

Oracle Corporation

**Response to the ACCC's Digital Platform Services Inquiry
Report on Market Dynamics and Consumer Choice Screens
in Search Services and Web Browsers Issues Paper March
2021**

16 April 2021

A. Introduction

1. Thank you for providing this opportunity to Oracle Corporation (**Oracle**) to respond to the Australian Competition & Consumer Commission's (**ACCC**) Issues Paper for the Report on Market Dynamics and Consumer Choice Screens in Search Services and Web Browsers (**Issues Paper**).
2. The ACCC has stated that its intention is to examine the provision of browsers and general search services to Australian consumers, the impact of default arrangements on these service offerings and the effectiveness of choice screens to address these issues. Oracle assumes that the ACCC will build on the analysis contained in the Final Report from the ACCC's Digital Platforms Inquiry. It remains the case, as the ACCC found in the Digital Platforms Inquiry, that:
 - (a) Google has substantial market power in Australia in the supply of search services. At the time of the ACCC's Final Report, Google's share of the Australian general search market was approximately 95%;¹ and
 - (b) Google's substantial market power is contributed to by a "default bias" that exists with Google search being the default search engine on a substantial number of internet browsers and Google Chrome in turn being the default internet browser on a substantial number of operating systems.²
3. Oracle has no doubt that the ACCC will reach the same conclusions regarding Google's dominance in the provision of search services as set out in the Final Report from the Digital Platforms Inquiry. Oracle also believes that the ACCC will confirm that default bias is a large contributor to Google's dominance. However, since the time of the release of the ACCC's Final Report from the Digital Platforms Inquiry, a number of other events have occurred which the ACCC should also consider, as highlighted in the Issues Paper:
 - (a) *Implementation of ineffective choice screen proposal:* Google has implemented its choice screen proposal, limited only to search services,³ in the European Economic Area (**EEA**). This has failed to deliver any meaningful change to Google's monopoly position in the provision of search services. The failure of that proposal does not mean that choice screens are an ineffective mechanism for the promotion of competition. Instead this indicates that the model adopted by Google is fundamentally flawed.
 - (b) *Regulatory findings in the United Kingdom:* The UK's Competition & Markets Authority (**CMA**) has released the final report from its Online Platforms and Digital Advertising Market Study (**CMA Report**)⁴ which provides additional useful information and potential alternative regulatory options for consideration by the ACCC in relation to choice screens and Google's dominance in the provision of search and browser services.
 - (c) *Litigation has cast further light on anti-competitive practices:* As a result of litigation commenced in the US, an even clearer picture of Google's anti-competitive restrictions on original equipment manufacturers (**OEMs**) and mobile network operators (**MNOs**) has emerged. Google's contractual arrangements in effect force these entities to pre-

¹ As referred to, for example, on page 8 of the ACCC's Final Report from the Digital Platforms Inquiry.

² This is summarised on pages 110 and 111 of the ACCC's Final Report from the Digital Platforms Inquiry. Google sets Google Search as the default search service where Chrome is the browser.

³ This is despite public statements made by Google that it would also implement a choice screen option for browsers, as referred to here: <https://www.blog.google/around-the-globe/google-europe/presenting-search-app-and-browser-options-android-users-europe/>

⁴ The CMA Report is available here: https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

install Google search and the Chrome browser, denying choice for consumers. As the ACCC noted in the Issues Paper, in 2018 the European Commission (EC) took action against Google in relation to similar anti-competitive practices (**Android Decision**). The litigation commenced in the US indicates that the anti-competitive arrangements found by the EC remain in place and are global in nature.⁵

The conduct alleged in the US cases is more egregious than the conduct found by the EC. In the case commenced in October 2020 by the US Department of Justice (**DoJ**) and a number of US States, it is also alleged that Google has also entered into anti-competitive agreements with Apple to maintain its dominant position in search. In other words, Google's anti-competitive conduct is not limited to smart devices (or other internet connected devices, including desktops and tablets) that use the Android operating system (**OS**) but also extends to Apple desktop and mobile devices.

In December 2020, 38 US States commenced separate proceedings against Google in relation to its monopoly power in the search market and anti-competitive conduct, including anti-competitive contracts. That case bears many similarities to the DoJ case, and includes allegations that Google pays Apple between US\$8 billion and US\$12 billion per annum to ensure that it is the default search service on Apple desktop and mobile devices. This supports the ACCC's findings in the Final Report from the Digital Platforms Inquiry but also indicates that there is a clear case for the ACCC to find that the actions of Google, in relation to the agreements it has entered into with Apple, are anti-competitive.

