), *Australian Financial Review*, 5 March 2021.

Australian consumers are concerned about online safety, including the safety of children, losses from online fraud and scams, and data breaches and hacks.<sup>213</sup> In particular, the ACCC has found that 64% of Australians consider exposure to scams or fraud to be the top risk of harm online.<sup>214</sup> In the ACCC's view, online consumer harms are increasing across a range of areas and need to be more directly addressed.

The ACCC has found that digital platforms do not do enough to remove scams either proactively or in response to complaints. The platforms also do not provide appropriate and effective redress for their users – see further discussion in section 5.4.3.<sup>215</sup> This lack of effective redress persists despite consumer expectations of being protected from scams when using large digital platform services. For example, research from the UK consumer group Which? has shown that, despite scams being prevalent on social media, Facebook users have limited awareness about the risks of scams and expect that Facebook has systems in place to protect them.<sup>216</sup>

#### **Box 5.4 Specific obligations in the telecommunications industry to combat scams**

In 2020, the Telecommunications (Mobile Number Pre-Porting Additional Identity Verification) Industry Standard 2020 came into effect and has been effective in reducing by mobile porting scams.<sup>217</sup> In November 2021, the ACMA consulted on proposed new rules on the telecommunications industry to require all providers to use additional authorisation processes (such as multi-factor identification) to prevent scammers gaining access to a customer's device for account or personal information.<sup>218</sup> Once implemented, this is expected to be effective in preventing a broader range of scams including, for example, sim swap scams.<sup>219</sup>

In 2021, the Reducing Scam Calls Industry Code<sup>220</sup> commenced and placed obligations on telecommunications providers to monitor, trace and block scam phone calls. The ACCC provides telephone numbers used by scammers that are reported to Scamwatch to the telecommunications providers on a weekly basis for the purposes of call tracing and blocking. Millions of scam calls have been effectively blocked as a result of these measures.

In 2022, the industry body, Communications Alliance, commenced a public consultation on proposed amendments to the Scam Calls Code to include scam SMS as well as calls. This followed amendments to regulations associated with the *Telecommunications (Interception and Access) Act* (Cth) to enable telecommunications companies to monitor SMS content to identify and block scam messages.

In contrast to the lack of sector-specific regulation in digital platform services dealing with these issues, the telecommunications industry is regulated by obligations in Industry Codes of Practice. This includes general protections for mobile, landline and internet users in the Telecommunications Consumer Protection Code<sup>221</sup> as well as a number of codes and standards to specifically combat scams – see further discussion in box 5.4. The ACCC is

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<sup>213</sup> Consumer Policy Research Centre, [Unfair Trading Practices in Digital Markets: Evidence and regulatory gaps, December 2020](#), Attachment 1, pp 27–28.

<sup>214</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 60.

<sup>215</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 60.

<sup>216</sup> Which?, [Connecting the world to fraudsters?](#), accessed 22 December 2021.

<sup>217</sup> Mobile porting scams refers to malicious third-party actors 'hijacking' a person's mobile phone number to gain access to their bank accounts and other applications containing sensitive information or capable of receiving personal information. See The Hon Paul Fletcher MP, [Protecting Australians from mobile porting scams](#), Media Release, 3 July 2020.

<sup>218</sup> ACMA, [Draft Telecommunications Service Provider \(Customer Identity Verification\) Determination 2021 – consultation 39/2021](#).

<sup>219</sup> See further ACMA, [What to do if your mobile number has been stolen](#), last updated 23 February 2022.

<sup>220</sup> Communications Alliance Ltd, [C661:2020 Reducing Scam Calls Industry Code](#).

<sup>221</sup> ACMA, [Telecommunications Consumer Protections Code](#), last updated 14 July 2021. ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 174.

concerned that, without effective obligations placed on digital platforms to address and prevent scams delivered online, scammers may increasingly move to online methods to find their victims.

### **(b) Harmful apps**

The ACCC has found that consumers are exposed to harm in the form of malicious, exploitative or otherwise harmful apps distributed by Google and Apple via their app marketplaces.<sup>222</sup> Key categories of potentially harmful apps found on Apple's App Store and Google's Play Store include 'real prize' scams, malware, apps facilitating fake product or service scams, apps with bait and switch features, as well as subscription traps.<sup>223</sup>

Bait and switch features in apps include tactics that mislead consumers by representing that certain functions on apps are available at specific prices (or for 'free'), when in fact those functions are unavailable, must be paid for, or cost more than was disclosed.<sup>224</sup> For example, ads for the Gardenscapes app were found by the UK Advertising Standards Authority to be misleading because their content was not reflective of the games they were purported to feature.<sup>225</sup>

Subscription traps occur when consumers have insufficient information about or control over subscriptions due to low or no useful user functionality or impediments to cancelling; they warrant particular scrutiny as they appear to cause consumers significant financial detriment.<sup>226</sup> For example, in 2020 the BetterMe Widget Workout & Diet iOS app generated USD375,956 in gross revenue and received 112 negative reviews, with users citing unauthorised debits, an inability to cancel their subscription, and advertised services not being provided.<sup>227</sup>

Some malicious apps cause disproportionate harm to certain vulnerable consumer groups, including children.<sup>228</sup> For example, the ACCC has found that children continue to be exposed to age-inappropriate apps and apps that mimic gambling.<sup>229</sup> Of the top 1,000 'free' and 1,000 highest grossing casino apps on the App Store globally (combined, excluding duplicates), 176 apps were rated appropriate for children aged four years and above, six for those nine years and above, and 71 for consumers aged 12 years and above.<sup>230</sup> The ACCC also notes research which finds that the majority of the 5,855 most popular free children's apps on Android are collecting personally identifiable information, potentially in violation of US privacy laws governing the collection of children's data.<sup>231</sup>

Harmful or malicious apps can result in considerable consumer detriment. In particular, ScamWatch data shows that Australian consumers reported over AUD36 million lost to *scammers using mobile apps* in 2021, which represents more than five times the amount lost

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<sup>222</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 108.

<sup>223</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 112-114.

<sup>224</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 113.

<sup>225</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 113, citing ASA, [ASA Ruling on PLR Worldwide Sales Ltd t/a Playrix](#), 30 September 2020, accessed 24 March 2021.

<sup>226</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 110.

<sup>227</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 112, citing Apple, [BetterMe: Home Workout & Diet. App Store Preview](#), accessed 24 March 2021.

<sup>228</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 108.

<sup>229</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 108.

<sup>230</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 118, citing Sensor Tower, Store Intelligence, Top Apps, Casino app category data for 2020, accessed 24 March 2021. Similar findings were made on the Play Store.

<sup>231</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 119, citing I Reyes et al, [Won't Somebody Think of the Children? Examining COPPA Compliance at Scale](#), Proceedings on Privacy Enhancing Technologies, 3 (2018).

in 2019.<sup>232</sup> As discussed above, given the research that the vast majority of scam victims do not report their losses to Scamwatch, the true amount lost to scams on mobile apps is likely to be much higher.<sup>233</sup> In addition to financial losses, consumers inadvertently using apps that misrepresent their purpose, functionality, content and/or age suitability, or that otherwise manipulate user behaviour or their mobile devices, result in a range of non-financial harms to consumers including reducing consumers' trust in online activity.<sup>234</sup>

The ACCC has previously found that Apple and Google should take further measures to prevent and remove apps that harm consumers, including apps that facilitate subscription traps and other scams, and apps that target vulnerable groups, such as children. In addition, consumers must have adequate access to avenues for redress from the app marketplaces for losses caused by malicious, exploitative or otherwise harmful apps.<sup>235</sup>

The ACCC considers that the internal dispute resolution mechanisms and ombudsman scheme recommended in the *Digital Platforms Inquiry Final Report* would assist consumers to obtain that redress and is considering whether additional measures to increase the effectiveness of dispute resolution processes on digital platforms are required – see further discussion in section 8.4.2.<sup>236</sup>

### **(c) Fake reviews**

Consumers are increasingly relying on reviews to decide what products to use or purchase online. Online reviews may appear on a range of digital platforms, including social media platforms and online retail marketplaces. Genuine, independent reviews provide consumers with important information about products, services and businesses based on the experiences of other consumers.<sup>237</sup> A 2021 survey has found that 96% of Australians read reviews sometimes or always before purchasing online.<sup>238</sup>

However, the rise in consumer reliance on online reviews is accompanied by the growing use of fake reviews to promote goods or services or to discredit competitors.<sup>239</sup> The ACCC is aware of concerns regarding the prevalence of fake positive reviews that mislead consumers. One survey has found that 52% of Australian consumers believe they've fallen for fake reviews and 26% were not able to tell the difference between a fake review and a real review.<sup>240</sup> In 2020, HealthEngine Pty Ltd was ordered by the Federal Court to pay AUD2.9 million in penalties for engaging in misleading conduct, including the publishing of misleading patient reviews and ratings.<sup>241</sup>

In a recent investigation, the UK consumer association Which? went undercover to purchase a range of recommendations and page likes, accumulating almost 600 fake reviews and recommendations within a week,<sup>242</sup> Which? found numerous fake review selling sites

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<sup>232</sup> The ACCC notes that scams often involve a combination of contact methods. The Scamwatch service only collects one contact method. Consumers may select 'mobile app' or 'internet' for a scam that occurred on social networking platform.

<sup>233</sup> Roy Morgan ACCC scam survey 2019.

<sup>234</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 115.

<sup>235</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 108.

<sup>236</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 108.

<sup>237</sup> ACCC, [Managing online reviews](#), accessed 24 February 2022.

<sup>238</sup> G Dixon, [More than 50% of Australians Believe They've Fallen for Fake Reviews](#), *Reviews.org*, 13 August 2021.

<sup>239</sup> OECD, [Understanding Online Consumer Ratings and Reviews](#), 9 September 2019.

<sup>240</sup> G Dixon, [More than 50% of Australians Believe They've Fallen for Fake Reviews](#), *Reviews.org*, 13 August 2021.

<sup>241</sup> ACCC, [HealthEngine to pay \\$2.9 million for misleading reviews and patient referrals](#), 20 August 2020. HealthEngine was also found to be engaging in misleading conduct in relation to the sharing of patient personal information to private health insurance brokers.

<sup>242</sup> M Calnan, [How fake reviews help boost businesses on Facebook](#), *Which? News*, 6 October 2021, accessed 24 February 2022.



claiming to have worked on thousands of Facebook recommendation campaigns and having received 10,000 orders.<sup>243</sup>

The ACCC is also concerned by the use of fake negative reviews to unfairly harm a business's reputation. Fake negative consumer reviews, which do not reflect a reviewer's genuinely held opinion but are left by competitors or motivated by a personal dislike, not only mislead consumers but can also cause businesses substantial harm.<sup>244</sup> Research from the Consumer Policy Research Centre (CPRC) found that 70% of consumers believe that fake reviews are likely to be positive reviews, despite one survey reporting that 38% of business owners reported an experience of an untrue negative review posted on their listings and 33% reported a competitor had left a negative review on their listings.<sup>245</sup>

A 2020 survey of small and medium-sized businesses in Australia found that 65% of these businesses invite customers to leave online comments, ratings or reviews and that more than 1 in 5 are concerned by negative comments or reviews.<sup>246</sup> As the main recourse for affected businesses is usually to complain to the platform publishing the review, the harm caused by fake negative reviews is exacerbated by the lack of effective dispute resolution processes on digital platforms – see further discussion in section 5.4.3.

The ACCC, through its Scamwatch service, is also aware that some scammers use review platforms to give a sense of legitimacy to a scam. Scam victims have reported that they were influenced by positive reviews to purchase a product or service or make an investment and subsequently lost money to a scam.<sup>247</sup> The ACCC is also aware of instances where negative reviews warning that a business may be a scam have been removed by scammers.

#### **5.3.4. Lock-in and reduced choice**

The ACCC is concerned that a lack of interoperability between digital platform services may increase switching costs for consumers and exacerbate lock-in of consumers.<sup>248</sup>

Apple and Google have the primary mobile device ecosystems and Apple and Microsoft have the primary desktop device ecosystems.<sup>249</sup> These device ecosystems are likely to become increasingly important as digital platforms create and expand the range of products and services that interoperate with each other within these ecosystems. Finally, consumers' increasing use of connected devices and voice assistants that are associated with a particular digital platform's ecosystem may also further lock-in consumers to that particular ecosystem to the extent that these systems cannot interoperate.<sup>250</sup>

As individuals spend more of their time online and invest more time using services in a specific ecosystem, it becomes more difficult for them to move their online presence between ecosystems.<sup>251</sup> The potential for device ecosystems to raise switching costs for consumers is illustrated in past statements by Apple in relation to its app stores and iMessage service (see further discussion in box 5.5).

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<sup>243</sup> M Calnan, [How fake reviews help boost businesses on Facebook](#), *Which? News*, 6 October 2021, accessed 24 February 2022.

<sup>244</sup> ACCC, [Online reviews—a guide for business and review platforms](#), November 2013, p 13.

<sup>245</sup> Consumer Policy Research Centre, [Online reviews: a guide not a gospel](#), December 2019, p 5.

<sup>246</sup> The survey involved 1,020 small and medium-sized businesses of up to 199 employees. See Yellow Pages, [Yellow Social Media Report 2020 – Business Statistics](#), pp 2-3.

<sup>247</sup> See, for example, ACCC, [Targeting Scams 2019](#), June 2020, p 50.

<sup>248</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 75.

<sup>249</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 26.

<sup>250</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 92.

<sup>251</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 28.

### Box 5.5 Statements from Apple regarding consumer lock-in

Comments from Apple executives released as part of the *Epic Games v. Apple* case in California acknowledge the costs that users face in switching between services inside and outside of Apple's ecosystem, particularly in relation to:

- **Apple's iMessage private messaging service:** In 2016, when a former Apple employee commented that “the #1 most difficult [reason] to leave the Apple universe app is iMessage ... iMessage amounts to serious lock-in” to the Apple ecosystem, Mr. Phil Schiller commented that “moving iMessage to Android will hurt us more than help us, this email illustrates why”.<sup>252</sup>
- **Apple's media and app stores:** ‘The more people use our stores the more likely they are to buy additional Apple products and upgrade to the latest versions. Who's going to buy a Samsung phone if they have apps, movies, etc already purchased? They now need to spend hundreds more to get to where they are today’.<sup>253</sup>

The ACCC notes, however, that Apple has recently extended the ability to make FaceTime calls beyond Apple devices, and that Google has recently updated Google Messages on Android to allow it to display emoji reactions sent from iMessage.<sup>254</sup>

The UK has also found that there are material barriers to switching between iOS and Android devices, including issues relating to the transfer of data and content and requirements to use proprietary in-app payment systems.<sup>255</sup>

## 5.4. Unfair trading practices for business users

### 5.4.1. Unfair terms of use or access

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. A number of large digital platforms have substantial bargaining power which is underpinned by their market power and gatekeeper status.

The substantial bargaining power of some digital platforms vis-à-vis their business users, can have negative impacts on consumers. The more costly it is for business users to access the consumers of a platform, the more consumers are ultimately likely to pay for the business's services, and the lower the incentive for such businesses to innovate and develop services for these consumers.

The bargaining power imbalance between large digital platforms and their business users typically limits the ability of businesses to negotiate their terms of service. In some cases, the bargaining power of digital platforms is so strong that contracts are offered on a take it or leave it basis. Smaller business users may feel that they have no choice but to accept standardised terms of service in order to access consumers through platforms that play a

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<sup>252</sup> United States District Court, *Epic Games Inc v Apple Inc*, [Findings of fact and conclusions of law proposed by Epic Games, Inc.](#), p 15.

<sup>253</sup> United States District Court, *Epic Games Inc v Apple Inc*, [Findings of fact and conclusions of law proposed by Epic Games, Inc.](#), p 19.

<sup>254</sup> Apple, [iOS 15 brings new ways to stay connected, and powerful features that help users focus, explore, and do more with on-device intelligence](#), Press release, 8 June 2021. J Porter, [Android Messages update handles Apple iMessage reactions properly](#), *The Verge*, 22 November 2021.

<sup>255</sup> CMA, [Mobile ecosystems market study interim report](#), 14 December 2021, p 122.

gatekeeper role.<sup>256</sup> These terms of service may leave those smaller business users at a significant and enduring commercial disadvantage compared to digital platforms. For example, the ACCC considers that one effect of Google and Meta's substantial market power in the supply of search and display advertising respectively, is that some advertisers, particularly small businesses, are unable to negotiate the terms on which they do business with Google and Meta.<sup>257</sup>

The ACCC has also found that the bargaining power imbalance between news media businesses and Google and Meta resulted in news media businesses accepting terms of service that are less favourable than they would otherwise agree to.<sup>258</sup> In early 2021, the Australian Government passed legislation giving effect to the News Media and Digital Platforms Mandatory Bargaining Code in order to address the consequences of the bargaining power imbalances between these parties and, in doing so, promote the sustainability of public interest journalism in Australia.

In addition to news media businesses, other businesses also face a significant bargaining power imbalance between themselves and gatekeeper platforms. The ACCC's review of multiple digital platforms' standard terms for businesses that seek to advertise on their services has found common terms that could be unfair for small businesses, including extremely broad discretions to remove content and suspend or terminate accounts, prohibitive dispute resolution clauses such as requirements for claims to be made in the US or via international arbitration, and limitations on class actions.<sup>259</sup>

These terms reflect the power imbalance that exist between businesses and gatekeeper platforms and often leave the smaller businesses at a significant disadvantage.<sup>260</sup> The unilateral blocking of many accounts, including police and emergency services, health departments, charities, and the Bureau of Meteorology, by Facebook in February 2021 is a high-profile example of this platform's broad discretion to remove content without recourse from its business users.<sup>261</sup>

The ACCC has expressed particular concern about the potential impact of unfair terms on small businesses where the terms must be accepted by default, are heavily biased in favour of dominant digital platforms and do not provide sufficient recourse in the event of difficulties or disputes.<sup>262</sup> In particular, the ACCC has concerns where a dominant digital platform is able to unilaterally and adversely change the terms and conditions for a business user (for example, the terms applicable to an app developer using an app marketplace or a seller using an online marketplace). This action – or even the threat of such action – allows the platform to 'appropriate' some of the value of the sunk investments made by the business (such as costs associated with making their services compatible with the platform), which in turn can undermine the incentives for future investment.<sup>263</sup> This can create uncertainty for

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<sup>256</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 6.

<sup>257</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 163.

<sup>258</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 206.

<sup>259</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 71.

<sup>260</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 6-7.

<sup>261</sup> ABC News, [Facebook news ban stops Australians from sharing or viewing Australian and international news content](#), 18 February 2021, accessed 24 February 2022; BBC News, [Facebook blocks Australian users from viewing or sharing news](#), 18 February 2021, accessed 24 February 2022; G Hinch, [Facebook to reverse news ban on Australian sites, government to make amendments to media bargaining code](#), ABC News, 23 February 2021, accessed 24 February 2022; G Frey, [NBC News, Outrage as Facebook blocks access to news content in Australia](#), 19 February 2021, accessed 24 February 2022.

<sup>262</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, pp 6-7.

<sup>263</sup> D Biggar and A Heimler, [Digital Platforms and the Transactions Cost Approach to Competition Law](#), *Industrial and Corporate Change*, 1 September 2021, p 35.

businesses, and lead to inefficient investment decisions. It can also unduly restrict or prevent the emergence of alternative business models.

App marketplaces, for example, are linked to a particular mobile OS (such as iOS or Android) and only supply apps that are compatible with that OS. App developers must invest in creating apps for one or both of these OS in order to reach consumers. Apple and Google, as the major app marketplace providers, both set the terms and conditions of access to their respective app marketplaces, including mandating the use of certain proprietary systems such as billing payments – see further discussion in 5.2.2.

In some cases, these rules may be unclear, overly broad or applied in an inconsistent manner, with limited avenues for appeal.<sup>264</sup> The ACCC has heard concerns from app developers, for example, who expressed frustration with inconsistent app review processes where new apps or certain app features are delayed or rejected despite being similar to those approved for other apps. In these circumstances, app developers may be reluctant to develop new apps or features, which may lead to a dampening of innovation and loss of potential benefits for consumers.<sup>265</sup> The CMA has found similar concerns in relation to app marketplaces, as described in box 5.6.

The ACCC notes that some types of unfair terms may be addressed under the Australian Government's bill to enhance and strengthen the ACL by prohibiting unfair contract terms.<sup>266</sup> Potential measures that may enhance protections for businesses users of large digital platforms are discussed further in section 8.4.

#### **Box 5.6 CMA mobile ecosystems interim report, December 2021**

The CMA found that Apple and Google are able to use their control over their app stores, operating systems and in Apple's case, devices, to set the 'rules of the game' for competition between app developers. The CMA considers this could be harmful to competition in several ways including:

- Opaque app review processes, which mean app developers have no choice but to make changes to their apps to meet Apple and Google's requirements, while delays and uncertainty can add to development costs. The CMA found both Apple and Google have wide discretion to reinterpret and change the rules, including removing and/or blocking apps or app updates.
- Where Apple is able to use commercially sensitive data or information about other apps, obtained through operation of its app store, to either develop new products or otherwise gain a competitive advantage from this access. This may be facilitated by contractual terms that weaken developers' intellectual property rights.

### **5.4.2. Lack of transparency**

Transparency about pricing, quality and a digital platform's operations is important to enable both consumers and business users of digital platforms to make informed choices about services and providers.

Business users of digital platforms require sufficient transparency to allow them to appropriately manage and increase their online visibility, to inform the production, pricing and development of their products and services, and to assess the value and quality of the services they are receiving. Similarly, consumers of digital platform services require

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<sup>264</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 48.

<sup>265</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 52.

<sup>266</sup> [Treasury Laws Amendment \(Enhancing Tax Integrity and Supporting Business Investment\) Bill 2022 \(Cth\)](#).

transparency of price and non-price terms of digital platform services to make informed decisions about their use of these services and to access goods and services that appropriately meet their needs.

While it is not necessary to disclose all the details of a platform's operations, a balance should be struck between protecting platforms' legitimate business interests (such as the need to avoid 'gaming' of ranking algorithms) and the level of transparency required to promote fair and effective competition.

The ACCC has identified concerns about a lack of transparency in several digital platform markets. For example, the operation of app marketplaces, such as their search algorithms and featured editorials, can have a large impact on an app's ability to reach consumers and compete effectively in downstream markets for apps. In addition, many app developers have raised concerns about the opacity of algorithms and the lack of notification about changes to these algorithms, as this can have significant flow-on effects to rankings within app store search results and visibility to users.<sup>267</sup>

The ACCC has also identified a range of transparency issues in the supply of ad tech services, including in relation to the operation of ad tech auctions, prices and fees of ad tech services, as well as the performance of demand-side services (such as ad verification and attribution services). For example, this opacity may give Google the ability to retain hidden fees, as it is not clear how much of the total price paid by advertisers Google keeps from selling its ads before revenue is passed on to ad publishers, and the limited information provided by Google is not independently verifiable.<sup>268</sup>

#### **5.4.3. Ineffective dispute resolution**

A lack of transparency as to digital platforms' decisions can be exacerbated by a lack of adequate dispute resolution processes. The ACCC has repeatedly noted concerns from consumers, advertisers, and businesses using digital platform services (for example, online marketplace services) about the ability of digital platforms to effectively deal with disputes in relation to their services.<sup>269</sup> For example, harms to businesses affected by fake reviews can be exacerbated by a lack of effective dispute resolution processes on digital platforms – see further discussion on these harms in section 5.3.3(c).

The ACCC has previously identified clauses containing prohibitive dispute resolution processes in the standard terms governing the supply of advertising services by large platforms.<sup>270</sup> These include clauses that require disputes to be resolved in the US or via international arbitration, or clauses that otherwise make dispute resolution effectively inaccessible, particularly to small businesses, providing users with little scope for recourse.

New research from the Australian Communications Consumer Action Network (ACCAN) has found that nearly three in four Australians would like better complaints handling from digital platforms.<sup>271</sup> In a nationally representative survey of 1000 Australians, ACCAN found that 74% of Australians think that it needs to be easier for people to make a complaint regarding

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<sup>267</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 89-91.

<sup>268</sup> ACCC, [Report on App Marketplaces](#), 28 September 2021, pp 155-156.

<sup>269</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 162, 507. ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 73.

<sup>270</sup> ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 71.

<sup>271</sup> Australian Communications Consumer Action Network (ACCAN), [New research finds nearly three-quarters of Australians want better complaints handling from digital platforms](#), Press Release, 29 November 2021.

conduct on or by digital platforms, and that 60% of Australians feel there's not much they can do when something goes wrong online.<sup>272</sup>

In addition to the ACCC's previous recommendations regarding both minimum requirements for internal dispute resolution processes and the introduction of an independent ombudsman scheme for digital platforms,<sup>273</sup> the ACCC is considering additional measures to address the deficiencies in digital platforms' dispute resolution processes, which are discussed in section 8.4.2 .

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<sup>272</sup> ACCAN, [New research finds nearly three-quarters of Australians want better complaints handling from digital platforms](#), Press Release, 29 November 2021.

<sup>273</sup> Recommendations 22 and 23; ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 509-510.

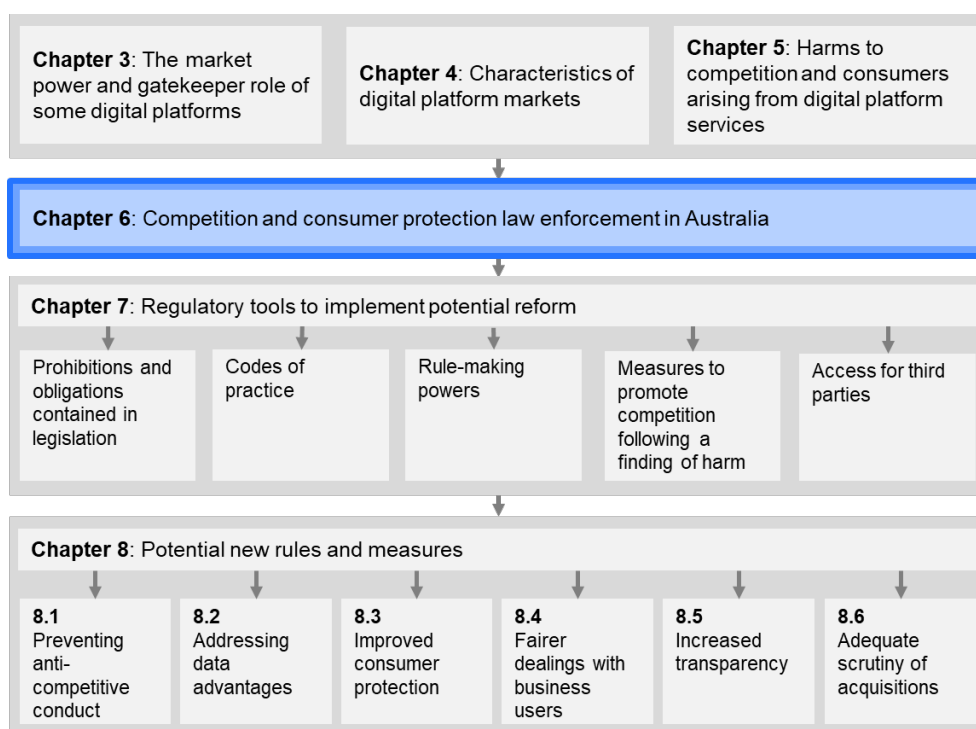
## 6. Competition and consumer protection law enforcement in Australia

This chapter discusses the ACCC's consideration to date of competition and consumer law enforcement cases and acquisitions in relation to digital platform services. It also examines the effectiveness of Australia's existing competition and consumer protection legislation in addressing harms arising in relation to digital platform services – see Discussion Paper Roadmap.

This chapter is set out as follows:

- **Section 6.1** outlines the ACCC's consumer and competition law enforcement actions in relation to digital platform services.
- **Section 6.2** considers the effectiveness of the CCA and the ACL in relation to the supply of digital platform services.

### Discussion Paper Roadmap



### Consultation question

The question below applies to all of the discussion in chapter 6.

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?

## 6.1. ACCC enforcement cases

Regarding competition issues, the ACCC considers specific allegations against digital platforms under the general, economy-wide provisions of the CCA and takes enforcement action where appropriate. For example, the ACCC can take action against digital platform firms where they misuse their market power or engage in anti-competitive conduct, and where acquisitions have the effect or likely effect of substantially lessening competition. The ACCC has the ability to address contraventions of the CCA through court-enforceable undertakings that seek to address harm caused by the anti-competitive conduct of firms. More information on these provisions of the CCA is available on the ACCC's [website](#).

The ACCC also administers the ACL along with state and territory consumer protection agencies, including the provisions regarding unfair contract terms and misleading and deceptive conduct. More information on the ACL is available on the ACCC's [website](#).

### 6.1.1. Consumer law cases

In recent years the ACCC has taken enforcement action against digital platform firms regarding a number of alleged contraventions of consumer law, including:

- Proceedings against **Google LLC and Google Australia** in October 2019 for misleading consumers about the collection of their personal location data. The ACCC alleged Google did not properly disclose that two Google Account settings (Location History and Web & App Activity) needed to be switched off if consumers didn't want Google to collect, store and use their personal location data.<sup>274</sup> In April 2021, the Federal Court ruled in favour of the ACCC in relation to some of these allegations.<sup>275</sup>
- Ongoing proceedings against **Google LLC** in July 2020 where the ACCC alleged Google misled consumers when it failed to properly inform consumers about the scope of personal information that Google could collect and combine about their internet activity, for use by Google, including for targeted advertising. In 2016, Google started combining personal information from consumers' Google accounts with information about those individuals' activities on non-Google sites that used Google technology (formerly DoubleClick technology) to display ads. This newly combined information was used to improve the commercial performance of Google's advertising businesses.<sup>276</sup>
- Ongoing proceedings against **Meta Platforms Inc.** (then Facebook Inc.) and two subsidiaries in December 2020 for alleged false, misleading or deceptive conduct when promoting Meta's Onavo Protect<sup>277</sup> mobile VPN app to consumers. The ACCC alleged that these parties misled consumers by representing that Onavo Protect would keep users' personal activity data private, protected and secret and would not be used for any purpose other than providing the Onavo Protect services. Whereas Onavo Protect was used to collect, aggregate and use significant amounts of users' personal data for Facebook's commercial benefit, such as supporting its market research activities including identifying potential future acquisition targets.<sup>278</sup>

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<sup>274</sup> ACCC, [Google allegedly misled consumers on collection and use of location data](#), Press Release, 29 October 2019.

<sup>275</sup> ACCC, [Google misled consumers about the collection and use of location data](#), Press Release, 16 April 2021.

<sup>276</sup> ACCC, [Correction: ACCC alleges Google misled consumers about expanded use of personal data](#), Press Release, 27 July 2020.

<sup>277</sup> Onavo Protect was a free downloadable software application providing a virtual private network service.

<sup>278</sup> ACCC, [ACCC alleges Facebook misled consumers when promoting app to 'protect' users' data](#), Press Release, 16 December 2020.



In addition, the ACCC is investigating Meta Platforms, Inc. for its role in publishing advertisements featuring Australian public figures which the ACCC is concerned give the misleading appearance that those public figures used or endorsed cryptocurrency or money-making schemes that were in fact scams.

Internationally, the *Autorità Garante della Concorrenza e del Mercato* (AGCM) (the Italian Competition Authority) has issued numerous fines to Meta for data practices that violate the Italian Consumer Code, discussed in box 6.1.

### Box 6.1 Consumer law cases against Meta in Italy

In February 2021, the AGCM issued a fine of 7 million euros to Meta (then Facebook Inc.) for failing to comply with an earlier order to adequately inform users about the commercial uses Meta makes of data collected through Facebook.<sup>279</sup> In 2018, the AGCM issued two fines totalling 10 million euros to Meta for infringing the Italian Consumer Code by:<sup>280</sup>

- misleading consumers signing up to Facebook by emphasising the free nature of Facebook's services without adequately informing them during sign-up that the data provided will be used for commercial purposes, and
- exerting undue influence on signed-up Facebook users to share their data between Meta and third-party websites and apps for commercial purposes.

In 2017, the AGCM fined WhatsApp 3 million euros for infringing the Consumer Code by forcing users to accept in full a new terms of service with a provision on sharing of user data with Meta (then Facebook).<sup>281</sup>

## 6.1.2. Competition law cases

The ACCC is currently considering whether Apple's practice of restricting third-party access to NFC technology on its mobile devices, and the terms it imposes for use of Apple Pay by third parties, raise concerns under competition law.

The ACCC is also continuing to consider the specific allegations made against Google over the course of the *Ad Tech Inquiry* under the competition provisions of the CCA. This includes Google limiting the access of third-party demand-side platforms<sup>282</sup> to YouTube ad inventory, channelling demand from Google's demand-side platforms to its own supply-side platforms<sup>283</sup> and using its publisher ad server to preference its supply-side platform.<sup>284</sup>

The ACCC continues to examine other specific allegations made against Google under the CCA, including in relation to pre-installation and default arrangements between Google and

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<sup>279</sup> Autorità Garante della Concorrenza e del Mercato, [Sanzione a Facebook per 7 milioni](#), 17 February 2021 (in Italian). N Lomas, [Facebook fined again in Italy for misleading users over what it does with their data](#), *TechCrunch*, 18 February 2021, accessed 24 February 2022.

<sup>280</sup> Autorità Garante della Concorrenza e del Mercato, [Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes](#), 7 December 2018.

<sup>281</sup> Autorità Garante della Concorrenza e del Mercato, [WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook](#), 12 May 2017.

<sup>282</sup> A demand-side platform is a platform used by advertisers to help them purchase ad inventory from suppliers of ad inventory as effectively and as cheaply as possible, and which utilise various data to provide ad targeting services.

<sup>283</sup> A supply-side platform (SSP) is a platform used by publishers to set price floors, decide which buyers can bid and connect to demand-side platforms (often by programmatic auctions). Historically, a separate ad exchange would run the real-time auctions, but the functions of SSPs are increasingly integrated with those of ad exchanges.

<sup>284</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 9.

OEMs. The ACCC is also monitoring the court proceedings brought by overseas counterparts in relation to similar arrangements.<sup>285</sup>

Internationally, competition authorities in multiple countries are taking action against various digital platforms.<sup>286</sup> For example, the Italian AGCM fined Amazon over €1,128 billion in December 2021 for abusing its dominant position in the Italian market for intermediation services on marketplaces to preference its own logistics service, Fulfillment by Amazon, and to harm rival logistics services providers.<sup>287</sup> Apple has also been the subject of enforcement action in several jurisdictions, as discussed in box 6.2.

### **Box 6.2 International competition law cases and investigations against Apple in relation to the Apple App Store**

In **Japan**, a settlement deal was reached in September 2021 between the Japan Fair Trade Commission (JFTC) and Apple following a JFTC investigation into the Apple App Store under Japan's *Antimonopoly Act*. The investigation examined Apple's practice of prohibiting links to alternative payment systems in reader apps and found this practice could reduce accessibility and use of these alternative payment systems, leading to higher prices for consumers.<sup>288</sup>

In the **UK**, the CMA commenced an investigation in March 2021 into whether Apple's terms and conditions for the Apple App Store violate UK competition law.<sup>289</sup> The investigation is considering whether Apple has a dominant position in relation to the distribution of apps on Apple devices in the UK, and if so, whether Apple imposes unfair or anti-competitive terms on developers using the App Store.

In the **EU**, the European Commission (EC) opened an investigation in June 2020 into Apple's rules for app developers on the App Store. In particular, the investigation is looking at the mandatory use of Apple's own proprietary in-app purchase system and restrictions on the ability of developers to inform users of alternative cheaper purchasing options outside of the app.<sup>290</sup>

In the **US**, there are reports that the Department of Justice and State Attorneys-General have launched an antitrust investigation into Apple's App Store practices.<sup>291</sup>

In the US, the Federal Trade Commission (FTC) and multiple State Attorneys General, are investigating Meta's Oculus in relation to anti-competitive practices, including whether the Oculus app store is discriminating against third-parties' competitors; and whether Meta is undercutting competitors with the price of the Oculus headset.<sup>292</sup>

However, despite these enforcement efforts in Australia and overseas, there has not been a noticeable change in market dynamics and similar conduct continues to emerge across these and related digital platform markets.

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<sup>285</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 12.

<sup>286</sup> For example, see European Commission: [AT.39740 Google Search \(Shopping\)](#); AT.40099 Google (Android); AT.40437 Apple (music streaming). In the US, the Federal Trade Commission case against Meta (see Robertson, A [Judge says the FTC's Meta monopoly lawsuit can go forward](#), *The Verge*, 11 January 2022, accessed 24 February 2022). In Japan, the Japan Fair Trade Commission has taken action against Apple (see Japan Fair Trade Commission, *Closing the Investigation of the Suspected Violation of the Antimonopoly Act by Apple Inc.*, Press Release, 2 September 2021)

<sup>287</sup> Autorità Garante della Concorrenza e del Mercato, [Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' data for commercial purposes](#), Press Release, 9 December 2021.

<sup>288</sup> Japan Fair Trade Commission, [Closing the Investigation of the Suspected Violation of the Antimonopoly Act by Apple Inc.](#), Press Release, 2 September 2021.

<sup>289</sup> CMA, [Investigation into Apple App Store](#), 4 March 2021, accessed 24 February 2022.

<sup>290</sup> EC, [Antitrust: Commission opens investigations into Apple's App Store rules](#), Press Release, 16 June 2020.

<sup>291</sup> J Sisco, [Apple Very Likely to Face DOJ Antitrust Suit](#), *The Information*, 25 October 2021.

<sup>292</sup> N Nix and M Gurman, [Meta's Oculus Unit Faces FTC-Led Probe of Competition Practices](#), *Bloomberg*, 15 January 2022, accessed 24 February 2022.

## 6.2. Effectiveness of the CCA and ACL in digital platform markets

The ACCC is considering whether existing competition and consumer laws are sufficient alone to address the specific competition and consumer harms arising in relation to digital platform services in Australia, as discussed in chapter 5.

General, economy-wide competition and consumer laws play an important role in targeting specific conduct by businesses that adversely affects competition and/or consumers. However, in relation to competition, as recognised in the landmark 1993 National Competition Policy Review Report (the Hilmer Report), which recommended the implementation of a national competition policy in Australia, there are some sectors in which there is strong public interest in ensuring effective competition can take place without relying solely on general competition law provisions.<sup>293</sup>

The ACCC considers that the supply of certain digital platform services falls within this category. This is because of the use and significance of certain key platforms to Australian consumers, the role of these platforms as gatekeepers between businesses and end users and the high barriers to entry and expansion (including network effects and economies of scale). These factors contribute to the substantial market power of certain digital platforms, and the dependency of businesses and consumers on access to their services.

In relation to the CCA, the ACCC considers that existing provisions alone may not be sufficient to address the harms to consumers and competition arising from the significant and entrenched market power of the large digital platforms, particularly where effective competition is no longer possible.<sup>294</sup> The reasons for this are discussed in more detail below.

Internationally, multiple competition authorities and some governments have come to similar conclusions and are transitioning from relying solely on enforcement of general competition law to also adopting new rules to address harms in relation to digital platform services. This follows years of efforts to enforce competition law in respect of conduct occurring in relation to digital platform services<sup>295</sup> and an emerging consensus that competition law enforcement may not be sufficiently effective and timely in relation to these services.<sup>296</sup> In particular, there have been limited changes in the supply of these services following enforcement efforts, in relation to both behaviour and market power.

In relation to the ACL, the ACCC has identified specific types of conduct prevalent in the supply of digital platform services that are harmful to consumers but not expressly prohibited under Australian law.<sup>297</sup> This includes:

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<sup>293</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 133. Commonwealth of Australia, National Competition Policy Review Report (The Hilmer Report), August 1993, p. 248.

<sup>294</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 19. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 5.

<sup>295</sup> For example, the European Commission (EC) case against Google in respect of its Google Shopping service spanned over 11 years from first investigating the conduct (2010), issuing a fine (2017) and Google losing its appeal (2021); with the conduct at the source of the case dating from at least 2005. See European Commission, [AT.39740 Google Search \(Shopping\)](#); Ketchell, M. [Google loses appeal against €2.4 billion fine: tech giants might now have to re-think their entire business models](#), *The Conversation*, 11 November 2021; General Court of the European Union, [Press Release No 197/21, Judgment in Case T-612/17 Google and Alphabet v Commission \(Google Shopping\)](#), Luxembourg, 10 November 2021. Similarly, cases against Google in respect of its Android conduct are ongoing after more than 6 years in the European Union and 5 years in Korea. See European Commission, [Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engines](#), 18 July 2018; H Yang, [S.Korea fines Google \\$177 mln for blocking Android customisation](#), *Reuters*, 15 September 2021). In Germany, a case against Facebook is similarly ongoing after more than 5 years. See Bundeskartellamt, [Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules](#), 2 March 2016.

<sup>296</sup> OECD, [Competition Enforcement and Regulatory Alternatives](#), OECD Competition Committee Discussion Paper, 2021, p 25.

<sup>297</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 498.

- businesses collecting and/or disclosing consumer data without express informed consent
- businesses failing to comply with reasonable data security standards, including failing to put in place appropriate security measures to protect consumer data
- businesses making it extremely difficult or almost impossible for a consumer to cancel a service they no longer need or want
- businesses inducing consumer consent or agreement to data collection and use by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information that would enable consumers to properly consider the contract terms, and
- business practices that seek to dissuade consumers from exercising their contractual or other legal rights, including requiring the provision of unnecessary information to access benefits.

The ACCC also notes that in addition to the current ACL and CCA provisions, the Government has recently announced consultation on payment systems reforms to address potential gaps in current regulatory structures, including in relation to competition issues, which may arise from the role of large digital platforms in-app payment services and digital wallets.<sup>298</sup>

### 6.2.1. Limitations of enforcement action

The ACCC considers there are several reasons why the current tools under the CCA and the ACL may not be sufficient alone to address the harms arising in relation to digital platform services due to multiple digital platforms holding substantial market power.

First, investigations and court proceedings are lengthy and necessarily retrospective in effect, seeking to address competition and consumer harms after they have occurred. For example, the EC's cases against Google, regarding Google Shopping and the Android OS, have so far taken seven and five years respectively, not including the appeals processes (see box 6.3). Due to the dynamic nature of digital platform services, there is a risk that market power can be relatively quickly extended and/or entrenched while a case is being investigated and further harm may occur, with potentially irreversible consequences.<sup>299</sup> This dynamic nature also means that many of the competition harms in particular, may be more novel and prospective, which makes them more difficult for a court to assess.

Secondly, the ACCC is only able to address harms that fit within the specific provisions of the CCA and ACL, and cases must typically focus on a very specific breach. This means enforcement action is unable to effectively address the breadth of problematic conduct that a digital platform with substantial market power can engage in.<sup>300</sup> Enforcement of current competition and consumer law may also not be well placed to address the issues arising from the creation of digital platform ecosystems, which have seen digital platforms become de facto regulators of activity and commerce on their networks of products and services (which in many cases is in conflict with their commercial interests).<sup>301</sup>

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<sup>298</sup> Australian Government, [Transforming Australia's Payments System](#), December 2021, pp 4, 8.

<sup>299</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 133.

<sup>300</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 133.

<sup>301</sup> OECD, [Competition Enforcement and Regulatory Alternatives](#), OECD Competition Committee Discussion Paper, 2021, p 25.

Thirdly, it is difficult to use enforcement action to obtain remedies that address the underlying cause of the problems in relation to digital platform services, including the supply of ad tech services,<sup>302</sup> particularly where harm is caused by a lack of competition, or where a market has already tipped in favour of one platform, and where there is a likelihood of harm to competition in many related markets. It may not be possible for specific behavioural remedies, designed in response to individual alleged breaches of the CCA, to be sufficiently flexible to address persistent market-wide issues. Further, the behavioural remedies most likely to be available through enforcement of individual breaches of the CCA also have limitations in addressing structural problems, such as barriers to entry, expansion and exit.

Finally, it is difficult to impose one-off penalties of a scale necessary to deter very large global digital platforms from engaging in similar conduct in the future and encourage a change in behaviour. As the *Unlocking digital competition: Report from the Digital Competition Expert Panel* notes, the fines issued to digital platform companies need to be extremely high to influence behaviour, which could be difficult to impose on a consistent basis.<sup>303</sup> One example is the antitrust investigations and penalties issued to Google in the EU, discussed in box 6.3.