4. Oracle has provided more detail on each of the issues raised in the paragraph immediately above in its discussion of appropriate regulatory responses in this submission.

B. Well-designed choice screens are both necessary and effective in improving competition

As is noted in the CMA Report, and as the ACCC is aware, default settings is an extensively researched area of behavioural economics. The evidence from that research shows that individuals generally use default options. This is why Google pays such large amounts to be the default general search service and default browser across many different devices notwithstanding its existing dominant position in the market for both of these services.

1. The ACCC found in the Digital Platforms Inquiry that consumers infrequently change defaults on their devices. This means that the default settings on devices are crucial in considering competition in the provision of consumer facing digital services. For example the ACCC noted:⁶

The operation of default settings ... entrenches the market power of incumbents, and increases the barriers to entering these markets.

Google benefits from its position as the default search engine on both the Chrome browser (owned by Google), and the Safari browser (owned by Apple), which together account for more than 80 per cent of the Australian market for browsers. The

⁵ Google announced in 2018 that it would make changes to the options offered to OEMs, and its payment arrangements with OEMs and mobile network operators, in the European Economic Area (EEA) however those changes have not been implemented globally. In any event, as explained in this submission those changes do not address Google's anti-competitive behaviour.

⁶ At page 10 of the Final Report

substantial amount paid by Google to Apple for default status on Safari (estimated at approximately US\$12 billion in 2019) reflects the value of this default status.

Google Chrome is pre-installed on nearly all Android devices and Google Search is the default option on Google Chrome and Apple's Safari mobile browsers. Google's Android and Apple's iOS operating systems are present on over 40 and 55 per cent of mobile devices in Australia respectively. This means Google's search engine is effectively the default search engine on over 95 per cent of Australian mobile devices.

2. If further support is required for the ACCC's conclusions, this is found in the CMA Report. For example, the CMA, in the context of UK markets and search engine defaults:⁷

(a) Pointed to numerous case studies that showed a positive relationship between default positions and usage of search services.

(b) Found that Google pays significant amounts to be the default search engine across the mobile device sector and, to a lesser extent, the desktop PC sector. The CMA concluded, in referring to the payments made by Google:⁸

... we consider that the high levels of compensation paid by search engines under default agreements further indicates that search defaults influence consumer search behaviour and, in turn, search advertising revenues. In particular, it is striking that the largest search engine, with a strong brand and high and sustained shares of supply, makes such significant payments for default positions.

(c) Considered that default settings are particularly impactful in relation to search options as consumers may not understand that they are able to change default settings or may not understand available alternatives. Consumers may be discouraged from changing by the complexity of doing so (or warnings given)⁹ and also because changes may take effect only temporarily, for example, the default search option may be reset on software updates occurring.

3. Providing consumers with an effective choice would remove the unjustified advantage Google receives from this clearly documented "default bias". As the ACCC acknowledged in the Final Report from its Digital Platforms Inquiry, offering a choice screen for consumers would improve consumer choice and would lower barriers to entry and expansion for rival search services. The same analysis applies to browser defaults.

An appropriately designed choice screen for Android devices is necessary for both search and browser services. Flaws in design would mean the aims of the regulatory policy would not be met. The browser choice screen offered by Microsoft from 2009 provides the basis for an appropriate model that the ACCC could utilise.

4. Choice screen design should actively promote the user's choice of a browser or search service. Poorly designed choice screens would reinforce Google's dominance in the search and browser markets.

⁷ See from page 101 in the CMA Report, available here:

https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf

⁸ As set out in paragraph 3.111 on page 104 of the CMA Report.

⁹ For example, the CMA referred to evidence that Google displays a warning notice when consumer seek to change the default search engine in Chrome or on Android OS devices – as referred to on page 105 of the CMA Report.

5. An example of a well-designed choice screen is provided by the Microsoft browser choice screen implemented in 2010. In December 2009, the EC accepted commitments from Microsoft to provide a choice screen option for browsers (**Microsoft Commitments**).¹⁰ The Microsoft Commitments were provided to address the EC's concerns that Microsoft may have tied installation of its internet browser, Internet Explorer, to the Windows PC operating system in breach of European Union (**EU**) rules on abuse of a dominant market position.
6. Under the Microsoft Commitments, Microsoft made available for 5 years in Europe a choice screen that enabled Windows users to choose a browser other than Microsoft's Internet Explorer and also enabled computer manufacturers to install browsers other than Internet Explorer as the default browsers on computers using the Windows PC operating system (and turn off Internet Explorer).
7. We have set out below the necessary ingredients for a choice screen to be considered effective, which adopt key elements of the proven and effective implementation of a browser choice screen under the Microsoft Commitments:
 - (a) A choice screen must provide users with a *real* choice to select an alternative search provider or browser, as applicable. To effectively eliminate anti-competitive bias, a choice screen must ensure that there is no default option. Under the Microsoft Commitments, when the choice screen was launched, the Internet Explorer icon would automatically be unpinned from the task bar (see Figure 1 below).