### **Box 6.3 Competition law investigations of Google in the EU**

The EC has made several infringement decisions against Google, including in relation to Google Shopping and the Android OS, which have resulted in fines totalling almost USD10 billion. Google has appealed each of these decisions but lost its appeal in relation to Google Shopping after a ruling by the EU General Court in November 2021.<sup>304</sup>

These cases illustrate how slow competition enforcement can be. For example, excluding the appeal processes, the Google Shopping case took more than seven years, the Android case took more than five years and another case brought by the EC in relation to Google AdSense took nine years.<sup>305</sup>

In its Android case, the EC found that Google had engaged in instances of illegal tying through pre-installation of the Google Search app and the Google Chrome browser on Android devices sold in the European Economic Area (EEA). Search apps represent an important entry point for search queries on mobile devices, as do browsers. Further, Google Search is the default search engine on Google Chrome. The EC concluded that Google's practices denied rival search engines the opportunity to compete on the merits, and that this conduct formed part of an overall strategy by Google to cement its dominance in general internet search, at a time when the importance of mobile internet was growing significantly.<sup>306</sup>

However, this decision – which came five years after the commencement of the EC's investigation – was unable to reverse the impact of this conduct, which enabled Google to extend its market power in the market for general internet search services into search services on mobile devices.

Google subsequently offered to voluntarily implement a choice screen covering browsers and search engines on new and existing Android devices in the EEA. However, only a choice screen for search engines was implemented. This has also had an uncertain impact and there are mixed views about whether Google's choice screen has helped to improve competition.<sup>307</sup> For example, some stakeholders raised concerns to the ACCC about nudges or dark patterns that encourage

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<sup>302</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 133.

<sup>303</sup> Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 58.

<sup>304</sup> F Aulner and F Yun Chee, [Google loses challenge against EU antitrust ruling, \\$2.8-bln fine](#), *Reuters*, 11 November 2021.

<sup>305</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 10.

<sup>306</sup> EC, [Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine](#), Press release, 18 July 2018.

<sup>307</sup> J Whalen, [Europe fined Google nearly \\$10 billion for antitrust violations, but little has changed](#), *The Washington Post*, 10 November 2020. NPR, [Google is appealing a \\$5 billion antitrust fine in the EU](#), *NPR*, 27 September 2021.

users to switch back to the pre-set search engine (Google Search),<sup>308</sup> and concerns that the choice screen created ‘artificial scarcity’ by limiting the places on the choice screen to four search engines, which limited the amount of potential competition to Google.<sup>309</sup> Changes to the choice screen were implemented in September 2021 and the ACCC will continue to monitor the effect of the choice screen remedy in the EU as these new iterations and changes are implemented.

Private actions by Australian businesses to enforce relevant competition and fair trading protections against a large digital platform also face considerable challenges. This is due in part to prohibitive dispute resolution clauses in some digital platforms’ standard terms of service as well as the imbalance in access to financial resources. The latter is particularly likely to influence the ability of smaller businesses to reach a settlement on an issue that impacts their viability without recourse to initiating legal action.

In light of the harms arising from the concentration of market power in the supply of digital platform services, the ACCC is considering whether reform is needed to supplement the CCA and ACL with respect to digital platform services, and if required, what this could look like (this is discussed further in chapters 7 and 8).

The ACCC has already found that its current tools are not adequate on their own to address the systemic harms identified in the *Ad Tech Inquiry Final Report*, which have resulted from Google’s dominance and vertical integration in ad tech services. The ACCC considers that harms are likely to continue to occur across multiple digital platform services in the future in the absence of new measures.

In relation to competition law, the ACCC is considering whether the CCA could be supplemented by additional provisions aimed at addressing both current and future anti-competitive or harmful conduct in relation to digital platform services. These provisions could also seek to address harmful conduct that cannot be sufficiently addressed under the existing CCA, such as systemic, market-wide harms that may only be addressed through structural change. This is discussed further in chapters 7 and 8.

In relation to consumer law, the ACCC considers its findings from the *Digital Platforms Inquiry Final Report* remain relevant, including in relation to unfair trading practices and dispute resolution mechanisms.<sup>310</sup> The ACCC made recommendations in that report relating to consumer protection provisions of the CCA and the ACL discussed in section 5.3 and at **Attachment A** under domestic reform processes.

### 6.2.2. High risk of anti-competitive acquisitions by digital platforms

There are global concerns surrounding the competitive outcomes of several past acquisitions by the largest digital platforms and the challenges faced by competition authorities in assessing such acquisitions. There is a broad recognition from both competition agencies and governments that, given the critical role that large digital platforms and their growing ecosystems perform in the economy, acquisitions by these firms require a higher level of scrutiny.<sup>311</sup> This is seen by the number of legislative proposals being

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<sup>308</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 107.

<sup>309</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 110.

<sup>310</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 25-26.

<sup>311</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 111. Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 6, 95. J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, pp 10-11.

considered around the world seeking to enhance scrutiny of such acquisitions, as outlined in **Attachment A**.

The ACCC has similarly raised the potential for additional measures focused on acquisitions by certain large digital platforms. At the Law Council of Australia's Competition and Consumer Workshop 2021, ACCC Chair Rod Sims outlined ACCC concerns with Australia's current merger laws.<sup>312</sup> Although these concerns are economy-wide, the Chair highlighted that reforms specific to acquisitions by digital platforms may be required and the speech foreshadowed that options would be explored in this discussion paper (and the associated September 2022 report).

Section 50 of the CCA prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia. There is no formal merger approval process in the legislation and merger parties are not required to notify the ACCC ahead of completing a transaction, regardless of the transaction's size or impact on competition. While there is a voluntary practice known as informal merger clearance under which parties often engage with the ACCC ahead of transactions, it is not mandatory and does not restrain completion of the transaction. The statutory prohibition relies on the ACCC enforcing the prohibition on anti-competitive mergers in the Federal Court.

The ACCC has conducted informal public reviews of a number of acquisitions involving digital platform services and ultimately cleared seven transactions.<sup>313</sup> In relation to Google's acquisition of Fitbit (2020), the ACCC published a Statement of Issues outlining its preliminary competition concerns with the acquisition and announced that it would not accept a long-term behavioural undertaking offered by Google.<sup>314</sup> The parties completed the transaction before the ACCC completed its merger review and this matter subsequently became an enforcement investigation.<sup>315</sup>

In relation to Meta's acquisition of Giphy (2020), the parties completed the transaction before notifying the ACCC or any competition authorities in other jurisdictions. The ACCC is investigating this matter as an enforcement matter of a completed acquisition.

While the ACCC has not opposed any acquisitions involving digital platforms under its informal merger review process to date, it is not an outlier. Until very recently, no acquisition by a large digital platform has been opposed by a competition authority.<sup>316</sup>

The network effects underpinning many digital platforms mean that digital platform markets are often highly concentrated. In such markets, the major constraints can come from potential competition which threatens to displace the incumbent's market position. Firms with substantial positions in these markets can undermine this process by acquiring nascent competitors before they can become a substantial threat. It is important that our merger laws capture these types of anti-competitive acquisitions as serial strategic acquisitions by large digital platforms may cause substantial harm to competition and innovation, particularly over the medium to long term.

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<sup>312</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>313</sup> These include the ACCC's informal public reviews of [Google's acquisition of DoubleClick](#) (October 2007) (not opposed); [Microsoft's acquisition of Skype](#) (2011) (not opposed); [Amazon's acquisition of The Book Depository International](#) (2011) (not opposed); [Google's acquisition of Motorola](#) (2012) (not opposed); [Meta's proposed acquisition of Kustomer](#) (2021); [Microsoft's acquisition of Nuance Communications](#) (2021) and [Amazon's proposed acquisition of MGM Holdings](#) (2021) (not opposed).

<sup>314</sup> ACCC, [ACCC rejects Google behavioural undertakings for Fitbit acquisitions](#), 22 December 2020.

<sup>315</sup> ACCC, [Google LLC proposed acquisition of Fitbit Inc](#), 15 January 2021.

<sup>316</sup> Digital Competition Expert Panel, [Unlocking digital competition report](#), 2019, p 91.

Of particular concern is the challenge of trying to prevent acquisitions which might cause a very significant anti-competitive harm (such as buying a nascent potential competitor) but where the probability of that harm arising (e.g., the probability that the nascent potential competitor would become a significant competitor in the future but for the acquisition) may not be high. Such acquisitions are sometimes referred to as ‘low probability/high impact’ acquisitions.

Section 50 of the CCA currently prohibits acquisitions that would have the effect, or be *likely* to have the effect, of substantially lessening competition. Australian courts have interpreted ‘likely’ to mean a ‘real chance’ or real commercial likelihood of a substantial lessening of competition must be proven for a breach of merger law to be established.

While the ACCC accepts that blocking a proposed acquisition requires the anticipated anti-competitive effect to be more than speculative, it has significant concerns that the high degree of certainty that has been expected when applying this test in a contested legal hearing goes beyond establishing a real commercial likelihood of a substantial lessening of competition.<sup>317</sup>

Significant information asymmetries exist between the ACCC and merger parties, and there is a great asymmetry in the ability to prepare evidence about what the target firm would do absent the transaction. Further, the ACCC finds customers and suppliers are reluctant to provide evidence due to concerns about potential retribution and confidentiality.<sup>318</sup>

The ACCC does recognise that predicting the future growth and competitive impact of a target firm at an early stage of its development in a fast-changing dynamic market is clearly difficult. However, the ACCC is concerned that the inherent uncertainty of the forward-looking merger test has resulted in clearance being the default in relation to digital mergers.<sup>319</sup> These concerns also arise economy-wide, and the ACCC has advocated for economy-wide changes to the merger test including to define ‘likely’ as meaning ‘a possibility that is not remote’.<sup>320</sup>

However, the problems with the current merger laws are especially acute in relation to acquisitions by large digital platforms, given the difficulty of predicting the likely future competitive impact of the target, particularly where it is a nascent rival in a fast-changing industry. Reports from the UK and US have also acknowledged that the application of economy-wide merger rules to digital platform acquisitions has tended to result in ‘false negatives’ (approved acquisitions that have resulted in anti-competitive effects) with no ‘false positives’ (blocking acquisitions that should have gone through).<sup>321</sup>

The Stigler Report recommended that current settings should be recalibrated to balance the risks of false positives and false negatives, given that false negatives can be particularly

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<sup>317</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>318</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021; Rod Sims, [Address to the International Competition Network Merger Workshop 2020](#), International Competition Network Merger Workshop, 27 February 2020.

<sup>319</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>320</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>321</sup> See for example, Digital Competition Expert Panel, [Unlocking digital competition report](#), 2019, p 6 and Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, pp 94-96.



costly because the market power of large digital platforms is more enduring, and as potential competitive threats to incumbent firms can be removed through an acquisition.<sup>322</sup>

The ACCC agrees that such recalibration in relation to acquisitions by large digital platforms is important. While the ACCC recognises the inherent difficulties in predicting the future growth and competitive impact of a target firm at an early stage of its development, given the costs of false negatives, the ACCC considers it more appropriate to take a cautious approach.

A further area requiring close scrutiny is acquisitions by large digital platforms of businesses operating in related markets. There are a number of circumstances where these types of acquisitions can be problematic.

One circumstance is where the acquirer is a provider of a key input to a related market. If the acquirer provides services that are considered essential to the operation of the target's service, the acquisition may in certain circumstances result in rival providers of the target's services being foreclosed from effective competition. For example, a key concern of the ACCC regarding Google's acquisition of Fitbit is that Google may use its control of access to key inputs for the supply of wearables, including Google Maps and the Google Play Store, to inhibit or disadvantage rival wearable manufacturers.<sup>323</sup>

Further, acquisitions of firms in adjacent, emerging areas like artificial intelligence and virtual reality may enable dominant digital platforms of today to position themselves to control new and emerging technology. This may be problematic where this enables dominant platforms to expand their ecosystems and erect barriers to entry or otherwise control access to key inputs (such as data) required for effective competition in services across those ecosystems (discussed further below).<sup>324</sup> Meta, for example, has completed acquisitions of virtual reality and augmented reality technology, such as Oculus, Big Box VR and Beat Games amongst others and has stated its focus is to move beyond social media to become a company focused on the 'metaverse'.<sup>325</sup> Meta recently announced its plans to acquire Within, a start-up focused on virtual reality and creator of virtual reality fitness service Supernatural.<sup>326</sup>

Another circumstance arises where the acquirer acts as a gateway or 'gatekeeper' between businesses and consumers. As identified above, a few large digital platforms enjoy an entrenched and durable position in a core platform service (often as a result of conglomerate ecosystems) with other firms reliant on them to provide access to consumers. Acquisitions by such gatekeepers create the risk that a platform will use its gatekeeper status to limit rivals' access to consumers, with the effect of extending its position of market power into these related or dependent markets.

Further, concerns about acquisitions in related markets have also been raised in circumstances where the digital platform does not have control over a key input or act as a key gateway or gatekeeper. As discussed at section 4.2, large digital platforms like Google Search and Meta's social network exhibit substantial network effects. The greater the number of users of these services, the greater the value of the service to each user. These network effects have assisted Google and Meta to accumulate large amounts of consumer data and provide them with substantial advantages over current and prospective rivals. This consumer data, which is important to both product development and increased targeting of

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<sup>322</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, pp 94-96.

<sup>323</sup> ACCC, [Statement of Issues, Google LLC – proposed acquisition of Fitbit Inc.](#), 18 June 2020, p 4.

<sup>324</sup> Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, [Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations](#), 6 October 2020, p 387.

<sup>325</sup> E Culliford, [Facebook sets up new team to work on the 'metaverse'](#), *Reuters*, 27 July 2021.

<sup>326</sup> J Rubin, [Within to join Meta](#), *Oculus Blog*, 29 October 2021.

both content and advertising can be valuable in many markets. An acquisition by a digital platform benefiting from substantial data advantages in one or more markets, can enable it to extend its dominant position to other markets, including emerging and new markets, due to the important economies of scope associated with data agglomeration.

While the ACCC recognises such acquisitions can in many cases provide substantial benefits, including increased efficiencies through the agglomeration of data and enhanced product offerings to consumers, these benefits need to be appropriately assessed and weighed up against longer-term competitive implications of such acquisitions, particularly for emerging markets.

Attempts to remedy the competitive impact of completed acquisitions and past underenforcement poses significant challenges. The US FTC's action against Meta is a current example of an attempt to remedy such underenforcement, discussed in box 6.4.

#### **Box 6.4 US FTC's action against Meta**

In December 2020, the FTC launched a lawsuit against Meta, alleging illegal monopolisation. The FTC alleged that Meta is illegally maintaining its personal social networking monopoly through a years-long course of anti-competitive conduct, which includes engaging in a systematic strategy, including its acquisitions of Instagram and WhatsApp, to eliminate threats to its monopoly.<sup>327</sup> The FTC amended its complaint in August 2021 to allege that after repeated failed attempts to develop innovative mobile features for its network, Meta instead engaged in an illegal 'buy-or-bury' scheme to maintain its dominance.<sup>328</sup> Among other things, the FTC is now seeking divestiture of assets including Instagram and WhatsApp.<sup>329</sup>

The ACCC considers that some acquisitions by digital platforms have contributed significantly to the current levels of market power and high levels of concentration in a number of digital platform markets, and it is very difficult to remedy the anti-competitive effects of these acquisitions under current laws. It is therefore important that our laws are effective in preventing future acquisitions of this type. As noted above, the potential competition issues arising from the limitations with current merger law are not unique to acquisitions by large digital platforms. However, the issues are particularly acute in relation to large digital platforms due to their positions of market power and substantial barriers to entry and expansion, creating a heightened risk of substantial and long-lasting anti-competitive harm.

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<sup>327</sup> FTC, [FTC sues Facebook for illegal monopolization](#), Press Release, 9 December 2020.

<sup>328</sup> FTC, [FTC alleges Facebook resorted to illegal buy-or-bury scheme to crush competition after string of failed attempts to innovate](#), Press Release, 19 August 2021.

<sup>329</sup> FTC, [FTC sues Facebook for illegal monopolization](#), Press Release, 9 December 2020. Facebook's acquisitions of Instagram and WhatsApp in 2012 and 2014 respectively, were both scrutinised by the FTC at the time of the acquisition. In both instances, the FTC did not take any action to stop the acquisitions.

## 7. Regulatory tools to implement potential reform

The ACCC is considering whether a new regulatory framework is needed to supplement the CCA and the ACL with respect to digital platform services in light of the challenges of using existing laws to address the competition and consumer issues arising in respect of these services (discussed in chapter 6).

This chapter outlines the range of regulatory tools that could be adopted in Australia under a new framework. The ACCC expects that, should any new tools be adopted, these would complement the existing competition and consumer law protection provisions in the CCA and the ACL, and that these existing provisions would continue to apply in respect of digital platforms.

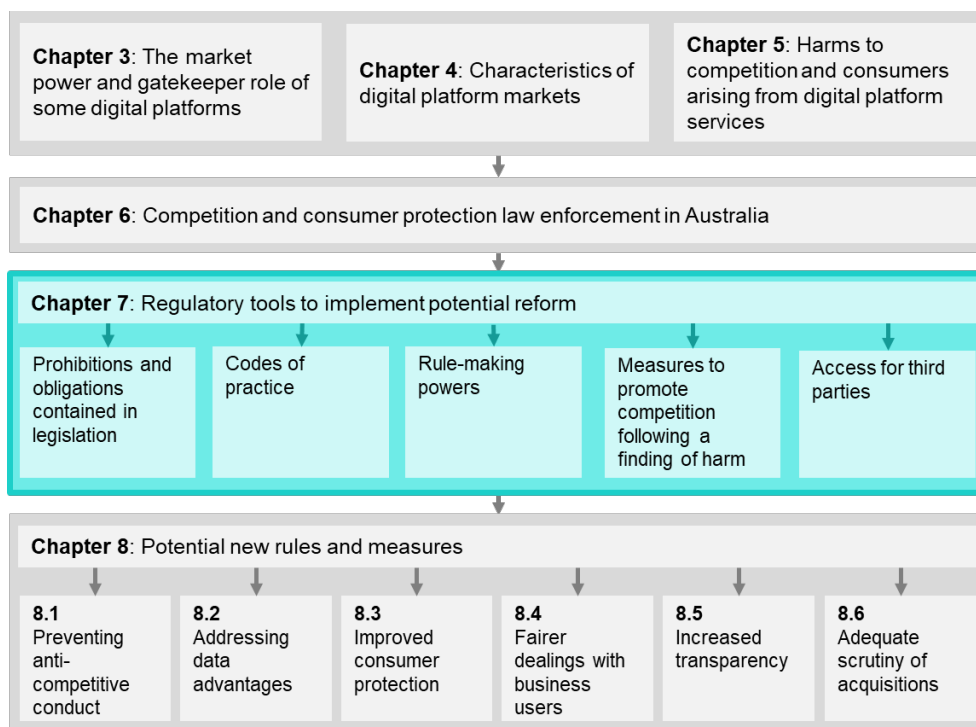
The ACCC is not at this stage endorsing a specific framework but is seeking views on the merits of these different tools, and which, if any, are appropriate for digital platform services in Australia.

The ACCC notes that any new tools should be proportionate and targeted to minimise the risk of undue burden on market participants and any adverse outcomes on efficiency or innovation in relation to digital platform services. The ACCC will carefully consider the benefits and costs of potential regulatory intervention in developing potential recommendations.

This chapter is set out as follows:

- **Section 7.1** outlines the rationale for new regulatory tools.
- **Section 7.2** discusses who a new framework might apply to.
- **Section 7.3** outlines possible legislative and regulatory tools to address competition and consumer harms arising from the supply of digital platform services. These include, but are not limited to:
  - obligations and prohibitions contained in legislation
  - codes of practice
  - rule-making powers
  - measures to promote competition, and
  - third-party access regimes.

## Discussion Paper Roadmap



## Consultation questions

The consultation questions below apply to all of chapter 7.

*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:*

- 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?
- 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 following regulatory tools to competition and consumer harms from digital platform services in Australia?
  - prohibitions and obligations contained in legislation
  - the development of code(s) of practice
  - the conferral of rule-making powers on a regulatory authority
  - the introduction of pro-competition or pro-consumer measures following a finding of a competitive or consumer harm
  - the introduction of a third-party access regime, and
  - any other approaches not mentioned in chapter 7.
- 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?

## 7.1. Rationale for new regulatory tools

The ACCC is considering whether a new framework is needed to supplement the CCA and the ACL with respect to digital platform services, and if required, what this new framework could look like. This is in light of the harms to competition, consumers, and business users arising from the concentration of market power amongst a few large digital platforms. These concerns were discussed in chapters 3, 4 and 5 and draw on the extensive analysis and inquiries completed by the ACCC regarding various digital platform services to date.

As discussed in chapter 6, there are also challenges with bringing enforcement cases against digital platforms under the existing competition and consumer protection laws as these cases are often (and necessarily) narrow and take a long time to proceed. This risks the market moving on before the conduct and harm can be resolved, and in some cases, a successful court outcome is unable to remedy or otherwise undo the damage.

The ACCC will carefully weigh the benefits and risks of any new framework it recommends in its report to the Treasurer in September 2022. A new framework specific to digital platform services has some key benefits over relying on enforcement action under existing competition and consumer laws. In particular, a new regulatory framework could address structural problems in markets for the supply of digital platform services<sup>330</sup> by addressing market contestability issues such as barriers to entry and expansion, multi-homing, and switching, to help keep markets open to entry and expansion.<sup>331</sup> To be effective, a new framework would need to provide sufficient legal certainty for market participants and be flexible enough to adapt to the dynamic and fast-moving nature of digital platform services to mitigate unintended outcomes.

## 7.2. Who might a new framework apply to?

Different measures might apply to different digital platforms or services depending on what issues those measures are seeking to address. In some cases, it may be appropriate that new measures apply only to specific digital platforms. For example, measures to address the consequences of entrenched market power might only need to apply to those large digital platforms with persistent market power. Such platforms could be identified by objective criteria or an assessment linked to their market power and/or strategic position (such as occupying a gatekeeper role).<sup>332</sup>

It may be appropriate for other measures to apply more broadly if their aim is to address systemic, wide-spread harms. For example, it might be appropriate for certain consumer protection measures to apply to all digital platforms. However, in some cases, it may be important to allow for a degree of flexibility or differentiation in the measures to reflect the different business models and market positions of different digital platforms.

There are examples of regulatory frameworks in Australia that apply in relation to key infrastructure which others rely on, such as in the telecommunications and rail sectors. However, there are also examples of frameworks or measures that apply more broadly to multiple (or all) market participants in an industry or market.

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<sup>330</sup> P Akman, [Regulation Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act](#), *European Law Review* (2022), revised version 16 December 2021, pp 16 -17.

<sup>331</sup> P Akman, [Regulation Competition in Digital Platform Markets: A Critical Assessment of the Framework and Approach of the EU Digital Markets Act](#), *European Law Review* (2022), revised version 16 December 2021, p 17.

<sup>332</sup> For example, in the ACCC's Report on Search Defaults and Choice Screens and the Ad Tech Inquiry Final Report, the ACCC recommended that new measures only apply to digital platforms 'that meet certain criteria linked to their market power and strategic position'. See ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 18. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 11.

The number of businesses subject to any new measures may also influence the choice of regulatory tools. For example, where the harm sought to be addressed is associated with the market power of only a few dominant digital platforms, there might be merit in allowing for the measures to be tailored to the specific business models of the relevant digital platforms. However, this may be less appropriate where the measures aim to address concerns which exist in relation to a broader set of businesses (for example, to all digital platforms).

A number of overseas proposals clearly focus on the largest digital platforms and propose different tests for identifying the platforms that would be subject to specific provisions or powers. These include:

- The UK Government's proposal for 'a new pro-competition regime for digital markets', which would apply to firms found by the CMA's Digital Markets Units (DMU) to have Strategic Market Status (SMS). SMS is determined where a firm is found to have substantial and entrenched market power in at least one 'activity' (for example, social media platforms or ad tech products), and that market power provides the firm with a 'strategic position'.
- The EU's proposed Digital Markets Act (DMA), places obligations on 'core platform services' designated with 'gatekeeper' status. Gatekeeper designation will arise either from the operation of a rebuttable presumption linked to quantitative criteria relating to the platforms' economic impact and role as an 'important gateway' between businesses and end users (for example, revenue and user numbers) or from a market investigation by the EC.
- The package of antitrust bills introduced to the US Congress in 2021 aimed at promoting competition and contestability in digital platform markets propose provisions that would apply to 'covered platforms'. Under current proposals, this describes platforms that have 50 million monthly active users or 100,000 monthly active business users, sales or a market capitalisation exceeding USD600 billion, and which are considered critical trading partners for businesses.

Each of these developments is discussed in further detail in **Attachment A**.

### 7.3. Options for implementing new regulatory tools

There are several regulatory tools that could be used to address competition and consumer harms in relation to digital platform services in Australia, as outlined below. These tools could be used individually or in combination to address the broad set of harms that the ACCC has identified in relation to a number of digital platform services.

Several of the tools identified below are already being considered in jurisdictions overseas. Other tools identified are similar to those which apply to other sectors in Australia. While the ACCC is focussed on identifying the best solution for Australian businesses and consumers, the ACCC recognises the global reach of many digital platforms and the benefits for all stakeholders of international regulatory coherence.

An alternative to developing a new framework to address competition and consumer harms associated with a digital platform service(s) would be to address specific harms as they are identified. The Australian Government took this approach with the News Media Bargaining Code, which was designed to address the bargaining power imbalance between digital platforms and news media organisations to help support the sustainability of Australian news media. The Australian Government could continue this approach by, for example,

introducing legislation to address specific issues, for example, to implement a choice screen for search engines<sup>333</sup> or to address other specific concerns identified in ACCC inquiries.

This appears to be the approach taken in some overseas jurisdictions. For example, South Korea has introduced targeted rules to address issues arising in relation to app store services (see box 7.1).

### **Box 7.1 South Korea rules for app stores**

In South Korea, an amendment to the *Telecommunications Business Act* introduced measures to address 'anti-steering' concerns relating to the in-app payment systems in the Apple App Store and Google Play Store. This amendment prevents Apple and Google from requiring app developers to use their proprietary billing system for in-app purchases. It also prevents app store operators from engaging in unreasonable delays in reviewing or rejecting apps. If Apple or Google fail to comply with this new law, they could face fines of up to 3% of their South Korean revenue.<sup>334</sup> Google announced changes to its billing system in South Korea to comply with this law,<sup>335</sup> and Apple has reportedly submitted plans to the regulator outlining its plan for compliance.<sup>336</sup>

Such an approach allows for a tailored response to specific harms as they arise and could potentially reduce the risk of unforeseen consequences. However, given the wide range of competition and consumer issues in relation to digital platform services, a broader framework may ensure the full range of concerns, as well as future changes in relation to these dynamic services, can be addressed. In particular, a broader framework could potentially address systemic issues which can manifest in various ways across digital platforms' ecosystems.

A range of regulatory tools that could potentially be used to address competition and consumer harms associated with digital platform services are discussed below. In practice, there may be overlap between some of these tools, and there is also the potential for a number of these tools to be used in combination (for example, the approach the DMU recommended in the UK).

#### **7.3.1. Prohibitions and obligations contained in legislation**

One potential regulatory tool would be the introduction of a suite of prohibitions and obligations to be included in legislation, to address the multiple harms identified in chapter 5. This could, for example, include prohibitions on certain conduct or obligations to require certain conduct. An example of this approach is discussed in box 7.2.

While there could be common obligations to apply to all parties subject to the provisions, the obligations could also be adaptable to reflect differences in business models or service offerings. For example, there could be a tiered approach with different obligations applying to different sub-categories of digital platforms. The design of any obligations would need to be carefully considered. One such consideration would be that obligations should be precise enough to effectively prevent harmful conduct and reduce the risk of over-capture but should not be so narrow that they can be easily circumvented.

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<sup>333</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 17.

<sup>334</sup> Korea Communications Commission, [Telecommunications Business Act Prohibiting Forced In-App Payment Methods Goes Into Effect](#), Press Release, 14 September 2021.

<sup>335</sup> H Yang, [Google to allow third party app payments for first time in S.Korea](#), *Reuters*, 4 November 2021.

<sup>336</sup> H Yang, J Lee, N Balu, [Apple submits plans to allow alternative payment systems in S.Korea – regulator](#), *Reuters*, 11 January 2022.

One potential issue to consider with this approach is whether it is sufficiently flexible to remain relevant and effective in response to changes in digital platform's business models or operations, and the broader innovations in digital services. This is critical given the dynamic nature of digital platform services.

### **Box 7.2 Digital Markets Act in the EU**

Article 5 of the EC's proposed DMA contains a range of prohibitions and obligations that apply to all digital platforms designated as 'gatekeepers'. The obligations in the DMA were influenced by past and current antitrust cases in the EU, particularly where there is a direct negative impact on business users and consumers.<sup>337</sup> Some of the key obligations in Article 5 of the DMA are that gatekeeper platforms:

- must allow business users to offer the same products or services to end users through third-party online intermediation services at prices or conditions that are different from those offered through the gatekeeper's service
- must allow business users to choose promotion and distribution channels used to reach end users acquired through the gatekeeper's core platform services; and not prevent end users from acquiring content, subscriptions, features or other items outside the gatekeeper's core platform services
- must not prevent business users raising issues with any relevant public authority relating to any practice of gatekeepers
- must not require business users to use, offer or interoperate with the gatekeeper's identification services as a condition of using the gatekeeper's core platform services
- must not require business or end users to use any other core platform services as a condition of access to the gatekeeper's core platform services (i.e. bundling/tying)
- must not combine personal data collected through core platform services with other personal data unless the end user provided consent as defined by the EU General Data Protection Regulation (GDPR).

More detail about the current DMA proposal is outlined in Attachment A.

### **7.3.2. Codes of practice**

Another option that could be implemented, including in combination with any of the other options, is a code or codes of practice to establish clear standards of acceptable conduct. Codes could potentially apply to a specific service offered by a digital platform or to one or more of their services. One of the key benefits of codes is their flexibility in that they can be tailored to suit different circumstances and issues and they can be more easily adapted as circumstances change (compared to prohibitions or obligations contained in legislation, for example).

In Australia, codes of practice are used in a number of sectors, including electricity, banking,<sup>338</sup> dairy, food and groceries,<sup>339</sup> franchising<sup>340</sup> and telecommunications.<sup>341</sup> The ACCC is currently responsible for administering several mandatory industry codes under

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<sup>337</sup> OECD, [Competition Enforcement and Regulatory Alternatives](#), OECD Competition Committee Discussion Paper, 2021, p 31.

<sup>338</sup> Australian Banking Association, [The Banking Code](#), accessed 24 February 2022.

<sup>339</sup> ACCC, [Food and Grocery Code](#), accessed 24 February 2021.

<sup>340</sup> ACCC, [Franchising Code of Conduct](#), accessed 24 February 2021.

<sup>341</sup> ACMA, [Telecommunications Consumer Protections Code](#), 14 July 2021, accessed 24 February 2022.



Part VIB of the CCA, including the Dairy Code of Conduct<sup>342</sup> and the Electricity Retail Code,<sup>343</sup> and could have a role in monitoring the development and compliance with any digital platform industry codes.

Development of a code(s) of practice for digital platforms (that meet certain pre-identified thresholds or apply more broadly) would require close consultation with platforms, business users as well as consumer and industry representative organisations.

In Australia, there are already several existing and proposed codes that relate to specific issues and conduct by digital platforms, discussed further in box 7.3. Any new code(s) of practice would target competition and consumer issues that are not already covered under existing codes. The ACCC is following the development and operation of these codes and should the ACCC propose any new code(s), they would be developed in a way that minimises the risk of duplication or inconsistency in application.

### **Box 7.3 Codes (including proposed codes) applicable to digital platforms in Australia**

#### **Legislative codes**

##### **News Media and Digital Platforms Mandatory Bargaining Code**

This mandatory code of conduct addresses the bargaining power imbalance between Australian news media businesses and digital platforms and ensures that news media businesses registered under the code can bargain in good faith with designated digital platforms for the news content featured on digital platform services. It provides that the Treasurer may designate a digital platform corporation and digital services that must comply with the code.<sup>344</sup> To date, the Treasurer has not designated any digital platforms under the code, although the passage of this legislation has incentivised major digital platforms, Google and Meta, to undertake voluntary commercial negotiations with a range of Australian news businesses. A statutory review of this code will be conducted by the Treasury, commencing in March 2022.

##### **Online Safety Act code to regulate harmful online content**

The *Online Safety Act 2021* provides for the establishment of new industry codes or standards in relation to the online industry. Under this Act, a new code is being developed to regulate harmful online content and would apply to a wide range of industry participants including providers of social media, email, messaging, gaming, dating, search engine and app distribution services, and internet and hosting service providers, manufacturers and suppliers of equipment used to access online services and those that install and maintain the equipment.<sup>345</sup>

##### **Online Privacy code**

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 social media and other 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 codes. It is proposed the code will apply to organisations that provide social media services, data brokerage services, and large online platforms.<sup>346</sup>

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<sup>342</sup> ACCC, [Dairy Code of Conduct](#), accessed 24 February 2022.

<sup>343</sup> ACCC, [Electricity Retail Code](#), accessed 24 February 2022.

<sup>344</sup> The Parliament of the Commonwealth of Australia, House of Representatives, [Treasury Laws Amendment \(News Media and Digital Platforms Mandatory Bargaining Code\) Bill 2021](#).

<sup>345</sup> eSafety Commissioner, [Development of industry codes under the Online Safety Act: Position Paper](#), September 2021.

<sup>346</sup> Australian Government Attorney-General's Department, [Explanatory Paper: Privacy Legislation Amendment \(Enhancing Online Privacy and Other Measures\) Bill 2021](#), October 2021. Australian Government Attorney-General's Department, [Online Privacy Bill Exposure Draft](#), accessed 24 February 2022.

## Industry codes

### **Australian Code of Practice on Disinformation and Misinformation**

This voluntary code of practice has been developed by the Digital Industry Group Inc (DIGI) and launched on 22 February 2021 and is overseen by the Australian Communications and Media Authority (ACMA). The code has been adopted by Adobe, Apple, Meta, Google, Microsoft, Redbubble, TikTok and Twitter. The signatories commit to developing and implementing safeguards to protect Australians against harm from online disinformation and misinformation, and to adopting a range of scalable measures that reduce its spread and visibility.<sup>347</sup>

This approach is also seen in the UK Government's proposed pro-competition regime for digital markets, which proposes individual codes of conduct for firms designated as having SMS in a digital activity, as discussed in **Attachment A**. Once designated, a SMS firm would then be subject to one or more enforceable codes of conduct which sets out how it is expected to behave in relation to the activity where it has SMS. While the SMS designation is proposed to apply to an entire corporate group, the code/codes would only apply to the activity or activities in which the firm is found to have SMS. While each code would outline specific principles that provide a more detailed articulation of what the firm must do (or not do) to comply, each code would be governed by high level objectives ('fair trading', 'open choices' and 'trust and transparency') that may be set out in legislation.<sup>348</sup> 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.

### **7.3.3. Rule-making powers**

Another option would be for legislation to provide the ACCC or another authority with the powers to develop and implement rules to achieve overarching objectives or principles contained in the legislation. Empowering a regulatory authority to develop such rules, which would apply to those digital platforms covered by the legislation, or as identified in the rules, would enable prohibitions and/or obligations to be detailed and potentially adaptable in their application. Such rules could potentially apply to a specific digital platform service, or a specific digital platform firm, depending on the problem that the rules sought to address. Rules put in place by a regulatory authority are also typically much easier to change in a timely manner in response to new developments or market conditions, compared to legislated obligations and prohibitions.

In Australia, the Australian Energy Market Commission (AEMC) makes rules under relevant legislation that governs the electricity and natural gas markets – the National Electricity Rules, the National Gas Rules and the National Energy Retail Rules.<sup>349</sup> The National Electricity Rules set out procedures that govern the operation of the electricity market relating to wholesale trading, for example, including provisions relating to the operation of the spot market, spot price determination, and market information requirements and obligations.<sup>350</sup> The National Energy Retail Rules include, for example, model terms and conditions for standard retail contracts about the sale of energy to residential and business customers at their premises, including specific rights and obligations about energy marketing, payment methods and arrangements for customers experiencing payment difficulties.<sup>351</sup>

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<sup>347</sup> DiGi, [Disinformation Code: About the Code](#), accessed 24 February 2022.

<sup>348</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, pp 27-28.

<sup>349</sup> [Australian Energy Market Commission](#), accessed 24 February 2022.

<sup>350</sup> [National Electricity Rules](#), version as at 16 November 2021.

<sup>351</sup> [National Energy Retail Rules](#), version as at 16 November 2021.

### **7.3.4. Measures to promote competition following a finding of competition or consumer harm**

Another option would be to establish a provision that would allow a pro-competition or pro-consumer measure to be put in place or imposed on a particular platform or set of platforms, following a finding of a competitive or consumer harm. Measures implemented in such a way could work together with any of the other approaches identified in this chapter.

A pro-competition measure could require a firm to provide third parties with access to data (subject to managing privacy and confidentiality concerns) or provide consumers with an option to change default settings or prohibit the pre-installation (or exclusive pre-installation) of a service, if a finding has been made that there is significant anti-competitive or consumer harm arising, or such a measure would significantly lower barriers to entry.

Such measures could operate in a similar way to that envisaged in the UK Government's proposed pro-competition regime for digital markets, which incorporates the use of 'Pro-competitive interventions' where the CMA's DMU finds conduct has an adverse effect on competition. These pro-competitive interventions are intended to be agile and flexible to keep pace with fast-moving and dynamic digital markets.<sup>352</sup> It is proposed that pro-competitive interventions 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.<sup>353</sup> The UK approach is also discussed in **Attachment A**.

Currently, in Part XIB of the CCA, the ACCC can issue notices to telecommunications companies where they are believed to have been, or currently be, engaging in anti-competitive conduct. There are parallels between this telecommunications model and the option discussed above.

### **7.3.5. Access for third parties**

There has been debate about whether certain services offered by a few large digital platforms such as Google, Meta and Amazon, should be classified as 'essential facilities' similar to national infrastructure and 'natural monopolies' like rail, telecommunications and electricity, and be subject to obligations akin to an access regime.

Parallels can be drawn between digital platform services and other services with common characteristics such as direct network effects, economies of scale and the range of services on offer which gives firms opportunities to bundle or tie services.<sup>354</sup>

This is because digital platforms with substantial market power are able to leverage network effects and barriers to entry to build scale and protect themselves from competition, becoming unavoidable gatekeepers between businesses and consumers.

In its recent judgment relating to the Google Shopping case in the EU, for example, the General Court of the EU considered that the general search results page of Google Search has similar characteristics to an essential facility as there is currently no actual or potential

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<sup>352</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, pp 35-36.

<sup>353</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 34.

<sup>354</sup> Frontier Economics, [Policy Makers Focus on Big Tech: What, if anything, can be learnt from the telecoms sector?](#), p 2. ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, pp 133-134,

substitute available that would enable it to be replaced in an economically viable manner on the market.<sup>355</sup>

The ACCC has a number of existing regulatory roles in relation to telecommunications services (see box 7.4) and other services which display characteristics of essential facilities and natural monopolies.

#### **Box 7.4 Existing sector-specific competition and access functions in the CCA**

The ACCC has an existing regulatory role under Part XIC of the CCA in relation to the telecommunications sector.

The ACCC may declare a service following a public inquiry if it is satisfied the declaration will promote the long-term interests of end users. Another way a service may become declared is if a party gives the ACCC a special access undertaking in relation to a service, and the ACCC must decide whether it accepts or rejects the undertaking (the ACCC may also declare the service even if it is covered by a special access undertaking). Once a service is declared the access provider is subject to standard access obligations. The CCA gives the ACCC the power to make binding rules of conduct and access determinations that set terms and conditions of access in the event that parties do not enter into their own access agreement.

Declaration of a service can promote competition where access to a specific service is needed for all parties to compete effectively, and a monopoly provider is restricting, or has the ability to restrict, this access. The ACCC may make access determinations that would set price and other terms and conditions of access for declared services.<sup>356</sup>

Currently the CCA does not provide for the ACCC to perform similar functions in relation to other services, such as digital platforms services. However, the ACCC is considering whether a similar approach could be used to address some of the harms and conduct arising in relation to these services.

Access to certain data, for example, is a key barrier to entry and/or expansion in the supply of some digital platform services.<sup>357</sup> Declaring access to certain data, such as click-and-query data in the market for search services, could reduce a significant barrier to entry or expansion for market participants and help to foster a more competitive environment. However, the ACCC notes that the design and implementation of such measures would require careful consideration to ensure they include appropriate safeguards to protect consumers' privacy. Search engines use this data to improve their search algorithm and hence, the quality of their offering, to be more competitive.<sup>358</sup>

Access determinations for digital platform services could also be complemented by conduct prohibitions and obligations, proactive measures and/or codes of practice in a similar way to how Part XIC is complemented by Part XIB of the CCA (which relates to anti-competitive conduct in the telecommunications sector).

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<sup>355</sup> General Court of the European Union, [The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services](#), Press Release, 10 November 2021, p 2.

<sup>356</sup> More information about the ACCC's regulation of the telecommunications sector is available [here](#).

<sup>357</sup> Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 33. M Iansiti, [The Value of Data and its Impact on Competition](#), Harvard Business School, 2021, pp 3-4.

<sup>358</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 13.

## 8. Potential new rules and measures

This chapter discusses a range of potential new rules or measures that could be introduced to prevent and/or remedy the competition and consumer harms arising in relation to digital platform services. The potential rules and measures identified in this chapter could be implemented via the tools that were discussed in chapter 7.

The ACCC notes that the discussion of a wide range of potential rules and measures in this chapter does not necessarily indicate the ACCC's support for, or intention to recommend, all (or indeed any) of them. Nor should it be read as a comment on potential reforms being pursued in other policy domains, such as those announced in relation to payment systems.<sup>359</sup> The ACCC welcomes stakeholder views on the feasibility and effectiveness of the measures discussed below in addressing the competition and consumer issues that have been identified in relation to digital platform services in Australia.

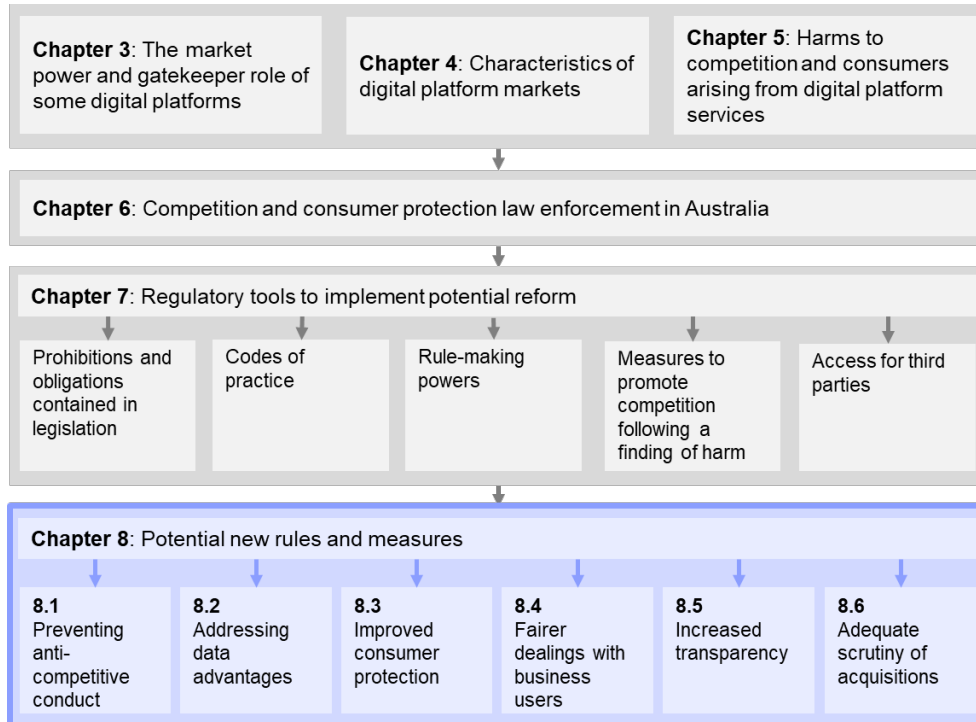
This chapter is set out as follows:

- **Section 8.1** outlines proposals to prevent harms arising from anti-competitive conduct.
- **Section 8.2** discusses proposals to address some digital platforms' data advantages.
- **Section 8.3** outlines proposals to improve consumer protection in the supply of digital platform services.
- **Section 8.4** sets out proposals to improve the fairness of dealings between some digital platforms and their business users.
- **Section 8.5** discusses proposals to increase transparency of digital platform services.
- **Section 8.6** discusses proposals to ensure adequate scrutiny of digital platforms' acquisitions.

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<sup>359</sup> Australian Government, [Transforming Australia's Payments System](#), December 2021.

## Discussion Paper Roadmap



## Consultation questions

The consultation questions below apply to the relevant sections of chapter 8.

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

### 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?

### Improved consumer protection

11. What additional measures are necessary or desirable to adequately protect consumers against:
  - a) the use of dark patterns<sup>360</sup> online
  - b) scams, harmful content, or malicious and exploitative apps?
12. Which digital platforms should any new consumer protection measures apply to?
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?