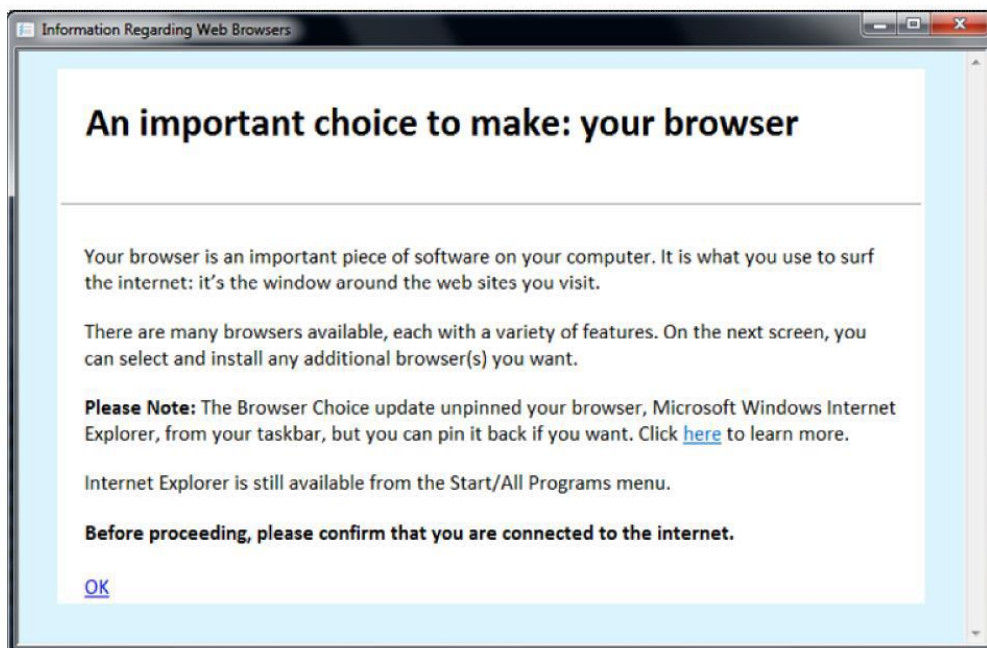


Figure 1: Annex B of Commission Decision of 16.12.2009 (Case Comp/C-3/39.530 –Microsoft (tying))

- (b) The manner in which the competing browsers or search providers to be included in the choice screen are selected must be clear and transparent. Under the Microsoft Commitments, the four other options selected with Internet Explorer to appear on the initial choice screen were determined based on market share. Users could scroll

¹⁰ Case Comp/C-3/39.530 –Microsoft (tying).

sideways on the choice screen to view another 7 options, which were also determined based on market share. The Microsoft Commitments provided that the list of browsers (on both the initial choice screen page and the second page) would be updated every six months based on averaging monthly usage data for the previous six months.

- (c) In order to avoid "screen bias", search providers or browsers included in the choice screen should be listed in a dynamic random order. It is well established in behavioural economic literature that placing an option first in a list of choices renders that option far more likely to be chosen than options further down on the list. Microsoft undertook to list the browsers on its choice screen (both the initial choice screen page and the second page) in a random order precisely to address this concern (see Figure 2 below). This was easily achieved via readily-available randomization algorithms.



Figure 2: Annex C of Commission Decision of 16.12.2009 (Case Comp/C-3/39.530 – Microsoft (tying))

- (d) A choice screen should not include a "next" button (or any equivalent button, for example, a "no, thank you" button, or "finish" button), because, instead of inviting users to make a choice, this invites users to click "next" and move on without making any changes, preserving the status quo. Under the Microsoft Commitments, users could not escape from making a choice and had to select a browser from the list of browsers displayed. While users could delay their choice by clicking "Select Later" (as shown in Figure 2), the choice screen would keep appearing until the user made his or her choice.
- (e) Microsoft explicitly committed to not charging for the inclusion of a third party web browser on the choice screen.¹¹ Again, this is an important requirement for the reasons discussed in the next section that outlines the problems with Google's choice screen for search services.

¹¹ Case Comp/C-3/39.530 – *Microsoft (tying)*, Commitments Annex, paragraph 17.

8. A final requirement for a choice screen to be effective is that other actions are not taken to “nudge” users back towards using the dominant provider. For example, in the case of implementation of a browser choice screen, where the user selects a non-dominant browser, later software updates on the device should not reinstate the dominant browser; pop-ups should not suggest to users to re-install the dominant browser, etc. There is insufficient publicly available information to determine if Google undertakes actions in the EEA to nudge users back to using Google search if an alternative search service is selected. However, this is an issue that the ACCC should consider in designing its regulatory intervention.¹²
9. The Microsoft Commitments had a significant impact. In the period from March 2010, when the Microsoft choice screen was first implemented in accordance with the Microsoft Commitment until November 2010, a total of 84 million browsers were downloaded through use of that choice screen.¹³ The effectiveness of Microsoft’s choice screen on competition was also evident from the consequences of a technical glitch which meant that Microsoft failed to include the browser choice screen in its Windows 7 Service Pack 1 release from February 2011 until July 2012, in breach of the Microsoft Commitments.
10. The EC estimated that, during the period of Microsoft’s breach, 15 million Windows users were not presented with the choice screen. Mozilla, the owner of the Firefox browser (which should have been displayed on the choice screen), was able to demonstrate that the choice screen made a significant difference to its users. Mozilla’s Senior Vice President of Business and Legal Affairs released figures indicating that, during the period of the breach, Firefox’s daily downloads decreased by 63% to a low of 20,000, representing a loss of 6 to 9 million Firefox browser downloads over the relevant period.¹⁴ After the breach was rectified by Microsoft and the choice screen was restored, Firefox’s daily downloads increased 150% to approximately 50,000 per day.

It is essential for effectiveness that the regulator (in this case, the ACCC) has a role in supervising the design and implementation of choice screens.

11. Oracle supports the CMA’s view, as set out in the CMA Report, that a regulator (in the case of Australia, the ACCC) should have an ongoing supervisory role, including to review the design of any choice screen. Design is a critical element and should not be left solely to be determined by Google. In reviewing the design of each choice screen, particular regard should be had to the matters dealt with in the earlier parts of this section B and also:
 - (a) The number of options presented on the choice screen. The CMA referred to research submitted by DuckDuckGo that choice screens that presented a greater number of options (being 8 options) were more effective than those which presented fewer options (being 4 options) in increasing the selection of non-dominant search engines.
 - (b) The placement of the options on the choice screen. The CMA referred to research submitted by DuckDuckGo that non-dominant search engines were more likely to be

¹² However, there is evidence that Google nudges users back to its products in other contexts, including regarding use of desktop web browsers: <https://www.windowscentral.com/google-continues-campaign-convince-consumers-ditch-new-microsoft-edge-chrome>; <https://9to5google.com/2020/02/24/google-chrome-microsoft-edge-switch-pop-up/>

¹³ As reported by the European Commission here: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_196

¹⁴ As reported by Harvey Anderson here: <https://lockshot.wordpress.com/2012/10/30/windows-eu-ballot-screen-technical-glitch/>

selected if Google appeared at the end of, as opposed to at the top of, the choice screen.

- (c) The description of the options on the choice screen. The CMA considered that Google's current design – which allows a brief description of each available option but prohibits descriptions which indicate incentive-based use of an option – disadvantage certain competitors, whose business model is incentive-based, from attracting interested consumers. For example, Ecosia provides a search service based on the incentives that it will plant a tree for each search.
- (d) The timing of the choice screen. The CMA considered the different implications for user behaviour when the choice screen is displayed at a “relevant time” – for example, during device-set up or when the consumer is using the search function – as opposed to when the consumer is engaging in an “unrelated activity”.
- (e) The additional action required to be taken by a user. If a choice of either a general search service or browser (as applicable) is made, the choice screen should be designed so that this becomes the default option for the device (whether desktop or mobile). Users should not need to take further action to give effect to the option selected.

C. Google's search choice screen design is fundamentally flawed

1. As explained above, using the Microsoft model as a basis for Australia's choice screen regulation will be effective. For the reasons set out in this section, it is equally apparent that adopting the Google model currently used for search services in the EEA would be *ineffective*. The most problematic issue with the Google choice screen model is the use of an opaque auction process to determine the search services providers who will appear on the choice screen. Google's choice screen model perpetuates the anti-competitive conduct that it is designed to address; it is designed to favour Google search and to consolidate the position Google search has obtained through its anti-competitive activities.