### **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?
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?

### **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?

### **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?

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<sup>360</sup> The design of user interfaces intended to confuse users, make it difficult for users to express their actual preferences, or manipulate users into taking certain actions.



## 8.1. Preventing anti-competitive conduct

As discussed in chapter 3, several large digital platforms have increased or maintained their market power in Australia over the past decade, aided by strategic acquisitions and expanding ecosystems of online services. As a result, these platforms are now important gatekeepers for many businesses to reach Australian consumers. The market power of these digital platforms is reinforced by economies of scale, a range of network effects, data-driven economies of scale, advantages of scope, and a lack of transparency.

This combination of features may mean that some digital platforms can effectively set the rules of the game regarding the functioning of products and services in which they are dominant.<sup>361</sup> As such, the ACCC is considering measures to prevent particular digital platforms from engaging in anti-competitive conduct, such as:

- anti-competitive self-preferencing
- imposing restrictive or discriminatory terms of service
- limiting access to key inputs required for competition in related services, and
- limiting interoperability with key services.

The ACCC welcomes stakeholder views regarding the necessity and effectiveness of additional rules to regulate anti-competitive conduct in relation to digital platform services. The ACCC is also seeking feedback regarding the formulation of such rules, having regard to the need for both clear guidance on what constitutes anti-competitive conduct as well as maintaining adaptability to fast-evolving digital platform services.

The ACCC notes that many overseas jurisdictions have introduced, or have proposed to introduce, additional rules to regulate the conduct of certain digital platforms – see further discussion in box 8.1.

### Box 8.1 Overseas reforms to regulate the conduct of digital platforms

Overseas jurisdictions have also recognised the harms to the competitive process caused by digital platforms' market power, and have implemented, or are proposing to implement, measures to prevent and address anti-competitive conduct by gatekeeper digital platforms.

In the **UK**, the proposed codes of conduct applying to a few large digital platforms with SMS are expected to be guided by overarching objectives of 'fair trading', 'open choices', and 'trust and transparency'.<sup>362</sup> Each proposed Code of Conduct aims to manage the effects of the relevant digital platform's market power and to anticipate and prevent that platform from engaging in practices which exploit consumers and businesses or exclude innovative competitors.<sup>363</sup>

In the **EU**, the proposed DMA includes numerous conduct obligations on gatekeeper digital platforms such as requiring gatekeeper digital platforms to:

- allow businesses to interact with consumers on their platforms, including in relation to off-platform payment options, and the offering of discounts and promotions<sup>364</sup>

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<sup>361</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 60.

<sup>362</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 27.

<sup>363</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 27.

<sup>364</sup> DMA Article 5 (b) & (c).

- fairly rank a platform’s own services and products alongside comparable services and products offered by third parties<sup>365</sup>
- allow consumers the ability to review and un-install any pre-installed software<sup>366</sup>
- provide fair and non-discriminatory conditions of access to its app stores,<sup>367</sup> and
- allow third-party apps similar access to the operating system, hardware or software features that are available to the digital platform’s first-party apps where it is possible to do so without compromising the security of the device.<sup>368</sup>

In **Germany**, the 10<sup>th</sup> Amendment to the *German Competition Act* gives the Bundeskartellamt the ability to prohibit companies designated as having paramount significance in a market from engaging in anti-competitive conduct including self-preferencing.<sup>369</sup>

In the **US**, members of the House Judiciary Committee have introduced a suite of bills to regulate digital platform services aimed at ‘holding unregulated Big Tech monopolies accountable for anti-competitive conduct.’<sup>370</sup> These bills include provisions preventing ‘covered platforms’ from restricting interoperability, and self-preferencing their services,<sup>371</sup> as well as requirements for covered platforms to facilitate interoperability and manage conflicts of interest.<sup>372</sup>

In **Japan**, on 27 May 2020, the Japanese legislature passed the *Act on Improving Transparency and Fairness of Digital Platforms*. The Act requires that specified digital platform providers develop procedures that ensure fairness and reporting on the measures that they have implemented.<sup>373</sup>

In **South Korea**, on 31 August 2021, the South Korean Parliament passed a bill that prevents Apple and Google from requiring app developers to use only their billing system for in-app purchases.<sup>374</sup>

### 8.1.1. Prohibitions against exclusionary conduct, including anti-competitive self-preferencing and leveraging

Although self-preferencing conduct is often benign, self-preferencing conduct that leverages market power over a key online service into a related service, which is not justified by a pro-competitive rationale, can distort competition and decrease consumer welfare.<sup>375</sup> Similarly, self-preferencing or other leveraging conduct can harm consumers when it affects a rivals’ ability to compete in related services. Examples of conduct that can potentially have this effect include restricting access to a key input or providing rivals with less favourable access.

Rules against anti-competitive self-preferencing conduct could prevent digital platforms using their control of key services to favour their own services and harm competition in related markets. They could also require digital platforms to provide fair and non-

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<sup>365</sup> DMA Article 6(d).

<sup>366</sup> DMA Article 6(b).

<sup>367</sup> DMA Article 6(k).

<sup>368</sup> DMA Article 6(f).

<sup>369</sup> Bundeskartellamt, Amendment of the German Act against Restraints of Competition, p. 2.

<sup>370</sup> Congressman David Cicilino, Press Release, [House Lawmakers Release Anti-Monopoly Agenda for “A Stronger Online Economy: Opportunity, Innovation, Choice”](#), 11 June 2021.

<sup>371</sup> [American Innovation and Choice Online Act](#)

<sup>372</sup> [Ending Platform Monopolies Act](#)

<sup>373</sup> Ministry of Economy, Trade and Industry, [Key Points on the Act on Improving Transparency and Fairness of Digital Platforms](#), last updated 16 April 2021, accessed 7 December 2021.

<sup>374</sup> Reuters, [South Korea’s parliament passes bill to curb Google, Apple commission dominance](#), accessed 30 November 2021.

<sup>375</sup> Digital Competition Expert Panel, [Unlocking digital competition report](#) (2019), p 45. J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 7.

discriminatory terms of access to key services or platforms and prevent anti-competitive tying or bundling. Such rules may include, for example:

- Prohibitions on self-preferencing conduct that prevents competition on the merits, such as prohibiting search engine operators from favouring their own downstream services, demoting rival services in search results, or prohibiting operating systems from preferencing their own apps without a reasonable justification (for example, search, maps, gaming etc).
- Obligations to treat competitors fairly or in a non-discriminatory manner; for example, requiring app store operators to provide third-party apps with fair terms and conditions of access to app stores or to allow the un-installation of any non-essential pre-installed software applications.
- Rules to require that digital platforms provide access to key inputs on fair and non-discriminatory grounds.

The ACCC has considered the need for such rules in its past reports. In its examination of app marketplaces, the ACCC noted concerns that apps may not be treated equally on their merits and that certain apps may receive preferential treatment regarding the display and discoverability in app marketplaces, the ability of consumers to rate and review apps, and the pre-installation or default settings of certain apps.<sup>376</sup> To address these concerns, the ACCC found there is a need to provide for greater choice of default apps for consumers, greater transparency of app marketplace discoverability and display algorithms, and to provide consumers with the ability to rate and review a digital platform's own first-party apps alongside third-party apps.<sup>377</sup>

In its report on search defaults and choice screens, the ACCC has recommended that it be given powers to implement measures preventing particular search engine providers (based on their market power and strategic position) from tying or bundling their search engine services with other products or services and paying for certain default positions.<sup>378</sup>

The ACCC also recommended the implementation of a mandatory choice screen – which would provide users with the ability to choose which search app will be used as the default for searches conducted on their mobile device – initially only for Android mobile devices, but which could be extended to other apps as required (i.e. where the incumbent app provider holds significant market power and the app provides a gateway service).<sup>379</sup> In recommending these potential measures, the ACCC emphasised the need for user testing and detailed consultation with industry.

The ACCC's *Ad Tech Inquiry Final Report* also recommended similar rules to manage conflicts of interest and prevent anti-competitive self-preferencing in the supply of ad tech services, identifying specific examples of how these rules could be developed.<sup>380</sup> This report recommended that these rules should be developed by the ACCC and apply to particular ad tech providers that meet criteria linked to their market power and strategic position.<sup>381</sup>

Since these reports, the European General Court's recent judgment regarding Google search has underscored the need for conduct rules. In particular, the European General

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<sup>376</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 7-8.

<sup>377</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 7-8.

<sup>378</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 123.

<sup>379</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 122.

<sup>380</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 11.

<sup>381</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 11.

Court's upheld the EC's decision that Google anti-competitively favoured its own comparison-shopping services by displaying its own service more prominently on its general results page and demoting rival services.<sup>382</sup>

While conduct rules would be novel in the context of digital platforms in Australia, Australian energy markets demonstrate a precedent for applying sector-specific conduct rules to promote competition, as noted in chapter 7. The AER issues ring-fencing guidelines which aim to prevent regulated businesses from discriminating in favour of their own related parties to disadvantage competitors operating in upstream or downstream markets.

While anti-competitive self-preferencing, bundling and tying are common concerns across a range of digital platform markets, such conduct can take different forms and have different impacts when conducted by different types of digital platforms. The ACCC also recognises that there may be legitimate justifications for such conduct (e.g. promoting efficiency or addressing security or privacy concerns) that would need to be carefully considered in each instance. This suggests that any high-level general prohibition on self-preferencing is likely to need to be limited so as not to catch those situations where there are legitimate reasons for the conduct, or the benefits of the conduct outweigh the anti-competitive harm. Alternatively, the rules might need to be specifically tailored to each digital platform service with a high level of precision, to target the specific conduct that causes anti-competitive harm.

### 8.1.2. Enhancing interoperability of services

Interoperability means that services from outside a digital platform's ecosystem can work together with services from inside that ecosystem, such as operating systems that run third-party apps.<sup>383</sup> Promoting interoperability between services strengthens competition by lowering switching costs for consumers and allows rivals to compete on the merits of the specific service.<sup>384</sup>

As such, the ACCC is considering measures to ensure that digital platforms that control large ecosystems of services do not unfairly exclude rivals by limiting interoperability. These may include obligations such as requiring, wherever possible, that third-party apps are given comparable access to device hardware or operating system features as a digital platform's own first-party apps. (The ACCC is also considering potential ways of increasing data interoperability, discussed at section 8.2.1.)

Apple and, to a lesser but still significant extent Google, control the OS and device functionality that third-party apps can access.<sup>385</sup> The ACCC has found that, where third-party apps do not have access to the same functionality as Apple and Google's first-party apps, they may not be able to compete effectively, which may reduce consumer choice and innovation.<sup>386</sup> An example of this is app developers' access to 'tap-and-go' functionality of NFC technology in iPhones, which has been raised as a concern in recent reports.<sup>387</sup> As

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<sup>382</sup> General Court of the European Union, [The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services](#), Press Release, 10 November 2021.

<sup>383</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 38.

<sup>384</sup> This is also referred to as 'protocol interoperability' in J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 83.

<sup>385</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 44.

<sup>386</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, pp 44.

<sup>387</sup> Australian Government, [Payments system review – from system to ecosystem](#), June 2021, p 79; Parliamentary Joint Committee on Corporations and Financial Services, [Mobile Payment and Digital Wallet Financial Services](#), October 2021, p 49; RBA, [Review of Retail Payments Regulation Conclusions Paper](#), October 2021, p 60.

noted elsewhere, the Government has proposed certain reforms that may allow competition issues (among other goals) to be examined within existing payments systems regulation.<sup>388</sup>

Overseas regulators have launched investigations into Apple's restrictions on interoperability between third-party apps and aspects of Apple's device hardware and software, including the EC and the Netherlands Authority for Consumers and Markets (ACM).<sup>389</sup> The EU's proposed DMA also includes rules to mandate greater interoperability with a digital platform's services – see further discussion in box 8.1.

## 8.2. Addressing data advantages

The ACCC is considering whether measures to address incumbents' data advantage may be effective in addressing competition concerns in the supply of digital platform services. These may include remedies aimed at increasing data access, such as promoting data portability and interoperability, as well as remedies aimed at limiting data use such as mandating data separation.

### 8.2.1. Increased access to data for rivals or potential rivals

#### *(a) Data portability measures*

Data portability measures facilitate transfers of data at a consumer's request. Measures to increase data portability could require platforms to action consumers' requests to export their data from one service to another without excessive friction. They could also require that digital platforms do not block tools developed to help consumers export their data<sup>390</sup> or require the development of IT systems to facilitate such transfer.

Data portability could address the competitive advantage of large digital platforms by facilitating consumer switching between some competing digital platform services. For example, the ability to export friends' contact information could facilitate a consumer's switch from one social network to another. By lowering switching costs for consumers, data portability may lessen lock-in effects of some digital platform services and promote competition by reducing barriers to entry and expansion.<sup>391</sup> Portability of data held by digital platforms may also deliver significant benefits to current and potential future markets, including through innovation and the development of new services.<sup>392</sup>

The ACCC has found that, subject to consideration of privacy impacts as well as careful design and ongoing monitoring, certain search engine providers should provide access to click-and-query data, and potentially other datasets.<sup>393</sup> The ACCC has also recommended the implementation of sector-specific rules to prevent Google from leveraging its extensive

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<sup>388</sup> Australian Government, [Transforming Australia's Payments System](#), 8 December 2021.

<sup>389</sup> European Commission, [Antitrust: Commission opens investigation into Apple practices regarding Apple Pay](#), 16 June 2020, accessed 24 March 2021. Authority for Consumers and Markets, [ACM launches an investigation into users' freedom of choice regarding payment apps on smartphones](#), 4 December 2020, accessed 24 March 2021.

<sup>390</sup> For example, in 2018 Facebook blocked a tool developed to help users extract contact information from their Facebook friends and importing this into rival social media platform Google+ S Shankland, [Facebook blocks contact-exporting tool](#), *cnet*, 5 July 2011.

<sup>391</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 8. D L. Rubinfeld and M Gal, [Access Barriers to Big Data](#), *Arizona Law Review* 339 (2017), 26 August 2016, p 30. ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 115.

<sup>392</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 11.

<sup>393</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p123.

first-party data to advantage its own ad tech services, including data access requirements, provided they can be implemented in a way that adequately protects consumers' privacy.<sup>394</sup>

The Consumer Data Right (CDR) is an example of new regulation giving Australian consumers greater access to and control over their data— see discussion in box 8.2.<sup>395</sup> At the time of the *Digital Platforms Inquiry*, the ACCC found that increasing data portability obligations was unlikely to address the market power and competition issues it had identified in digital platform markets in the short-term.<sup>396</sup> This was because there are limited alternatives for some digital platform services for consumers to upload their data onto, and there appear to be limited incentives for users to port data in relation to some digital platform services such as online search.<sup>397</sup>

Another example of a data portability initiative currently being implemented internationally is the Data Transfer Project, with large digital platforms including Apple, Meta, Google, Microsoft, and Twitter participating in developing secure standards for transferring user data from one service to another.<sup>398</sup>

### **Box 8.2 The Consumer Data Right**

The CDR was introduced by the Australian Government on 26 November 2017. The aim of the CDR is to give consumers greater access to and control over their data, to improve consumers' ability to compare and switch between products and services. It will encourage competition between service providers, leading not only to better prices for customers but also more innovative products and services.

The ACCC is currently working with the Department of the Treasury, the Data Standards Body, and the Office of the Australian Information Commissioner in delivering the CDR in Australia. The banking sector is the first sector to be designated as being subject to the CDR. This means that consumers can choose to share their existing banking data, such as their transaction history, interest rate and account balances, with a prospective bank or CDR-accredited finance-related app or website.<sup>399</sup> The CDR will be introduced next in the energy sector and then the telecommunications sector. Under the CDR, a data holder in a designated sector (for example, a bank) must facilitate and fulfil the consumer's request to share their data, and penalties can apply if it doesn't meet these obligations.

To protect the information being accessed under the CDR, there are strong privacy and information security protections in the legislation and rules implementing the CDR in the banking sector. These include continuing notification requirements for data collection, time-limited consents, requirements for destruction or de-identification of redundant data, individual rights of action for breach, and civil penalties for breach.<sup>400</sup>

### **(b) Data interoperability measures**

Section 8.1.2 discusses possible measures to enhance interoperability between digital platforms' services. In many cases, a key component of any such service interoperability is likely to be data interoperability. However, there may be circumstances in which data

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<sup>394</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 82.

<sup>395</sup> See ACCC, [Consumer data right \(CDR\)](#).

<sup>396</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p115.

<sup>397</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p116.

<sup>398</sup> [Data Transfer Project](#), accessed 7 December 2021.

<sup>399</sup> Australian Government, Consumer Data Right, [What is CDR?](#), accessed 24 February 2022.

<sup>400</sup> See ACCC, [Consumer data right \(CDR\)](#).

interoperability may be important, but not service interoperability. This section focusses on possible ways to achieve data interoperability.

Data interoperability encourages the use of common frameworks and open systems to store and process data in ways that are technically compatible between services, including services offered by competing digital platform firms. Data interoperability can facilitate data portability and data sharing/access measures; however, interoperability refers specifically to the frameworks and systems that enable compatibility between different services and competing firms. In some cases, this can enable the continuous or real-time sharing of data between firms.<sup>401</sup>

Given the importance of data inputs for the supply of certain digital platform services, data interoperability is a key component of enabling greater overall interoperability between digital platform ecosystems. Data interoperability can facilitate multi-homing across different digital platform services and enable different firms to offer complementary services.<sup>402</sup> By enabling data collected by one firm to be used by a rival, data interoperability measures also have the potential to lower barriers to entry for smaller rivals where access to certain types of data is needed to compete effectively.

The ACCC has previously noted concerns from stakeholders regarding the lack of interoperability of data between digital platforms' ecosystems. For instance, since 2018 Google has been limiting the user ID information that can be accessed by advertisers and other attribution service providers. The ACCC has found that this makes it difficult for advertisers to independently compare the performance of ads purchased through Google's ad tech services with rival ad tech services.<sup>403</sup>

Numerous overseas reports have discussed the potential for data portability and interoperability obligations as potential remedies to promote competition in digital platform markets.<sup>404</sup> Data portability and interoperability obligations are also a common feature of overseas reforms in relation to digital platforms services – see box 8.3.

### ***(c) Other measures to increase data access***

There are a range of other measures to increase access to data, including data sharing or data pooling arrangements, and mandatory data access arrangements. These measures have the potential to resolve data bottlenecks or to enable firms to develop new or better products or services or to train algorithms.<sup>405</sup>

Another potential measure to increase access to personal data is the use of data banks or information banks. Data banks can provide firms with access to their databases of personal data, while giving the individual supplying personal data robust controls to select the types of data to be accessed and which specific firms have access to their information.<sup>406</sup> In Japan,

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<sup>401</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, pp 8-9.

<sup>402</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 8.

<sup>403</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 162.

<sup>404</sup> Stigler Center for the Study of the Economy and the State, [Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report](#), 1 July 2019, p 117, J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 74, Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 76; Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, [Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations](#), 6 October 2020, p 385-86.

<sup>405</sup> J Cremer, Y de Motjaye and H Schweitzer, [Competition policy for the digital era](#), European Commission Directorate-General for Competition, 20 May 2019, p 9.

<sup>406</sup> See, e.g., *Japan Times*, [Japan grants certification for first time to 'information banks'](#), 9 July 2019, accessed 13 December 2021.

seven Personal Data Trust Banks have been certified to facilitate sharing of personal data with individuals' informed consent – see further box 8.3.<sup>407</sup>

The ACCC welcomes views from stakeholders on the full range of potential data access measures.

### **Box 8.3 Overseas reform proposals that increase access to data**

Many overseas reform proposals feature data portability, data interoperability, and data access requirements. In the **EU**, the General Data Protection Regulation already gives EU citizens the right to data portability in the EU, and the proposed DMA also contains provisions requiring effective data portability and interoperability as well as sharing access to search engines' click-and-query data.<sup>408</sup> In addition, the EU's proposed Digital Services Act includes provisions for sharing of data with authorities and researchers.<sup>409</sup>

In the **US**, the proposed Augmenting Compatibility & Competition by Enabling Service Switching Act imposes both data portability and interoperability requirements on 'covered digital platforms'.<sup>410</sup>

In the **UK**, the codes of conduct proposed to be implemented under the UK Government's proposed new pro-competition regime for digital markets (see Attachment A) could include principles preventing designated digital platform suddenly restricting a third party's access to key data. The proposed reform also gives the UK's DMU the ability to implement individual 'pro-competitive interventions'. According to a CMA report that first advocated for pro-competitive interventions, examples of these measures may include mandating interoperability and portability, third-party access to click and query data, and mandating data separation and/or silos, giving consumers a choice to not share their data, as well as requiring access to data for third-party ad tech verification and measurement services.<sup>411</sup>

In **Israel**, the Competition Authority and Consumer Protection and Fair Trade Authority, in conjunction with the Privacy Protection Authority, has recently recommended the establishment of a statutory right to data portability.<sup>412</sup>

In **Japan**, the Japanese Government has released a Guideline on Certification of Personal Data Trust Banks, which sets out a system to certify firms as 'Personal Data Trust Banks' to promote the distribution and utilisation of personal data with individuals' consent.<sup>413</sup> As of March 2021, seven Personal Data Trust Banks have been certified by the Information Technology Federation of Japan.<sup>414</sup> According to a White Paper published by the Japanese Government, the launch of initiatives such as personal data trust banks has been accompanied by a decrease in the number of consumers feeling insecure about the provision of their personal data over a three year period.<sup>415</sup> In addition, a 2020 survey by the Japanese Ministry of Internal Affairs and

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<sup>407</sup> Japan Ministry of Internal Affairs and Communications, [Decision on Certification of Personal Data Trust Bank](#), 29 March 2021, accessed 13 December 2021.

<sup>408</sup> DMA Article 6(h), (i), (j).

<sup>409</sup> European Commission, [The Digital Services Act: ensuring a safe and accountable online environment](#), accessed 9 November 2021.

<sup>410</sup> 117th Congress, House of Representatives, [Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021](#).

<sup>411</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 35.

<sup>412</sup> Israel Competition Authority, [The Privacy Protection Authority, the Competition Authority, and the Consumer Protection & Fair Trading Authority recommend the adoption of the right to data portability in Israeli law](#), accessed 30 November 2021.

<sup>413</sup> Ministry of Internal Affairs and Communications (Japan), [Appeal for Opinions on Draft Summary of Study Group for Certification Scheme of Personal Data Trust Bank](#), Press Release, 21 June 2021.

<sup>414</sup> Ministry of Internal Affairs and Communications (Japan), [Decision on Certification of Personal Data Trust Bank](#), Press Release, 29 March 2021.