Google's auction process violates the requirement that a clear and transparent process is implemented to select other search services to appear on the choice screen; discriminates against search service providers that do not have an advertising funded business model and, most problematic of all, allows Google to profit from its anti-competitive behaviour.

2. By using an auction process, Google has ensured that the manner in which search services are selected to appear on the choice screen is not clear or transparent. As the ACCC is aware, Google uses a “fourth-price auction” to select the search services that will appear on the choice screen.¹⁵ This auction process occurs on a country by country basis, three times a year. Although of course Google publishes the list of “winners,”¹⁶ no information is provided regarding the number of bidders, bid prices generally or the price actually paid by those “winners”. There is no way to objectively determine whether Google is operating the auctions in a fair and reasonable manner, since Google has sole control over the auction process, without any supervision or oversight from a third party.
3. The auction process is also problematic because of the distortion created by the need for Google's competitors to pay to appear on the choice screen. As competitors must pay to appear, the competitors who are able to pay the most are naturally most likely to “win” these

¹⁵ The auction process is described here: <https://www.android.com/choicescreen/>

¹⁶ The “winners” for Q2 2021 are published here: <https://www.android.com/choicescreen-winners/>

auctions. Those competitors are the ones that have similar business models to Google's, that is, the search services providers who monetise the consumer data collected through search.

4. This is demonstrated by the March 2021 "winners" of the choice screen auction. Looking across the different EEA countries the following entities were most often selected:
 - (a) PrivacyWall, selected in 30 countries (97% of the total);
 - (b) GMX, selected in 23 countries (74% of the total); and
 - (c) Bing, selected in 13 countries (42% of the total).
5. PrivacyWall is owned by Social Game Media Inc. Despite its name, PrivacyWall's main business is selling information obtained through tracking users across the internet. GMX is owned by the German company United Internet AG, which has the same business model. Bing, as the ACCC knows, is owned by Microsoft and has the same business model as Google. Therefore, in effect, Google's choice screen does not provide *any* choice to users – whatever option is selected, the search services provider intends to collect data about the user and monetise that data.
6. Other search services providers, with different business models rarely win these auctions. This is demonstrated by looking at two examples of search services providers with different models, Ecosia and DuckDuckGo. Ecosia's model offers a service that prioritises environmental sustainability, a tree is planted each time a user enters a query. Similarly, DuckDuckGo attracts users on the basis that it is a privacy-friendly search service, which inherently precludes the exploitation and monetisation of user data that Google undertakes to achieve profit maximisation. These business models are less capable of monetisation – with less per-user revenue – and therefore both search service providers face significant barriers to equal participation in Google's choice screen auctions.
7. In the March 2021 auction, DuckDuckGo was successful for only three countries (Liechtenstein, Lithuania and Malta) and Ecosia was successful for only one country (Slovenia). In other words, DuckDuckGo and Ecosia will rarely appear on choice screens in Europe notwithstanding that they are the most popular small search engines in Europe.¹⁷ The net result of Google's auction model is that consumers are deprived of the option to select search services providers with an alternative business model they may find more attractive. To quote from the founder and chief executive of DuckDuckGo:¹⁸

Anyone with less ads is getting hurt. Anyone doing privacy is getting hurt. Anyone doing things where they give away profit [to support causes] is getting hurt.
8. The final problem with the search choice screen implemented by Google in Europe which Oracle wishes to highlight is that it allows Google to directly profit from its anti-competitive behaviour. The auction process enables Google to leverage its monopoly position to benefit financially from the less dominant position of its competitors who must bid for inclusion in the choice screen to attract new users.
9. The artificial scarcity created by offering only three spots to third party search service providers on the choice screen enhances the benefits that Google receives. This limits the number of alternative search services presented to consumers, meaning Google limits the competition it faces within the search services market, allowing it to retain its market

¹⁷ Wall Street Journal: https://www.wsj.com/articles/some-google-search-rivals-lose-footing-on-android-system-11601289860?mod=searchresults_pos1&page=1

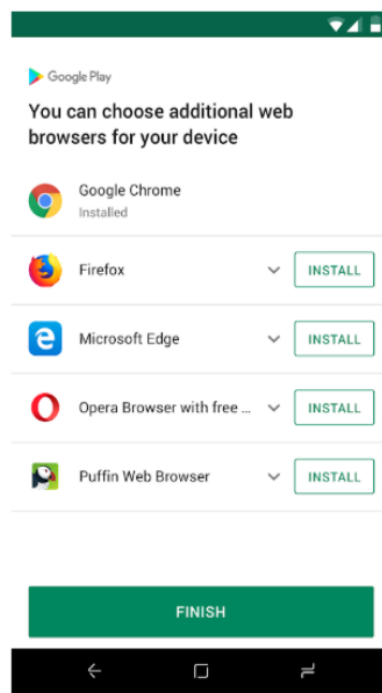
¹⁸ Ibid.

dominance. Additionally, by limiting the number of spaces available in the choice screens, a greater number of rival search services are competing over a small number of spaces, increasing the price they are required to pay in order to be successful. The artificial scarcity that Google creates therefore allows it to profit – to the maximum extent – from its competitors within the auction.

10. And, finally, the auction process means that Google extracts most of the profits of the successful participants in the auctions, limiting the ability of those companies to expand and innovate and therefore, ultimately, limiting their ability to challenge Google’s dominance in the provision of search services.
11. It is therefore no wonder that most stakeholders consider that Google’s choice screen has failed, with Google maintaining a search services market share in Europe as at March 2021 of over 90%.¹⁹

D. Browser screen choice

1. Although there is no evidence that the browser screen choice proposed by Google has been implemented in the EEA, it is nonetheless useful to consider what Google had proposed to demonstrate elements that it is respectfully submitted the ACCC should not adopt.
2. This is a screen shot of Google’s proposed model:²⁰



3. Simply viewing this screen shot demonstrates the problems with Google’s proposed model. Based on Google’s blog describing the choice screen, all browsers that are already installed

¹⁹ As shown here: https://gs.statcounter.com/search-engine-market-share/all/europe#desktop+mobile+tablet+console_search_engine-eu-desktop+mobile+tablet+console_search_engine-eu--bar

²⁰ As shown in this Google blog post: <https://www.blog.google/around-the-globe/google-europe/presenting-search-app-and-browser-options-android-users-europe/>

will be shown at the top of the choice screen. As may be seen from the above, where Chrome is already installed, as will inevitably be the case on an Android OS device, Chrome will appear at the top of the choice screen (with no option of removal). This does not facilitate an unbiased choice of a browser. That placement will encourage users to maintain that pre-existing setting.²¹

4. As mentioned in the description of the Microsoft Commitments, a choice screen should not include a "next" button (or any equivalent button, for example, a "no, thank you" button, or "finish" button), because instead of inviting users to make a choice, this invites users to click "next" and move on without making any changes, preserving the status quo. Looking at Google's proposal here, any user seeing this screen is likely to click on the largest option by far, the "Finish" button. This will further exacerbate the "incumbency" problem created by Chrome being listed at the top of the choice screen, as referred to in the paragraph above.
5. As Google explained when it announced this option, where a user did in fact decide to install an additional browser, selecting "INSTALL" would not be the end of the process. The user would then be shown an additional screen with instructions on how to set up the browser. This screen disappeared when the user clicked "I understand" at the bottom of the screen. This meant that, unless (as would seem unlikely) a user both memorised the instructions and then took the further time necessary to implement them, the user's selection of an alternative browser would not be given effect to. This would ensure that the small number of users who did actually select to add an "additional" browser would be dis-incentivised from actually taking the further steps required to complete that choice.
6. Google's plan had been to include 5 browsers in total, with Chrome appearing first (together with other browsers, if any, that were already installed on the device). The remaining slots would be allocated to browsers based "on their popularity" and shown in a random order. However there was no transparency as to how "popularity" would be defined, therefore again limiting the effectiveness of the choice screen proposal – to be effective, the manner by which the competing browsers are selected must be clear and transparent.
7. Accordingly, it is respectfully submitted that there are no elements of Google's browser choice screen which the ACCC should adopt.

E. Regulation imposing choice screen requirements only part of the answer

Imposing regulation requiring Google to implement choice screens for Android devices will be insufficient to address Google's anti-competitive behaviour. Action is also required to be taken to ensure Google cannot continue to enter into anti-competitive agreements with Apple, OEMs that use Android OS and others.