<sup>415</sup> Ministry of Internal Affairs and Communications (Japan), [Key Points of the 2020 White Paper on Information and Communications in Japan](#), p 5.



Communications indicates that increasing numbers of consumers across Japan, US, Germany and China have an interest in using personal data trust banks or personal data stores.<sup>416</sup>

#### **(d) Impact on consumers and privacy**

Consumer and privacy impacts should be carefully considered before implementing proposals to increase data access, including the extent of consumer controls and the types and extent of data to be shared.<sup>417</sup> The ACCC considers that any sharing and use of personal data should be accompanied by robust consumer-level controls that limit the privacy risks of data sharing and use. Where consumer controls are inadequate or absent, data portability and interoperability initiatives should be limited to the sharing of non-personal or aggregated data and only where the data is important to lower key barriers to entry in digital platform markets.

The ACCC also considered data portability and interoperability measures in its *Ad Tech Inquiry Final Report*. The ACCC's views regarding data portability and interoperability measures in the supply of ad tech services are discussed in box 8.4.

#### **Box 8.4 ACCC consideration of data portability and interoperability in the Ad Tech Inquiry**

In its *Ad Tech Inquiry*, the ACCC considered data portability, data interoperability, and data separation measures as potential remedies to address data related issues in the supply of ad tech services. These issues primarily concerned Google's superior access to data compared to other ad tech providers. In the supply of ad tech services in Australia, the ACCC considered that measures to limit data use would be most effective to address these concerns – see further discussion in section 8.2.2.

The ACCC considered that, at the time of the final report, data portability and interoperability measures were unlikely to address data-related competition issues in ad tech because:<sup>418</sup>

- For data portability, consumers are unlikely to agree to share their data with other ad tech providers, due to ad tech services not being consumer-facing, and consumers' lack of familiarity with ad tech services.
- For data interoperability, the nature of the data that would be shared would likely raise significant privacy concerns (absent consumer consent), and the likely need for a consent mechanism would raise similar issues of effectiveness as data portability.

However, the ACCC noted that change is occurring rapidly in this area and future developments might enable data interoperability or data access measures to be implemented in a privacy safe way.<sup>419</sup>

#### **8.2.2. Limiting data use by incumbents**

In some instances, there may also be a case for introducing measures to limit data use as a way of addressing the data advantages of some digital platforms. For example, data silos could regulate the internal sharing of data within a firm by prohibiting the combining of some types of datasets for a broad range of purposes.

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<sup>416</sup> Ministry of Internal Affairs and Communications (Japan), [Key Points of the 2020 White Paper on Information and Communications in Japan](#), p 5.

<sup>417</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 11.

<sup>418</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78-79.

<sup>419</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 79.

The ACCC has recommended that measures available for addressing an ad tech provider's data advantage should include data separation measures such as preventing an ad tech provider from using data it has collected from its consumer-facing services to provide ad tech services on third-party sites and apps.<sup>420</sup> The ACCC has also found that there is a need for Apple and Google, in their capacity as app marketplace operators, to ring-fence their data from other operations and business decisions to minimise this information being used to provide an unfair competitive advantage over third-party app developers.<sup>421</sup>

Data separation measures may improve competition in the supply of some digital platform services by levelling the playing field between large platforms with a significant data advantage and smaller rivals. They may also be imposed to minimise the potential for data-related self-preferencing conduct that may enable some digital platforms to obtain a competitive advantage by accessing sensitive datasets in relation to their rivals.

Measures limiting use of data may result in decreased efficiency from reduced access to data for the platforms subject to data separation requirements. However, data separation also has the potential to limit a dominant incumbent's ability to leverage its data advantage across markets, thereby leveling the playing field, which could be expected to improve competition and dynamic efficiency.<sup>422</sup> As such, it is important that efficiency impacts of data separation are considered across the relevant services and market players. In addition, data separation requirements may also be appropriate where a firm has collected data through the misuse of market power within a market or an anti-competitive acquisition and that firm uses that data to adversely affect competition in other markets.<sup>423</sup>

Any assessment of the benefits and costs of data separation measures should also include a consideration of consumers' preferences regarding their personal information. For example, advertisers may consider that access to the broadest set of granular personal data, including sensitive health data, financial information, location data and online and offline search and purchase history, would provide for the most efficient and effective targeting of advertisements. However, some consumers may prefer less granular targeting in order to protect their personal information. The ACCC notes that it has been reported that only 4% of Apple iOS users have opted to let apps track their online behaviour following the iOS 14.5 update in early 2021, which gave Apple iOS users the ability to 'opt out' of such tracking.<sup>424</sup>

The ACCC notes that the Australian Government is currently consulting on the *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* (Cth) ('Online Platforms Bill').<sup>425</sup> This Bill proposes to introduce a binding code of practice ('Online Platforms Code') that imposes additional requirements on social media and other online platforms that trade in personal information, including some requirements that will limit online platforms' data use.<sup>426</sup> For example, the Online Platforms Code requires covered platforms to take such steps as are reasonable in the circumstances to cease to use or disclose an individual's personal information upon request from that individual.<sup>427</sup>

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<sup>420</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78.

<sup>421</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 9.

<sup>422</sup> CMA, [Online platforms and digital advertising: Market study final report](#), 1 July 2020, Appendix Z, Z29.

<sup>423</sup> CMA, [Online platforms and digital advertising: Market study final report](#), 1 July 2020, p 413.

<sup>424</sup> R Kraus, [After update, only 4 percent of iOS users in U.S. let apps track them](#), Mashable, 7 May 2021.

<sup>425</sup> The Parliament of the Commonwealth of Australia, *Privacy Legislation Amendment (Enhancing Online Privacy and Other Measures) Bill 2021* [Exposure Draft](#), October 2021.

<sup>426</sup> Attorney General's Department, [Privacy Legislation Amendment \(Enhancing Online Privacy and Other Measures\) Bill 2021 Explanatory Paper](#), October 2021, p 4.

<sup>427</sup> Attorney General's Department, [Privacy Legislation Amendment \(Enhancing Online Privacy and Other Measures\) Bill 2021 Explanatory Paper](#), October 2021, p 10.

A range of overseas jurisdictions are also contemplating various measures to limit data use - see further box 8.5.

#### **Box 8.5 Overseas reforms that limit data use**

In the **EU**, the proposed DMA requires gatekeeper digital platforms to refrain from combining personal data sourced from their core platform services with personal data from any other services offered or from third-party sources.<sup>428</sup> It further proposes to require gatekeeper digital platforms to refrain from using non-public data generated through activities of its business users on the gatekeeper platforms.<sup>429</sup>

In **Germany**, the recently amended Act against Restraints of Competition gives the Bundeskartellamt the power to prohibit certain firms 'with paramount significance for competition across markets' from combining user data from different services or using data collected for the purpose of providing its services for a different purpose without giving the user sufficient choice as to whether, how, and for what purpose such data are processed.<sup>430</sup>

In the **UK**, the UK Government is also currently consulting on pro-competitive interventions that could include data separation measures.<sup>431</sup>

### **8.3. Improved consumer protection**

As discussed in section 5.3, a range of consumer harms can arise in the supply of digital platform services, including harms from excessive online tracking; the use of dark patterns; online scams, harmful apps and fake reviews; and consumer lock-in.

#### **8.3.1. Reducing consumer harms from online scams, harmful apps and fake reviews**

It is important that consumers are adequately protected from harms arising from products and services provided by, or distributed on, digital platforms. The ACCC has previously considered the need to protect consumers from harms caused by apps that are malicious, exploitative, or harmful, whether for all consumers or for particularly vulnerable consumer groups.<sup>432</sup>

In light of the escalation in harmful online content in recent years, along with a persistent lack of effective redress for consumers, the ACCC is considering the need for additional measures such as specific obligations on some digital platforms. As noted in box 8.6, overseas jurisdictions and consumer advocates are considering and advocating for potential regulation to address specific harms from scams, malicious apps and fake reviews. These options include requirements that digital platforms:

- improve their existing processes to more effectively monitor, block and remove online scams and malicious apps from being displayed to their users and to manage the harms associated with the prevalence of fake online reviews on their platforms

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<sup>428</sup> DMA Article 5(a).

<sup>429</sup> DMA Article 6(b).

<sup>430</sup> GWB Section 19a(4)(a) and (b).

<sup>431</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 34. CMA, [Digital Platforms and Online Advertising Final Report](#), p 413.

<sup>432</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 121.

- notify and/or provide redress to their users who have been exposed to harmful content identified on their platforms
- implement systems and processes that proactively prevent the distribution of online scams and malicious apps to their users, such verification requirements for advertisers and labelling that clearly distinguishes the advertisements of unverified advertisers, and
- report regularly to relevant regulators and law enforcement agencies.

A key potential way to enhance consumer protections against online scams, harmful apps, and fake reviews is to place further fair trading obligations on digital platforms' dealings with consumers where such conduct is not addressed by existing legislation. As such, the ACCC continues to strongly advocate for its recommendation for an economy-wide prohibition on certain unfair trading practices.<sup>433</sup>

In addition, the ACCC has considered preventative measures such as regular sweeps of websites or apps to identify breaches of consumer law.<sup>434</sup> While the onus for addressing harmful content online should not be placed solely on consumers, the ACCC also considers that consumer awareness campaigns and other measures to improve consumers' digital literacy may provide some protection for consumers when using apps.<sup>435</sup>

The ACCC also notes that improved dispute resolution processes may be a further way to provide digital platform users with the means to obtain redress for the harms caused by malicious or exploitative apps and content – see further discussion at section 8.4.2.

Finally, the ACCC will continue to investigate and take enforcement action in relation to the conduct of digital platforms that may breach the current provisions of the CCA and ACL. More detail on the ACCC's investigations of digital platforms conduct that may breach consumer laws is set out at section 6.1.1.

#### **Box 8.6 Overseas reforms to address the rise in scams on digital platforms**

In the **UK**, the current draft of the Online Safety Bill proposes to impose a duty on digital platforms to remove 'illegal content' such as online fraud when notified of it by users.<sup>436</sup> In a recent report published by a Joint Committee on the Draft Online Safety Bill, the Joint Committee recommended that online fraud should instead be designated 'priority illegal content' such that digital platforms have a duty to minimise the risk that fraudulent content would appear on their service in the first place.<sup>437</sup> The UK consumer association Which? has also recommended that Facebook and other digital platforms should improve their systems to protect their users from scams and that the UK Government should give social media platforms a legal responsibility for preventing scam content from appearing on their sites.<sup>438</sup>

In addition, the UK Financial Conduct Authority (FCA) was recently given powers to take enforcement action against digital platforms such as Google and Facebook for displaying financial adverts that were not issued or approved by FCA-authorized firms.<sup>439</sup> Subsequently, Google has updated its policy for companies looking to promote their financial products and services on

<sup>433</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 37.

<sup>434</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 121. See, for example, ICPEN, [International Internet Sweep Day](#).

<sup>435</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 121.

<sup>436</sup> UK Parliament, [Draft Online Safety Bill](#), May 2021.

<sup>437</sup> UK Joint Committee on the Draft Online Safety Bill, [Report of Session 2021-22](#), 14 December 2021, para 191.

<sup>438</sup> Which? [Connecting the world to fraudsters? Protecting social media users from scams](#), 14 October 2020

<sup>439</sup> K Markortoff, [UK regulator warns Google about accepting scam adverts](#), *The Guardian*, 15 June 2021, accessed 8 December 2021.

Google to require proof that they are authorised by the FCA or qualify for one of the limited exemptions available.<sup>440</sup>

Finally, the UK's existing Consumer Protection from Unfair Trading Regulations 2008 contains a general prohibition on traders in all sectors engaging in unfair commercial practices against consumers.<sup>441</sup> The UK CMA has noted that it interprets these Regulations as requiring digital platforms to take proactive steps to minimise economically harmful content on their platforms, rather than simply responding to it when it is reported.<sup>442</sup>

In the **EU**, the proposed DSA includes several mechanisms to manage and reduce the harms associated with online scams, including obligations to:

- report on the removal and disabling of information considered to be illegal content<sup>443</sup>
- allow users to report and remove illegal content<sup>444</sup>
- notify authorities of suspicion of criminal offences<sup>445</sup>
- provide certain information on ads, such as clearly marking that it is an advertisement, the advertiser, and information about why a user has been shown the ad,<sup>446</sup> and
- implement dispute resolution mechanisms for users regarding the removal of illegal content.<sup>447</sup>

### 8.3.2. Regulating the use of dark patterns

Consumers should be able to make informed choices in their online interactions and be protected from exploitative or manipulative user interfaces. This means consumers should be able to access clear information about the non-monetary costs of using a digital platform's services and make meaningful choices without being nudged or manipulated into making selections that are not in their best interests.

Some instances of dark patterns and negative choice architecture may raise serious concerns where user interfaces are designed in a way that is exploitative, or deceptive, and undermines consumer autonomy.<sup>448</sup> As such, the ACCC has previously considered the need for measures requiring digital platforms to design user interfaces in a way that facilitates consumer choice and respects individual autonomy.<sup>449</sup>

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<sup>440</sup> C Angeloni, [Google UK toughens restrictions for financial adverts](#), *International Adviser*, 30 June 2021, accessed 8 December 2021.

<sup>441</sup> [Explanatory Memorandum](#) to the Consumer Protection from Unfair Trading Regulations 2008 (UK), p 1.

<sup>442</sup> Competition and Markets Authority, [Written evidence submitted by the Competition and Markets Authority to Joint Committee on the Draft Online Safety Bill](#), 28 September 2021.

<sup>443</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\) and amending Directive 2000/31/EC](#), 15 December 2020, pp 50-51.

<sup>444</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\) and amending Directive 2000/31/EC](#), 15 December 2020, pp 51-52.

<sup>445</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\) and amending Directive 2000/31/EC](#), 15 December 2020, p 56.

<sup>446</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\) and amending Directive 2000/31/EC](#), 15 December 2020, p 62.

<sup>447</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\) and amending Directive 2000/31/EC](#), 15 December 2020, pp 53-54.

<sup>448</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 16.

<sup>449</sup> ACCC, [Report on Search Defaults and Choice Screens](#), 28 October 2021, p 16.

The ACCC's recommendation that the ACL be amended to prohibit certain unfair trading practices could provide the incentive to deter the use of dark patterns in some instances, including due to the possibility of ACCC enforcement action.<sup>450</sup>

The ACCC is also considering whether regulatory measures that improve consumer autonomy would be effective in addressing the harms associated with digital platform services' use of dark patterns. Measures being considered include requiring large digital platforms to ensure that their user interfaces and choice architecture are designed fairly without taking advantage of behavioural biases to undermine consumer choice or nudging consumers towards a certain outcome that benefits the platform.

Specific practices that could be prevented through such regulatory measures include, for example:

- giving unequal visual prominence to options that benefit the platform (whether by enabling more data collection, giving broader permissions, signing up to more expensive services, or impeding switching) when asking a consumer to give consent or when consumers are seeking to change a default setting
- repeatedly prompting a user to change a setting to one that would benefit the platform after they have already made a choice (for example, highlighting the risks of a competitor's service even when the same risks apply for the incumbent's service), and
- making the process for cancelling a service much harder than signing up for the service.

Other measures to address harms associated with use of dark patterns may include further scrutiny to better understand the prevalence and characteristics of dark patterns and harmful or malicious apps, along with guidance for businesses on how consumer laws apply to dark patterns.<sup>451</sup> It could also be helpful for voluntary standards to be developed (in collaboration with businesses) to address harmful behaviour that may not breach existing Australian consumer protection laws.<sup>452</sup> The ACCC notes that some overseas jurisdictions have also recognised the need for further scrutiny of the use of dark patterns in online choice architecture – see discussion in box 8.7.<sup>453</sup>

#### **Box 8.7 Overseas measures to address consumer harms arising from use of dark patterns**

In the **EU**, the Members of the European Parliament have recently proposed amendments to the DSA which propose to prohibit online platforms from using deceiving or nudging techniques to influence users' behaviour through 'dark patterns'.<sup>454</sup>

In the **US**, the California Consumer Privacy Act Regulations have been amended to prohibit the use of dark patterns when obtaining consumer consents to opt-in to the collection of their personal information.<sup>455</sup>

In addition, the **Netherlands** Authority for Consumers & Markets (ACM), **Norwegian** Consumer Council and the **French** Commission nationale de l'informatique et des libertés (CNIL) have also

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<sup>450</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, pp 33.

<sup>451</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 121.

<sup>452</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 121.

<sup>453</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 66.

<sup>454</sup> European Parliament, [Digital Services Act: a safer online space for users, stricter rules for platforms](#), 14 December 2021.

<sup>455</sup> [California Consumer Privacy Act Regulations \(2020\)](#) § 999.315.

released guidance on dark patterns,<sup>456</sup> with the ACM observing that ‘practices that take advantage of consumers’ instinctive behaviour to nudge them toward particular choices that are not in their interest are misleading’ and may amount to an unfair commercial practice.<sup>457</sup>

In the **UK**, the CMA in its final report made two recommendations, aimed at addressing consumer harms, including those caused by dark patterns, which could form part of the government’s proposed pro-competition regime:

- introduction of a pro-competition intervention requiring designated platforms to give consumers the choice to not share their data for personalised advertising.
- including a fairness by design duty in the enforceable codes of conduct, which would aim to ensure that choices and defaults provided by the platform are presented in a way that facilitates informed consumer choice over the use of their personal data.

## 8.4. Fairer dealings with business users

### 8.4.1. Obligations to promote fair trading

The 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.<sup>458</sup>

For example, app developers have concerns that Apple and Google (through their control of the App Store and Play Store) are unavoidable business partners and that developers must accept Apple’s and Google’s agreements to reach consumers.<sup>459</sup> This may have enabled Apple and Google to charge inflated commissions on in-app payments and place restrictions on direct communications between app developers and consumers, which limit the business models available to app developers and results in consumers who are not fully informed about the payment options available.<sup>460</sup> As such, the ACCC has found that there is a need for greater awareness about the payment options available to consumers through an obligation on marketplaces to allow developers to provide users with information about alternative payment options.<sup>461</sup>

Restrictive terms of service for business users can also prevent rivals from competing freely elsewhere and unfairly restrict the use of alternative platforms, which reduces competition by limiting consumers’ ability to switch to alternatives where they could find better offers.<sup>462</sup> It is important that gatekeeper digital platforms that both control and compete in related markets ensure a level playing field on their platform and do not exploit their rule-setting powers to extract inflated prices or to unfairly restrict competition.

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<sup>456</sup> Norwegian Consumer Council, [Deceived by Design](#), 27 June 2018; Norwegian Consumer Council, [You can log out, but you can never leave](#), 14 January 2021; CNIL, [Shaping Choices in the Digital World](#), 16 April 2019; ACM, [Guidelines on the protection of the online consumer](#), 2020.

<sup>457</sup> ACM, [Guidelines on the protection of the online consumer](#), 2020, p 47.

<sup>458</sup> Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 46.

<sup>459</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 46.

<sup>460</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 63.

<sup>461</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 14. This is also consistent with the findings of Parliamentary Joint Committee on Corporations and Financial Services that recommended that payment systems make their fee structures more transparent to consumers, merchants, and regulators, see Parliamentary Joint Committee on Corporations and Financial Services, [Mobile Payment and Digital Wallet Financial Services](#), October 2021, p 88.

<sup>462</sup> Digital Competition Expert Panel, [Unlocking digital competition](#), Report of the Digital Competition Expert Panel, March 2019, p 48.

Given the ACCC's findings regarding harms from unfair conduct that are not currently captured by the ACL and arise in different sectors of the economy, the ACCC continues to advocate for an economy-wide prohibition on unfair trading practices.<sup>463</sup> However, in addition, the ACCC is considering whether there is a need to mandate fair-trading obligations for some digital platforms, which may include rules that:

- prohibit restrictions on business users that unreasonably restrict access to consumers, for example, restricting direct communications with end consumers about payment options without justification, and
- prohibit broad restrictions on business users from offering different promotions or discounts to consumers that they access outside of that platform.

The ACCC notes that some overseas jurisdictions have already implemented or are considering regulations to promote fair trading between digital platforms and businesses – see box 8.8.

### **Box 8.8 Overseas regulations to promote fair trading**

In the **UK**, 'fair trading' is one of the key objectives guiding the codes of conduct recommended by the CMA to protect competition in fast-moving digital platform markets.<sup>464</sup> The 'fair trading' objective would require designated platforms to trade on fair and reasonable terms for services where they are an unavoidable trading partner as a result of their market position.<sup>465</sup> The following principles were identified by the CMA as applying under the 'fair trading' objective:<sup>466</sup>

- to trade on fair and reasonable contractual terms
- not to unduly apply discriminatory terms, conditions or policies to certain customers
- not to put any unreasonable restrictions on how customers can use platform services
- to act in customers' best interests when making choices on their behalf, and
- to require use of data from customers only in ways which are reasonably linked to the provision of services to those customers.

In the **EU**, the P2B Regulation seeks to address the superior bargaining power of some online platforms who are able to behave unilaterally in unfair ways that harm the legitimate interests of their business users and, as a result, also indirectly harm consumers in the EU.<sup>467</sup> It prohibits certain unfair trading practices, such as suspending, terminating or otherwise restricting accounts without clear reasons or failing to give appropriate notice of changes to the terms and conditions.<sup>468</sup>

The EU's proposed DSA also imposes fairness obligations on online intermediaries and platforms such as online marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms.<sup>469</sup> The rules proposed in the DSA seek to maintain a fair and open online platform environment with new obligations on digital platforms including more

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<sup>463</sup> See, e.g., <https://www.accc.gov.au/media-release/new-fair-trading-law-needed-to-enhance-australias-perishable-agricultural-markets>.

<sup>464</sup> Competition and Markets Authority, [Online platforms and digital advertising market study](#), 1 July 2020, p 322.

<sup>465</sup> Competition and Markets Authority, [Online platforms and digital advertising market study](#), 1 July 2020, p 342.

<sup>466</sup> Competition and Markets Authority, [Online platforms and digital advertising market study](#), 1 July 2020, p 342.

<sup>467</sup> [Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services](#), 20 June 2019, Recital 2.

<sup>468</sup> [Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services](#), 20 June 2019, Article 3.

<sup>469</sup> EC, [The Digital Services Act Package](#), updated 21 October 2021, accessed 24 November 2021.



effective safeguards for users and transparency requirements for some online platforms on a range of issues including the algorithms used for recommendations.<sup>470</sup>

#### 8.4.2. Effective dispute resolution processes

The ACCC remains of the view that it is necessary to have effective and easily accessible avenues for consumers and business users to seek redress from digital platforms and that, if their complaints are not properly resolved by digital platforms, there should be assistance from an external body that will facilitate the resolution of these complaints.