1. Requiring the implementation of choice screens for Android devices will not be sufficient of itself to restore competition in either the search services or browser market. The ACCC must take action to ensure that Google's arrangements with Apple are unwound and that Google

²¹ Being placed first provides a significant advantage: Case AT.39740 - *Google Search (Shopping)*, Commission Decision of 27 June 2017, paragraphs 455 and 460. The *Google Search (Shopping)* decision also refers to the UK Competition and Markets Authority's review of existing literature on "Online Search: Consumer and Firm Behaviour", 7 April 2017, paragraph 1.6(c), LoF Response, Annex 21.19: "[o]n average, the first three links seem to account for 40-65% of the total clicks on desktop devices. On mobile devices, this tendency is even more accentuated, with the top three links on average accounting for more than 70% of the total clicks. The evidence suggests that [...] consumers seem to display an inherent bias to click on links in higher positions".

cannot in future impose anti-competitive tying arrangements on OEMs that would require Google search and the Chrome browser to be pre-loaded on devices, whether mobile or desktop computers. Agreements under which Google pays OEMs, MNOs or others for exclusive pre-installation or default rights for Google search should also be unwound. The types of arrangements that should be unwound include, for example, Google's arrangements with other browser providers for Google search to be the default search option on the relevant browser.

2. If these types of arrangements continue, even with the implementation of choice screen regulation, there would continue to be barriers to entry and expansion for other providers of these services. It is particularly important that the arrangements with Apple are unwound, given that the choice screen remedies discussed by the ACCC in the Issues Paper will not apply to Apple devices.

Arrangements with Apple

3. A significant number of Australians use Apple devices. Google pays Apple between US\$8 billion and US\$12 billion per annum to ensure that it is the default search service on Apple devices. The US litigation mentioned earlier correctly argues these arrangements are anti-competitive given that users rarely change defaults. There is a clear case for the ACCC to commence proceedings against Google in relation to this arrangement on the basis that it breaches section 46 of the Competition and Consumer Act 2010 (Cth) (**CCA**). Section 46 prohibits a firm with a substantial degree of market power of engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.
4. It is difficult to envisage a clearer breach of section 46. Google has a substantial degree of market power in the market for search services. The conduct, that is, entry into the arrangement with Apple, has as its sole purpose the substantial lessening of competition in the market for those services. Why else would Google pay Apple, given its current dominant position? Google is fully aware of the need to make these payments to ensure its continued dominance in this market. And, of course, although this would be arguably unnecessary to prove, the arrangement with Apple does have the effect of substantially lessening competition in the market for search services as it provides a barrier to entry and expansion for alternative providers of search services (including Apple, which might otherwise enter the market if it was not paid, or was paid less, by Google).

Tying arrangements with OEMs

5. As a consequence of the Android Decision, not only did Google develop the choice screen for search services but it also made changes to its contractual arrangements with OEMs to offer separate licences for:²²
 - (a) Google's mobile apps suite known as "Google Mobile Services" (**GMS**), that is, Google Play Store and other Google apps such as YouTube and Google Maps;
 - (b) Google search; and
 - (c) the Chrome browser.
6. Importantly, under the European arrangements, if GMS is separately licensed, the licensee must pay a licence fee. Google stated that the imposition of this licence fee is necessary "(s)ince the pre-installation of Google Search and Chrome together with our other apps helped us to fund the development and free installation of Android, we will introduce a new

²² As described in this Google blog post: <https://www.blog.google/around-the-globe/google-europe/complying-ecs-android-decision/>

paid licensing agreement for smartphones and tablets shipped into the EEA".²³ In other words, OEMs now have a choice, but this comes at a cost.²⁴ Either GMS is licensed together with both Google search and the Chrome browser, which Oracle understands will continue to be available at no cost, or a fee is payable by a licensee who wishes only to licence GMS. This is of course a strong economic incentive for OEMs to continue to take the full suite of Google's consumer facing services. Google's contractual arrangements implemented in Europe therefore preserve the pre-existing status quo and are anti-competitive.