As such, the ACCC continues to strongly support its 2019 recommendation from the *Digital Platforms Inquiry Final Report* that digital platforms should be subject to minimum internal dispute resolution standards and that an independent ombudsman scheme should be established to resolve complaints and disputes between consumers and digital platforms as well as between businesses and digital platforms.<sup>471</sup>

The ACCC is concerned by the persistent lack of accountability and effective redress for complaints and disputes arising on digital platforms, both for consumers, advertisers, and a range of business users of digital platform services. This lack of effective redress exacerbates the harms experienced by consumers in relation to online scams and harmful online content, as well as the losses caused to businesses from fake negative reviews – see further discussion at section 5.3.3.

As a result, the ACCC is considering whether other rules may be necessary to improve the accountability and transparency of digital platforms' decisions and to provide consumers and businesses with greater recourse to resolve disputes arising on digital platforms. Such rules would build on the ACCC's past recommendations for minimum internal dispute resolution standards and the implementation of an independent ombudsman scheme, which the ACCC still considers are required. Such additional rules may include mechanisms for review of decisions to terminate or suspend accounts, or requirements for digital platforms to employ staff in Australia who can respond promptly to and resolve disputes with Australian consumers or business users.

The ACCC notes that broader fair-trading obligations, as discussed in section 8.4.1, may also improve the accountability of digital platforms' decisions. The ACCC welcomes stakeholder views on whether additional targeted measures to improve specific aspects of digital platforms' dispute resolution processes are necessary and desirable.

The ACCC notes that the EU has implemented or proposed to implement specific laws aimed at improving platform-to-business and platform-to-consumer terms which, among other things, aim to improve the dispute resolution mechanisms in digital platform services – see box 8.9.

#### Box 8.9 EU measures to improve dispute resolution on digital platforms

In the EU, the P2B Regulation makes it mandatory for online intermediaries and platforms to identify in their terms and conditions two or more mediators with which they are willing to engage

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<sup>470</sup> European Commission, [The Digital Services Act: ensuring a safe and accountable online environment](#), accessed 24 November 2021.

<sup>471</sup> ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 37. The ACCC re-iterated its support for these recommendations in the *Report on Online Private Messaging Services* and the *Report on App Marketplaces*: ACCC, [Report on Online Private Messaging Services](#), 23 October 2020, p 61. ACCC, [Report on App Marketplaces](#), 28 April 2021, p 6.

in out of court dispute resolution, where an internal complaint handling system was not able to resolve the issue.<sup>472</sup>

The proposed DSA also imposes obligations on all but the smallest of online platforms to set up complaint and redress mechanisms and out-of-court dispute settlement mechanisms.<sup>473</sup>

## 8.5. Increased transparency

Transparency is an important prerequisite for effective competition and informed consumers in relation to digital platform services. Increased transparency in key areas such as pricing and the operation of algorithms is critical to empower consumers and businesses to accurately assess the price and quality of digital platform services. It is also necessary to enable regulators to monitor the impact of digital platforms' conduct on competition and consumer welfare.

To address concerns regarding a lack of transparency in the supply of digital platform services, the ACCC is considering the need for measures to address opacity in key areas including the operation of algorithms and pricing.

### 8.5.1. Improving pricing transparency

A key area of opacity in the supply of digital platform services is in relation to the prices paid for supply of digital advertising and ad tech services.<sup>474</sup> A lack of pricing transparency makes it difficult for advertisers and publishers to accurately assess and make informed choices about which ad tech services and digital advertising providers will best meet their needs, which may lead to higher prices or lower quality services.

The ACCC has already recommended a range of measures to increase pricing transparency in the supply of ad tech services, including that it should be given powers to develop and enforce rules to improve transparency of pricing information in the Australian ad tech supply chain.<sup>475</sup> In addition, the ACCC has also recommended that voluntary, industry-led standards should be established to require ad tech providers to publish average fees and take rates for ad tech services.<sup>476</sup>

### 8.5.2. Improving non-price transparency

There is also considerable opacity in other aspects of digital platform services, including regarding digital platforms' data practices and regarding the key decision-making algorithms digital platforms use to display content and advertising, rank search results, and personalise services.

As such, the ACCC is considering the effectiveness of measures to improve transparency of digital platform services, which may include:

- requiring the provision of certain types of information or data regarding the operation or outcomes of key algorithms for regulators, researchers, and stakeholders

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<sup>472</sup> [Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services](#), 20 June 2019, Article 12.

<sup>473</sup> Digital Services Act, Article 17.

<sup>474</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 155. ACCC, [Digital Platforms Inquiry Final Report](#), 26 July 2019, p 12.

<sup>475</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 14.

<sup>476</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 13.

- mandating prior notice of significant changes to key algorithms
- requiring independent verification of the performance of key algorithms, and
- requiring the provision of information regarding how digital platform services use data to provide their services.

The ACCC has found that there is a need for greater transparency about key algorithms and processes determining discoverability including impending changes to the key parameters algorithms use and editorial processes to enable app developers to adapt in a timely way.<sup>477</sup> However, the ACCC acknowledges that excessive transparency about algorithms may enable businesses ranked by the algorithms to ‘game’ them and that it is important that an appropriate balance is struck.

The ACCC has also recommended that Google should amend its public material to clearly describe how it uses first-party data to provide ad tech services.<sup>478</sup>

A wide range of measures to improve transparency in the supply of digital platform services have been proposed in overseas jurisdictions. These are discussed in box 8.10.

### **Box 8.10 Overseas measures to improve transparency**

In the **EU**, the proposed DSA includes wide-ranging transparency measures, including in relation to online advertising and the algorithms used to recommend content to users.<sup>479</sup>

In addition, the proposed DMA includes numerous provisions to improve the transparency of digital platform markets, including requirements for gatekeeper digital platforms to:

- provide advertisers and publishers with information about the prices paid by advertisers and the revenue paid to publishers,<sup>480</sup> and
- provide advertisers and publishers with access to performance measuring tools and information necessary to carry out independent verification of ad inventory.<sup>481</sup>

In the **EU**, the *Platform to Business Regulation 2019/1150* (P2B Regulation) also imposes transparency requirements on providers of online platforms that facilitate direct transactions between business users and consumers.<sup>482</sup> Platforms covered by the P2B Regulation include online search engines, e-commerce marketplaces, app stores and social media for businesses.<sup>483</sup> The P2B Regulation requires these platforms to ensure their terms and conditions are drafted in clear and intelligible language and are easily available to their business users.<sup>484</sup>

In the **UK**, the Government has proposed that enforceable codes of conduct include ‘Trust and Transparency’ as an overarching objective.<sup>485</sup> The CMA recommended in its market study final report that this objective could allow the proposed DMU to scrutinise the working of algorithms

<sup>477</sup> ACCC, [Report on App Marketplaces](#), 28 April 2021, p 14.

<sup>478</sup> ACCC, [Digital Advertising Services Inquiry Final Report](#), 28 September 2021, p 78.

<sup>479</sup> European Commission, [Europe fit for the Digital Age: Commission proposes new rules for digital platforms](#), 15 December 2020.

<sup>480</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector \(Digital Markets Act\)](#), 15 December 2020, p 39. [Digital Markets Act](#), art 5(g)

<sup>481</sup> European Commission, [Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector \(Digital Markets Act\)](#), 15 December 2020, p 40.

<sup>482</sup> [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](#), 20 June 2019, OJ L 186/57.

<sup>483</sup> [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](#), 20 June 2019, OJ L 186/57.recitals 9-11.

<sup>484</sup> [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](#), 20 June 2019, OJ L 186/57art 3.

<sup>485</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 27.

and auctions, require greater fee transparency, or require compliance with industry standards on the provision of information to advertisers or independent firms.<sup>486</sup>

In **Japan**, on 27 May 2020, the Japanese legislature passed the *Act on Improving Transparency and Fairness of Digital Platforms*, which requires that specified digital platform providers take voluntary and proactive efforts toward improving the transparency of their platforms, and report on the measures that they have implemented.<sup>487</sup>

### 8.5.3. Record keeping rules

Record keeping rules require market participants to provide information to assist the ACCC to monitor competition and market developments. For example, the ACCC currently collects information from several telecommunications providers through a number of record-keeping rules under Part XIB of the CCA. Record keeping rules are also used by other authorities including the ACMA.

The collection of information on a regular basis provides a level of transparency for the ACCC about competition and market conduct and enables the ACCC to proactively investigate potentially anti-competitive conduct and prevent significant harm.

Information may also be used to inform public reports on competition in a sector, which provides transparency to all market participants. For example, the ACCC publishes an annual report on the state of competition in the telecommunications sector.

In relation to digital platform services, record keeping rules could collect information about the operation of algorithms, for example, and be used to inform the public and other market participants about the use of algorithms to promote greater transparency.

## 8.6. Adequate scrutiny of acquisitions

As discussed in section 6.2.2, ACCC Chair Rod Sims, in an address to the Law Council of Australia on 27 August 2021, identified ACCC concerns that merger law in Australia may not be effective in preventing anti-competitive mergers and acquisitions.<sup>488</sup>

The aim of the speech was to start a debate on merger reform in Australia. The ACCC identified its proposals for economy-wide changes to Australia's merger laws but also proposed that bespoke tailored merger rules may be required to adequately address the particular challenges posed by acquisitions by large digital platform firms, such as Google, Meta and Apple.<sup>489</sup>

Any tailored merger rules developed for large digital platforms will require careful consideration and drafting to ensure that they can achieve their objective of capturing anti-competitive acquisitions but not reduce incentives for innovation and investment in the technology sector.

This Discussion Paper only invites submissions on specific proposals relating to acquisitions by large digital platforms, but the economy-wide proposals previously put forward by the

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<sup>486</sup> Competition and Markets Authority, [Online platforms and digital advertising market study](#), 1 July 2020, pp 396-7.

<sup>487</sup> Ministry of Economy, Trade and Industry, [Key Points on the Act on Improving Transparency and Fairness of Digital Platforms](#), last updated 16 April 2021, accessed 7 December 2021.

<sup>488</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>489</sup> See also Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021; ACCC, [Digital Platform Services Inquiry First Interim Report](#), 23 October 2020, p 75.

ACCC provide relevant context for the consideration of any changes to merger rules specific to acquisitions by large digital platforms. In particular, if the ACCC's economy-wide merger proposals were to be implemented, they would likely go part of the way to addressing some of the concerns identified in relation to digital platform acquisitions.

The key elements of the economy-wide merger reform package put forward by the ACCC are:

- Introducing a new formal merger regime with:
  - compulsory notification of acquisitions above specific thresholds
  - limited merits review by the Australian Competition Tribunal
  - ACCC (or Australian Competition Tribunal on appeal) to clear an acquisition only where satisfied that it is not likely to substantially lessen competition
  - a simple notification-waiver process (or pre-assessment for those transactions below the notification threshold) so that the significant majority of acquisitions that are unlikely to raise any competition issues are cleared expeditiously with minimal regulatory burden.
- Revising the merger factors in subsection 50(3) to focus more on the structural changes arising from an acquisition, and to incorporate the recommendations from the *Digital Platforms Inquiry Final Report* to include factors relating to the loss of potential competitive rivalry and/or increased access to or control of data, technology or other significant assets.
- A new deeming provision that would prohibit acquisitions where one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended.
- Including a definition for the word “likely” in the merger test, to mean “a possibility that is not remote”.

In the sections below, we explore how a tailored merger regime applicable to acquisitions by the largest digital platforms might work, either alongside the above economy-wide reforms or in the current situation where we have the current informal merger regime in Australia. A range of elements of the package are set out below. Many of these would not be capable of being implemented in isolation and consideration needs to be given to how the reforms work together as a package, including any broader economy-wide merger reforms.

### **8.6.1. Who the digital platform-specific merger rules would apply to**

The ACCC envisages that any new tailored merger rules for digital platforms would only apply to digital platform firms that meet pre-defined criteria linked to their market power and/or strategic position (including, potentially, their role as gatekeepers) in one or more digital platform markets.

These criteria (referred to in this section as ‘relevant criteria’) would require close consideration. However, the ACCC intends that only a few of the largest digital platforms that benefit from entrenched and substantial market power would be subject to the bespoke merger regime.

Further, the relevant criteria identifying those digital platform firms subject to the bespoke merger laws could be the same as for other rules to address other competition issues – see further discussion at section 7.2.

### 8.6.2. Notification requirements

The current Australian merger regime does not require firms to notify the ACCC of proposed mergers or acquisitions. However, as set out above, the ACCC proposed mandatory notification of transactions above certain thresholds as part of its economy-wide merger reform proposals in August.<sup>490</sup> Notification requirements for certain transactions would ensure that the ACCC is able to scrutinise proposed acquisitions that may impact competition in Australia. Indeed, there are a number of examples of the ACCC not being notified of acquisitions before completion which warranted close review. One example of this is Meta's completed acquisition of Giphy (see box 8.11).

#### Box 8.11 Meta's completed acquisition of Giphy

The ACCC is investigating Meta's completed acquisition of Giphy Inc., which provides a database of shareable animated images, known as GIFs, and is integrated in several popular social media and online private messaging apps. This acquisition was not notified to any competition authorities prior to completion and is being considered by the ACCC as an enforcement investigation of a completed acquisition.<sup>491</sup> It is an example of a transaction that the ACCC considers should have been notified in advance given Meta's strong position in a number of digital markets.<sup>492</sup>

On 30 November 2021, the CMA concluded that Meta's acquisition of Giphy would reduce competition between social media platforms and remove Giphy as a potential competitor in the market for display advertising.<sup>493</sup> The CMA directed Meta to sell Giphy in its entirety to an approved purchaser.

The broad notification requirements of an economy-wide merger reform regime will likely need to be accompanied by a switch to a formal clearance process and may go much of the way to address the notification issues associated with acquisitions by large digital platforms.

However, the ACCC is considering whether, in addition to the above, a bespoke notification regime is required for acquisitions by digital platforms that meet the relevant criteria. Given the particular risks of under-enforcement in digital platform markets and the potentially long-lasting and substantial harm associated with the acquisition of often very small nascent competitors, it may be appropriate for a specific notification threshold to apply to acquisitions by the largest digital platforms. Specific notification requirements would ensure that the significant risks that may arise from acquisitions by the largest digital platforms can be assessed, and that resources can be allocated efficiently. Internationally, competition authorities are also increasingly considering bespoke notification requirements for prospective acquisitions by large digital platforms, as noted below.

#### Box 8.12 Alignment with UK reform proposals

The UK Government's proposed pro-competition regime for digital markets requires digital platforms designated as having SMS to inform the CMA of *all* proposed acquisitions, as well as

<sup>490</sup> Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>491</sup> D Swan, 'Australia probing Facebook's Giphy buy amid UK ruling', *The Australian*, 1 December 2021.

<sup>492</sup> ACCC, [The ACCC's Digital Platforms Inquiry and the need for competition, consumer protection and regulatory responses](#), Speech by Chair Rod Sims to the Australia-Israel Chamber of Commerce (Western Australia), 6 August 2020.

<sup>493</sup> CMA, [CMA directs Facebook to sell Giphy](#), 30 November 2021.

requiring a sub-set of transactions by such firms to be subject to mandatory reporting requirements that prevent parties completing a transaction before it has been assessed by the CMA.

The ACCC is cognisant of the burden that notification requirements may place on digital platforms that meet the relevant criteria. The ACCC seeks views on whether it would be appropriate for these digital platforms to notify the ACCC of all acquisitions that meet certain thresholds (for example, where the target is carrying on business in Australia) and what form these notification requirements could take.

### 8.6.3. Changing the probability threshold

As noted in section 6.2.2, the ACCC has economy-wide concerns about the approach of the Court and Tribunal to assessing whether a substantial lessening of competition is ‘likely’ under section 50. The concerns with the current approach are particularly acute in relation to acquisitions by large digital platforms given the difficulty of predicting the future competitive impact of the target (with and without the acquisition) and the dynamic nature of digital markets.

Applying a lower probability of competitive harm threshold to acquisitions by those digital platforms that meet the relevant criteria would enable the ACCC to intervene in circumstances where there may be a low probability that the acquisition would substantially lessen competition – but where the impact of any substantial lessening of competition is likely to be very substantial and long-lasting (i.e., to account for low probability but high impact competition effects).

A variation to simply lowering the probability threshold of competitive harm for all acquisitions by large digital platforms that meet the relevant criteria, would be to adopt the so-called ‘balance of harms’ assessment, as proposed by the UK Digital Competition Expert Panel in its *Unlocking Digital Competition* report.<sup>494</sup> This approach would take into account the scale and likelihood of potential harms and benefits arising from a proposed acquisition, to assess whether on balance the acquisition is expected to be beneficial or harmful to the competitive process.

However, the ACCC notes that this approach would likely require a quantitative assessment, of both the likelihood of particular outcomes and also the harms associated with each outcome, which would be a complex and challenging exercise.

#### Box 8.13 Alignment with UK reform proposals

The UK Government’s proposed pro-competition regime for digital markets includes proposals that would provide the CMA with greater scope to scrutinise mergers by firms with SMS. For example, acquisitions by firms with SMS would be assessed using the existing substantive test, but with a lower probability standard for intervention at phase 2, which is the second stage in-depth investigation by the CMA.<sup>495</sup>

### 8.6.4. Reversing the onus of proof

One proposal being put forward to address the risk of under-enforcement/false negatives is to reverse the onus of proof. Under the economy-wide merger reform proposals the ACCC put forward in August 2021, the ACCC (or Australian Competition Tribunal if there is an

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<sup>494</sup> Digital Competition Expert Panel, [Unlocking digital competition report](#), 2019, p 100.

<sup>495</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 55.

appeal) would be prevented from clearing a merger unless it is satisfied that the acquisition is not likely to substantially lessen competition. This approach would effectively require merger parties to establish that an acquisition does not have the effect and is not likely to have the effect of substantially lessening competition.

In the event this broader economy-wide merger reform is not implemented, it may be appropriate to consider an option to reverse the onus on proof specifically in relation to acquisitions by large digital platforms that meet the relevant criteria.

A variant of this option would be the introduction of a rebuttable presumption in section 50 that certain acquisitions by large digital platforms that meet the relevant criteria would result in competitive harm. This option has parallels with some overseas reform proposals, see box 8.14.

#### **Box 8.14 Overseas reform proposals shifting the onus of proof in relation to certain digital platform acquisitions**

In the **US**, the proposed Competition and Antitrust Law Enforcement Reform Act introduced in the Senate would, among other elements, shift the burden of proof to the merger parties to show that the merger would not violate the law in cases where mergers significantly increase market concentration; where a dominant firm (with at least 50% market share) is the acquirer; and where the transaction is valued at more than USD5 billion.<sup>496</sup> The changes proposed by this bill would apply across the economy (rather than just to digital platform firms).

The proposed Platform Competition & Opportunity Act introduced in the US Congress also requires that designated 'covered platforms' provide evidence that certain acquisitions by a dominant digital platform would not be unlawful.<sup>497</sup> A similar bill was also introduced in the US Senate in November 2021.<sup>498</sup>

### **8.6.5. Changes to merger factors**

In the *Digital Platforms Inquiry Final Report*, the ACCC has previously recommended the addition of further merger factors to subsection 50(3) of the CCA to make it clear that the acquisition of potential competitors by dominant firms and economies of scope created via control of data sets should be taken into account in assessing whether an acquisition has the effect or likely effect of substantially lessening competition.

Additionally, as part of the proposed economy-wide merger reforms put forward in August 2021, the ACCC proposed changes to the merger factors in subsection 50(3) of the CCA. As noted above, the proposed new factors would place a greater focus on the structural changes arising from an acquisition, and also incorporate the *Digital Platforms Inquiry Final Report* recommendations to ensure factors relating to the loss of potential competitive rivalry and/or increased access to or control of data, technology or other significant assets are taken into account.

At this stage, the ACCC considers that it is unlikely to be necessary to make any further changes to the merger factors beyond those identified above.

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<sup>496</sup> [Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement](#), 4 February 2021.

<sup>497</sup> [Platform Competition and Opportunity Act](#), 11 June 2021.

<sup>498</sup> C Zakrzewski, [Klobuchar and Cotton introduce legislation to regulation Big Tech acquisitions](#), *The Washington Post*, 5 November 2021.



### 8.6.6. New deeming provisions

As noted above, the ACCC proposed a new ‘deeming’ provision for firms with substantial market power as part of its economy-wide merger reform proposals: acquisitions where one of the merger parties has substantial market power and, as a result of the acquisition, that position of substantial market power would be likely to be entrenched, materially increased or materially extended would be *deemed* to substantially lessen competition.<sup>499</sup>

The ACCC considers that such a deeming provision may be particularly important for acquisitions by certain large digital platforms, given the substantial market power held by key digital platforms and the impact an acquisition by such a platform can have in terms of cementing or extending that position of market power – see further discussion at section 3.2.

The ACCC is also considering whether there should be an enhanced deeming provision, applying only to digital platforms that meet the relevant criteria in order to resolve the concerns identified in relation to such acquisitions. For example, in addition to focussing on those situations that entrench, materially increase or materially extend a position of market power, a digital platform-specific deeming provision could also focus on acquisitions by such digital platforms that raise barriers to entry for rivals; or that remove or weaken a source of future competitive constraint or partial competitive constraint.

Implementing such a targeted deeming provision to acquisitions by digital platforms that meet the relevant criteria may help capture the types of anti-competitive transactions discussed in section 3.2 – such as where a dominant digital platform provides services that are essential to the operations of the target’s rivals, or where the acquirer has a gatekeeper role, and the acquisition will make it more difficult for rivals to access customers.

### 8.6.7. Stricter prohibition on certain categories of acquisition

It has been suggested that in order to address the potentially long-standing and substantial harm to competition that may be caused by acquisitions by particular large digital platforms, it may be appropriate to prohibit digital platforms that meet the relevant criteria from acquiring any business in certain categories, such as those businesses operating in the same or adjacent markets, or businesses that may allow a digital platform firm to extend, expand or entrench its market power.<sup>500</sup>

The ACCC recognises that this particular option could severely restrict the ability of digital platforms to acquire other businesses. The ACCC is interested in stakeholder feedback on whether such an approach is warranted to address issues regarding acquisitions by relevant digital platforms and any potentially adverse impacts of such an approach on competition and efficiencies in the long term.

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<sup>499</sup> The ACCC Chair stated at the time, ‘Informing our proposal is a concern that effects-based assessments of competition, when put to the test before a Court, are prone to take attention away from what is really going on in an acquisition where the acquirer already has significant market power and is seeking to expand its reach or cement its position. Our experience has been that all too often the Courts are taken down an evidentiary rabbit warren in the name of identifying precisely how competition will play out in the future with and without the proposed transaction. Indeed, this is a natural tendency for judges whose role is to systematically establish facts to the requisite standard of proof.’ See Rod Sims, [Protecting and promoting competition in Australia](#), Competition and Consumer Workshop 2021 – Law Council of Australia, 27 August 2021.

<sup>500</sup> See S Musil, ‘[US senator proposes banning acquisitions by Big Tech](#)’, *CNET*, 12 April 2021; S King, ‘[We allowed Facebook to grow big by worrying about the wrong thing](#)’, *The Conversation*, 9 February 2021.

# Attachment A: Domestic and international regulatory developments relating to digital platform markets

## Regulatory reforms in Australia related to digital platform markets

The Australian Government is still in the process of implementing its responses to the ACCC's recommendations in the *Digital Platforms Inquiry Final Report* that the CCA be amended so that unfair contract terms are prohibited (and not just voidable) and to prohibit certain unfair trading practices.<sup>501</sup>

These include:

- introducing a bill to enhance and strengthen the ACL by prohibiting unfair contract terms,<sup>502</sup> which is likely to deter digital platforms more effectively from including potential unfair contract terms in their terms of use and privacy policies, and
- considering how an unfair trading prohibition could be adopted in Australia to address potentially unfair business practices. The Commonwealth 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, including a potential prohibition on unfair trading practices.<sup>503</sup>

As outlined in box A.1, the Government is also conducting reviews of other laws related to previous concerns identified by the ACCC.

### Box A.1 Domestic reviews involving the supply of digital platform services

There are several regulatory review processes underway that are considering some of the issues and harms identified by the ACCC. These include:

- The **Review of the *Privacy Act 1988***, which was announced as part of the Australian Government's response to the *Digital Platforms Inquiry*. The purpose of the Review is to ensure privacy settings empower consumers, protect their data and best serve the Australian economy.<sup>504</sup> The Review proposes changes that would provide individuals with greater control over their personal information, improve protections regarding handling of personal data, and changes aimed at ensuring better compliance with the Privacy Act. This may be able to address some of the consumer harms arising from a lack of consumer awareness or control over digital platforms' data practices.
- The **Review of the Australian Payments System**, which considered whether the regulatory architecture of the Australian payments system remains fit-for-purpose and responsive to advances in payments technology and changes in consumer demand. The Review included consideration of issues relating to the growth of digital wallets and development of NFC

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<sup>501</sup> Australian Government, [Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry](#), December 2020.

<sup>502</sup> [Treasury Laws Amendment \(Enhancing Tax Integrity and Supporting Business Investment\) Bill 2022 \(Cth\)](#).

<sup>503</sup> Consumer Affairs Forum, Communiqués, [Meeting 12 - Meeting of Ministers for Consumer Affairs](#), 6 November 2020.

<sup>504</sup> Australian Government Attorney General's Department, [Review of the Privacy Act 1988](#), accessed 9 November 2021.

technology.<sup>505</sup> Similar issues were also the subject of the Reserve Bank of Australia's Review of Retail Payments Regulation.<sup>506</sup>

- **Mobile Payment and Digital Wallet Financial Services** were the subject of a report by the Parliamentary Joint Committee on Corporations and Financial Services in October 2021.<sup>507</sup> Among other things, it examined Apple's practice of limiting third party access to NFC technology, and the potential for this to harm competition and innovation. The report also made specific recommendations on the issues to be considered as part of the ACCC's investigation into Apple's restrictions on third party access to NFC technology.
- The **Review of Australia's Cyber Security Regulations and Incentives**, which forms part of Australia's Cyber Security Strategy 2020. The Australian Government is considering stronger cyber security regulations and incentives to support a growing digital economy and respond to a growing threat environment, particularly ransomware.<sup>508</sup> The review proposed potential voluntary and regulatory measures in three key areas of action:
  - setting clear cyber security expectations, such as minimum standards for personal information and mandatory product standards for smart devices
  - increasing transparency, such as labelling for smart devices, and
  - protecting consumer rights, such as clear legal remedies for consumers under the ACL.
- The **Review of the Model Defamation Provisions**, which considered whether the policy objectives remain valid and whether the provisions are appropriate to achieve these objectives. The Review considered the question of internet intermediary liability in defamation for the publication of third-party content.<sup>509</sup>

## Key international developments to regulate digital platform markets

Across international jurisdictions there are several different proposals to address the various issues and harms arising in digital platform markets. Some of these proposals are outlined in detail below.

### United Kingdom (UK)

#### *A pro-competitive regime for digital markets*

The UK has proposed a new pro-competitive regime for digital markets (the regime), which intends to facilitate competition in digital platform markets by addressing concerns about the market power of large digital platforms.<sup>510</sup> The new statutory Digital Markets Unit (DMU) within the CMA would be responsible for administering the regime.

The regime involves designating firms with SMS, which would be based on an assessment by the DMU of whether a firm has:

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<sup>505</sup> Australian Government, [Payments system review: From system to ecosystem](#), June 2021, p 4.

<sup>506</sup> RBA, [Review of Retail Payments Regulation Conclusions Paper](#), October 2021.

<sup>507</sup> Parliamentary Joint Committee on Corporations and Financial Services, [Mobile Payment and Digital Wallet Financial Services](#), October 2021. See also, the Government's response: Australian Government, [Transforming Australia's Payments System](#), 8 December 2021.

<sup>508</sup> Australian Government Department of Home Affairs, [Strengthening Australia's cyber security regulations and incentives](#), accessed 9 November 2021.

<sup>509</sup> NSW Government Communities and Justice, [Review of Model Defamation Provisions](#), accessed 9 November 2021.

<sup>510</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021.

- (i) substantial, entrenched market power in a specified digital activity (e.g. search or social media), which has particularly widespread or significant effects, and
- (ii) a strategic position in a designated activity in the market.

Firms designated with SMS would be subject to:

- **a binding code of conduct:** based on high level objectives of ‘fair trading’, ‘open choices’ and ‘trust and transparency’. These objectives will be legislated and the DMU will prepare codes of conduct and related guidance tailored to individual firms’ activities where they are found to have SMS, in consultation with these firms.
- **potential application of pro-competitive interventions (PCIs):** where the DMU finds there is an adverse effect on competition (in line with the legal test in the existing market investigation regime in the UK), including harms to consumers<sup>511a</sup> a PCI could be imposed. These PCIs could include measures such as mandating third-party access to data, ensuring software compatibility, imposing obligations to provide access to an operating system/online marketplace, and operational or functional separation.
- **a new merger control regime:** SMS firms would be subject to additional merger control requirements, including a requirement to report all transactions to the CMA; a lower probability threshold for intervention by the CMA at phase 2 of a review in relation to acquisitions by SMS firms

and potentially a merger clearance requirement for acquisitions above a specified threshold.

## European Union (EU)

### *Digital Markets Act proposal*

The proposed Digital Markets Act (DMA) seeks to ensure that competition policy is fit for the new digital economy and to address perceived gaps in competition enforcement. In particular, the DMA aims to complement the EU’s (ex post) enforcement of existing competition rules with a new regulatory toolkit in order to restrain the power of large digital platforms deemed to be ‘gatekeeper’ platforms. The section below outlines the current proposals under the DMA, which are not yet finalised in the EU.

The DMA proposes to designate ‘gatekeepers’ who are providers of ‘core platform services’, which are defined as online intermediation services (e.g. online marketplaces, booking sites.); search engines; social networking services; video-sharing platforms; number-independent interpersonal communication services (e.g. messaging and chat apps); operating systems; cloud computing services; and advertising services provided alongside any of the aforementioned other core platform services.

A provider of core platform services will be designated as a gatekeeper if it meets certain quantifiable criteria or if the criteria are not met, following a separate market investigation by the EC:

The criteria are:

- (a) **it has a significant impact on the internal market of the EU:** i.e. it operates core services in at least 3 EU Member States and achieved an annual turnover in the

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<sup>511</sup> UK Government, [A new pro-competition regime for digital markets](#), July 2021, p 36.

European Economic Area of or above €6.5 billion in each of the last three financial years or has an average market capitalisation or market value of or above €65 billion.

**(b) it operates a core platform service that serves as an important gateway for business users to reach end users:** i.e. the service has over 45 million monthly active end users in the EU (roughly 10% of the population of the EU) and more than 10,000 yearly active business users in the EU in the last financial year; and

**(c) it enjoys an entrenched and durable position in its operations, or it is foreseeable that it will enjoy such a position in the near future.**

If these criteria are met, then the designation as gatekeeper is presumed automatic and it falls to the relevant platform to challenge the designation.

The DMA sets out multiple obligations requiring the core services operated by all gatekeepers to:

- allow business users to offer the same products or services to end users through third-party online intermediation services at prices or conditions that are different from those offered through the gatekeeper's service
- allow business users to choose the promotion and distribution channels used to reach end users acquired through the gatekeeper's core platform services; and not prevent end users from acquiring content, subscriptions, features or other items outside the gatekeeper's core platform services
- not prevent business users raising issues with any relevant public authority relating to any practice of gatekeepers
- not require business users to use, offer or interoperate with the gatekeeper's identification services as a condition of using the gatekeeper's core platform services
- not require business or end users to use any other core platform services as a condition of access to the gatekeeper's core platform services (i.e. bundling/tying)
- combine personal data collected through core platform services with other personal data unless the end user provided consent as defined by the EU General Data Protection Regulation (GDPR)

Further, following a 'regulatory dialogue' with a gatekeeper, the EC would also be able to impose the following obligations on the gatekeeper to:

- not rank their own products more favourably than similar third-party products on the platform (i.e. self-preferencing)
- not use, in competition with business users, any non-public data generated through activities by those business users, including by the end users of these business users
- allow end users to un-install any pre-installed software applications on its core platform service other than pre-installed software essential for the functioning of the operating system or device that cannot technically be offered on a standalone basis by third parties
- provide advertisers and ad publishers free access to advertising performance measurement tools and information necessary to independently verify performance of advertising services
- allow business users to inter-operate with the gatekeeper's platforms in certain circumstances (e.g. access to the APIs used by the gatekeeper's own applications)

- ensure effective data portability for business users and end users
- provide business users free, effective, high-quality, continuous and real-time access to and use of aggregated and non-aggregated data (subject only to GDPR requirements).
- provide third-party search engines with access on fair, reasonable and non-discriminatory (FRAND) terms to data generated by end users of the gatekeeper's search engines (subject to anonymisation of personal data).
- provide FRAND conditions for business users of app stores.

The conditions above would be subject to specification based on the individual platform and have the potential to be tailored to individual requirements on a platform-to-platform basis.

The ACCC notes that the obligations and criteria outlined above were the proposals of the European Commission as of the date of publication of this paper the terms of the DMA are still being settled through negotiation by the three EU institutions.

### ***Digital Services Act***

The proposed Digital Services Act (DSA) relates to consumer protection issues and would update the EU's legal framework for digital services, the 'e-Commerce Directive', has remained largely unchanged since the Directive was adopted in 2000. The update aims to clarify the liability regime for digital intermediaries active in the EU and to reinforce oversight and enforcement.

The new proposed provisions require intermediary providers to take greater initiative and responsibility to address illegal content and also respond to orders from EU national judicial or administrative authorities 'to act against illegal content (Article 8) and to provide information (Article 9)'. The largest platforms (gatekeepers) will be expected to share data with authorities and researchers, as well as face greater auditing along with having 'risk management obligations and compliance officer'.

Obligations under the proposed DSA will be applicable to different types of providers and platforms, which are spilt into four categories: very large platforms (those with more than 45 million EU users); online platforms; hosting services and intermediary services.

Obligations that apply to all categories of providers and platforms relate to transparency reporting, terms of service and fundamental rights, cooperation with national authorities following orders, and points of contact and representation (where required).

Similar to the position with the proposed DMA, the terms of the DSA are currently subject to negotiation by the three EU institutions.

## **Germany**

### ***Amendments to the German Competition Act***

In January 2021, new competition law provisions amending the German Competition Act came into effect. The 10<sup>th</sup> amendment to the German Competition Act (GWB Digitalisation Act) enables the Bundeskartellamt to designate platforms which are of 'paramount significance' and prohibit these companies from engaging in anti-competitive practices.<sup>512</sup>

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<sup>512</sup> Bundeskartellamt, [Amendment of the German Act against Restraints of Competition](#), 19 January 2021.

The provision enables the Bundeskartellamt to intervene earlier and more effectively to address harmful practices of large digital companies. The legal provision includes specific examples of practices that can be prohibited if they are used by a company with paramount significance for competition across markets. Examples of where early intervention may be required include a designated platform self-preferencing its own services or impeding competitors from entering the market by processing data relevant for competition.<sup>513</sup>

Google is the first company to be designated under the new provisions.<sup>514</sup> The Bundeskartellamt considers that Google is of paramount significance for competition across markets as the company has an economic position of power across markets that is insufficiently controlled by competition. The designation is limited to five years and within this period Google is subject to special abuse control by the Bundeskartellamt in Germany. The Bundeskartellamt has stated that it is already examining Google's data processing terms and the Google News Showcase service.<sup>515</sup> Among other things, the Bundeskartellamt can order in favour of dependent companies that access to data must be granted in return for adequate compensation.<sup>516</sup>

The Bundeskartellamt is also considering whether Apple, Meta and Amazon should also be designated.<sup>517</sup>

## United States (US)

There are a number of bills under consideration in the US Congress that seek to address different issues and harms arising in digital platform markets. Most of the bills discussed below would only apply to 'covered platforms' which would be designated by the FTC if the platform had at least 50,000,000 US-based monthly active users or at least 100,000 US-based business users', a market capitalisation or net annual sales exceeding USD600 billion and was a 'critical trading partner' for the sale or provision of products or services offered on or related to the platform.

### *Platform Competition and Opportunity Act proposal*

The proposed Platform Competition and Opportunity Act would prohibit acquisitions by a covered platform if the business activities of the target compete with the covered platform, constitute a nascent or potential competitor, enhance or increase the covered platform's market position, or enhance or increase the covered platforms' ability to maintain its market position. The proposal also includes a reversal of the burden of proof, whereby the acquiring covered platform must prove the acquisition is not unlawful.

A version of the proposal has been introduced in the House of Representatives<sup>518</sup> and the Senate.<sup>519</sup>

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<sup>513</sup> Bundeskartellamt, [Amendment of the German Act against Restraints of Competition](#), 19 January 2021.

<sup>514</sup> Bundeskartellamt, [Alphabet / Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines 'paramount significance across markets'](#), 5 January 2022.

<sup>515</sup> Bundeskartellamt, [Alphabet / Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines 'paramount significance across markets'](#), 5 January 2022.

<sup>516</sup> Bundeskartellamt, [Amendment of the German Act against Restraints of Competition](#), 19 January 2021.

<sup>517</sup> Bundeskartellamt, [Alphabet / Google subject to new abuse control applicable to large digital companies – Bundeskartellamt determines 'paramount significance across markets'](#), 5 January 2022.

<sup>518</sup> [H.R. 3826 — 117th Congress: Platform Competition and Opportunity Act of 2021](#), 11 June 2021, accessed 10 November 2021.

<sup>519</sup> C Zakrzewski, [Klobuchar and Cotton introduce legislation to regulation Big Tech acquisitions](#), *The Washington Post*, 5 November 2021.

### ***Augmenting Compatibility and Competition by Enabling Service Switching Act proposal***

The proposed Augmenting Compatibility and Competition by Enabling Service Switching Act (ACCESS Act) aims to promote competition online by lowering barriers to entry and switching costs for businesses and consumers by introducing interoperability and data portability requirements.

A version of this proposal has been introduced in both the House of Representatives<sup>520</sup> and the Senate, with the Senate version also requiring the National Institute of Standards and Technology to develop and publish model technical standards for implementing platform interoperability.<sup>521</sup>

### ***Ending Platform Monopolies Act proposal***

The proposed Ending Platform Monopolies Act would prohibit ownership or control of a business which creates the incentive and ability for a covered digital platform to self-preference their own products and services in a way that disadvantages competitors and undermines free and fair competition. It focuses on 'eliminating conflicts of interest' arising from dominant online platforms concurrent ownership or control of an online platform and certain other businesses. The proposal was introduced in the House of Representatives.<sup>522</sup>

### ***American Innovation and Choice Online Act proposal***

The proposed American Innovation and Choice Online Act would prohibit covered platform operators from engaging in discriminatory conduct such as advantaging their own products or services over those of another business user; excluding or disadvantaging the products, services, or lines of business of another business user relative to the covered platform operator's own products or services; or discriminating among similarly situated business users.

The proposal also prohibits other forms of discriminatory conduct such as restricting or impeding access to or interoperability with the covered platform, condition access to the covered platform on the purchase of other products or services of the covered platform, using non-public data gathered by the covered platform to support its own products or services, and restricting or impeding users from un-installing pre-installed software applications or changing default settings on the covered platform.

A version of the proposal has been introduced in the House of Representatives<sup>523</sup> and the Senate.<sup>524</sup>

### ***Open App Markets Act proposal***

The proposed Open App Markets Act would require companies that control operating systems to allow third-party apps and app stores. It would also prevent those companies using non-public information collected through their platforms to create competing apps. The proposal applies to a 'covered company', which owns or controls a App Store with more than 50,000,000 users in the US.

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<sup>520</sup> [H.R. 3849 — 117th Congress: ACCESS Act of 2021](#), 11 June 2021, accessed 10 November 2021.

<sup>521</sup> [S. 2658 – 116<sup>th</sup> Congress: Augmenting Compatibility and Competition by Enabling Service Switching Act of 2019](#), 22 October 2019.

<sup>522</sup> [H.R. 3825 — 117th Congress: Ending Platform Monopolies Act](#), 11 June 2021.

<sup>523</sup> [H.R. 3816 — 117th Congress: American Choice and Innovation Online Act](#), 11 June 2021.

<sup>524</sup> [S. 2992 — 117th Congress: American Innovation and Choice Online Act](#), 18 October 2021.



A version of the proposal has been introduced in both the House of Representatives<sup>525</sup> and the Senate.<sup>526</sup>

## Republic of Korea (South Korea)

### *Act on Fair Intermediate Transactions on Online Platforms proposal*

The proposed Act on Fair Intermediate Transactions on Online Platforms (Online Platform Act) intends to regulate dominant online platform operators in light of unfair trade amid the surge in digital transactions during COVID-19. It would apply to online marketplaces, delivery apps, app markets, accommodation apps, ride sharing apps, price comparison sites and information services about matters such as real estate and used cars.

The proposed legislation seeks to ensure a transparent and fair business environment for platforms and online businesses. It seeks to address issues including unfair contracts that have unfavourable terms and conditions between platform providers and business users. It also prohibits abuse of superior bargaining power by platform providers.<sup>527</sup>

### *Telecommunications Business Act amendment*

An amendment to South Korea's *Telecommunications Business Act*, passed in August 2021, prevents application market operators such as Apple and Google from requiring app developers to use their billing system for in-app purchases. It also prevents app store operators from engaging in unreasonable delays in reviewing or apps. If Apple or Google fail to comply with this new law, they could face fines of up to 3 per cent of their South Korean revenue.

### *Monopoly Regulation and Fair Trade Act amendment*

Under the *Monopoly Regulation and Fair Trade Act*, changes to the merger notification thresholds mean companies operating social media or digital content services with at least 1 million monthly users or significant research and development activities in South Korea will be required to report any deals with a transaction value of above 600 billion won (around AUD694 million). The new thresholds have been introduced to screen potentially harmful transactions in the tech sector that wouldn't be caught by existing rules.<sup>528</sup>

## Japan

### *Act on Improvement of Transparency and Fairness in Trading on Specific Digital Platforms*

In 2021, Japan implemented the Act on Improvement of Transparency and Fairness of Digital Platforms (TFDPA). The TFDPA was introduced in response to concerns about a lack of transparency in digital platform markets, such as changes to terms and conditions, and insufficient procedures and systems to handle requests from users of platforms.<sup>529</sup>

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<sup>525</sup> [H.R. 5017 – 117<sup>th</sup> Congress: Open App Markets Act](#), 13 August 2021.

<sup>526</sup> [S. 2710 – 117<sup>th</sup> Congress: Open App Markets Act](#), 11 August 2021.

<sup>527</sup> K Mi-jung and L Min-ji, [Recent legislative changes over online platform businesses in Korea](#), *The Korea Herald*, 12 September 2021, accessed 9 November 2021.

<sup>528</sup> H Ki Kim and K Won Shin, [South Korea: Overview](#), *Global Competition Review*, 21 April 2021, accessed 9 November 2021.

<sup>529</sup> Ministry of Economy, Trade and Industry, [Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving Transparency and Fairness of Digital Platforms](#), 1 April 2021.

The TFDPA enables the government to designate digital platform businesses as ‘specified digital platform providers’, with these providers then being subjected to specific rules under the TFDPA. These rules include requirements to:

- Disclose information such as terms and conditions to users and give prior notice of changes to these terms and conditions to the platform users.
- Develop procedures and systems (such as ensure fairness of transactions and dispute-settlement procedures) in accordance with guidelines specified by the Ministry of Economy, Trade and Industry (METI).
- Submit a report of self-assessment to METI every fiscal year on their current compliance with the rules, which the Minister will assess and publish results on.

The TFDPA aims to prevent anti-competitive conduct by companies using a co-regulation approach where the regulator sets up compliance goals and the regulated companies take voluntary measures.<sup>530</sup>

It currently only applies to platforms that are either online mall operators with domestic sales greater than JPY 300 billion per annum (AUD3.7 billion) or operators of app stores with domestic sales greater than JPY 200 billion per annum (AUD3.45 billion).<sup>531</sup> METI has so far designated Amazon Japan, Google, Apple, Yahoo Japan and ecommerce platform Rakuten as ‘specified digital platform providers’.<sup>532</sup>

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<sup>530</sup> Clifford Chance, [Japan's digital platform regulations Online mall operators and app store operators now subject to regulation, and additional entities to be covered in future](#), 23 August 2021.

<sup>531</sup> Clifford Chance, [Japan's digital platform regulations Online mall operators and app store operators now subject to regulation, and additional entities to be covered in future](#), 23 August 2021.

<sup>532</sup> Ministry of Economy, Trade and Industry, [Designation of Digital Platform Providers Subject to Specific Regulations Under the Act on Improving Transparency and Fairness of Digital Platforms](#), 1 April 2021.