7. The justification given by Google for charging this GMS licence fee does not bear scrutiny. It is incongruous that Google should argue that the revenues it has earned from its anti-competitive behaviour should be recouped by another means through a remedy intended to provide redress for that anti-competitive behaviour. In any event, the underlying rationale is incorrect – Google does in fact earn significant revenue through its GMS apps, for example, through the excessive fees that it charges to app developers who have no choice but to make their apps available through Google's Play Store²⁵ as well as through the data it collects on consumers who use the GMS apps, which Google then monetises through the sale of targeted advertising. And, finally, Google's argument ignores the fact that Google monetises the data that it collects from Android OS for targeted advertising as well – although OEMs may not pay a software licence fee for Android OS, its use is not free to consumers, who pay through the excessive data collection practices of Google.
8. Agreements that require OEMs to pre-install apps for particular consumer facing services on devices as a condition of Google granting a licence of Google search or the Chrome browser are a form of exclusive dealing. These types of exclusive dealing are expressly prohibited under section 47 of the CCA, as these agreements clearly have the purpose (as well as the effect) of substantially lessening competition in the relevant consumer facing digital services markets.
9. Given that these Google agreements with OEMs are a breach of the CCA, action must be taken to unwind them and ensure that such agreements are not entered into in future. The ACCC should not accept a remedy in Australia that is on the same terms as that which has been accepted in Europe. OEMs should be able to choose the search and browser apps, and other consumer facing services, they carry on their devices on the merits. Regulation should therefore require that Google continues to offer all of the consumer facing services that it currently offers at no cost, with OEMs able to select, without penalty, which of these services they wish to use.

Arrangements with providers of other browser services

10. Google enters into anti-competitive contracts not only with Apple and OEMs but also the providers of other browser services. An example of this is the arrangement that Google has entered into with Mozilla for Google search to be the default search engine on Firefox.²⁶ In late 2020, it was announced that this arrangement had been extended until 2023 and that Google pays between US\$400 and US\$450 million per annum to Mozilla for these default rights.
11. Given Google's dominance in the general search services market, there is no commercial justification for this payment arrangement. As applies for the Apple arrangement, Google

²³ Ibid.

²⁴ As reported here: <https://www.theverge.com/2018/10/19/17999366/google-eu-android-licensing-terms>

²⁵ As demonstrated by the litigation commenced by Epic Games, referred to here:

<https://www.afr.com/technology/fortnite-creator-sues-google-as-app-store-fight-continues-20210310-p579g1>

²⁶ As discussed in this article: <https://www.theverge.com/2020/8/15/21370020/mozilla-google-firefox-search-engine-browser>

makes these payments to ensure its continued dominance in the market for general search services. The ACCC should accordingly take action to ensure that these anticompetitive Google agreements with the providers of other browser services are unwound.

Support from the CMA

12. The CMA Report also proposed to restrict Google's ability to enter into arrangements to be the default search engine on devices and web browsers. While the CMA's proposed intervention focused on eliminating or restricting default arrangements in relation to search services, for the reasons outlined above, Oracle supports the extension of this approach to capture the pre-installation of internet browsers on mobile and desktop devices within the Australian market as well.

F. Other regulatory interventions proposed by the UK's Competition and Markets Authority (CMA)

1. In its Issues Paper, the ACCC has referred to a number of regulatory interventions proposed in the CMA Report. Oracle is most interested in commenting on the suggestion by the CMA that competitors may be given access to Google's search engine data.²⁷
2. The CMA considered intervention in the search services market to require Google to provide access to the following search data types:
 - (a) user queries; and
 - (b) user interactions – for example, the websites users choose to visit after making a query, click back data, location data and/or previous search data
3. The more queries a search engine receives and responds to, the more accurate its algorithms become. A search engine is able to respond more accurately to a query if it has greater experience answering queries of that type. The sheer scale of Google's user base operates to enhance the quality of the search results it generates and smaller search engines are disadvantaged in competing with Google as they see far fewer queries of any given type. Google's market dominance is therefore increased by both the improvements in its own quality and the much slower progress of smaller search engines' algorithms. Exposure to more user query data would therefore increase the capacity of non-dominant search engines to improve the accuracy of their own algorithms and potentially grow their market share. This data will only be useful if smaller search services providers also have access to information regarding users' interactions with Google search as this will enable other providers to obtain valuable insights to potentially improve their services such as through implementing changes to rankings of results.
4. Like the CMA, Oracle therefore supports the imposition of regulation to require Google to provide (at no cost) access to this search data. The data provided does not need to include users' personal information or to be grouped by any common user identifier. It is not necessary for data to be linked by "session" which would group a user's searches with reference to a particular period of time or a particular device. Therefore this search data should be able to be provided in a privacy protective manner.
5. The CMA commented that the imposition of this form of regulatory intervention would also be at a low cost given that application programming interfaces (**APIs**) already exist to provide

²⁷ As described in Appendix V to the CMA Report.

search results and a bespoke API could be developed to deliver the relevant types of search data.²⁸ This is another reason why this would be an effective regulatory intervention.

Thank you again for the opportunity to make this submission.

Oracle Corporation

16 April 2021

²⁸ This is discussed at page 365 of the CMA Report.